FASHION LAW: A MULTIFACETED PRACTICE

INTRODUCTION BY OLIVERA MEDENICA

Fashion law is an often misunderstood area of the law, as complex as the diverse practice areas that it encompasses. From manufacturing to retail, fashion technology, distribution, innovation, privacy, and sustainability, the issues range from the mundane to novel issues of law. It is an industry that struggles daily to reach the appropriate balance between marketability, ethical sourcing, profitability, and the ever-changing demands of sophisticated and diverse consumers. Included below are articles written by students from New York Law School's Fashion Law Initiative, a fashion law center for, inter alia, clinical and experiential learning preparing law students for innovative careers in fashion law. These articles illustrate the breadth of the industry and the issues that fashion counsel may encounter in his or her practice. We hope that you enjoy reading them, as much as you will enjoy experiencing New York's sartorial offerings come September 2018. We look forward to seeing you in the Big Apple. ☉

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NEW YORK CITY: A TRENDSETTER IN FASHION AND THE LAW

BY KATARINA SYKES

As a fashion capital of the world, New York City is a global leader at the forefront of the fashion industry's creativity, style, and innovation. Who could forget Meryl's Streep ice-cold rendition of Anna Wintour in "The Devil Wears Prada," where a subtle tilt of the head determines the commercial fate of hopeful fashion designers seeking a coveted spot in the editor's glossy magazine? The movie perfectly encapsulates fashion culture's undeniable influence on New York City and beyond.

Statistics reflect this reality. More than 900 fashion companies are headquartered in New York City; this number does not include branch offices of global fashion powerhouses headquartered elsewhere. New York boasts the country's best fashion schools, such as the Fashion Institute of Technology, LIM College, Parsons, the New School for Design, and the Pratt Institute.[1] Fashion trade shows such as Coterie and local showrooms attract more than half a million visitors annually to New York City. With more than 500 shows and an annual economic impact of $887 million, New York Fashion Week brings designers from all over the world to showcase their newest fashion collections, drawing thousands of visitors to their shows and boosting New York's tourism industry as a result.[2]

What is largely uncredited, however, is the central role of our local federal courts in this initiative. New York's federal courts have settled the contentious fashion-centric disputes and set judicial precedents that often make headlines in the fashion industry's most widely circulated media. Some of the most important fashion law cases were filed and decided in our courts; they not only impact intellectual property issues here, but also the commercial practice of fashion brands worldwide.

Louis Vuitton Malletier S.A. v. My Other Bag

Trademark law plays a central role in the fashion industry since a trademark is often the only method of protecting a fashion brand's clothing designs. Under § 32(1) of the Lanham Act, fashion designers, companies, and brands can establish their right as a trademark owner to prevent others from using and registering marks that are confusingly similar to existing marks.[3] Trademark law serves to protect those who put in the time and work to create the mark, the reputation of the brand, and the consumers who rely on trademarks

as a source indicator. When others use marks that are identical or similar to another brand's trademark, the infringing brand is likely to cause confusion, which is what trademark law wants to avoid.

Owning a trademark, however, does not provide a complete monopoly over every possible reference to a brand owner's trademark. Parody is a defense often relied upon in the context of trademark industry disputes in the fashion world. Where applicable, parody can be a complete defense to trademark infringement. A successful parody communicates to a consumer that an entity separate and distinct from the trademark owner is poking fun at a trademark or the policies of its owner. It must be sufficiently clear to the ordinary observer that the defendant is not connected in any way with the owner of the target trademark.

This issue was addressed at length by the Southern District of New York in a 31-page opinion penned by Judge Jesse M. Furman. In *Louis Vuitton Malletier S.A. v. My Other Bag*, world-renowned fashion luxury house Louis Vuitton was defeated by My Other Bag's (MOB) parody defense. MOB is a retailer of canvas tote bags that portray a cartoon illustration of iconic designer handbags on one side and the text "My Other Bag" on the other. Several of MOB's tote bags depict the classic Louis Vuitton bags featuring the iconic Toile Monogram, Monogram Multicolore, and Damier designs but replacing the interlocking "LV" and "Louis Vuitton" with an interlocking "MOB" or "My Other Bag." While Louis Vuitton sells its handbags for thousands of dollars apiece, MOB's canvas totes sell at prices between $30 and $55.

Louis Vuitton argued that MOB (1) had diluted Louis Vuitton's trademark, (2) had infringed Louis Vuitton's trademark, and (3) had infringed upon Louis Vuitton's copyrights as well. MOB, however, asserted that its bags constituted a parody of the plaintiff's intellectual property rights and that, as a result, it should not be liable for trademark, or copyright, infringement.

Louis Vuitton's main claim was that MOB was liable for trademark dilution under the Lanham Act, 15 U.S.C. § 1125(c), and New York General Business Law § 360-l. Specifically, Louis Vuitton pursued dilution by blurring, which refers to the weakening of a mark's signaling power through unauthorized use of the mark on a completely unrelated good or service. To succeed on a dilution claim under federal law, a plaintiff "must prove (1) that the trademark is truly distinctive or has acquired secondary meaning, and (2) a likelihood of dilution ... as a result of blurring. A plaintiff need not show economic injury."[4] New York law, however, does not require proof that the mark is famous.

Under federal law, a court may consider six factors when assessing whether dilution by blurring is likely to occur: (1) the degree of similarity between the challenged mark and the famous mark; (2) the degree of distinctiveness of the famous mark; (3) the extent to which the owner of the famous mark is engaging in exclusive use of the mark; (4) the degree of recognition of the famous mark; (5) whether the user of the mark or trade name intended to create an association with the famous mark; and (6) any actual association between the mark or trade name and the famous mark.[5] Judge Furman noted that the analysis under federal law should focus on whether the "association arising from the similarity between the subject marks, impairs the distinctiveness of the famous mark, that is, the ability of the famous mark to serve as a unique identifier."[6]

Under § 360-l, New York courts look to a similar set of factors: "(i) the similarity of the marks; (ii) the similarity of the products covered; (iii) the sophistication of the consumers; (iv) the existence of predatory intent; (v) the renown of the senior mark; and (vi) the renown of the junior mark."[7] Judge Furman noted that under New York law, the factors are only "guideposts" and that the analysis should focus on "whether there is a likelihood that the capacity of the senior owner's mark 'to serve as a unique identifier of its source' will be diminished."[8]

The court recognized that the Lanham Act allows certain uses of a mark to constitute fair use, such as parody.[9] Because the statute does not define "parody," the district court looked at four circuit courts' interpretations that have explained parody as a form of entertainment communicating some point of satire, ridicule, or joke that it is an original but also not the original and is instead a parody.[10] The court noted that a successful parody "communicates to a consumer that an entity separate and distinct from the trademark owner is poking fun at a trademark or the policies of its owner" and "clearly indicates to the ordinary observer that the defendant is not connected in any way with the owner of the target trademark."[11]

The court points to the joke of "my other car" that My Other Bag plays off of which suggests that the canvas tote bag is not the "other bag"—a Louis Vuitton bag, that he or she is carrying. In addition, the aesthetics of the canvas bag and the cartoon-like illustrations of the Louis Vuitton bags printed on the side "builds significant distance" and creates an "amusing comparison" between MOB's inexpensive tote and the expensive, luxury status of the leather handbags they are meant to evoke. "Louis Vuitton's sense of humor (or lack thereof) does not delineate the parameters of its rights (or MOB's rights) under trademark law."[12]

For much of the same reasons in finding fair use, the court additionally held that My Other Bag's use of Louis Vuitton's patterns do not arise to trademark dilution, trademark infringement, and copyright infringement. This decision raised many eyebrows since most small companies typically do not have the resources to litigate with the size of Louis Vuitton. The implications of this decision have given companies deference in trademark dilution suits so long as the mark is used within the bounds of parody.

Christian Louboutin S.A. v. Yves Saint Laurent America Holding Inc.

The battle of the red soles ceased in 2012 when the U.S. Court of Appeals for the Second Circuit delivered a decision in *Christian Louboutin S.A. v. Yves Saint Laurent America Holding Inc.* reversing the district court's holding that a single color can never serve as a trademark in the fashion industry.[13]

Louboutin initiated the lawsuit against Yves Saint Laurent (YSL) in the Southern District of New York upon discovery that the defendant was gearing up to launch a line of monochromic shoes featuring the color red. The YSL shoe's design consisted of a monochromatic color design—including a shoe with the color red on the insole, heel, upper, and outsole. Christian Louboutin sought to remove the shoes from the market asserting trademark infringement and trademark dilution, among other claims. YSL counterclaimed by seeking cancellation of the Red Sole Mark, arguing that the mark was functional and merely ornamental.

The main issue before the court was whether a single color may serve as a legally protected trademark in the fashion industry and, in particular, as the mark for a particular style of high fashion women's footwear. The Second Circuit reversed in part, holding that trade-

mark protection was available to Louboutin's use of contrasting red lacquered outsoles, but such protection does not exclude others from using a red sole as part of a monochrome red shoe. The Second Circuit pointed to the Supreme Court decision in *Qualitex Co. v. Jacobson Products Co.*, holding "color alone, at least sometimes, can meet the basic legal requirements for use as a trademark. It can act as a symbol that distinguishes a firm's goods and identifies their source, without serving any other significant function."[14]

The court analyzes trademark infringement in two stages. The first stage assesses whether the plaintiff's mark merits protection by being distinctive. If, and only if, the plaintiff's trademark is distinctive, the second stage determines whether the defendant's use of a similar mark is likely to cause consumer confusion.[15] Standing alone, a single color can almost never automatically tell a consumer that it refers to a brand; however, the court noted that a single color is capable of acquiring secondary meaning. "Secondary meaning is acquired when in the minds of the public, the primary significance of a product feature is to identify the source of the product rather than the product itself."[16] The main factors the court looks to in determining secondary meaning include (1) advertising expenditures, (2) consumer studies linking the mark to a source, (3) unsolicited media coverage of the product, (4) sales success, (5) attempt to plagiarize the mark, and (6) length and exclusivity of the mark's use.[17]

The record included extensive evidence showing Louboutin's substantial investment of capital through advertising and media coverage that has garnered the brand a reputation of goodwill. In addition, the record included extensive consumer surveys from both parties emphasizing how Louboutin's marketing efforts have created worldwide recognition. By consistently and deliberately placing the color red in an unusual context, Christian Louboutin was able to create an identifying mark firmly associated with his brand, one that instantly denotes his shoes' source.[18] The Second Circuit held that the Red Sole Mark qualifies as a distinct symbol for trademark protection when the lacquered red sole is applied to a shoe with a different colored upper body.

The Second Circuit further held that the Red Sole Mark does not extend to shoes where the sole does not contrast with the upper, such as a monochromatic red shoe. The court reasoned that it was the contrast between the sole and the upper that causes the sole to "pop" and to distinguish its creator. In addition, of the hundreds of pictures of Louboutin shoes submitted to the district court, only four were monochrome red. This evidentiary record supported that the Red Sole Mark is more closely associated with contrasted shoes. Even consumer surveys conducted by Louboutin and Yves Saint Laurent showed that when consumers were shown the YSL monochrome red shoe, of those consumers who misidentified the pictured shoes as Louboutin-made, nearly everyone cited the red sole of the shoe rather than its general red color. Based on these factors, the Second Circuit court applies secondary meaning to the red sole to a red shoe only where the red sole contrasts with the "upper" of the shoe. The use of a red lacquer on the outsole of a red shoe of the same color is not a use of the Red Sole Mark.

In this case, neither side won all nor lost all. Christian Louboutin was able to retain his trademark and Yves Saint Laurent was not found to infringe the trademark. This decision is impactful because it affords trademark protection over single color marks that have acquired secondary meaning. The ruling provides comfort for other fashion companies with signature colors such as Tiffany blue or Hermes orange.

The two cases stand for significant propositions that have had a fundamental impact on intellectual property law as well as the commercial practice of fashion brands worldwide. Where trademark law intends to prevent others from using the same or similar marks, the concept of parody allows fashion companies to use marks of fashion giants, like Louis Vuitton, so long as it conveys a message or joke. In addition, allowing single-color marks to be protected under trademark law allows fashion companies to reap the benefits of creating a successful brand in the eyes of the consumer. The *Christian Louboutin v. Yves Saint Laurent* decision provides comfort to those companies that have consistently and prominently used a color in an unusual way with their products that have gained them worldwide recognition. Ultimately it is up to trademark owners to police their mark and protect their brand. For fashion companies, this means that they are not only trendsetters on the runway but also in the law. ⊙

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Endnotes

[1]*Fashion*, NYCEDC, https://www.nycedc.com/industry/fashion (last visited July 10, 2018).

[2]*NYCEDC Seeks Financial Institution to Operate Loan Fund for Emerging Fashion Designers*, NYCEDC (Mar. 26, 2012), https://www.nycedc.com/press-release/nycedc-seeks-financial- institution-operate-loan-fund-emerging-fashion-designers.

[3]15 U.S.C. § 1114(1)(a).

[4]*Louis Vuitton Malletier S.A. v. My Other Bag Inc.*, 156 F. Supp. 3d 425, 433 (S.D.N.Y. 2016).

[5]15 U.S.C. § 1125(c)(2)(B).

[6]*Louis Vuitton,* 156 F. Supp. at 434.

[7]*Id.*

[8]*Id.*

[9]*See* 15 U.S.C. § 1125(c)(3).

[10]*Louis Vuitton,* 156 F. Supp. at 435.

[11]*Id.*

[12]*Louis Vuitton,* 156 F. Supp. at 436.

[13]*Christian Louboutin S.A. v. Yves St. Laurent Am. Holding Co.,* 693 F.3d 206, 216 (2d. Cir. 2012)

[14]*Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 116 S. Ct. 1300 (1995).

[15]*Christian Louboutin,* 693 F.3d at 216.

[16]*Id.* at 225.

[17]*Id.* at 226. (*quoting Centaur Commc'ns Ltd. v. A/S/M Commc'ns Inc.*, 830 F.2d 1217, 1222 (2d Cir. 1985)).

[18]*Id.* at 227.

PROTECTING UNDERAGE MODELS STILL A FEDERAL ISSUE, BUT NOT IN NEW YORK

BY ROXY MENHAJI

Fashion law may be one of the most rapidly developing legal disciplines. It is characterized as a subspecialty of business law and manages to incorporate various legal disciplines such as intellectual property, information privacy, real estate, and employment law.[1] Although fashion law has to do with the day-to-day business issues of international design houses, there is still much to be learned regarding the fashion models that bring these garments to life.

This article (1) highlights noteworthy developments in the protection of child labor laws throughout U.S. history and explains how child performers are currently protected, (2) considers how these protections have played out with respect to underage models in New York State,[2] and (3) addresses the pros and cons of the proposed Child Performers Protection Act of 2015.

Child Performers and the Law

Federal child labor laws speak to issues related to the welfare and employment of working minors and children in the United States. In 1916, Congress passed its very first child-labor regulation, the Keating-Owen Act,[3] which regulated interstate commerce involving goods produced by employees under the ages of 14 or 16. Nine months later in *Hammer v. Dagenhart*,[4] the U.S. Supreme Court ruled the Keating-Owen Act as unconstitutional, reasoning that the law violated the Commerce Clause by regulating interstate commerce.[5] Nearly 20 years later, in *United States v. Darby,* the Supreme Court overturned *Hammer.* In its unanimous decision, the Court held that Congress had the power under the Commerce Clause[6] to regulate child labor conditions and upheld the Fair Labor Standards Act of 1938 (FLSA) for the very first time.

The current federal law regulating child labor in the United States is the FLSA.[7] The provisions under this act are designed to protect the educational opportunities of youth and prohibit their employment in jobs that are detrimental to their health and safety. While regulations for agricultural employment are generally less strict, a number of exceptions exist for non-agricultural jobs, such as employment of child performers.[8] Under the act, a child performer is defined as children "employed as actors or performers in motion pictures or theatrical, radio, or television productions."[9] Child performers that fall into this definition are exempt from the FLSA, meaning that rules regarding allowable daily work times and total hours do not apply to them. While the act sets workplace criteria for children in the United States, child models are not covered by the law, and protections for minors in the modeling or fashion industry are left up to individual states.

Protection Under NY State Law

Though the United States has yet to adopt a federal standard that would put underage runway and print models in a sheltered work space, New York State has established a baseline legal standard holding fashion and entertainment businesses liable for unlawful treatment of underage models either living or working for them in New York.

The Model Alliance, joined by Sens. Jeffrey Klein and Diane Savino, were successful in passing a bill affording child models protection through the New York State Department of Labor. After its passing vote in June 2013, the New York Child Performers Protection Act has protected underage child performers (recognizing child models for both runway and print) under the New York Department of Labor. Similar to child-labor laws in California, the bill sheds light on child models and affords them the same protections that actors, dancers, and musicians under the age of 18 are afforded. Since its enactment, the law has mandated fashion businesses seeking to cast models under the age of 18 to adhere to strict guidelines. The law stipulates that each company must:

- Be in possession of a certificate of eligibility to employ "child models" issued by the New York Department of Labor;
- Submit a notice of use of child performers to the New York Department of Labor at least two days before each of the child's employed business-events (i.e., fittings, runway rehearsal, runway show, photo-shoot, etc.);
- Make sure the child models have valid work permits and maintain a copy of said permits;
- Follow the restricted working hours with respect to the models age (a child model age 6 years to 9 years may be permitted to remain at the place of employment or contracting for no more than eight hours per day, and a child performer age 9 years to 16 years may be permitted to remain at the place of employment or contracting for no more than nine hours per day), which includes giving the models breaks after every four hours of work; and
- Keep documentation evidencing models' trust accounts (placing 15 percent of the models' earnings in those accounts).

The New York State law limits the length a child model may be employed, provides financial protection for such children, and clarifies the liabilities of their employers and contractors. Child models either living or working in New York cannot be compensated for their work by way of handbags or clothing that were used during a fashion show they worked. Additionally, in a state with a thriving entertainment industry, this law prevents parents from taking the money earned by their children.

Many child labor laws mandate maximum work hours set out by the FLSA or by state legislation; however, Congress has yet to implement a regulation affording federal protections to child models.

Potential Federal Protection

In September 2017, Rep. Grace Meng of New York re-introduced the Child Performer Protection Act (H.R. 3691, 115th Congress (2017-

2018)) to the House of Representative on Education and the Workforce. The proposed legislation, modeled similar to New York State's Child Protection Act of 2015, would establish a federal standard of protections that child models would be guaranteed nationwide. These would include establishing a maximum number of hours that child models can continuously work, requiring that compensation be provided in cash wages, that 15 percent of a child's earnings be places in a trust account until the child turns 18 (unless a financial need for the money is demonstrated), and creating a private right of action for kids who are sexually harassed, allowing them to sue their employers if harassed while on the job.

Some may argue that New York has provided a guiding post for how change is to transpire on a federal level. Regardless of whether reform follows, it is clear that New York, harboring our fashion capital that is New York City, is one of few states that will advocate for stricter child labor laws with respect to the fashion industry. ⊙

Roxy Menhaji

Endnotes

[1]Guillermo C. Jimenez, *Fashion Law: Overview of a New Legal Discipline, In* Fashion Law: A Guide For Designers, Fashion Executives, and Attorneys 3, 3 (Guillermo C. Jimenez & Barbara Kolsun eds., 2010).

[2]"Underage models" refers to high fashion models under the age of 18. High fashion models are models whose main projects include high-end advertising campaigns, magazine editorials, and runway shows. While underage models face a plethora of injustices in the fashion industry, this article examines their exploitation through the amount of time they are required to work and their age. (For more on "underage models" *See* Roger Talley, The Professional's Guide to Modeling: A Comprehensive Look at The Business of Being a Model 150, 155 (2007) (the line between "child" and "not child" may be anywhere from age 12 to 18).

[3]Pub. L. No. 64-249, § 432, 39 Stat. 675 (1916).

[4]247 U.S. 251 (1918).

[5]U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause). That same year, Congress endeavored to levy a national tax on businesses with employees under the ages of 14 or 16 through the Child Labor Tax Law, which was struck down by the U.S. Supreme Court in *Bailey v. Drexel Furniture,* 259 U.S. 20 (1922). Additionally, in 1992, Sen. Tom Harkin first proposed the Child Labor Deterrence Act in Congress, with subsequent propositions in 1993, 1995, 1997, and 1999. "This bill would prohibit the importation of products that have been produced by child labor, and included civil and criminal penalties for violators." *Child Labor*, Sen. Tom Harkin, https://web.archive.org/web/20070517052626/http://harkin.senate.gov/child-labor/index.cfm (last visited July 6, 2018).

[6]U.S. Const. art. I, § 8.

[7]29 U.S.C. § 212 (2017).

[8]29 U.S.C. § 213(c)(3).

[9]Sarah A. Donovan & Jon O. Shimabukuro, The Fair Labor Standards Act (FLSA) Child Labor Provisions 4 (June 29, 2016), https://fas.org/sgp/crs/misc/R44548.pdf.

FASHION PRIVACY LAW

BY ELI LEKHT

The area of privacy law was first developed in 1890, by Samuel D. Warren and Louis Brandies, with the idea that individuals have a limited right to privacy, the right "to be let alone."[1] That right, to be let alone, and other definitions of privacy, are still in their infant stages, especially regarding their implications in the 21st century. The right to privacy, stemming from the Fourth Amendment, is still being defined by our courts. The Second Circuit has been one of the leading circuits, establishing frameworks, applicable standards, and tests for determining whether an invasion of privacy has occurred. Privacy issues have been on the rise as our technological progression produces inventions with higher capabilities and metadata collection, which tracks data and preferences over a period of time and produces a bigger picture based on data points.

This is especially relevant in the fashion industry. Fashion companies, like most other companies, want to know as much as possible about their consumers so they can better target consumers' needs. Keeping records such as the sizes, colors, and designs that a customer previously bought has the potential of crossing the line and constitute an infringement of privacy if companies are not careful with the data collected. Furthermore, as "smart" technology is being implemented in all areas of life, fashion companies are getting more involved with creating smart fabrics and integrating the technology into their designs. Additionally, fashion companies are collaborating with the tech-world to create better-looking gadgets that could be worn as a functional fashion statement. Traditionally, technology is first made to serve a specific function, but in recent times, there is a big progression into making fashionable gadgets that look good while serving their functional capabilities.

However, the collaboration of fashion and technology companies creates privacy concerns that were not previously encountered. Fashion companies are collecting data through their wearable

products. Smart fabrics can collect data on heart rates, geo-locations, and even sweat gland activity. The combination of this information causes concerns because of the ability to trace a person's patterns through the collected data. Therefore, wearing a "smart" shirt or a gadget with the above-mentioned capabilities can produce enough data points to constitute an infringement of privacy because the inferences that could be drawn from the data. For example, a show of a consistent increased heart rate around noon may be correlated to consumption of a caffeinated drink. This information, if sold to a third party, can allow for an advertisement or an offer of a coupon to target the customer to purchase his or her cup of coffee from a particular brand.

Furthermore, a trend of increased heart rate in later hours of the day, in combination with other data such an increase in sweat glands activity, can be correlated with a consistent exercise routine. As technology progresses, the capabilities increase, and more data can be collected and more inferences can be drawn from the data. For example, most people would agree that their sexual activity or inactivity should be granted a higher level of privacy. However, assuming the person is not having a nightmare or performing a late night exercise, an increased heart rate and sweat glands activity at 2 a.m., with the combination of the geolocation that matches the consumer's credit card information and shipping address, allows companies to infer when their consumers are engaged in the most private of activities. With the increase of collected data points, more accurate inferences can be drawn.

One category of products that may be considered especially private, which should be particularly sensitive to invasion, is underwear. Skiin's "smart underwear" is equipped with six high-tech sensors woven into their bras and undies that can track heart rate, temperature, pressure, motion, body fat, and hydration levels. Although these fabrics can be used as a measuring tool to help an individual to track his or her state throughout various periods of time, the information that is being shared is of the most sensitive nature and must be dealt with using extreme caution and due diligence.

A current collaboration of fashion and tech companies includes one between Levi Strauss & Co. and Google. They have produced the Levi's Commuter x Jacquard by Google trucker jacket, a piece of wearable technology designed for urban cyclists. Conductive yarn is weaved into the left cuff enabling touch interactivity so users can tap, swipe, or hold to change music tracks, block or answer calls, or access navigation information. What stands out here, however, is that not only does the jacket's functionality answer an actual need for cyclists, but it also genuinely looks good while doing it. Why? Because it looks like a jean jacket and not a piece of technology.[2]

Additionally, among many other devices, there is a wearable device that's about the size of a quarter that track stress levels, steps, sleep, and menstrual cycles.[3] This tracker can prove to be of great help to many of its users. Providing a holistic analysis by integrating sleep cycles with activity trends allows the user to optimize their routines. However, inter alia, data about menstrual cycles should be protected and control of dissemination should be afforded to the user.

On one hand, technology provides us with tools that make invading another's privacy with ease broadly available. In other words, the progression of technology enables individuals to purchase devices such as cameras with advanced zooming options, drones, heat sensors, etc. Previously, such technology was not available for just anyone, but with the progression of time and the development of cheaper electronics, such technology is becoming more and more prevalent. Therefore, invading another's privacy, at least in the traditional sense, has become a lot easier. For example, anyone can walk into a store or go online and buy a drone equipped with a camera and fly it over his neighbor's yard.

On the other hand, technology also provides us with the tools to collect, store, and analyze enormous amounts of data, which results in an invasion of privacy because of the aggregate of information collected. Here, the right to be "let alone" is infringed not because of the invasion into the privacy sphere on a single occasion, but by the collection of pieces of information that on their own would not constitute an infringement. The collection of "innocent" data points allows the collector to draw inferences that would constitute an infringement, especially when the data is collected over a prolonged period of time.[4] This theory of privacy invasion is also referred to as the mosaic theory, where each piece of the mosaic does not constitute an infringement, but because the pieces could be arranged in a way to create a mosaic. Now the question becomes where should courts draw the line between permissible collection and impermissible collection based on the amount and sensitivity of the data collected.

Furthermore, nowadays we can look someone up with a simple search and find out extremely private information about the person within seconds. Every reasonable person would want to have the option to exclude others from accessing private information about themselves. Additionally, as lay persons we face a certain set of problems when some individual tries to look into our lives; however, celebrities face a much bigger problem because many people are trying to obtain information about them and the more sensitive or private the information is, the more profitable the information becomes. "To celebrities, the right of publicity can be an extremely valuable personal asset, as is evident from common advertising campaigns, such as a sports drink promoted by a prominent athlete, as well as the numerous lawsuits seeking to protect that right. The term 'right of publicity' dates to a pivotal 1953 Second Circuit decision."

Fashion law will intersect with privacy law in private businesses by setting regulations that require companies to protect the information collected and take sufficient precautionary measures to ensure data security. In-house attorneys who serve as the median between law and fashion will need to address privacy concerns and liabilities incurred by the collection of data. Additional weight should be given the sensitivity of the issue, the measures taken to keep the information safe, a reasonable expectation of privacy, and the amount of overall information collected. The aggregate of collected information and metadata can produce a "bigger picture" of an individual by drawing inferences and making connections based on seemingly isolated facts.

Despite intellectual property law being key to protecting and promoting brands. Fashion law attorneys do not just focus on the existing laws. Professor Susan Scafidi, academic director of Fashion Law Institute, noted the various areas of law that fashion attorneys face today, as reported by Kenya Wiley on The Fashion Law site:

> What was once considered to be a small area of the law limited to intellectual property protection, fashion law has gained prominence as a recognized legal field involving everything from data security and privacy to real estate, mergers and ac-

quisitions, and even public policy issues in Washington, D.C., that stand to impact the future of fashion.[5]

Wiley, an attorney and political strategist at Ripe Strategic Affairs where she focuses on issues at the intersection of fashion, technology, and public policy, further noted the impact of technology on fashion law and New York Fashion Week and stressed the "importance of keeping up with the changing laws and policies affecting fashion and retail, including the Dodd-Frank Wall Street Reform and Consumer Protection Act."

> As the rise of new media and social networks continue to transform New York Fashion Week and the fashion industry as a whole, the field of fashion law will also evolve and expand. In its Fashion.NYC.2020 report, the New York Economic Development Corporation highlighted the consumer-centric and tech trends that are changing the future of fashion, while also noting the nearly $900 million generated annually from New York Fashion Week. More designers are using e-commerce, mobile apps and social media to circumvent the established Fashion Week process and communicate with their customers directly.

However, the tech and social media trends for fashion also raise additional legal and policy challenges for the designers and the field of fashion law. These include cybersecurity, privacy, new trade pacts and provisions on international data laws for engaging suppliers and customers outside the [United States].[6]

Companies and in-house counsel need to consider privacy concerns when collecting information about individuals and their likings. Especially when the information is personally identifiable and of a sensitive nature. Additionally, companies and in-house counsel need to consider privacy concerns when continuously collecting information because the aggregation of information can become personally identifiable. Furthermore, companies and in-house counsel need to consider privacy concerns when collecting information that is unreasonable, unrelated, or unnecessary to the goal sought. Therefore, companies should aim to collect only relevant information about their customers in order to help customize and better the service provided.

Another solution to the problem can be addressed in well-crafted privacy policies. Privacy policies should be designed in such a way that notify users about what information is being collected and what is done with that information. For example, designing a privacy policy that is more user friendly, requires users to opt-in or opt-out of certain data collections, and explicitly specifies whether the information is sold to third parties. ⊙

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Endnotes

[1]Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

[2]Rachel Arthur, *The Future of Fashion: 10 Wearable Tech Brands You Need to Know*, Forbes (June 30, 2016, 6:34 PM), https://www.forbes.com/sites/rachelarthur/2016/06/30/the-future-of-fashion-10-wearable-tech-brands-you-need-to-know/#146c29d44220.

[3]Bellabeat Leaf health tracker. Bellabeat, https://www.bellabeat.com/activity-tracking (last visited July 5, 2018).

[4]*United States v. Jones*, 565 U.S. 400, 416, 132 S. Ct. 945, 956 (2012).

[5]Kenya Wiley, *Fashion Attorneys and the New Front Row*, Fashion Law (Feb. 22, 2016), http://www.thefashionlaw.com/home/fashion-law-attorneys-the-new-front-row.

[6]*Id.*