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**Look-Alike Products in the
Luxury Fashion Industry:
Intellectual Property Protection and
the Case of Gucci v. Guess**

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Introduction

This thesis examines the legal treatment of look-alike products in the luxury fashion industry, starting from the proposition that the central doctrinal problem of fashion imitation does not lie in counterfeiting alone, but in the more elusive terrain of legally ambiguous resemblance.^{1 2} Proceeding from the distinction between counterfeit goods and non-identical products designed to evoke a luxury original, the analysis combines theoretical literature, comparative doctrinal study, and case-based examination in order to determine how and to what extent existing legal tools can protect luxury brand identity without suppressing the circulation of trends on which the fashion system itself depends. Particular attention is devoted to the semiotic structure of luxury value and to the way in which trademark law, dilution doctrine, trade dress, and unfair competition operate as substitutes for the limited protection that fashion design as such often receives. The enquiry is anchored in the *Gucci v. Guess* litigation and then extends through the examination of *Louis Vuitton v. My Other Bag* and the *Christian Louboutin red-sole* disputes, so as to test the thesis across controversies involving reputation, parody, colour marks, comparative market positioning, and the boundaries of lawful inspiration.^{3 4 5}

The thesis concludes that present legal frameworks are neither wholly ineffective nor fully adequate. They are effective where luxury undertakings can demonstrate that the copied feature has become a source-indicating or reputation-bearing sign, but far less effective where what is appropriated is chiefly an overall aesthetic atmosphere, a trend logic, or an aspirational code that falls short of legally cognisable distinction.^{6 7} From this perspective, the research shows that the law does not protect fashion in general; rather, it protects selected forms of market meaning generated within fashion.⁸ Comparative case law further demonstrates that judicial decisions perform a constitutive role in this area by classifying contested features, balancing exclusivity and competition, and specifying the circumstances in which imitation becomes confusion, dilution, parody, or parasitic free-riding.^{9 10} The principal analytical finding is therefore that case law functions as a structuring force of fashion law, precisely because legislation remains fragmented and the contested objects of luxury markets are at once aesthetic, commercial, and symbolic.

The thesis ultimately argues that the enduring tension between imitation and protection in fashion cannot be resolved by a simple expansion of exclusive rights. Such a response would be

¹ Hemphill, C.S. and Suk, J. (2009) 'The law, culture, and economics of fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

² Raustiala, K. and Sprigman, C.J. (2006) 'The piracy paradox: innovation and intellectual property in fashion design', *Virginia Law Review*, 92(8), pp. 1687–1777.

³ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.* (S.D.N.Y. 2016) 156 F. Supp. 3d 425.

⁴ *Christian Louboutin S.A. v. Yves Saint Laurent America Holdings, Inc.* (2d Cir. 2012) 696 F.3d 206.

⁵ *Gucci America, Inc. v. Guess?, Inc.* (S.D.N.Y. 2012) 868 F. Supp. 2d 207.

⁶ *Christian Louboutin S.A. v. Yves Saint Laurent America Holdings, Inc.* (2d Cir. 2012) 696 F.3d 206.

⁷ *Christian Louboutin and Christian Louboutin SAS v Van Haren Schoenen BV* (CJEU 2018) Case C-163/16, EU:C:2018:423.

⁸ Rosati, E. and Calboli, I. (2025) 'Introduction: The rise and consolidation of fashion law as a field of practice, study, and research', in Rosati, E. and Calboli, I. (eds.) *The Handbook of Fashion Law*. Oxford: Oxford University Press, pp. 1–4.

⁹ *Gucci America, Inc. v. Guess?, Inc.* (S.D.N.Y. 2012) 868 F. Supp. 2d 207.

¹⁰ *L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd* (CJEU 2009) Case C-487/07, EU:C:2009:378.

normatively both overbroad and practically insufficient in a market shaped by platform distribution, dupe culture, circular-fashion practices, digital authentication problems, virtual goods, and AI-assisted design.^{11 12 13} What is required instead is a more differentiated legal strategy, based on strong protection for marks and visual codes that truly function as indicators of origin and carriers of reputation, clearer limits for parody and transformative use, more precise treatment of sustainable reuse and upcycling,^{14 15} and institutional adaptation to online intermediaries, metaverse commerce, and algorithmic forms of imitation.^{16 17} In this sense, the thesis argues neither for deregulation nor for maximal proprietisation, but for a more precise legal settlement between brand protection, competitive openness, technological change, and the evolving cultural economy of fashion.^{18 19}

¹¹ Rosati, E. (2025) 'The role, responsibility, and liability of online intermediaries under EU IP law', in Rosati, E. and Calboli, I. (eds.) *The Handbook of Fashion Law*. Oxford: Oxford University Press, pp. 68–88

¹² Bartos, C. (2025) 'Fashion brands in the metaverse: legal and policy implications', in Rosati, E. and Calboli, I. (eds.) *The Handbook of Fashion Law*. Oxford: Oxford University Press, pp. 746–767.

¹³ Kim, W. and Ha-Brookshire, J.E. (2026) 'What makes it a dupe? Exploring consumer understanding of legally copied products in the fashion industry', *Fashion and Textiles*, 13, Article 4.

¹⁴ Senftleben, M. (2024) 'Developing defences for fashion upcycling in EU trademark law', *GRUR International*, 73(2), pp. 99–110.

¹⁵ Senftleben, M. (2025) 'Fashion waste, trade mark protection, and the circular economy: towards a new public domain for sustainable reuse', in Rosati, E. and Calboli, I. (eds.) *The Handbook of Fashion Law*. Oxford: Oxford University Press, pp. 115–136.

¹⁶ Rosati, E. (2025) 'Algorithm fashion: an EU perspective on copyright-related challenges', in Rosati, E. and Calboli, I. (eds.) *The Handbook of Fashion Law*. Oxford: Oxford University Press, pp. 712–726.

¹⁷ Härkönen, H. (2025) 'The impact of artificial intelligence on the fashion sector: a moral rights' perspective', in Rosati, E. and Calboli, I. (eds.) *The Handbook of Fashion Law*. Oxford: Oxford University Press, pp. 727–745.

¹⁸ OECD and EUIPO (2025) *Mapping Global Trade in Fakes 2025: Global Trends and Enforcement Challenges*. Paris: OECD Publishing.

¹⁹ Daukantienė, V. (2023) 'Analysis of the sustainability aspects of fashion: a literature review', *Textile Research Journal*, 93(3–4), pp. 991–1002

Chapter 1

1.1 The phenomenon of imitation in the fashion industry

In the luxury fashion industry, imitation is not merely widespread—it is structurally embedded and economically significant. It is not an occasional deviation in fashion; it is a structural feature of an industry built on trends, seasonal cycles, and continuous reinterpretation. Legal and economic scholarship increasingly describes fashion as a trend-based social practice in which novelty rapidly becomes familiar, and where individuality and conformity coexist: consumers pursue differentiation, yet they also seek participation in a shared aesthetic language that signals belonging and social meaning.^{20 21 22} Empirical data further confirms the scale of the broader phenomenon of unlawful imitation. According to a joint OECD–EUIPO report, counterfeit goods accounted for approximately 2.3% of global trade (around USD 467 billion in 2021), highlighting the significant economic dimension of counterfeiting and related forms of market appropriation.²³

This dual character of fashion has immediate implications for intellectual property (IP) analysis. First, it becomes difficult, both conceptually and evidentially, to separate independent creation from ordinary participation in common trends, and to distinguish both from close copying. Second, it raises a normative question that is particularly acute in fashion: how much exclusivity should be attributed to a design or a style without freezing the very diffusion of trends that makes fashion culturally and economically functional. Hemphill and Suk emphasize that the legal system must be capable of differentiating close copying from trend participation, precisely because the latter is a constitutive element of the fashion process and cannot realistically be eliminated without altering the market itself.²⁴

From a law-and-economics perspective, an influential strand of literature argues that fashion has historically operated in what has been called a “low-IP equilibrium,” in which extensive copying does not necessarily eliminate innovation and may, under certain conditions, accelerate the fashion cycle. In this view, copying can contribute to rapid diffusion of trends and to “induced obsolescence”: as a look spreads and becomes widely available, its status value erodes, pushing status-oriented consumers toward new designs and thereby sustaining incentives for continuous innovation.^{25 26} This dynamic, however, coexists with substantial economic investments by firms, particularly in the luxury segment, where value is not only embedded in product design but also in brand identity and controlled scarcity. Even where one does not fully endorse this account as a complete explanation of fashion dynamics, it provides an essential baseline for

²⁰ Simmel, G. (1957) ‘Fashion’, *American Journal of Sociology*, 62(6), pp. 541–558

²¹ Blumer, H. (1969) ‘Fashion: From Class Differentiation to Collective Selection’, *The Sociological Quarterly*, 10(3), pp. 275–291

²² Hemphill, C.S. and Suk, J. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199

²³ OECD (2025) *Mapping global trade in fakes 2025: Global Trends and Enforcement Challenges*. Paris: OECD Publishing

²⁴ Hemphill, C.S. and Suk, J. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

²⁵ Raustiala, K. and Sprigman, C. (2006) ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Virginia Law Review*, 92(8), pp. 1687–1777

²⁶ Raustiala, K. and Sprigman, C. (2009) ‘The Piracy Paradox Revisited’, *Stanford Law Review*, 61(5), pp. 1201–1225.

understanding why the relationship between originality and copying in fashion is not identical to that of other creative industries.^{27 28}

Moreover, the fashion sector, especially in its luxury segment, relies heavily on brand-mediated value: reputation, exclusivity, scarcity, and recognisability play a decisive role in consumer decision-making. Luxury brands typically invest heavily in the construction of this identity—through heritage narratives, visual codes, and controlled distribution—so that even forms of imitation that do not directly mislead consumers may still have significant effects on perceived exclusivity and brand value.^{29 30} This explains why litigation and enforcement in fashion frequently shift away from attempts to protect “design as such” toward the protection of distinctive signs that structure brand identity in the marketplace, including logos, monograms, patterns, and characteristic colour schemes. In other words, while fashion may generically tolerate a degree of stylistic borrowing, luxury business models place significant weight on the legal capacity to control the use of signs that evoke brand origin and brand aura.^{31 32}

The legal background reinforces this shift. In the United States, copyright protection for the design of useful articles is limited, and policy discussions have long recognised that most fashion items fall outside copyright’s core scope unless separable artistic features can be identified.^{33 34} As a consequence, rights-holders in fashion disputes frequently rely on trademark and related doctrines, which are structurally designed to address market-facing harms such as consumer confusion, false association, exploitation of goodwill, or erosion of distinctiveness. This doctrinal channeling is not merely technical; it affects the type of innovation that is rewarded, encouraging investment in brand-signifying elements that can be protected more effectively than the underlying design alone.^{35 36} From a legal perspective, imitation becomes problematic when it exceeds the threshold of lawful inspiration and encroaches upon the protected sphere of exclusive rights, thereby giving rise to claims based on likelihood of confusion, unfair advantage, or dilution of distinctive character.^{37 38}

²⁷ Hemphill, C.S. and Suk, J. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199

²⁸ Raustiala, K. and Sprigman, C. (2006) ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Virginia Law Review*, 92(8), pp. 1687–1777.

²⁹ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page

³⁰ Veblen, T. (1899) *The Theory of the Leisure Class: An Economic Study of Institutions*. New York: Macmillan.

³¹ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704

³² Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing

³³ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, Supreme Court of the United States, 2017

³⁴ Scafidi, S. (2006) ‘Intellectual Property and Fashion Design’, in Yu, P.K. (ed.) *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*. Vol. 1. Westport, CT: Praeger Publishers, pp. 115–131.

³⁵ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing

³⁶ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

³⁷ Gangjee, D. and Burrell, R. (2010) ‘Because You’re Worth It: L’Oréal and the Prohibition on Free Riding’, *The Modern Law Review*, 73(2), pp. 282–295

³⁸ Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

1.1.1 Distinction between counterfeiting and look-alike products

Although both counterfeits and look-alikes are forms of imitation, they occupy different legal and commercial categories, and the distinction matters for enforcement strategies, evidentiary burdens, and policy framing. Counterfeiting is generally understood as the unauthorised use of a protected trademark in a manner that seeks to pass off goods as genuine, typically involving identical or near-identical marks and an implicit or explicit deception as to origin. This core idea is reflected at the international level in the TRIPS framework, where “counterfeit trademark goods” are defined as goods (including packaging) bearing, without authorisation, a trademark that is identical to, or essentially indistinguishable from, a validly registered trademark, in a way that infringes the trademark owner’s rights under the law of the importing country.³⁹ At the level of positive law, counterfeiting constitutes a particularly serious form of trademark infringement. Under European Union law, Articles 9 and 10 of Regulation (EU) 2017/1001⁴⁰ confer upon the trademark proprietor the exclusive right to prohibit third parties from using identical signs for identical goods, as well as similar signs where a likelihood of confusion arises or where the use takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the mark. In the United States, Section 32 of the Lanham Act (15 U.S.C. § 1114)⁴¹ provides analogous protection against the unauthorised use of registered trademarks. In many jurisdictions, including Italy, counterfeiting may also give rise to criminal liability in addition to civil enforcement.^{42 43}

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Look-alike products operate differently. They are typically marketed as “inspired” alternatives that aim to evoke the aesthetic, the overall impression, or the symbolic universe of a well-known brand while avoiding a direct reproduction of the brand name or logo. In contemporary discourse, these products are often described as “dupes”: items that mimic design and aesthetic cues but deliberately steer away from explicit brand identifiers.⁴⁵ The legal ambiguity of look-alikes begins precisely at this point. If there is no identical mark and no overt misrepresentation, the dispute turns on whether the overall presentation produces an actionable marketplace harm, such as likelihood of confusion, false association, dilution, unfair advantage, or parasitic behaviour.⁴⁶ In this sense, look-alike strategies typically remain in a legal grey area: they may escape strict trademark infringement where no likelihood of confusion is established, yet still give rise to claims based on dilution, unfair competition, or parasitic imitation.^{47 48}

³⁹ World Trade Organization (1994) *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, Article 51, footnote 14.

⁴⁰ European Union (2017) *Regulation (EU) 2017/1001 on the European Union trade mark*

⁴¹ United States Code (n.d.) 15 U.S.C. § 1114 – *Infringement of registered mark (Lanham Act, Section 32)*

⁴² European Parliament and Council (2017) *Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark*, OJ L 154, 16 June, Articles 9–10

⁴³ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1114

⁴⁴ Italy (1942) *Codice penale*, Articles 473–474.

⁴⁵ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry’, *Fashion and Textiles*, 13(1), Article 4, pp. 1–19

⁴⁶ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry’, *Fashion and Textiles*, 13(1), Article 4, pp. 1–19

⁴⁷ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing

⁴⁸ Gangjee, D. and Burrell, R. (2010) ‘Because You’re Worth It: L’Oréal and the Prohibition on Free Riding’, *The Modern Law Review*, 73(2), pp. 282–295

Recent academic and industry-focused literature increasingly differentiates “dupes” from more direct forms of counterfeiting. Dupes are generally framed as look-alike products that attempt to remain outside straightforward trademark infringement by avoiding direct brand use, while super-fakes are described as increasingly convincing counterfeits that compete more directly with genuine goods and raise severe enforcement and authentication problems. This distinction is not merely semantic: it mirrors different legal pathways and different strategic choices for brand owners, who may pursue classic anti-counterfeiting actions against super-fakes, while testing broader theories (for example, trade dress, dilution, unfair competition, and advertising-related claims) against look-alikes.^{49 50}

Doctrinally, the difference matters because trademark law does not protect design in the abstract; it protects source identification and related market functions. In the United States, the Lanham Act contains a specific dilution regime that aims to safeguard famous marks from “dilution by blurring” or “dilution by tarnishment,” and this protection operates even where confusion is absent. This feature is particularly relevant in luxury disputes: a look-alike strategy may avoid point-of-sale confusion, yet still seek to capture the aura of a famous brand through association, thereby risking impairment of distinctiveness or harm to reputation.^{51 52 53}

Similarly, EU trademark law provides expanded protection for marks with a reputation. Article 9(2)(c) of Regulation (EU) 2017/1001 on the European Union Trade Mark allows the proprietor of a mark with a reputation to prohibit the use of identical or similar signs even where goods are not identical, when used without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the EU trade mark. This architecture is structurally aligned with the look-alike phenomenon: it focuses less on classic deception and more on association, free-riding, and the long-term erosion of brand distinctiveness.^{54 55 56}

The Italian legal framework provides an additional perspective on look-alike strategies, combining trademark protection with unfair competition principles. Articles 20 and 21 of the Italian Industrial Property Code define the scope of exclusive trademark rights, including the right to prevent confusing or associative uses of similar signs. Alongside trademark law, Article 2598(3) of the Italian Civil Code addresses acts of unfair competition consisting in the systematic imitation of a competitor’s products or business initiatives.⁵⁷ Italian case law has clarified that such parasitic imitation requires a continuous and organised pattern of conduct aimed at exploiting the reputation, investments, and market positioning of another undertaking.

⁴⁹ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry’, *Fashion and Textiles*, 13(1), Article 4, pp. 1–19

⁵⁰ Nolan, M. (2023) ‘Prada Bag or Fraud-A Bag: The Impacts of Knockoffs and Counterfeits on the Fashion Industry’, *Saint Louis University Law Journal*, 68(1), pp. 275–306.

⁵¹ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c)

⁵² Bone, R.G. (2012) ‘Taking the Confusion Out of “Likelihood of Confusion”’: Toward a More Sensible Approach to Trademark Infringement’, *Northwestern University Law Review*, 106(3), pp. 1307–1378

⁵³ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

⁵⁴ European Parliament and Council (2017) *Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark*, OJ L 154, 16 June, Article 9(2)(c)

⁵⁵ Gangjee, D. and Burrell, R. (2010) ‘Because You’re Worth It: L’Oréal and the Prohibition on Free Riding’, *The Modern Law Review*, 73(2), pp. 282–295

⁵⁶ Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

⁵⁷ Italy (2005) *Decreto legislativo 10 febbraio 2005, n. 30: Codice della proprietà industriale*, Articles 20–21; Italy (1942) *Codice civile*, Article 2598(3).

In this context, courts must distinguish between lawful inspiration, which reflects common stylistic trends, and unlawful imitation, which reveals a deliberate strategy of free-riding on a luxury brand's distinctive identity.^{58 59}

1.1.2 The growing relevance of imitation in the luxury market

The luxury fashion sector is especially sensitive to imitation because its value proposition depends not only on product quality, but also on intangible attributes such as heritage, reputation, and perceived exclusivity⁶⁰, which are often conveyed through recurring visual signs such as logos, patterns, and colour configurations that operate as core elements of brand identity.⁶¹ In this context, counterfeits and look-alikes may generate harm through different channels. Counterfeits can directly divert sales and undermine consumer trust by introducing unauthorised goods into circulation.⁶² Look-alikes, by contrast, can function as a reputational shortcut: by normalising signature aesthetics at lower price points, they may weaken scarcity and symbolic value, and can blur the boundary between the luxury brand's controlled identity and broader mass-market diffusion.⁶³

From a market-scale perspective, data on illicit trade illustrates why regulators and brand owners treat imitation as a sustained structural risk. In its 2025 communication accompanying the joint report with the European Union Intellectual Property Office, the Organisation for Economic Co-operation and Development reported that counterfeit goods accounted for an estimated USD 467 billion in global trade in 2021. The same communication highlighted that clothing, footwear, and leather goods remained among the most affected sectors, together accounting for 62% of seized counterfeit goods.⁶⁴ These figures confirm the particular exposure of fashion-related categories to unlawful appropriation and illicit supply chains, and they also provide background context for the broader ecosystem in which look-alike strategies operate.⁶⁵

The 2025 OECD–EUIPO report further frames the problem as an enforcement challenge amplified by globalisation and e-commerce. It estimates that counterfeit trade represented approximately 2.3% of total global imports in 2021, and identifies the EU as a significant target market, with counterfeit imports estimated at 4.7% of total EU imports. While these figures are specific to counterfeiting and piracy, they matter for a thesis on look-alikes because they show that consumer demand for lower-cost access to high-status aesthetics exists at scale and is increasingly mediated by online distribution, where product presentation and visual similarity

⁵⁸ *Corte di Cassazione*, Ordinanza n. 3392, 10 February 2025; *Tribunale di Milano, Sezione specializzata in materia di impresa*, 22 October 2020

⁵⁹ Vanzetti, A. and Di Cataldo, V. (2018) *Manuale di diritto industriale*. 8th edn. Milan: Giuffrè Francis Lefebvre.

⁶⁰ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

⁶¹ Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704.

⁶² OECD/EUIPO (2025) *Mapping Global Trade in Fakes 2025: Global Trends and Enforcement Challenges*. Paris: OECD Publishing

⁶³ Hietanen, J., Mattila, P., Sihvonen, A. and Tikkanen, H. (2018) 'Paradox and Market Renewal: Knockoffs and Counterfeits as Doppelgänger Brand Images of Luxury', *Marketing Intelligence & Planning*, 36(7), pp. 750–763.

⁶⁴ OECD/EUIPO (2025) *Mapping Global Trade in Fakes 2025: Global Trends and Enforcement Challenges*. Paris: OECD Publishing

⁶⁵ OECD (2025) *Global trade in fake goods reached USD 467 billion, posing risks to consumer safety and compromising intellectual property*

can influence consumer perception and association even absent explicit brand use.⁶⁶ This risk is explicitly recognised in European trademark law. Article 9(2)(c) of Regulation (EU) 2017/1001, as well as Article 10(2)(c) of Directive (EU) 2015/2436, extend protection to marks with a reputation by allowing the proprietor to prevent uses that take unfair advantage of, or are detrimental to, their distinctive character or reputation, even in the absence of consumer confusion.⁶⁷

Beyond illicit trade, the growing relevance of look-alikes is also linked to contemporary “dupe culture,” which is shaped by social media narratives that reframe imitation as a budgeting strategy or a form of consumer savvy rather than as a wrongful act.⁶⁸ Practitioner analysis notes that dupes have become ubiquitous, and that luxury brands increasingly test enforcement routes such as trade dress and design-patent-adjacent strategies alongside trademark theories, seeking a roadmap to address high-visibility look-alike markets.⁶⁹ This cultural shift is relevant because it modifies the reputational terrain: the alleged harm is not limited to short-term diversion of sales, but includes long-term effects on distinctiveness and brand equity, especially when large audiences are repeatedly exposed to products designed to evoke the luxury original.⁷⁰ These dynamics are further complicated by differences between legal systems, as U.S. trademark law traditionally emphasises consumer confusion, while European law provides broader protection for reputed marks through dilution and unfair advantage doctrines.⁷¹

1.1.3 Presentation of the Gucci v. Guess case

Within this broader landscape, the dispute between Gucci and Guess, initiated in 2009 and developed across multiple jurisdictions, provides a paradigmatic example of how luxury brands attempt to use trademark-centred doctrines to address look-alike strategies.⁷² The case is particularly significant because it illustrates, in concrete litigation, how a brand portfolio of distinctive signs functions as a legal perimeter around luxury identity⁷³, and how courts evaluate imitation that is extensive enough to evoke the claimant brand yet often calibrated to avoid an obvious, one-to-one counterfeit scenario.⁷⁴

In the United States proceedings, the dispute was explicitly framed as a trademark conflict between two global fashion companies. In its Opinion and Order of May 2012, the United States District Court for the Southern District of New York described Gucci’s allegations as involving infringement or counterfeiting of multiple trademarks and one trade dress across over one

⁶⁶ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry’, *Fashion and Textiles*, 13(1), Article 4.

⁶⁷ European Parliament and Council (2017) *Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark*, OJ L 154, 16 June, Article 9(2)(c).

⁶⁸ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry’, *Fashion and Textiles*, 13(1), Article 4.

⁶⁹ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry’, *Fashion and Textiles*, 13(1), Article 4.

⁷⁰ Hietanen, J., Mattila, P., Sihvonen, A. and Tikkanen, H. (2018) ‘Paradox and Market Renewal: Knockoffs and Counterfeits as Doppelgänger Brand Images of Luxury’, *Marketing Intelligence & Planning*, 36(7), pp. 750–763.

⁷¹ Kur, A. and Senffleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

⁷² *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

⁷³ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

⁷⁴ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

thousand stock keeping units, in an attempt to “Gucci-fy” the defendants’ product line. The decision identifies, among the contested assets, the Green-Red-Green stripe mark, the Repeating GG pattern, a Diamond Motif trade dress linked to the GG pattern in a specific colourway, a Stylized G design mark, and a Script mark.⁷⁵

A widely cited 2012 case summary reports that the court found trademark infringement and dilution for certain uses and granted a permanent injunction, while substantially limiting monetary recovery: Gucci obtained approximately USD 4.6 million out of a reported USD 120 million damages request. The same summary emphasises that Gucci’s infringement theory relied on post-sale confusion, namely confusion that arises after purchase when products are seen in public and may signal a mistaken association with the luxury brand.⁷⁶ This is crucial for luxury brand enforcement, as the communicative function of luxury goods often extends beyond the immediate consumer transaction and into the social visibility of the product as a signal.⁷⁷

The case also illustrates the structural limits of design-based protection in US fashion litigation.⁷⁸ The 2012 summary notes explicitly that Gucci did not pursue a copyright claim, linking that decision to the limited reach of copyright protection for useful articles such as purses.⁷⁹ This strategic choice is coherent with the broader framework discussed above: when design protection is legally constrained, rights-holders frequently reframe disputes in trademark, trade dress, and unfair competition terms,⁸⁰ and the legal inquiry becomes centred on how design elements operate as brand identifiers, rather than on the originality of the design alone.⁸¹

The comparative dimension becomes even more salient when considering European proceedings, particularly in Italy.⁸² Parallel proceedings also unfolded at the EU level, where the General Court ultimately upheld decisions finding that certain Guess signs produced a sufficiently different overall impression from Gucci’s marks.⁸³ A 2014 analysis reproduced from World Intellectual Property Report recounts that Gucci initiated proceedings before the Milan court in 2009, alleging a deliberate and large-scale imitation strategy described as a progressive “Guccification” of Guess, and requesting findings of trademark infringement and unfair competition.⁸⁴ The same source reports that in 2013 the Milan court rejected Gucci’s claims and upheld counterclaims affecting certain trademarks, while the Milan Court of Appeal, in September 2014, partially upheld Gucci’s appeal by overturning the unfair competition part of

⁷⁵ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

⁷⁶ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

⁷⁷ Bone, R.G. (2006) ‘Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law’, *Boston University Law Review*, 86(3), pp. 547–622.

⁷⁸ Scafidi, S. (2006) ‘Intellectual Property and Fashion Design’, in Yu, P.K. (ed.) *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*. Vol. 1. Westport, CT: Praeger Publishers, pp. 115–131.

⁷⁹ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, Supreme Court of the United States, 2017.

⁸⁰ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

⁸¹ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

⁸² Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

⁸³ *Guccio Gucci SpA v EUIPO — Guess? IP Holder LP* (2016) Case T-461/15, General Court of the European Union, Third Chamber, 11 October, ECLI:EU:T:2016:605.

⁸⁴ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

the first-instance decision and using strong language to characterise the overall business behaviour.⁸⁵

What makes the Italian appellate reasoning especially relevant for a thesis on look-alikes is its logic: the contested conduct is described as structured to avoid actual likelihood of confusion while maintaining a constant intention to imitate.⁸⁶ Acts that, taken individually, might not amount to counterfeiting, were treated as unlawful when assessed globally over time, as a breach of fair business practice and as “parasitic” unfair competition under Article 2598(3) of the Italian Civil Code.⁸⁷ The same account notes that the divergence among national outcomes contributed to the case becoming emblematic of legal conflict in protecting high-end fashion brands, and that the Italian luxury association Altagamma publicly supported Gucci after the first-instance decision.⁸⁸

In this sense, *Gucci v. Guess* is not solely a dispute about particular motifs; it is a concrete laboratory for examining how legal systems allocate the boundary between lawful inspiration, aggressive referencing, and unlawful appropriation of distinctive brand identity,⁸⁹ and for observing how different legal tools, each with its own threshold and ratio, are mobilised in response to look-alike strategies.⁹⁰ This highlights both the economic stakes involved and the persistent legal uncertainty surrounding the boundary between lawful inspiration and unlawful imitation.⁹¹

1.1.4 Aim and structure of the thesis

This thesis investigates the legal challenges posed by look-alike products in the luxury fashion industry, focusing on the interaction between IP protection and competitive dynamics.⁹² The underlying question is whether, and to what extent, existing legal instruments can effectively protect luxury brand identity against imitations that are not classic counterfeits, but are intentionally designed to evoke the original brand’s recognisable universe through visual and semiotic cues.⁹³

Gucci v. Guess is used as the central reference point because it combines three elements that make it particularly instructive.⁹⁴ First, it involves a luxury brand whose distinctive signs function as strong market identifiers.⁹⁵ Second, it concerns allegations of systematic imitation

⁸⁵ *Corte d’Appello di Milano*, Sentenza n. 3308/2014, 15 September 2014.

⁸⁶ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

⁸⁷ Italy (1942) *Codice civile*, Article 2598(3).

⁸⁸ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

⁸⁹ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

⁹⁰ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

⁹¹ Kur, A. and Senfleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

⁹² Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

⁹³ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

⁹⁴ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

⁹⁵ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

across a wide product portfolio, highlighting how look-alike strategies may operate through repetition and variation rather than exact replication.⁹⁶ Third, it generated outcomes across jurisdictions that illuminate how similar factual patterns can be filtered through different doctrinal structures, including trademark infringement, dilution, trade dress, and unfair competition.⁹⁷

Following the approved index, Chapter 1 reconstructs the Gucci v. Guess dispute and isolates the key legal issues it raises, including the limits of trademark protection and the practical boundary between inspiration and imitation in the fashion industry. Chapter 2 develops the broader legal framework for look-alike products, with specific attention to likelihood of confusion, dilution and the protection of famous marks, trade dress as a tool for protecting brand identity, and unfair competition doctrines, while also addressing the structural limits of IP protection in fashion.⁹⁸ Chapter 3 broadens the perspective through comparative case law and targeted case studies, using them to evaluate how courts address imitation, reputation, and evolving challenges for luxury brand protection in a market increasingly shaped by globalised distribution and digital communication.⁹⁹

1.2 The Gucci v. Guess Case: Imitation and Trademark Protection in the Fashion Industry

Following the general overview of imitation dynamics in the fashion industry, this section focuses on the dispute commonly referred to as Gucci v. Guess, analysed through a lens consistent with the thesis' focus on look-alike phenomena.¹⁰⁰ In particular, attention is devoted to the strategic value of brand identity in the luxury sector,¹⁰¹ the role of “signature codes” as legally protectable signs,¹⁰² and the sequence of events that led to parallel judicial proceedings, notably in the United States and Italy.¹⁰³

The analysis is deliberately centred on (i) Gucci's identity and market positioning as a brand whose economic value is strongly tied to recognisable semiotic elements,¹⁰⁴ and (ii) the distinctive features that became central to the litigation—particularly the GG monogram and the green-red-green stripe.¹⁰⁵ These elements exemplify the core legal issue addressed in this thesis:

⁹⁶ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

⁹⁷ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

⁹⁸ Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

⁹⁹ OECD/EUIPO (2025) *Mapping Global Trade in Fakes 2025: Global Trends and Enforcement Challenges*. Paris: OECD Publishing.

¹⁰⁰ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁰¹ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

¹⁰² Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

¹⁰³ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

¹⁰⁴ DeFanti, M., Bird, D. and Caldwell, H. (2013) ‘Gucci's Use of a Partially Borrowed Heritage to Establish a Global Luxury Brand’, *Past, Present and Future of Luxury Brands Conference Proceedings*, pp. 14–23.

¹⁰⁵ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

forms of imitation designed to evoke a well-known brand universe while remaining at the margins of direct counterfeiting.¹⁰⁶

1.3 Gucci's identity and market positioning

1.3.1 Heritage and corporate structure

Gucci is a luxury fashion house historically anchored in Italian craft and travel-related leather goods.¹⁰⁷ According to Gucci's official historical timeline, the House's founder Guccio Gucci—inspired by his experience working as a porter at The Savoy—returned to Florence and in 1921 opened the first boutique on Via della Vigna Nuova, initially centred on artisanal luggage and related leather goods.¹⁰⁸

That origin story is not merely biographical: it forms a durable narrative backbone for the brand's "heritage value"¹⁰⁹ and helps explain why certain codes (linked to travel, equestrian motifs, and recognisable textiles) later became central to Gucci's identity and to its enforcement strategy.¹¹⁰

Gucci's own timeline describes a gradual evolution from a luggage atelier to a global luxury fashion leader, with expanding product categories including ready-to-wear, leather goods, shoes, jewellery, watches, and décor.¹¹¹

This breadth is relevant for trademark disputes in fashion because the same distinctive signs (monograms, stripes, and recurring motifs) can operate across product lines, reinforcing brand recognition through repeated, cross-category exposure.¹¹² In Gucci's account, the late 1930s already saw the emergence of distinctive textile identities (notably the "Diamante" fabric and its emblematic diamond motif), described as a precursor of later GG monogram canvas.¹¹³

From a corporate standpoint, Gucci is today part of Kering, a point also reflected in encyclopaedic sources.¹¹⁴

As a business unit within a global luxury group, Gucci's performance is disclosed in group reporting: Kering's 2024 annual results press release reports Gucci revenue of €7.7 billion for 2024,¹¹⁵ and notes that sales from the directly operated retail network accounted for 91% of Gucci's total—an indicator of distribution control consistent with luxury-brand strategies oriented to safeguarding brand equity and presentation.

This "control dimension" matters for IP analysis because luxury brands frequently rely on a controlled ecosystem—product, retail environment, communications—to maintain the symbolic

¹⁰⁶ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

¹⁰⁷ DeFanti, M., Bird, D. and Caldwell, H. (2013) 'Gucci's Use of a Partially Borrowed Heritage to Establish a Global Luxury Brand', *Past, Present and Future of Luxury Brands Conference Proceedings*, pp. 14–23.

¹⁰⁸ Gucci (n.d.) *History of Gucci*.

¹⁰⁹ Urde, M., Greyser, S.A. and Balmer, J.M.T. (2007) 'Corporate Brands with a Heritage', *Journal of Brand Management*, 15(1), pp. 4–19.

¹¹⁰ DeFanti, M., Bird, D. and Caldwell, H. (2013) 'Gucci's Use of a Partially Borrowed Heritage to Establish a Global Luxury Brand', *Past, Present and Future of Luxury Brands Conference Proceedings*, pp. 14–23.

¹¹¹ Gucci (n.d.) *History of Gucci*.

¹¹² Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704.

¹¹³ Gucci (n.d.) *History of Gucci*.

¹¹⁴ Kering (n.d.) *Gucci*.

¹¹⁵ Kering (2025) *2024 Annual Results*. Paris: Kering, 11 February.

premium attached to their signs.¹¹⁶ The legal relevance is twofold. First, when a brand's value is heavily sign-mediated, unauthorised imitation can harm not only through diverted sales but also through erosion of distinctiveness and “aura.”¹¹⁷ Second, the more a brand invests in coherent and repetitive sign-use, the easier it may be (in evidentiary terms) to demonstrate acquired distinctiveness, fame, and association in the marketplace—thresholds that become central in trademark and dilution litigation.¹¹⁸

1.3.2 Luxury positioning and brand-mediated value

In contemporary marketing scholarship, luxury is commonly defined through a cluster of features rather than price alone.¹¹⁹ An open-access conceptual paper in the *International Journal of Research in Marketing* defines “luxury” as “expensive and exclusive” products and brands differentiated by exquisite design and craftsmanship, sensory appeal, and distinct socio-cultural narratives.¹²⁰

This definition is especially useful for legal analysis because it highlights why visual and semiotic devices (logos, patterns, stripes) are not superficial ornamentation in luxury, but are core assets that transmit meaning, origin, and narrative.¹²¹

Crucially, modern luxury is not only produced through product quality; it is also maintained through distribution and presentation.¹²² EU case law—though in a competition-law rather than trademark posture—explicitly recognises that luxury products may warrant selective distribution to preserve their luxury image.¹²³ In the Court of Justice's *Coty Germany* judgment (C-230/16), the Court states that a selective distribution system for luxury goods aimed primarily at safeguarding luxury image can be compatible with Article 101(1) TFEU, provided qualitative, objective, uniform, and non-discriminatory criteria are used and do not exceed what is necessary.¹²⁴

Although this is not a trademark decision, it confirms that EU law conceptualises “luxury image” as something that can justify legally significant market arrangements, reinforcing the broader point that luxury value is strongly linked to controlled signification and presentation.¹²⁵

¹¹⁶ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

¹¹⁷ Hietanen, J., Mattila, P., Sihvonen, A. and Tikkanen, H. (2018) ‘Paradox and Market Renewal: Knockoffs and Counterfeits as Doppelgänger Brand Images of Luxury’, *Marketing Intelligence & Planning*, 36(7), pp. 750–763.

¹¹⁸ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

¹¹⁹ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

¹²⁰ Wang, Y., John, D.R. and Griskevicius, V. (2022) ‘A Conceptual Framework of Contemporary Luxury Consumption’, *International Journal of Research in Marketing*, 39(3), pp. 788–803.

¹²¹ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

¹²² Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

¹²³ Giosa, P.A. (2018) ‘Luxury Goods and Third-Party Online Platforms: The ECJ's Judgment in the *Coty* Case’, *European Competition and Regulatory Law Review*, 2(1), pp. 49–52.

¹²⁴ *Coty Germany GmbH v. Parfümerie Akzente GmbH*, Case C-230/16, Court of Justice of the European Union, 6 December 2017, ECLI:EU:C:2017:941.

¹²⁵ *Coty Germany GmbH v. Parfümerie Akzente GmbH*, Case C-230/16, Court of Justice of the European Union, 6 December 2017, ECLI:EU:C:2017:941.

Within fashion law scholarship, this sign-mediated structure of value is a major reason why disputes in fashion often migrate from attempts to protect “design as such” toward the protection of brand identifiers.¹²⁶ Hemphill and Suk emphasise that fashion is structurally intertwined with copying and trend diffusion, and they highlight the need to distinguish “close copying” from trend participation; this analytical frame helps explain why luxury brands focus enforcement on distinctive signs that can be shown to function as identifiers rather than on broader, style-level similarities.¹²⁷

Similarly, the “piracy paradox” literature argues that copying can coexist with, and sometimes accelerate, fashion innovation cycles;¹²⁸ yet luxury brands—whose value is heavily anchored in status signalling and recognisability—are especially incentivised to protect signature identifiers (monograms, stripes, recurring motifs) that anchor their brand universe.¹²⁹

This conceptual background is directly relevant to Gucci. In the U.S. record of *Gucci v. Guess*, the district court notes Gucci’s strict quality standards and its vigorous enforcement posture—especially against counterfeiting.¹³⁰

More broadly, earlier U.S. litigation involving the green-red-green stripe device already framed Gucci as a “fashion leader” whose trademarks were widely recognised by trade and the purchasing public as associated with high style and quality—language typical of a brand positioned at the apex of the market, for which sign integrity is economically central.¹³¹

1.4 The distinctive elements of the Gucci brand

A look-alike dispute becomes legally actionable when “appearance” functions not only as aesthetic similarity but as a mechanism of association: the defendant’s products are designed to call to mind the claimant’s source-signifying universe.¹³² In luxury fashion this universe is frequently constructed through a portfolio of recurring signs: monogram canvases, hallmark stripes, signature hardware, and repeated motifs.¹³³

In the U.S. proceedings, Gucci alleged infringement or counterfeiting of multiple assets, including (among others) the Green-Red-Green stripe mark and the Repeating GG pattern, across “over one thousand” SKUs, characterising the conduct as an attempt to “Gucci-fy” the defendants’ product line.¹³⁴

¹²⁶ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

¹²⁷ Hemphill, C.S. and Suk, J. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

¹²⁸ Raustiala, K. and Sprigman, C. (2006) ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Virginia Law Review*, 92(8), pp. 1687–1777.

¹²⁹ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

¹³⁰ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹³¹ *Gucci America, Inc. v. Dart, Inc.*, 715 F. Supp. 566, United States District Court for the Southern District of New York, 1989.

¹³² Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

¹³³ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

¹³⁴ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

Within the thesis structure, the GG monogram and the green-red-green stripe are examined first because they embody two archetypal categories of non-traditional brand signification in fashion: (i) a repeating pattern used across accessories and apparel ¹³⁵, and (ii) a colour-stripe configuration that operates as a recognisable “code” even when detached from the brand name. ¹³⁶

Both are treated in U.S. litigation not as vague stylistic influences but as protectable identifiers with long-term commercial use, substantial advertising support, and strong recognition—elements that become central in both infringement and dilution analysis. ¹³⁷

1.4.1 The GG monogram

Gucci’s own historical account frames early textile identity (the “Diamante” fabric and diamond motif) as a precursor to later monogram canvas. ¹³⁸

Independent market-facing heritage documentation consistent with Gucci archive materials describes the GG monogram as an update of the earlier Diamante motif, with the double reverse GG initials incorporated in homage to the founder and becoming synonymous with the brand. ¹³⁹

While such historical narratives are not determinative in court, they matter analytically because they show that Gucci’s repeating pattern is not incidental decoration but part of an intentional, long-lived system of meaning and recognisability. ¹⁴⁰

In the U.S. court’s findings, the “Repeating GG Pattern” is explicitly treated as a key visual identifier. The court records that Gucci obtained trademark registrations for the design in 2003 (for jewellery) and 2006 (for a broader set of goods including handbags, luggage, small leather goods, neckties, scarves, and footwear).

The same portion of the opinion notes scale and commercial centrality: Gucci had sold “billions of dollars” worth of products bearing the Repeating GG Pattern (and a related diamond-motif trade dress), and it spent more than \$13 million in the U.S. on advertising featuring these marks between 2001 and 2009.

Two further points from the trial record are especially important for a thesis on look-alikes.

First, recognition: the court notes that defendants acknowledged the Repeating GG Pattern as a key identifier of Gucci and as transmitting qualities such as heritage, quality, and exclusivity. ¹⁴¹

This is significant because look-alike strategies commonly operate by leveraging “recognised codes” rather than by copying the brand name. ¹⁴² Defendants’ acknowledgement functions as

¹³⁵ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

¹³⁶ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

¹³⁷ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹³⁸ Gucci (n.d.) *History of Gucci*.

¹³⁹ Christie’s (2023) ‘Gucci’s Iconic Trio: The Bamboo, the Horsebit and the “Jackie”’

¹⁴⁰ Urde, M., Greyser, S.A. and Balmer, J.M.T. (2007) ‘Corporate Brands with a Heritage’, *Journal of Brand Management*, 15(1), pp. 4–19.

¹⁴¹ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁴² Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

strong evidence that the pattern is understood as source-linked in the marketplace, even where consumers may not consciously articulate the association as a formal trademark.¹⁴³

Second, fame and dilution relevance: the court expressly finds the Repeating GG Pattern to be a “famous mark” within the meaning of the U.S. dilution regime (TDRA),¹⁴⁴ referencing the same rationale applied to the green-red-green stripe.¹⁴⁵

This is analytically important because a central difficulty in policing look-alikes is that they may avoid clear point-of-sale confusion but nevertheless trade on association.¹⁴⁶ “Fame” is the doctrinal gateway that allows the legal system to address harm framed as blurring of distinctiveness rather than deception.¹⁴⁷

Finally, the GG pattern’s litigation salience also reflects an industry-specific feature identified in scholarship: fashion design protection is structurally limited in certain jurisdictions, particularly in the U.S. for “useful articles”¹⁴⁸, encouraging brands to invest in protectable identifiers—monograms and recurring patterns—rather than relying on the protectability of the underlying product silhouette as such.¹⁴⁹

1.4.2 The green-red-green stripe

The green-red-green stripe (often described in fashion discourse as a “web stripe”) illustrates particularly well how a simple configuration can become a powerful luxury identifier through long-term, repeated, and controlled use.¹⁵⁰ Archival-oriented accounts trace this motif to equestrian heritage: Christie’s documentation (referencing Gucci archive materials) describes the green-red-green web stripe as first seen in the early 1950s, inspired by the girth strap used to hold a saddle in place.¹⁵¹

The legal salience of this motif, however, lies in the evidentiary pattern the courts describe: long-standing use, registration history, advertising investment, and recognition as an identifier.¹⁵²

In the U.S. *Gucci v. Guess* findings, the court states that Gucci used the green-red-green stripe since the 1960s and describes its composition (outer green stripes flanking a central red stripe). It reports registrations for the stripe in 1979 (for handbags, luggage, small leather goods, and similar goods) and 1988 (for footwear).

¹⁴³ Bone, R.G. (2006) ‘Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law’, *Boston University Law Review*, 86(3), pp. 547–622.

¹⁴⁴ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁴⁵ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁴⁶ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

¹⁴⁷ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

¹⁴⁸ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, Supreme Court of the United States, 2017.

¹⁴⁹ Scafidi, S. (2006) ‘Intellectual Property and Fashion Design’, in Yu, P.K. (ed.) *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*. Vol. 1. Westport, CT: Praeger Publishers, pp. 115–131.

¹⁵⁰ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

¹⁵¹ Christie’s (2023) ‘Packed with Style: A History of Gucci Valigeria in 10 Objects’.

¹⁵² *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

The decision further notes the stripe's commercial scale: it appeared on about 20% of Gucci accessories over the prior two decades; between 2005 and 2009, sales of products featuring the stripe amounted to approximately \$250 million; and advertising expenditures featuring the stripe (2001–2009) were approximately \$3.7 million (with a higher figure if other colour variants are included).

These findings echo earlier judicial treatment. In a prior Southern District of New York decision concerning counterfeit watches, the court described Gucci as having used the green-red-green stripe device since at least 1967, identified Registration No. 1,123,224 (July 31, 1979) for the stripe device, and emphasised that limited distribution and quality control were important to maintaining the high-quality image associated with Gucci's trademarks.¹⁵³

For a thesis on luxury imitation, this earlier case is valuable because it shows that the stripe device has been framed (judicially) for decades not merely as decoration but as an indicator with "secondary meaning" in the fashion field—precisely the kind of meaning that look-alike strategies attempt to harvest.¹⁵⁴

In *Gucci v. Guess*, recognition and "fame" are again decisive. The district court notes that defendants acknowledged the stripe as a key identifier of Gucci, and it concludes—based on extensive sales, publicity, recognition, and decades-old registration—that the green-red-green stripe is a "famous mark" under the TDRA.¹⁵⁵

This is a critical analytical point: when the law classifies a simple configuration as a famous mark, it affirms that luxury brand equity can reside in very compact visual cues¹⁵⁶, making the boundary between permissible inspiration and unlawful association especially contested.¹⁵⁷

At the same time, the same opinion contains an important caution that is directly relevant to look-alikes. The court remarks that stripe patterns are "basics" that competitors must be able to use, except where a particular configuration has come to identify a specific brand; it then indicates that protection should be strong but narrow, limited to a restricted band of similar colour configurations.¹⁵⁸

Even at this initial stage of the chapter, this observation foreshadows a recurring tension: luxury brands seek robust control over their signature codes¹⁵⁹, while courts remain attentive to overreach that might transform basic decorative vocabulary into excessive monopoly.¹⁶⁰

¹⁵³ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁵⁴ Hietanen, J., Mattila, P., Sihvonen, A. and Tikkanen, H. (2018) 'Paradox and Market Renewal: Knockoffs and Counterfeits as Doppelgänger Brand Images of Luxury', *Marketing Intelligence & Planning*, 36(7), pp. 750–763

¹⁵⁵ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁵⁶ Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704.

¹⁵⁷ Gangjee, D. and Burrell, R. (2010) 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding', *The Modern Law Review*, 73(2), pp. 282–295.

¹⁵⁸ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁵⁹ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

¹⁶⁰ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

1.5 The background of the dispute between Gucci and Guess

The Gucci-Guess dispute is often presented (especially in non-technical commentary) as a binary conflict between originality and imitation. The record, however, points to a more complex background: repeated market encounters, multi-year internal monitoring, and an escalation from concern to coordinated global litigation.¹⁶¹

This section reconstructs the background up to the point of filing, to prepare the later doctrinal analysis of infringement, dilution, and unfair competition.¹⁶²

A threshold contextual point is the companies' market characterisation. Gucci is positioned and described as a luxury house with strong identity-based value,¹⁶³ while Guess?, Inc. is described in its SEC filing as a global lifestyle brand designing, marketing, distributing, and licensing contemporary apparel and accessories; the same filing identifies a core customer demographic primarily between ages 20 and 35 and describes a multi-channel distribution model (direct-to-consumer, wholesale, and licensing).¹⁶⁴

In the later U.S. merits decision, the court explicitly references the idea—advanced by Guess—that the parties occupied different market tiers (“mid-market versus high-end”), even though it does not treat that point as dispositive.¹⁶⁵

This is characteristic of look-alike disputes: the alleged wrong is not always framed as direct substitution, but as the harvesting of associative value across segments¹⁶⁶, including through post-sale visibility.¹⁶⁷

The U.S. record also indicates that Gucci and Guess coexisted in overlapping advertising channels and that Gucci monitored Guess's placement of advertisements—some of which featured designs later challenged in litigation. The court notes evidence that both brands advertised in the same fashion magazines, and it records testimony that Gucci monitored where Guess advertised.¹⁶⁸

This matters for background because it supports a narrative of sustained competitive awareness: the dispute developed in an environment in which Gucci was attentive to Guess's market presentation, and in which similarities were perceived as meaningful enough to be tracked.¹⁶⁹

From a pre-litigation perspective, discovery-related rulings provide unusually concrete insight into Gucci's internal deliberations. A Southern District of New York protective-order decision by

¹⁶¹ *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, United States District Court for the Southern District of New York, 2010.

¹⁶² Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

¹⁶³ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

¹⁶⁴ Guess?, Inc. (2009) *Form 10-K Annual Report for the Fiscal Year Ended January 31, 2009*. Washington, DC: United States Securities and Exchange Commission.

¹⁶⁵ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁶⁶ Hietanen, J., Mattila, P., Sihvonen, A. and Tikkanen, H. (2018) ‘Paradox and Market Renewal: Knockoffs and Counterfeits as Doppelgänger Brand Images of Luxury’, *Marketing Intelligence & Planning*, 36(7), pp. 750–763.

¹⁶⁷ Morris, P.S. (2013) ‘Guess What Gucci? Post-Sale Confusion Exists in Europe’, *Valparaiso University Law Review*, 47(4), pp. 1319–1358.

¹⁶⁸ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁶⁹ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

James L. Cott (in the context of privilege disputes) frames the case as a trademark infringement action initiated by Gucci America, Inc. and describes communications involving non-party Guccio Gucci S.p.A.'s in-house IP counsel (reflecting coordination within the wider corporate structure).¹⁷⁰

The same decision describes an “investigation leading up to this action”: in March 2008 Gucci’s Italian-side legal leadership instructed counsel to commence an investigation into Guess’s alleged infringement of certain trademarks, which involved communications with counsel across jurisdictions and personnel at Gucci affiliates worldwide.

It further records a November 2008 meeting in New York involving group counsel and outside U.S. counsel to discuss investigative findings and consider parallel litigation.¹⁷¹

Importantly, this background indicates that the dispute was not triggered by a single product incident but by a pattern perceived as systematic. The same protective-order decision states that after late-2008 investigative steps, a decision was made to coordinate with affiliates around the world and commence a trademark infringement action in Italy, with a corresponding effort to prepare for a U.S. action.¹⁷²

This supports the thesis’ framing of look-alikes: the phenomenon often unfolds through repeated “referencing” of a brand’s universe across seasons and product lines¹⁷³, rather than through one-off, easily classifiable counterfeits.¹⁷⁴

The filings timeline is clear in the U.S. discovery decision. It states that on May 5, 2009, Guccio Gucci S.p.A. sued Guess and its Italian affiliate in Milan for trademark infringement and related claims, and the U.S. proceedings followed shortly thereafter in May 2009. The U.S. merits opinion similarly identifies May 6, 2009 as the filing date for the U.S. complaint and lists the defendants (including multiple licensees and accessory/footwear companies), framing the dispute as involving alleged infringement/counterfeiting of multiple trademarks and one trade dress across over one thousand SKUs in an attempt to “Gucci-fy” the product line.¹⁷⁵

The presence of multiple defendants—beyond the core brand company—already signals an important structural feature of fashion disputes: brand identity may be disseminated and repeated through licensing arrangements and category-specialist partners (e.g., footwear, accessories)¹⁷⁶, which can multiply the factual locations where look-alike dynamics occur.¹⁷⁷

¹⁷⁰ *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, United States District Court for the Southern District of New York, 2010.

¹⁷¹ *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, United States District Court for the Southern District of New York, 2010.

¹⁷² *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, United States District Court for the Southern District of New York, 2010.

¹⁷³ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry’, *Fashion and Textiles*, 13(1), Article 4.

¹⁷⁴ World Trade Organization (1994) *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, Article 51, footnote 14.

¹⁷⁵ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁷⁶ Guess?, Inc. (2009) *Form 10-K Annual Report for the Fiscal Year Ended January 31, 2009*. Washington, DC: United States Securities and Exchange Commission.

¹⁷⁷ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

Within this pre-litigation phase, the green-red-green stripe episode offers a concrete “flashpoint” that illustrates how look-alike concerns are detected and managed. In the U.S. findings, the court records internal communications in which design personnel instructed manufacturers to reference Gucci’s stripe colours (“Green/Red/Green like the GUCCI”), even offering to send a Gucci shoe as an example; it also records that a Guess-branded shoe bearing the stripe came to the attention of Guess’s IP counsel in November 2008, followed by recall-related steps that were imperfectly implemented.¹⁷⁸

Even without moving into the legal merits (reserved for later sections), these facts are foundational for understanding the dispute’s escalation: they portray imitation not as accidental convergence on a general trend¹⁷⁹, but as deliberate referencing of an identifiable luxury sign to evoke Gucci’s universe.¹⁸⁰

Finally, the Italian background narrative—while analysed in depth later—already appears in practitioner and specialist reporting as framed by an allegation of progressive “Guccification”: a sustained strategy of imitating Gucci’s distinctive signs and products at a lower price point.¹⁸¹

This narrative is analytically relevant at the background stage because it aligns with the central difficulty of look-alike products: conduct that may avoid the simplest form of counterfeit (the direct use of the Gucci word mark)¹⁸² but seeks to build consumer association through persistent use of recognisable codes.¹⁸³

1.6 The legal claims brought by Gucci

Gucci’s complaint (filed May 2009) was built on a broad set of intellectual-property theories, reflecting the multi-dimensional harm caused by look-alikes. In the United States, Gucci invoked trademark infringement under 15 U.S.C. §§1114, 1125(a) and §43(a)¹⁸⁴, trademark dilution under §43(c) (the TDRA)¹⁸⁵, and related unfair competition statutes.¹⁸⁶ Internationally, Gucci relied on EU and Italian law: it cited EU Trade Mark Regulation 2017/1001 (Art.9(2)(c)) for famous marks protection¹⁸⁷ and Italian Civil Code art.2598(3) to address parasitic imitation.¹⁸⁸ Gucci’s U.S. suit (filed May, 2009) closely followed an Italian proceeding filed May 5, 2009, underscoring a coordinated strategy against Guess’s alleged pattern of copying.

¹⁷⁸ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁷⁹ Hemphill, C.S. and Suk, J. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

¹⁸⁰ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

¹⁸¹ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

¹⁸² World Trade Organization (1994) *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, Article 51, footnote 14.

¹⁸³ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry’, *Fashion and Textiles*, 13(1), Article 4.

¹⁸⁴ United States Congress (1946) *Lanham Act*, 15 U.S.C. §§ 1114 and 1125(a).

¹⁸⁵ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

¹⁸⁶ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁸⁷ European Parliament and Council (2017) *Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark*, OJ L 154, 16 June, Article 9(2)(c).

¹⁸⁸ Italy (1942) *Codice civile*, Article 2598(3).

1.6.1 Trademark infringement

To prove infringement, Gucci had to show ownership of valid marks¹⁸⁹ and a likelihood of consumer confusion under the Lanham Act¹⁹⁰. Gucci identified five contested marks: the repeating interlocked GG canvas (monogram), the green-red-green stripe device, a “Diamond Motif” trade dress (a canvas with GG at corners), a Stylized “G” logo, and its cursive “Gucci” script. Each mark was shown to have acquired distinctiveness through long-term exclusive use. For example, the court found the GG pattern and stripe to be “strong, famous marks” based on billions in sales and substantial advertising. Gucci also documented overlapping product lines (bags, belts, shoes) where Guess had similar designs, and introduced evidence (including internal Guess communications) suggesting Guess intentionally emulated Gucci’s aesthetic.¹⁹¹ Crucially, Gucci’s theory focused on post-sale confusion: observers seeing a Guess item in public might believe it came from Gucci¹⁹². Under the Polaroid factors (Second Circuit test), the court considered the marks’ strength, similarity, intent, and evidence of confusion.¹⁹³ It concluded that Guess “intended to copy the upscale look” of Gucci’s GG Pattern and Diamond Motif, and therefore held infringement on specific products and colour schemes. For instance, the court ruled that some Guess shoes with a brown-red-brown stripe infringed Gucci’s trademarked green-red-green stripe, whereas Guess’s use of a script logo (in a generic font) did not infringe Gucci’s cursive logo.¹⁹⁴ The infringement claim was thus tailored: only Guess’s uses that closely mimicked Gucci’s distinctive signs (with minimal variation) were condemned, in line with trademark principles that disallow only source-confusing imitation.¹⁹⁵

1.6.2 Trademark dilution

In parallel, Gucci asserted claims under the TDRA (15 U.S.C. §1125(c)), which protect famous marks from blurring (dilution of distinctiveness) or tarnishment.¹⁹⁶ Gucci’s marks (GG canvas, stripe, diamond motif) were alleged to be famous. The court agreed that the GG pattern and green-red-green stripe were famous marks entitled to maximum protection.¹⁹⁷ Under the TDRA, once fame is shown, Gucci needed only to prove that Guess’s use “lessens the capacity” of those marks to identify Gucci.¹⁹⁸ The court found that several of Guess’s imitations were likely to blur the distinctiveness of Gucci’s marks. For example, Guess’s uses of similar stripes and patterns (even on different products) were deemed to dilute Gucci’s unique identity, because they linked Guess’s goods in the mind of the public to Gucci. At the same time, the court noted that some

¹⁸⁹ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1114.

¹⁹⁰ *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, United States Court of Appeals for the Second Circuit, 1961

¹⁹¹ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁹² Morris, P.S. (2013) ‘Guess What Gucci? Post-Sale Confusion Exists in Europe’, *Valparaiso University Law Review*, 47(4), pp. 1319–1358.

¹⁹³ *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, United States Court of Appeals for the Second Circuit, 1961.

¹⁹⁴ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁹⁵ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

¹⁹⁶ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

¹⁹⁷ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

¹⁹⁸ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

uses in different colours or contexts did not dilute. Guess's striped shoe in brown-red was considered not to dilute Gucci's green-red stripe.¹⁹⁹ The dilution claim also allowed Gucci to seek relief even where confusion was absent²⁰⁰. Notably, the court rejected dilution claims on two marks: the Stylized G was not "famous" before Guess's use, and the Gucci script mark was deemed dissimilar enough that it could not be diluted.²⁰¹ In Europe, a similar effect would be sought under Art.9(2)(c) EU Reg, which forbids uses that "unfairly take advantage of" or "detrimentally" affect a mark with reputation²⁰². Gucci's U.S. dilution argument parallels this approach by focusing on harm to brand image rather than just marketplace deception.²⁰³

1.6.3 Trade dress

Gucci also invoked trade dress protection for the overall design of certain products. Under the Lanham Act (§43(a)), unregistered trade dress (product design, packaging, etc.) is protectable if it is non-functional, distinctive, and its imitation is likely to cause confusion.²⁰⁴ Gucci's Diamond Motif (a repeating GG pattern with a square-grid layout) was presented as a trade dress it had developed into a signal of Gucci origin. Gucci showed that the Diamond Motif had acquired secondary meaning through decades of use on iconic goods (bags, belts, luggage), and that its configuration had no functional necessity.²⁰⁵ The court agreed, finding the Diamond Motif trade dress to be distinctive of Gucci. Gucci then had to prove that Guess's use of a similar canvas design was confusingly similar in its overall impression. The trial record includes testimony and a consumer survey indicating that the combined pattern and colour scheme of the Diamond Motif was recognized by the public as identifying Gucci. As a result, the court extended trademark protection to this trade dress.²⁰⁶ (Under EU law, a similar analysis might involve "unregistered" design rights or unfair competition, since EU trade dress doctrines are less developed.)²⁰⁷

1.6.4 Unfair competition

Finally, Gucci pursued unfair competition claims. In New York, these were essentially consolidated with its Lanham Act claims.²⁰⁸ In Italy, Gucci specifically relied on Article 2598 of the Civil Code. Article 2598(3) prohibits acts contrary to professional ethics that are "a total or partial imitation of another's business operations," even absent confusion, when done in bad faith to take advantage of the other's efforts²⁰⁹. Gucci characterized Guess's conduct as exactly that: a

¹⁹⁹ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁰⁰ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

²⁰¹ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁰² European Parliament and Council (2017) *Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark*, OJ L 154, 16 June, Article 9(2)(c).

²⁰³ Gangjee, D. and Burrell, R. (2010) 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding', *The Modern Law Review*, 73(2), pp. 282–295.

²⁰⁴ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(a).

²⁰⁵ *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, Supreme Court of the United States, 2001.

²⁰⁶ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁰⁷ Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

²⁰⁸ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁰⁹ Italy (1942) *Codice civile*, Article 2598

systematic plan to copy Gucci's symbols on a broad scale, thereby free-riding on Gucci's creative investments²¹⁰. According to reports, the Milan courts, especially on appeal in 2014, accepted that Guess's sustained strategy of imitation (the "Guccification") was unfair competition: even if each imitation was slightly tweaked, collectively they exploited Gucci's brand aura and contravened fair trading practices.²¹¹ Thus, Gucci's unfair competition theory captured the overall context: Guess knowingly piled new products evoking Gucci's style, undermining Gucci's exclusivity and goodwill.²¹²

Taken together, these claims show that Gucci was required to meet specific evidentiary standards: e.g. for infringement, proof of distinctiveness (secondary meaning or registration) and similarity²¹³; for dilution, fame of the mark and likelihood of blurring²¹⁴; for trade dress, non-functionality and distinctiveness of the overall design²¹⁵; for unfair competition, intent and parasitic effect²¹⁶. Gucci marshalled advertising expenditures, sales figures, consumer surveys, and internal documents to satisfy these requirements. The result was a mosaic of mixed outcomes: the court found infringement and dilution for many of Gucci's asserted marks (especially the GG pattern, stripe, and diamond motif) but narrowed the liability by distinguishing certain colour variants and designs as non-infringing.²¹⁷

1.7 The defence arguments of Guess

Guess's defence strategy attacked both the facts and the law underlying Gucci's claims. Its arguments developed along several interconnected lines, all directed at showing that no confusion would result²¹⁸, that the contested elements belonged to the shared vocabulary of fashion²¹⁹, that Gucci's marks were not uniformly strong, and that Guess acted without bad faith.²²⁰ These defences draw on case-specific evidence and on legal doctrines concerning "fair use" of design elements.²²¹

At the centre of this defence was Guess's insistence that its products, clearly labelled with the GUESS brand, would not mislead consumers.²²² It noted that Guess markets itself as a

²¹⁰ Sganga, C. (2014) 'Gucci Wins Appeal in Italy Against Guess', *World Intellectual Property Report*, 28(11), pp. 19–20.

²¹¹ *Corte d'Appello di Milano*, Sentenza n. 3308/2014, 15 September 2014.

²¹² Sganga, C. (2014) 'Gucci Wins Appeal in Italy Against Guess', *World Intellectual Property Report*, 28(11), pp. 19–20.

²¹³ *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, United States Court of Appeals for the Second Circuit, 1961.

²¹⁴ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

²¹⁵ *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, Supreme Court of the United States, 2001.

²¹⁶ Italy (1942) *Codice civile*, Article 2598(3).

²¹⁷ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²¹⁸ *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, United States Court of Appeals for the Second Circuit, 1961.

²¹⁹ Hemphill, C.S. and Suk, J. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

²²⁰ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²²¹ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1115(b)(4).

²²² *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

contemporary brand for younger consumers, at mid-range prices ²²³, whereas Gucci sells high-luxury goods ²²⁴. According to Guess, an ordinary buyer or observer would distinguish a Guess bag from a Gucci bag based on branding, build quality, and retail setting. This market separation argument was bolstered by actual trial findings: the court found no evidence of actual confusion in the marketplace and emphasised that the parties served different retail channels. Guess therefore argued that consumers are sophisticated enough to avoid confusion, and that any attributions of similarity are purely incidental. ²²⁵

Guess reinforced this position by pointing to concrete differences in the disputed designs. For instance, where Gucci used a green-red-green stripe, Guess used a brown-red-brown stripe on some products.²²⁶ Guess's "Square G" logo was in a different style than Gucci's interlocking "G," and Guess's font for "Guess" was generic, not copying Gucci's cursive. Guess argued that these distinctions were significant and meant that the overall commercial impressions were not the same. Moreover, Guess emphasised that geometric patterns, stripe motifs, and interlocking letters are common in fashion design and cannot be exclusively appropriated.²²⁷ This defence aligns with trademark principles that exclude functional or ornamental features from protection.²²⁸ As one commentary notes, "dupes" typically avoid using the exact trademark and instead rely on generic stylistic cues.²²⁹ Guess effectively contended that its uses were ornamental or descriptive rather than source-identifying ²³⁰. In relation to trade dress, Guess argued that stripes and grid patterns were either functional, because they could serve reinforcement or elasticity purposes, or aesthetically conventional, and therefore not subject to exclusive rights. ²³¹

The same restrictive approach shaped Guess's response to Gucci's dilution claims, which it challenged by disputing both fame and effect.²³² It argued that aside from a few core symbols, Gucci's design elements did not have universal fame among the general public. In fact, the court agreed that the Stylized G was not famous at Guess's time of use. Guess also stressed that its different colour choices prevented any blurring; as the court noted, Guess's brown-red stripe was unlikely to dilute Gucci's green-red stripe. It further argued that there was no tarnishment or unfair advantage—Guess's products did not disparage Gucci, and they catered to a different market ²³³. Legally, Guess implied that dilution should not extend to any evocation of style;

²²³ Guess?, Inc. (2009) *Form 10-K Annual Report for the Fiscal Year Ended January 31, 2009*. Washington, DC: United States Securities and Exchange Commission.

²²⁴ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

²²⁵ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²²⁶ Kim, W. and Ha-Brookshire, J.E. (2026) 'What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry', *Fashion and Textiles*, 13(1), Article 4.

²²⁷ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²²⁸ *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, Supreme Court of the United States, 2001.

²²⁹ Kim, W. and Ha-Brookshire, J.E. (2026) 'What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry', *Fashion and Textiles*, 13(1), Article 4

²³⁰ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1115(b)(4).

²³¹ *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, Supreme Court of the United States, 2001.

²³² United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

²³³ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

absent strong evidence of brand association, Gucci's famous mark protection shouldn't be invoked against Guess's stylistic similarities.²³⁴

Guess further sought to characterise its conduct as the result of independent creation and good faith. It claimed that its designs were independently created under normal competitive conditions²³⁵ and that, after Gucci complained, Guess took steps to modify its products, suggesting a lack of intent to mislead. For example, Guess's legal team instructed its supplier to remove the Gucci-style ribbon stripe from an accused shoe model, switching to a brown-red band. Guess also cooperated by investigating and recalling certain items. These actions were offered as proof that Guess did not act in wilful bad faith²³⁶. Moreover, Guess highlighted that industry practice involves designing fashion items based on prevailing trends, including rivals' styles²³⁷, and that such comparative referencing is lawful unless it crosses the line into trademark infringement²³⁸. While internal emails showed Guess designers were aware of Gucci's visuals, Guess emphasised that mere awareness does not establish illegality, especially when no explicit trademark was used.

A further element of Guess's position concerned the limitations of Gucci's marks. Guess pointed out that not all marks asserted by Gucci are equally protectable²³⁹. In the trial, Judge Scheindlin held that Gucci's Stylized G mark had been abandoned and was not protectable. Guess also noted that the "Gucci script" had limited distinctiveness²⁴⁰. In practice, this meant Guess could argue that those elements should be given only narrow protection²⁴¹. Additionally, Guess contested the broad damages Gucci sought, noting that Gucci had never licensed those designs and thus could not claim lost royalties. Indeed, the court reduced Gucci's recovery partly on this basis.

1.7.1 Strategic Implications

Taken as a whole, Guess's defences served a broader strategic aim. By framing the dispute as one of legitimate competition and common design use, Guess sought to limit injunctions to narrowly defined infringing instances. By emphasizing differences and good faith, Guess aimed to contest Gucci's dilution and bad-faith claims, thereby reducing potential liability. Finally, by highlighting Gucci's lack of licensing interest, Guess effectively limited Gucci's damages to actual profits rather than hypothetical royalties. In this sense, Guess's defence narrative was that it offered an independent fashion line that occasionally shared aesthetic cues with Gucci, rather

²³⁴ Gangjee, D. and Burrell, R. (2010) 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding', *The Modern Law Review*, 73(2), pp. 282–295

²³⁵ Hemphill, C.S. and Suk, J. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

²³⁶ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²³⁷ Raustiala, K. and Sprigman, C. (2006) 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), pp. 1687–1777.

²³⁸ Hemphill, C.S. and Suk, J. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

²³⁹ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing

²⁴⁰ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁴¹ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

than a line of counterfeit products, and relied on both factual and legal arguments to narrow the case accordingly.²⁴²

1.7.2 Comparative synthesis of claims, arguments, and defences

The preceding analysis can be synthesised through a comparative table, which clarifies how Gucci's claims, the relevant evidentiary requirements, and Guess's counter-arguments interacted within the litigation.

Claim (Basis)	Evidentiary Elements & Gucci's Arguments	Guess's Defences & Counter-Arguments
Distinctiveness	Gucci must show its marks (GG monogram, GRG stripe, etc.) have secondary meaning (fame). Gucci produced decades of exclusive use and advertising as proof. Similarity & Confusion: Gucci must show Guess's marks are similar enough to cause confusion. Gucci pointed to almost identical pattern/stripe uses on similar products, and evidence of Guess's intent to imitate. Intent: Gucci emphasised Guess's deliberate copying (references in internal emails) to invoke a presumption of confusion.	Guess argues consumers would not be confused: its products are clearly branded and sold at different price points and channels. Design Differences: Guess highlights colour and style differences (brown-red stripe vs. green-red, distinct "G" shapes) to argue that marks are not substantially similar. Common Elements: Stripes and monograms are common fashion motifs; Gucci cannot monopolize basic designs. Different Markets: Argues Gucci targets high-luxury buyers, Guess targets mid-market; bridging this gap is unlikely.
Trademark Dilution (Fame of Mark)	Gucci's marks (GG pattern, GRG stripe) must be famous. The court recognized them as famous. Blurring/Tarnishment: Gucci must show Guess's uses would blur distinctiveness or tarnish reputation. Gucci argued Guess's products would dilute Gucci's exclusivity and aura. Evidence: identical design cues on different products.	Guess contends some marks (Stylized G) were not famous, and thus not dilutable. colour Variation: Use of the same design in different colours (brown vs. green) was held non-dilutive. No Tarnishment: Guess's products are of comparable quality, causing no reputational harm; argues dilution protection should not extend to lawful stylistic inspiration.
Trade Dress	- Distinctiveness: The overall design (e.g. Diamond Motif canvas) must be non-functional	- Functionality/Common Design: Guess argued the pattern/stripe is functional or common in fashion

²⁴² *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

Claim (Basis)	Evidentiary Elements & Gucci's Arguments	Guess's Defences & Counter-Arguments
	and have acquired secondary meaning. Gucci showed the diamond-motif pattern is strongly associated with Gucci. Non-Functionality: Gucci argued the design is purely decorative, not functional. - Confusion: Gucci must prove Guess's product "look" is likely to confuse. Evidence: consumer survey and Gucci's advertising linking the trade dress to the brand.	and not exclusively Gucci's. Stripes serve functional purposes (reinforcement, etc.). Different Impression: Guess claimed the overall impressions differ; the presence of Guess's own brand prevents confusion.
Unfair Competition	- Bad Faith & Parasitism: Gucci must show Guess knowingly exploited Gucci's business. Gucci pointed to repeated imitations, timing of releases, and internal strategy (the so-called "Guccification" plan). Harm to Business: Gucci must show harm to its goodwill and market (diverted prestige). Gucci alleged Guess's entire branding strategy relied on Gucci's image, constituting free-riding.	- Fair Competition: Guess argued it competed fairly by establishing its own brand identity. Any similarities were incidental to trend-following, not done in bad faith. - Compliance Steps: Guess highlighted its corrective actions (design recalls, colour changes) as evidence of good faith. No Unfair Gain: Without confusion or deception, Guess claimed its success comes from legitimate efforts, not unfair advantage.

This comparison shows that the dispute was not structured around a single legal claim, but around a combination of infringement, dilution, trade dress, and unfair competition arguments. It also shows that Guess's defence strategy sought to reframe the alleged imitation as lawful market differentiation, common fashion vocabulary, and insufficient consumer confusion. The table therefore supports the broader argument that look-alike disputes depend less on resemblance alone than on the legal characterisation of that resemblance.

1.8 Judicial proceedings and decisions

The Gucci–Guess litigation unfolded in parallel in the United States and Italy, resulting in extensive judicial findings on the factual allegations and mixed outcomes on Gucci's claims.²⁴³ In the U.S. District Court for the Southern District of New York, Judge Scheindlin issued a

²⁴³ Morris, P.S. (2013) 'Guess What Gucci? Post-Sale Confusion Exists in Europe', *Valparaiso University Law Review*, 47(4), pp. 1319–1358.

detailed Opinion and Order on May 21, 2012, resolving the principal trademark, dilution, trade dress, and unfair competition issues in the U.S. proceedings²⁴⁴. The court confirmed Gucci's ownership of the asserted marks and trade dress – specifically the interlocking GG canvas monogram, the green-red-green stripe device, the “Diamond Motif” pattern (a GG-grid trade dress), a Stylized “G” logo, and the cursive “Gucci” script – and applied the Polaroid likelihood-of-confusion factors²⁴⁵. It found that Guess had infringed Gucci's trademarks on multiple products, notably by “Gucci-fying” certain shoes and belts with nearly identical stripe and canvas patterns. The court also held that the GG canvas, stripe, and Diamond Motif trade dress were famous or well-known marks subject to dilution protection. As a remedy, Gucci secured a permanent injunction barring Guess from further use of three of the four contested designs, and was awarded approximately USD 4.6 million in profits and damages. This sum was a small fraction of the USD 120+ million Gucci sought, in part because the court limited liability to the narrow uses it found infringing or diluting. Notably, some colour variants and design uses were held non-infringing: for example, Guess's use of a brown-red-brown stripe did not infringe or dilute Gucci's green-red-green stripe. Similarly, Gucci's cursive script mark was deemed sufficiently different from Guess's generic “GUESS” logo, and thus not infringed or diluted. The U.S. judgment emphasised post-sale confusion (the risk that observers of a Guess-branded product would mistakenly believe it was Gucci²⁴⁶) and the famousness of Gucci's codes as the basis for relief. Gucci did not obtain injunctive relief or damages for every product or design it claimed – rather, liability was confined to those instances where the overall commercial impression was substantially identical or the manner of imitation was deliberate.²⁴⁷

In Italy, Gucci also commenced litigation in May 2009. The Milan Court of First Instance (2013) largely dismissed Gucci's claims on both trademark and unfair-competition grounds. The court found insufficient likelihood of confusion or dilution in the contested designs, given differences in colours and market positioning (notably Guess's focus on mid-market consumers). Gucci appealed²⁴⁸. In September 2014, the Milan Court of Appeal delivered a split decision. It affirmed the first-instance holding on trademark validity and infringement (i.e. did not find direct infringement of Gucci's marks) but reversed on unfair competition²⁴⁹. The appellate court held that Guess's conduct constituted “parasitic” unfair competition under Article 2598(3) of the Italian Civil Code²⁵⁰. In doing so, it used notably strong language: even though individual Guess products did not cause actual confusion, the court found Guess's systematic copying of Gucci's signature motifs over time demonstrated a deliberate intent to free-ride on Gucci's creativity. The judges observed that Guess launched products closely imitating Gucci's designs shortly after Gucci's collections debuted, and that this cumulative behavior exploited Gucci's enterprise and goodwill. Gucci was therefore entitled to injunctive relief and damages under the parasitic

²⁴⁴ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁴⁵ *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, United States Court of Appeals for the Second Circuit, 1961.

²⁴⁶ Morris, P.S. (2013) ‘Guess What Gucci? Post-Sale Confusion Exists in Europe’, *Valparaiso University Law Review*, 47(4), pp. 1319–1358.

²⁴⁷ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁴⁸ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

²⁴⁹ *Corte d'Appello di Milano*, Sentenza n. 3308/2014, 15 September 2014.

²⁵⁰ Italy (1942) *Codice civile*, Article 2598(3).

competition provision, even without point-of-sale confusion. The Court of Appeal expressly noted that evidence from the U.S. case – including internal emails and the recognition of the stripe as a Gucci identifier – supported an inference of bad faith. The Italian appeal judgment is considered seminal for fashion law because it effectively extended protection to Gucci’s brand “aura” against imitation tactics outside classic trademark theory.²⁵¹ The decision left open the determination of damages to be paid by Guess, and indicated that Gucci could appeal to the Italian Supreme Court. (As of 2026, any final Italian outcome beyond 2014 is not publicly specified.)²⁵²

1.8.1 Comparison of Remedies

The U.S. court imposed a permanent injunction on specific designs and awarded limited monetary relief, reflecting the Lanham Act’s focus on confusion and false designation of origin.²⁵³ In Italy, the appellate finding of parasitic unfair competition also resulted in injunctions (and pending damages) under civil law, though Gucci’s first-instance injunctions had been vacated.²⁵⁴ The divergent outcomes illustrate jurisdictional differences: in the U.S., Gucci’s injunctive victories hinged on traditional trademark criteria and famous-mark dilution²⁵⁵, whereas in Italy the success came from a broader unfair-competition standard that bypassed proof of confusion.²⁵⁶

1.9 Key legal issues emerging from the case

1.9.1 Limits of trademark protection.

Gucci v. Guess surfaces enduring issues about the scope of trademark law in fashion.²⁵⁷ A central question is the extent to which everyday design elements can be monopolized.²⁵⁸ The case underscores that merely invoking a famous brand’s aesthetic does not automatically trigger liability; courts require concrete evidence of consumer confusion or reputation injury. In the U.S., Judge Scheindlin reiterated that basic design elements (like stripes or geometric grids) are normally free for all to use unless they have acquired secondary meaning as source-identifiers. Thus, Gucci prevailed only where Guess’s use was so close as to raise a likelihood of confusion (even post-sale²⁵⁹) or to dilute a famous Gucci mark²⁶⁰. The decision exemplifies the doctrinal trade-off: trademark law protects distinctiveness, not abstract design or fashion style.²⁶¹ The court’s admonition that competitors “must be free to use [stripe] patterns in general” absent a

²⁵¹ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

²⁵² *Corte d’Appello di Milano*, Sentenza n. 3308/2014, 15 September 2014.

²⁵³ United States Congress (1946) *Lanham Act*, 15 U.S.C. §§ 1114, 1125(a), 1125(c).

²⁵⁴ Italy (1942) *Codice civile*, Article 2598(3)

²⁵⁵ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁵⁶ *Corte d’Appello di Milano*, Sentenza n. 3308/2014, 15 September 2014.

²⁵⁷ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

²⁵⁸ Hemphill, C.S. and Suk, J. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199

²⁵⁹ Morris, P.S. (2013) ‘Guess What Gucci? Post-Sale Confusion Exists in Europe’, *Valparaiso University Law Review*, 47(4), pp. 1319–1358.

²⁶⁰ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

²⁶¹ Beebe, B. (2004) ‘The Semiotic Analysis of Trademark Law’, *UCLA Law Review*, 51(3), pp. 621–704.

specific brand association reflects this constraint. Similarly, Gucci's Stylized "G" mark was ruled abandoned and not protectable, reflecting the necessity of active use and registration maintenance. In EU law, Article 9(2)(c) of the EU Trade Mark Regulation extends protection to marks with reputation even without confusion, but still requires proof of "unfair advantage" or detriment ²⁶². Gucci's U.S. dilution claims effectively mirrored this by showing Guess's look-alikes could blur Gucci's distinctiveness. Guess successfully countered that some design changes (colour, context) were sufficient to avoid blurring; the U.S. court agreed that Guess's brown-red stripe did not dilute the green-red Gucci stripe ²⁶³. Thus, a key issue is balancing a famous mark's protected "aura" against the public domain of generic design elements. ²⁶⁴

1.9.2 Inspiration vs. imitation

Fashion inherently involves trend diffusion, raising the question of when mere inspiration crosses into unlawful copying ²⁶⁵. *Gucci v. Guess* highlights this tension. On one hand, copying and "dupes" are a known part of fashion dynamics ²⁶⁶. On the other hand, luxury brands argue that look-alikes exploiting their codes—even without explicit deception—can damage brand equity ²⁶⁷. The case probes this boundary from multiple angles. In the U.S., the focus remained on confusion and dilution metrics; ²⁶⁸ Guess's good-faith claims (independent creation, different colours) succeeded for some designs, underscoring that not all aesthetic borrowing is unlawful ²⁶⁹. In Italy, by contrast, the parasitic competition doctrine treated the cumulative pattern of imitation as actionable even without item-by-item confusion ²⁷⁰. The appeal judges effectively aggregated many small similarities into a finding of bad-faith exploitation of Gucci's efforts ²⁷¹. This raises doctrinal questions: should the law allow a competitor to systematically replicate a brand's stylistic universe if each piece only minimally references the brand? ²⁷² *Gucci v. Guess* suggests some legal systems say "no," using doctrines like Art. 2598(3) c.c. to catch sustained free-riding.

²⁶² European Parliament and Council (2017) *Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark*, OJ L 154, 16 June, Article 9(2)(c).

²⁶³ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁶⁴ Gangjee, D. and Burrell, R. (2010) 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding', *The Modern Law Review*, 73(2), pp. 282–295

²⁶⁵ Hemphill, C.S. and Suk, J. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199

²⁶⁶ Kim, W. and Ha-Brookshire, J.E. (2026) 'What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry', *Fashion and Textiles*, 13(1), Article 4.

²⁶⁷ Hietanen, J., Mattila, P., Sihvonen, A. and Tikkanen, H. (2018) 'Paradox and Market Renewal: Knockoffs and Counterfeits as Doppelgänger Brand Images of Luxury', *Marketing Intelligence & Planning*, 36(7), pp. 750–763

²⁶⁸ United States Congress (1946) *Lanham Act*, 15 U.S.C. §§ 1114, 1125(a), 1125(c).

²⁶⁹ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁷⁰ Italy (1942) *Codice civile*, Article 2598(3).

²⁷¹ *Corte d'Appello di Milano*, Sentenza n. 3308/2014, 15 September 2014.

²⁷² Raustiala, K. and Sprigman, C. (2006) 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), pp. 1687–1777.

1.9.3 Post-sale confusion and brand signalling

Luxury goods often convey status beyond the point-of-sale; a consumer may wear an item publicly to send a signal ²⁷³. The U.S. court accepted Gucci's "post-sale confusion" theory, meaning confusion can arise when observers see a product later. This expands protection in fashion (where visibility is high) but requires courts to assess consumer sophistication and market channels. Guess argued that its customers were different and would not be confused ²⁷⁴. The court effectively balanced this by finding confusion possible where visual codes overlapped strongly, while limiting liability in other cases ²⁷⁵. Thus, market segmentation became a factor: luxury versus mid-market branding influences confusion assessments, a nuance seen in both U.S. and EU contexts. ²⁷⁶

1.9.4 Dilution vs. tarnishment

Gucci framed much of its case as dilution-by-blurring: Guess's products, even absent confusion, could erode the distinctiveness of Gucci's famous marks ²⁷⁷. The court's analysis confirms that dilution law can address association-based harm ²⁷⁸. Guess's use of similar motifs on unrelated goods was found to "lessen the capacity" of Gucci's marks to identify a single source. At the same time, the court distinguished blurring from tarnishment; it found no evidence that Guess's products harmed Gucci's reputation, so no tarnishment was established. *Gucci v. Guess* thus illustrates how luxury brands use dilution doctrine to protect brand image and distinctiveness ²⁷⁹, a strategy acknowledged in EU law (Art.9(2)(c)) and national laws on famous marks ²⁸⁰. Guess's defences — pointing to distinct colours and contexts — highlight that not every stylistic influence amounts to legally cognizable dilution. ²⁸¹

1.9.5 Trade dress protection limits

Gucci also sought to protect the overall look of its Diamond Motif canvas as a trade dress. This succeeded, but only after Gucci showed it had acquired secondary meaning and the design was non-functional. This underscores a broader issue that product design protection is narrow ²⁸². Many look-alike claims must pivot to trade dress only when an overall design is undeniably

²⁷³ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

²⁷⁴ Guess?, Inc. (2009) *Form 10-K Annual Report for the Fiscal Year Ended January 31, 2009*. Washington, DC: United States Securities and Exchange Commission.

²⁷⁵ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁷⁶ Morris, P.S. (2013) 'Guess What Gucci? Post-Sale Confusion Exists in Europe', *Valparaiso University Law Review*, 47(4), pp. 1319–1358.

²⁷⁷ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

²⁷⁸ Gangjee, D. and Burrell, R. (2010) 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding', *The Modern Law Review*, 73(2), pp. 282–295.

²⁷⁹ Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704.

²⁸⁰ European Parliament and Council (2017) *Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark*, OJ L 154, 16 June, Article 9(2)(c).

²⁸¹ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

²⁸² Scafidi, S. (2006) 'Intellectual Property and Fashion Design', in Yu, P.K. (ed.) *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*. Vol. 1. Westport, CT: Praeger Publishers, pp. 115–131.

source-indicative ²⁸³. If a design feature serves a utilitarian purpose (e.g. reinforcing a bag), it cannot be monopolized. Guess raised this by arguing stripes serve functional purposes. The *Gucci v. Guess* opinion implies a careful functionality analysis: the Diamond Motif trade dress was found decorative and distinctive, whereas purely functional or generic patterns remain in the public domain. ²⁸⁴

1.9.6 Comparative law and policy

Gucci v. Guess highlights divergent approaches across jurisdictions ²⁸⁵. U.S. trademark law focuses on consumer confusion and famous-mark dilution ²⁸⁶, with limited use of unfair competition beyond trademark ²⁸⁷. Italian law, via Art.2598(3) c.c., explicitly curbs parasitic imitation ²⁸⁸. The case shows how a tactic like progressive “Guccification” – incrementally adopting Gucci’s style – might evade trademark infringement in one system but be caught by another ²⁸⁹. This raises policy questions about harmonization: should courts more readily consider the cumulative effect of look-alike strategies? ²⁹⁰ How to reconcile encouraging creative competition with protecting brand-generated signals? ²⁹¹ *Gucci v. Guess* does not fully resolve these questions, but it illuminates them. Its interplay of U.S. and Italian outcomes is widely noted as a key case study on the limits of imitation in fashion ²⁹².

1.9.7 Comparative outcomes and remedies

Jurisdiction & Issue	Outcome	Remedies/Damages
U.S. – Trademark Infringement	Found infringement for specific GG-pattern and stripe uses; no infringement for Stylized G or cursive marks. Post-sale confusion recognized.	Permanent injunction on specified designs; damages ~\$4.6M (out of \$120M sought).
U.S. – Trademark Dilution (TDRA)	GG monogram and green-red-green stripe declared famous; certain Guess uses held dilutive.	Remedies encompassed in above injunction; statutory damages awarded (~\$4.6M total).

²⁸³ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

²⁸⁴ *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, Supreme Court of the United States, 2001.

²⁸⁵ Morris, P.S. (2013) ‘Guess What Gucci? Post-Sale Confusion Exists in Europe’, *Valparaiso University Law Review*, 47(4), pp. 1319–1358.

²⁸⁶ United States Congress (1946) *Lanham Act*, 15 U.S.C. § 1125(c).

²⁸⁷ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

²⁸⁸ Italy (1942) *Codice civile*, Article 2598(3).

²⁸⁹ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

²⁹⁰ Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

²⁹¹ Raustiala, K. and Sprigman, C. (2006) ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Virginia Law Review*, 92(8), pp. 1687–1777.

²⁹² Morris, P.S. (2013) ‘Guess What Gucci? Post-Sale Confusion Exists in Europe’, *Valparaiso University Law Review*, 47(4), pp. 1319–1358.

U.S. – Trade Dress	Diamond Motif canvas found distinctive, non-functional, and infringed when used by Guess.	Included in the permanent injunction on design uses.
U.S. – Unfair Competition (Lanham)	Consolidated with Lanham Act claims; no separate ruling beyond above.	N/A
Italy – Trademark Infringement	First instance dismissed Gucci’s infringement claims; Appeal left this unchanged.	Gucci’s initial injunctions were vacated; no further trademark remedies awarded.
Italy – Unfair Competition (Art.2598(3) c.c.)	First instance denied unfair competition (no confusion); Appeal reversed, finding “parasitic” unfair competition.	Injunctions against infringing design uses; damages to be determined. Damages pending appeals.
EU – TM Reg. 2017/1001 (Art.9(2)(c))	(Not directly litigated, but relevant) Gucci’s marks would be protected as reputed; claimant must prove unfair advantage or detriment.	Not litigated; no EU judgment.
International (TRIPS Art.51)	Highlights distinction: Gucci/Guess dispute did not involve direct counterfeiting (identical marks); it involved look-alikes.	N/A

This comparison confirms that the United States and Italian proceedings did not simply reach different outcomes, but applied different legal filters to the same pattern of imitation. The U.S. approach remained more closely tied to trade mark infringement, dilution, and specific evidence of confusion or blurring, whereas the Italian appellate reasoning gave greater weight to the cumulative and parasitic character of Guess’s conduct. The table therefore reinforces the chapter’s central claim that look-alike disputes are shaped as much by doctrinal architecture as by visual similarity.

Chapter 2

2.1 Legal Issues Arising from Look-Alike Products in the Fashion Industry

This chapter examines the trademark law issues raised by “look-alike” fashion products – i.e. non-counterfeit items that imitate distinctive brand elements – focusing on trademark infringement (likelihood-of-confusion) and dilution of famous marks.

Section 2.1 explains the doctrine of trademark protection as the exclusive right of a mark owner to prevent unauthorised use of identical or confusingly similar marks on identical or related goods, as reflected in TRIPS Article 16(1)²⁹³ and mirrored in EU and national laws.²⁹⁴

It then examines the likelihood-of-confusion test, which generally involves a multi-factor analysis of mark similarity, product similarity, distinctiveness, and consumer perception²⁹⁵, with reference to leading cases such as *Two Pesos v. Taco Cabana* in the United States and the Court of Justice decisions in *Sabel* and *Canon*. The application of these principles to fashion is illustrated through examples such as Gucci’s stripes and monogram and Adidas’ three-stripe sign.

Section 2.1 also compares jurisdictional approaches, including the U.S. Polaroid factors, the EU holistic assessment²⁹⁶, and Italian and UK law. It further considers enforcement mechanisms, such as civil injunctions and damages²⁹⁷, as well as the policy balance between protecting brand investment and preserving free competition and design freedom.²⁹⁸

Section 2.2 turns to famous-mark protection and dilution. It explains that well-known trademarks enjoy expanded rights under TRIPS/Paris Art.6bis²⁹⁹ and EU law (now EUTMR Art.9(1)(c)), a famous mark owner may prevent use of similar signs on even dissimilar goods if such use “takes unfair advantage of” or harms the mark’s distinctive character or reputation. In the US, the Lanham Act (15 U.S.C. § 1125(c))³⁰⁰ likewise forbids dilution by “blurring” or “tarnishment” of famous marks. These concepts are illustrated through leading decisions, including *Moseley v. V Secret and Louboutin v. YSL* in the United States, *L’Oréal v. Bellure* in the European Union, and selected UK and Italian examples. The discussion examines how dilution claims differ from ordinary infringement (no requirement of consumer confusion)³⁰¹ and addresses policy: dilution

²⁹³ WTO (1994) *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, Art. 16(1)

²⁹⁴ European Union (2017) *Regulation (EU) 2017/1001 on the European Union Trade Mark (EUTMR)*

²⁹⁵ Beebe, B. (2006) ‘An Empirical Study of the Multifactor Tests for Trademark Infringement’, *California Law Review*, 94(6), pp. 1581–1654

²⁹⁶ Court of Justice of the European Union (1998) *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*, C-39/97; Court of Justice of the European Union (1997) *Sabel BV v Puma AG*, C-251/95; US Court of Appeals (2d Cir. 1961) *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492.

²⁹⁷ WTO (1994) TRIPS Agreement, Art. 61; European Parliament and Council (2004) *Directive 2004/48/EC on the Enforcement of Intellectual Property Rights*

²⁹⁸ Landes, W.M. and Posner, R.A. (1987) ‘Trademark Law: An Economic Perspective’, *Journal of Law and Economics*, 30(2), pp. 265–309.

²⁹⁹ Paris Convention for the Protection of Industrial Property (1883, as revised), Art. 6bis

³⁰⁰ United States Congress (2006) *Lanham Act*, 15 U.S.C. § 1125(c) (Trademark Dilution Revision Act).

³⁰¹ Schechter, F.I. (1927) ‘The Rational Basis of Trademark Protection’, *Harvard Law Review*, 40(6), pp. 813–833.

law protects the unique investment and goodwill of famous brands³⁰², but critics argue it may create monopolies over common design features.³⁰³

2.1.1 Trademark protection and likelihood of confusion

Trademark law grants the owner of a registered mark the **exclusive right** to prevent third parties from using identical or confusingly similar signs on identical or related goods or services. Article 16(1) of the TRIPS Agreement (1994) epitomizes the standard: “the owner of a registered trademark shall have the exclusive right to prevent all third parties...using...identical or similar signs for goods or services which are identical or similar...where such use would result in a likelihood of confusion”³⁰⁴. This obligation is mirrored in national laws: for example, the EU Trade Mark Regulation (EUTMR 2017) Art.9(1)(b) and UK Trade Marks Act 1994 §10(2)–(3) similarly forbid use of a later sign on identical/similar goods if confusion is likely. (In Italy, Codice della Proprietà Industriale art. 20 likewise imposes confusion-based liability.³⁰⁵

Infringement therefore hinges on a global likelihood-of-confusion assessment, understood as a fact-specific inquiry into the overall impression produced by the signs in their market context. Courts and authorities do not examine the relevant elements in isolation, but consider them together, including the visual, aural, and conceptual similarities between the signs, the degree of similarity between the goods or services, the distinctiveness or reputation of the earlier mark, and the perception and level of attention of the relevant consumer. The distinctiveness of the earlier mark plays a central role, since highly distinctive or reputed marks tend to enjoy a broader scope of protection. Where marks are identical and used for identical goods or services, confusion may generally be presumed without the need for further detailed analysis.³⁰⁶

Leading jurisprudence confirms that the overall impression of the marks must be assessed as a whole rather than through an overly technical comparison of isolated details. The CJEU decisions in *Canon v. Metro-Goldwyn-Mayer* and *Sabel v. Puma* are particularly relevant in this respect, as they emphasise that consumers perceive marks globally and that the assessment must take into account the interaction between similarity of signs, similarity of goods or services, and the distinctiveness of the earlier mark. This global approach is especially important in fashion look-alike disputes, where imitation often operates through cumulative visual association rather than exact reproduction of a single protected sign.

Additional factors may also influence the assessment. Evidence that the later user intentionally referred to or copied the earlier mark may support a finding of likelihood of confusion, particularly in United States law, where intent appears among the Polaroid factors. Similar reasoning may also emerge in other jurisdictions where bad faith or deliberate imitation is relevant to the overall evaluation. The fame or reputation of the earlier mark is likewise

³⁰² Gervais, D.J. and Holmes, M.L. (2001) ‘Fame, Property and Identity: The Scope and Purpose of Trademark Dilution Protection’, *Fordham Law Review*, 69, pp. 2649–2653.

³⁰³ Lemley, M.A. (1999) ‘The Modern Lanham Act and the Death of Common Sense’, *Yale Law Journal*, 108(7), pp. 1687–1715.

³⁰⁴ World Trade Organization (2024) *WTO Analytical Index: TRIPS Agreement – Article 16 (Jurisprudence)*

³⁰⁵ Giurisprudenza delle Imprese (n.d.) *Tutela del marchio: somiglianza, confondibilità e rischio di confusione dei prodotti*.

³⁰⁶ World Trade Organization (2024) *WTO Analytical Index: TRIPS Agreement – Article 16 (Jurisprudence)*

significant, because well-known or highly distinctive marks are more likely to be associated with a broader range of similar signs.

Finally, the assessment is grounded in the perspective of the average consumer. This hypothetical consumer is not an expert or specialist, but an ordinary purchaser of the relevant goods or services. In European Union law, the average consumer is usually described as reasonably well-informed, observant, and circumspect. The likelihood of confusion analysis therefore depends on how such a consumer would perceive the signs in real market conditions, rather than on a meticulous side-by-side comparison.³⁰⁷

Courts in different jurisdictions articulate the test with similar factors but varying emphasis.

In the **United States**, the test follows the Polaroid factors (Second Circuit, 1961), including strength of the mark, proximity of goods, similarity of marks, evidence of actual confusion, marketing channels, intent of the alleged infringer, and the degree of care of consumers. For example, *Two Pesos, Inc. v. Taco Cabana, Inc.* (505 U.S. 763, 1992) underscored that trade dress (product design) that is inherently distinctive is entitled to protection under the Lanham Act without proof of secondary meaning, establishing a broad scope of protection.³⁰⁸ U.S. courts often rely on surveys or explicit evidence of confusion³⁰⁹, and remedies can include not only injunctive relief and damages but in some cases statutory or trebled damages for wilful infringement³¹⁰. U.S. law also recognises concepts like **post-sale confusion** (consumer confusion after purchase), though this is more often asserted in trade dress cases³¹¹ (e.g. see *Doll v. Authentic Apparel*, 2005).

In the **EU/UK**, the test is structured similarly but framed by EU law. The European Court of Justice has emphasised a global assessment, balancing all relevant factors. The relevant consumer is assumed “reasonably well informed and reasonably observant and circumspect” – an average consumer standard.³¹² Crucially, EU law (Art.8(1) CTMR, now 9(1) EUTMR) gives owners a right to prevent use of a similar sign on **similar goods** where confusion is likely. The CJEU in *Sabel v. Puma* (C-251/95) and *Canon v. MGM* stressed that even limited differences in one element cannot overcome overall similarity.³¹³ The EU test also recognises **identity of product** (identical marks on identical goods) as a special case with presumed confusion. The UK Trade Marks Act likewise provides (s.10(3)) for prohibition of use of similar marks on similar goods if confusion would be likely, directly reflecting EU law. UK courts often follow EU case law (pre-Brexit cases remain authoritative), adding local precedents: for instance, *Specsavers v. Asda* [2012] which discussed reputation, and *Lloyd Schuhfabrik v. Klijsen* where it was held that similarity of trademark and goods is assessed from the consumer’s perspective.

³⁰⁷ Pacini, P. (2005) ‘Likelihood of Confusion in the Judgements of the European Court of Justice’, Master’s thesis, Lund University, Faculty of Law.

³⁰⁸ Pacini, P. (2005) ‘Likelihood of Confusion in the Judgements of the European Court of Justice’, Master’s thesis, Lund University, Faculty of Law.

³⁰⁹ McCarthy, J.T. (2023) *McCarthy on Trademarks and Unfair Competition*. 5th edn. Thomson Reuters.

³¹⁰ United States Congress (1946, as amended) *Lanham Act*, 15 U.S.C. §§ 1117(a)–(b).

³¹¹ Dogan, S.L. and Lemley, M.A. (2004) ‘Trademarks and Consumer Search Costs on the Internet’, *Houston Law Review*, 41(3), pp. 777–838

³¹² Court of Justice of the European Union (1999) *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, C-342/97

³¹³ Pacini, P. (2005) ‘Likelihood of Confusion in the Judgements of the European Court of Justice’, Master’s thesis, Lund University, Faculty of Law.

In **civil-law jurisdictions** like Italy and France, the rules are analogous to EU law (often through implementing directives). For example, the Italian Industrial Property Code (CPI) art. 20(1)(a)³¹⁴ prohibits use of an identical/similar sign on identical/similar goods causing confusion. Italian courts likewise apply a likelihood-of-confusion test akin to EU standards.³¹⁵ Notably, Italian courts (as seen in the *Gucci v. Guess* litigation) also consider related unfair competition law when imitation is systematic, as discussed below.³¹⁶ French law and others include similar provisions (Art. L.714-3 CPI, e.g., forbids confusing imitation)³¹⁷. In all these systems, the owner's mark must be valid and entitled to protection; mere ownership of an expired or invalid mark will not avail.³¹⁸

2.1.2 Judicial application of the likelihood of confusion test

Jurisdictions have produced many emblematic cases. In the **US**, *Adidas-America, Inc. v. Payless Shoesource, Inc.* (546 F.3d 1066, 9th Cir. 2008)³¹⁹ is notable: the Ninth Circuit held that Payless for trainfringed Adidas' famous three-stripe design on shoes by selling similar-looking low-cost shoes, emphasizing that strong marks justify protection even if used on discount products. Another example is *Christian Louboutin S.A. v. Yves Saint Laurent America*, 696 F.3d 206 (2d Cir. 2012)³²⁰, which held Louboutin's red sole trademark valid (focusing on the mark's fame and acquired distinctiveness) and granted an injunction against YSL's red-soled shoes (with carve-outs for certain uses).

In the **EU**, *L'Oréal SA v. Bellure NV* (C-487/07, 2009)³²¹ is a leading dilution/unfair advantage case: it held that distributors of perfumes which mimicked L'Oréal products by evoking their brands (through similar names or packaging) infringed L'Oréal's marks by taking unfair advantage of the marks' repute, even absent confusion. Another relevant EU example is *Ferrero SpA v. Wagina Handel GmbH* (C-58/08, 2009)³²², concerning shape marks for chocolate frogs; the court found that marks can be infringed by unfair advantage (extended rights) even on dissimilar goods, reflecting Article 6bis/TRIPS principles. The ECJ also reaffirmed the classic confusion factors in cases like *Canon*.³²³

In the **UK**, *Arsenal Football Club plc v. Reed* [2001] F.S.R. 99 (HL)³²⁴ is famous: a fan sold cheap replicas of Arsenal's jersey featuring the club crest, and the House of Lords upheld an infringement claim, finding that fans familiar with the club would be confused into thinking the jerseys were club-endorsed. More recently, *Interflora Inc. v. Marks & Spencer plc* [2014] UKSC

³¹⁴ Italian Republic (2005) *Industrial Property Code (Legislative Decree No. 30/2005)*

³¹⁵ Giurisprudenza delle Imprese (n.d.) *Tutela del marchio: somiglianza, confondibilità e rischio di confusione dei prodotti*

³¹⁶ Italian Republic (1942) *Civil Code, Article 2598*

³¹⁷ French Republic (1992) *Code de la propriété intellectuelle*

³¹⁸ Dinwoodie, G.B. and Janis, M.D. (2022) *Trademarks and Unfair Competition: Law and Policy*. 6th edn. Frederick, MD: Aspen Publishing. ISBN 9781543847451.

³¹⁹ *Adidas-America, Inc. v. Payless Shoesource, Inc.* (2008) 546 F. Supp. 2d 1029, United States District Court for the District of Oregon, 22 February.

³²⁰ *Christian Louboutin S.A. v. Yves Saint Laurent America, Inc.*, 696 F.3d 206 (2d Cir. 2012)

³²¹ Court of Justice of the European Union (2009) *L'Oréal SA v. Bellure NV*, Case C-487/07

³²² *Ferrero SpA v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (2011) Case C-552/09 P, Court of Justice of the European Union, Fifth Chamber, 24 March, ECLI:EU:C:2011:177.

³²³ Court of Justice of the European Union (1998) *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.*, Case C-39/97

³²⁴ House of Lords (2001) *Arsenal Football Club plc v. Reed* [2001] FSR 99

13³²⁵ concerned keyword advertising; while primarily on passing off, it also touched confusion issues in the online context. These cases illustrate how UK courts view consumer confusion and the weight of reputation.

For **fashion look-alikes** specifically, the Gucci v. Guess litigation provides instructive contrasts. In *Gucci S.r.l. v. Guess, Inc.* (No. 06-cv-04857, S.D.N.Y. 2012), Judge Scheindlin found that Guess's bags (featuring a diamond G pattern, coloured stripes, etc.) infringed Gucci's marks based on consumer confusion and intentional copying. The court noted abundant evidence (including discovery) that Guess deliberately copied Gucci's "green-red-green" stripe and "GG" motif, imposing a permanent injunction and awarding Gucci damages.³²⁶ By contrast, Italian courts initially disagreed, but on appeal Milan's Court of Appeal ultimately found that Guess's repeated imitation constituted "parasitic" unfair competition that harmed Gucci, even if each act individually was not classic counterfeiting. This dichotomy highlights that closely similar designs in fashion often raise confusion issues in some jurisdictions and broader equity concerns in others.

2.1.3 Application to fashion look-alike disputes

Fashion brands typically employ distinctive logos, patterns (monograms, motifs), colour schemes, and stylized elements. Look-alike products often copy these features to evoke the famous brand. Trademark law assesses whether such copying would confuse the consumer as to source. For example, a streetwear brand using a red-green-red stripe on a bag might be seen as imitating Gucci. Courts will ask: How distinctive is the stripe? How similar is it? Are the goods in the same luxury category? How careful is the average buyer? High-end fashion consumers may pay more attention, but brand recognition is also higher – a potent brand can trigger confusion even with subtle cues.

Because fashion consumers often make purchases with incomplete information (e.g. in busy stores or online), courts recognise that confusion can be subconscious.³²⁷³²⁸ Moreover, fashion goods often have common elements (e.g. stripes, logos) used by many designers. This can make confusion less likely if the borrowed elements are generic. On the other hand, if a pattern or logo is highly stylised and widely associated with one brand (like Louis Vuitton's "LV" monogram or Adidas's stripes), even partial copying can mislead. Post-sale confusion is also noted in fashion: consumers who later see someone wearing a knock-off might assume the wearer bought a counterfeit, reflecting poorly on the brand. US courts recognize this in some contexts³²⁹, though the UK/EU do not specifically focus on that scenario.

³²⁵ *Interflora Inc and Interflora British Unit v Marks & Spencer plc* (2014) [2014] EWCA Civ 1403, Court of Appeal of England and Wales, Civil Division, 5 November.

³²⁶ Sganga, C. (2014) 'Gucci Wins Appeal in Italy Against Guess', *World Intellectual Property Report*, 28(11), pp. 19–20.

³²⁷ Beebe, B. (2006) 'An Empirical Study of the Multifactor Tests for Trademark Infringement', *California Law Review*, 94(6), pp. 1581–1654

³²⁸ Pacini, P. (2005) 'Likelihood of Confusion in the Judgements of the European Court of Justice', Master's thesis, Lund University, Faculty of Law.

³²⁹ McCarthy, J.T. (2023) *McCarthy on Trademarks and Unfair Competition*. 5th edn. Thomson Reuters.

2.1.4 Comparative perspectives

In substance, the infringement standards are similar (likelihood of confusion), but procedures and emphasis vary. US law often requires concrete proof (surveys, evidence of intent) and allows jury trials³³⁰; EU/UK apply the test more abstractly. In the EU, “likelihood” means a real risk; there is no rigorous test for actual market confusion required.³³¹ Italy (consistent with TRIPS) also presumes confusion if the sign and goods are identical.³³² Remedies differ: all permit injunctions, but damages rules vary (US statutory damages, EU limited to compensation and accounts)³³³. UK law allows corrective advertising orders in rare cases. Criminal penalties for trademark counterfeiting exist in many countries (e.g. Italy’s penal code, UK’s Trade Mark Act 1994 offenses, US 18 U.S.C. § 2320 for wilful counterfeiting), but such sanctions are rarely invoked for look-alikes (which are not literal counterfeits).

2.1.5 Policy implications of confusion-based protection

Trademark protection aims to prevent consumer confusion and protect the goodwill owners invest in their brands. This encourages brands to innovate while relying on legal exclusivity. However, overly broad protection (enforcing similarity in every design detail) can stifle legitimate competition and design³³⁴. In fashion, there is a tension between brand exclusivity and the industry’s tradition of “inspiration” and trends.³³⁵ Some commentators argue (e.g. the upcycling literature) that narrow deference to free-riding and strong use requirements could better balance interests.³³⁶ But brand owners counter that imitation of distinctive signs is unfair. The Gucci/Guess case shows industry pressure: Italian fashion associations lamented a narrow first-instance ruling as “outdated” because it undermined brand value.³³⁷

2.1.6 Implications for luxury brands and designers

Brands must vigilantly police similar designs and consider registering logos/colours to strengthen enforcement.³³⁸ Designers of new brands should avoid features closely associated with famous marks. Given globalization, cross-border enforcement is key: an injunction in the US may not help in China. Licensing or coexistence agreements sometimes preempt disputes. Enforcement through customs and digital platforms (e.g. online marketplaces) is increasingly

³³⁰ McCarthy, J.T. (2023) *McCarthy on Trademarks and Unfair Competition*. 5th edn. Thomson Reuters

³³¹ Court of Justice of the European Union (1999) *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, C-342/97

³³² World Trade Organization (2024) *WTO Analytical Index: TRIPS Agreement – Article 16 (Jurisprudence)*

³³³ European Parliament and Council (2004) *Directive 2004/48/EC on the Enforcement of Intellectual Property Rights*

³³⁴ Lemley, M.A. (1999) ‘The Modern Lanham Act and the Death of Common Sense’, *Yale Law Journal*, 108(7), pp. 1687–1715

³³⁵ Raustiala, K. and Sprigman, C. (2012) *The Knockoff Economy: How Imitation Sparks Innovation*. Oxford University Press

³³⁶ Senfleben, M. (2024) ‘Developing Defences for Fashion Upcycling in EU Trademark Law’, *GRUR International*, 73(2), pp. 99–110.

³³⁷ Sganga, C. (2014) ‘Gucci Wins Appeal in Italy Against Guess’, *World Intellectual Property Report*, 28(11), pp. 19–20.

³³⁸ Dinwoodie, G.B. and Janis, M.D. (2022) *Trademarks and Unfair Competition: Law and Policy*. 6th edn. Frederick, MD: Aspen Publishing. ISBN 9781543847451.

important³³⁹. For look-alikes that are not exact copies, litigation is uncertain; many brand owners pursue negotiated settlements. In sum, understanding the confusion test in each jurisdiction helps brands decide which similarities to litigate.

2.1.7 Enforcement mechanisms in trademark disputes

Civil actions (injunctions, damages, account of profits) are primary. In the EU and UK, injunctive relief is standard and often no monetary awards unless actual loss proven. In the US, plaintiffs routinely obtain damages (sometimes trebled for wilful infringement). Criminal enforcement exists for counterfeiting (not typically for look-alikes) – see TRIPS Art.61, which requires criminal penalties at least for wilful counterfeiting on a commercial scale.³⁴⁰ Some countries (e.g. Italy) have strong unfair competition and criminal provisions; others (US) rely on civil enforcement and Customs records.

2.2 Trademark Dilution and Protection of Famous Marks

2.2.1 The doctrine of trademark dilution

Famous or well-known marks receive **extra protection** beyond normal trademark rights. This derives from TRIPS (Art. 16(2)–(3)) and the Paris Convention (Art. 6bis), and is implemented in EU and national law^{341 342}. The rationale is that a mark's unique reputation should not be “diluted” or tarnished by third-party uses, even on unrelated goods.³⁴³ Two core forms of dilution are recognized: **blurring** (gradual whittling away of a mark's distinctiveness through unauthorised uses) and **tarnishment** (harming a mark's reputation by association with inferior or unsavory products). For example, a well-known “Swiss chocolate” trademark used on a low-quality generic chocolate may be seen as blurring, while a revered luxury logo on obscene novelty items might be tarnishing.³⁴⁴

TRIPS Article 16(2) incorporates Paris Convention protections for *well-known marks in the country of registration*, while 16(3) extends Article 6bis to dissimilar goods if use “takes unfair advantage” or is “detrimental” to the famous mark's owner. EU law parallels this: the pre-2017 Trademark Directive (89/104/EEC Art.5(2)) and current EUTMR (Art.9(1)(c)) allow famous mark owners to oppose later marks or uses on *dissimilar* goods if the use exploits the mark's reputation (taking unfair advantage) or is detrimental to it³⁴⁵. UK law similarly provides under Trade Marks Act 1994 s.10(3A) that an owner of a mark with a reputation may forbid use of a similar sign on dissimilar goods where use takes unfair advantage of or is detrimental to the mark's distinctive character or reputation. Italy's CPI explicitly recognizes this: art.20(1)(c) gives a well-known mark owner the right to prohibit use of identical/similar signs on **dissimilar** goods if such use draws unfair advantage or is prejudicial to the mark's distinctive character or

³³⁹ OECD and European Union Intellectual Property Office (2021) *Misuse of E-Commerce for Trade in Counterfeits. Illicit Trade*. Paris: OECD Publishing.

³⁴⁰ WTO (1994) *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, Art. 61

³⁴¹ World Trade Organization (2024) *WTO Analytical Index: TRIPS Agreement – Article 16 (Jurisprudence)*

³⁴² Melilli, V. and Mannini, A. (2016) ‘European Union and Italy in alignment over protection of well-known marks’, *World Trademark Review*, issue 64, 1 December.

³⁴³ Schechter, F.I. (1927) ‘The Rational Basis of Trademark Protection’, *Harvard Law Review*, 40(6), pp. 813–833.

³⁴⁴ Dogan, S.L. and Lemley, M.A. (2005) ‘The Merchandising Right: Fragile Theory or Fait Accompli?’, *Emory Law Journal*, 54, pp. 461–516.

³⁴⁵ Court of Justice of the European Union (2008) *Intel Corporation Inc. v CPM United Kingdom Ltd*, C-252/07

reputation.³⁴⁶ Thus, a famous fashion brand need not confine its protection to clothing and accessories; it can oppose uses in other markets that nonetheless trade on its aura.

In practical legal terms, dilution claims involve proving that (1) the prior mark is “famous” or has a reputation, (2) the defendant’s use is commercial use of an identical/similar sign on non-competing goods, and (3) the use results in either (a) lessening of the mark’s uniqueness (blurring) or (b) harm to its image (tarnishment). Under U.S. law, the Federal Trademark Dilution Act (FTDA, 1995) and its 2006 revision (TDRA) codified these elements. A mark is “famous” if widely recognized by the general consuming public of the United States, beyond local or niche recognition.³⁴⁷ The FTDA was intended to protect famous marks “regardless of the presence or absence of...likelihood of confusion”³⁴⁸. Initially, courts required proof of *actual* dilution (*Moseley v. V Secret*, 2003), but Congress amended the law (TDRA) to require only a likelihood of dilution. The primary remedy is an injunction (15 U.S.C. § 1125(c) authorizes injunctive relief; criminal penalties may apply only for counterfeit not dilution).

In the EU, no separate “dilution” statute exists; instead, the broad right under Art.9(1)(c) covers both blurring and tarnishment as unfair advantage or detriment. Case law confirms this interpretation: for instance, in *Coty Germany GmbH v. Parfume Holding*, the CJEU allowed protection of a perfume mark against use on unrelated goods where reputation was exploited. The key is that the mark must have a qualifying reputation in the relevant Member State. Unlike in the US, there is generally no requirement of actual “fame” by survey; reputation can be inferred from market data or acceptance.³⁴⁹ UK courts have applied s.10(3A) similarly, as in *Interflora v. Marks & Spencer* (2014) where Interflora’s reputation (as a florist network) extended to advertising (though that case was more passing-off).

2.2.2 Judicial treatment of dilution claims

Landmark decisions illustrate the operation of dilution and famous-mark protection, but their doctrinal value lies in the specific legal principles they establish rather than in broad generalisations. In the United States, *Moseley v. V Secret* clarified that, under the original Federal Trademark Dilution Act (FTDA), a claimant was required to prove **actual dilution**, not merely a likelihood of dilution. The Supreme Court thereby set a high evidentiary threshold and confirmed that dilution is conceptually distinct from confusion-based infringement, focusing on demonstrable harm to the distinctiveness of a famous mark.³⁵⁰ Although this standard was later relaxed by legislative amendment, the decision remains significant in defining the contours of dilution as an autonomous cause of action.

This concern with the scope of protection is further illustrated in *Christian Louboutin v. Yves Saint Laurent*. The Second Circuit upheld the validity of Louboutin’s red outsole mark, but only insofar as it had acquired distinctiveness **in contrast with the rest of the shoe**. The court

³⁴⁶ Melilli, V. and Mannini, A. (2016) ‘European Union and Italy in alignment over protection of well-known marks’, *World Trademark Review*, issue 64, 1 December.

³⁴⁷ United States Congress (2006) *Trademark Dilution Revision Act*, 15 U.S.C. § 1125(c)

³⁴⁸ Gervais, D.J. and Holmes, M.L. (2001) ‘Fame, Property and Identity: The Scope and Purpose of Trademark Dilution Protection’, *Fordham Law Review*, 69, pp. 2649–2653.

³⁴⁹ Senftleben, M. (2009) ‘The Trademark Tower of Babel: Dilution Concepts in International, US and EC Trademark Law’, *International Review of Intellectual Property and Competition Law*, 40(1), pp. 45–77.

³⁵⁰ *Moseley v. V Secret Catalogue, Inc.*, 2003

rejected a broader claim to exclusivity over all red soles, limiting protection to the specific configuration that functioned as a source identifier. The case is therefore best understood as refining the **boundaries of trademark protection for a reputed sign**, rather than simply extending dilution protection to similar luxury goods.³⁵¹

A comparable but doctrinally distinct approach is evident in European Union law. In *L'Oréal SA v. Bellure NV*, the Court of Justice of the European Union held that the marketing of imitation perfumes accompanied by comparison lists constituted **taking unfair advantage of the repute** of L'Oréal's marks. Importantly, the Court did not require proof of confusion or detriment; instead, it recognised that the unauthorised evocation of a famous mark's reputation could itself be sufficient to establish infringement under Article 5(2) of the Trade Marks Directive.³⁵² The case is thus central to the development of the EU concept of "free-riding".

By contrast, *Davidoff & Cie SA v. Gofkid Ltd* is more limited in its ratio. The Court held that Member States may provide protection for marks with a reputation **even where the conflicting goods are dissimilar**, thereby confirming the availability of extended protection beyond the traditional likelihood-of-confusion framework. The judgment does not itself establish liability for tarnishment, but clarifies the legal basis on which such claims may be pursued within EU law.³⁵³

National courts apply these principles within their respective legal systems. In Italy, *Gucci v. Guess* demonstrates how repeated imitation may be characterised as **parasitic exploitation** of another undertaking's goodwill, particularly where it reflects a systematic strategy of appropriation. The decision relies on both trademark protection and unfair competition principles under Italian law.³⁵⁴

In the United Kingdom, *Harrods v. Harrodian* illustrates a more cautious approach. Although the claimant possessed a well-known name, the court emphasised that **reputation alone is insufficient** to establish liability without a legally relevant form of misrepresentation or unfair advantage. The case underscores the continued importance of doctrinal limits even in the presence of strong brand recognition.³⁵⁵

Taken together, these decisions demonstrate that, while famous marks benefit from enhanced protection across jurisdictions, such protection remains **structured and conditional**, whether through evidentiary thresholds, limitations on scope, or specific doctrinal categories such as unfair advantage or extended reputation protection.

2.2.3 Application to fashion look-alike products

In fashion, famous brand marks (e.g. logos like Gucci's interlocking G, Dior's overlapping D, or patterns like Louis Vuitton's monogram) are highly likely to qualify for dilution protection. A look-alike product that echoes such a mark, even on dissimilar apparel or accessories, may be challenged for blurring or tarnishment. For example, selling shoes or bags with a stripe that

³⁵¹ *Christian Louboutin SA v. Yves Saint Laurent America Holding, Inc.*, 2012

³⁵² *L'Oréal SA v. Bellure NV*, 2009

³⁵³ *Davidoff & Cie SA v. Gofkid Ltd*, 2003

³⁵⁴ *Gucci v. Guess*, Corte d'Appello di Milano, 2014

³⁵⁵ *Harrods Ltd v Harrodian School Ltd* (1996) [1996] EWCA Civ 1315; [1996] RPC 697, Court of Appeal (Civil Division), 2 April.

recalls Gucci's colour band could be seen as free-riding on Gucci's reputation (unfair advantage). If the look-alike design is crude or cheaply made, it may tarnish the mark's luxury image.

Because dilution law operates without requiring consumer confusion, plaintiffs often succeed in eliminating "close but not confusing" copies. In practice, proving fame is critical: under TRIPS/EU law, the mark's reputation in the market is a threshold issue. Large fashion brands typically easily meet this. Courts then examine whether the defendant's mark use either erodes distinctiveness ("dilution by blurring") or harms reputation ("tarnishment"). In the UK and EU, a broad reading of Art.9(1)(c) essentially covers both. As one commentator notes, EU trademark law thus exposes fashion reuse to claims of blurring and tarnishment (and even a form of 'unfair free-riding').³⁵⁶³⁵⁷

2.2.4 Policy limits of dilution protection

Dilution law is often justified as protecting consumers (by preserving reliable product identifiers) and especially protecting the investment of famous mark owners³⁵⁸. Advocates argue it prevents the "uniqueness" of a brand from being diluted by copyists. Critics counter that it grants very powerful rights to incumbents, potentially blocking innocuous uses and favoring large corporations.³⁵⁹ In fashion, where distinctive elements (e.g. a particular stripe or motif) might be borderline generic or part of a broader design "vocabulary," dilution claims can provoke debate. Some urge that courts carefully require clear evidence of actual damage (a view reflected in US *Moseley* before TDRA) so as not to over-protect. On balance, current EU/UK law errs on the side of brand owners when the mark is famous: the owner need only show that the unauthorised use would "take unfair advantage" or be detrimental³⁶⁰, which can be inferred from market perception.

2.2.5 Enforcement of dilution claims

As with infringement, the primary remedy for dilution is injunctive relief. In the US, the TDRA explicitly provides injunctive relief, and courts may also award damages or profits where available. In the EU/UK/Italy, remedies come through civil actions; damages for purely reputational harm are notoriously hard to quantify, so injunctions and accounts of profits are typical.³⁶¹ Notably, dilution claims do not carry criminal penalties (those apply only to counterfeiting of marks *per se*). However, the fact that a mark is deemed "well-known" can affect other rights: for example, in trademark oppositions or invalidations, the famous mark's

³⁵⁶ Senftleben, M. (2013) 'Adapting EU Trademark Law to New Technologies – Back to Basics?', in Geiger, C. (ed.) *Constructing European Intellectual Property: Achievements and New Perspectives*. Cheltenham: Edward Elgar Publishing, pp. 137–176.

³⁵⁷ Senftleben, M. (2024) 'Developing Defences for Fashion Upcycling in EU Trademark Law', *GRUR International*, 73(2), pp. 99–110.

³⁵⁸ Gervais, D.J. and Holmes, M.L. (2001) 'Fame, Property and Identity: The Scope and Purpose of Trademark Dilution Protection', *Fordham Law Review*, 69, pp. 2649–2653.

³⁵⁹ Lemley, M.A. (1999) 'The Modern Lanham Act and the Death of Common Sense', *Yale Law Journal*, 108(7), pp. 1687–1715

³⁶⁰ Melilli, V. and Mannini, A. (2016) 'European Union and Italy in alignment over protection of well-known marks', *World Trademark Review*, issue 64, 1 December.

³⁶¹ European Parliament and Council (2004) *Directive 2004/48/EC on the Enforcement of Intellectual Property Rights*.

owners can invoke its extended protection to block later marks (under TRIPS Art.16(3) and EU Dir 89/104 Art.5(2)).

2.2.6 Implications for luxury brands and designers

Fashion brands with famous marks must be vigilant even beyond their core product lines. For instance, a designer who launches a clothing line should ensure that no elements too closely recall a famous competitor's mark, lest the competitor sue for dilution. Conversely, emerging designers must navigate around the extensive trademark "minefield" created by famous brands – one reason why some designers license motifs or co-brand³⁶². In enforcement, brand owners may rely on customs and border measures (e.g. EU Reg. 608/2013) to seize goods bearing confusing marks.³⁶³ They also often negotiate settlements or limit the scope of designs (as Gucci did by settling with Burberry over a "plaid") to avoid costly litigation.

In sum, trademark dilution and famous-mark protection give luxury fashion brands a potent tool against copycats: even if the copy is not confusing, if it exploits the brand's prestige or harms its image, it can be enjoined. Brands must register variations of their marks in multiple classes to maximize this protection (since reputation-based opposition can block dissimilar classes). Designers must remain aware that common design elements can sometimes infringe famous marks if used as source identifiers.

2.2.7 Look-alike disputes and the limits of trademark protection

Case	Jurisdiction	Year	Issue	Holding	Remedy
<i>Two Pesos, Inc. v. Taco Cabana, Inc.</i>	US	1992	Trade-dress (fashion restaurant)	Inherently distinctive trade dress infringement	Injunction
<i>Adidas-Am., Inc. v. Payless Shoesource, Inc.</i>	US	2008	Trademark (three-stripe design)	Copying of Adidas stripes likely to confuse	Injunction, \$305m damages (later vacated)
<i>Christian Louboutin v. YSL</i>	US	2012	Famous-mark (red sole design)	Louboutin's red sole mark valid (except red-on-red)	Injunction (limited)
<i>L'Oréal SA v. Bellure NV</i> (C-487/07)	EU	2009	Unfair advantage/dilution (perfume)	unauthorised evocation of famous perfume brands infringed	Injunction

³⁶² Raustiala, K. and Sprigman, C. (2012) *The Knockoff Economy: How Imitation Sparks Innovation*. Oxford University Press.

³⁶³ European Parliament and Council (2013) *Regulation (EU) No 608/2013 concerning customs enforcement of intellectual property rights*

Case	Jurisdiction	Year	Issue	Holding	Remedy
				(unfair advantage)	
<i>Arsenal F.C. plc v. Reed</i>	UK	2001	Likelihood of confusion (crest/t-shirt)	Fans likely confuse cheap jerseys for official merchandise	Injunction
<i>Interflora Inc. v. M&S</i> [2014] UKSC 13	UK	2014	Keyword advertising / passing off	Use of “Interflora” keyword ads misleading (confusion)	Injunction (and damages to Interflora)
<i>Gucci S.r.l. v. Guess, Inc.</i>	US	2012	Trademark infringement (GG logo, stripes)	Guess liable for intentional copying and confusion[10]	Injunction, damages
<i>Gucci S.r.l. v. Guess S.r.l.</i> (App. Ct. Milano)	Italy	2014	Unfair competition/ parasitic copying	Repeated imitation over time breached fair practice	Injunction

This table confirms that trade mark law offers strong protection only where the contested feature can be translated into a recognised sign of origin, reputation, or distinctiveness. It also shows why look-alike products remain difficult to capture: they may evoke a luxury brand’s visual universe without reproducing a protected mark in a way that clearly establishes confusion or dilution. The table therefore supports the broader argument that trade mark protection is powerful but structurally incomplete in relation to fashion imitation.

2.3 Trade Dress and Protection of Brand Identity

Trade dress refers, in its classical United States sense, to the total image or overall appearance of a product, its packaging, or even a commercial environment, provided that the appearance functions as an indicator of source.³⁶⁴ The category can encompass combinations of shape, colour, texture, graphics, placement and decorative arrangement, and for that reason it has obvious relevance to the fashion industry, where brand identity is often expressed through recurring visual codes rather than through word marks alone. Yet the same breadth that makes trade dress attractive also explains judicial caution: if every successful aesthetic feature could be monopolised through trade mark law, the result would be a potentially perpetual right over design elements that should remain available to competitors once patents, designs or copyright

³⁶⁴ McCarthy, J.T. (2023) *McCarthy on Trademarks and Unfair Competition*. 5th edn. Thomson Reuters

do not apply.³⁶⁵ For that reason, trade dress protection is conceptually strongest when the contested appearance tells consumers who made the product, and weakest when it merely makes the product attractive.³⁶⁶

The first doctrinal threshold is distinctiveness. In *Two Pesos v Taco Cabana*, the United States Supreme Court held that inherently distinctive trade dress is protectable under section 43(a) of the Lanham Act without proof of secondary meaning. That principle, however, was significantly narrowed in *Wal-Mart v Samara Brothers*, where the Court held that product design, unlike some forms of packaging or décor, is protectable only on proof of secondary meaning. In other words, for fashion goods the claimant must usually show that the relevant public understands the appearance not simply as design, but as an indication of commercial origin. This requirement is especially demanding in fashion because seasonal turnover, rapid trend diffusion and the short commercial life of many garments make it difficult for the public association necessary for acquired distinctiveness to crystallise. Academic commentary has therefore stressed that non-traditional trade mark claims in fashion may succeed mainly for stable, repeated and heavily promoted visual codes rather than for ordinary garment silhouettes (Calboli, 2018; Leong and Calboli, 2025).³⁶⁷

Secondary meaning is a factual inquiry, normally established through long and consistent use, advertising expenditure, consumer surveys, editorial coverage, market recognition and, sometimes, evidence of deliberate copying.³⁶⁸ The fashion litigation involving Christian Louboutin is instructive. In the United States proceedings against Yves Saint Laurent, the Second Circuit rejected the proposition that a single colour can never function as a mark in the fashion industry, and held that Louboutin's contrasting red outsole had acquired a limited secondary meaning identifying the Louboutin brand. At the same time, the court confined the mark to uses in which the red outsole contrasts with the remainder of the shoe, thereby reinforcing the idea that the protectable sign was a specific source-indicating presentation, not the colour red in the abstract. That decision illustrates both the utility and the limits of trade dress logic in fashion: unusual visual signals can be protected, but only in the precise form in which they have become distinctive in the market.³⁶⁹

The second major threshold is non-functionality. In *TrafFix Devices v Marketing Displays*, the Supreme Court reaffirmed the orthodox rule that a feature is functional if it is essential to the use or purpose of the article or affects its cost or quality. The Court also clarified that the "significant non-reputation-related disadvantage" formula derived from *Qualitex* does not replace the traditional rule, but supplements it particularly in cases of aesthetic functionality. *Qualitex*, for its part, confirmed that colour alone may in principle function as a trade mark where it identifies source and where there is no competitive need for that colour to remain available. Read together, these cases establish a strict anti-monopoly principle.³⁷⁰ Fashion claimants must therefore show

³⁶⁵ Landes, W.M. and Posner, R.A. (1987) 'Trademark Law: An Economic Perspective', *Journal of Law and Economics*, 30(2), pp. 265–309.

³⁶⁶ United States House of Representatives, Office of the Law Revision Counsel (n.d.) *15 U.S. Code § 1125 – False designations of origin, false descriptions, and dilution forbidden*

³⁶⁷ Supreme Court of the United States (1992) *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763

³⁶⁸ Dinwoodie, G.B. and Janis, M.D. (2022) *Trademarks and Unfair Competition: Law and Policy*. 6th edn. Frederick, MD: Aspen Publishing. ISBN 9781543847451.

³⁶⁹ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.* (2012) 696 F.3d 206 (2d Cir.)

³⁷⁰ Lemley, M.A. (1999) 'The Modern Lanham Act and the Death of Common Sense', *Yale Law Journal*, 108(7), pp. 1687–1715.

not only that consumers recognise a visual feature as theirs, but also that exclusive control over that feature would not deprive competitors of a design element that they need in order to compete in the relevant market. In aesthetic industries this inquiry is especially delicate, because beauty and source significance often coexist.³⁷¹

That tension is visible in disputes involving luxury fashion branding. In the litigation between Gucci and Guess in the Southern District of New York, Gucci pleaded infringement of not only conventional marks but also a “Diamond Motif Trade Dress”, namely a patterned arrangement used across fashion accessories. Whether or not every such claim ultimately succeeds on the merits, the case shows how fashion houses attempt to frame recurring composite visual patterns as source-identifying trade dress when ordinary copyright or design protection is too narrow or too short-lived. In practical terms, the more the asserted feature resembles a systematic brand code repeated across product lines and advertising, the stronger the trade dress argument becomes; the more it resembles a desirable stylistic flourish, the greater the risk that the claim will fail for lack of distinctiveness or because of functionality concerns.³⁷²

Outside the United States, there is no direct one-to-one equivalent of the American category of trade dress, but there are functional equivalents. Under Article 4 of the EUTM Regulation, an EU trade mark may consist of any sign capable of distinguishing the goods or services of one undertaking from those of another and of being represented in a manner clear enough to define the subject matter of protection. Article 7 then excludes signs devoid of distinctive character and signs consisting exclusively of a shape, or another characteristic, resulting from the nature of the goods, necessary to obtain a technical result, or giving substantial value to the goods.³⁷³ The doctrinal architecture is therefore similar in purpose, even if the terminology differs. The central question remains whether product appearance has crossed the line from design to source indicator.³⁷⁴

The Court of Justice has developed this area through a line of cases of obvious importance for fashion. In *Libertel*, it held that a colour per se may constitute a trade mark if it is represented in a clear and precise way and is capable of distinguishing the goods or services of one undertaking; yet the Court also emphasised the public interest in not unduly restricting the availability of colours and indicated that acquired distinctiveness will usually be necessary. In *Hauck v Stokke*, the Court interpreted the “substantial value” exclusion broadly enough to prevent trade mark law from capturing features whose aesthetic and essential characteristics materially contribute to consumer demand.³⁷⁵ By contrast, in *Louboutin v Van Haren* the Court held that a sign consisting of a specific colour applied to the sole of a high-heeled shoe did not consist exclusively of a “shape” within the meaning of the exclusion. That judgment is crucial for fashion because it confirms that position marks or precisely delimited colour applications may protect brand

³⁷¹ Supreme Court of the United States (2001) *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23.

³⁷² Gucci America, Inc. v. Guess?, Inc. (2012) *Opinion and Order*, No. 09 Civ. 4373 (SAS), U.S. District Court, Southern District of New York, 21 May

³⁷³ Court of Justice of the European Union (2010) *LEGO Juris A/S v OHIM*, C-48/09 P.

³⁷⁴ European Union (2017) *Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification)*. OJ L 154, 16 June.

³⁷⁵ Kur, A. (2015) ‘Trade Marks Function, Don’t They? CJEU Jurisprudence and Unfair Competition’, *Max Planck Institute for Innovation & Competition Research Paper*.

identity without automatically collapsing into the prohibited category of product-shape monopolies.³⁷⁶

The law of reputed marks also intersects with this analysis. Although the present section is centred on trade dress, the decision in the dispute involving L'Oréal and Bellure is relevant because it demonstrates the Court of Justice's willingness to restrain conduct that rides on the power of attraction, prestige and marketing investment of a famous sign, even outside classic confusion. The Court's formulation of "riding on the coat-tails" of a reputed mark is especially valuable in fashion, where the commercial objective of look-alikes is often not to misstate literal source, but to borrow aura, status and symbolic capital. Nevertheless, reputation-based trade mark protection cannot displace the absolute exclusions concerning distinctiveness and substantial value. It supplements, rather than replaces, the structural limitations on protecting product appearance through trade mark law.³⁷⁷

In the United Kingdom, the picture remains more fragmented. UK law protects non-traditional signs through the Trade Marks Act 1994, including reputed marks and earlier rights preserved through section 5(4), which explicitly recognises the law of passing off. At the same time, as recent scholarship has restated, English common law does not recognise a general tort of unfair competition.³⁷⁸ The practical consequence is that the protection of visual brand identity depends on either registration of a distinctive sign or the narrower, goodwill-centred action of passing off, rather than on a free-standing doctrine equivalent to American trade dress. This places considerable pressure on the claimant's ability to prove source significance and protectable commercial goodwill.³⁷⁹

Italy follows a similarly composite structure. The Italian Industrial Property Code allows trade marks to consist of product shape, packaging, colours and other signs, but only if they are capable of distinguishing one undertaking's goods from another's and can be represented with sufficient clarity. At the same time, Article 9 excludes shapes or other characteristics imposed by the nature of the product, necessary to obtain a technical result, or giving substantial value to the product. Article 13 requires distinctive character, while Article 20 confers exclusive rights against confusingly similar signs and, for marks enjoying renown, against unfair advantage or detriment even for dissimilar goods. Italian law therefore accommodates the protection of brand identity through shape marks, colour marks, pattern marks and position marks, but it does so within limits strongly aligned with EU law.³⁸⁰

In practice, effective enforcement in fashion depends on a cumulative strategy rather than on trade dress alone. The first step is careful clearance and, where viable, early filing of non-traditional trade marks for the repeating visual code that genuinely functions as a badge of origin. The second is evidential: brands must systematically document advertising, consumer recognition, editorial references, influencer presentations, sales history, survey evidence and the consistency of use across product categories. The third is remedial coordination with design

³⁷⁶ Court of Justice of the European Union (2003) *Libertel Groep BV v Benelux-Merkenbureau*, Case C-104/01, ECR I-03793

³⁷⁷ Court of Justice of the European Union (2009) *L'Oréal SA v Bellure NV*, Case C-487/07, ECR I-05185.

³⁷⁸ Wadlow, C. (2016) *The Law of Passing-Off: Unfair Competition by Misrepresentation*. 5th edn. Oxford University Press.

³⁷⁹ United Kingdom (1994) *Trade Marks Act 1994* (c. 26)

³⁸⁰ Italy (2023) *Industrial Property Code* (Legislative Decree No. 30 of 10 February 2005, as amended up to Law No. 102 of 24 July 2023)

rights, copyright, contractual controls and digital enforcement. The legal toolkit is broad. In the United States, the Lanham Act provides injunctions, monetary remedies and destruction of infringing materials. In the European framework, the Enforcement Directive requires effective measures, procedures and remedies.³⁸¹ In Italy, the Industrial Property Code supplements these with injunctions, recall from the market, destruction, damages, disgorgement of profits, publication of the judgment, evidentiary seizure and interim relief. The strategic lesson for fashion businesses is clear: brand identity should be protected as a portfolio, not as a single right.³⁸²

For fashion design, the normative implication is that trade dress should remain exceptional but not marginal. It is indispensable where consumers truly perceive a visual code as a source identifier, especially in accessories, footwear, packaging and retail presentation. It becomes dangerous where it is used to seek perpetual control over aesthetic vocabulary that competitors need in order to participate in fashion discourse. The judicial insistence on secondary meaning, non-functionality and precise claim definition is therefore not merely technical. It is the mechanism by which courts distinguish genuine brand identity from a claim to style as such.³⁸³ That distinction is essential in any thesis concerned with look-alike products, because it explains why some “dupes” are unlawful appropriations of brand identity while others, however commercially aggressive, remain outside trade mark liability and must instead be assessed through unfair competition or design law.³⁸⁴

2.4 Unfair Competition and Imitation in the Fashion Industry

Unfair competition is the broader normative category within which many imitation disputes in fashion are ultimately assessed. At international level, Article 10bis of the Paris Convention defines unfair competition as any act of competition contrary to honest practices in industrial or commercial matters and gives, as core examples, acts creating confusion, discrediting competitors, and misleading indications about goods. That formula is deliberately open-textured. Its importance for fashion lies in the fact that not all harmful imitation is counterfeiting and not all parasitism creates trade mark confusion. Unfair competition therefore functions as a doctrinal bridge between hard intellectual property rights and the wider commercial demand for market fairness.³⁸⁵

Comparative law shows, however, that the category is far from uniform. In the United States, “unfair competition” often operates as a label for passing off, false designation, false advertising and related state-law torts rather than as a general anti-imitation principle. The Supreme Court’s decisions in *Bonito Boats* and *Dastar* are central here.³⁸⁶ *Bonito Boats* reasserted the strong federal policy favouring free competition in ideas that do not merit patent protection and warned against state-law doctrines that create patent-like rights over publicly available designs. *Dastar*

³⁸¹ European Parliament and Council (2004) *Directive 2004/48/EC on the Enforcement of Intellectual Property Rights*

³⁸² United States House of Representatives, Office of the Law Revision Counsel (n.d.) *15 U.S. Code § 1125 – False designations of origin, false descriptions, and dilution forbidden*

³⁸³ Senfleben, M. (2009) ‘The Trademark Tower of Babel: Dilution Concepts in International, US and EC Trademark Law’, *International Review of Intellectual Property and Competition Law*, 40(1), pp. 45–77.

³⁸⁴ Supreme Court of the United States (2000) *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205

³⁸⁵ World Intellectual Property Organization (WIPO) (1979) *Paris Convention for the Protection of Industrial Property (as amended on 28 September 1979)*

³⁸⁶ Supreme Court of the United States (2003) *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23

then held that section 43(a) of the Lanham Act concerns the producer of tangible goods, not the author of the ideas embodied in them, thereby preventing the use of trade mark law as a form of perpetual attribution right or “mutant copyright”. The American position therefore leaves room for action where copying deceives consumers about source, sponsorship or qualities, but it resists a general prohibition on copying unprotected fashion designs as such.³⁸⁷

The law of the United Kingdom takes a different route but reaches a similarly cautious result. There is no general tort of unfair competition; instead, targeted doctrines such as passing off, malicious falsehood, design right and trade mark infringement occupy the field.³⁸⁸ Statutory trade mark law expressly preserves earlier rights based on passing off through section 5(4) of the Trade Marks Act 1994, but that mechanism does not amount to a general anti-copying rule. For fashion plaintiffs, the consequence is significant: where the copied element has not become either a registered sign or protectable goodwill, English law offers only limited control over imitation. That structural restraint reflects the common-law suspicion of broad market-fairness actions untethered from recognised heads of liability.³⁸⁹

Italy, by contrast, offers one of the most developed codified models. Article 2598 of the Civil Code prohibits acts likely to create confusion with a competitor’s goods or activity, “servile” imitation of a competitor’s products, appropriation of a competitor’s merits, and any other conduct contrary to principles of professional fairness capable of damaging another undertaking. Articles 2599 and 2600 provide for injunctions, elimination of effects, damages and publication of the judgment, with fault presumed once unfair competition is established. This formulation is especially important for fashion disputes because it allows courts to address imitation that is parasitic or systematically exploitative even where the claimant cannot prove a technical trade mark or design infringement.³⁹⁰ Italian law therefore operates as a stronger corrective against “free-riding” than the United States or the United Kingdom, particularly when the imitation is repetitive, deliberate and commercially opportunistic.³⁹¹

At the European Union level, the position is more fragmented. EU trade mark and design law are harmonised, but unfair competition between traders is not fully unified by a single horizontal instrument.³⁹² The Unfair Commercial Practices Directive is directed at business-to-consumer practices and does not govern unfair commercial practices between traders. As a result, the regulation of imitation that stops short of trade mark or design infringement remains predominantly national. This explains why look-alike disputes in fashion frequently produce a layered litigation strategy: EU rights are pleaded where available, but national unfair competition rules do much of the work in relation to parasitic imitation, slavish copying and appropriation of commercial effort.³⁹³

³⁸⁷ Supreme Court of the United States (1989) *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141

³⁸⁸ Wadlow, C. (2016) *The Law of Passing-Off: Unfair Competition by Misrepresentation*. 5th edn. Oxford: Oxford University Press.

³⁸⁹ United Kingdom (1994) *Trade Marks Act 1994* (c. 26)

³⁹⁰ Vanzetti, A. and Di Cataldo, V. (2012) *Manuale di diritto industriale*. 7th edn. Milan: Giuffrè.

³⁹¹ Italy (2017) *Civil Code* (approved by Royal Decree No. 262 of 16 March 1942, as amended up to Decree No. 291 of 7 December 2016)

³⁹² Henning-Bodewig, F. (ed.) (2006) *Unfair Competition Law: European Union and Member States*. The Hague: Kluwer Law International.

³⁹³ European Union (2022) *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (consolidated version)*.

The contemporary fashion market sharpens these tensions because imitation is no longer confined to obvious counterfeits. It ranges from counterfeit goods, through “inspired by” products, to openly marketed “dupes” that copy the aesthetic code of a luxury item while avoiding the protected word mark. Academic literature has long debated whether this phenomenon is socially harmful or partially innovation-enhancing. Raustiala and Sprigman’s “piracy paradox” argued that low protection and some degree of copying may accelerate trend cycles and stimulate continual innovation in fashion; Hemphill and Suk likewise described fashion as a market in which copying, differentiation and status competition interact in unusual ways.³⁹⁴ More recent work, however, has highlighted that this general account often fits large and established players better than small and independent designers, who may lack the scale, capital and branding power needed to survive rapid appropriation of their work³⁹⁵. The comparative literature therefore increasingly treats imitation in fashion as a distributive problem as much as an innovation problem.³⁹⁶

This debate is particularly vivid in the context of fast fashion. Fast-fashion firms reduce the time between catwalk, celebrity exposure, social-media circulation and market availability, transforming visual references into mass retail products with extraordinary speed. The ethical and economic consequences are ambivalent. On one side, imitation widens access, lowers prices and can intensify inter-brand competition. On the other, it may erode the signalling and scarcity value of original designs, transfer commercial returns from creators to rapid imitators, and encourage overproduction and overconsumption. Research in the sustainability literature identifies “speed and style at low cost” as the characteristic logic of fast fashion and links this model to wider environmental and social concerns, while more recent scholarship points to mounting pressure for a transition towards more sustainable production patterns.³⁹⁷ None of this means that every look-alike is unlawful. It does mean, however, that the legal system confronts imitation not only as a technical rights problem but also as part of a wider political economy of fashion. (Joy et al., 2012; Baena, 2024).³⁹⁸

From a law-and-economics perspective, the key question is whether unrestricted imitation undermines incentives to create. Here the answer depends on market structure. For global luxury brands with powerful trade marks, copying may sometimes reinforce notoriety while leaving the original brand’s core clientele intact. For emerging labels, by contrast, the loss of exclusivity may occur before reputational capital has crystallised, making imitation considerably more harmful. Atkinson and van Caenegem therefore observe that in the fashion sector copyright, design rights and unfair competition are often pleaded cumulatively, because no single doctrine reliably captures the full commercial harm caused by imitation. In practice, unfair competition becomes most valuable where the defendant has not merely adopted a trend, but has systematically

³⁹⁴ Hemphill, C.S. and Suk, J. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

³⁹⁵ Wang, L. (2023) ‘The Copying of Independent Fashion Designers: Perils and Potential Remedies in a Post-Star Athletica World’, *Stanford Law Review*, 75, pp. 979–1032.

³⁹⁶ Raustiala, K. and Sprigman, C. (2006) ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Virginia Law Review*, 92(8)

³⁹⁷ Niinimäki, K., Peters, G., Dahlbo, H., Perry, P., Rissanen, T. and Gwilt, A. (2020) ‘The environmental price of fast fashion’, *Nature Reviews Earth & Environment*, 1, pp. 189–200.

³⁹⁸ Joy, A., Sherry, J.F., Venkatesh, A., Wang, J. and Chan, R. (2012) ‘Fast Fashion, Sustainability, and the Ethical Appeal of Luxury Brands’, *Fashion Theory*, 16(3)

appropriated the claimant's commercial narrative, merchandising strategy, visual identity or launch momentum.³⁹⁹

Enforcement nevertheless remains difficult. In the United States, *Bonito Boats*, *Wal-Mart* and *Dastar* impose genuine doctrinal brakes on attempts to transform misappropriation into a general anti-copying cause of action. In the United Kingdom, the absence of a general unfair competition tort means that new or niche fashion brands may fail simply because they cannot prove the goodwill and misrepresentation required by passing off. In Italy, while the broader language of Article 2598 offers more flexibility, the claimant must still prove market confusion, servile imitation or conduct contrary to professional fairness, and urgent intervention is often necessary because the commercial life of a fashion product may be over before a full merits judgment is delivered. Italian law partly addresses this through specialised IP sections and strong interim mechanisms such as description, seizure and injunctions when unfair competition overlaps with industrial property rights.⁴⁰⁰ Even so, cross-border supply chains, online marketplaces and rapid SKU turnover make enforcement structurally reactive rather than preventive.⁴⁰¹

A principled policy response should therefore be neither maximalist nor laissez-faire. The better approach is to preserve strict trade mark filters for distinctiveness and functionality, while allowing unfair competition to intervene against clearly parasitic, systematically confusing or professionally unfair conduct. Procedurally, interim relief and evidence-preservation tools are decisive in fashion because timing matters as much as final judgment. Institutionally, smaller designers would benefit from lower-cost enforcement channels and from platform governance rules better suited to serial look-alikes. Substantively, the law should resist any attempt to award de facto perpetual exclusive rights over ordinary cuts, silhouettes or generic aesthetic ideas, while remaining willing to sanction the appropriation of another undertaking's identity, launch strategy, promotional investment and reputation. In this sense, Italian-style unfair competition clauses may offer a useful model for addressing egregious parasitism, provided they are interpreted in a way consistent with the anti-monopoly warnings articulated in *Bonito Boats* and *Dastar*.⁴⁰²

The comparison developed above can be synthesised as follows. The table does not replace the doctrinal analysis, but clarifies how each jurisdiction structures the legal response to imitation that falls outside straightforward trade mark infringement.⁴⁰³

³⁹⁹ Atkinson, V. and van Caenegem, W. (2019) 'The fashion sector: copyright, designs or unfair competition?', *Journal of Intellectual Property Law & Practice*, 14(3)

⁴⁰⁰ Italy (2005) *Codice della proprietà industriale*, Legislative Decree No. 30 of 10 February 2005, Arts. 120–132.

⁴⁰¹ Supreme Court of the United States (1989) *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141

⁴⁰² Italy (2017) *Civil Code (approved by Royal Decree No. 262 of 16 March 1942, as amended up to Decree No. 291 of 7 December 2016)*

⁴⁰³ European Union (2017) *Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification)*. OJ L 154, 16 June

Jurisdiction	Functional equivalent of trade dress	Distinctiveness threshold	Main anti-monopoly limit	Typical relevance in fashion
United States	Trade dress under Lanham Act § 43(a)	Packaging or ambience may be inherently distinctive; product design requires secondary meaning after <i>Wal-Mart</i>	Functionality doctrine under <i>TrafFix</i> and <i>Qualitex</i>	Repeating product appearance, boutique presentation, signature colour placement, accessory patterns
European Union	Non-traditional trade marks under EUTMR (shape, colour, pattern, position marks)	Must distinguish goods/services and often requires acquired distinctiveness for non-traditional signs	Article 7 exclusions for nature, technical result and substantial value; <i>Hauck</i> and <i>Louboutin</i> define limits	colour-position marks, pattern marks, packaging, iconic shoe or accessory identifiers
United Kingdom	Registered trade marks plus passing off	Registration requires distinctiveness; unregistered protection depends on goodwill-based causes	No general tort of unfair competition; reliance on passing off and statutory bars	Strongest for established brand cues and recognised commercial goodwill
Italy	Non-traditional trade marks under CPI plus Civil Code unfair competition	Articles 7 and 13 CPI require distinctiveness; acquired distinctiveness recognised	Article 9 CPI bars shape/other characteristic monopolies tied to nature, technical result or substantial value	Protection of shape, packaging, colours and visual identity, reinforced by Article 2598 c.c. in cases of parasitic or servile imitation

Jurisdiction	General unfair competition action	Scope regarding imitation	Principal limitation	Practical utility in fashion
United States	Fragmented: Lanham Act, state unfair competition, false advertising, passing off	Targets confusion, false designation and misrepresentation rather than mere design copying	<i>Bonito Boats</i> and <i>Dastar</i> prevent quasi-patent or quasi-copyright protection for unprotected designs	Strong against deceptive look-alikes; weak against mere stylistic copying

European Union	No single trader-v-trader EU-wide tort	National laws fill the gap; EU law mainly protects trade marks/designs and regulates B2C unfair practices	Fragmentation across Member States	Useful only through national law coupled with EU rights
United Kingdom	No general tort; passing off and targeted doctrines	Protects against misrepresentation harming goodwill	Requirement of protectable goodwill and misleading conduct	Effective for famous or established labels; difficult for new entrants
Italy	Yes, under Article 2598 c.c.	Covers confusion, servile imitation, appropriation of merits and broader parasitic conduct	Fact-intensive proof of unfairness and damage; no blanket ban on copying	Particularly valuable against systematic look-alikes that exploit reputation and commercial effort

The table shows that unfair competition operates unevenly across jurisdictions. In the United States and the United Kingdom, the absence of a broad general tort means that look-alike disputes remain tied to confusion, misrepresentation, or goodwill-based claims. By contrast, Italian law provides a more flexible route through Article 2598 c.c., allowing courts to consider systematic and parasitic conduct even where individual acts may not amount to classic infringement. This supports the thesis’s central argument that look-alikes are legally assessed not only through visual similarity, but through the doctrinal architecture available in each system.

2.5 Limits of Intellectual Property Protection in Fashion

The central structural limit of intellectual property protection in fashion is that the law protects source-signals, specific creative expressions, and registered designs far more effectively than it protects style as such. In every major system examined here, fashion businesses can obtain meaningful protection for logos, monograms, labels, some surface ornamentation, selected product configurations, and registered designs; yet no jurisdiction grants a general, perpetual right over an aesthetic concept, silhouette, trend, or “look” in the abstract.⁴⁰⁴ That position is not accidental: it reflects the international compromise embedded in the TRIPS framework, under which industrial designs must be protected only if they are new or original, may be excluded where dictated essentially by technical or functional considerations, and need only enjoy a limited term, while trademark law remains tied to distinctive source-identification and anti-deception rationales rather than protection of creative style per se. The result is a deliberately incomplete architecture of protection, one that is particularly visible in fashion

⁴⁰⁴ Landes, W.M. and Posner, R.A. (1987) ‘Trademark Law: An Economic Perspective’, *Journal of Law and Economics*, 30(2), pp. 265–309

because competitive value is often concentrated in visual appearance rather than in technical innovation.⁴⁰⁵

From a comparative standpoint, the fragmentation of protection is doctrinally sharper in the United States than in the European Union, but it exists everywhere. In the United States, copyright does not protect the cut, shape, or utilitarian architecture of clothing as such; under *Star Athletica v Varsity Brands*, only features of a useful article that can be perceived separately and would qualify independently as pictorial, graphic or sculptural works are copyrightable, leaving much garment design outside copyright's reach.⁴⁰⁶ Design patent law offers an additional path, but only for a new, original and ornamental design for an article of manufacture, and it requires filing, drawings, examination, and a narrower, image-based claim scope than many fashion businesses can exploit at the speed of seasonal markets.⁴⁰⁷ This means that many fashion “dupes” remain non-infringing in the United States unless they copy separable artistic expression, a valid design patent, or source-identifying trade dress.⁴⁰⁸

The European picture is broader but not unlimited. Under Community design law, protection attaches to the appearance of the whole or part of a product if it is new and has individual character, with a three-year unregistered right and a registered right renewable up to twenty-five years; yet technical-function exclusions, disclosure rules, exhaustion, and time limits prevent design law from maturing into an indefinite monopoly over style.⁴⁰⁹ The recent design reform package deepens protection in the digital age and clarifies procedural issues, but it also confirms the same basic discipline: protection remains temporary, right-specific, and conditioned by novelty, individual character, and non-functionality. Likewise, EU copyright after *Cofemel* does not make all aesthetically attractive garments protectable; it requires originality in the autonomous EU sense, and later case law has reiterated that the court must identify creative choices in the object's shape rather than infer protectability from fashion appeal, market success, or museum recognition.^{410 411}

The position in the United Kingdom⁴¹² and in civil-law systems such as Italy and France confirm the same structural ceiling. UK law continues to combine registered designs, domestic unregistered design right, copyright, trademarks and passing off, but the domestic unregistered design right under the CDPA is confined to shape or configuration and expressly excludes certain functional features, which is significant in fashion because many commercially valuable elements are surface decoration, print, colour placement, or “get-up” rather than shape alone.⁴¹³

⁴⁰⁵ World Trade Organization (2017) *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, as amended on 23 January 2017

⁴⁰⁶ Ginsburg, J.C. (2020) ‘Copyright Protection for Applied Art and Works of Artistic Craftsmanship: Intersections in U.S. Law’, *Columbia Journal of Law & the Arts*, 43(3), pp. 353–384.

⁴⁰⁷ Merges, R.P., Menell, P.S. and Lemley, M.A. (2017) *Intellectual Property in the New Technological Age*. 5th edn. Berkeley, CA: Clause 8 Publishing.

⁴⁰⁸ Supreme Court of the United States (2017) *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405

⁴⁰⁹ Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

⁴¹⁰ Court of Justice of the European Union (2019) *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV*, C-683/17.

⁴¹¹ European Union (2002) *Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs*. OJ L 3, 5 January

⁴¹² United Kingdom, Intellectual Property Office (2024) *Trade Marks Act 1994 (unofficial consolidated version, as amended)*

⁴¹³ Bently, L., Sherman, B., Gangjee, D. and Johnson, P. (2022) *Intellectual Property Law*. 6th edn. Oxford: Oxford University Press.

Italian law, through the Industrial Property Code and Civil Code article 2598, offers both registered rights and unfair competition controls, including servile imitation and broader acts contrary to professional fairness, but these avenues do not abolish the baseline principle that competition in non-protected forms remains lawful. French law similarly combines trademark and design protection with a robust unfair competition/parasitism tradition under article 1240 of the Civil Code, yet recent case law insists that parasitism cannot be reduced to a complaint about market proximity or trend-following; the claimant must identify the distinct economic value allegedly appropriated and show conduct amounting to free-riding rather than legitimate competition.^{414 415}

Trademark law, moreover, supplies powerful protection only at the price of demanding threshold proof that many fashion claimants find difficult to assemble. Product-design trade dress in the United States is never inherently distinctive after *Wal-Mart Stores v Samara Brothers* and therefore requires secondary meaning; unregistered trade dress claims also impose an explicit burden to prove non-functionality. Functionality doctrine, reaffirmed in *TrafFix Devices v Marketing Displays*, prevents trademark law from becoming an eternal substitute for expired or unavailable patent rights, while *Qualitex* shows that even colour marks survive only where they identify source and do not significantly impair competitive need.⁴¹⁶ In the fashion sector, those requirements are particularly exacting because shape, colour placement, stitching, heel height, sole structure, and ornament frequently perform both aesthetic and market functions, making the line between source significance and product desirability contestable.⁴¹⁷

EU and UK trademark law are more receptive to reputation-based and unfair-advantage arguments than US law, but here too the practical bottleneck is evidence. Under article 9 EUTMR and equivalent national provisions, the right holder must usually show similarity of sign, relevant use in the course of trade, and—depending on the theory pleaded—confusion, a link, detriment, or unfair advantage.⁴¹⁸ The famous red sole litigation involving Christian Louboutin and Yves Saint Laurent⁴¹⁹ demonstrates both the possibilities and the boundaries of this route: non-traditional marks may be protected, but only after the claimant precisely defines the sign, delimits the scope of exclusivity, and overcomes objections rooted in shape/function characteristics. For look-alike disputes, the most difficult evidentiary tasks are ordinarily proving acquired distinctiveness or reputation, disentangling source significance from purely ornamental appeal, and demonstrating why the defendant's use should be understood as taking advantage of brand identity rather than merely participating in a broader aesthetic vocabulary.⁴²⁰

These doctrinal thresholds translate into substantial enforcement limits. Fashion disputes are seasonal and time-sensitive, but the evidence needed for a robust claim—consumer surveys, advertising records, design history, sales data, screenshots of marketplace presentation, expert comparison of designs, proof of reputation, and proof of non-functionality—can be expensive

⁴¹⁴ Passa, J. (2009) *Traité de droit de la propriété industrielle*. Tome 1: Marques et autres signes distinctifs, dessins et modèles. 2nd edn. Paris: LGDJ-Lextenso.

⁴¹⁵ United Kingdom (1988) *Copyright, Designs and Patents Act 1988* (c. 48)

⁴¹⁶ McCarthy, J.T. (2023) *McCarthy on Trademarks and Unfair Competition*. 5th edn. Thomson Reuters.

⁴¹⁷ Supreme Court of the United States (2000) *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205.

⁴¹⁸ Court of Justice of the European Union (2008) *Intel Corporation Inc. v CPM United Kingdom Ltd*, C-252/07.

⁴¹⁹ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.* (2012) 696 F.3d 206 (2d Cir.)

⁴²⁰ European Union (2017) *Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification)*. OJ L 154, 16 June

and slow to assemble.⁴²¹ Even where infringement is established, monetising harm is difficult because many injuries in the look-alike context are diffuse: erosion of distinctiveness, prestige effects, displaced scarcity, reputational spillovers, and loss of “attention value” are harder to quantify than straightforward lost sales. United States law provides strong civil tools, including presumptions of irreparable harm for injunctions and recovery of profits, damages, costs, and in exceptional cases attorney’s fees, but those remedies do not eliminate the claimant’s evidentiary burden; by contrast, Italian unfair competition law contains a favourable presumption of fault once unfair competition is established, yet the claimant must still prove the wrongful act and causal nexus to harm.⁴²²

The limits are even sharper at the criminal and border-enforcement level. At the international level, the minimum criminal obligation under the World Trade Organization TRIPS Agreement concerns wilful trademark counterfeiting and copyright piracy on a commercial scale, not ordinary look-alike goods that avoid identical or substantially indistinguishable marks. Customs regulation in the EU is likewise highly effective against clear counterfeits and pirated goods but less naturally suited to ambiguous “dupe” products whose legality depends on nuanced assessments of distinctiveness, function, link, or unfair advantage.⁴²³ In practical terms, therefore, the legal system is at its strongest against fake branded goods and at its weakest against carefully engineered look-alikes that borrow brand identity without replicating the precise legal object of protection.⁴²⁴

For fashion brands and designers, these limitations yield a clear practical lesson: isolated rights are rarely sufficient. Effective protection requires a cumulative strategy built around early design filing where possible, disciplined trademark registration for names, logos, colour-position marks and repeat patterns, consistent evidencing of use and advertising, meticulous archiving of launch dates and marketing materials, and fast internal assessment of whether a competitor’s product targets a sign, a design, a reputation, or merely a trend. For courts and policymakers, however, the harder question is systemic. Overexpanding trademark or unfair competition law would risk recreating perpetual exclusivity over fashion forms that the legal system has deliberately kept free, yet under-protection allows large-scale free-riding that may hollow out incentives for originality and disproportionately harm independent designers. The most defensible reform path is therefore calibrated rather than maximalist: clearer “use as a trademark” filters for fashion disputes, temporally limited protection against close copies of non-functional designs, accelerated interim procedures for seasonal industries, greater procedural space for low-cost evidence-gathering, and carefully cabined unfair-advantage doctrines that target parasitic appropriation without converting style itself into private property.⁴²⁵

⁴²¹ Beebe, B. (2006) ‘An Empirical Study of the Multifactor Tests for Trademark Infringement’, *California Law Review*, 94(6), pp. 1581–1654.

⁴²² United States House of Representatives, Office of the Law Revision Counsel (n.d.) *15 U.S. Code § 1116 – Injunctive relief*

⁴²³ European Parliament and Council (2013) *Regulation (EU) No 608/2013 concerning customs enforcement of intellectual property rights*.

⁴²⁴ World Trade Organization (2017) *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, as amended on 23 January 2017

⁴²⁵ Senftleben, M. (2024) ‘Developing Defences for Fashion Upcycling in EU Trademark Law’, *GRUR International*, 73(2)

2.6 The Legal Qualification of Look-Alike Products

A look-alike product is not a self-standing legal category but a descriptive commercial phenomenon whose legal qualification depends on the protected interest engaged by the defendant's conduct. That point is crucial. The word “dupe” has cultural, marketing and consumer meanings, but the law does not condemn or protect “dupes” as such; it asks instead whether the product copies a protected sign, a protected design, a copyrightable expression, or a reputation in a way that falls within trademark, design, copyright, passing off, dilution, or unfair competition rules. The same object may therefore be lawful in one jurisdiction or under one theory of action, yet unlawful in another because the relevant right, evidentiary threshold, or remedial doctrine differs.⁴²⁶

For analytical purposes, look-alikes should be placed on a spectrum. At one end lies counterfeiting: the use of an identical or essentially indistinguishable mark in a manner calculated to present the product as authentic, a category that typically triggers the strongest civil, customs and criminal responses. Next come confusing imitations or confusing get-up cases, where the issue is misrepresentation as to source, affiliation, licence, or sponsorship. Beyond that lie reputation-based and parasitic cases, where the defendant may avoid confusion but still exploit the claimant's aura, goodwill, or economic investment. At the opposite end lie lawful inspirations and trend-driven similarities, where the defendant copies a style language, silhouette, or market-leading aesthetic without appropriating a legally protected sign or misrepresenting commercial origin. The difficulty of “qualifying” look-alikes arises precisely because many disputes cluster in the middle of this spectrum.

A coherent qualification exercise should therefore proceed through five cumulative questions. First, what exactly has been copied: a word mark, logo, pattern, position mark, packaging layout, product contour, surface decoration, marketing narrative, or merely a general style? Second, does a valid right subsist in that element under the applicable system: distinctiveness and non-functionality for trade marks, novelty and individual character for designs, originality and expression for copyright? Third, how is the copied element used in the market: as a source-indicator, as decorative matter, as mere descriptive reference, or as part of an overall strategy of association? Fourth, how does the relevant public perceive the use: confusion, mental link, prestige transfer, or simple recognition without source misattribution? Fifth, what remedy, if any, is proportionate: injunction, destruction, customs detention, profits, damages, corrective advertising, or no intervention at all? Qualification is thus inseparable from remedial design.⁴²⁷

On this framework, the United States remains comparatively formalist. If the claimant cannot point to a valid mark, a protectable non-functional trade dress with secondary meaning, a separable copyrighted work, or a valid design patent, the look-alike will often fall outside actionable infringement even when consumers instantly recognize the source of inspiration. That is why US doctrine has frequently been described as permitting a significant amount of legal copying in fashion. The Supreme Court's refusal in *Dastar* to allow section 43(a) to mutate into a backdoor attribution right, together with *Wal-Mart*, *TrafFix*, and the useful-article limits of *Star Athletica*, means that US law intentionally prevents trademarks from swallowing design

⁴²⁶ Roberts, A.J. (2025) ‘Dupes’, *New York University Journal of Intellectual Property & Entertainment Law*, 14(2)

⁴²⁷ United States House of Representatives, Office of the Law Revision Counsel (n.d.) *15 U.S. Code § 1125 – False designations of origin, false descriptions, and dilution forbidden*

competition.⁴²⁸ In practice, the legal qualification of a look-alike in the United States therefore turns less on the intuitive resemblance between products and more on whether resemblance has attached itself to a protectable legal object.⁴²⁹

The European approach is not necessarily broader in substance, but it offers more doctrinal pathways. EU design law is structurally more hospitable to fashion than US design patent law because it protects non-technical appearance more directly and includes unregistered protection.⁴³⁰ EU trademark law is also more receptive to reputation-based claims and has developed the notion of unfair advantage, exemplified by *L'Oréal v Bellure*, in which imitation lists for smell-alike perfumes were treated as taking unfair advantage of famous marks. Yet EU law does not authorise a general property right in style: *Cofemel v G-Star Raw* rejects copyright protection based merely on aesthetic effect, and design law keeps protection time-limited and conditioned by novelty and individual character.⁴³¹ Accordingly, a European look-alike is actionable only when it can be anchored in a distinct right or in a recognised form of unfair appropriation; resemblance alone is still insufficient.⁴³²

The UK position is especially instructive because recent case law on “copycat” products illustrates the moving boundary between lawful benchmarking and unlawful exploitation of reputation. In *Thatchers Cider Company v Aldi*, the IPEC held at first instance that there was no likelihood of confusion and no passing off in respect of a look-alike cider label, despite a mental link between the competing products. The Court of Appeal in 2025, however, reversed the outcome on the reputation-based ground and held that Aldi had taken unfair advantage under section 10(3) of the Trade Marks Act 1994.⁴³³ The significance of the case for fashion and adjacent luxury markets is immediate: in UK law, a look-alike may escape confusion-based liability yet still be qualified as infringing where the defendant’s emulation of a reputed get-up is found to free-ride on the claimant’s investment and image transfer.⁴³⁴

Civil-law systems offer a different balance. In Italy, article 2598 of the Civil Code expressly addresses servile imitation and broader conduct capable of creating confusion, disparaging a competitor, appropriating its merits, or violating professional fairness; as a result, Italian qualification is not confined to the taxonomy of registered rights and can absorb patterns of imitation that would be harder to fit into US doctrines. French law goes further through parasitisme, which is independent of confusion and focuses on whether one trader has placed itself in another’s wake to appropriate investments, know-how, or acquired reputation.⁴³⁵ Yet

⁴²⁸ Supreme Court of the United States (2000) *Wal-Mart Stores, Inc. v Samara Brothers, Inc.*, 529 U.S. 205; Supreme Court of the United States (2001) *TrafFix Devices, Inc. v Marketing Displays, Inc.*, 532 U.S. 23; Supreme Court of the United States (2017) *Star Athletica, LLC v Varsity Brands, Inc.*, 580 U.S. 405.

⁴²⁹ Supreme Court of the United States (2003) *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23

⁴³⁰ European Union (2002) *Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs*. OJ L 3, 5 January.

⁴³¹ Court of Justice of the European Union (2019) *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV*, Case C-683/17.

⁴³² Court of Justice of the European Union (2009) *Press Release No 54/09, 18 June 2009: Judgment of the Court of Justice in Case C-487/07 L'Oréal and Others v Bellure NV and Others – A trade mark proprietor may prevent the use of a comparison list presenting the product of a third party as an imitation of one of his products*

⁴³³ Court of Appeal of England and Wales (2025) *Thatchers Cider Company Ltd v Aldi Stores Ltd*, [2025] EWCA Civ 5.

⁴³⁴ *Thatchers Cider Company Ltd v Aldi Stores Ltd* (2024) [2024] EWHC 88 (IPEC), Claim No IP-2022-000076

⁴³⁵ French Republic (1804, as amended) *Code civil*, Article 1240.

recent French analysis also demonstrates an important restraint: the victim of parasitism must identify the specific economic value appropriated, and the mere fact that a competitor has adopted an adjacent trend or market concept does not suffice.⁴³⁶ For the legal qualification of look-alikes, this means that civil-law systems are comparatively more open to relational and fairness-based reasoning, but they are not supposed to restore exclusivity over marketable style after IP rights fail or expire.⁴³⁷

The hardest practical problems concern evidence. Source significance is often inferred from a constellation of facts—advertising intensity, exclusivity of use, unsolicited press, celebrity exposure, consumer surveys, prior infringement episodes, and internal documents showing intent to emulate—rather than from any single smoking gun.⁴³⁸ Distinctiveness and fame are dynamic; a bag shape, sole colour, or stitching arrangement may become strongly source-indicative for one market segment and remain generic for another. Survey evidence is costly and methodologically contestable, screenshots and social-media posts are evanescent, and damages proof is often weaker than liability proof. Consequently, the legal qualification of look-alikes is frequently driven by pre-litigation evidence discipline rather than by doctrine alone: brands that can document the evolution of their sign systems and the precise commercial role of visual elements are better positioned to convert resemblance into a recognisable legal injury.⁴³⁹

The following table synthesises the principal doctrinal thresholds, evidentiary burdens and remedy profiles across the main jurisdictions relevant to fashion look-alike disputes. It is drawn from the Lanham Act, TRIPS, EU trade mark and design legislation, the EU Enforcement Directive, UK trademark and design legislation, and Italian and French unfair competition sources.⁴⁴⁰

Jurisdiction	Standard for qualification	Key evidentiary requirements	Typical remedies
United States	Actionable only if the look-alike copies a valid mark, non-functional trade dress with secondary meaning, separable copyrighted expression, or a valid design patent; counterfeits are treated separately and far more severely.	Secondary meaning, non-functionality, likelihood of confusion or dilution, survey evidence, proof of fame, design patent drawings, proof of defendant sales for profits.	Preliminary and permanent injunctions, profits, actual damages, possible fee shifting; ex parte seizure and enhanced/statutory damages mainly in counterfeit cases.

⁴³⁶ Cour de cassation (2024) *Pourvoi n° 22-17.647*, Commercial Chamber, 26 June.

⁴³⁷ Italy (1942) *Civil Code* (approved by Royal Decree No. 262 of 16 March 1942)

⁴³⁸ McCarthy, J.T. (2023) *McCarthy on Trademarks and Unfair Competition*. 5th edn. Thomson Reuters.

⁴³⁹ *Easy Spirit, LLC v. Skechers U.S.A., Inc. et al.* (2021) No. 1:19-cv-03299, Document 101 (S.D.N.Y., 26 January).

⁴⁴⁰ European Parliament and Council (2004) *Directive 2004/48/EC on the Enforcement of Intellectual Property Rights*. OJ L 157, 30 April

Jurisdiction	Standard for qualification	Key evidentiary requirements	Typical remedies
European Union	Qualification through EU/national trade mark infringement, design infringement, copyright where originality is shown, or reputation-based unfair advantage/detriment; resemblance alone is insufficient.	Validity of right, novelty/individual character for design, originality for copyright, similarity, link/confusion/unfair advantage, evidence of reputation and market presentation.	Injunctions, damages, corrective measures, destruction/withdrawal, customs detention, cross-border relief within the relevant territorial scope.
United Kingdom	Qualification through TMA 1994, passing off, registered designs and domestic design right; recent case law shows that failure on confusion does not preclude success on unfair-advantage grounds.	Goodwill or reputation, sign similarity, evidence of confusion or link, proof of unfair advantage, design subsistence and scope, marketplace context.	Injunctions, damages or account of profits, delivery up/destruction, passing off relief, fast-track and cost-controlled proceedings in IPEC where appropriate.
Italy	Qualification through the Industrial Property Code plus Civil Code article 2598, including servile imitation, confusory acts, appropriation of merits and acts contrary to professional fairness.	Proof of competitive relationship, imitation or confusion, unfairness of conduct, causal connection to damage; once unfair competition is established, fault is presumed.	Injunctions, elimination of effects, damages, publication of judgment, ancillary measures under IP procedure where relevant.
France	Qualification through trademark/design/copyright rules and article 1240-based unfair competition/parasitism	Identification of specific economic value appropriated, evidence of free-riding, market context, link with claimant's	Injunctions, damages, publication and corrective measures; strong civil tools, but qualification is

Jurisdiction	Standard for qualification	Key evidentiary requirements	Typical remedies
	sm, independent of confusion.	investments or reputation, not mere trend similarity.	fact-intensive and less amenable to border/criminal enforcement absent counterfeiting.

The doctrinal and policy implication is that “look-alike products” should not be treated as a monolithic evil or a monolithic entitlement. Some look-alikes are plainly unlawful because they piggyback on the claimant’s sign system or reputation; some are lawful because the legal system intentionally leaves style available for competitive borrowing; and many occupy an evidentiary grey zone in which the outcome depends less on superficial resemblance than on proof about source function, market meaning, and competitive context. For brands, the practical implication is to litigate less from intuition (“it obviously copies us”) and more from legal characterisation (“which protected interest is being appropriated, and how can it be proved?”). For policymakers, the lesson is equally clear: any reform must distinguish between counterfeits, confusing copies, parasitic association, and legitimate trend participation, or it will either under-protect innovation or over-protect fashion aesthetics.

2.6.1 Concluding observations on the legal qualification of look-alikes

The cumulative lesson of sections 2.1 to 2.6 is that the law of look-alikes in fashion is best understood not as a single body of “anti-copying” rules, but as an unstable intersection between trademark, design, copyright, passing off, dilution, unfair competition and policy choices about the permissible scope of imitation. Fashion businesses are protected robustly when they can translate visual identity into legally cognisable signs or rights; they are protected only partially when what is copied is chiefly aesthetic atmosphere, trend value, or prestige coding. Future research would profitably move in three directions: first, the evidentiary treatment of consumer recognition and post-sale association in “dupe” disputes; second, the interaction between circular-fashion practices such as repair, reworking and upcycling and expanding trademark claims; and third, the design of time-limited, low-cost anti-copying mechanisms capable of protecting independent designers without converting transient fashion innovation into perpetual exclusivity.⁴⁴¹

⁴⁴¹ Senftleben, M. (2024) ‘Developing Defences for Fashion Upcycling in EU Trademark Law’, *GRUR International*, 73(2)

Chapter 3

3.1 Case Law, Comparative Perspectives and the Judicial Construction of Fashion Law

Having examined in the preceding chapters the conceptual distinction between counterfeiting and look-alike products, and having subsequently mapped the principal legal instruments through which the fashion sector seeks protection—trade marks, copyright, design law, patents, trade dress, and rules on unfair competition—the present chapter turns from doctrine in the abstract to doctrine in operation. Its object is not merely illustrative. Rather, it seeks to verify, through judicial practice, whether the analytical framework developed earlier in the thesis is capable of explaining how courts actually distinguish lawful inspiration from unlawful imitation, competitive proximity from parasitic appropriation, and symbolic borrowing from actionable free-riding. In that sense, this final chapter has an expressly concluding function: it tests the adequacy of the thesis as a whole by observing what happens when the theoretical categories discussed in Chapters 1 and 2 are confronted with concrete disputes arising in the contemporary fashion market. The importance of judicial reasoning in this field is particularly evident because fashion law has been described as an evolving and only partially systematised legal area, rather than as a self-contained discipline.^{442 443} It is precisely at the adjudicative level that the instability of fashion objects becomes most visible, because the same handbag, sole, pattern, or logo can be framed, depending on context, as ornament, source-indicator, artistic work, investment-bearing intangible asset, or competitive instrument.^{444 445}

The chapter is accordingly structured in a way that moves from the general to the specific and then back to the general. Section 3.1 offers a comparative survey of case law across legal systems, with particular attention to the United States and the European legal order, while also drawing on civil-law perspectives that reveal how unfair competition and parasitism continue to supplement, and sometimes correct, the limits of formal intellectual property rights.^{446 447} Section 3.2 then addresses the more theoretical question of the role of case law in fashion law itself, arguing that judgments do not merely apply pre-existing rules but actively shape the field by classifying fashion signs, allocating value among competing interests, and producing the doctrinal vocabulary through which the industry understands its own disputes.^{448 449} The subsequent sections of the chapter, though not yet written here, will deepen this argument

⁴⁴² Brewer, M.K. (2017) 'Fashion Law: More than Wigs, Gowns, and Intellectual Property', *San Diego Law Review*, 54(4), pp. 739–784

⁴⁴³ Scafidi, S. (2006) 'Intellectual Property and Fashion Design', in Yu, P.K. (ed.) *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*. Vol. 1. Westport, CT: Praeger/Greenwood.

⁴⁴⁴ Scafidi, S. (2019) 'Towards a Jurisprudence of Fashion', *Fordham Intellectual Property, Media & Entertainment Law Journal*, 29(2), pp. 429 ff.

⁴⁴⁵ Hemphill, C.S. and Suk, J.C. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

⁴⁴⁶ Atkinson, V. and van Caenegem, W. (2019) 'The fashion sector: copyright, designs or unfair competition?', *Journal of Intellectual Property Law & Practice*, 14(3), pp. 214–222.

⁴⁴⁷ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press.

⁴⁴⁸ Brewer, M.K. (2017) 'Fashion Law: More than Wigs, Gowns, and Intellectual Property', *San Diego Law Review*, 54(4), pp. 739–784.

⁴⁴⁹ Hemphill, C.S. and Suk, J.C. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

through two extended case studies—first, the litigation between Louis Vuitton and My Other Bag, and secondly, the Christian Louboutin disputes concerning the red sole mark—before moving to a broader comparative analysis of look-alikes and brand protection, and finally to a discussion of future challenges in fashion law, including the pressure exerted by circularity, digital communication, artistic appropriation, and the growing mismatch between accelerated market cycles and slower systems of legal enforcement.⁴⁵⁰

The choice to end the thesis with case analysis is methodologically significant. Fashion law, as the literature increasingly acknowledges, is not a neatly codified and autonomous branch of law, but an aggregative and evolving field in which questions of trade mark, copyright, design, consumer protection, labour, cultural heritage, sustainability, and unfair competition intersect in a commercially and symbolically dense environment.^{451 452 453} For that reason, judicial decisions often perform a stronger constitutive function in fashion than in sectors where legislation is more tailored or technical. Courts are frequently asked to decide issues that statutes were not drafted specifically to solve: whether a colour may function as a trade mark in a market defined by aesthetic appeal; whether a humorous or parodic reference to a luxury sign remains outside the core of infringement; whether a pattern belongs to the common visual vocabulary of a sector or has become legally appropriable through acquired distinctiveness; whether the aura of a famous mark deserves protection against reputational transfer even in the absence of consumer confusion; and whether legal doctrine should adapt when products are simultaneously utilitarian, aesthetic, communicative, and status-bearing.⁴⁵⁴ The concluding ambition of this chapter is therefore to show that case law is not ancillary to fashion law, but one of its principal sites of production.

The case studies selected for the latter part of the chapter are especially apt for that purpose because they crystallise two recurrent tensions in the law of fashion. The *Louis Vuitton v. My Other Bag* litigation places in sharp relief the relationship between luxury aura, parody, dilution, and expressive freedom, thereby testing the limits of brand-centred enforcement when the allegedly infringing product derives much of its meaning from irony and social commentary.⁴⁵⁵
^{456 457} The Christian Louboutin disputes, by contrast, expose the instability of non-traditional marks and the difficulty of separating source-identification from aesthetics when the claimed sign is a colour applied to an inherently design-driven product.^{458 459} Taken together, those disputes provide the empirical foundation for the chapter's broader comparative reflections: they demonstrate that the law of fashion is forged through a constant negotiation between exclusivity and circulation, between protection of investment and preservation of competition, and between

⁴⁵⁰ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press.

⁴⁵¹ Brewer, M.K. (2017) 'Fashion Law: More than Wigs, Gowns, and Intellectual Property', *San Diego Law Review*, 54(4), pp. 739–784.

⁴⁵² Scafidi, S. (2019) 'Towards a Jurisprudence of Fashion', *Fordham Intellectual Property, Media & Entertainment Law Journal*, 29(2), pp. 429.

⁴⁵³ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press.

⁴⁵⁴ Basma, D. (2021) 'Dilution Versus Unfair Advantage: Myths and Realities', *International Review of Intellectual Property and Competition Law*, 52, pp. 1217–1257.

⁴⁵⁵ Malarie-Vignal, M. and Legrand, S. (2019) 'Intellectual property law and parodies in the fashion industry', *Journal of Intellectual Property Law & Practice*, 14(6), pp. 459–471.

⁴⁵⁶ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁴⁵⁷ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 674 F. App'x 16 (2d Cir. 2016)

⁴⁵⁸ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

⁴⁵⁹ *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

the aspiration of luxury houses to control the semiotic environment in which their signs operate and the legal system's continuing reluctance to transform every successful aesthetic choice into a perpetual private monopoly.

3.2 The Comparative Function of Case Law in Fashion Disputes

Any serious comparative enquiry into fashion disputes must begin from the recognition that fashion products are legally difficult objects because their value is often generated by the simultaneous operation of several functions. A garment, bag, shoe or logo can act at once as a material commodity, a sign of commercial origin, a communicative device, a cultural artefact, a marker of status, and an object of aesthetic consumption.^{460 461} The law, however, tends to divide these dimensions into separate doctrinal compartments. Copyright asks whether there is protectable expression distinct from utility; trade mark law asks whether the relevant feature identifies origin and is not barred by functionality or genericity; design law asks whether form is novel and individual; unfair competition asks whether market behaviour distorts competition by appropriation, deception or parasitism.^{462 463} Fashion litigation therefore rarely involves the simple application of one self-contained rule. More often, it forces courts to decide which legal description of the disputed feature should prevail. Comparative analysis is indispensable precisely because different systems answer that classificatory question in different ways: common-law systems often frame the problem through consumer confusion, functionality and evidentiary proof of acquired distinctiveness, whereas European and continental systems have been more open to the language of reputation, unfair advantage and parasitic conduct, albeit with significant internal variation and continuing concern about over-propertisation.⁴⁶⁴

In the United States, the doctrinal centre of gravity in fashion disputes remains the Lanham Act, complemented, where relevant, by the law of useful articles under copyright and by state-law unfair competition.^{465 466} What emerges from the jurisprudence is a structurally cautious approach to granting exclusive rights over design features that competitors may need in order to participate in the market. This caution is visible both in the persistence of functionality analysis and in the judicial insistence that trade marks are not designed to confer patents-by-another-name over attractive product features.⁴⁶⁷ The Second Circuit's decision in *Christian Louboutin v. Yves Saint Laurent* is exemplary in this respect. The court did not reject the possibility that a single colour could function as a trade mark in fashion; on the contrary, it recognised that Louboutin's lacquered red outsole had acquired secondary meaning. Yet it also limited the scope of protection by tying the sign to the condition of contrast between the red outsole and the rest of the shoe,

⁴⁶⁰ Buccafusco, C. and Fromer, J.C. (2017) 'Fashion's Function in Intellectual Property Law', *Notre Dame Law Review*, 93(1), pp. 51–108.

⁴⁶¹ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press

⁴⁶² Atkinson, V. and van Caenegem, W. (2019) 'The fashion sector: copyright, designs or unfair competition?', *Journal of Intellectual Property Law & Practice*, 14(3), pp. 214–222

⁴⁶³ Ciani Sciolla, J., Ghidini, G., Atkinson, V. and van Caenegem, W. (2019) 'A Comparative Study of Fashion and IP: Non-traditional Trademarks in Italy and Australia', *International Review of Intellectual Property and Competition Law*, 50(9), pp. 1101–1130.

⁴⁶⁴ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press

⁴⁶⁵ *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. (2017).

⁴⁶⁶ United States (2006, as amended) 15 U.S.C. § 1125(c).

⁴⁶⁷ Buccafusco, C. and Fromer, J.C. (2017) 'Fashion's Function in Intellectual Property Law', *Notre Dame Law Review*, 93(1), pp. 51–108

thereby refusing a monopoly over every monochromatic red shoe.⁴⁶⁸ The judgment is important because it neither embraces the district court's broad scepticism toward colour marks in fashion nor allows an unlimited appropriation of a visually desirable feature. Instead, it translates the problem into the language of secondary meaning, market recognition and competitive necessity, making clear that source-identification in fashion is possible but never doctrinally innocent.

A similarly revealing, though differently oriented, U.S. example is *Louis Vuitton v. My Other Bag*. At first instance and on appeal, the courts treated the defendant's canvas totes not as ordinary market substitutes but as products whose legal meaning depended upon parody and rhetorical inversion. The crucial judicial move was not to deny that the bags alluded to Louis Vuitton's marks, but to hold that they did so in a manner that simultaneously invoked and distanced the original.⁴⁶⁹ ⁴⁷⁰ The Second Circuit's formulation, borrowing from established parody doctrine, insisted that a successful parody communicates two contradictory messages at once: that it is the original and that it is not. That analysis mattered at three levels. First, in the infringement inquiry, differences in product format, market positioning and the paucity of convincing evidence of confusion weakened the plaintiff's claim. Secondly, in dilution, the parody was treated as falling within the statutory fair-use exclusion rather than as a mere attempt to freeride on prestige.⁴⁷¹ Thirdly, in copyright, the same parodic logic supported a finding of transformative use. From a comparative standpoint, the significance of the case lies in the fact that the U.S. courts accommodated symbolic contestation within the trademark framework itself. Luxury imagery was not treated as untouchable property simply because it was famous; its fame also made it legible as a target of humour.⁴⁷² ⁴⁷³

The European picture is at once adjacent to and sharply distinct from the American one. EU trade mark law has developed, especially through the Court of Justice, a particularly influential body of doctrine on marks with a reputation, unfair advantage, and the protection of communicative, advertising and investment functions.⁴⁷⁴ ⁴⁷⁵ ⁴⁷⁶ In *Adidas-Salomon v. Fitnessworld*, the Court already signalled that reputed marks could be protected even where the competing sign operated as an embellishment and not necessarily in a classically confusing manner.⁴⁷⁷ In *L'Oréal v. Bellure*, that trajectory was deepened decisively. The Court accepted that the use of comparison lists and similar packaging for "smell-alike" perfumes could amount to taking unfair advantage of the distinctive character or repute of a famous mark, even absent detriment or confusion in the strict sense.⁴⁷⁸ The notion that the junior user could be restrained for "riding on the coat-tails" of a reputed mark reflects an especially expansive European

⁴⁶⁸ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012)

⁴⁶⁹ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁴⁷⁰ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 674 F. App'x 16 (2d Cir. 2016)

⁴⁷¹ United States (2006, as amended) 15 U.S.C. § 1125(c).

⁴⁷² Malaurie-Vignal, M. and Legrand, S. (2019) 'Intellectual property law and parodies in the fashion industry', *Journal of Intellectual Property Law & Practice*, 14(6), pp. 459–471.

⁴⁷³ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 674 F. App'x 16 (2d Cir. 2016)

⁴⁷⁴ Basma, D. (2021) 'Dilution Versus Unfair Advantage: Myths and Realities', *International Review of Intellectual Property and Competition Law*, 52, pp. 1217–1257

⁴⁷⁵ European Union (2015) Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast), OJ L 336/1

⁴⁷⁶ European Union (2017) Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), OJ L 154/1

⁴⁷⁷ *Adidas-Salomon AG and Adidas Benelux BV v. Fitnessworld Trading Ltd*, Case C-408/01, EU:C:2003:582.

⁴⁷⁸ *L'Oréal SA and Others v. Bellure NV and Others*, Case C-487/07, EU:C:2009:378.

sensitivity to the misappropriation of brand aura.⁴⁷⁹ Academic commentary has repeatedly noted that this doctrine shifts trade mark law away from source confusion and toward a broader protection of goodwill, investment and symbolic capital. In fashion, where much of the value of a famous sign lies precisely in what it projects socially and culturally, that move has had obvious appeal for luxury houses and equally obvious implications for competition.^{480 481}

At the same time, European jurisprudence is not uniformly protectionist. The CJEU's 2018 *Louboutin* ruling concerning the Benelux registration of the red sole shows a more careful doctrinal operation. The Court did not simply ratify the luxury claimant's commercial interest. Instead, it framed the issue narrowly as one of whether a sign consisting of a colour applied to a specific part of a product was excluded from registration as a shape giving substantial value to the goods. By holding that the registration sought to protect not the shape of the sole but the application of a colour to a particular position, the Court avoided collapsing all position marks into the category of product shape.⁴⁸² This was not an endorsement of limitless non-traditional branding; rather, it clarified the boundaries of one exclusion ground while leaving untouched the broader requirements of distinctiveness and enforceability.⁴⁸³ A comparable caution can be observed in Italian commentary on *Gucci v. Guess*, where the Milan court's refusal, at first instance, to accept every ornamental similarity as infringement was read as an attempt to distinguish common fashion trends from protected signs.⁴⁸⁴ The Italian debate is particularly instructive because it connects formal intellectual property doctrine with the broader civilian tradition of unfair competition and parasitism, reminding us that fashion disputes are often understood not only as conflicts over exclusive rights but also as conflicts over acceptable market behaviour.^{485 486}

The comparative lesson that emerges from these authorities is not that one system protects fashion more and another less, but that they protect different interests through different doctrinal grammars. The U.S. case law tends to preserve a stronger discursive space for parody, market differentiation and anti-monopolistic anxiety around attractive product features; it continues to tie legitimacy largely to secondary meaning, likely confusion, transformation and functionality.⁴⁸⁷ The EU framework, by contrast, has created a more hospitable environment for claims based on reputational transfer and unfair advantage, particularly where famous luxury signs are

⁴⁷⁹ Mc Guinness, S. (2012) 'Observations on free riding after *L'Oréal v Bellure*', *Journal of Intellectual Property Law & Practice*, 7(12), pp. 890–899.

⁴⁸⁰ Basma, D. (2021) 'Dilution Versus Unfair Advantage: Myths and Realities', *International Review of Intellectual Property and Competition Law*, 52, pp. 1217–1257.

⁴⁸¹ *L'Oréal SA and Others v. Bellure NV and Others*, Case C-487/07, EU:C:2009:378.

⁴⁸² *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

⁴⁸³ Ciani Sciolla, J., Ghidini, G., Atkinson, V. and van Caenegem, W. (2019) 'A Comparative Study of Fashion and IP: Non-traditional Trademarks in Italy and Australia', *International Review of Intellectual Property and Competition Law*, 50(9), pp. 1101–1130.

⁴⁸⁴ Machnicka, A.A. (2013) 'The Italian voice in the *Gucci v Guess* saga: common trends versus infringement of IP fashion rights', *Journal of Intellectual Property Law & Practice*, 8(12), pp. 903–905.

⁴⁸⁵ Ciani Sciolla, J., Ghidini, G., Atkinson, V. and van Caenegem, W. (2019) 'A Comparative Study of Fashion and IP: Non-traditional Trademarks in Italy and Australia', *International Review of Intellectual Property and Competition Law*, 50(9), pp. 1101–1130.

⁴⁸⁶ Spolidoro, M.S. (2018) 'Concorrenza sleale, appropriazione del lavoro altrui e parassitismo', *Rivista di Diritto Industriale*, pp. 6–34.

⁴⁸⁷ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

concerned.^{488 489} Continental systems such as Italy further complicate the picture by retaining the behavioural vocabulary of parasitism and unfair competition, which may either supplement intellectual property rights or limit overbroad proprietary claims by insisting that not every aesthetic resemblance distorts competition.^{490 491} When read together, these comparative perspectives confirm a central proposition of this thesis: the legal treatment of look-alikes cannot be understood solely by asking whether two products look alike. One must also ask what kind of market meaning that similarity generates, which doctrinal category is mobilised to capture it, and how each jurisdiction chooses to balance exclusivity against imitation as an engine of fashion circulation.

3.3 The Role of Case Law in Fashion Law

The role of case law in fashion law is unusually central because the field remains, even today, only partially systematised at legislative level. Unlike sectors governed by highly specialised statutory regimes, fashion is regulated through a mosaic of generally worded rules that were not originally conceived with the specific semiotics and acceleration of fashion markets in mind. As a consequence, judicial decisions perform a constitutive function: they translate sector-specific disputes into legal categories and, in doing so, effectively define what fashion law is.^{492 493} This explains why the scholarship repeatedly treats landmark judgments not merely as examples but as moments of disciplinary formation.⁴⁹⁴ Case law supplies fashion law with its working concepts—distinctiveness, source significance, ornamentality, aesthetic functionality, substantial value, unfair advantage, parody, transformation, parasitism—and also with the practical thresholds through which those concepts become operable in disputes over bags, soles, patterns, packaging, slogans and garments.^{495 496} For an emerging field such as fashion law, therefore, judgments are not simply *ex post* resolutions of conflict; they are one of the principal mechanisms through which doctrinal coherence is created across otherwise fragmented areas of law.

A first and indispensable judicial function is classificatory. Courts in fashion disputes are constantly required to decide what, exactly, the disputed feature is in legal terms. The same visual element may be treated as a mere decorative detail, a trade mark, a component of trade

⁴⁸⁸ Basma, D. (2021) 'Dilution Versus Unfair Advantage: Myths and Realities', *International Review of Intellectual Property and Competition Law*, 52, pp. 1217–1257.

⁴⁸⁹ *L'Oréal SA and Others v. Bellure NV and Others*, Case C-487/07, EU:C:2009:378.

⁴⁹⁰ Atkinson, V. and van Caenegem, W. (2019) 'The fashion sector: copyright, designs or unfair competition?', *Journal of Intellectual Property Law & Practice*, 14(3), pp. 214–222.

⁴⁹¹ Ciani Sciolla, J., Ghidini, G., Atkinson, V. and van Caenegem, W. (2019) 'A Comparative Study of Fashion and IP: Non-traditional Trademarks in Italy and Australia', *International Review of Intellectual Property and Competition Law*, 50(9), pp. 1101–1130.

⁴⁹² Brewer, M.K. (2017) 'Fashion Law: More than Wigs, Gowns, and Intellectual Property', *San Diego Law Review*, 45, pp. 739–783.

⁴⁹³ Scafidi, S. (2019) 'Towards a Jurisprudence of Fashion', *Fordham Intellectual Property, Media & Entertainment Law Journal*, 29(2), pp. 429 ff.

⁴⁹⁴ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press.

⁴⁹⁵ European Union (2015) Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast), OJ L 336/1.

⁴⁹⁶ European Union (2017) Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), OJ L 154/1.

dress, a copyrightable graphic element, or a functional part of a useful article.⁴⁹⁷ The significance of this classificatory activity can hardly be overstated, because it determines not only the applicable doctrine but also the duration, scope and policy logic of protection. *Star Athletica* illustrates the point in the copyright context: the question was not whether the cheerleading uniform designs were aesthetically valuable, but whether their pictorial and graphic features could be identified separately from, and exist independently of, the useful article.⁴⁹⁸ Louboutin presented a parallel problem in trade mark law: was the red sole merely an attractive aesthetic component of footwear, or had it become a source-indicator with legally cognisable secondary meaning?⁴⁹⁹ The CJEU's later intervention in *Van Haren* reframed the issue yet again by asking whether the sign should be analysed as a prohibited shape or as a permissible colour-position mark.⁵⁰⁰ These disputes demonstrate that case law does not merely enforce rights once clearly identified; its prior labour is to decide what kind of right, if any, the fashion claimant is actually asserting.

A second function is one of normative balancing. Fashion law sits at the intersection of values that are individually familiar to intellectual property law but collectively intensified in the fashion sector: creative incentive, fair competition, expressive freedom, consumer information, investment protection, market dynamism, and access to a shared visual culture. Judicial reasoning is where these values are concretely weighed against one another. The debate between the “piracy paradox” thesis and scholars who favour tailored protection against close copying captures the tension well.^{501 502} On one side lies the argument that copying may hasten diffusion, induce obsolescence and stimulate further cycles of innovation; on the other lies the contention that uncontrolled close copying can undercut incentives, distort market rewards and privilege parasitic appropriation over genuine differentiation. Courts do not usually announce that they are arbitrating between these grand theories, but cases such as *L'Oréal v. Bellure*, *My Other Bag* and *Louboutin* reveal that they do exactly that.^{503 504 505} When a court expands protection for reputed marks against aura-transfer, it strengthens the investment and anti-parasitism rationale.⁵⁰⁶ When it recognises parody or limits a fashion colour mark to a narrower zone of use, it preserves space for competition and cultural commentary. Case law thus gives operational form to the policy struggles that academic debate identifies only at a higher level of abstraction.

A third function is temporal and strategic. Fashion markets move quickly, but legal categories acquire authority slowly, often through repeated litigation and incremental judicial clarification.

⁴⁹⁷ Buccafusco, C. and Fromer, J.C. (2017) ‘Fashion’s Function in Intellectual Property Law’, *Notre Dame Law Review*, 93(1), pp. 51–108.

⁴⁹⁸ *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. (2017).

⁴⁹⁹ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

⁵⁰⁰ *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423

⁵⁰¹ Hemphill, C.S. and Suk, J.C. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

⁵⁰² Raustiala, K. and Sprigman, C.J. (2006) ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Virginia Law Review*, 92(8), pp. 1687–1777.

⁵⁰³ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁵⁰⁴ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

⁵⁰⁵ *L'Oréal SA and Others v. Bellure NV and Others*, Case C-487/07, EU:C:2009:378.

⁵⁰⁶ Basma, D. (2021) ‘Dilution Versus Unfair Advantage: Myths and Realities’, *International Review of Intellectual Property and Competition Law*, 52, pp. 1217–1257.

⁵⁰⁷ ⁵⁰⁸ This temporal mismatch has two consequences. First, it means that individual garments may be commercially obsolete by the time a dispute is resolved, which partly explains the attractiveness of trade marks and other rights capable of attaching to enduring brand signifiers rather than season-specific designs. ⁵⁰⁹ Secondly, it means that the *ex ante* value of litigation often lies less in rescuing a single product cycle than in establishing doctrinal capital for future controversies. A judgment may change how brands register signs, design collections, draft enforcement letters, negotiate settlements or assess the legal risk of quotation, homage and adaptation. Yet the same temporal dynamic also produces inequality. As empirical and comparative scholarship has stressed, uncertainty is particularly burdensome for smaller and emerging designers, who lack the resources to generate evidence-intensive protection strategies or to sustain lengthy litigation in multiple jurisdictions. ⁵¹⁰ Case law therefore structures the fashion field strategically, but it does so asymmetrically: it is a source of legal clarity and deterrence for powerful houses, while remaining expensive and often inaccessible for those actors most vulnerable to appropriation. ⁵¹¹

A fourth function is expressive and constitutional in character. Fashion disputes are rarely exhausted by economics alone because they concern signs that circulate publicly and acquire meaning through imitation, distinction, irony and critique. ⁵¹² ⁵¹³ The judicial treatment of parody in *My Other Bag* shows that courts can recognise that reference to a luxury mark may itself be culturally productive, not merely commercially exploitative. ⁵¹⁴ ⁵¹⁵ More recent scholarship on artistic use, trademark parody and upcycling similarly suggests that fashion law increasingly confronts practices that are neither straightforwardly infringing nor straightforwardly immune, but occupy intermediate zones where reuse, commentary and branding overlap. ⁵¹⁶ In this setting, case law can act as a safeguard against the transformation of trade mark law into a general right to control all downstream meanings of a famous sign. At the same time, it can also legitimate expansive enforcement when the reference is treated as a thin disguise for promotional appropriation. The importance of judicial reasoning lies precisely in the fact that statutes rarely offer sufficiently nuanced guidance for these mixed cases. Courts must therefore decide whether the use is perceived as a badge of source, a decorative feature, a joke, a commentary, or a reworked object within sustainability-oriented circular practices. In fashion law, then, case law

⁵⁰⁷ Janssens, A. and Lavanga, M. (2020) 'An Expensive, Confusing, and Ineffective Suit of Armor: Investigating Risks of Design Piracy and Perceptions of the Design Rights Available to Emerging Fashion Designers in the Digital Age', *Fashion Theory*, 24(2), pp. 1–32

⁵⁰⁸ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press.

⁵⁰⁹ Ciani Sciolla, J., Ghidini, G., Atkinson, V. and van Caenegem, W. (2019) 'A Comparative Study of Fashion and IP: Non-traditional Trademarks in Italy and Australia', *International Review of Intellectual Property and Competition Law*, 50(9), pp. 1101–1130.

⁵¹⁰ Janssens, A. and Lavanga, M. (2020) 'An Expensive, Confusing, and Ineffective Suit of Armor: Investigating Risks of Design Piracy and Perceptions of the Design Rights Available to Emerging Fashion Designers in the Digital Age', *Fashion Theory*, 24(2), pp. 1–32.

⁵¹¹ Adler, A.M. and Fromer, J.C. (2019) 'Taking Intellectual Property into Their Own Hands', *California Law Review*, 107(5), pp. 1455

⁵¹² Malaurie-Vignal, M. and Legrand, S. (2019) 'Intellectual property law and parodies in the fashion industry', *Journal of Intellectual Property Law & Practice*, 14(6), pp. 459–471.

⁵¹³ Duhanic, I. (2024) 'The Artistic Use Defence in Trademark Dilution Cases – Hermès' Legal Setback in Its Attempt to Prevent Others from Using Its Iconic Birkin Handbag', *GRUR International*, 73(5), pp. 421–427.

⁵¹⁴ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁵¹⁵ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 674 F. App'x 16 (2d Cir. 2016)

⁵¹⁶ Senftleben, M. (2024) 'Developing Defences for Fashion Upcycling in EU Trademark Law', *GRUR International*, 73(2), pp. 99–110.

protects not only economic ordering but also the breathing space necessary for visual dialogue within a sign-saturated market.

Finally, case law plays an integrative role in the transnational formation of fashion law. Even where precedent has different formal status across legal traditions, judges, litigants and scholars read fashion decisions comparatively because the commercial field itself is transnational.^{517 518 519} A luxury sign launched in Paris, sold in Milan, parodied in New York and circulated through digital platforms addresses a market that is already cross-border before the law begins to classify it. Judicial decisions therefore travel intellectually even when they do not travel formally. U.S. debates on functionality, EU debates on unfair advantage, and civilian debates on parasitism increasingly appear side by side in both scholarship and litigation strategy.^{520 521} This has produced a body of fashion law that is neither fully harmonised nor purely local, but dialogic. Its openness is intellectually fruitful, yet it also contains a warning. When case law becomes the principal engine of legal development, there is a risk that doctrinal evolution will be driven disproportionately by the enforcement priorities of large brands, by expensive headline litigation, and by the symbolic power of famous marks. The critical task is thus not to deny the centrality of case law, but to recognise both its creative and its distributive effects. The ultimate argument of this chapter is that fashion law is judicially constructed in a double sense: courts build its categories, and they also shape the competitive conditions under which those categories will matter.^{522 523 524}

3.4 Case study: Louis Vuitton v. My Other Bag

Section 3.3 turns from the general doctrinal discussion developed in the preceding parts of this chapter to a concrete judicial controversy that exposes, with unusual clarity, the tensions between exclusivity, humour, and market differentiation in contemporary fashion law. The dispute between Louis Vuitton and My Other Bag is especially significant because it did not concern a straightforward counterfeit or a clandestine appropriation of brand indicia⁵²⁵, but rather a conspicuously playful commercial use of luxury symbolism.⁵²⁶ In that sense, the case provides an ideal lens through which to examine how trade mark law reacts when the alleged infringer simultaneously borrows, comments upon, and distances itself from the symbolic capital of a

⁵¹⁷ Scafidi, S. (2019) 'Towards a Jurisprudence of Fashion', *Fordham Intellectual Property, Media & Entertainment Law Journal*, 29(2), pp. 429

⁵¹⁸ Atkinson, V. and van Caenegem, W. (2019) 'The fashion sector: copyright, designs or unfair competition?', *Journal of Intellectual Property Law & Practice*, 14(3), pp. 214–222

⁵¹⁹ Basma, D. (2021) 'Dilution Versus Unfair Advantage: Myths and Realities', *International Review of Intellectual Property and Competition Law*, 52, pp. 1217–1257

⁵²⁰ Spolidoro, M.S. (2018) 'Concorrenza sleale, appropriazione del lavoro altrui e parassitismo', *Rivista di Diritto Industriale*, pp. 6–34

⁵²¹ Mc Guinness, S. (2012) 'Observations on free riding after L'Oréal v Bellure', *Journal of Intellectual Property Law & Practice*, 7(12), pp. 890–899

⁵²² Scafidi, S. (2019) 'Towards a Jurisprudence of Fashion', *Fordham Intellectual Property, Media & Entertainment Law Journal*, 29(2), pp. 429

⁵²³ Atkinson, V. and van Caenegem, W. (2019) 'The fashion sector: copyright, designs or unfair competition?', *Journal of Intellectual Property Law & Practice*, 14(3), pp. 214–222

⁵²⁴ Spolidoro, M.S. (2018) 'Concorrenza sleale, appropriazione del lavoro altrui e parassitismo', *Rivista di Diritto Industriale*, pp. 6–34

⁵²⁵ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁵²⁶ Machnicka, A.A. (2016) 'Louis Vuitton does not laugh at its bags' parody', *Journal of Intellectual Property Law & Practice*, 11(5), pp. 324–326

famous mark.⁵²⁷ It is precisely this coexistence of appropriation and disavowal that makes the decision important for fashion law: the court was required to assess not only similarity and market effects, but also the semiotic function of the contested use in a field in which value is generated as much by image and cultural meaning as by material fabrication.⁵²⁸

The facts of the litigation are by now well known. My Other Bag, founded in 2011, marketed relatively inexpensive canvas tote bags bearing the phrase “My Other Bag ...” on one side and simplified, cartoon-like renderings of famous luxury handbags on the other, including designs evidently evocative of Louis Vuitton’s Toile Monogram, Monogram Multicolour e, and Damier motifs. Louis Vuitton instituted proceedings in the Southern District of New York in 2014, alleging federal trade mark infringement, federal and New York dilution, and copyright infringement.⁵²⁹ The contrast between the parties’ products was stark: Louis Vuitton’s handbags were sold as highly curated luxury goods at prices reaching into the hundreds or thousands of dollars, whereas My Other Bag’s totes retailed for roughly thirty to fifty-five dollars and were promoted as practical carriers for groceries, gym clothing, or beach items.⁵³⁰ The disparity of price, materiality, and retail presentation mattered profoundly because it framed the judicial inquiry around symbolic evocation rather than market substitution.^{531 532}

At the doctrinal level, the case sits at the intersection of two bodies of trade mark law that are often discussed together but are analytically distinct: infringement, which turns on likely confusion, and dilution by blurring, which protects famous marks even absent confusion.⁵³³ Under the Trademark Dilution Revision Act, parody appears within the statutory fair use safe harbour, yet not as an autonomous and absolute “right to parody”; rather, it functions as a structured limit upon dilution claims where the challenged use does not serve as a designation of source for the user’s own goods.⁵³⁴ Courts therefore confront a recurrent paradox: parody must call the mark to mind strongly enough to be recognisable, but if it does so too faithfully it may begin to look confusing or source-indicating. This paradox had already been explored in earlier decisions such as *Haute Diggity Dog* and *Hormel*^{535 536}, and the *My Other Bag* litigation effectively required the Southern District of New York to determine whether fashion parody sold as merchandise could inhabit that narrow doctrinal space without collapsing into actionable free-riding.⁵³⁷

⁵²⁷ Hemphill, C.S. and Suk, J.C. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

⁵²⁸ Raustiala, K. and Sprigman, C.J. (2006) ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Virginia Law Review*, 92(8), pp. 1687–1777.

⁵²⁹ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 674 F. App’x 16 (2d Cir. 2016), cert. denied, 138 S. Ct. 221 (2017).

⁵³⁰ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁵³¹ Machnicka, A.A. (2016) ‘Louis Vuitton does not laugh at its bags’ parody’, *Journal of Intellectual Property Law & Practice*, 11(5), pp. 324–326.

⁵³² Hemphill, C.S. and Suk, J.C. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

⁵³³ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁵³⁴ Emerson, P. (2011) “‘I’m Litigatin’ It’: Infringement, Dilution, and Parody Under the Lanham Act”, *Northwestern Journal of Technology and Intellectual Property*, 9(7), pp. 477–500.

⁵³⁵ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

⁵³⁶ *Hormel Foods Corp. v. Jim Henson Productions, Inc.*, 73 F.3d 497 (2d Cir. 1996).

⁵³⁷ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

Judge Furman's opinion is notable for its refusal to treat parody as a marginal or decorative consideration. Instead, parody structured the court's entire understanding of how the bags communicated with consumers. Drawing on established authority, the court accepted that a successful trade mark parody conveys two simultaneous and contradictory messages: first, that the target mark is being invoked; second, that the invoking product is not the original, but a joke about it.^{538 539} My Other Bag's totes were found to satisfy this criterion because the slogan itself referred to an absent "other" bag, while the rendered bag-within-a-bag image used simplified graphics and substitutions such as "MOB" in place of "LV". Importantly, the court also rejected Louis Vuitton's argument that a parody must be hostile, biting, or disparaging. A gentle joke, or even an implied compliment, remains a parody if it places symbolic distance between itself and the brand.⁵⁴⁰ This aspect of the judgment is doctrinally important because it prevents luxury rights holders from redefining trade mark parody according to their own threshold of acceptable wit.⁵⁴¹

The dilution analysis is particularly revealing for fashion law because it places pressure on the assumption that every unauthorised evocation of a famous luxury mark necessarily weakens it. The court accepted, as it could hardly avoid, that Louis Vuitton's marks were exceptionally famous and that My Other Bag intended consumers to associate the totes with Louis Vuitton. Yet the mere generation of association was held insufficient. Dilution by blurring requires likely impairment of distinctiveness, not simply recognisability⁵⁴². On the facts, the court reasoned that the obvious humour, visual simplification, and marked commercial distance of the totes made impairment unlikely⁵⁴³; indeed, the opinion suggested that the parody might reinforce the fame and singularity of the Louis Vuitton brand by presupposing that consumers instantly recognise the original⁵⁴⁴. From a theoretical perspective, this is crucial: in highly symbolic markets, the invocation of a mark can function less as erosion than as confirmation of its cultural salience.⁵⁴⁵ The decision thus challenges a maximalist vision of dilution as a universal anti-reference right.

The infringement claim required the court to transpose parody into the familiar Polaroid framework⁵⁴⁶, thereby illustrating how expressive context can reshape an otherwise orthodox confusion inquiry. While Louis Vuitton's marks were undoubtedly strong, the court treated that very strength as making parody possible and confusion less likely, because consumers confronted with a famous mark in an obviously altered and jokey format were more, not less, likely to perceive the difference.⁵⁴⁷ Similarity, too, was considered in totality rather than atomistically. Although the rendered designs intentionally recalled Louis Vuitton bags, their "cartoonish" execution, the replacement of core elements, the slogan on the reverse side, and the utilitarian canvas medium all created an overall appearance fundamentally unlike a Louis Vuitton

⁵³⁸ Louis Vuitton Malletier, S.A. v. My Other Bag, Inc., 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁵³⁹ Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252 (4th Cir. 2007)

⁵⁴⁰ Machnicka, A.A. (2016) 'Louis Vuitton does not laugh at its bags' parody', *Journal of Intellectual Property Law & Practice*, 11(5), pp. 324–326

⁵⁴¹ Dogan, S.L. and Lemley, M.A. (2013) 'Parody as Brand', *UC Davis Law Review*, 47, pp. 473–512

⁵⁴² Emerson, P. (2011) "'I'm Litigatin' It": Infringement, Dilution, and Parody Under the Lanham Act', *Northwestern Journal of Technology and Intellectual Property*, 9(7), pp. 477–500.

⁵⁴³ Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252 (4th Cir. 2007).

⁵⁴⁴ Dogan, S.L. and Lemley, M.A. (2013) 'Parody as Brand', *UC Davis Law Review*, 47, pp. 473–512

⁵⁴⁵ Dogan, S.L. and Lemley, M.A. (2013) 'Parody as Brand', *UC Davis Law Review*, 47, pp. 473–512

⁵⁴⁶ Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492 (2d Cir. 1961)

⁵⁴⁷ Dogan, S.L. and Lemley, M.A. (2013) 'Parody as Brand', *UC Davis Law Review*, 47, pp. 473–512

handbag.⁵⁴⁸ The proximity of the goods, their channels of trade, and their price points also militated against confusion. This part of the judgment is significant because it shows that in fashion litigation the meaning of visual similarity cannot be isolated from the surrounding sign system through which consumers read luxury and non-luxury objects.⁵⁴⁹

Equally important is the court's rejection of Louis Vuitton's attempt to invoke post-sale confusion.⁵⁵⁰ Luxury trade mark litigation frequently turns upon the possibility that third-party observers, rather than purchasers, may misread a product in social circulation and thus confer unearned prestige upon the junior user.⁵⁵¹ The Southern District was not prepared to extend that logic to the My Other Bag totes. It emphasised that post-sale confusion has ordinarily been recognised in the context of knock-offs, where the defendant strives to simulate the original as closely as possible.⁵⁵² My Other Bag, by contrast, highlighted dissimilarity: a plain tote bag, overtly branded as "My Other Bag", sold for a tiny fraction of the price, and intended to be used in precisely the quotidian contexts from which luxury handbags are often symbolically insulated.⁵⁵³ The judgment therefore refused to let prestige-based theories of confusion swallow the distinction between imitation and commentary.⁵⁵⁴ In doing so, it preserved a space for cultural reference and satire within commercial fashion discourse.

The appellate disposition in the Second Circuit, though brief, is jurisprudentially consequential because it affirmed the central insight of the district court without attempting to retreat into procedural caution. The court endorsed the proposition that the "gentle" character of the joke did not deprive it of parodic status and accepted that the combination of the slogan and the conscious departure from Louis Vuitton's luxury image sufficiently communicated both reference and non-identity.⁵⁵⁵ That affirmation matters because brand owners commonly argue that commercial parodies are not really jokes at all, but merely devices for exploiting goodwill.⁵⁵⁶ The Second Circuit's approach instead acknowledged what scholarship has increasingly emphasised: commercial and expressive functions are not mutually exclusive.⁵⁵⁷ A product can be sold for profit and still convey satire, social commentary, or humorous displacement.⁵⁵⁸ In fashion markets, where signs are themselves commercialised aesthetic statements, that recognition is indispensable if trade mark law is to avoid collapsing into a regime of total semiotic enclosure.

From a critical viewpoint, the case illuminates the limits of aggressive luxury-brand enforcement. Louis Vuitton presented the litigation as a defence of famous marks against dilution

⁵⁴⁸ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁵⁴⁹ Kim, W. and Ha-Brookshire, J.E. (2026) 'What makes it a dupe? Exploring consumer understanding of legally copied products in the fashion industry', *Fashion and Textiles*, 13, article 4.

⁵⁵⁰ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016)

⁵⁵¹ *Hermès International v. Lederer de Paris Fifth Avenue, Inc.*, 219 F.3d 104 (2d Cir. 2000).

⁵⁵² *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961).

⁵⁵³ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016)

⁵⁵⁴ Kim, W. and Ha-Brookshire, J.E. (2026) 'What makes it a dupe? Exploring consumer understanding of legally copied products in the fashion industry', *Fashion and Textiles*, 13, article 4.

⁵⁵⁵ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 674 F. App'x 16 (2d Cir. 2016), cert. denied, 138 S. Ct. 221 (2017)

⁵⁵⁶ Emerson, P. (2011) "'I'm Litigatin' It": Infringement, Dilution, and Parody Under the Lanham Act', *Northwestern Journal of Technology and Intellectual Property*, 9(7), pp. 477–500.

⁵⁵⁷ Dogan, S.L. and Lemley, M.A. (2013) 'Parody as Brand', *UC Davis Law Review*, 47, pp. 473–512.

⁵⁵⁸ Machnicka, A.A. (2016) 'Louis Vuitton does not laugh at its bags' parody', *Journal of Intellectual Property Law & Practice*, 11(5), pp. 324–326..

and confusion⁵⁵⁹, but the judicial response suggested that over-assertion may itself distort the normative purposes of trade mark law.⁵⁶⁰ Fashion brands operate through carefully curated narratives of rarity, exclusivity, and aspirational consumption;⁵⁶¹ parody that invokes those narratives may be uncomfortable, yet discomfort alone is not a legally cognisable injury. Scholars have therefore read the case as a rebuke to the use of trade mark doctrine as an instrument of image control detached from consumer deception or real competitive harm.⁵⁶² The broader fashion-law implication is that the legal system may be willing to protect the economic value of a luxury sign, but not the broader ambition to monopolise all cultural references to its prestige.⁵⁶³ In this respect, My Other Bag becomes part of a longer debate about whether luxury trade mark litigation is sometimes less about protecting source identification than about policing symbolic hierarchy.

The case also has a comparative resonance beyond the American parody doctrine. In several European jurisdictions, trade mark parody has traditionally lacked the same explicit statutory visibility that it enjoys under the TDRA, and the accommodation of humour has often been channelled through broader doctrines concerning due cause, freedom of expression, unfair competition, or proportionality.⁵⁶⁴ Comparative scholarship on fashion parody has consequently noted that the American willingness to integrate parody directly into confusion and dilution analysis is relatively distinctive, especially where the parody is embodied in a commercialised fashion article rather than in an overtly artistic work.⁵⁶⁵ My Other Bag therefore represents a comparatively liberal moment in fashion trade mark law: not because it creates immunity for all humorous uses, but because it insists that luxury symbolism remains part of a wider cultural vocabulary.⁵⁶⁶ The significance of this position should not be underestimated in a sector where the value of signs derives precisely from their public recognisability and social circulation.⁵⁶⁷

That does not mean, however, that the decision weakens trade mark protection in any general sense. The judgment should instead be read as drawing a boundary. Had My Other Bag offered products more closely approximating Louis Vuitton's material quality, retail environment, or prestige-signalling function, the result might plausibly have differed.⁵⁶⁸ The court's reasoning depended heavily on the comic dissonance between the products: the fact that the tote was, in essence, the antithesis of a Louis Vuitton handbag.⁵⁶⁹ This is why the case is best understood not

⁵⁵⁹ Dogan, S.L. and Lemley, M.A. (2013) 'Parody as Brand', *UC Davis Law Review*, 47, pp. 473–512

⁵⁶⁰ Machnicka, A.A. (2016) 'Louis Vuitton does not laugh at its bags' parody', *Journal of Intellectual Property Law & Practice*, 11(5), pp. 324–326.

⁵⁶¹ Hemphill, C.S. and Suk, J.C. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

⁵⁶² Raustiala, K. and Sprigman, C.J. (2006) 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), pp. 1687–1777.

⁵⁶³ Hemphill, C.S. and Suk, J.C. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

⁵⁶⁴ Malaurie-Vignal, M. and Legrand, S. (2019) 'Intellectual property law and parodies in the fashion industry', *Journal of Intellectual Property Law & Practice*, 14(6), pp. 459–471

⁵⁶⁵ Dogan, S.L. and Lemley, M.A. (2013) 'Parody as Brand', *UC Davis Law Review*, 47, pp. 473–512.

⁵⁶⁶ Hemphill, C.S. and Suk, J.C. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

⁵⁶⁷ Raustiala, K. and Sprigman, C.J. (2006) 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), pp. 1687–1777.

⁵⁶⁸ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

⁵⁶⁹ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

as a victory of “free speech” over trade marks in the abstract, but as a fact-sensitive statement that humour, distance, and market differentiation can neutralise confusion and blurring. For fashion law, the lesson is that parody is strongest where it openly inhabits a different register of consumption from the luxury object that it references.⁵⁷⁰ Once proximity increases, the legal tolerance for humorous borrowing is likely to contract sharply.⁵⁷¹

Ultimately, the jurisprudential importance of *Louis Vuitton v My Other Bag* lies in its refusal to treat the luxury mark as legally invulnerable merely because it is culturally powerful. The case demonstrates that the strength of a fashion mark can operate in two directions: it justifies heightened concern about misappropriation, but it also makes parody legible and therefore less confusing. In doctrinal terms, the decision clarifies that association is not the same as impairment, and that intentional evocation is not identical to unlawful designation of source.⁵⁷²
⁵⁷³ In theoretical terms, it confirms that fashion trade marks participate in cultural communication, and that courts cannot evaluate them solely as inert badges of origin detached from humour, status performance, and social commentary.⁵⁷⁴ Section 3.3 therefore occupies a pivotal place in this chapter’s broader argument: it shows that case law in fashion does not merely apply pre-existing rules to garments and accessories, but actively reveals the limits of those rules when legal protection collides with the communicative excess of luxury culture.⁵⁷⁵

3.5 Case study: Christian Louboutin and the red sole trademark

Section 3.4 addresses a very different, but equally emblematic, problem in fashion law: whether a single colour applied to a particular part of a fashion product can function as a legally protectable trade mark without granting an undue monopoly over aesthetically valuable design features.⁵⁷⁶⁵⁷⁷ The litigation surrounding Christian Louboutin’s red sole has become canonical because it condenses within one dispute many of the structural tensions at the heart of fashion branding: the relationship between ornament and source indication, the operation of acquired distinctiveness, the reach of aesthetic functionality, and the market consequences of awarding exclusivity over a sign whose expressive force depends upon visual immediacy.⁵⁷⁸ If *Louis Vuitton v My Other Bag* involved the permissibility of humorous reference to a famous mark, the Louboutin litigation concerns the anterior question of how a fashion sign becomes famous,

⁵⁷⁰ Emerson, P. (2011) “‘I’m Litigatin’ It’: Infringement, Dilution, and Parody Under the Lanham Act’, *Northwestern Journal of Technology and Intellectual Property*, 9(7), pp. 477–500.

⁵⁷¹ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What makes it a dupe? Exploring consumer understanding of legally copied products in the fashion in

⁵⁷² *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁵⁷³ *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 674 F. App’x 16 (2d Cir. 2016), cert. denied, 138 S. Ct. 221 (2017).

⁵⁷⁴ Malaurie-Vignal, M. and Legrand, S. (2019) ‘Intellectual property law and parodies in the fashion industry’, *Journal of Intellectual Property Law & Practice*, 14(6), pp. 459–471.

⁵⁷⁵ Hemphill, C.S. and Suk, J.C. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

⁵⁷⁶ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁵⁷⁷ Keating, B. and Coltman, T. (2009) ‘Marketing and the colour Defending single color trademarks’, *Journal of the Academy of Marketing Science*, 37(3), pp. 375–380.

⁵⁷⁸ Teilmann-Lock, S. and Petersen, T.B. (2018) ‘Louboutin’s red sole mark and the logics of fashion’, *Journal of Intellectual Property Law & Practice*, 13(11), pp. 890–895

legally cognisable, and judicially manageable in the first place.⁵⁷⁹ The red sole thus offers a paradigmatic example of fashion law's encounter with non-traditional trade marks.⁵⁸⁰

The commercial and legal history of the mark begins with Louboutin's adoption, from the early 1990s, of a glossy red outsole on women's high-heeled shoes, a feature that over time became strongly associated with the brand in elite fashion markets. On the strength of that association, Louboutin applied in March 2007 to register the sign in the United States, and the registration issued in January 2008, describing the mark as a lacquered red sole on footwear.⁵⁸¹ This history matters because under both American and European doctrine colour marks generally cannot rely on inherent distinctiveness; they must be shown to have become source-identifying through sustained commercial use, publicity, and consumer recognition.⁵⁸² ⁵⁸³ The red sole therefore illustrates a foundational proposition of modern trade mark law: even a feature that appears initially decorative may, through market practice, come to function as a symbol of origin.⁵⁸⁴

The dispute with Yves Saint Laurent arose when YSL prepared to market a line of monochrome shoes in several single colours, including a shoe that was entirely red, with the upper, insole, heel, and outsole all rendered in the same shade.⁵⁸⁵ ⁵⁸⁶ Louboutin sought a preliminary injunction in the Southern District of New York, arguing that the red outsole infringed his registered mark. Judge Marrero denied the injunction and went further, suggesting that a single colour could never serve as a trade mark in the fashion industry because colour is too deeply embedded in the aesthetic and expressive vocabulary of fashion to be owned by one producer.⁵⁸⁷ Although the district court's instinct captured a genuine competition concern, its doctrinal formulation was excessively categorical. The problem was not that fashion exists outside trade mark law, but that trade mark law must calibrate protection in a way that preserves competition in aesthetically significant features.⁵⁸⁸

The Second Circuit's 2012 judgment is therefore pivotal. Relying on *Qualitex*, it rejected the district court's proposed per se exclusion of colour marks from the fashion field. The appellate court reaffirmed that the Lanham Act permits protection of colour alone where the colour has acquired secondary meaning and is non-functional.⁵⁸⁹ At the same time, the court refused to give Louboutin the unqualified monopoly he sought. Instead, pursuant to section 37 of the Lanham Act, it narrowed the registration to uses in which the red outsole contrasts with the colour of the upper. On that basis, the red sole remained valid, but YSL's monochrome red shoe lay outside the

⁵⁷⁹ *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

⁵⁸⁰ Keating, B. and Coltman, T. (2009) 'Marketing and the colour Defending single color trademarks', *Journal of the Academy of Marketing Science*, 37(3), pp. 375–380.

⁵⁸¹ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁵⁸² *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

⁵⁸³ Keating, B. and Coltman, T. (2009) 'Marketing and the colour Defending single color trademarks', *Journal of the Academy of Marketing Science*, 37(3), pp. 375–380.

⁵⁸⁴ *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

⁵⁸⁵ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁵⁸⁶ *Christian Louboutin S.A. et al. v. Yves Saint Laurent America, Inc. et al.*, 778 F. Supp. 2d 445 (S.D.N.Y. 2011).

⁵⁸⁷ Machnicka, A.A. (2012) 'Is a "red shoe sole" a valid trade mark?', *Journal of Intellectual Property Law & Practice*, 7(3), pp. 157–159.

⁵⁸⁸ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

⁵⁸⁹ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

modified scope of the mark.⁵⁹⁰ This judicial narrowing is perhaps the most important doctrinal feature of the case: rather than choosing between complete protection and complete invalidity, the court reformulated the sign so that it tracked the specific market meaning that the evidence actually supported.^{591 592}

The secondary-meaning analysis deserves careful attention because it reveals how courts convert fashion symbolism into legally tractable evidence. The Second Circuit emphasised the factors traditionally used to assess acquired distinctiveness: advertising expenditures, consumer studies, unsolicited media coverage, sales success, plagiarism by others, and length and exclusivity of use.⁵⁹³ The record, in the court's view, demonstrated extensive promotion, substantial commercial success, persistent media attention, and an established public association between the "flash" of a red sole and the Louboutin brand in the relevant high-fashion consumer segment.⁵⁹⁴ Yet the court also scrutinised the evidence closely enough to conclude that the acquired meaning was not unlimited. It was the contrast between red outsole and differently coloured upper, not redness in isolation across an entire monochrome shoe, that had become the relevant badge of origin.⁵⁹⁵ Thus, acquired distinctiveness was recognised, but only in the precise form in which the market had learned to read it.⁵⁹⁶

This limited recognition is deeply instructive for fashion law because it shows that source-identifying significance in fashion often attaches not to an abstract feature alone, but to a relational visual effect.⁵⁹⁷ The red sole "popped", as the district court had itself observed, because it contrasted with the rest of the shoe. The Second Circuit's reference to surveys and photographic evidence underscores that what consumers recognised was not a generic claim to red, but a particular aesthetic presentation: the unexpected flash of red beneath or behind a differently coloured upper.⁵⁹⁸ In other words, the protectable sign was a colour-position effect rather than a bare chromatic monopoly.⁵⁹⁹ This is a sophisticated judicial response to a recurrent problem in fashion branding. The law can acknowledge that consumers perceive a distinctive brand gesture while still insisting that the gesture be defined with enough precision to avoid swallowing a broader field of legitimate aesthetic variation.⁶⁰⁰

⁵⁹⁰ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁵⁹¹ *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205 (2000).

⁵⁹² *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

⁵⁹³ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995)

⁵⁹⁴ Keating, B. and Coltman, T. (2009) 'Marketing and the colour Defending single color trademarks', *Journal of the Academy of Marketing Science*, 37(3), pp. 375–380.

⁵⁹⁵ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁵⁹⁶ Johnson, P. (2024) 'Enhanced Distinctiveness and Why "Strong Marks" Are Causing Us All Confusion', *International Review of Intellectual Property and Competition Law*, 55, pp. 185–212

⁵⁹⁷ Teilmann-Lock, S. and Petersen, T.B. (2018) 'Louboutin's red sole mark and the logics of fashion', *Journal of Intellectual Property Law & Practice*, 13(11), pp. 890–895

⁵⁹⁸ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁵⁹⁹ Engels, G., Hofhuis, J. and Lehr, C. (2016) 'The local colour of colour marks', *Journal of Intellectual Property Law & Practice*, 11(8), pp. 628–639

⁶⁰⁰ *Libertel Groep BV v. Benelux-Merkenbureau*, Case C-104/01, EU:C:2003:244.

The functionality doctrine supplies the principal counterweight to such protection. As *Louboutin* made clear, two strands are relevant: utilitarian functionality and aesthetic functionality.⁶⁰¹ The former excludes features essential to use or affecting cost or quality⁶⁰²; the latter addresses aesthetically desirable features whose monopolisation would place competitors at a significant non-reputation-related disadvantage.⁶⁰³ The Second Circuit surveyed this doctrine extensively, recognising both the centrality and the controversy of aesthetic functionality in trade mark law.⁶⁰⁴ The case is therefore significant not only because of its holding, but because it dramatized a profound normative issue: in fashion, many of the very features that identify source also contribute to a product's desirability. This collapses the easy distinction between "branding" and "design" that trade mark doctrine often assumes in more utilitarian markets.⁶⁰⁵

The appellate court ultimately declined to decide whether the red sole mark, as modified, was functional, because YSL's monochrome shoe did not use the sign in its narrowed form.⁶⁰⁶ Even so, the opinion's structure suggests a deliberate compromise. By limiting the mark to contrasting uses, the court reduced the competitive burden that full protection might have imposed upon designers wishing to produce monochrome footwear, including monochrome red footwear.⁶⁰⁷ The judgment thus functioned as a partial answer to aesthetic functionality without pronouncing directly upon it.⁶⁰⁸ Critical commentary has rightly observed that this move was ingenious but not entirely eliminative of uncertainty. It avoided the hardest question—how far fashion should permit exclusivity over aesthetic signals that partly constitute the product's desirability—while nevertheless preserving a strong proprietary position for *Louboutin* in the most commercially salient instantiation of the sign. This is simultaneously the brilliance and the fragility of the decision.⁶⁰⁹

The European trajectory of the red sole dispute introduced a different doctrinal framework, centred not on the American language of aesthetic functionality, but on absolute grounds for refusal and invalidity concerning shapes that give substantial value to the goods.⁶¹⁰ In the Benelux system, *Louboutin* had registered a mark described as the colour red (Pantone 18-1663TP) applied to the sole of a shoe, with the contour of the shoe shown only to indicate positioning.⁶¹¹ When the Dutch retailer Van Haren sold women's high-heeled shoes with red soles, *Louboutin* sued for infringement; Van Haren responded that the mark was invalid because it consisted exclusively of a shape giving substantial value to the goods. The resulting reference to the Court of Justice of the European Union therefore required the Court to decide whether a

⁶⁰¹ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁶⁰² *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23 (2001)

⁶⁰³ Bone, R.G. (2015) 'Trademark Functionality Reexamined', *Journal of Legal Analysis*, 7(1), pp. 183–246

⁶⁰⁴ Mireles Jr., M.S. (2013) 'Aesthetic Functionality', *Texas Intellectual Property Law Journal*, 21(2), pp. 155–208.

⁶⁰⁵ *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23 (2001)

⁶⁰⁶ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁶⁰⁷ Teilmann-Lock, S. and Petersen, T.B. (2018) 'Louboutin's red sole mark and the logics of fashion', *Journal of Intellectual Property Law & Practice*, 13(11), pp. 890–895

⁶⁰⁸ Bone, R.G. (2015) 'Trademark Functionality Reexamined', *Journal of Legal Analysis*, 7(1), pp. 183–246.

⁶⁰⁹ Mireles Jr., M.S. (2013) 'Aesthetic Functionality', *Texas Intellectual Property Law Journal*, 21(2), pp. 155–208.

⁶¹⁰ Rosati, E. (2018) 'AG Szpunar confirms that there is a way out of invalidation for the *Louboutin* red sole trade mark', *Journal of Intellectual Property Law & Practice*, 13(7), pp. 518–520.

⁶¹¹ *Libertel Groep BV v. Benelux-Merkenbureau*, Case C-104/01, EU:C:2003:244.

mark combining colour and positional application on a product part should be characterised as a “shape” mark for the purposes of the exclusion.^{612 613}

In C-163/16, the Court of Justice held that a mark consisting of a colour applied to the sole of a shoe is not covered by the prohibition on registering signs consisting exclusively of shapes. The Court reasoned that although the shape of the sole provides the contour within which the colour is applied, the registration did not seek protection for the shape itself, but only for the application of the colour to a specific position on the product.⁶¹⁴ This formal distinction was decisive.⁶¹⁵ The ruling preserved the validity of the Benelux registration and confirmed that colour-position marks remain conceptually distinct from pure shape marks.⁶¹⁶ From the perspective of fashion law, the significance of the judgment lies not merely in the victory for Louboutin, but in the doctrinal pathway it opened for designers seeking to protect visually striking signatures that are neither conventional word marks nor product shapes in the narrow sense.⁶¹⁷

Yet the European outcome should not be misunderstood as an unqualified endorsement of broad proprietary control over colour in fashion. The Court’s reasoning resolved a classification issue⁶¹⁸; it did not abolish the deeper competition concerns that have long animated scepticism toward single-colour marks.⁶¹⁹ European scholarship has therefore emphasised that the red sole remains a difficult sign because its value is simultaneously reputational, aesthetic, and positional.⁶²⁰ As the wider European case law on colour marks already suggested in *Libertel* and subsequent decisions, the law remains anxious about colour depletion, about the need for precision through internationally recognised colour codes, and about preserving room for competitors in markets where aesthetic variation is central.⁶²¹ The result is a legal regime that formally accepts colour marks but subjects them to unusually exacting demands of definition and evidentiary substantiation.

A comparative assessment of the American and European approaches is instructive. In the United States, the red sole survived because the court reframed the mark around acquired distinctiveness and contrast, thereby narrowing the sign to the market meaning that evidence established. In the European Union, the mark survived because the Court of Justice declined to classify it as a prohibited shape mark, thereby preserving its eligibility for protection as a colour applied in a specific position. The doctrinal routes differ, but the structural pattern is similar: both systems were unwilling to grant a blanket monopoly over “red shoes”, yet both accepted

⁶¹² *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

⁶¹³ Engels, G., Hofhuis, J. and Lehr, C. (2016) ‘The local colour of colour marks’, *Journal of Intellectual Property Law & Practice*, 11(8), pp. 628–639.

⁶¹⁴ *Libertel Groep BV v. Benelux-Merkenbureau*, Case C-104/01, EU:C:2003:244.

⁶¹⁵ *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

⁶¹⁶ Gommers, C. (2014) ‘When a colour becomes a shape: Brussels Commercial Court annuls Louboutin’s red sole trade mark’, *Journal of Intellectual Property Law & Practice*, 9(9), pp. 705–706.

⁶¹⁷ Engels, G., Hofhuis, J. and Lehr, C. (2016) ‘The local colour of colour marks’, *Journal of Intellectual Property Law & Practice*, 11(8), pp. 628–639.

⁶¹⁸ *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

⁶¹⁹ *Libertel Groep BV v. Benelux-Merkenbureau*, Case C-104/01, EU:C:2003:244.

⁶²⁰ Teilmann-Lock, S. and Petersen, T.B. (2018) ‘Louboutin’s red sole mark and the logics of fashion’, *Journal of Intellectual Property Law & Practice*, 13(11), pp. 890–895.

⁶²¹ Engels, G., Hofhuis, J. and Lehr, C. (2016) ‘The local colour of colour marks’, *Journal of Intellectual Property Law & Practice*, 11(8), pp. 628–639.

that a carefully delimited fashion sign could function as an indicator of source.^{622 623} The contrast shows that non-traditional marks in fashion are not protected because courts have ceased to worry about competition; rather, they are protected only once courts can redefine them narrowly enough to render exclusivity tolerable.^{624 625}

For branding theory, the red sole exemplifies the enormous economic value of a visually minimal yet culturally saturated sign.⁶²⁶ A single glimpse of the outsole can operate as a compressed form of brand communication, allowing the product to remain recognisable even in the absence of visible logos.⁶²⁷ This is precisely why luxury houses seek protection for such features and precisely why courts must proceed cautiously.⁶²⁸ Strong marks perform a powerful informational function, but their strength also risks expanding the gravitational pull of trade mark law into domains better occupied by competitive design freedom.⁶²⁹ Recent scholarship on enhanced distinctiveness has shown that the rhetoric of “strong marks” can itself obscure the normative question of what kind of strength deserves reward and what kind threatens overreach.⁶³⁰ In fashion, where branding and aesthetic form are unusually entangled, that concern is acute.

The red sole litigation also carries implications for contemporary digital distribution and enforcement. In the joined Amazon references, the Court of Justice held that an operator of an online marketplace may, depending on the presentation of advertisements and the integration of third-party offers into its own commercial communication, be treated as using a sign identical to another’s trade mark.⁶³¹ Although those proceedings concerned intermediary liability rather than validity, they demonstrate the continuing operational life of the Louboutin mark beyond boutique retail and traditional competitor disputes.⁶³² The red sole is therefore not simply a symbol adjudicated once and fixed forever; it is a dynamic proprietary asset whose meaning and enforceability now extend into platform governance, online perception, and hybrid retail environments.⁶³³ The fashion-law significance of this development is substantial, because luxury branding today is inseparable from digital circulation and algorithmically mediated visibility.⁶³⁴

⁶²² *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁶²³ *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

⁶²⁴ *Libertel Groep BV v. Benelux-Merkenbureau*, Case C-104/01, EU:C:2003:244.

⁶²⁵ Engels, G., Hofhuis, J. and Lehr, C. (2016) ‘The local colour of colour marks’, *Journal of Intellectual Property Law & Practice*, 11(8), pp. 628–639.

⁶²⁶ Johnson, P. (2024) ‘Enhanced Distinctiveness and Why “Strong Marks” Are Causing Us All Confusion’, *International Review of Intellectual Property and Competition Law*, 55, pp. 185–212.

⁶²⁷ Teilmann-Lock, S. and Petersen, T.B. (2018) ‘Louboutin’s red sole mark and the logics of fashion’, *Journal of Intellectual Property Law & Practice*, 13(11), pp. 890–895.

⁶²⁸ Hemphill, C.S. and Suk, J.C. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

⁶²⁹ Bone, R.G. (2015) ‘Trademark Functionality Reexamined’, *Journal of Legal Analysis*, 7(1), pp. 183–246.

⁶³⁰ Johnson, P. (2024) ‘Enhanced Distinctiveness and Why “Strong Marks” Are Causing Us All Confusion’, *International Review of Intellectual Property and Competition Law*, 55, pp. 185–212.

⁶³¹ *Christian Louboutin v. Amazon Europe Core Sàrl and Others*, Joined Cases C-148/21 and C-184/21, EU:C:2022:1016.

⁶³² *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

⁶³³ Teilmann-Lock, S. and Petersen, T.B. (2018) ‘Louboutin’s red sole mark and the logics of fashion’, *Journal of Intellectual Property Law & Practice*, 13(11), pp. 890–895.

⁶³⁴ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What makes it a dupe? Exploring consumer understanding of legally copied products in the fashion industry’, *Fashion and Textiles*, 13, article 4.

In the final analysis, the Louboutin red sole cases reveal both the promise and the danger of trade mark law in fashion. They demonstrate that the law can recognise a fashion sign generated through advertising, reputation, and repeated aesthetic presentation, even where that sign consists of colour rather than word or logo.⁶³⁵ At the same time, they show that such recognition is sustainable only through delimitation: by tying protection to contrast, by insisting on precise representation, by preserving defences rooted in competition, and by resisting any transformation of trade mark law into a perpetual design right.⁶³⁶ The red sole thus stands as a partial victory for brand owners, but also as a doctrinal warning.⁶³⁷ Fashion law may protect the badge, yet it must not extinguish the visual commons from which fashion continually renews itself.⁶³⁸

3.6 Comparative analysis of imitation in the fashion industry

3.6.1 Converging premises and divergent grammars

Building on the comparative and case-study framework already developed in this chapter, the synthesis that now becomes possible is that imitation in fashion is never regulated as a merely visual fact; it is regulated as a legal translation of market meaning.^{639 640}

The central question is therefore not simply whether two products look alike, but whether the relevant similarity is being read, in a given institutional setting, as lawful trend participation, unlawful source misrepresentation, reputational free-riding, or anti-competitive parasitism. This is precisely why fashion disputes so often migrate across doctrinal boundaries: the same sign may appear, depending on the legal lens employed, as ornament, trade mark, design feature, joke, status signal, or competitive shortcut. The chapters preceding this section have already shown that the instability of fashion objects is not an incidental complication but the structural condition of fashion law itself. What comparative analysis now adds is the recognition that different legal systems do not merely reach different outcomes; they encode different normative anxieties. Some worry above all about consumer confusion, others about the misappropriation of reputation, and others still about the broader fairness of a strategy of systematic imitation. The comparative problem is thus not a binary one of stronger versus weaker protection, but one of selecting the doctrinal vocabulary through which the market significance of similarity will be made intelligible.^{641 642}

From that perspective, the distinction between the American and European approaches should not be overstated as a difference of simple intensity. The United States continues to organise

⁶³⁵ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012), amended, 709 F.3d 140 (2d Cir. 2013).

⁶³⁶ Teilmann-Lock, S. and Petersen, T.B. (2018) 'Louboutin's red sole mark and the logics of fashion', *Journal of Intellectual Property Law & Practice*, 13(11), pp. 890–895.

⁶³⁷ *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, EU:C:2018:423.

⁶³⁸ Bone, R.G. (2015) 'Trademark Functionality Reexamined', *Journal of Legal Analysis*, 7(1), pp. 183–246.

⁶³⁹ Hemphill, C.S. and Suk, J. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

⁶⁴⁰ Raustiala, K. and Sprigman, C.J. (2006) 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), pp. 1687–1777.

⁶⁴¹ Atkinson, V. and van Caenegem, W. (2019) 'The fashion sector: copyright, designs or unfair competition?', *Journal of Intellectual Property Law & Practice*, 14(3), pp. 214–222.

⁶⁴² Noto La Diega, G. (2019) 'Can the law fix the problems of fashion? An empirical study on social norms and power imbalance in the fashion industry', *Journal of Intellectual Property Law & Practice*, 14(1), pp. 18–24.

most fashion imitation disputes around the Lanham Act, with consumer confusion, secondary meaning, and functionality serving as the principal filters through which claims must pass.⁶⁴³ Even where courts accept expansive propositions—such as the protectability of a colour mark or the relevance of post-sale confusion—they typically do so by narrowing the relevant sign to the precise market meaning demonstrated by evidence. The European framework, by contrast, has been more willing to theorise the injury produced by imitation in terms of unfair advantage, detriment to repute, and the broader communicative and investment functions of reputed marks. Decisions such as *Adidas-Salomon* and *L'Oréal v Bellure* illustrate that the European legal order is prepared, under certain conditions, to restrain uses that do not fit neatly within a classic confusion paradigm, so long as the junior user is perceived as benefiting from the senior mark's symbolic capital.⁶⁴⁴ Yet even here the system is not unlimited: cases such as *Coty* and the later *Louboutin* litigation show a continuing insistence on doctrinal containment, precision, and proportionality.⁶⁴⁶ Comparative analysis therefore reveals two different grammars of control: one primarily confusion-centred and competition-sensitive, the other more explicitly attentive to aura-transfer and free-riding, but both ultimately concerned with avoiding the conversion of successful aesthetics into unrestricted private monopoly,

The case studies analysed in this chapter confirm that courts tend to protect luxury signs most confidently when the claimant can persuade the court that what is being copied is not style in the abstract, but a compact and recognisable code of origin. That proposition is visible in different ways across the chapter. In *Louis Vuitton v My Other Bag*, the defendant escaped liability not because the mark lacked power, but because the court concluded that its power remained legible despite the joke; the parody worked precisely because the famous sign was recognisable and because the consumer was expected to perceive distance rather than substitution.⁶⁴⁷ In the *Louboutin* litigation, the red sole survived only once it had been re-described as a delimited colour-position sign whose legal scope corresponded to the empirically proven conditions of acquired distinctiveness.⁶⁴⁹ Read together with the earlier *Gucci* analysis, the pattern becomes clear: luxury brands succeed most readily when the legal claim is tied to repeated, source-indicating elements—monograms, stripes, sole colours, signature placements—rather than to a broader aspiration to control the atmosphere or “look” of a collection as such.⁶⁵¹ In doctrinal terms, this suggests that fashion law remains more comfortable protecting brand choreography than design language. It will often defend the sign that condenses identity, but it remains uneasy when invited to protect the wider aesthetic field from which fashion itself draws

⁶⁴³ Beebe, B. (2006) ‘An Empirical Study of the Multifactor Tests for Trademark Infringement’, *California Law Review*, 94(6), pp. 1581–1654.

⁶⁴⁴ Court of Justice of the European Union (2009) *L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd*, Case C-487/07, Judgment of 18 June 2009, ECLI:EU:C:2009:378.

⁶⁴⁵ Court of Justice of the European Union (2003) *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd*, Case C-408/01, Judgment of 23 October 2003, ECLI:EU:C:2003:582.

⁶⁴⁶ Court of Justice of the European Union (2017) *Coty Germany GmbH v Parfümerie Akzente GmbH*, Case C-230/16, Judgment of 6 December 2017, ECLI:EU:C:2017:941.

⁶⁴⁷ *Louis Vuitton Malletier, S.A. v My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016).

⁶⁴⁸ *Louis Vuitton Malletier, S.A. v My Other Bag, Inc.*, 674 F. App'x 16 (2d Cir. 2016).

⁶⁴⁹ *Christian Louboutin S.A. v Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

⁶⁵⁰ Court of Justice of the European Union (2018) *Christian Louboutin and Christian Louboutin SAS v Van Haren Schoenen BV*, Case C-163/16, Judgment of 12 June 2018, ECLI:EU:C:2018:423.

⁶⁵¹ *Gucci America, Inc. v Guess?, Inc.*, 868 F. Supp. 2d 207 (S.D.N.Y. 2012).

its vitality. That unease is not a defect in the law; it is one of the mechanisms by which the law preserves fashion's dependence on circulation, variation, and referentiality.

A further comparative lesson concerns the instability of non-traditional and semiotic marks. The more a luxury house relies on a sign that is simultaneously aesthetic and source-indicative, the more the resulting litigation turns into an argument about where branding ends and design begins. The red sole is the most famous contemporary example, but the issue is broader than colour marks.⁶⁵² ⁶⁵³ Stripes, outsole flashes, recurring patterns, product contours, and even carefully managed retail imagery all reveal the same structural tension: in fashion, source significance commonly attaches to features that remain attractive independently of their trade mark function.⁶⁵⁴ This means that the doctrines of functionality, substantial value, and competitive necessity are not peripheral technicalities. They are the principal devices by which courts decide whether a proprietary claim remains compatible with the openness that aesthetic competition requires.⁶⁵⁵ The result is a form of conditional recognition. Courts may accept that a sign has become distinctive through extensive and disciplined use, but they will often rescue competition by narrowing the sign, by requiring exact definition, or by refusing to extend protection to adjacent aesthetic variants. In this sense, non-traditional fashion marks are protected not because courts have ceased to worry about overreach, but because they can be denied generality and tied to a carefully specified market meaning. The comparative significance of this point is considerable: it explains why fashion trade mark victories are often simultaneously doctrinal successes and evidential compromises.

The analysis also suggests that the legal treatment of imitation cannot be separated from the economic and cultural functions that copying performs in fashion markets. The “piracy paradox” literature remains indispensable here, not because it proves that copying is socially optimal in every instance, but because it explains why the complete elimination of imitation is neither feasible nor necessarily desirable in an industry driven by rapid trend diffusion, induced obsolescence, and layered market segmentation.⁶⁵⁶ More recent work on legally copied products—or “dupes”—shows that contemporaneous consumer culture continues to normalise forms of imitation that sit outside classical counterfeit paradigms, often treating them as savvy, lawful, or even democratising modes of consumption rather than obvious legal wrongs.⁶⁵⁷ This does not mean that luxury houses suffer no legally relevant harm. On the contrary, where value depends upon recognisable codes, controlled scarcity, and cumulative investment in brand aura, imitation may erode exclusivity, blur symbolic distinctions, and redistribute prestige.⁶⁵⁸ ⁶⁵⁹ Yet the comparative lesson is that the law responds unevenly because it must mediate two competing

⁶⁵² *Christian Louboutin S.A. v Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

⁶⁵³ Court of Justice of the European Union (2018) *Christian Louboutin and Christian Louboutin SAS v Van Haren Schoenen BV*, Case C-163/16, Judgment of 12 June 2018, ECLI:EU:C:2018:423.

⁶⁵⁴ *Gucci America, Inc. v Guess?, Inc.*, 868 F. Supp. 2d 207 (S.D.N.Y. 2012).

⁶⁵⁵ *Star Athletica, LLC v Varsity Brands, Inc.*, 580 U.S. 405 (2017).

⁶⁵⁶ Raustiala, K. and Sprigman, C.J. (2006) ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Virginia Law Review*, 92(8), pp. 1687–1777.

⁶⁵⁷ Kim, W. and Ha-Brookshire, J.E. (2026) ‘What makes it a dupe? Exploring consumer understanding of legally copied products in the fashion industry’, *Fashion and Textiles*, 13, Article 4.

⁶⁵⁸ Hemphill, C.S. and Suk, J. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

⁶⁵⁹ OECD and European Union Intellectual Property Office (2025) *Mapping Global Trade in Fakes 2025: Global Trends and Enforcement Challenges*. Paris: OECD Publishing.

truths: fashion depends upon imitation as a mechanism of circulation, but luxury depends upon selective legal control over the signs through which status and origin are made visible. That contradiction cannot be eliminated; it can only be managed. A convincing analysis of fashion imitation must therefore resist both absolutisms: the absolutism of maximal enforcement and the absolutism of laissez-faire copying,

The strongest conclusion to emerge from this comparative survey is therefore a negative one with positive implications: no single doctrine is capable of governing imitation in the fashion industry satisfactorily on its own.^{660 661} Trade mark infringement remains important but is often too narrow when confusion is difficult to establish; dilution can address aura-transfer but risks overextension when association is treated as injury per se;⁶⁶² design and copyright protections are useful but episodic and unevenly available; unfair competition and parasitism can capture systematic free-riding but may also generate unpredictability if their behavioural criteria are left under-theorised. The future of doctrinal coherence in fashion law is thus likely to depend less on the supremacy of one regime than on a more self-conscious articulation of the dividing line between protectable signification and non-protectable aesthetic reference.⁶⁶³ The comparative material examined in this thesis suggests that such an articulation should proceed from three propositions: first, that protection is strongest where the claimant can identify a stable, source-indicating sign rather than a diffuse style; secondly, that courts should remain wary of treating all evocative borrowing as reputational harm; and thirdly, that doctrines of unfair competition are most persuasive when they address organised strategies of cumulative appropriation rather than isolated similarities. Fashion imitation is therefore best understood not as a single legal problem, but as a spectrum of practices requiring differentiated legal responses calibrated to the kind of value being appropriated and the kind of competition being displaced

3.7 Future challenges for luxury brand protection

3.7.1 Digital circulation and platform governance

If the comparative analysis above clarifies the present architecture of fashion imitation disputes, the future challenges for luxury brand protection arise from a more difficult proposition: the signs at issue are now circulating through technical, commercial, and cultural environments that were not fully anticipated by the traditional doctrines discussed in Chapters 1 and 2. The final task of this thesis is therefore not to predict a single legal trajectory, but to identify the pressure points at which existing categories are likely to become less stable. Those pressure points are already visible. Institutional reports continue to show that counterfeit trade remains economically significant at a global scale, that fashion-related sectors remain especially exposed, and that online channels have intensified the speed and fragmentation with which infringing or look-alike

⁶⁶⁰ Atkinson, V. and van Caenegem, W. (2019) 'The fashion sector: copyright, designs or unfair competition?', *Journal of Intellectual Property Law & Practice*, 14(3), pp. 214–222.

⁶⁶¹ Noto La Diega, G. (2019) 'Can the law fix the problems of fashion? An empirical study on social norms and power imbalance in the fashion industry', *Journal of Intellectual Property Law & Practice*, 14(1), pp. 18–24.

⁶⁶² Court of Justice of the European Union (2009) *L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd*, Case C-487/07, Judgment of 18 June 2009, ECLI:EU:C:2009:378.

⁶⁶³ Senftleben, M. (2024) 'Developing Defences for Fashion Upcycling in EU Trademark Law', *GRUR International*, 73(2), pp. 99–110.

products reach consumers.^{664 665} At the same time, current scholarship in fashion law increasingly treats the field as one in which intellectual property, platform governance, sustainability, digital authentication, and emerging technologies no longer operate as separate conversations.⁶⁶⁶ For luxury houses, this means that “brand protection” can no longer be understood solely as the policing of marks, designs, or individual acts of copying. It has become a broader governance problem involving data, logistics, intermediation, consumer perception, circularity, and the allocation of enforcement costs across public and private actors.

The first and most immediate challenge is the migration of infringement control from bilateral litigation to platform regulation. OECD and EUIPO work has shown that e-commerce infrastructures, small-parcel logistics, and cross-border digital marketplaces have become central enablers of counterfeit and infringing trade.⁶⁶⁷ European law has responded by moving beyond the older intermediary-liability model and toward a denser framework of due diligence, transparency, and marketplace responsibility in the Digital Services Act.⁶⁶⁸ The CJEU’s judgment in *Louboutin v Amazon* confirms the relevance of this shift for luxury brands specifically. The Court did not announce blanket platform liability, but it made clear that an online operator may itself be regarded as using the sign where the overall presentation of advertisements and marketplace offers leads the average user to perceive the sign as forming part of the operator’s own commercial communication.⁶⁶⁹ That insight is significant for luxury enforcement because it reframes the problem. The future dispute is not only whether a counterfeit item exists online, but how the surrounding architecture of recommendation, storage, fulfilment, and interface design shapes the attribution of legal responsibility. Luxury brand protection is, in other words, becoming inseparable from platform design and platform governance.⁶⁷⁰ The practical consequence is that litigation strategy will increasingly have to combine classic infringement claims with arguments about presentation, intermediation, and the structure of digital retail environments rather than focusing only on the immediate seller.

A second challenge lies in the normalisation of “dupe culture” as a mass consumer practice. Historically, luxury brands could frame imitation primarily as deception, counterfeiting, or unfair freeriding.^{671 672} That framing is more difficult when consumers knowingly seek non-identical but aesthetically proximate substitutes and regard the purchase as a rational response to high prices or as an ordinary mode of participating in fashion trends. Recent empirical work on legally

⁶⁶⁴ OECD and European Union Intellectual Property Office (2025) *Mapping Global Trade in Fakes 2025: Global Trends and Enforcement Challenges*. Paris: OECD Publishing.

⁶⁶⁵ OECD and European Union Intellectual Property Office (2021) *Misuse of E-Commerce for Trade in Counterfeits*. Paris: OECD Publishing.

⁶⁶⁶ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press.

⁶⁶⁷ OECD and European Union Intellectual Property Office (2021) *Misuse of E-Commerce for Trade in Counterfeits*. Paris: OECD Publishing.

⁶⁶⁸ European Union (2022) Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277/1.

⁶⁶⁹ Court of Justice of the European Union (2022) *Christian Louboutin v Amazon Europe Core Sàrl and Others*, Joined Cases C-148/21 and C-184/21, Judgment of 22 December 2022, ECLI:EU:C:2022:1016.

⁶⁷⁰ European Commission (2025) *Intellectual Property Rights: Facts & Figures*. Brussels: European Commission.

⁶⁷¹ Hemphill, C.S. and Suk, J. (2009) ‘The Law, Culture, and Economics of Fashion’, *Stanford Law Review*, 61(5), pp. 1147–1199.

⁶⁷² Raustiala, K. and Sprigman, C.J. (2006) ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Virginia Law Review*, 92(8), pp. 1687–1777.

copied products suggests that consumer understanding of dupes is neither conceptually trivial nor legally benign: such products remain linked to origin, comparison, and marketplace meaning, but often in ways that do not map neatly onto traditional infringement categories.⁶⁷³ This matters for luxury law because the legitimacy of many trade mark claims depends, explicitly or implicitly, on assumptions about how consumers read similarity. If contemporary consumers increasingly interpret some forms of imitation as obvious, intentional, and socially acceptable alternatives rather than as deceptive impositions, the rhetorical power of certain enforcement strategies may weaken even where the formal legal claim remains plausible.⁶⁷⁴ The challenge is therefore not simply evidential; it is ideological. Luxury houses must now protect signs in a culture that may valorise the decoupling of aesthetic enjoyment from origin loyalty. Legal doctrine can still intervene, but the future effectiveness of that intervention will depend more heavily on granular evidence of actual or post-sale confusion, harm to distinctiveness, or systematic freeriding, rather than on broad assertions that all high-visibility similarity threatens prestige

3.7.2 Circularity, authenticity, and sustainable reuse

A third challenge is emerging from the circular economy, where the logic of sustainable reuse collides with the proprietary logic of luxury branding. Recent scholarship has demonstrated that trade mark law may create substantial obstacles for repair, refurbishment, artistic reuse, and especially fashion upcycling, because reworked products frequently retain visible brand elements whose recognisability is part of both the source material and the new object's communicative force.⁶⁷⁵ ⁶⁷⁶ In the luxury context, this tension is unusually acute. Many houses rely on destruction controls, selective distribution, and the policing of resale environments to preserve aura and scarcity; yet the regulatory and social climate now increasingly favours extended product life, reduced waste, and secondary circulation. The Ecodesign for Sustainable Products Regulation, together with the wider policy architecture surrounding sustainability and traceability, signals that the European legal order is moving toward a framework in which circularity is no longer peripheral but structurally expected.⁶⁷⁷ This creates a profound normative difficulty for luxury brands: the more successful they have been in embedding value in visible and durable signs, the more likely those same signs are to obstruct socially valuable reuse when trade mark rights are enforced broadly. The future challenge is therefore not merely how to enforce trade marks against counterfeiters, but how to reconcile exclusivity with an emerging public interest in reuse, repair, and sustainable transformation. That reconciliation will require more precise doctrines of exhaustion, clearer treatment of artistic and transformative modification, and possibly a more explicit recognition that not all downstream use of

⁶⁷³ Kim, W. and Ha-Brookshire, J.E. (2026) 'What makes it a dupe? Exploring consumer understanding of legally copied products in the fashion industry', *Fashion and Textiles*, 13, Article 4.

⁶⁷⁴ Noto La Diega, G. (2019) 'Can the law fix the problems of fashion? An empirical study on social norms and power imbalance in the fashion industry', *Journal of Intellectual Property Law & Practice*, 14(1), pp. 18–24.

⁶⁷⁵ Senfleben, M. (2024) 'Developing Defences for Fashion Upcycling in EU Trademark Law', *GRUR International*, 73(2), pp. 99–110.

⁶⁷⁶ Izyumenko, E. (2024) 'Intellectual Property in the Age of the Environmental Crisis: How Trademarks and Copyright Challenge the Human Right to a Healthy Environment', *International Review of Intellectual Property and Competition Law*, 55, pp. 864–900.

⁶⁷⁷ European Union (2024) Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of eco-design requirements for sustainable products, OJ L, 2024/1781.

trademarked fashion goods should be evaluated through the lens of confusion or dilution alone.⁶⁷⁸

Closely connected to circularity is the challenge of authentication. Digital Product Passports are likely to reshape not only sustainability compliance but also the semiotics of authenticity itself. The emerging literature suggests that if consumers gain routine access to verified digital information about provenance, materials, repair history, and lawful circulation, the traditional search-cost function of the trade mark may be altered in important ways.⁶⁷⁹ For luxury houses, this change is double-edged. On the one hand, digital passports and traceability tools may strengthen anti-counterfeiting efforts, enrich brand storytelling, and facilitate the policing of unauthorised resale or deceptive distribution channels.^{680 681} On the other hand, a regulatory environment in which authenticity becomes technologically verifiable may reduce the need for consumers to rely on the trade mark alone as the principal indicator of genuineness. That possibility matters because much of luxury trade mark doctrine has been built, economically and rhetorically, on the premise that marks reduce information asymmetries in markets characterised by symbolic and material differentiation.⁶⁸² If authenticity becomes increasingly data-mediated, the luxury mark may persist as a prestige vector while losing some of its older justificatory centrality as a search-cost reducer. The legal consequence could be significant: future trade mark disputes may turn less on whether the sign alone communicates authenticity and more on how trademark rights interact with parallel verification systems imposed by regulation or created by platforms. This is not a diminution of trade marks, but a reconfiguration of their role within a wider informational infrastructure.

3.7.3 Generative design, virtual markets, and asymmetrical enforcement

A fourth challenge concerns the temporal and distributive asymmetry of fashion enforcement. The literature has long observed that fashion markets move faster than formal legal resolution and that this mismatch disproportionately burdens smaller actors who cannot sustain evidence-heavy or cross-border disputes.^{683 684} Institutional reporting on counterfeit and online infringement suggests that this asymmetry has not diminished; if anything, it has moved into new forms of logistical and informational complexity.^{685 686 687} For large luxury groups, the strategic value of litigation often lies in creating doctrinal capital, deterrence, and negotiating leverage

⁶⁷⁸ Göskén, C. (2025) 'Fashioning Authenticity: How Digital Product Passports could shape the future of trade mark law', *Journal of Intellectual Property Law & Practice*, 20(2), pp. 105–110.

⁶⁷⁹ Göskén, C. (2025) 'Fashioning Authenticity: How Digital Product Passports could shape the future of trade mark law', *Journal of Intellectual Property Law & Practice*, 20(2), pp. 105–110.

⁶⁸⁰ European Union (2024) Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, OJ L, 2024/1781.

⁶⁸¹ European Commission (2025) *Intellectual Property Rights: Facts & Figures*. Brussels: European Commission.

⁶⁸² Court of Justice of the European Union (2017) *Coty Germany GmbH v Parfümerie Akzente GmbH*, Case C-230/16, Judgment of 6 December 2017, ECLI:EU:C:2017:941.

⁶⁸³ Atkinson, V. and van Caenegem, W. (2019) 'The fashion sector: copyright, designs or unfair competition?', *Journal of Intellectual Property Law & Practice*, 14(3), pp. 214–222.

⁶⁸⁴ Noto La Diega, G. (2019) 'Can the law fix the problems of fashion? An empirical study on social norms and power imbalance in the fashion industry', *Journal of Intellectual Property Law & Practice*, 14(1), pp. 18–24.

⁶⁸⁵ OECD and European Union Intellectual Property Office (2025) *Mapping Global Trade in Fakes 2025: Global Trends and Enforcement Challenges*. Paris: OECD Publishing.

⁶⁸⁶ OECD and European Union Intellectual Property Office (2021) *Misuse of E-Commerce for Trade in Counterfeits*. Paris: OECD Publishing.

⁶⁸⁷ European Commission (2025) *Intellectual Property Rights: Facts & Figures*. Brussels: European Commission.

across future controversies. For independent designers, emerging labels, and sustainable reworkers, the same system may be experienced as inaccessible, delayed, or prohibitively expensive. This inequality has two implications for the future of luxury brand protection. First, it means that doctrinal development risks being shaped disproportionately by the priorities of powerful right holders, especially in headline disputes involving famous marks. Secondly, it means that any account of “effective protection” must ask not only whether luxury houses can enforce their rights, but whether the broader legal environment remains compatible with competitive innovation and plural participation in the fashion market. A future framework that protects only those actors with the resources to litigate globally may be formally sophisticated yet substantively unbalanced. The challenge is thus distributive as well as doctrinal.

Generative artificial intelligence adds a further layer of complexity because it changes both the scale and the form of imitation. WIPO’s recent guidance and economic analysis make clear that AI systems raise unsettled questions concerning training data, authorship, infringement risk, and the allocation of value between human creators, model developers, and commercial users.^{688 689} In fashion specifically, emerging scholarship has already identified the legal and ethical difficulty of classifying AI-generated outputs and of determining when sufficient human creative input exists to justify traditional authorship and protection claims.⁶⁹⁰ For luxury brands, however, the deeper challenge is not only authorship but statistically assisted approximation. Generative systems can absorb vast corpora of visual material and produce outputs that do not reproduce a protected sign verbatim yet nonetheless echo the stylistic grammar, product architecture, or recognisable codes of a brand at a scale impossible for ordinary human copying alone. Existing doctrines are only partially equipped for this. Trade mark law can still intervene when protected signs or source-indicating features are reproduced, and copyright or design law may remain relevant in some instances; but much AI-enabled imitation will likely occupy the same grey zone that has historically characterised look-alikes, except now accelerated by automated iteration.⁶⁹¹ Future research will therefore need to consider whether existing tests for similarity, transformation, and consumer perception remain adequate when imitation is no longer episodic and manual but probabilistic, synthetic, and industrially scalable.

The emergence of virtual fashion and metaverse markets extends these pressures beyond the physical product. Recent scholarship has shown that trade mark law in virtual environments must confront familiar issues—classification, territoriality, confusion, exhaustion, and the comparison of goods and services—but in altered factual conditions.^{692 693} For luxury brands, the challenge is particularly acute because digital twins, NFT-linked fashion assets, gaming skins, and virtual accessories continue the same prestige dynamics that animate physical luxury while loosening

⁶⁸⁸ World Intellectual Property Organization (2024) *Generative AI: Navigating Intellectual Property*. Geneva: WIPO.

⁶⁸⁹ Cuntz, A., Fink, C. and Stamm, H. (2024) *Artificial Intelligence and Intellectual Property: An Economic Perspective*. WIPO Economic Research Working Paper No. 77. Geneva: World Intellectual Property Organization.

⁶⁹⁰ Bae, Y.J. (2024) ‘Fashion Design and Generative AI: Categories of Creative Works and Ethical Challenges’, *The Korean Fashion and Textile Research Journal*, 26(4), pp. 326–338.

⁶⁹¹ Atkinson, V. and van Caenegem, W. (2019) ‘The fashion sector: copyright, designs or unfair competition?’, *Journal of Intellectual Property Law & Practice*, 14(3), pp. 214–222.

⁶⁹² Lastiri Santiago, M. (2024) ‘Metaverse in the World of Trademark Law’, *Uniform Law Review*, 28(3–4), pp. 390–406.

⁶⁹³ Charmeil, T. (2024) ‘Enforceability of trade mark rights in Metaverse: where virtual worlds meet legal realities’, *Journal of Intellectual Property Law & Practice*, 19(12), pp. 860–873.

the territorial and material anchors on which older enforcement strategies depended.⁶⁹⁴ The law has shown some plasticity, and current academic work suggests that existing trade mark doctrine can adapt to at least part of this environment. Nevertheless, adaptation should not be confused with closure. Questions remain about how far reputation-based protection extends to virtual substitutes, how genuine use should be assessed in mixed physical/digital portfolios, and whether the reputational logic of luxury becomes even more expansive once signs circulate independently of material manufacture. For that reason, virtual fashion should not be treated as a separate niche problem. It is an intensified version of the same issue that has structured this thesis throughout: the increasing detachment of fashion value from the physical object and its relocation in signs, narratives, and environments of circulation.

The broader conclusion of this final section is therefore that the future of luxury brand protection cannot lie in a simple ratcheting-up of exclusivity. Such a solution would be normatively unstable and practically incomplete. It would be unstable because it would collide too directly with the values of competition, reuse, expression, and technological experimentation already pressuring the field.⁶⁹⁵ ⁶⁹⁶ It would be incomplete because many of the contemporary challenges for luxury houses arise not from doctrinal weakness alone but from changed infrastructures of circulation—platforms, data systems, generative tools, and secondary markets—that no traditional infringement action can fully discipline.⁶⁹⁷ ⁶⁹⁸ A more sustainable future for fashion law would accordingly proceed in a more selective and institutionally differentiated way: strong protection for genuinely source-indicating and reputation-bearing signs; clearer limitations for parody, transformative reuse, and sustainability-oriented upcycling; enhanced platform obligations where commercial presentation blurs the line between host and seller; improved authentication and traceability tools that complement rather than replace trade mark law; and a greater empirical emphasis on how consumers actually understand dupes, virtual goods, and AI-assisted design outputs.⁶⁹⁹ ⁷⁰⁰ What this thesis has shown, in the end, is that luxury brands do deserve legal protection, but that such protection remains legitimate only when it continues to distinguish the defence of brand identity from the attempted enclosure of fashion's shared visual culture. The future intellectual task is therefore not to choose between protection and circulation, but to refine the legal terms on which they may continue to coexist.

⁶⁹⁴ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press.

⁶⁹⁵ Senftleben, M. (2024) 'Developing Defences for Fashion Upcycling in EU Trademark Law', *GRUR International*, 73(2), pp. 99–110.

⁶⁹⁶ World Intellectual Property Organization (2024) *Generative AI: Navigating Intellectual Property*. Geneva: WIPO.

⁶⁹⁷ OECD and European Union Intellectual Property Office (2025) *Mapping Global Trade in Fakes 2025: Global Trends and Enforcement Challenges*. Paris: OECD Publishing.

⁶⁹⁸ Rosati, E. and Calboli, I. (eds.) (2025) *The Handbook of Fashion Law*. Oxford: Oxford University Press.

⁶⁹⁹ Kim, W. and Ha-Brookshire, J.E. (2026) 'What makes it a dupe? Exploring consumer understanding of legally copied products in the fashion industry', *Fashion and Textiles*, 13, Article 4.

⁷⁰⁰ Noto La Diega, G. (2019) 'Can the law fix the problems of fashion? An empirical study on social norms and power imbalance in the fashion industry', *Journal of Intellectual Property Law & Practice*, 14(1), pp. 18–24.

Conclusion

This thesis has demonstrated that imitation in the luxury fashion industry is not an external distortion of an otherwise orderly market, but one of the constitutive conditions through which fashion circulates, acquires visibility, and generates value.^{701 702} The decisive legal problem has therefore never been whether copying can be eradicated, but how the law should distinguish between imitation that participates in trend diffusion and imitation that appropriates accumulated goodwill, reputational capital, and source-signalling power.^{703 704} Read in those terms, the central finding of the thesis is unequivocal: contemporary intellectual property law does not protect fashion design in any comprehensive sense. What it protects, and protects unevenly, is the conversion of design into market meaning. Luxury goods receive their strongest legal shelter not when a form is simply desirable or aesthetically successful, but when repeated use, commercial investment, and consumer recognition have transformed that form into a legally cognisable sign of origin, prestige, or reputation. The thesis has thus shown that the real object of protection in luxury fashion is not design as such, but semiotic value: the legally recognisable condensation of origin, aura, and commercial identity within particular visual codes.^{705 706 707}

Sign-Based Settlement of Imitation

That conclusion carries a more incisive implication than the mere observation that existing legal tools are imperfect. What the doctrinal analysis and the case studies collectively reveal is that the present framework is structurally selective in a way that both explains its coherence and exposes its limits. Trademark infringement, dilution, protection of reputed marks, trade dress, and unfair competition do not operate as fragmented substitutes for a missing anti-copying right; together, they constitute a legal architecture that intervenes only when copied elements can be read as signs rather than as style alone.^{708 709 710} This is why the Gucci monogram and stripe, the Louis Vuitton canvas codes, and the Louboutin red outsole matter so much doctrinally: they are protected not because the law has embraced a general hostility to resemblance, but because they

⁷⁰¹ Raustiala, K. and Sprigman, C. (2006) 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), pp. 1687–1777;

⁷⁰² Hemphill, C.S. and Suk, J. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

⁷⁰³ Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704;

⁷⁰⁴ Bone, R.G. (2006) 'Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law', *Boston University Law Review*, 86(3), pp. 547–622.

⁷⁰⁵ Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704;

⁷⁰⁶ Scafidi, S. (2006) 'Intellectual Property and Fashion Design', in Yu, P.K. (ed.) *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*. Vol. 1. Westport, CT: Praeger Publishers, pp. 115–131

⁷⁰⁷ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

⁷⁰⁸ Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704;

⁷⁰⁹ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing

⁷¹⁰ Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

have crossed the threshold from ornament into commercial meaning.^{711 712 713} The broader conclusion is therefore inescapable. Fashion law, as reconstructed through this thesis, protects signified distinction more effectively than creative form. It privileges the defence of market meaning over the defence of design autonomy, and in doing so it leaves a substantial zone of stylistic borrowing, atmospheric evocation, and aspirational similarity only partially governed.⁷¹⁴

This selective structure should not be mistaken for a merely technical limitation; it is the normative centre of the field. A legal regime that protected every commercially successful silhouette, motif, or aesthetic direction would not simply strengthen luxury brands; it would transform the ordinary language of fashion into private property. The thesis has shown why that conclusion is untenable. Fashion depends upon circulation, reiteration, and visible reference.⁷¹⁶
⁷¹⁷ Luxury, by contrast, depends upon the controlled concentration of distinction.⁷¹⁸ The law's role is therefore not to abolish the former in favour of the latter, but to mediate their coexistence. Yet the cases examined also show that this mediation is increasingly strained. The closer imitation moves toward communicative appropriation rather than verbatim duplication, the harder it becomes for traditional doctrine to capture the harm. Current frameworks remain effective where claimants can prove acquired distinctiveness, strong consumer association, reputational investment, or unfair advantage.^{719 720} They remain weak where what is copied is not a badge of source in the orthodox sense, but an atmosphere of luxury, a status cue, or a bundle of recognisable associations calibrated to remain just outside formal confusion. That is the real limit of current protection, and it is a structural one.^{721 722}

Case Law as the Architecture of Fashion Law

For that reason, the thesis ultimately demonstrates that case law is not merely illustrative of fashion law; it is constitutive of it. Statutory frameworks offer only partial vocabularies—confusion, reputation, functionality, due cause, parody, unfair advantage, dilution.

⁷¹¹ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

⁷¹² *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206, United States Court of Appeals for the Second Circuit, 2012

⁷¹³ *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, Court of Justice of the European Union, 12 June 2018

⁷¹⁴ Raustiala, K. and Sprigman, C. (2006) 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), pp. 1687–1777;

⁷¹⁵ Hemphill, C.S. and Suk, J. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

⁷¹⁶ Raustiala, K. and Sprigman, C. (2006) 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), pp. 1687–1777

⁷¹⁷ Hemphill, C.S. and Suk, J. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199.

⁷¹⁸ Kapferer, J.N. and Bastien, V. (2012) *The Luxury Strategy: Break the Rules of Marketing to Build Luxury Brands*. 2nd edn. London: Kogan Page.

⁷¹⁹ Gangjee, D. and Burrell, R. (2010) 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding', *The Modern Law Review*, 73(2), pp. 282–295

⁷²⁰ Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

⁷²¹ Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704.

⁷²² Kim, W. and Ha-Brookshire, J.E. (2026) 'What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry', *Fashion and Textiles*, 13(1), Article 4, pp. 4–19,

⁷²³ ⁷²⁴ It is judicial interpretation that organises those vocabularies into an operative settlement of imitation. Courts decide when similarity is legally inert and when it becomes misappropriation; when humour is sufficiently transformative to defeat a dilution claim; when a colour functions as a source-indicating sign rather than as an aesthetic feature; when repeated imitation across a product line amounts to parasitic conduct; and when the preservation of competition must prevail over claims of exclusivity. ⁷²⁵ ⁷²⁶ ⁷²⁷ In other words, case law does not simply apply pre-existing doctrine to the fashion sector. It repeatedly constructs the doctrinal thresholds through which fashion objects become legally intelligible. The thesis has therefore shown that the development of fashion law occurs less through legislative design than through cumulative judicial classification of hybrid objects that are at once aesthetic, symbolic, and commercial. ⁷²⁸ ⁷²⁹

The comparative dimension sharpens this conclusion further. American and European frameworks often appear to proceed in different idioms: the former more insistently through confusion, post-sale confusion, and parody; the latter more openly through reputation, unfair advantage, and free-riding. ⁷³⁰ ⁷³¹ Yet the cases analysed in this thesis show that these systems are not moving toward opposite destinations. Both, in distinct doctrinal languages, intensify protection as copied matter becomes more clearly legible as a sign and retreat as claimants approach a proprietary claim over style itself. The Louis Vuitton parody litigation shows judicial reluctance to convert fame into a right against all referential play. ⁷³² The Louboutin judgments, in both the United States and the European Union, show that even strong protection for non-traditional marks is justified only once distinctiveness, context, and limits are carefully defined. ⁷³³ ⁷³⁴ The Gucci v. Guess dispute, precisely because it straddles multiple jurisdictions and multiple legal theories, reveals the same underlying truth from another angle: imitation becomes actionable not because resemblance exists, but because courts become persuaded that resemblance has been organised as a strategy of market appropriation. The law of fashion is thus best understood not as a law against copying, but as a jurisprudence of translated meaning. ⁷³⁵

⁷²³ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*.

⁷²⁴ Cheltenham: Edward Elgar Publishing; Kur, A. and Senftleben, M. (2017) *European Trade Mark Law: A Commentary*. Oxford: Oxford University Press.

⁷²⁵ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, United States Court of Appeals for the Fourth Circuit, 2007.

⁷²⁶ *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, United States District Court for the Southern District of New York, 2012.

⁷²⁷ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206, United States Court of Appeals for the Second Circuit, 2012.

⁷²⁸ Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704;

⁷²⁹ Scafidi, S. (2006) 'Intellectual Property and Fashion Design', in Yu, P.K. (ed.) *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*. Vol. 1. Westport, CT: Praeger Publishers, pp. 115–131.

⁷³⁰ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*.

⁷³¹ Cheltenham: Edward Elgar Publishing; Gangjee, D. and Burrell, R. (2010) 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding', *The Modern Law Review*, 73(2), pp. 282–295.

⁷³² *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, United States Court of Appeals for the Fourth Circuit, 2007.

⁷³³ *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206, United States Court of Appeals for the Second Circuit, 2012.

⁷³⁴ *Christian Louboutin and Christian Louboutin SAS v. Van Haren Schoenen BV*, Case C-163/16, Court of Justice of the European Union, 12 June 2018.

⁷³⁵ Beebe, B. (2004) 'The Semiotic Analysis of Trademark Law', *UCLA Law Review*, 51(3), pp. 621–704.

Future Directions for Luxury Brand Protection

The final consequence of that analysis is that a simple expansion of anti-copying protection would be both conceptually misguided and institutionally counterproductive. This thesis does not support the conclusion that luxury fashion requires a broader proprietary entitlement against resemblance as such. On the contrary, it shows that such a move would collapse the crucial distinction between source-based harm and competitive or cultural circulation. It would entrench exclusivity where the law should still tolerate reinterpretation, and it would do so precisely at a moment when fashion markets are being reshaped by pressures that cannot plausibly be answered through maximal proprietisation alone.^{736 737 738} Parody, comparative reference, second-hand trade, repair, and sustainability-oriented upcycling all expose the inadequacy of blunt anti-copying logic.^{739 740} So, too, do the findings of emerging scholarship on dupes, which suggest that consumer perception, association, and confusion operate in more nuanced ways than doctrine often assumes.⁷⁴¹ The future of protection therefore lies not in abolishing the grey area, but in refining it: by policing freeriding more precisely where genuine semiotic appropriation occurs, while preserving room for lawful transformation, expressive distance, and non-deceptive reuse.^{742 743}

That need for nuance is becoming urgent because the most serious challenges now arise less from isolated copies than from transformed conditions of circulation. Online intermediaries, social commerce, and platform merchandising architectures can intensify association and accelerate reputational spillover without reproducing a mark in counterfeit form. Small-parcel logistics and e-commerce continue to facilitate the rapid movement of fake and imitation goods at scale.^{744 745} At the same time, generative systems can reproduce brand-adjacent aesthetics through probabilistic recombination rather than direct duplication, while virtual goods and metaverse environments extend luxury signification into markets where materiality is no longer

⁷³⁶ Raustiala, K. and Sprigman, C. (2006) 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), pp. 1687–1777

⁷³⁷ Hemphill, C.S. and Suk, J. (2009) 'The Law, Culture, and Economics of Fashion', *Stanford Law Review*, 61(5), pp. 1147–1199

⁷³⁸ Dinwoodie, G.B. and Janis, M.D. (eds.) (2008) *Trademark Law and Theory: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing.

⁷³⁹ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, United States Court of Appeals for the Fourth Circuit, 2007

⁷⁴⁰ Senftleben, M. (2024) 'Developing Defences for Fashion Upcycling in EU Trademark Law', *GRUR International*, 73(2), pp. 99–110

⁷⁴¹ Kim, W. and Ha-Brookshire, J.E. (2026) 'What Makes It a Dupe? Exploring Consumer Understanding of Legally Copied Products in the Fashion Industry', *Fashion and Textiles*, 13(1), Article 4, pp. 4–19

⁷⁴² Gangjee, D. and Burrell, R. (2010) 'Because You're Worth It: L'Oréal and the Prohibition on Free Riding', *The Modern Law Review*, 73(2), pp. 282–295

⁷⁴³ Senftleben, M. (2024) 'Developing Defences for Fashion Upcycling in EU Trademark Law', *GRUR International*, 73(2), pp. 99–110

⁷⁴⁴ OECD/EUIPO (2018) *Misuse of Small Parcels for Trade in Counterfeit Goods: Facts and Trends*. Paris: OECD Publishing.

⁷⁴⁵ OECD/EUIPO (2021) *Misuse of E-Commerce for Trade in Counterfeits*. Paris: OECD Publishing

the primary site of value.^{746 747 748} Circular-fashion practices raise an additional tension by exposing the friction between brand control and sustainability, particularly where trade mark law is used to challenge reuse or upcycling of genuine branded items.⁷⁴⁹ What these developments collectively reveal is that contemporary luxury protection cannot remain focused on the finished physical product alone. It must confront an informational ecosystem in which value is produced through visibility, metadata, authentication, ranking, platform design, and digital repetition. The object of legal analysis is no longer just the copied item, but the infrastructure through which imitation acquires market force.⁷⁵⁰

The final position that emerges from this thesis is therefore clear and deliberately firm. The structural inadequacy of traditional intellectual property frameworks in the face of contemporary luxury imitation does not justify abandoning protection; it justifies redefining its object with greater precision. Fashion law should protect those signs whose duplication distorts source, reputation, or the fair allocation of prestige, but it should not become a vehicle for the wholesale privatisation of similarity.^{751 752} Luxury fashion deserves strong legal protection where exclusivity rests on demonstrable market meaning, not on a general claim to aesthetic priority. The decisive lesson of the cases examined is that the law remains most legitimate when it protects the communicative infrastructure of luxury without converting all imitation into infringement.⁷⁵³ That is why the real future of this field lies not in multiplying exclusive rights, but in sharpening doctrinal distinctions: between design and sign, inspiration and extraction, circulation and capture, reuse and exploitation, visibility and deception.^{754 755} This thesis has, in essence, demonstrated that fashion law will remain credible only if it accepts the paradox at its core: luxury depends on exclusivity, fashion depends on circulation, and the law must govern the boundary between them without allowing either principle to annihilate the other.^{756 757 758}

⁷⁴⁶ Lapatoura, I. (2022) 'Fashion Beyond Physical Space: NFTs and Intellectual Property Challenges in the Metaverse', *Entertainment Law Review*, 33(6), pp. 197–202.

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