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Caylee Phillips
Southern Methodist University, Dedman School of Law

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A No-No From Coco: The Contentious Relationship Between Luxury Brands and Resale Websites

*Caylee Phillips**

“Perfume is the unseen, but unforgettable, ultimate fashion accessory. . . [that] heralds [your] arrival and prolongs [your] departure.”

– Gabrielle “CoCo” Chanel¹

I. INTRODUCTION

Famous for its iconic perfumes and luxury handbags, Chanel is one of the most world-renowned luxury brands. Recently, however, Chanel also made headlines for two lawsuits that could have significant ramifications for the retail industry. The century-old luxury brand filed suit against two secondhand luxury retail websites, The RealReal (TRR) and What Goes Around Comes Around (WGACA), taking issue with the authentication process of the luxury goods the websites have established.²

These lawsuits not only showcase the contentious relationship between luxury brands and resale companies, but they are also noteworthy because they are the first of their kind.³ Resale companies have “been able to live in relatively lawsuit-free existence” because they have fallen squarely within the bounds of the first sale doctrine.⁴ The first sale doctrine establishes that “once a trademark owner, such as Chanel, releases its goods into the market, it cannot prevent the subsequent re-sale of those goods by their purchasers, assuming, of course, that the physical condition of the goods in question had [not] been altered or impaired.”⁵ The suits are also noteworthy because they appear to uproot the settled doctrine that secondhand retailers are insulated

* Caylee Phillips is a second-year law student at SMU Dedman School of Law. She attended Oklahoma State University and graduated with a degree in chemical engineering.

1. June Weir, *A Woman’s Distinctive Signature*, N.Y. TIMES MAG. (Mar. 4, 1984), <https://www.nytimes.com/1984/03/04/magazine/a-woman-s-distinctive-signature.html> [<https://perma.cc/KHL6-26DF>].
2. See Complaint at 2, Chanel, Inc. v. The RealReal, Inc., No. 1:18-CV-10626 (S.D.N.Y. Nov. 14, 2018) [hereinafter Complaint, Chanel, Inc. v. The RealReal, Inc.]; Complaint at 2, Chanel, Inc. v. What Goes Around Comes Around, LLC, No. 1:18-CV-02253 (S.D.N.Y. Mar. 14, 2018) [hereinafter Complaint, Chanel, Inc. v. What Goes Around Comes Around].
3. See *The Rocky Relationship Between Luxury Resale and (Some) Luxury Brands*, FASHION L. (Dec. 19, 2018), <https://www.thefashionlaw.com/relationship-between-luxury-re-sale-luxury-brands-is-rocky/> [<https://perma.cc/223Y-8DHR>].
4. *Id.*
5. *Id.*

from trademark infringement liability for products that consumers sell on their websites, as long as the secondhand retailer does not create confusion by implying an association between the two retailers.⁶

This Comment will discuss the ongoing lawsuits Chanel has filed, as well as the potential effects the outcome of the cases could have on the secondhand retail industry. Part II of this Comment will discuss the background of luxury fashion, Chanel, and the secondhand luxury retail industry. Part III will provide a brief overview of the applicable law. These sections will give a basic understanding of the law underlying the claims—trademark infringement, counterfeit, false advertising, and unfair competition and deceptive trade practices. Additionally, TRR has filed two counterclaims against Chanel for antitrust and tortious interference, so a brief background of this law will conclude the relevant law sections.⁷ Part IV will detail the arguments for both sides laid out in the two ongoing lawsuits. Finally, through analyzing Chanel’s lawsuits against TRR and WGACA, this article will find that partnerships between luxury brands and secondhand retail websites would establish mutually beneficial relationships because secondhand retailers can provide valuable consumer data to brands in exchange for proper authentication procedures of the luxury goods.

II. BACKGROUND

From Instagram to runways, the fascination with attaining luxury fashion is not a new concept in modern society, but the appeal of luxury goods is a historically recent cultural phenomenon.⁸ The word “luxury” actually derives from the French word “luxurie” which means “lust” or “debauchery.”⁹ Back in ancient times, Romans passed legislation specifically to limit people’s spending on luxury goods because they were concerned with the “disruptive power of gratuitousness and excess.”¹⁰ In Greece, people were shunned for eating fish because it was shameful to be able to “afford such expensive foodstuff.”¹¹ And, in Britain during the Middle Ages, it was con-

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6. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 102–03 (2d Cir. 2009) (holding that eBay was not liable for trademark infringement based on counterfeits sold because eBay’s platform allowed users to directly list products. eBay did not guarantee authenticity of products, nor did it have any part in the description of the terms listed).
 7. *See Memorandum in Support of the The RealReal, Inc.’s Motion for Leave to File Amended Answer, Affirmative Defenses, and Counterclaims at 1–2, Chanel, Inc. v. The RealReal, Inc.*, No. 1:18-CV-10626 (S.D.N.Y. Nov. 3, 2020) [hereinafter *Mem. in Supp. of TheRealReal’s Motion for Leave*].
 8. *See* Rae Oliver, *A Brief History of Luxury*, TRULY (Jan. 27, 2020), <https://truly-experiences.com/blog/brief-history-luxury/> [<https://perma.cc/R8KH-V8MJ>].
 9. *Id.*
 10. *Id.*
 11. *Id.*

sidered “bad form” to have something expensive or not easily attainable.¹² But as the world evolved so did society’s perception on luxury. The industrial revolution in the 19th century brought a demand for luxury goods that has continued to escalate over time.¹³ Luxury today not only symbolizes our fashion sense, but it also “defines our political, social, and economic standing and our self-worth.”¹⁴

Gabrielle “CoCo” Chanel was born on August 19, 1883.¹⁵ While her early life was plagued with hardships, Chanel forged one of the most revolutionary luxury fashion brands.¹⁶ Chanel opened her first shop in 1910, and the brand quickly became known for elegant, simple, and luxuriously constructed clothes.¹⁷ Chanel’s inspiration for the iconic little black dress drew from her unique upbringing.¹⁸ The renowned Chanel No.5 remains one of the world’s most recognized perfumes, and the launch of this iconic scent was the first perfume released from a fashion brand.¹⁹

After a hiatus from fashion during World War II, Chanel returned to fashion at the age of seventy-one and once again took over the world with her classic designs.²⁰ Chanel passed away in 1971, but Karl Lagerfeld has continued her legacy.²¹ The Chanel brand remains known today for its classy designs and functional women’s clothing and accessories.²²

With luxury fashion still on the rise, secondhand resale websites have become a popular alternative for younger generations to attain coveted items at discounted prices.²³ Resale companies have also become increasingly vital to the growing sustainability movement with more consumers flocking to

12. *Id.*

13. *Id.*

14. Harry Hurt III, *Luxury, and How it Became Common*, N.Y. TIMES (Aug. 19, 2007), <https://www.nytimes.com/2007/08/19/business/yourmoney/19shelf.html> [<https://perma.cc/8WXV-LYYU>].

15. *Inside Chanel*, CHANEL, https://inside.chanel.com/en/timeline/1883_birth-of-gabrielle-chanel (last visited Feb. 12, 2022) [<https://perma.cc/S37T-GEHH>].

16. *See History of the Brand: Chanel*, LUXURY VINTAGE (June 5, 2020), <https://www.biography.com/fashion-designer/coco-chanel> [<https://perma.cc/2E86-KTMB>] (after her mother’s death and father’s sequential abandonment, Gabrielle grew up in an orphanage raised by nuns).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *See History of the Brand: Chanel*, *supra* note 16.

23. *See* Cassidy Michel, *Chanel v. TheRealReal: Luxury Meets Resale*, U. CIN. L. REV. (Dec. 14, 2020), <https://uclawreview.org/2020/12/14/chanel-v-the-real-real-luxury-meets-resale/> [<https://perma.cc/CG3Q-RSYY>].

their websites.²⁴ Resale companies have created a “\$27 billion market that is projected to raise to \$51 billion by 2023” and “occupy at least 10% of the retail industry.”²⁵

While some luxury brands have embraced this new trend, others (namely Chanel) have become increasingly wary of their influence on consumers.²⁶ Many brands—like Gucci, Balenciaga, Saint Laurent, and Bottega Veneta—have chosen to partner with these companies to obtain valuable consumer data or create consignment partnerships or promotional relationships.²⁷ The CEO of Vestiaire Collective has even said that resale is “a point of entry-level access for young customers who can’t yet shop full price luxury.”²⁸

Instead of recognizing the potential for partnerships, Chanel has filed suit against the secondhand retail websites—one against WGACA and one against TRR.²⁹ These two cases highlight a potentially harmful outcome for online resellers of luxury goods. Not only do these cases showcase the arguably monopolistic power that some luxury brands can establish over their goods beyond the first sale, but also the harmful consequences this unchecked power could have on both the market and the goodwill of the brands themselves.³⁰ Partnerships between luxury brands and online resellers is good for both consumers and luxury brands because the online retailers will establish a secondary market for Millennials and Gen Z consumers, who have become the top buyers of luxury goods, and allow for a broader consumer base overall.³¹

Ideally, to protect this market, the law would require brands to help secondhand retailers develop procedures to ensure authenticity of goods.³² This would protect the existence of secondhand retailers without risk of

24. *Id.*

25. *Id.*

26. *See id.*

27. *The Rocky Relationship Between Luxury Resale and (Some) Luxury Brands*, *supra* note 3.

28. *Id.*

29. *See* Complaint, Chanel, Inc. v. The RealReal, Inc., *supra* note 2; Complaint, Chanel, Inc. v. What Goes Around Comes Around, LLC, *supra* note 2.

30. *Chanel is Maintaining a “Monopoly” with the Help of Big Name Retailers, Publishers, The RealReal Claims in New Filing*, FASHION L. (Oct. 30, 2020), <https://www.thefashionlaw.com/chanel-is-maintaining-a-monopoly-with-the-help-of-big-name-retailers-publishers-the-realreal-claims-in-new-filing/> [<https://perma.cc/6Z7V-5UCH>].

31. Sufiana Sharuddin, *The Evolution of the Luxury Fashion Market*, OMNILYTICS (Sept. 1, 2020), <https://omnilytics.co/blog/the-evolution-of-the-luxury-fashion-market> [<https://perma.cc/YYT3-BR8S>].

32. *See* discussion *infra* Part V, Section B.

counterfeits that could tarnish the goodwill of the brands.³³ The issue with a compulsory requirement is it could potentially disclose confidential business practices of the brands.³⁴ Instead, the law should encourage partnerships between the two while punishing anticompetitive practices.³⁵ Luxury brands and secondhand retailers could establish their own terms while preventing the brands from establishing a monopoly.³⁶ Partnerships will balance the established reputation and goodwill luxury brands have spent over a century establishing with the rightful establishment of a secondary market.³⁷

III. TRADEMARK AND RELATED LAW

A. Background of Intellectual Property Protection in Luxury Goods

Fashion innovation is protected through intellectual property (IP) law because fashion “emanates from an individual’s creativity and vision” while IP provides the legal framework to protect that creativity.³⁸ IP protection is extremely vital to luxury brands because it allows companies to “generate[] customer loyalty and add[] to the commercial value” of the companies.³⁹ Further, luxury brands must capitalize on the IP rights available to “deter others from copying their designs” and to “distinguish their brand’s image” in order to be successful.⁴⁰

However, the United States’ intellectual property framework is not necessarily set up to provide fashion companies the protection they seek.⁴¹ Currently, in the United States, there is no protection for the “cut of an item of clothing,” and trademark protection is often based on the brand’s notoriety and only available to words and marks, “not the design itself.”⁴² In contrast, the European Union “affords comprehensive IP protection for clothing, accessory, and footwear design” and trademark and copyright protection for “other structural facets of and identifiers on clothing, accessories, and foot-

33. See discussion *infra* Part V, Section B.

34. See Mem. in Supp. of TheRealReal’s Motion for Leave, *supra* note 7, at 1.

35. See discussion *infra* Part V, Section B.

36. See *infra* notes 312–320 and accompanying discussion.

37. See discussion *infra* Part V, Sections A–B.

38. Lisa Rosaya, *Luxury Fashion & the Importance of Intellectual Property*, LUXURY SOC’Y (Apr. 18, 2016), <https://luxurysociety.com/en/articles/2016/04/luxury-fashion-the-importance-of-intellectual-property> [https://perma.cc/HV64-4XFL].

39. *Id.*

40. Shieva Salehnia, *A Golden Opportunity: Supporting Up-and-Coming U.S. Luxury Designers Through Design Legislation*, 42 BROOK. J. INT’L L. 367, 370 (2016).

41. *Id.* at 371.

42. *Id.*

wear items.”⁴³ This disconnect is largely because European courts have a “long-held tradition[]” of recognizing design rights.⁴⁴ The protection is even more significant in countries like France “where fashion has been heralded as an art form important for economic and cultural growth.”⁴⁵

Copyrights protect “original works of authorship, such as writings, music, and works of art, that have been tangibly expressed by the author.”⁴⁶ To be tangibly expressed means that one can “perceive[], reproduce[], or otherwise communicate[]” the work.⁴⁷ However, copyright does not protect useful articles, such as the “cut or shape of garments, accessories, and furniture.”⁴⁸ “Useful articles” is defined as “objects having an intrinsic . . . function that is not merely to portray the appearance of the article or to convey information.”⁴⁹ Some useful articles might contain “applied art” features that will be protected, such as a “design and decoration applied to everyday objects to make them aesthetically pleasing.”⁵⁰ These features must be separately identifiable and “exist independently” from the useful aspects of the article.⁵¹ Because copyright does not apply to useful articles, it is extremely hard for luxury brands to obtain a copyright for their fashion innovation.⁵² Even if their design does receive this protection, the copyright will not apply to the whole design—it will only apply to the artistic features that exist independent from the useful article.⁵³

Patent law protects inventions that are new, useful, and non-obvious.⁵⁴ This type of protection pertains to “invented material used in the manufacture of fashion items or luxury goods” and “innovative methods of manufacturing.”⁵⁵ Design patents, a special type of patent, pertain to “new, original, and ornamental design[s] for . . . article[s] of manufacture.”⁵⁶ Because patent law

43. *Id.* at 370–71.

44. *Id.* at 371.

45. *Id.*

46. Lisa Rosaya, *Types of IP—Copyrights*, in GLOBAL LEGAL GUIDE FOR LUXURY & FASHION COMPANIES § 1:4 (2019 ed. 2019).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*; see also *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1008 (2017) (holding the chevron design on cheer uniforms existed independently from the cheer uniform itself so the design was protectable).

52. See Rosaya, *supra* note 46, § 1:4.

53. See *id.*

54. See *id.*

55. *Id.*

56. *Id.*

pertains to the manufacturing of articles and the protection is limited in duration, patent law does not necessarily lend itself to the protection of the creative designs of fashion brands.⁵⁷

B. Trademarks

The limitations of the other two types of IP are the reason that luxury companies tend to protect their brands in trademark law. Trademark law protects the “words, phrases, symbols, and/or designs used to identify and distinguish the products/services of one party from those of another.”⁵⁸ Trademarks can also be “the appearance of product designs and product packaging and designs used in connection with the offering of retail services.”⁵⁹ Trademark law protects the “owner’s investment in the goodwill and reputation attached to the mark.”⁶⁰ Trademark law’s primary function is to protect consumers from confusion as to the source and “signif[ies] all goods and services sold or provided under the mark are of an equal level of quality.”⁶¹

To obtain a trademark, the owner registers the mark with the U.S. Patent and Trademark Office provided the mark(s) is “distinctive, non-functional, and serve[s] as an indicator of [a] source; not confusingly similar to a third party’s mark; and not deceptive.”⁶² Whether a mark satisfies the “distinctiveness” requirement depends on the “strength of the mark.”⁶³ There are four categories of marks: (1) fanciful or arbitrary; (2) suggestive; (3) descriptive; and (4) generic.⁶⁴ Arbitrary or fanciful marks are “words with no meaning, or words that have meaning but not in relation to the goods or services of interest.”⁶⁵ Suggestive marks “imply certain attributes” of the goods or services.⁶⁶ Descriptive marks “describe a purpose, characteristic, quality, user, ingredi-

57. *See id.*

58. Rosaya, *supra* note 38.

59. Rosaya, *supra* note 46, § 1:6.

60. Rosaya, *supra* note 38.

61. *Id.*

62. Rosaya, *supra* note 46, § 1:6; *see also* *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (holding that trademarks can now be disparaging because this requirement was held invalid under the First Amendment protection of free speech); *In re Brunetti*, 877 F.3d 1330, 1355 (Fed. Cir. 2017) (holding immoral or scandalous marks can be registered because there was no substantial government interest in justifying the bar on these marks).

63. Rosaya, *supra* note 46, § 1:6.

64. *Id.*

65. *Id.*

66. *Id.*

ent, feature, or function of the goods or services.”⁶⁷ Descriptive marks require secondary meaning to acquire trademark protection.⁶⁸ Generic marks consist of the “common name for the relevant goods or services.”⁶⁹ These categories are a spectrum with the strongest marks being fanciful or arbitrary and the weakest marks being descriptive.⁷⁰ Generic marks are not afforded trademark protection.⁷¹

Registration of a mark is not required to have rights in the mark.⁷² The United States recognizes common law trademarks that afford some degree of trademark rights “derive[d] from [the] use of the mark.”⁷³ However, registration provides advantages to the brands such as notice to the public, “legal presumption of ownership,” and “prima facie evidence of the owner’s exclusive right[s].”⁷⁴

1. Trademark Infringement

Trademark owners have the right “to prevent others from registering or using an identical or confusingly similar mark in connection with [the] goods or services.”⁷⁵ This right includes circumstances where another uses the mark to confuse or deceive consumers into believing that: “the third party is affiliated, connected, or associated with the trademark owner”; “the third party’s goods or services derive from the trademark owner”; or “the trademark owner sponsors or approves the third party’s goods or services.”⁷⁶

Trademark infringement analysis involves two steps: (1) “whether the mark merits protection,” and (2) “whether the alleged[] infringing use of the mark (or a similar mark) is likely to cause consumer confusion.”⁷⁷ The “central inquiry” under Section 32(a) of the Lanhama Act is “the likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question.”⁷⁸ However, the Lanham Act does not “impose liability for the sale of genuine goods

67. *Id.*

68. *Id.* (Secondary meaning means that “consumers have come to recognize the owner as the unique source of that particular product or service.”).

69. Rosaya, *supra* note 46, § 1:6.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Rosaya, *supra* note 46, § 1:6.

76. *Id.*; Lanham Act § 32(1)(a), 15 U.S.C. § 1114(1)(a).

77. Chanel, Inc. v. The RealReal, Inc., 449 F. Supp. 3d 422, 435 (S.D.N.Y. 2020).

78. *Id.* at 436.

bearing a true mark” even if “the sale is not authorized by the mark owner.”⁷⁹ Further, the Lanham Act “does not prevent one who trades a branded product from accurately describing it by its brand name” as long as the third party “does not create confusion by implying an affiliation with the owner of the product.”⁸⁰ Likelihood of confusion requires a “probability of confusion, not a mere possibility.”⁸¹

There are multiple tests among the circuits to determine the likelihood of confusion, but the Second Circuit uses an eight-factor balancing test established in *Polaroid Corp. v. Polarad Electronics Corp.*⁸² The factors are:

- (1) strength of the trademark; (2) similarity of the marks; (3) proximity of the products and their competitiveness with one another; (4) evidence that the senior user may “bridge the gap” by developing a product for sale in the market of the alleged infringer’s product; (5) evidence of actual consumer confusion; (6) evidence that the imitative mark was adopted in bad faith; (7) respective quality of the products; and (8) sophistication of consumers in the relevant market.⁸³

In addition to considering these factors, courts consider “nominative fair use” factors.⁸⁴ Nominative fair use is a defense to trademark infringement and permits another to “refer to the trademark owner’s goods and services associated with the mark.”⁸⁵ These factors are: (1) “whether the use of the plaintiff’s mark is necessary to describe both the plaintiff’s product or service and the defendant’s product or service . . .”; (2) “whether the defendant uses only as much of the plaintiff’s mark as is necessary to identify the product or service”; and (3) “whether the defendant did anything that would, in conjunction with the mark, suggest sponsorship or endorsement by the plaintiff.”⁸⁶ Wrongful intent is not required for an action for trademark infringement, and acting in good faith is no defense.⁸⁷ The Lanham Act is a strict liability stat-

79. *Id.*

80. *Id.*

81. *Id.* at 436 (quoting *Guthrie Healthcare Sys. v. ContextMedia, Inc.*, 826 F.3d 27, 37 (2d Cir. 2016)).

82. *Id.* at 436 (citing *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961)).

83. *The RealReal*, 449 F. Supp. 3d at 436–37.

84. *Id.* at 437.

85. *Fair Use of Trademarks*, INT’L TRADEMARK ASS’N, <https://www.inta.org/fact-sheets/fair-use-of-trademarks-intended-for-a-non-legal-audience/> [https://perma.cc/VP9C-LXMK] (last updated Jan. 31, 2016).

86. *The RealReal*, 449 F. Supp. 3d at 437.

87. *Id.* at 438.

ute, and a “retailer’s direct sale of an infringing product is sufficient” to establish liability.⁸⁸

If a mark is a well-known or famous mark, the mark may gain “special protection.”⁸⁹ The special protection grants the owner rights in all “classes of goods and services.”⁹⁰ This means that an owner can not only sue a third party for infringement based on likelihood of consumer confusion but also sue on dilution grounds.⁹¹ There are two types of dilution: blurring and tarnishment.⁹² Blurring arises when the “connection in consumers’ minds between the famous mark and the goods or services with which that mark is used is weakened.”⁹³ Tarnishment occurs when the “defendant’s use is unsavory or unwholesome, or the mark is used in connection with inferior products.”⁹⁴

2. Counterfeits

A counterfeit is a use of a trademark that is a “knock-off” for the same type of good that the genuine mark was registered.⁹⁵ Counterfeits are so similar in design to the genuine goods that it is “evident what item the knock off was copying.”⁹⁶ Counterfeits are a specific type of trademark infringement.⁹⁷ To bring a counterfeit action, the trademark must be registered.⁹⁸ While trademark infringement requires balancing of the likelihood of confusion factors, counterfeiting does not because “counterfeit marks are inherently confusing.”⁹⁹ Counterfeits are prosecuted under both criminal and civil laws if they are likely to cause consumer confusion.¹⁰⁰

88. *Id.* (quoting *GMA Accessories, Inc. v. BOP, LLC*, 765 F. Supp. 2d 457, 463 (S.D.N.Y. 2011)).

89. Rosaya, *supra* note 46, § 1:6.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Colleen Jordan Orscheln, *Bad News Birkins: Counterfeit in Luxury Brands*, 14 J. MARSHALL REV. INTELL. PROP. L. 249, 254 (2015).

96. *Id.*

97. *Id.* at 253.

98. *Id.*

99. *Chanel, Inc. v. The RealReal, Inc.*, 449 F. Supp. 3d 422, 437 (S.D.N.Y. 2020) (quoting *Spin Master Ltd. v. Alan Yuan’s Store*, 325 F. Supp. 3d 413, 421 (S.D.N.Y. 2018)).

100. Orscheln, *supra* note 95, at 254 (explaining that a civil action is prosecuted under the Lanham Act while a criminal action is prosecuted under 18 U.S.C. § 2320).

C. False Advertising

Section 43(a)(2) of the Lanham Act establishes a cause of action for false advertising.¹⁰¹ The elements of false advertising are: “(1) a false or misleading statement of fact; that is (2) used in a commercial advertisement or promotion; that (3) deceives or is likely to deceive in a material way; (4) in interstate commerce; and (5) has caused or is likely to cause competitive or commercial injury to the plaintiff.”¹⁰² False advertising is brought on one of two theories: (1) the advertisements are “literally false” or (2) the advertisements, while not “literally false,” tend to “mislead or confuse consumers.”¹⁰³ On either theory, the plaintiff has the burden to prove that the false or misleading advertisement “involved an inherent or material quality of the product.”¹⁰⁴ Further, the plaintiff must prove that the advertisement “is the cause of actual or likely injury” to them.¹⁰⁵

To prove literal falsity, the plaintiff must show that “the advertisement either makes an express statement that is false or a statement that is ‘false by necessary implication.’”¹⁰⁶ False by necessary implication means that the advertisements, considered in context, “necessarily and unambiguously imply a false message.”¹⁰⁷ To establish that the advertisements tend to mislead or confuse consumers, the plaintiff must show that “a statistically significant part of the commercial audience holds the false belief allegedly communicated.”¹⁰⁸ False advertising is only actionable for “false misrepresentations or statements of fact” and does not apply to statements of opinion or subjective claims about products.¹⁰⁹

101. Chanel, Inc. v. The RealReal, Inc., 449 F. Supp. 3d 422, 442 (S.D.N.Y. 2020).

102. *Do I Have a Lanham Act Claim Against My Competitor for False Advertising?*, BONA LAW PC, <https://www.businessjustice.com/do-i-have-a-lanham-claim-against-my-competitor-for-false-adverti.html> [https://perma.cc/6UT8-M8DA] (last visited Nov. 11, 2021).

103. Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 112 (2d Cir. 2010) (quoting Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 153 (2d Cir. 2007))

104. *Id.* (quoting *Time Warner Cable*, 497 F.3d at 153 n.3).

105. Church & Dwight Co. v. SPF Swiss Precision Diagnostics, GmbH, 843 F.3d 48, 65 (2d Cir. 2016).

106. *Id.* (quoting *Time Warner Cable*, 497 F.3d at 158).

107. *Id.*

108. *Tiffany*, 600 F.3d at 112–13.

109. Chanel, Inc. v. The RealReal, Inc., 449 F. Supp. 3d 422, 443 (S.D.N.Y. 2020) (quoting *Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995)).

D. Unfair Competition and Deceptive Trade Practices

An unfair competition claim requires a showing of “either actual confusion or a likelihood of confusion.”¹¹⁰ The plaintiff must also prove bad faith or intent on the part of the defendant.¹¹¹ Bad faith is “an attempt by a junior user of the mark to exploit the good will and reputation of a senior user by adopting the mark with the intent to sow confusion.”¹¹² If a counterfeit mark is involved, bad faith is presumed as long as the “defendants were aware of the counterfeiting.”¹¹³

Section 349 of the New York General Business Law establishes the cause of action for deceptive trade practices.¹¹⁴ The elements of this cause of action are: (1) the “challenged transaction was ‘consumer-oriented’”; (2) the “defendant engaged in deceptive or materially misleading acts or practices”; and (3) the “plaintiff was injured by reason of defendant’s deceptive or misleading conduct.”¹¹⁵ The non-consumer plaintiff must prove that the alleged conduct has “significant ramifications for the public at large.”¹¹⁶ This means that there has to be “specific and substantial injury to the public interest over and above ordinary trademark infringement.”¹¹⁷

E. Antitrust

Antitrust claims are governed by the Sherman Act and the Federal Trade Commission Act (FTC Act).¹¹⁸ The Sherman Act outlaws “every contract, combination, or conspiracy in restraint of trade” and “any monopolization, attempted monopolization, or conspiracy or combination to monopolize.”¹¹⁹ The FTC Act bars “unfair methods of competition” and “unfair or deceptive

110. *Id.* at 446 (requirements under New York common law).

111. *Id.*

112. *Id.* (quoting *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 388 (2d Cir. 2005)).

113. *Id.* (quoting *BBK Tobacco & Goods, LLP v. Galazy VI Corp.*, 408 F. Supp. 3d 508, 523 (S.D.N.Y. 2019)).

114. *Id.* (quoting *Weight Watchers Int’l, Inc. v. Noom, Inc.*, 403 F. Supp. 3d 361, 381 (S.D.N.Y. 2019)).

115. *The RealReal*, 449 F. Supp. 3d at 446 (quoting *Weight Watchers*, 403 F. Supp. 3d at 381).

116. *Id.* (quoting *RCA Trademark Mgmt. S.A.S. v. VOXX Int’l Corp.*, No. 14CV6294-LTS-HBP, 2015 WL 5008762, at *4 (S.D.N.Y. Aug. 24, 2015)).

117. *Id.* at 447.

118. *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [https://perma.cc/LBY3-VNTH] (last visited Feb. 24, 2022).

119. *Id.*

acts or practices.”¹²⁰ Although the Federal Trade Commission (FTC) does not enforce the Sherman Act, it can bring actions “against the same kinds of activities that violate the Sherman Act.”¹²¹

In any antitrust claim, the first step is to determine the “relevant market.”¹²² The relevant market is a set of products that one has “control over in order to retain the consumers.”¹²³ Determination of the relevant market is “an empirical matter” and is “closely related to the ability to exert monopoly power.”¹²⁴ One has monopoly power when they are able to control prices and the consumers will not “shift their demand to some other product which one doesn’t control.”¹²⁵ The Second Circuit has explained that while market share is a relevant determination, the court should also consider monopoly power after “full consideration of the relationship between market share and other relevant market characteristics.”¹²⁶ The other relevant factors include “barriers to entry, the elasticity of consumer demand, and the nature of the anticompetitive conduct such as whether there is ‘exclusionary conduct without justification of efficiency.’”¹²⁷ Thus, the Second Circuit has “permitted findings of market power with [relevant market] shares less than 50%.”¹²⁸

F. Tortious Interference

Tortious interference is a “common law tort [that allows] a claim for damages against a defendant who wrongfully interferes with the plaintiff’s contractual or business relationships.”¹²⁹ There are two types of tortious interference: interference with contractual relations and interference with pro-

120. *Id.*

121. *Id.*

122. Ben Kleinman, *Luxury Markets, Antitrust, and Intellectual Property: An Introduction*, 90 J. PAT. & TRADEMARK OFF. SOC’Y 742, 744 (2008).

123. *Id.* at 745.

124. *Id.*

125. *Id.*

126. The RealReal’s Reply Memorandum in Support of The RealReal’s Motion for Leave to File Amended Answer, Affirmative Defenses, and Counterclaims at 11–12, *Chanel, Inc. v. The RealReal, Inc.*, No. 1:18-CV-10626 (S.D.N.Y. Nov. 24, 2020) (quoting *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 98 (2d Cir. 1998)) [hereinafter Reply in Support of The RealReal’s Motion for Leave].

127. *Id.* at 12 (quoting *M&M Med. Supplies & Servs., Inc. v. Pleasant Valley Hosp. Inc.*, 981 F.2d 160, 168 (4th Cir. 1992)).

128. *Id.* at 12–13 (quoting *New York v. Actavis, PLC*, No. 14 Civ. 7473, 2014 WL 7015198, at *37 (S.D.N.Y. Dec. 11, 2014)).

129. *Tortious Interference*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/tortious_interference [<https://perma.cc/F8P8-5FJS>] (last visited Jan. 12, 2022).

spective business relations.¹³⁰ There are four conditions that must be met to allege a claim for tortious interference with business relations under New York law: (1) “business relations with a third party”; (2) “the defendants interfered with those business relations”; (3) “the defendants acted for a wrongful purpose”; and (4) “the defendants’ acts injured the relationship.”¹³¹ For this type of tortious interference, the plaintiff must also prove that they would have entered into a contract with the third party if it had not been for the defendant’s conduct.¹³² The elements are the same for tortious interference with contractual relations, except the first two elements would be: (1) contractual relations with a third party, and (2) the defendants interfered with those contractual relations.¹³³

IV. CHANEL V. SECONDHAND RETAILERS

This section will focus on an overview of two ongoing cases filed by Chanel against two secondhand retail websites, TRR and WGACA. These cases highlight the “still-largely-unsettled relationship” between luxury brands and retail companies and what many luxury brands have voiced concerns about over the years.¹³⁴ Despite the familiar bitterness, resale websites and luxury brands have remained in relatively conflict-free coexistence because of the well settled first sale doctrine.¹³⁵ The cases’ impending outcomes could mean a change in the luxury fashion industry as it is now known, making them a highly watched line of cases.

This section will start with a brief discussion of the case Chanel filed against WGACA and will end with a discussion of the case Chanel filed against TRR. The TRR case implicates a lengthier discussion because TRR has filed four counterclaims against Chanel for antitrust, anticompetition, and tortious interference with both contract and prospective business relations based on alleged findings in discovery of the WGACA case.¹³⁶ Both cases have a preliminary decision by the court—a limited grant of a motion to

130. *What is Tortious Interference?*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-is-tortious-interference.html> [https://perma.cc/H8TK-7EZ8] (last visited Jan. 12, 2022).

131. Reply in Support of The RealReal’s Motion for Leave, *supra* note 126, at 25 (quoting *Scutti Enter., L.L.C. v. Park Place Ent. Corp.*, 322 F.3d 211, 215 (2d Cir. 2003)).

132. *Id.*

133. *What is Tortious Interference?*, *supra* note 130 (elements three and four would be exactly the same).

134. *The Rocky Relationship Between Luxury Resale and (Some) Luxury Brands*, *supra* note 3.

135. *Id.*

136. Reply in Support of The RealReal’s Motion for Leave, *supra* note 126, at 1.

dismiss in favor of the resale companies; however, both cases are largely ongoing.¹³⁷

A. *Chanel, Inc. v. What Goes Around Comes Around, LLC*

Chanel filed their initial lawsuit against WGACA on March 14, 2018.¹³⁸ Chanel asserted claims for: (1) counterfeiting and trademark infringement under Section 32(1) of the Lanham Act, 15 U.S.C. § 1141(1); (2) false advertising under Section 43(a)(1)(B) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); (3) unfair competition and endorsement and association under Section 43(a)(1)(A), 15 U.S.C. § 1125(a)(1)(A); (4) unfair competition and false advertising under Sections 349 and 350 of the New York General Business Law, respectively; and (5) unfair competition under New York common law.¹³⁹ The crux of their argument was that WGACA was representing itself as a “leading global purveyor of authentic luxury vintage accessories and apparel” and certified that all of their goods were “100% Authenticity Guaranteed.”¹⁴⁰ Chanel argues this was an attempt to “deceive consumers into falsely believing” that WGACA had an affiliation or a relationship with Chanel or “that Chanel has authenticated WGACA’s goods in order to trade off of Chanel’s brand and good will.”¹⁴¹ Specifically, Chanel argues WGACA’s use of their trademark in advertisements, social media, and on their website misleads consumers as to the source of the goods.¹⁴² Further, Chanel argues that there is evidence of WGACA selling counterfeit items including a handbag and a fake Chanel-branded tissue box cover.¹⁴³

1. What Goes Around Comes Around, LLC’s Motion to Dismiss

WGACA filed a motion to dismiss the suit on June 18, 2018, alleging that the complaint fails to allege sufficient facts to support the claims for infringement, unfair competition, and false advertising.¹⁴⁴ WGACA first argued that Chanel failed to support a probability, not just mere possibility, of

137. *Chanel, Inc. v. The RealReal, Inc.*, 449 F. Supp. 3d 422, 429 (S.D.N.Y. 2020); *Chanel, Inc. v. What Goes Around Comes Around, LLC*, No. 18 Civ. 2253 (LLS), 2018 WL 4440507, at *1 (S.D.N.Y. Sept. 14, 2018).

138. Complaint, *Chanel, Inc. v. What Goes Around Comes Around*, *supra* note 2, at 1.

139. *Id.* at 3–4.

140. *Id.* at 2.

141. *Id.*

142. *Id.* at 3.

143. *Id.*

144. Memorandum of Law in Support for Motion to Dismiss at 1, *Chanel, Inc. v. What Goes Around Comes Around, LLC*, No. 1:18-CV-02253 (S.D.N.Y. June 18, 2018) [hereinafter Mem. of Law in Support – WGACA Motion to Dismiss].

likelihood of consumer confusion by their use of the Chanel mark on their website and in advertising.¹⁴⁵ Further, WGACA argued that their use of Chanel's trademarks on their websites was nominative fair use because they are merely using the marks to identify goods offered for sale.¹⁴⁶

Secondly, WGACA argued that the complaint failed under the first sale doctrine.¹⁴⁷ WGACA recounted that the "right of the producer to control distribution of its products does not extend beyond the first sale of the product."¹⁴⁸ Chanel only asserted that the products WGACA sold "may" include counterfeits, but WGACA contended this assertion was "purely speculative and couched in terms that avoid any direct allegation of fact."¹⁴⁹ Moreover, WGACA argued that Chanel had not presented any allegations of fact that supported the argument that the products WGACA sold on their website are not products originally sold by Chanel.¹⁵⁰

WGACA further argued that Chanel had not asserted facts to support the claims for false advertising.¹⁵¹ WGACA detailed that, for a claim of false advertising, Chanel must prove that the statements made were either literally false, either explicitly on their face or by necessary implication.¹⁵² Specifically, WGACA argued Chanel contends the inclusion of Chanel's trademarks were literally false by necessary implication because it necessarily implied that Chanel is associated with WGACA or authorized WGACA to sell its products.¹⁵³ In contrast, WGACA argued the inclusion of their trademarks is subject to more than one reasonable interpretation and therefore cannot be literally false.¹⁵⁴

Lastly, WGACA asserted that Chanel failed to adequately state a claim for relief under New York common law for unfair competition and New York general business law for deceptive business practices.¹⁵⁵ For unfair competition, WGACA asserted that Chanel did not prove that WGACA acted

145. *Id.* at 5–6 (quoting *Streetwise Maps, Inc. v. VanDam, Inc.*, 159 F.3d 739, 743 (2d Cir. 1998)) (requiring a showing of probability of confusion for infringement claims as opposed to a mere possibility).

146. *Id.* at 7.

147. *Id.* at 8–9.

148. *Id.* (citing *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013)).

149. *Id.* at 9.

150. Mem. of Law in Support – WGACA Motion to Dismiss, *supra* note 144, at 9.

151. *Id.* at 9–11.

152. *Id.* at 10.

153. *Id.*

154. *Id.*

155. *Id.* at 12–14.

in bad faith, a requirement under New York law.¹⁵⁶ Further, WGACA simply asserted that Chanel failed to point to any misleading business practice.¹⁵⁷

2. Chanel’s Opposition to What Goes Around Comes Around, LLC’s Motion to Dismiss

Chanel filed a memorandum of law in opposition to WGACA’s motion to dismiss, arguing WGACA’s conduct is squarely within the express language of the Lanham Act, not protected under nominative fair use, not protected under the first sale doctrine, and supported by Chanel’s state law claims.¹⁵⁸ Chanel asserted that WGACA is not merely using their mark to identify the products being sold, but instead, is seeking to use the “powerful strength of the CHANEL brand and trademarks to free ride off of Chanel’s goodwill.”¹⁵⁹ Yet, Chanel remained adamant that they are not trying to restrain WGACA’s sale of secondhand goods nor its use of their marks when necessary to identify the products, but they are merely trying to stop “deceptive use of CHANEL Trademarks and misleading and marketing tactics.”¹⁶⁰

Specifically, Chanel further reiterated that WGACA purports to authenticate Chanel products with the promise of “100% authenticity guaranteed” without any training or authorization by Chanel.¹⁶¹ Chanel emphasized that WGACA is misleading consumers by not advising customers that WGACA is “not affiliated with or sponsored by Chanel or that the products offered have not been authenticated by Chanel.”¹⁶² Further, Chanel took issue with WGACA’s advertising and marketing, arguing that the hashtag “#WGACACHANEL” and other former Chanel advertisements were featured on their social media “without authorization [by Chanel].”¹⁶³ Chanel also referenced advertisements featured on their brick-and-mortar stores featuring the Chanel trademark and pictures of their iconic products such as Chanel No.5.¹⁶⁴ The luxury brand argued that these advertisements, featuring their goods and registered trademark, infringe their rights and create a false associ-

156. Mem. of Law in Support – WGACA Motion to Dismiss, *supra* note 144, at 1, 12.

157. *Id.* at 13.

158. Memorandum of Law in Opposition of Defendants’ Motion to Dismiss at 8–25, Chanel, Inc. v. What Goes Around Comes Around, LLC, No. 1:18-CV-02253 (S.D.N.Y. July 27, 2018) [hereinafter Mem. of Law in Opposition of Defendant’s Motion to Dismiss – WGACA].

159. *Id.* at 1.

160. *Id.* at 2.

161. *Id.* at 4.

162. *Id.* at 5.

163. *Id.* at 6.

164. Mem. of Law in Opposition of Defendant’s Motion to Dismiss – WGACA, *supra* note 158, at 7.

ation in the mind of the consuming public.¹⁶⁵ Thus, the crux of Chanel's argument was the repeated use and prominent display of their trademark and goods in total amount to trademark infringement as they allege that the use is more than necessary to accurately describe the products being sold by WGACA.¹⁶⁶

3. Southern District of New York's Decision on the Motion to Dismiss

On September 14, 2018, the Southern District of New York granted WGACA's motion to dismiss in part.¹⁶⁷ The court denied the motion to dismiss in relation to the claims for trademark infringement, false endorsement, and false advertising under the Lanham Act.¹⁶⁸ The court reasoned that WGACA's use of the hashtag "#WGACACHANEL," as well as the prominence and repeated use of the marks, was likely to cause confusion to consumers as to the source of the goods or a false affiliation between Chanel and WGACA.¹⁶⁹

Additionally, the court denied the motion to dismiss with respect to the claims for deceptive business practices under Section 349 of the New York General Business Law and false advertising under New York General Business Law.¹⁷⁰ The court determined that the complaint evidenced advertising and marketing business practices that "could deceive customers or constitute false advertising."¹⁷¹ Specifically, the court stated WGACA's website "may suggest an affiliation or sponsorship with Chanel by prominently displaying Chanel-branded goods and Chanel trademarks."¹⁷²

However, the court granted the motion to dismiss with respect to the unfair competition claim under New York common law.¹⁷³ The common law unfair competition claim is like claims under the Lanham Act, except New York law requires a showing of bad faith.¹⁷⁴ The court held that Chanel made no showings that WGACA intended to impart confusion between the two companies' products; in fact, the court understood WGACA's intent was to

165. *Id.* at 6–7.

166. *Id.*

167. Chanel, Inc. v. What Goes Around Comes Around, LLC, No. 18 Civ. 2253 (LLS), 2018 WL 4440507, at *1 (S.D.N.Y. Sept. 14, 2018).

168. *Id.* at *2–4.

169. *Id.* at *3.

170. *Id.* at *4.

171. *Id.*

172. *Id.*

173. *What Goes Around Comes Around, LLC*, 2018 WL 4440507, at *4.

174. *Id.*

“display the Chanel brand conspicuously, and emphasize that their source was Chanel.”¹⁷⁵

B. *Chanel, Inc. v. The RealReal, Inc.*

Chanel filed their initial suit against TRR on November 14, 2018.¹⁷⁶ Their initial complaint was largely the same as the initial complaint against WGACA—alleging counterfeiting and trademark infringement under Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1); unfair competition and false endorsement and association under Section 43(a)(1)(B) under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); unfair competition under Section 349 of the New York Business Law; false advertising under Section 350 of the New York General Business Law; and unfair competition under the common law of New York.¹⁷⁷ Chanel argued that TRR represented to consumers that “[TRR] is authentic” and that they “ensure[d] that every item on The RealReal is 100% real things” thanks to a “dedicated team of authentication experts.”¹⁷⁸ This, Chanel argued, led consumers to believe that TRR had approval “from or an association or affiliation with Chanel,” which Chanel denied.¹⁷⁹ Further, Chanel alleged that there was evidence of TRR selling seven counterfeit Chanel bags as if they were authentic.¹⁸⁰

Like in the WGACA case, Chanel asserted that TRR was “piggybacking on the reputation” of their brand.¹⁸¹ The luxury brand indicated that all guarantees of authenticity by TRR are in vain because “only Chanel itself can know what is genuine Chanel.”¹⁸² Furthermore, Chanel urges the counterfeit bags that TRR allegedly sold are additional evidence of improper authentication procedures.¹⁸³ Chanel supported the false advertising and false endorsement claims by the sale of counterfeits to prove that their authenticity guarantee is impliedly false and creates a “false impression” in the minds of consumers.¹⁸⁴

175. *Id.* at *4–5.

176. Complaint, *Chanel, Inc. v. The RealReal, Inc.*, *supra* note 2, at 1.

177. *Id.* at 3.

178. *Id.* at 2.

179. *Id.* at 2, 11–12.

180. *Id.* at 11–12.

181. *Id.* at 9.

182. Complaint, *Chanel, Inc. v. The RealReal, Inc.*, *supra* note 2, at 11.

183. *Id.* at 12.

184. *Id.* at 13.

1. The RealReal's Motion to Dismiss

TRR countered by filing a motion to dismiss, asserting that Chanel failed to state a claim for all issues.¹⁸⁵ TRR asserted that Chanel has “no right to control the secondary market” based on settled trademark law and consumer rights.¹⁸⁶ TRR called the suit an “effort by Chanel to uproot this settled doctrine to the detriment of consumers, undermine consumer confidence in the secondary market, and stifle legitimate competition.”¹⁸⁷ Further, TRR contended that Chanel’s sweeping claim that only they can authenticate their products “would make it impossible for all secondary dealers to do business.”¹⁸⁸

TRR also took specific issue with Chanel’s claims that “TRR’s marketing of Chanel products or its representations about authenticity imply any affiliation between the parties” because TRR explicitly stated that “The RealReal’s authentication process is unique to The RealReal and independent of any brands.”¹⁸⁹ Additionally, TRR’s website states that “none of the brands sold assume any responsibility for any products featured through the website,” and that “[b]rands sold on The RealReal are not partnered or affiliated with The RealReal in any manner.”¹⁹⁰

Furthermore, TRR asserted Chanel’s claims for trademark infringement, counterfeiting, and false endorsement/unfair competition fail for two distinct reasons.¹⁹¹ First, Chanel did not sufficiently plead facts to establish a likelihood of consumer confusion because they did not establish that a “reasonable consumer would believe that TRR is affiliated with Chanel.”¹⁹² Instead, TRR reminded that trademark law allows TRR’s use of the mark to “describe and promote the sale of Chanel goods” as nominative fair use.¹⁹³ Second, TRR argued their business practices are protected under the first sale doctrine.¹⁹⁴ Chanel is only “entitled to control the initial sale of its branded goods,” but once the goods have entered the market, “the first sale rule bars

185. Memorandum of Law in Support of The RealReal’s Motion to Dismiss at 1, Chanel, Inc. v. The RealReal, Inc., No. 1:18-CV-10626 (S.D.N.Y. Jan. 10, 2019) [hereinafter Mem. of Law in Support of The RealReal’s Motion to Dismiss].

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 2.

190. *Id.*

191. Mem. of Law in Support of The RealReal’s Motion to Dismiss, *supra* note 185, at 2.

192. *Id.*

193. *Id.* at 1.

194. *Id.* at 2–3.

Chanel from dictating to consumers when or how they may part with their Chanel items.”¹⁹⁵

Likewise, TRR argued that Chanel’s claim for false advertising also fails.¹⁹⁶ With regards to the authentication process, TRR has an express disclaimer that would defeat any likelihood of consumer confusion allegations.¹⁹⁷ Also, Chanel’s claim that TRR “falsely and/or misleadingly represents to consumers The RealReal’s ability to authenticate secondhand CHANEL products” is not supported because TRR only warrants that they authenticate their products through their own “internal, proprietary process.”¹⁹⁸ Lastly, TRR asserted that the unfair competition claim under New York law and similar claims under New York General Business law were unsupported because Chanel did not adequately allege that TRR acted in bad faith with intent to confuse consumers, “nor that TRR’s conduct resulted in a public harm above and beyond ordinary trademark infringement.”¹⁹⁹

2. Chanel’s First Amended Complaint in Response to The RealReal’s Motion to Dismiss

On February 1, 2019, Chanel amended their complaint “adding some additional assertions to ideally bolster its existing trademark infringement, counterfeiting, and false advertising claims.”²⁰⁰ In combination with their first complaint about the TRR allegedly piggybacking off of their reputation, Chanel further emphasized the “representations and guarantees that TRR makes to consumers about its staffs’ ability to properly and fully authenticate real Chanel products” is misleading to consumers.²⁰¹ Chanel also asserted that none of the TRR’s authentication team was, in fact, “properly qualified or trained in authentication of Chanel products to support [TRR’s] claims as to the genuineness of the products it resell[s].”²⁰² Chanel adamantly asserts

195. *Id.* at 1–3 (emphasis omitted).

196. *Id.* at 3.

197. Mem. of Law in Support of The RealReal’s Motion to Dismiss, *supra* note 185, at 3.

198. *Id.*

199. *Id.* at 3–4.

200. *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, FASHION L. (Feb. 4, 2019), <https://www.thefashionlaw.com/chanel-to-the-realreal-your-authentication-experts-arent-experts-at-all/> [https://perma.cc/77ZS-TLTY]; *see also* Chanel’s First Amended Complaint at 3–4, *Chanel, Inc. v. The RealReal, Inc.*, No. 1:18-CV-10626 (S.D.N.Y. Feb. 1, 2019) [hereinafter Chanel’s First Am. Complaint].

201. *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, *supra* note 20000 (internal quotations omitted); Chanel’s First Am. Complaint, *supra* note 200, at 12–13.

202. Chanel’s First Am. Complaint, *supra* note 20000, at 12.

that “only products purchased directly from Chanel and its authorized retailers can be certain to be” and advertised as “genuine and authentic.”²⁰³

Additionally, the luxury brand emphasized that any disclaimer by TRR that they are not associated or affiliated with Chanel was “not sufficient to adequately qualify, contextualize, explain, or negate the representations and guarantees.”²⁰⁴ “Any disclaimer that [TRR] purports to offer consumers to distance itself from the brands of products it resells is neither present nor sufficiently conspicuous or likely to be seen by all consumers prior to purchasing from [TRR].”²⁰⁵

Chanel also took issue with TRR’s alleged practice of “removing [Chanel] serial numbers from all of its Chanel branded leather goods product listings” which they claim took place after they notified TRR about the alleged counterfeit items.²⁰⁶ Since removing the serial number would be of “no benefit to consumers,” Chanel alleged that TRR did this “to frustrate attempts to determine whether [TRR’s] Chanel-branded goods are of questionable origin or counterfeit” and done as a “dishonest means [of] unfairly competing.”²⁰⁷ Further, the luxury brand pointed to complaints to the Better Business Bureau from consumers “as a result of [TRR’s] false and misleading business practices.”²⁰⁸

Finally, Chanel argued that TRR’s use of the term “vintage” to describe some of the Chanel products when “in fact they are not vintage products, and instead, are likely less than 20 years old.”²⁰⁹ The luxury brand claimed this is false advertising because the FTC’s definition of vintage is “an item that is at

203. *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, *supra* note 200; Chanel’s First Am. Complaint, *supra* note 200, at 10.

204. *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, *supra* note 200; Chanel’s First Am. Complaint, *supra* note 200, at 13.

205. Chanel’s First Am. Complaint, *supra* note 200, at 13.

206. *Id.* at 19; *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, *supra* note 200.

207. *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, *supra* note 200; Chanel’s First Am. Complaint, *supra* note 200, at 19.

208. *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, *supra* note 200; Chanel’s First Am. Complaint, *supra* note 200, at 20.

209. *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, *supra* note 200; Chanel’s First Am. Complaint, *supra* note 200, at 14.

least 50 years old.”²¹⁰ By describing products as “vintage” that are not at least fifty years old, Chanel claimed this “misrepresent[ed] the nature and description of secondhand Chanel-branded products.”²¹¹

3. Southern District of New York’s Decision on the Motion to Dismiss

On March 30, 2020, the Southern District of New York granted TRR’s motion to dismiss in part.²¹² The court granted the motion to dismiss with respect to trademark infringement under 15 U.S.C. § 1114(a)(1), false endorsement and unfair competition under 15 U.S.C. § 1125(a)(1)(A), deceptive and unfair trade practices under New York General Business Law Section 349, and false advertising under New York General Business Law Section 350.²¹³ The court granted the motion to dismiss with respect to these claims because TRR’s use of genuine Chanel trademarks was not likely to cause consumer confusion, and Chanel did not adequately allege injury to the public at large.²¹⁴

The court started the analysis by noting that the Lanham Act “does not prevent one who trades a branded product from accurately describing it by its brand name, so long as the trader does not create confusion by implying an affiliation with the owner of the product.”²¹⁵ After applying the *Polaroid* factors, the court determined Chanel did not allege facts sufficient for its infringement, false endorsement, or unfair competition claims.²¹⁶ Chanel’s trademarks are “incredibly well-known, recognizable, and prevalent in the luxury fashion market,” and even though TRR’s sale of their products may directly compete with Chanel, there was also evidence in the record that a secondhand market “bolsters primary markets.”²¹⁷ Further, Chanel itself has admitted that it does not sell secondhand or vintage Chanel goods, so with respect to these products, TRR was not directly competing with Chanel.²¹⁸

210. *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, *supra* note 200; Chanel’s First Am. Complaint, *supra* note 200, at 14.

211. *Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All*, *supra* note 200; Chanel’s First Am. Complaint, *supra* note 200, at 14.

212. Chanel, Inc. v. The RealReal, Inc., 449 F. Supp. 3d 422, 428 (S.D.N.Y. 2020).

213. *Id.* at 429.

214. *Id.*

215. *Id.* at 438 (quoting Dow Jones & Co., Inc. v. Int’l Sec. Exch., Inc., 451 F.3d 295, 308 (2d Cir. 2006)).

216. *Id.*

217. *Id.* at 438–39.

218. *The RealReal*, 449 F. Supp. 3d at 439.

Additionally, the court reminded that Chanel has “identified no evidence of actual customer confusion” or that TRR “adopted the genuine use of Chanel Trademarks in bad faith.”²¹⁹ The court also asserted that the luxury fashion market is “relatively sophisticated” in that consumers of luxury goods are more knowledgeable about luxury brands, so the risk of consumer confusion is low.²²⁰

The court also determined that Chanel did not sufficiently allege that TRR’s use of Chanel trademarks “stepped over the line into a likelihood of [consumer] confusion” by the use of marks “too prominently or too often, in terms of size, emphasis, or repetition.”²²¹ Even though TRR’s website has a page describing the Chanel brand, TRR also has pages for nine other luxury brands.²²² Chanel did not identify any facts “suggesting that [TRR] displays Chanel-branded goods ‘more prominently than other luxury-branded goods.’”²²³ There were also no facts to suggest that TRR used the marks in any way other than to identify Chanel products as Chanel.²²⁴ Further, the court ruled that Chanel “offered no non-conclusory allegations to suggest that [TRR] inaccurately depicts its relationship with Chanel or Chanel’s products and services.”²²⁵ The court found TRR’s disclaimer on its website sufficient to abrogate consumer confusion as to TRR’s association with the luxury brand.²²⁶ The court drew a marked distinction from the court’s decision in the WGACA case because WGACA “prominently featured the Chanel brand through promotional advertising that was Chanel specific” and “its social media pages included quotations of CoCo Chanel and photographs of Chanel products accompanied by the hashtags #WGACACHANEL.”²²⁷ The court stated that their advertising and authenticity guarantee was “materially different from the authenticity statements on [TRR’s] website.”²²⁸

However, the court denied the motion to dismiss with respect to trademark counterfeiting/infringement under 15 U.S.C. § 1114(1)(a), false advertising under 15 U.S.C. § 1125(a)(1)(B), and unfair competition under New

219. *Id.*

220. *Id.*

221. *Id.* (quoting *Int’l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC*, 823 F.3d 153, 168 (2d Cir. 2016)).

222. *Id.*

223. *Id.* (quoting *Chanel, Inc. v. What Goes Around Comes Around, LLC*, No. 18 Civ. 2253 (LLS), 2018 WL 4440507, at *3 (S.D.N.Y. Sept. 14, 2018)).

224. *The RealReal*, 449 F. Supp. 3d at 439.

225. *Id.*

226. *Id.* at 439–40.

227. *Id.* at 440 (internal quotation marks omitted).

228. *Id.*

York common law.²²⁹ The court determined that Chanel sufficiently alleged that TRR marketed and sold counterfeit Chanel products, and that TRR’s advertising regarding the authenticity of the products is “literally false.”²³⁰ Even though TRR argued that their liability for trademark infringement for counterfeit sales should be foreclosed by *Tiffany (NJ), Inc v. eBay, Inc.*, the court held that the analogy to *Tiffany* was not persuasive and even suggests that companies like TRR “would be liable for direct infringement based on the sale of counterfeit goods.”²³¹ The Second Circuit in *Tiffany* held that eBay’s knowledge in the sale of counterfeits “is relevant to the issue of whether eBay contributed to the direct infringement of Tiffany’s mark” but “is not a basis for a claim of direct infringement against eBay.”²³² Further, the Second Circuit determined that to “impose liability because eBay cannot guarantee the genuineness of all of the purported Tiffany products offered on its website would unduly inhibit the lawful resale of genuine Tiffany goods.”²³³ The reasoning in *Tiffany* “is premised on the fact that eBay did not itself sell counterfeit goods; only the fraudulent vendors did,” which is different than TRR’s business.²³⁴

TRR retains the power to “reject for sale, set prices, and create marketing for goods,” and TRR “maintains the inventory of merchandise” and “bears the risk of loss” for all the products.²³⁵ Therefore, the court maintained, TRR’s sale of the counterfeits is sufficient use for it to be liable for trademark infringement.²³⁶ By adopting this type of business model—where TRR “controls a secondary market for trademarked luxury goods”—the court concluded that TRR “must bear the corresponding burden of the potential liability.”²³⁷

With respect to the false advertising claims, the court held that the advertisements “regarding the authenticity of the products [TRR] sells, considered in context, are literally false.”²³⁸ The court went further to say that even

229. *Id.* at 429.

230. *The RealReal*, 449 F. Supp. 3d at 429.

231. *Id.* at 440; *see Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 103 (2d Cir. 2009) (Held that eBay was not liable for trademark infringement based on counterfeits sold because eBay’s platform allowed users to directly list products. eBay did not guarantee authenticity of products nor did it have any part in the description of the items listed.).

232. *The RealReal*, 449 F. Supp. 3d at 440 (citing *Tiffany*, 600 F.3d at 103).

233. *Id.* at 441.

234. *Id.* (internal quotations marks omitted).

235. *Id.*

236. *Id.* at 441 (citing *El Greco Leather Prods. Co. v. Shoe World, Inc.*, 806 F.2d 392, 396 (2d Cir. 1986)).

237. *Id.*

238. *The RealReal*, 449 F. Supp. 3d at 443.

if the advertisements were not held to be “literally false,” they would still likely to mislead or confuse customers.²³⁹ Specifically, the court determined that TRR’s statement that they “ensure every item on The RealReal is 100% the real thing” is an “unambiguous representation of fact that all the products advertised and sold” are 100% authentic.²⁴⁰ Considering Chanel’s allegations that certain counterfeits were sold on TRR’s website as authentic, this context “suffices to establish a plausible allegation of literal false advertising.”²⁴¹ However, the court did state that “a disclaimer might suffice” to protect TRR when the authentication procedures do not “immediately catch every instance of attempted deception.”²⁴²

Lastly, because the court rejected Chanel’s Lanham Act claims for TRR’s genuine use of Chanel Trademarks, the court also similarly rejected Chanel’s New York common law claims.²⁴³ However, because of the alleged sale of counterfeit items, the court held that Chanel had sufficiently alleged that TRR “advertised and sold counterfeit Chanel products under circumstances evidencing bad faith.”²⁴⁴ The court found persuasive Chanel’s independent investigation of the alleged counterfeits and Chanel’s findings of TRR removing identifying serial numbers from Chanel products.²⁴⁵ The court did recognize that discovery “might demonstrate that [TRR] had honest motives for removing these serial numbers,” but Chanel’s allegations were sufficient “to allege bad faith at this stage.”²⁴⁶

The court, however, did grant the motion to dismiss with respect to Chanel’s claims under Sections 349 and 350 of New York General Business Law because Chanel did not demonstrate “this dispute involves injury to the public interest over and above ordinary trademark infringement.”²⁴⁷ Chanel’s First Amended Complaint only alleged specific injury to themselves and the individuals that received counterfeit products but only made conclusory statements regarding injury to the public at large.²⁴⁸ The only case where TRR’s counterfeit sales were alone sufficient to invoke public interest are “cases in which defendants knowingly perpetuated counterfeiting schemes

239. *Id.*

240. *Id.* at 443–44.

241. *Id.* at 440.

242. *Id.* at 444 (citing *Tiffany*, 600 F.3d at 103).

243. *Id.* at 447.

244. *The RealReal*, 449 F. Supp. 3d at 447.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

with an intent to deceive consumers,” but there were no facts to suggest that this happened in this case.²⁴⁹

4. The RealReal’s Counterclaims

TRR filed an amended answer on November 24, 2020, alleging new counterclaims for antitrust, unfair competition, and tortious interference.²⁵⁰ TRR claimed the action arose out of Chanel’s unlawful efforts to bar second-hand sellers from selling Chanel goods under the guise of protecting its trademark.²⁵¹ These counterclaims were based on actions by Chanel that included “limiting supply and raising prices when it perceives its bags” are “being carried by too many people”; “taking the position that only Chanel can authenticate its handbags because ‘only Chanel itself can know what is genuinely Chanel,’ while simultaneously refusing to license its authentication database to competitors”; and using “its monopoly power” to cause retailers and publishers to end partnerships with the TRR.²⁵²

TRR first alleged that Chanel’s relevant market shares of 30% to 50% are sufficient to adequately plead monopolization with due consideration of the “relationship between market share and other relevant market characteristics.”²⁵³ TRR noted that the Second Circuit held “a party may have monopoly power over a particular market, even though its market share is less than 50%.”²⁵⁴ Thus, taking into account not only Chanel’s relevant market share but also Chanel’s specific actions in the market, Chanel has maintained a monopoly on their products.²⁵⁵ TRR pointed to the actions stated above, and TRR has alleged that Chanel “has tolerated similar conduct by Farfetch, in which it has a significant investment and/or partnerships and affirmatively refrained from pursuing litigation against Farfetch while pursuing actions against other competitors for similar actions.”²⁵⁶

Further, TRR alleged that Chanel tortiously interfered with contracts with Saks and Neiman Marcus by causing both stores to forego contracts with TRR after Chanel “threatened to pull all of its products” from their stores “if [the stores] did not make immediate changes.”²⁵⁷ TRR also alleged

249. *Id.* at 448.

250. *See* First Amended Answer, Affirmative Defenses And Counterclaims at 18–19, Chanel, Inc. v. The RealReal, Inc., No. 1:18-CV-10626 (S.D.N.Y. Feb. 25, 2021)

251. Reply in Support of The RealReal’s Motion for Leave, *supra* note 126, at 1.

252. *Id.*

253. *Id.* at 11–12.

254. *Id.* at 12 (quoting Hayden Pub. Co. v. Cox Broad. Corp., 730 F.2d 64, 69 n. 7 (2d Cir. 1984)).

255. *Id.* at 15.

256. *Id.*

257. Reply in Support of The RealReal’s Motion for Leave, *supra* note 126, at 26.

that Chanel tortiously interfered with their prospective business relations.²⁵⁸ TRR claimed they were set to run advertisements in *Women's Wear Daily*, but the advertisement were cancelled “at the behest of a ‘huge partner.’”²⁵⁹ TRR claimed that “these facts give rise to at least a plausible inference that but for Chanel’s interference, the advertisements in [*Women's Wear Daily*] would have run.”²⁶⁰

V. PARTNERSHIPS ARE IN THE BEST INTERESTS OF LUXURY BRANDS

Secondhand retailers have never had legal issues with reselling goods because they have traditionally fallen squarely within the first sale doctrine.²⁶¹ In fact, having an established secondhand market creates a larger market for retail brands because consumers are willing to spend more if they know that they will be able to resell these goods eventually.²⁶² Encouraging luxury brands to partner with these secondhand retailers not only benefits them, but also avoids the creation of a monopoly over luxury products. In this way, brands’ reputations are protected by ensuring that the goods marketed as “authentic” are, and further, this secondhand market is protected for the consumers’ benefit.

A. Chanel has Rightful Concerns about Retail Websites

Chanel has spent over a century creating and cultivating their luxury brand.²⁶³ To protect this vision, they have spent “hundreds-of-millions (if not billions)” of dollars marketing and defending their intellectual property rights.²⁶⁴ While secondhand luxury websites are not attempting to completely replace their presence in the market, Chanel is rightfully concerned about a number of issues.

First, one of the benefits of obtaining trademark rights is the ability to choose who to license their mark to and when to license.²⁶⁵ This is an important right because it allows the company to generate more revenue and have

258. *Id.* at 25.

259. *Id.*

260. *Id.*

261. *The Rocky Relationship Between Luxury Resale and (Some) Luxury Brands*, *supra* note 3.

262. *See id.*

263. *History of the Brand: Chanel*, L’ÉTOILE DE SAINT HONORÉ (June 5, 2020), <https://etoile-luxuryvintage.com/blogs/news/history-of-the-brand-chanel> [<https://perma.cc/7D37-CVNH>].

264. *The Rocky Relationship Between Luxury Resale and (Some) Luxury Brands*, *supra* note 3.

265. Rosaya, *supra* note 46, § 1:25.

their mark expand into new areas.²⁶⁶ However, this right also requires companies to perform due diligence on all of their licensees—such as ensuring quality control, contemplating any restrictions with distribution channels, and determining what rights are lawfully given to the licensees.²⁶⁷ Because of these requirements, it is vital for companies to make thoughtful decisions on who to license the intellectual property rights.

While both TRR and WGACA are not licensees, Chanel is likely concerned that the services and products they are providing to the public are analogous to the rights a licensee might have. If these companies can obtain almost the same rights as a licensee would, it might deter other companies in the future from trying to license the Chanel mark because they could obtain it without paying for it. Likewise, because they are not licensees, Chanel has no control over the use of their marks with respect to these secondhand retailers. This loss of control is frankly frightening to all luxury companies, not just Chanel.²⁶⁸

Further, Chanel has expressed concern that the “resale business model relies heavily on the leveraging of the appeal and esteem of the world’s most famous luxury brands and their valuable intellectual property.”²⁶⁹ Presumably, they are concerned that the secondhand retail websites are both blurring and tarnishing their brand. The blurring concerns stem from the fact that these brands are considered luxury from the mere fact that they are limited in supply and expensive.²⁷⁰ “After all, what’s the real luxury in being a ‘have’ if hordes of logo-loving former have-nots can own the same products?”²⁷¹

The tarnishment concerns emanate from Chanel’s assertion of counterfeits allegedly sold on the secondhand websites.²⁷² Counterfeits are not only likely to be of less quality than genuine goods, but they also “erode the status-symbol allure” of the luxury goods.²⁷³ The lesser quality of the counterfeits “hijack” the promise of luxury brands—“using high quality materials”—that is exacerbated when the customer believes they are purchasing the real thing.²⁷⁴ Further, counterfeits destroy the luxury brands “bottom line” by poaching customers away from their products and forcing luxury

266. *Id.*

267. *Id.*

268. *See The Rocky Relationship Between Luxury Resale and (Some) Luxury Brands, supra* note 3.

269. *Id.*

270. *See Hurt, supra* note 14.

271. *See id.*

272. *See Chanel to The RealReal: Your So-Called Authentication “Experts” Aren’t Really Experts at All, supra* note 200.

273. Orscheln, *supra* note 95, at 257.

274. *Id.* at 259.

brands to spend “millions of dollars each year fighting against counterfeiting.”²⁷⁵

B. Despite the Concerns, Partnering with Secondhand Retail Websites is Actually in Brands’ Best Interests

Even with the numerous concerns luxury brands have about secondhand websites, partnerships between the two creates a mutually beneficial relationship. First, secondhand retail websites increase luxury brands’ market because it serves as a “gateway drug” for consumers to purchase luxury goods.²⁷⁶ The CEO of Vestiaire Collective insists that luxury and resale “are more aptly described as allies” because resale serves as a “point of entry-level access for young customers who can’t yet shop full price luxury.”²⁷⁷ Similarly, the CEO of Tradesy suggests that the resale market “leads to customers making more purchases at retail” because when the customer “knows she can resell her item, she’s going to be more willing to pay a little more for it.”²⁷⁸ Further, Wainwright, the CEO and founder of TRR, contends “people are buying both new and previously owned” luxury goods suggesting that the two are not mutually exclusive.²⁷⁹

The notion of the resale market being an asset to luxury brands instead of a competitor emboldens when considering the age range and values of the largest luxury consumers—Millennials and Gen Z.²⁸⁰ A decade ago, the luxury market was “dominated by baby boomers and Gen X,” but today, “Gen Z and Millennials are currently the largest consumer group in retail.”²⁸¹ These younger consumers represent “around \$350 billion of spending power in the United States alone.”²⁸²

This change not only represents a new target but also suggests that luxury brands will need to consider a “completely different set of values.”²⁸³ This “new-gen of luxury fashion” have grown up in the age of the internet, so “tapping into this market” requires a “radically robust retail strategy” that is “equally effective online as it is offline.”²⁸⁴ Luxe Digital Online identified the four main drivers of luxury resale growth as “digital, affordability, col-

275. *Id.* at 256–59.

276. *The Rocky Relationship Between Luxury Resale and (Some) Luxury Brands*, *supra* note 3.

277. *Id.*

278. *Id.*

279. *Id.*

280. Sharuddin, *supra* note 31.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

lectability, and changing consumer preferences towards sustainability and experiences.”²⁸⁵

Some brands, like Gucci, have taken this change in stride.²⁸⁶ Recognizing the appeal of these online secondhand websites, Gucci protects their brand by increasing their own digital platform to redirect the new generation of consumers away from online secondhand retailers to their own website.²⁸⁷ Gucci’s creative director Alessandro Michele began with “a complete e-commerce overhaul” that contributed “6% of Gucci’s total revenue” their first financial quarter since the website went live.²⁸⁸ In 2020, Gucci announced a new “video based shopping experience called ‘Gucci Live.’”²⁸⁹ The new platform “recreates the personalized experience of visiting a physical store with a sales assistant tending solely to the customer.”²⁹⁰

Gucci remains one the best performing luxury brands online.²⁹¹ This suggests that secondhand retailers were not competitive solely because they were also selling luxury goods, albeit secondhand, but they detract consumers away from the luxury brands themselves due to the brands’ lack of online presence. Instead of attempting to rid the market of secondhand retailers, brands should protect themselves with a market strategy overhaul. Recognizing that younger consumers shop online more than any generation in the past requires a shift from the brands’ traditional methods of supplying luxury fashion to consumers.

However, physical stores are not yet a thing of the past—they are still projected to account for “75% of forecast sales in 2025.”²⁹² But, as digital commerce continues to rise, luxury brands are “shifting their approach” to “flagship outlets” instead.²⁹³ These stores are “focusing on the experience” and “feature display showrooms to drive online sales, rather than compete against it.”²⁹⁴ Geoff Cook, Base Design’s partner, explains that “millennials are more focused on experiences which inherently incorporate what they

285. Helen Siwak, *The Rise of Pre-Owned Luxury Fashion Marks Shift Amid Sustainability Movement*, RETAIL INSIDER (Mar. 9, 2020), <https://www.retail-insider.com/retail-insider/2020/03/the-rise-of-pre-owned-luxury-fashion-marks-shift-amid-sustainability-movement/> [https://perma.cc/DBD4-YUBL].

286. See Sharuddin, *supra* note 31.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. Sharuddin, *supra* note 31.

293. *Id.*

294. *Id.*

value: sharing time together, transparency or realness, and perhaps learning or doing something along the way.”²⁹⁵

Additionally, Millennials “generally have a lower disposable income than their predecessors.”²⁹⁶ This relates back to the idea that secondhand luxury retail acts as an important “gateway drug” for consumers to become hooked on buying luxury retail.²⁹⁷ While Millennials might not have the means of purchasing brand new luxury goods now, they can purchase secondhand luxury goods at resale prices, and in the future, sell those items to purchase new or used products.²⁹⁸ Partnering with secondhand retail websites in exchange for consumer data could be vital for the successful marketing to the new generations—“from social media mentions, browsing history, purchasing trends, and spending habits, luxury brands can discover what their young consumers are buying, when they choose to buy, and what they might buy next.”²⁹⁹

Further, Millennials are not just looking for quality pieces and experiences, they also want authenticity and ethical impact from brands.³⁰⁰ Traditionally, luxury brands had one purpose—“create a superior and exclusive product to maintain the status quo of the rich and famous.”³⁰¹ However, Millennials and Gen Z consumers have “radically different behaviors and attitudes towards all consumption and lifestyle.”³⁰² A Deloitte study found that “89% of U.S. millennials often consider whether a brand is ‘sustainable and ethical’ before making a purchasing decision.”³⁰³ Further, a Nielson study revealed that “81% of millennials expect the brands they buy into to be transparent in their marketing and actively talk about their sustainability impact.”³⁰⁴

In response, the Kering Group—owner of brands like Gucci and Balenciaga—initiated the “use of renewable raw materials in response to sustainability.”³⁰⁵ “Influencers” around the world encourage consumers to shop

295. *Id.*

296. *Id.*

297. *See The Rocky Relationship Between Luxury Resale and (Some) Luxury Brands, supra* note 3.

298. *See id.*

299. Sharuddin, *supra* note 31.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. Sharuddin, *supra* note 31.

secondhand to cut down on the fashion industry's environmental impact.³⁰⁶ Most of the push around shopping secondhand is in an effort to deter the harmful social and environmental effects of fast fashion; nevertheless, the popularity of luxury secondhand online retailers has also increased due to the sustainability movement.³⁰⁷ Now, “distinctive style” is “a medley of vintage and modern, high-end and accessible brands, tailored and sports styles, and an embracing of repeating and repurposing what already exists in your closet.”³⁰⁸ Secondhand fashion is “predicted to overtake the fast fashion market by 2029.”³⁰⁹

One thing is noticeably clear by the popularity of the sustainability movement—“consumers of all ages have indicated that supporting the resale market is something that they are very keen on and any brands not moving in that direction, will very possibly be left behind.”³¹⁰ Resale companies are only continuing to increase in popularity.³¹¹ If Chanel continues to try and shut down the sale of their products through these online retailers, there could be dire consequences for their brand in the eyes of the younger consumers. While Chanel masquerades behind trademark infringement concerns, the outcome for secondhand retail could be dire. The secondhand retailers would be left with two options if Chanel refuses to partner with them to ensure proper authentication procedures—stop selling Chanel products or risk a lawsuit every time a Chanel product is sold. By partnering with the online retailers to ensure proper authentication procedures, Chanel can obtain valuable consumer data and notoriety as a brand concerned with supporting the sustainability movement. Further, this partnership will eliminate the concern of counterfeits as Chanel could properly authenticate their products.

Lastly, the ramifications of this string of lawsuits could end up being a PR disaster for Chanel. TRR has claimed that Chanel launched these lawsuits not only out of concern of infringement of their trademark rights but also “in an effort to maintain a monopoly.”³¹² In their amended answer, TRR asserted antitrust and unfair competition claims alleging that “Chanel has been quietly

306. Anna Fox, *Second Hand September: Influencers Ditch Fast Fashion and Encourage Sustainable Shopping*, VEGAN REV. (Sept. 14, 2020), <https://theveganreview.com/second-hand-september-influencers-ditch-fast-fashion-and-encourage-sustainable-shopping/> [<https://perma.cc/PYS5-7GKJ>].

307. Siwak, *supra* note 285; *see also* Fox, *supra* note 306.

308. Siwak, *supra* note 285.

309. *Id.*

310. *Id.*

311. *See id.*

312. *Chanel is Maintaining a “Monopoly” with the Help of Big-Name Retailers, Publishers, The RealReal Claims in New Filing*, FASHION L. (Oct. 30, 2020), <https://www.thefashionlaw.com/chanel-is-maintaining-a-monopoly-with-the-help-of-big-name-retailers-publishers-the-realreal-claims-in-new-filing/> [<https://perma.cc/6Z7V-5UCH>].

carrying out an ‘aggressive campaign’ of ‘exclusionary and anticompetitive conduct’ aimed at ‘monopolizing the market’ to the “detriment of its competitors and consumers, alike.”³¹³ TRR also alleged that Chanel has “illegally stymie[d] competition” by “entering into exclusive contracts with high-end retailers and used its monopoly power to force them to refuse to engage in any ancillary relationship with resale competitors.”³¹⁴

TRR specifically asserted that it was due to enter partnerships with Neiman Marcus and Saks Fifth Avenue around 2015 until “Chanel threatened to pull all of its products from their stores unless both retailers agreed to prevent consumers from consigning Chanel products to TRR in their stores.”³¹⁵ TRR claimed that “Chanel used its position as the most powerful luxury brand to force” *New York Magazine*, *Vogue*, *The New York Times*, and *Women’s Wear Daily* “into an agreement not to deal with TRR.”³¹⁶ Even worse, TRR pointed out that while they and WGACA have both been sued, “‘one major secondary reseller’ . . . has been ‘notably absent in Chanel’s war’”—Farfetch.³¹⁷ Conveniently, Chanel “made a significant investment” to this company in February 2018.³¹⁸ TRR claimed that Farfetch “promotes, advertises, markets, sells,” and “guarantees the authenticity” of pre-owned Chanel goods “in much the same way as TRR and WGACA.”³¹⁹ TRR explained that this shows that “Chanel will only tolerate the resale of Chanel handbags . . . by a company in which [it] holds a significant investment.”³²⁰

Since these lawsuits are currently ongoing, the truth of the allegations has yet to be ascertained. However, if these claims have any truth to them, it is not hard to imagine the backlash Chanel will face for these monopolistic practices. Additionally, the fact that Farfetch is noticeably absent from suit for the seemingly same practices implies a possible ulterior motive for the suits that would undermine any rightful concerns of trademark infringement.

VI. CONCLUSION

Secondhand retail websites and luxury brands should partner with each other to create the most beneficial shopping experience to customers. While luxury brands rightfully have concerns over the competition raised by these online retailers, secondhand retailers increase the market reach of luxury brands. Younger consumers shop online more than any other generation,

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Chanel is Maintaining a “Monopoly” with the Help of Big-Name Retailers, Publishers, The RealReal Claims in New Filing*, *supra* note 312.

319. *Id.*

320. *Id.*

have less disposable income than the traditional shoppers, and care about the impact the fashion industry has on the environment. Secondhand retailers further the goal of attaining sustainable practices endorsed by Millennials and Gen Z. By partnering with secondhand online retailers, luxury brands will increase their market reach, ensure authenticity, and support the ideals their largest consumer base believes in.

