

Table of Contents

About the Authors	v
Table of Chapters	vii
Preface to the First Edition	xxix
Acknowledgments	xxxix
Introduction	xxxv

Chapter 1 Starting a Fashion Company

§ 1:1	Introduction	1-2
§ 1:1.1	Planning and Preparation.....	1-2
§ 1:1.2	Drafting the Business Plan	1-6
	[A] Executive Summary	1-7
	[B] Business Description	1-7
	[C] Industry and Market Analysis.....	1-8
	[D] Competition	1-8
	[E] Implementation.....	1-8
	[F] Organization and Management	1-9
	[G] Financial Projections.....	1-9
§ 1:2	Forming and Structuring the Business.....	1-12
§ 1:2.1	Initial Considerations	1-12
§ 1:2.2	Sole Proprietorship.....	1-13
§ 1:2.3	General Partnership	1-15
§ 1:2.4	C Corporation.....	1-19
§ 1:2.5	S Corporation	1-23
§ 1:2.6	Public Benefit Corporation.....	1-25
§ 1:2.7	Limited Liability Company.....	1-26
§ 1:2.8	Limited Partnership	1-29
§ 1:2.9	Cooperatives	1-31
§ 1:2.10	Piercing the Corporate Veil	1-31
§ 1:2.11	Organizational Structure	1-33
§ 1:3	Financing the Business	1-36
§ 1:3.1	Capital Structure	1-36
§ 1:3.2	Equity	1-37
§ 1:3.3	Debt.....	1-49

§ 1:4	Sources of Financing.....	1-50
§ 1:4.1	Financing in Stages.....	1-50
§ 1:4.2	Personal Funds.....	1-50
§ 1:4.3	Friends and Family	1-51
§ 1:4.4	Factoring.....	1-53
§ 1:4.5	Bank Financing and Commercial Credit.....	1-54
§ 1:4.6	Angel Investors	1-56
§ 1:4.7	Venture Capital Investors	1-59
§ 1:4.8	Private Equity	1-64
Appendix 1A	Sample Creative Control Provisions.....	App. 1A-1

Chapter 2 Trademarks and Trade Dress

§ 2:1	Introduction	2-3
§ 2:2	History	2-4
§ 2:3	Trademarks Defined	2-7
§ 2:4	Recurring Trademark Issues.....	2-9
§ 2:4.1	Letters and Numbers in Trademarks.....	2-9
§ 2:4.2	Personal Names	2-9
§ 2:4.3	Geographic Terms and Foreign Words.....	2-11
§ 2:4.4	Generic Terms and Common Phrases.....	2-12
§ 2:4.5	Deceptive Words	2-13
§ 2:5	Trade Dress.....	2-13
§ 2:6	Clearing and Registering a Trademark	2-16
§ 2:6.1	Registration Generally	2-16
§ 2:6.2	What Can Be Registered	2-18
§ 2:6.3	Overview of the Registration Process	2-19
	[A] Trademark Searching	2-19
	[B] The Application.....	2-20
	[C] Use-Based and Intent-to-Use Applications	2-21
	[D] Examination	2-22
	[E] Opposition Proceedings	2-23
	[F] Post-Registration.....	2-23
	[G] International Aspects.....	2-25
§ 2:7	Trademark Infringement.....	2-25
§ 2:7.1	First Element: Establishing That the Trademark Is Entitled to Protection	2-27
§ 2:7.2	Second Element: Establishing Likelihood of Confusion.....	2-29
	[A] The Confusion Factors	2-30
	[B] Types of Confusion	2-32
	[C] Likelihood of Confusion Analysis	2-37

Table of Contents

§ 2:8	Trademark Dilution.....	2-52
§ 2:8.1	Dilution by Blurring	2-54
§ 2:8.2	Dilution by Tarnishment	2-56
§ 2:9	Remedies for Trademark Infringement.....	2-58
§ 2:9.1	Injunctive Relief.....	2-58
[A]	Permanent Injunction.....	2-58
[B]	Preliminary Injunction	2-59
§ 2:9.2	Monetary Relief	2-65
[A]	Defendant’s Profits	2-65
[B]	Plaintiff’s Damages	2-67
[C]	Costs of the Action and Attorneys’ Fees.....	2-67
§ 2:9.3	Accounting of Profits	2-68
§ 2:9.4	Remedies for Infringing Domain Names.....	2-69
§ 2:9.5	International Trade Commission.....	2-70
§ 2:10	Defenses to Infringement	2-74
§ 2:10.1	Invalidity of the Trademark	2-74
§ 2:10.2	Lack of Standing	2-75
§ 2:10.3	Fraud in Procuring the Trademark	2-76
§ 2:10.4	Unclean Hands.....	2-77
§ 2:10.5	Nominative Fair Use.....	2-78
§ 2:10.6	Laches.....	2-80
§ 2:10.7	Naked Licensing	2-82
§ 2:10.8	Parody.....	2-84
§ 2:10.9	Aesthetic Functionality.....	2-87
[A]	The <i>Louboutin</i> Case	2-89
[B]	<i>Eliya v. Steven Madden</i>	2-90
[C]	<i>PUMA v. Forever 21</i>	2-91
§ 2:11	Search Engine and Internet Advertising as Infringement.....	2-92
§ 2:11.1	Use of Trademarks as Metatags	2-93
§ 2:11.2	Use of Trademarks in Search Engine Advertising	2-95
§ 2:11.3	Use of Trademarks in Hashtags	2-101
§ 2:12	Duty to Protect a Mark.....	2-102
§ 2:13	Developing an Enforcement Strategy	2-103
§ 2:13.1	Private Co-Existence Agreements	2-105
§ 2:14	Trademark Licensing	2-106
§ 2:15	International Trademark Issues	2-108
§ 2:15.1	The World Intellectual Property Organization	2-108
§ 2:15.2	The Madrid Protocol.....	2-109
Appendix 2A	International Trademark Classification of Goods and Services	App. 2A-1
Appendix 2B	Signatory Nations to the Madrid Agreement Concerning the International Registration Marks and Related Protocol....	App. 2B-1

Chapter 3 Patents

§ 3:1 Introduction 3-2

Figure 3-1 Trends in Fashion-Related Patents 3-4

§ 3:2 Overview of Patent Protection..... 3-4

 § 3:2.1 What Is a Utility Patent? 3-4

Figure 3-2 Sample Utility Patents in Fashion..... 3-7

 § 3:2.2 What Is a Design Patent?..... 3-7

Figure 3-3 Sample Design Patents in Fashion 3-8

§ 3:3 Applying for Patent Protection 3-10

 § 3:3.1 Application Requirements..... 3-10

 § 3:3.2 Prior Art Searches 3-12

 § 3:3.3 Costs and Fees 3-12

 § 3:3.4 Examination 3-13

 § 3:3.5 Design Patent Applications..... 3-15

 § 3:3.6 Marking..... 3-15

§ 3:4 Patent Enforcement and Remedies..... 3-16

 § 3:4.1 Patent Infringement..... 3-16

 § 3:4.2 Remedies 3-18

 [A] Monetary Damages..... 3-19

 [B] Injunctive Relief..... 3-21

 [C] Attorneys’ Fees..... 3-22

 [D] Prejudgment Interest 3-22

 [E] Enhanced Damages for Willful Infringement 3-23

§ 3:5 Territoriality of Patent Protection..... 3-23

 § 3:5.1 Patent Enforcement in the United States 3-24

 § 3:5.2 Patent Protection Outside the United States..... 3-25

§ 3:6 Patent Protection in Fashion..... 3-26

 § 3:6.1 Design Patent Protection in Fashion: Trends in
Use and Enforcement 3-26

Figure 3-4 Sample Patents Held by Columbia Sportswear
North America, Inc. Covering Related Designs..... 3-29

Figure 3-5 Sample Patents Held by Times Three
Clothier, LLC Covering Related Designs..... 3-30

Figure 3-6 Sample Design Patents Held by Lululemon
Athletica Canada Inc. 3-32

Figure 3-7 Design Patents Held by Skechers U.S.A..... 3-33

Figure 3-8 Design Patents Held by Deckers Outdoor
Corporation 3-34

 § 3:6.2 Utility Patent Protection in Fashion: Trends in
Use and Enforcement 3-35

 [A] High Performance Fabrics and Athletic Attire 3-36

Figure 3-9 Sample Utility Patents in Fashion..... 3-37

 [B] Other Uses of Utility Patents..... 3-37

Table of Contents

Figure 3-10 U.S. Patent No. 6,109,747 (Eyeglass frames
with magnets in flanges) 3-39
 [C] Integration of Technology and Fashion 3-41
Figure 3-11 Sample Utility Patents in Fashion Using RFIDs..... 3-42
Figure 3-12 Biosensing Garment—U.S. Patent D832,556
(OMsignal Inc.)..... 3-43
Figure 3-13 U.S. Patent Application Publ. No. 2018/0256115
(Sony Interactive Entertainment) (Display to
Mitigate “Virtual Reality Sickness”) 3-45
Figure 3-14 U.S. Patent Application Publ. No. 2018/0078183
(Apple, Inc.) 3-46
 § 3:7 Conclusion 3-47
Appendix 3A-1 Illustrative Design Patent 1:
 Seamans, March 28, 2006 App. 3A-1-1
Appendix 3A-2 Illustrative Design Patent 2:
 Iamartino, June 26, 2012..... App. 3A-2-1
Appendix 3B-1 Illustrative Utility Patent 1:
 Seamans, February 7, 2006.....App. 3B-1-1
Appendix 3B-2 Illustrative Utility Patent 2:
 Drab et al., September 11, 2012App. 3B-2-1

Chapter 4 Copyrights

§ 4:1 Introduction 4-2
§ 4:2 Development of Copyright Law in the
 Fashion Industry..... 4-3
§ 4:3 Elements of Copyright Protection 4-5
 § 4:3.1 Originality 4-5
 § 4:3.2 Separability 4-9
 [A] Development of the Separability Doctrine 4-9
 [B] Useful Articles in the Fashion Industry 4-10
 [C] “Separable” Elements of Useful Articles..... 4-11
 [D] Evaluating Whether Design Elements are
 “Separable” 4-12
 § 4:3.3 Idea and Expression 4-16
§ 4:4 Efforts to Protect Fashion More Vigorously 4-19
§ 4:5 Joint Ownership and Works Made for Hire..... 4-21
§ 4:6 Copyright Registration Procedures 4-24
 § 4:6.1 Elements of a Copyright Application 4-25
 § 4:6.2 Renewals and Change of Ownership..... 4-27
 § 4:6.3 Copyright Notice 4-27
 § 4:6.4 Length of Copyright 4-28
§ 4:7 Copyright Infringement 4-29
 § 4:7.1 Access..... 4-31

§ 4:7.2	Substantial Similarity	4-32
[A]	The Ordinary Observer and Related Tests.....	4-32
[B]	The Extrinsic/Intrinsic Tests.....	4-34
[C]	Other Substantial Similarity Tests	4-38
[D]	The Use of Characters in Apparel.....	4-39
§ 4:8	Defenses	4-40
§ 4:8.1	Fair Use	4-40
§ 4:8.2	The <i>De Minimis</i> Doctrine.....	4-43
§ 4:9	Remedies	4-44
§ 4:9.1	Injunctive Relief.....	4-44
§ 4:9.2	Impoundment and Disposition.....	4-45
§ 4:9.3	Damages and Profits.....	4-45
[A]	Actual Damages and Profits.....	4-45
[B]	Statutory Damages	4-46
§ 4:9.4	Costs and Attorneys' Fees.....	4-47

Chapter 5 International Design Protections

§ 5:1	Introduction	5-1
§ 5:2	The European Union.....	5-2
§ 5:3	Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs	5-5
§ 5:4	Individual European Countries	5-6
§ 5:4.1	France.....	5-6
§ 5:4.2	United Kingdom	5-7
§ 5:4.3	Italy	5-9
§ 5:5	Non-European Countries.....	5-10
§ 5:5.1	Japan	5-10
§ 5:5.2	China	5-11
§ 5:5.3	Australia	5-12
§ 5:5.4	New Zealand	5-13
§ 5:5.5	Canada	5-14
§ 5:5.6	Singapore.....	5-16
§ 5:5.7	India	5-17
§ 5:5.8	United Arab Emirates	5-17
§ 5:6	Conclusion	5-17

Chapter 6 Unfair Competition, Misappropriation, and Trade Secrets

§ 6:1	Introduction	6-1
§ 6:2	California Law.....	6-3
§ 6:2.1	California's Statutory Unfair Competition Law	6-3
§ 6:2.2	California's Common Law of Misappropriation.....	6-7
§ 6:2.3	California Uniform Trade Secrets Act.....	6-8

Table of Contents

§ 6:3 New York Law 6-9
 § 6:3.1 New York Common Law Unfair Competition 6-9
 [A] Passing Off..... 6-10
 [B] Misappropriation 6-10
 § 6:3.2 New York Statutory Unfair Competition Law 6-13
§ 6:4 Federal Law..... 6-14
 § 6:4.1 Federal Unfair Competition..... 6-14
 § 6:4.2 The Federal Trade Secrets Statute 6-15
§ 6:5 Illustrative Cases in the Fashion Industry 6-16
 § 6:5.1 Trade Secrets Cases..... 6-16
 § 6:5.2 *J. Crew Group Inc. v. Fenton* 6-18
 § 6:5.3 *Burch v. Burch* 6-20

Chapter 7 Counterfeiting

§ 7:1 Introduction 7-2
§ 7:2 Government Enforcement 7-2
§ 7:3 Civil Litigation 7-6
 § 7:3.1 Establishing Personal Jurisdiction over Counterfeiters..... 7-6
 [A] Websites Selling Goods in the Forum..... 7-7
 [B] Providing Services to Website Selling Counterfeit Goods in the Forum..... 7-8
 [C] Alternative Service of Process 7-8
 § 7:3.2 Likelihood of Confusion 7-9
 § 7:3.3 Ex Parte Injunctive Relief..... 7-11
 [A] Restraint of Third-Party Suppliers and Domain Name Registries..... 7-13
 [B] Restraint of Counterfeiters' Assets..... 7-14
 [C] Expedited and International Discovery 7-16
 § 7:3.4 Contributory Infringement 7-19
 [A] The *Inwood* Decision and Its Progeny 7-20
 [B] Secondary Liability in the Online Context..... 7-21
 [B][1] *Perfect 10 v. Visa International Service Association* 7-24
 [B][2] *Gucci America, Inc. v. Frontline Processing Corp.* 7-25
 § 7:3.5 Monetary Remedies 7-29
 [A] Counterfeiters' Profits..... 7-30
 [B] Statutory Damages 7-31
§ 7:4 Additional Remedies for Trademark Owners..... 7-33
 § 7:4.1 Technological Solutions 7-33
 § 7:4.2 Cooperation Among Trademark Owners, Credit Card Companies, and E-Commerce Servicers..... 7-34
 § 7:4.3 Public Education..... 7-35

Chapter 8 The Gray Market and The First Sale Doctrine

§ 8:1 Introduction 8-1

§ 8:2 Overview of the First Sale Doctrine 8-3

 § 8:2.1 Purpose of the First Sale Doctrine..... 8-3

 § 8:2.2 First Sale Doctrine in Copyright Law..... 8-5

 § 8:2.3 First Sale Doctrine in Trademark Law..... 8-7

 § 8:2.4 First Sale Doctrine in Patent Law..... 8-8

§ 8:3 Development of First Sale Doctrine and
 “Gray Market” Case Law 8-9

 § 8:3.1 *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*..... 8-9

 § 8:3.2 *Quality King Distributors, Inc. v. Lanza
 Research International, Inc.*..... 8-11

 § 8:3.3 *Abercrombie & Fitch v. Fashion Shops of
 Kentucky, Inc.*..... 8-12

 § 8:3.4 *Omega S.A. v. Costco Wholesale Corp.* 8-13

 § 8:3.5 *John Wiley & Sons, Inc. v. Kirtsaeng* 8-14

§ 8:4 First Sale Doctrine in the Fashion and
 Apparel Context 8-16

 § 8:4.1 Unauthorized Production and the “Genuine”
 Goods Doctrine 8-16

 § 8:4.2 Failure to Transfer Ownership of Goods 8-19

§ 8:5 Strategies Used by Fashion Brands to Combat Gray
 Market Sales 8-21

Chapter 9 Design and Manufacturing

§ 9:1 Introduction 9-1

§ 9:2 Fashion Design and Luxury 9-6

§ 9:3 Design and Production 9-11

§ 9:4 Supply Contracts 9-18

§ 9:5 Governmental Regulation and Industry Initiatives 9-18

 § 9:5.1 Federal and State Regulation..... 9-18

 § 9:5.2 Industry Initiatives 9-28

§ 9:6 Conclusion 9-31

Appendix 9A Sample Manufacturing Agreement..... App. 9A-1

Chapter 10 Licensing Arrangements

§ 10:1 Introduction 10-1

§ 10:2 License Agreements for the Manufacture and
 Sale of Products 10-3

 § 10:2.1 Using a Term Sheet 10-3

Table of Contents

§ 10:2.2	Drafting the License Agreement	10-4
[A]	Nature and Scope of the License	10-4
[B]	Rights of First Negotiation, First Offer or First Refusal.....	10-8
[C]	Term	10-9
[D]	Production Process and Quality Control	10-10
[E]	Royalties and Sales Volume.....	10-12
[F]	Reporting and Accounting.....	10-13
[G]	Advertising and Marketing.....	10-14
[H]	Intellectual Property Rights.....	10-14
[I]	Termination and Its Consequences.....	10-15
[J]	Buy-Out Rights.....	10-18
[K]	Representations and Warranties.....	10-19
[L]	Indemnification and Insurance	10-19
[M]	Other Provisions	10-20
§ 10:3	License Agreements for Retail Stores	10-20
§ 10:3.1	Nature and Scope of the License	10-20
§ 10:3.2	Development of the Stores.....	10-21
§ 10:3.3	Other Terms	10-22
Appendix 10A	Sample License Agreement	App. 10A-1

Chapter 11 Retail Sales

§ 11:1	Introduction	11-1
§ 11:1.1	Department Stores.....	11-5
§ 11:1.2	Specialty Stores.....	11-10
§ 11:1.3	Discount Department Stores	11-11
§ 11:1.4	Off-Price Stores.....	11-13
[A]	Factory Outlets	11-13
[B]	Off-Price Retailers	11-14
[C]	Retailer-Owned Off-Price Stores.....	11-15
§ 11:1.5	Boutiques.....	11-15
§ 11:1.6	Pop-Up Shops	11-16
§ 11:1.7	Internet Retailers	11-17
§ 11:1.8	Mail-Order (Catalog) Retailers and Television Retailers	11-21
§ 11:1.9	Transition to Brick-and-Mortar Stores and the Growth of Omni-Channel Retailing	11-22
§ 11:1.10	Shopping for the Experience.....	11-26
§ 11:2	Arrangements Between Retailers and Vendors	11-29
§ 11:2.1	Vendor Standards.....	11-31
§ 11:2.2	Selecting Products; Discounts and Markdown Allowances	11-33
§ 11:2.3	Purchase Orders.....	11-35

§ 11:2.4	Shipping, Delivery and Risk of Loss.....	11-36
§ 11:2.5	Acceptance and Terms of Payment.....	11-38
§ 11:2.6	Chargebacks	11-39
§ 11:2.7	Consignments	11-41
§ 11:3	Distribution Agreements	11-42
§ 11:4	Conclusion	11-42

Chapter 12 Antitrust

§ 12:1	Introduction	12-1
§ 12:2	Basics of Antitrust Claims.....	12-2
§ 12:3	Horizontal Relationships	12-6
§ 12:4	Vertical Relationships	12-7
§ 12:4.1	Vertical Price Restraints	12-8
[A]	Resale Price Maintenance	12-8
[B]	Suggested Retail Prices	12-10
[C]	Persuasion and Refusals to Deal	12-10
[D]	Consignment.....	12-11
[E]	Promotional Programs and Direct Rebates.....	12-12
[F]	Cooperative Advertising.....	12-13
§ 12:4.2	Non-Price Vertical Agreements	12-13
[A]	Exclusive Dealing and Exclusive Distribution	12-14
[B]	Territorial and Customer Restrictions.....	12-15
[C]	Tying.....	12-16
§ 12:5	Price Discrimination—The Robinson-Patman Act.....	12-17
§ 12:6	Antitrust Review.....	12-19

Chapter 13 Real Estate

§ 13:1	Introduction	13-1
§ 13:2	A Brick-and-Mortar Presence: Initial Considerations	13-4
§ 13:2.1	Finding a Suitable Space	13-4
§ 13:2.2	Forms of Real Property Interests	13-5
§ 13:2.3	Holding Real Property Interests; Guaranties and Security Deposits	13-8
§ 13:3	Drafting Lease Provisions	13-9
§ 13:3.1	Space	13-9
§ 13:3.2	Term.....	13-11
§ 13:3.3	Use Provisions	13-14
§ 13:3.4	Exclusive Use and Use Restrictions	13-15
§ 13:3.5	Rent.....	13-16
§ 13:3.6	Rent Abatements	13-19

Table of Contents

§ 13:3.7 Visibility and Signage..... 13-21
§ 13:3.8 Practical Considerations; Alterations..... 13-25
§ 13:3.9 Assignments and Subleases 13-29
§ 13:3.10 Other Provisions..... 13-31
§ 13:4 Special Considerations With Respect to
Fashion Shows..... 13-32

Chapter 14 E-Commerce and Mobile Commerce

§ 14:1 Introduction 14-1
§ 14:2 Developing E-Commerce and Mobile Commerce
Platforms 14-5
§ 14:2.1 E-Commerce Stores 14-5
§ 14:2.2 Mobile Commerce 14-8
§ 14:3 Legal Issues Affecting E-Commerce and
Mobile Commerce 14-10
§ 14:3.1 Contract Issues..... 14-10
§ 14:3.2 Data Privacy and Security Issues 14-16
[A] Regulatory Privacy Issues..... 14-17
[B] Private Privacy Litigation 14-28
§ 14:3.3 State Taxation and *South Dakota v. Wayfair* 14-31
§ 14:3.4 Other E-Commerce Issues 14-34
§ 14:4 Payment Methods..... 14-35

Chapter 15 False Advertising

§ 15:1 Introduction 15-2
§ 15:2 What Constitutes Actionable “False or Misleading”
Advertising?..... 15-2
§ 15:2.1 Commercial Speech Versus Non-Commercial
Speech 15-3
§ 15:2.2 “Advertising” Defined 15-3
§ 15:2.3 Non-Actionable Statements of Opinion Versus
Actionable Statements of Fact..... 15-5
§ 15:2.4 Material Versus Immaterial False and
Misleading Statements 15-7
§ 15:2.5 Literally False Advertisements Versus Ambiguous
But Misleading Advertisements 15-8
§ 15:2.6 Specific Claims (or Disclaimers) Must Be
Considered Within the Context of the
Larger Advertisement..... 15-10
§ 15:3 Historical Regulation of False Advertising..... 15-13
§ 15:4 Federal Regulation of False Advertising Today..... 15-14

§ 15:4.1	Private Litigation Under the Lanham Act	15-15
[A]	Establishing Standing to Sue Under Section 43(a)	15-15
[B]	Prima Facie Elements of a Section 43(a) Claim for False Advertising.....	15-16
[C]	“Establishment Claims”: A Special Case	15-17
[D]	Remedies for False Advertising Available Under the Lanham Act	15-19
[E]	Common Defenses to a Section 43(a) Claim	15-21
§ 15:4.2	Administrative Regulation: FTC Oversight of “Unfair or Deceptive Acts of Practices”	15-21
[A]	The FTC’s Mandate and Structure	15-21
[B]	Broad Scope of the FTC’s Investigative and Prosecutorial Powers	15-22
[C]	FTC Administrative Proceedings	15-22
[D]	FTC Prosecutions in Federal Court.....	15-24
[E]	FTC Enforcement of Labeling Regulations.....	15-24
[F]	“Made in the USA” Labeling	15-25
§ 15:4.3	Administrative Regulation: Concurrent FDA Oversight of Cosmetic Products.....	15-26
[A]	FDA and “Misbranding and Mislabeling” of “Cosmetic” Products.....	15-26
[B]	FDA Administrative Proceedings and Prosecutions in Federal Court.....	15-29
§ 15:5	State Regulation of False Advertising	15-30
§ 15:5.1	“Little FTC Act” Jurisdictions.....	15-30
§ 15:5.2	“Little UDTP Act” Jurisdictions	15-31
§ 15:5.3	California’s Approach to Regulation	15-32
§ 15:5.4	Cosmetics Consumer Class Actions	15-32
§ 15:6	Private Self-Regulation of False Advertising	15-34
§ 15:7	“The New Horizon”: False Advertising on Social Media Platforms	15-37
§ 15:7.1	Section 43(a) Suits Involving Digital Communications.....	15-38
§ 15:7.2	FTC Oversight of Social Media Advertisements.....	15-39
§ 15:7.3	Communications Decency Act	15-42
Appendix 15A	Examples of Effective and Ineffective Disclosures in Digital Advertising.....	App. 15A-1

Chapter 16 Labor and Employment

§ 16:1	Introduction	16-2
§ 16:2	Wages and Hours	16-3

Table of Contents

§ 16:2.1	Overview	16-4
§ 16:2.2	Overtime Exemptions	16-7
[A]	Executive Exemption	16-8
[B]	Administrative Exemption	16-8
[C]	Learned Professional Exemption	16-9
[D]	Creative Professional Exemption	16-10
[E]	Computer Professional Exemption.....	16-10
[F]	Outside Sales Exemption	16-11
[G]	Combination Exemption	16-11
[H]	Highly Compensated Employee Exemption	16-12
§ 16:2.3	Unpaid Trainees or Interns	16-12
§ 16:2.4	Restrictions on Home Workers	16-15
§ 16:2.5	“Hot Goods” and Combating Unfair Labor Practices.....	16-15
§ 16:3	Child Labor Laws and Sweatshop Practices.....	16-16
§ 16:3.1	Federal Child Labor Law	16-16
[A]	Employer-Employee Relationship.....	16-16
[B]	Age of the Minor.....	16-17
[C]	Wages.....	16-18
[D]	Work Prohibitions.....	16-19
[E]	Enforcement, Penalties and Contesting Penalties	16-19
§ 16:3.2	State Child Labor Laws	16-20
§ 16:3.3	Concerns Over Sweatshop Practices	16-20
§ 16:3.4	Addressing Labor Problems Through Self-Regulation: Corporate Codes of Conduct	16-21
§ 16:4	Anti-Discrimination Laws	16-22
§ 16:4.1	Role of the EEOC.....	16-24
§ 16:4.2	Defense to Sex and Age Claims: Bona Fide Occupational Qualifications	16-27
§ 16:4.3	Pregnancy Discrimination	16-28
§ 16:4.4	Family and Medical Leave Act	16-28
§ 16:5	Health Issues in the Fashion Industry and Implications for Employers.....	16-29
§ 16:6	Use of Sales Representatives.....	16-31
§ 16:7	Bargaining Units.....	16-33
§ 16:8	Social Media Usage.....	16-34

Chapter 17 Employment Agreements

§ 17:1	Introduction	17-1
§ 17:2	Basic Employment Terms	17-2
§ 17:2.1	Title and Scope	17-2
§ 17:2.2	Term	17-3

§ 17:2.3	Compensation	17-5
§ 17:2.4	Ownership of Creations.....	17-7
§ 17:2.5	Other Matters.....	17-7
§ 17:3	Confidentiality Covenants.....	17-8
§ 17:3.1	Confidentiality in the Fashion Industry.....	17-8
§ 17:3.2	Drafting Confidentiality Agreements.....	17-9
§ 17:4	Covenants Not to Compete and Related Restrictive Covenants	17-13
§ 17:4.1	Covenants Not to Compete	17-13
§ 17:4.2	Related Restrictive Covenants.....	17-19

Chapter 18 Rights of Publicity

§ 18:1	Introduction	18-1
§ 18:2	Overview of Right of Publicity Law	18-2
§ 18:3	History of the Right of Publicity	18-4
§ 18:4	Leading Examples of State Right of Publicity Law.....	18-8
§ 18:4.1	California	18-8
§ 18:4.2	New York.....	18-11
§ 18:4.3	Indiana	18-15
§ 18:5	Practical Implications for the Fashion Industry	18-17

Chapter 19 Customs and International Trade Issues

§ 19:1	Introduction	19-2
§ 19:2	Importer Responsibilities.....	19-3
§ 19:2.1	Reasonable Care	19-4
[A]	Generally	19-4
[B]	Forced Labor	19-5
[C]	Intellectual Property Rights.....	19-6
§ 19:2.2	Recordkeeping Requirements	19-7
§ 19:3	Entry of Merchandise	19-9
§ 19:4	Classification.....	19-11
§ 19:5	Valuation	19-14
§ 19:5.1	Assists	19-15
§ 19:5.2	Royalties	19-16
§ 19:5.3	Buying Agents.....	19-16
§ 19:5.4	Related Parties	19-17
§ 19:5.5	Alternative Means of Valuation.....	19-18
§ 19:5.6	Reconciliation.....	19-19
§ 19:6	Country of Origin Rules and Marking	19-20
§ 19:6.1	Non-Preferential Rules of Origin.....	19-21
§ 19:6.2	Textile and Apparel Rules of Origin	19-22
§ 19:6.3	Preferential Rules of Origin.....	19-23

Table of Contents

§ 19:6.4	Country of Origin Marking.....	19-24
§ 19:7	Administrative Process	19-25
§ 19:8	Penalties and Enforcement of the Customs Laws	19-26
§ 19:8.1	Seizure and Forfeiture	19-27
§ 19:8.2	Monetary Penalties	19-29
Table 19-1	U.S. Customs and Border Protection Mitigation Guidelines Mitigation	19-31
§ 19:9	Exporting From the United States.....	19-32
§ 19:9.1	Economic Sanctions.....	19-33
§ 19:9.2	Export Controls	19-34
Appendix 19A	Department of Homeland Security U.S. Customs and Border Protection: Entry Summary.....	App. 19A-1
Appendix 19B	Sample Page from Harmonized Tariff Schedule of the United States (2013)	App. 19B-1

Chapter 20 Foreign Corrupt Practices Act

§ 20:1	Introduction	20-2
§ 20:2	Foreign Corrupt Practices Act: Origins	20-2
§ 20:3	Foreign Corrupt Practices Act: Central Provisions	20-3
§ 20:3.1	Anti-Bribery Provisions.....	20-4
[A]	Who Is Covered?.....	20-5
[B]	What Conduct Is Covered?.....	20-7
[C]	Affirmative Defenses and Statutory Exception....	20-11
§ 20:3.2	Accounting Provisions	20-11
[A]	Books and Records Provision	20-13
[B]	Internal Controls Provision	20-13
§ 20:4	FCPA Enforcement	20-14
§ 20:4.1	Case Study: Ralph Lauren.....	20-14
§ 20:4.2	Case Study: Avon.....	20-17
[A]	History of the Avon Investigation	20-18
[B]	Ramifications of the Avon Investigation	20-20
§ 20:4.3	Case Study: Nu Skin.....	20-21
§ 20:4.4	Supply Chain Risks	20-22
[A]	Third-Party Manufacturers	20-23
[B]	Transportation Service Providers.....	20-23
[C]	Distributors	20-24
§ 20:5	Issue-Spotting in FCPA Enforcement.....	20-25
§ 20:5.1	Issuers vs. Non-Issuers	20-25
§ 20:5.2	Third-Party Payments	20-27
§ 20:5.3	Successor Liability	20-29
§ 20:5.4	Foreign Officials.....	20-31
§ 20:5.5	Gifts and Entertainment.....	20-35

§ 20:5.6	Crafting an Effective Compliance Program	20-36
§ 20:5.7	Responding to a Potential Violation	20-37

Chapter 21 Going Public

§ 21:1	Introduction	21-2
§ 21:2	Preparing for an IPO	21-5
§ 21:2.1	The Underwriters	21-5
§ 21:2.2	The Trading Market.....	21-6
§ 21:2.3	Work Streams	21-7
§ 21:3	IPO Process and Timeline.....	21-9
§ 21:3.1	The Registration Statement and SEC Review.....	21-9
§ 21:3.2	The Road Show and Pricing.....	21-11
§ 21:3.3	Gun Jumping.....	21-11
§ 21:4	Drafting the Prospectus	21-12
§ 21:4.1	Prospectus Summary	21-13
§ 21:4.2	Risk Factors	21-13
§ 21:4.3	Use of Proceeds.....	21-14
§ 21:4.4	Capitalization, Dilution and Selected Financial Data	21-14
§ 21:4.5	Management’s Discussion & Analysis of Financial Condition and Results of Operations.....	21-14
§ 21:4.6	Business.....	21-14
§ 21:4.7	Management and Compensation.....	21-15
§ 21:4.8	Principal Stockholders and Transactions with Related Parties	21-15
§ 21:4.9	Description of Securities	21-16
§ 21:4.10	Underwriting	21-16
§ 21:4.11	Financial Statements and Other Data	21-16
§ 21:5	Conducting the Road Show	21-16
§ 21:6	Additional Documentation.....	21-18
§ 21:6.1	The Underwriting Agreement.....	21-18
§ 21:6.2	Lock-Up Agreements	21-18
§ 21:6.3	Additional Filings	21-18
§ 21:7	Life after an IPO	21-19
Appendix 21A	Sample Risk Factors	App. 21A-1

Chapter 22 Selling a Fashion Company or Fashion Brand

§ 22:1	Introduction	22-2
§ 22:2	The Sale Process	22-5
§ 22:2.1	Potential Buyers.....	22-5
§ 22:2.2	Due Diligence.....	22-7
§ 22:2.3	Confidentiality and Standstill Agreements	22-8

Table of Contents

§ 22:3	The Transaction Structure.....	22-8
§ 22:3.1	Form of Transaction.....	22-8
§ 22:3.2	Purchase Price.....	22-9
[A]	Cash.....	22-9
[B]	Equity Securities of the Buyer.....	22-10
[C]	Buyer Promissory Notes.....	22-10
§ 22:3.3	Purchase Price Adjustment Mechanisms.....	22-11
§ 22:3.4	Contingent Payment Mechanisms.....	22-12
[A]	Earn-Outs.....	22-12
[B]	Sale of Brand or Royalty Rights.....	22-13
§ 22:4	Ancillary Agreements.....	22-15
§ 22:5	Risk Allocation.....	22-16
§ 22:5.1	Representations and Warranties.....	22-16
§ 22:5.2	Covenants.....	22-19
§ 22:5.3	Indemnities.....	22-19
§ 22:5.4	Escrow Arrangements.....	22-20
§ 22:6	Closing Conditions and Termination Rights.....	22-21
§ 22:7	Illustrative Acquisitions in the Fashion Industry.....	22-22
§ 22:7.1	Classic Stock Purchase Agreement.....	22-23
§ 22:7.2	Public Company Tender Offer.....	22-23
Appendix 22A	Sample Earn-Out Provision.....	App. 22A-1
Appendix 22B	Sample Fashion Industry Representations and Warranties.....	App. 22B-1

**Chapter 23 Distressed Fashion Businesses, Restructuring,
and Bankruptcy**

§ 23:1	Introduction.....	23-3
§ 23:2	Preparation for a Bankruptcy Case.....	23-4
§ 23:2.1	Fiduciary Duties.....	23-4
[A]	Insolvency and the Standing of Creditors.....	23-5
[B]	Determining Solvency.....	23-6
[C]	Special Considerations for Private Equity Portfolio Companies.....	23-7
§ 23:2.2	D&O Coverage.....	23-7
§ 23:2.3	Liquidity Needs.....	23-9
[A]	Typical Financing Arrangements.....	23-9
[A][1]	Asset-Backed Lending (ABL) Financing.....	23-9
[A][2]	Term Loan Financing.....	23-10
[A][3]	Factoring Arrangements.....	23-12
[B]	Cash Collateral.....	23-13
[C]	DIP Financing.....	23-14

§ 23:2.4	Venue Considerations	23-15
[A]	Third-Party Releases	23-16
[B]	Stub Rent Obligations Under Section 365(d)(3).....	23-19
[C]	Assumption of Intellectual Property Licenses	23-20
§ 23:3	Filing a Bankruptcy Case	23-21
§ 23:3.1	Automatic Stay	23-21
§ 23:3.2	First Day Relief	23-22
[A]	Employee Wages and Benefits	23-23
[B]	Insurance.....	23-23
[C]	Shippers, Warehousemen, and Goods in Transit	23-24
[D]	Reclamation and Section 503(b)(9) Claims	23-25
§ 23:4	Issues in a Bankruptcy Case	23-26
§ 23:4.1	First Day Relief	23-26
[A]	Property of the Estate.....	23-26
[B]	Post-Petition Value Creation	23-28
[B][1]	Source of Revenue and Prepetition Liens	23-28
[B][2]	Oversecured Creditors' Right to Postpetition Interest.....	23-30
§ 23:4.2	Treatment of Non-Residential Real Property Leases	23-32
[A]	Deadline to Assume or Reject	23-33
[B]	Assumption	23-35
[B][1]	Cure & Compensation	23-35
[B][1][a]	Defaults Under Ipso Facto Clauses	23-35
[B][1][b]	Defaults for Non-Monetary Breaches	23-36
[B][2]	Adequate Assurance	23-36
[C]	Assignment.....	23-37
[C][1]	Adequate Assurance	23-38
[C][2]	Non-Assignability of Leases.....	23-38
[C][3]	Special Rules for Shopping Center Leases	23-39
[C][4]	Designation Rights.....	23-40
[D]	Rejection and Damages Cap	23-41
[E]	Rent Obligations and Stub Rent.....	23-42
[F]	Special Rules if Debtor Is Landlord	23-43
§ 23:4.3	Treatment of Executory Contracts	23-43
§ 23:4.4	Intellectual Property	23-44
[A]	Limitations on Assignment	23-44
[A][1]	Whether an Intellectual Property License is an Executory Contract.....	23-45
[A][2]	Applicable Law Exception.....	23-46
[B]	Limitations on Assumption	23-47

Table of Contents

[C]	Special Rules if Debtor Is Licensor	23-48
[C][1]	Non-Trademark Licensees	23-48
[C][2]	Trademark Licensees	23-49
§ 23:4.5	Treatment of Consignments in Bankruptcy	23-50
[A]	Consignments Governed by Article 9 of the U.C.C.	23-50
[A][1]	Definition of Article 9 Consignment	23-50
[A][2]	Consignor’s Right to Obtain Senior Security Interest in Consigned Goods	23-53
[A][3]	If a Consignor Does Not Obtain a PMSI in Consigned Goods	23-55
[B]	Consignments Not Governed by Article 9 of the U.C.C.	23-58
§ 23:5	Bankruptcy Outcomes	23-60
§ 23:5.1	Reorganization or Liquidation Under Chapter 11	23-61
§ 23:5.2	Sales Authorized by Section 363	23-62
[A]	The Basics of a Section 363 Sale	23-63
[B]	Advantages of a 363 Sale to Buyers and Sellers.....	23-64
[B][1]	Going Out of Business Sales.....	23-65
[B][1][a]	Compliance with Federal and State Law	23-66
[B][1][b]	Merchandise Augmentation	23-67
[B][1][c]	Duration	23-67
[B][1][d]	Lease Restrictions.....	23-68
Table of Authorities	T-1
Index	I-1

