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The Laws of Fashion: What's Trending in 2023

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PREPARED BY THE FOLEY & LARDNER
FASHION, APPAREL & BEAUTY TEAM

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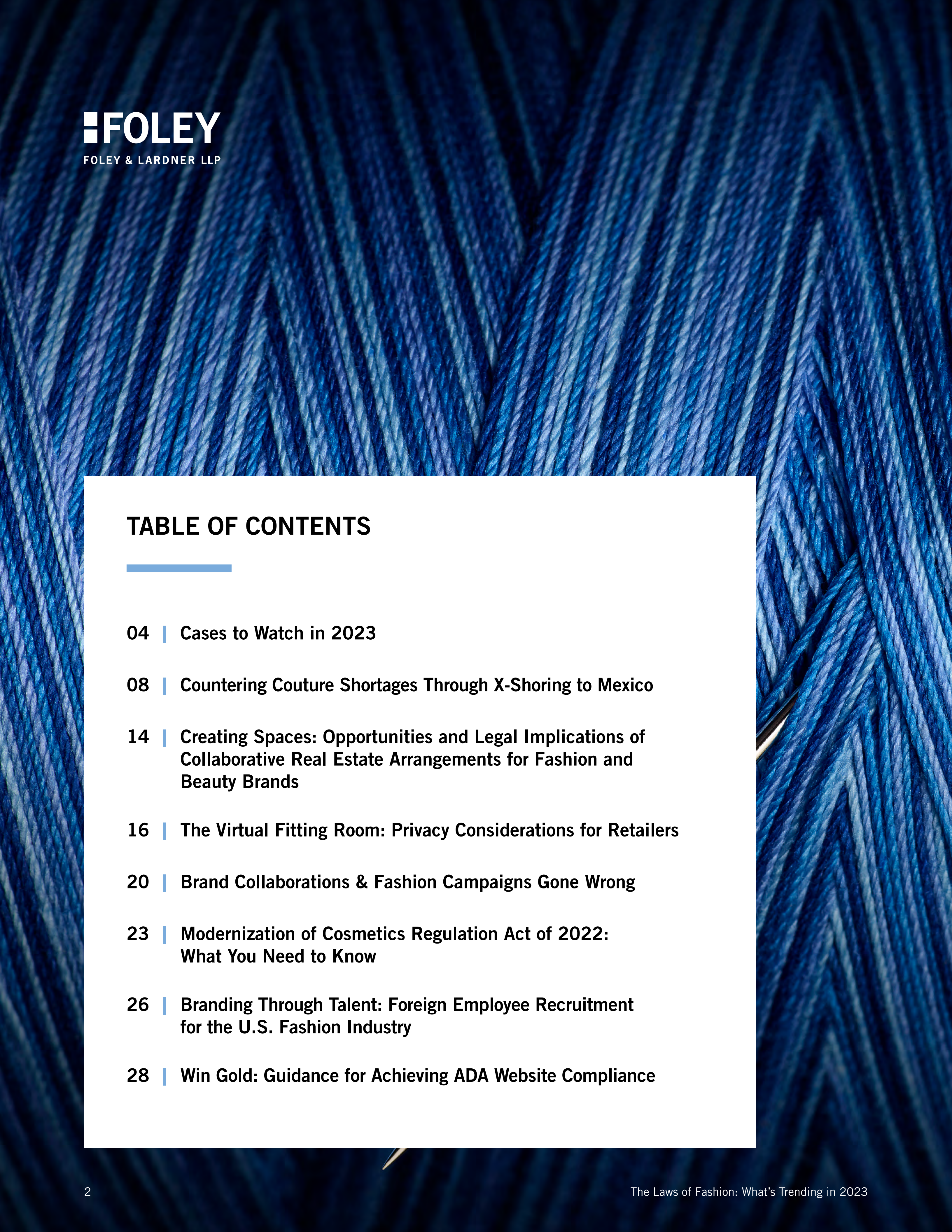

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Summary

The fashion industry has experienced another year of continued change driven by consumer trends, innovation in technology, geopolitical & public health issues, and legal developments, and we don't anticipate that stopping any time soon. The Fashion, Apparel and Beauty industry team at Foley & Lardner LLP invites you to dive into the hot topics facing the industry as brands continue to collaborate and innovate so that they remain on the cutting edge in 2023 and beyond. In this summary, our Foley FAB team examines case law, as well as cases to watch, and shares insights on impactful issues such as virtual retail software, brand collaboration scandals, recruiting foreign talent, and more.

We hope you find this information insightful and encourage you to contact a member of our team if we can discuss any of these issues in greater detail or assist you with any of your business needs.

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Cases to Watch in 2023

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In 2023, the fashion, apparel, and beauty field will be impacted by several legal decisions, including those rendered by the U.S. Supreme Court, various U.S. federal district courts, and Rome Court of First Instance. Specifically, we look forward to decisions on First Amendment protections against trademark infringement claims; the scope of the fair use defense against copyright infringement; the responsibility of companies to protect consumer biometric information; and trademark and copyright protections against third-party use of non-fungible tokens.

Jack Daniel's Properties, Inc. v. VIP Products LLC

VIP Products LLC manufactures dog toys and created a toy in the shape of a whiskey bottle named "Bad Spaniels," with an alcohol content of "43% Poo by Vol." and the words "The Old No. 2 on your Tennessee Carpet." Believing that Bad Spaniels too closely resembled its iconic Jack Daniel's Old No. 7 Tennessee Sour Mash Whiskey label, Jack Daniel's brought claims of trademark infringement under the Lanham Act. The district court held that the toy—as a parody—was entitled to First Amendment protection. The U.S. Court of Appeals for the Ninth Circuit affirmed and Jack Daniel's filed a Petition for Writ of Certiorari with the Supreme Court.

Jack Daniel's contends that the Lanham Act prohibits trademark uses, like VIP Products' toy, which are likely to cause confusion, and that there is simply no heightened standard for artistic, humorous, or expressive works. The Lanham Act only applies to expressive works if the trademark owner can establish one of the two requirements set forth in the *Rogers v. Grimaldi* test, which has long been used to balance the interests of trademark owners while preserving free speech under the First Amendment. The *Rogers* test, established by the Second Circuit in 1989, requires the trademark owner to show that the trademark is either (1) not artistically relevant to the underlying work; or (2) explicitly misleads consumers as to the source or content of the work. The *Rogers* test however—according to those in support of Jack Daniel's—was clearly created to shield the authors of expressive works from being significantly limited in their expression due to trademark rights and the test was not intended to be used in conjunction with consumer products like dog toys.

In late March, the Supreme Court heard oral argument in which counsel for VIP Products LLC argued that its parody dog toy did not violate the Lanham Act because not only are consumers not confused but the parody dog toy is protected by the first Amendment as an expressive work. Counsel for Jack Daniel's argued that the dog toy is not an expressive work because it is a consumer good. We can expect a decision from the Supreme Court later this year.

The implications of this case are sure to impact the fashion, apparel, and beauty space. On the one hand, a rebuke or further limitation of the *Rogers* test would strengthen the rights of brand owners and curb the unauthorized use of valuable trademarks combined with products that arguably offer minimal artistic expression. Alternatively, a decision in favor of VIP Products could prioritize artistic expression and free speech over any perceived infringement. The case has drawn interest of several brand owners leading to the filing of amicus briefs by Constellation Brands, Inc. (owner of numerous beverage alcohol brands such as Robert Mondavi, Svedka, and Corona), Campbell Soup Company, Levi Strauss & Co., Patagonia Inc., Campari America LLC, and NIKE, Inc., among others.

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith

The U.S. Supreme Court is also expected to clarify the fair use doctrine of copyright law. A celebrity photographer named Lynn Goldsmith photographed the now-deceased artist Prince in 1981 and licensed the portrait to *Vanity Fair* for their use in an article. Andy Warhol created fifteen images from the same photo in Warhol's pop art style. *Vanity Fair* reprinted one of the Warhol images in 2016 to commemorate Prince's passing, which led to claims of copyright infringement filed by Goldsmith. Warhol's foundation, in defense, argued that Warhol had transformed Goldsmith's photograph to give it a new meaning and thus such use did not constitute copyright infringement under the fair use doctrine. The Second Circuit overturned the district court's ruling in favor of the Warhol Foundation and held that the new work failed to transform Goldsmith's original photograph because it was recognizably derived from the original photograph.

The Fair Use defense in copyright law permits third parties to use copyrighted works without an owner's permission under certain circumstances. In determining fair use, courts review, among other things, the purpose and character of the allegedly infringing use by asking whether the new work sufficiently transforms the previous work, giving it a new meaning, message, or purpose. The Supreme Court now must establish what exactly is transformative enough to protect a new work from copyright infringement. The Supreme Court has the unenviable position of striking a balance between granting copyright holders arguably monopolistic control on derivative works and new expressions and protecting artistic expression. Under the Supreme Court's previous guidance, designs imprinted on textiles or fabric can be protected by copyright if they contain a sufficient amount of creative expression. The impending decision by the Supreme Court here could impact a number of fashion companies and artists that seek to transform protectable design elements of clothing.

Theriot v. Louis Vuitton North America, Inc.

In a stark reminder of the importance of compliance with individual state laws, Louis Vuitton North America faces a class action suit in the Southern District of New York (S.D.N.Y.) alleging that it failed to receive the permission of consumers before they used its virtual try-on tool on its website. The tool—used

increasingly by fashion, apparel, and beauty brands to allow customers to virtually try on products to facilitate online shopping—collects and processes prospective consumers' images to show them how a specific item would fit based on their facial geometry. The Plaintiffs, who are Illinois residents, claim that Louis Vuitton North America, in allowing customers to virtually try on glasses, violated the Illinois Biometric Privacy Act by not providing written notice of the collection of consumers' facial geometry, the purpose of the collection, and the length of time the data would be retained.

In response to the allegations, Louis Vuitton North America moved to dismiss the claims relating to the virtual try-on tool, claiming that the facial recognition technology was developed by another company and that company is responsible for collecting the biometric information. The S.D.N.Y., however, determined that the roles of each company in the collection of the biometric data is a factual question to be later determined after the pleading stage. Should the case proceed to decision, the Southern District of New York is poised to provide clarity on the liability of fashion, beauty, and apparel companies using third-party services. Please see our other article in this paper for more information on virtual try-on tools and the risks associated with such technology.

Yuga Labs, Inc. v. Ryder Ripps, et al.

A blockchain technology company specializing in digital collectibles has filed suit against an artist named Ryder Ripps in the Central District of California, alleging that Ripps misled consumers into purchasing NFTs that contained original Bored Ape Yacht Club images. Ripps allegedly used the same images created by Yuga Labs and promoted the collection by using a number of Yuga Labs' trademarks. While Yuga Labs has not alleged copyright infringement, Ripps has filed a counterclaim seeking a declaratory judgment that his activity did not result in copyright infringement.

The Copyright Act requires human authorship for the protection of a work, and Ripps claims Yuga Labs developed the Bored Ape Yacht Club images with computer algorithms and therefore are not protectable under the Copyright Act. As computer-generated images, AI, and NFTs continue to become increasingly relevant, district courts around the U.S. are poised to provide clarity on the protections afforded to companies in the fashion, apparel, and beauty space with respect to their virtual offerings in contrast to their traditional physical products. This dispute may lead to clarification on how companies can best protect from unauthorized uses of their virtual products.

Juventus Football Club S.p.A. v. Blockeras S.r.l. and *Hermès International v. Mason Rothschild*

Juventus FC, an Italian Serie A football club, won its trademark infringement suit in the Rome Court of First Instance against Blockeras S.r.l., which produces NFTs of athletes. Juventus FC asked the court for a preliminary injunction preventing Blockeras from selling NFTs that made use of Juventus' trademarks, including JUVENTUS and JUVE, and the design of Juventus FC's renowned white and black jersey. Blockeras' defense was that Juventus FC's trademarks are not registered for downloadable goods, and therefore the NFTs could not infringe Juventus FC's trademark rights.

The Court determined that Juventus FC's marks are widely recognized given the fame of the club, and therefore it was not necessary to consider their use on digital objects. Nonetheless, Juventus FC's digital market presence via its extensive merchandising activity showed that Juventus FC used its marks in the digital world.

It's clear that European courts, such as the court in Rome, are recognizing that existing trademark protection in the non-digital space can be sufficient to protect from unauthorized use in the digital arena so long as the trademarks are in use and well-known. This development may be key to protecting the rights of certain brand owners in the fashion, apparel, and beauty space in light of the emergence of NFTs and the metaverse.

The U.S. did not have a similar decision on the issues in *Juventus*, until *Hermès International v. Mason Rothschild*. Mason Rothschild launched an NFT collection titled "MetaBirkins" that featured furry renderings of Hermès' iconic Birkin handbag. In response, Hermès sent a cease and desist letter and filed suit in the S.D.N.Y. alleging trademark infringement, false designation of origin, trademark dilution, and cybersquatting. Rothschild filed two unsuccessful motions to dismiss, asserting First Amendment arguments that the depiction of fur in the MetaBirkin NFTs "comments on the animal cruelty inherent in Hermès' manufacture of its ultra-expensive leather handbags," and that his "fanciful depictions" met the "low threshold of minimal artistic relevance" and were not misleading. Both motions to dismiss were denied, as were both parties' motions for summary judgment.

The jury, after a weeklong trial, applied the *Rogers* test and found that although the MetaBirkin NFTs met the low threshold of being artistic expression, Rothschild's use of the BIRKIN trademark was explicitly misleading. Consequently, Rothschild was liable for trademark infringement, trademark dilution, and cybersquatting and an award of $133,000 in damages for Hermès. Following the verdict, Hermès filed a motion for permanent injunctive relief requesting that Rothschild relinquish to Hermès all materials related to the MetaBirkins collection alleging that Rothschild continued to promote the MetaBirkins collection despite the verdict. Rothschild, in response, filed a renewed motion for judgment as a matter of law or a new trial claiming that the Court's instructions to the jury were improperly structured by unjustifiably focusing on Rothschild's intent to confuse consumers, resulting in prejudice to Rothschild.

The decision sets the stage for the enforcement of intellectual property rights with respect to digital assets and NFTs and establishes important guidelines for artists seeking to incorporate third-party trademarks in NFTs. As evidenced by the post-trial activity, however, neither party is going down without a fight and we will almost certainly have an update on this case in the 2024 Year In Review.

Countering Couture Shortages Through X-Shoring to Mexico

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Companies in the Unites States of America have been discussing reshoring and nearshoring as alternatives to counter the effects of the on-going global supply chain crisis over the past few years. To help with the effects of supply chain issues, a new approach has taken the lead in boardroom discussions: *Ally- or Friend-shoring*. These concepts should be top-of-mind for apparel and garment designers as they are not exempt from supply chain disruptions that have affected manufacturers across the globe.

Concept

While reshoring refers to bringing overseas production or supply back home, and nearshoring to setting up production or sourcing closer to home, ally- or friend-shoring aims to develop supply chains of services, goods, and materials among close, usually Western countries, that are friendly toward or allied to U.S. interests.

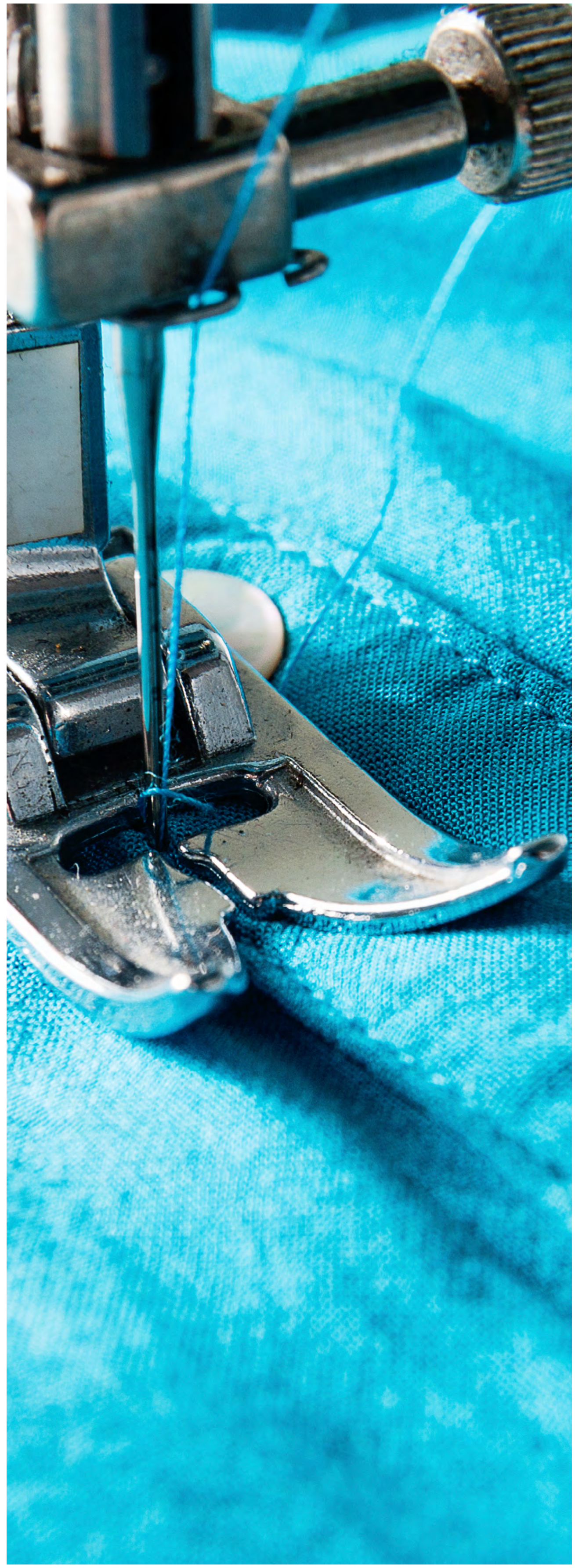
This approach is more realistic than aiming to reshore all production of products and supplies demanded back into the U.S., if we consider there are U.S. companies that have already established long-term, reliable relationships with countries friendly towards the U.S., such as Mexico or Canada. In addition to production in friendly jurisdictions, the concept of ally-shoring is worth consideration to address the current employment environment in U.S. manufacturing, primarily a lack of workers, which could seriously hamper a reshoring effort.

When thinking about the idea of nearshoring among allies, it is only natural to think about Mexico and Canada; firstly because of connectivity, and secondly considering the commonly adopted trade goals in the North American region established by the USMCA[1]. In fact, the USMCA recognizes the longstanding friendship between the three countries, and the strong

1 United States, Mexico, and Canada Agreement, which entered into effect on July 1, 2020.

economic cooperation developed through trade and investment since 1994 with NAFTA, as well as looks for incentivizing the production and sourcing of goods and materials in the North America region[2].

In addition, there are other well-known reasons to think about Mexico as a manufacturing ally-shoring destination.



Mexico as a Manufacturing Destination for the Apparel and Garment Industry

Establishing manufacturing facilities in Mexico by U.S. companies as an effort to nearshore the supply of materials, components, or finished products is not new.

The relocation of U.S. facilities to Mexico goes back to the establishment in the 1960's of the Export Promotion Program known as *Maquiladora* (currently known as IMMEX for Manufacturing, Maquiladora, and Export Services Industries Program). This program initially promoted the establishment of manufacturing facilities along the U.S.-Mexican border, and since has been the main trigger for the establishment of manufacturing sites all over Mexico.

This program created long-term benefits for U.S. companies and are currently benefiting from, among others:

- Lowest operating costs within the region;
- Access to a young and talented work force;
- Attractive lead-times and logistics because of the proximity to the U.S.;
- Access to favorable treatment regarding trade remedies and u.S. National security measures; and
- Access to other markets to source or sell products with preferential duties due to the broad network of multilateral free trade agreements Mexico has in place.

Apparel and garment manufacturers can similarly benefit from these programs. Fashion brands may find ally-shoring into Mexico attractive for the production of garments and apparel, particularly considering the presence of a highly skilled workforce and access to particular materials for the production of clothing and accessories.

2 USMCA´s Preamble.

Challenges

Players in the fashion industry can benefit from relocating their manufacturing facilities to Mexico for the reasons above, resolving existing supply chain challenges they may be facing. But before establishing operations in Mexico, an analysis of existing tariff and non-tariff regulations established by the Mexican government to protect local industry is highly recommended[3].

In addition to this, companies should evaluate what their operations will look like in Mexico, factoring in any tax, trade, and logistics implications that may surface. The Mexican government has made it attractive for companies to set up manufacturing operations within the country through a series of well-known programs that carry their own set of requirements that should be carefully considered as summarized below.

3 For instance, importation quotas, permits, countervailing duties, Mexican Official Standards, among others.

Programs

The IMMEX Program, formerly known as *Maquiladora*, is the longest-running program in place that facilitates relocation of manufacturing operations to Mexico. Considered a legacy program, it is seen by many as complex and onerous, and may carry its fair number of risks. All companies should evaluate whether IMMEX is in their business interests, or if they need to look at other trade facilitation programs, each with their own set of complexities, that will help them deliver business results.

IMMEX Program

Obtaining a license to operate under the IMMEX Program will allow companies to import goods, without paying import duties[4], on a temporary basis to carry

4 Please consider that when exporting goods to certain jurisdictions and pursuant to Free Trade Agreements, some materials may be subject to duties according to their respective duty deferral programs provisions.

out manufacturing activities or render export services. There are five categories which companies may choose to operate under IMMEX. The most favored are:

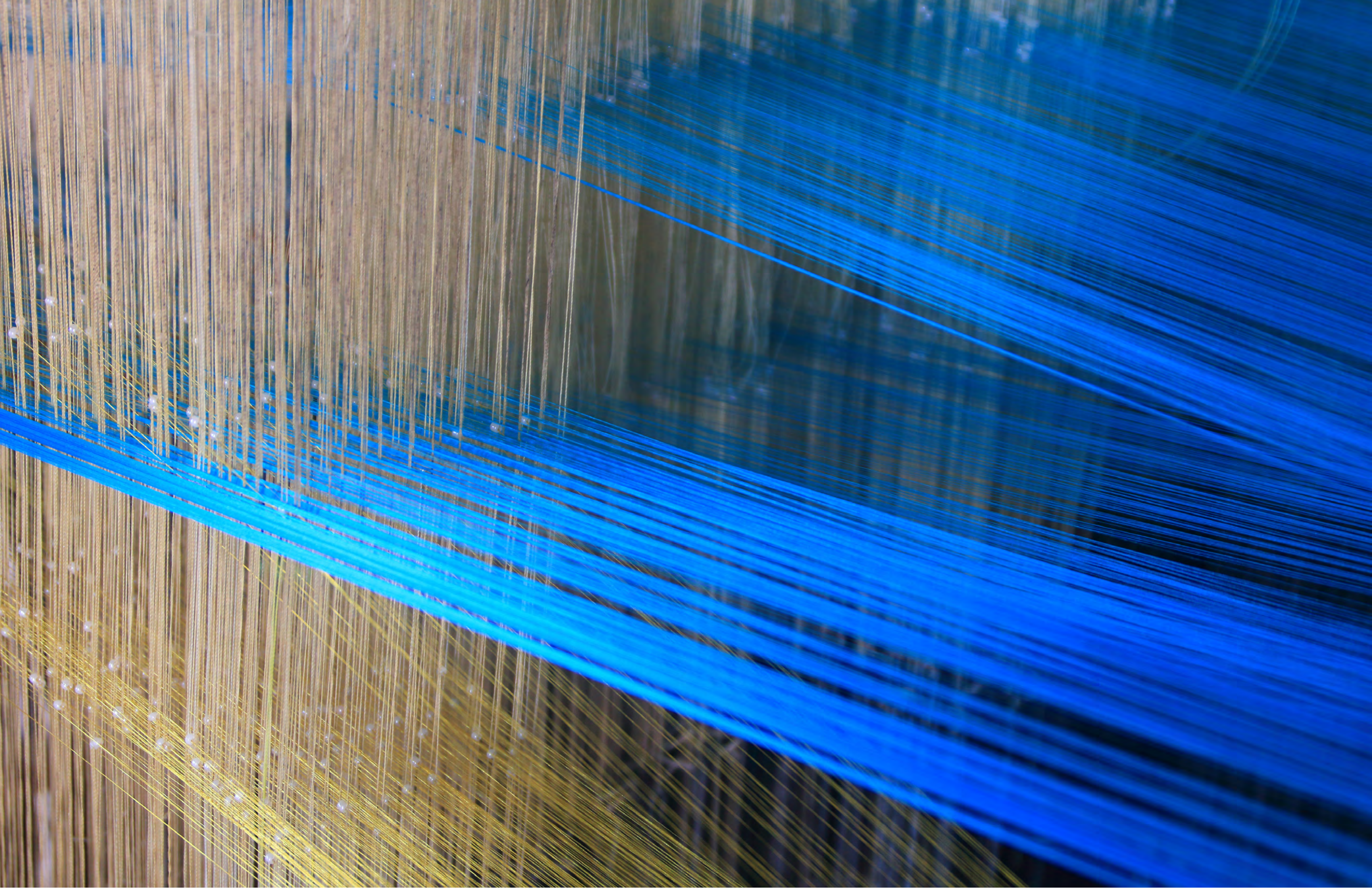
- Industrial: when the authorized company carries out an industrial process of elaboration or transformation of goods to be returned abroad.
- Services: when the authorized company provides services to export goods or export services.
- Shelter: when one or more foreign companies provide the technology and raw materials, but they do not operate the Program directly.

Under the IMMEX program, machinery and equipment may be imported under a temporary basis and kept in Mexico as long as the license to operate under IMMEX is in effect. Raw materials may be kept in the country for a maximum of 18 months, generally, during which time they must be incorporated into finished goods and exported or imported on a definitive basis.

IMMEX authorized that companies may, as a general rule, import raw materials and take advantage of benefits such as the exemption from the payment of import duties, preferential fixed customs processing fees and, when applicable, an exemption in the payment of countervailing duties. Import duties are always paid in the temporary importation of machinery and equipment; however, companies may apply preferential duty rates under Free Trade Agreements entered into by Mexico, or those applicable under other Programs, such as PROSEC (explained later in this article).

As an important benefit that comes with the IMMEX Program, authorized companies may have access to Value Added Tax (VAT) Certification, which allows them to avoid paying applicable VAT on the importation of goods used in their manufacturing operations. This benefit is relevant when importing goods subject to preferential duties treatment under Free Trade Agreements entered into by Mexico, such as the USMCA or the Agreement with the European Union (EUFTA), where import duties are not usually paid.

IMMEX Program authorization will remain in effect as long as the authorized company continues to meet the requirements of the program and complies with its IMMEX-related obligations.



The most significant obligations that an IMMEX-authorized company must comply with includes:

- Carrying out annual export sales greater than US$500,000 or representing at least 10% of its total sales;
- Keeping an inventory record in an automated inventory control system;
- Returning temporarily imported goods abroad within their authorized entry period;
- Submitting an annual electronic report of total sales and exports; and
- Submitting monthly information pertaining to imports and exports for statistical purposes, among others.

IMMEX-authorized companies are required to comply with additional obligations when using third parties to perform sub-manufacturing activities, or when carrying out sales and transfers of finished goods to other IMMEX-authorized companies.

PROSEC Program

Through a Sector Promotion or PROSEC Program, companies that carry out manufacturing activities in a specific industry sector can be authorized to import goods with preferential import duty rates, as long they are used to manufacture specific products regardless of whether the goods to be produced are for export or the domestic [Mexican] market.

PROSEC Program holders will have access to preferential duty rates ranging from 0% to 10% that are triggered when raw materials, machinery, and equipment[5] are imported.

Since imports under a PROSEC Program must be performed under a definitive basis, companies are obliged to pay importation VAT at the general rate of 16%, based on the customs value of the goods being imported.

5 Importers may also use preferential import duty rates under Free Trade Agreements.

A company may request qualification into more than one sector if they provide evidence of producing goods that fall within the sector. Under the PROSEC Programs, industrial sectors most relevant to the fashion industry include the Footwear Industry Sector and the Textile and Clothing Industry Sector.

It should be noted that the program´s preferential ad-valorem import duty rates only apply to the importation of goods pertaining to a specific industry-corresponding sector. For example, PROSEC duty rates may not be applied to a good included in the textile and clothing sectors for the production of a good in the automotive sector.

This program is valid for one year and is automatically renewed when the producer/manufacturer submits its annual report of operations.

Eight Rule

This rule allows companies that have an authorized PROSEC Program, to carry out the importation of machinery and equipment inputs, materials, parts, and components that are related to the products to be manufactured or assembled in Mexico, under a single tariff code (Mexican Harmonized Tariff Schedule codes 9802.00.01 to 9802.00.25) that is exempt from the payment of import duties.

PROSEC authorized companies must obtain a "previous authorization" to import. A case-by-case analysis must be performed to determine if companies meet the criteria required to obtain such "previous authorization."

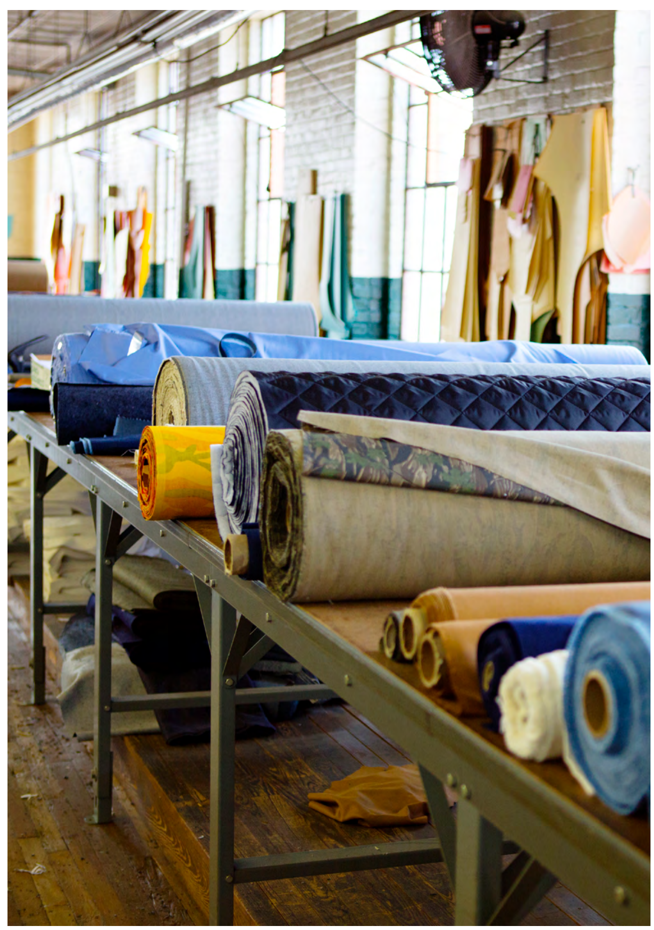
For example, an Eight Rule authorization may be authorized, among others, when: i) requiring the supply of imported goods during a pre-production stage; ii) there is absence or insufficiency of national supplies with the specific conditions required by the company (could be the case of certain smart fabrics that are not manufactured in Mexico); or iii) when companies are required to import certain products to maintain or improve their competitiveness in the market.

Such an authorization is usually granted for a particular importation or in connection to a specific project.

Other trade facilitation programs, registrations, and certifications may be considered when thinking of setting up a manufacturing operation in Mexico, such as:

- The drawback program, which is the program for the refund of import duties to exporters;
- The customs clearance registry, that provides for an inspection at origin procedure to rely on the information provided by the importer during the process of clearing goods; and
- The certified companies registry, that grants certain customs facilitation benefits to trusted importers.

Mexico continues to be an attractive market for manufacturers across all industries when they are considering relocating production facilities to address supply chain issues and overall costs of doing business. Whether this be in the form of nearshoring or ally-shoring, there are several options driven by trade facilitation programs that can assist players in the fashion industry to achieve their goals. Fashion as a whole is a creative art, and owners of fashion houses can get creative with their relocation objectives through thoughtful analysis of what the Mexican market can offer.



Creating Spaces: Opportunities and Legal Implications of Collaborative Real Estate Arrangements for Fashion and Beauty Brands

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The fashion and beauty industry was one of the industries most impacted by market challenges over the last few years. A global pandemic, scarce labor, supply chain issues, and increased costs due to rising interest rates, gas prices, and inflation have forced fashion and beauty companies to reassess key elements of their business models, including their use of and need for physical space. For many retailers, a decrease in foot traffic combined with high-cost rent and a labor shortage have made the operation of brick-and-mortar stores unsustainable for many brands, leaving companies with no choice but to adapt to new ways of selling their products. The market challenges do not stop at storefronts, but have also reached back-end operations in the office market and industrial spaces. As employees move to (or from) work-at-home arrangements and the economy shifts, the need for physical office space is changing for several companies. Manufacturing and warehouse space continues to be in high demand with limited supply, making the industrial market increasingly competitive. Accordingly, some brands have adopted collaborative real estate arrangements to navigate the current market, such as co-located retail, shared offices, or outsourcing warehousing and distribution activities to third-party logistics providers; however, these creative solutions pose a new set of challenges and legal considerations.

Collaborative real estate arrangements allow companies to reduce certain overhead costs so that they not only maximize their profit, but in some cases, leverage each other's customer bases and expand customer reach. In a world where many brick-and-mortar retailers have struggled to stay afloat, some have joined forces to co-locate within a single retail space which allows both companies to not only save costs, but also tap into new or underperforming demographic markets. In-store shops are beginning to emerge, for example, Ulta in Target and Sephora in Kohl's. Time is more valuable than ever, so being able to simultaneously shop at your favorite stores with a single point of sale is incredibly efficient and beneficial for consumers. The win-win is that the stores also gain benefits and efficiencies from the increased foot traffic and shared cost savings for labor, real estate, inventory management systems, marketing, advertising, and more.

Additionally, many companies have begun to outsource their warehousing and distribution operations to third-party logistics providers to not only reap the efficiency and cost benefits, but also to reduce potential liability and risk. These third-party logistic arrangements may be in the form of a license, lease, or sublease of the company's current industrial space. Brands see a better profit margin when they pour their energy and talents into what they know, like content and product creation, rather than tricky operational logistics. Third-party logistics providers offer expertise in a complicated, but imperative area of business so that the risk of disruptions is reduced, keeping customers happy.

While these collaborative real estate arrangements provide endless opportunity, they nevertheless have their pitfalls. In a situation where brands have attached their names to one another, what happens when one has a PR crisis? Or a bankruptcy? What if one party breaches a contract or lease, mismanages its business affairs, or has a compliance issue? Legal documents address these exact scenarios, but brands must pay careful attention to the legal structure and relevant terms to be sure that they are well protected.

Though some companies may opt for a partnership or joint venture agreement which typically includes shared profit and risk, collaborative real estate arrangements are generally governed by leases, subleases, lease assignments, or licensing agreements. Each legal instrument comes with its own nuances that can greatly affect the success (or failure) of these arrangements.

In a lease, the owner grants another party the exclusive right to possess and occupy all or a portion of the owner's property for a period of time under certain terms and conditions. A lease is one of the most commonly used agreements and is governed by applicable landlord-tenant laws. Some of the key considerations when entering into a lease are the permitted uses and users, events of default and related remedies, the ability to perform improvements and alterations, each party's respective maintenance and environmental obligations, liabilities and indemnities, the delivery condition and surrender requirements, relocation rights, the use of adjacent space, and any need for exclusivity.

In a sublease, the tenant under an existing lease subleases all or a portion of its premises to another party, which is similar to a lease except that it is not only governed by applicable landlord-tenant laws, but also by the existing lease. Therefore, the parties must also ensure that the terms of the sublease are consistent with the terms of the lease to avoid an inadvertent default. For example, if abandonment is an event of default under the existing lease (but not under the sublease) and the subtenant abandons the premises, the tenant will be in default without any claim for default against the subtenant. Similarly, if the subtenant wants the ability to expand into additional available space, the tenant cannot give the subtenant any right to do so unless the tenant has been granted the same under the existing lease and even then under the same terms and conditions as in the existing lease.

An assignment of a lease is different from a sublease in that all rights and obligations of the tenant under the existing lease are assigned to another party and either (i) the landlord releases the original tenant from all future obligations and liability under the lease or (ii) the original tenant continues to be responsible for all defaults and other obligations of the tenant under the lease for the entire remainder of the term—equivalent to a guaranty. Typically, landlord and mortgagee consent is required and more extensive for lease assignments, and new tenants may have to prove their creditworthiness or net worth, particularly if the existing tenant is seeking a full release.

Finally, in a license agreement, one party grants another party the exclusive or non-exclusive right to use all or a portion of their property or space for a limited scope or purpose, often for a short period of time, and sometimes without physical separation barriers to the space. This may be useful in niche situations, such as when a company needs a space for a pop-up store, but license agreements may be revocable by the licensor and tend to be much more restrictive on the licensee in terms of permitted use and operational control. For example, the licensor may be allowed to dictate and control the exact days and hours of operation and types of products that can be sold, and require a percentage of revenue or profit as part of the license fee. License agreements are not governed by landlord-tenant laws, but rather by general contract laws; however, the parties must still consider similar issues, like use, taxes, insurance, legal compliance, access and security, surrender, liability, and indemnities.

Collaborative real estate arrangements can provide great opportunities for fashion and beauty brands to navigate economic and industry challenges, both now and in the future. However, these arrangements also present new liability issues and legal considerations which companies must carefully consider so that they don't turn out to be more of a hassle than they're worth.

The Virtual Fitting Room: Privacy Considerations for Retailers

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Across industries, the COVID-19 pandemic forced consumers out of stores and into their homes. To adapt to the resulting increase in online shopping instead of in-store shopping, retailers in the fashion, apparel, and beauty industry implemented innovative virtual try-on programs to allow consumers to more easily view and select products remotely. In turn, this has led to an increased risk of litigation over alleged biometric data privacy violations. While other industries have confronted biometric data lawsuits in everything from virtual exam proctoring to anti-theft surveillance programs used in stores, the emergence of biometric privacy data violation lawsuits is new to the fashion, apparel, and beauty industry.

Virtual Try-On Programs

To replicate the experience of trying on a pair of eye- or sunglasses or swatching a makeup sample in store, retailers began using software that allows consumers to take a selfie or upload a picture of their face to the website and then virtually wear the glasses or apply the makeup. This allows consumers to see what a pair of glasses will actually look like on, or to better determine which shade of a cosmetic is the most flattering.

Virtual try-on programs use the biometric data present in the consumer's photograph—whether it is an existing picture or a selfie taken in real time—to apply the product correctly. The relevant biometric data used is facial geometry: the shape and distance between the facial features. Once the program has the facial geometry mapped, it is able to apply the image of the product to that facial feature, so that the lipstick covers the consumer's lips or the sunglasses cover the proportionate amount of space over the eyes and nose. Biometric data is unique to each person, so to replicate a true personalized try-on, it must be obtained to show how that product will look on the individual.

A recent study conducted by researchers at the University of Texas at Austin found that people were willing to pay up to 9.6% more for a product if they could see how it would actually look on them while using a virtual try-on program. So, despite the potential challenges regarding data privacy compliance or litigation risk, both consumers and retailers benefit from these programs.

How Virtual Try-On Programs Pose a Litigation Risk

Notwithstanding the ability for consumers to remotely test-drive a product, the use of biometric data in these virtual try-on programs has led to a spike in litigation. Plaintiffs' attorneys allege that their clients' biometric privacy rights have been violated by virtual try-on programs by (1) collecting consumers' biometric data and (2) failing to disclose to consumers how that data is handled once it is collected.

The vehicle for such litigation is the jurisdiction's biometric data privacy laws. Illinois was the first state to create a law specifically protecting biometric data in 2008, and over the last few years, other states have followed, including New York and California. The Illinois law, the Biometric Information Privacy Act ("BIPA"), remains the most aggressive to date and requires the informed, written consent of users before the capture, use, and storage of biometric information. The law also mandates disclosure about an entity's data collection practices and provides for a private cause of action.

Like BIPA, the biometric data privacy laws around the country similarly require that companies get consumers' explicit consent before collecting or using their biometric data. This means that retailers must inform consumers when and how their biometric data is being collected, and provide them with an opportunity to decline collection. These laws also typically provide the right to know what happens to biometric data after it is collected, including how the data is used, who has access to it, and how it is protected. When these procedures are not conveyed clearly to consumers, retailers open the door to potential violation allegations.

Current Virtual Try-On Cases

More than fifteen virtual try-on cases have been filed since 2021 in courts across the country, and we expect that number to continue to increase in 2023. As the popularity of BIPA-inspired cases grows, so does the pool of potential defendants. In November 2022, a virtual try-on class action was filed against Pandora Jewelry, LLC. Unlike the bulk of earlier cases targeting cosmetic and eyewear retailers, this suit focused on Pandora's use of a virtual try-on program for jewelry like necklaces and earrings. The class action plaintiffs allege that Pandora's website did not prompt users to agree to its privacy policy, nor were they asked to consent to any terms and conditions before uploading their photographs. Accordingly, the plaintiffs claim Pandora violated their rights under BIPA by collecting their biometric data without their consent and by not disclosing how that data is handled after collection.

The bulk of virtual try-on cases have been brought against sunglass and eyeglass retailers. In these class actions, the plaintiffs allege that their rights under BIPA were violated after using the retailers' virtual try-on features for eyewear without being informed in writing that the program used was collecting their facial geometry data. Because BIPA allows for private causes of action, the plaintiffs are able to seek statutory damages of $1,000 per each alleged negligent BIPA violation and $5,000 for each alleged willful or reckless BIPA violation. Many plaintiffs also request injunctions mandating that the defendant comply with BIPA's regulations moving forward.

However, for eyewear retailers specifically, an interesting counterargument has emerged in the litigation: perhaps, BIPA does not apply in the first place. BIPA includes a "general health care exemption" under which information captured from

a patient in a health care setting, or information used or collected for health care treatment, payment, or operations, is excluded from protection. Both sunglass and eyeglass retailers have challenged BIPA liability by arguing that their virtual try-on programs for eyewear goods are exempt under the general health care exemption to BIPA.

The general health care exemption argument has been successful for defendants in the past. In a 2020 virtual try-on case against an eyewear retailer, *Vo v. VSP Retail Dev. Holding, Inc.*, the court applied the general health care exemption to dismiss BIPA claims based on the retailer's virtual try-on feature for non-prescription eyewear. The court found that both prescription and non-prescription eyewear are Class 1 medical devices under federal regulations pursuant to 21 C.F.R. §§ 886.5842-44, 50. Accordingly, the virtual try-on feature for eyewear fell outside of BIPA's scope and so the court granted VSP Retail Development Holding, Inc.'s motion to dismiss.

Additionally, as recently as September 2022, another judge used the same reasoning in his dismissal of a BIPA case targeting the use of a virtual try-on program by an international online eyewear retailer. Although the lead plaintiff argued that she did not request medical treatment, consult with an ophthalmologist, or even end up purchasing the non-prescription sunglasses, the court found that the virtual try-on tool provided a service similar to one found within an optometrist's office and thus, fell within the exemption.

As a result, these cases demonstrate that for fashion eyewear retailers, the general health care exemption is potentially a powerful argument to challenge and even overcome liability.

Guidance for Companies Based on the Existing Litigation

Overall, BIPA will remain an attractive vehicle for litigation because of its potential for large statutory damages coupled with the benefit of allowing private causes of action. Retailers should therefore familiarize themselves with BIPA in addition to any jurisdiction-specific biometric privacy laws enacted in states where they conduct and operate their businesses.

As the current cases move through the courts, companies using virtual try-on features can take action to protect themselves from being named as defendants in lawsuits of their own. First, retailers should be sure to know the biometric data privacy laws applicable in the relevant jurisdictions and what sort of disclosures they require. Second, companies with user agreements already in place should conduct a thorough review of their existing language to make sure it closely complies with jurisdictional laws and BIPA's requirements. Third, for those using virtual try-on software without a user agreement prompt or pop-up window requiring consent, companies should consider implementing one that must be agreed to before consumers can access the virtual try-on feature. Finally, in addition to requesting consumer consent to the collection or use of biometric data, companies should clarify whether that biometric data is being stored, and if so, where and for how long.

Eyewear brand Warby Parker is an example of a retailer well-positioned to ward off BIPA litigation. Warby Parker developed an app for iPhone that not only lets users shop as they would on the company's website, but also includes a virtual try-on feature exclusive to the app. The app's description in the App Store emphasizes what biometric data is being used and how the company handles it. In the app description, Warby Parker states:

> Some features in this app incorporate Apple's TrueDepth API. In order to use these features, users must agree to Warby Parker's terms and conditions of use. Warby Parker's TrueDepth features look at multiple data points on the user's face only while they are interacting with the tool. We do not save or store any face scan data for any user or share with any third-parties. For Virtual Try-On and Find your width, the terms are: "By tapping 'Okay,' you agree to give us access to your camera and to measure your facial features. (FYI: We won't store or share these measurements – and will only collect and use them while you are using the [tool].)" For our Digital PD tool, we ask the user to opt-in for a second time: "By tapping 'Okay,' you agree to give us access to your camera and to measure your facial features. (FYI: We won't store your pupillary distance (PD) measurement without your permission–and will only collect it while you are using the PD tool.)."

To date, Warby Parker has not been targeted by these biometric data lawsuits. By clearly stating and re-stating what biometric data is being used by the company and what consumers are agreeing to by tapping "Okay," Warby Parker has disclosed its data collection practices in compliance with BIPA and similar laws.

Retailers can follow Warby Parker's lead and continue to utilize the benefits of virtual try-on programs while protecting themselves against biometric data privacy lawsuits. Regardless, even with pre-pandemic attitudes and lifestyles slowly returning in 2023, it is likely that virtual try-on programs are here to stay.

Brand Collaborations & Fashion Campaigns Gone Wrong

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Fashion brands collaborating with influencers or other brands is nothing new and continues to be popular. But, thanks to a slew of recent scandals, collaborations are also becoming more risky. Product collaborations rely on the clout of two brands coming together to market one product, collection, or line. If one of the brands is involved in a scandal while the collaboration is ongoing, however, it can spell major PR issues for the other brand. Public relations nightmares can also be the result of poor judgment and lack of internal controls. Some of these self-inflicted harms come from a lack of diversity in leadership. As consumers are becoming more discerning and "cancel culture" looms large, fashion brands should re-evaluate their contractual relationships with collaborators and their own internal procedures to avoid reputational harm, not to mention financial harm.

Adidas-Kanye Collaboration Debacle

The Adidas-Yeezy collaboration is an example of how costly a fallout from a partnership can be. The collaboration caused both intellectual property and contractual concerns. After a nine year partnership, Adidas recently severed ties from Ye (the rapper formerly known as Kanye West) after Ye publicly made anti-Jewish and anti-Black comments. The Yeezy collaboration between Ye and Adidas generated an estimated $1.8 billion in profits, making the Yeezy line more than 40% of Adidas' profits. The intellectual property for Yeezy-branded products is separate, but intertwined. Ye and his company hold the trademark rights to the Yeezy trademark, but Adidas owns the right to the actual designs of Yeezy-branded shoes. Adidas could continue to sell the design of the Yeezy shoe and just remove the Yeezy branding, but the distinct style of the shoes is likely to continue to be associated with Ye. As for the clothing, repurposing those under the Adidas branding may not yield the same price point Ye's products once did. In fact, in a recent statement, Adidas said it could lose about $1.3 billion in revenue, and operating profit would fall by around $535 million if it is unable to sell its existing Yeezy inventory[1].

Part of the problem is that choosing a controversial figure like Ye is often purposeful; usually, the more controversial, the bigger the payout. Nonetheless, brands should find ways to add some guardrails when collaborating with controversial people. Taking a lesson from the Adidas-Ye debacle, brands should revisit the morality clauses and other terms in their collaborations and licensing agreements. Here are a few suggestions and takeaways:

- **Be broad and specific in your contractual drafting:** Instead of a vague "do not partake in immoral activity," "do not tarnish our image," or "do not do anything illegal," morality clauses should be as detailed as possible. With so many ways for a celebrity to step into scandal, companies should emphasize drafting both broadly and in a detailed way to best encompass any issues that can result from a brand collaboration scandal. This includes thinking of whether other people your partner associates with can trigger the clause. For instance, if Kim Kardashian was still married to Ye when he made those comments, and Kim did not publicly condemn Ye, could her Fendi-SKIMS

1 In late February, 2023, several media outlets reported that Adidas and Ye reached an agreement to sell the remaining $500+ million worth of Yeezy stock. It is rumored that the new deal involves the sale of select non-branded Yeezy sneakers with no new designs to be produced.

collaboration be in danger of being terminated by the violation of a morality clause? Brands should also ensure that the morality clause can be triggered by allegations of wrongdoing and that they do not have to wait for criminal prosecution or legal actions. The mere appearance of impropriety may be enough to tarnish the image of a brand.

- **Consider Enhanced Remedies:** Keeping in mind the specific collaborator, make sure the remedies provisions are sufficient. For instance, future contracts with Ye (if anyone deigns to enter one) could be tailored to add enhanced remedies if Ye breaks the clause by making racist or anti-Semitic comments. Or, a vegan leather brand may want enhanced remedies if its spokesperson were caught on video on a hunting trip, for example, given the type of harm that may cause to a brand's core values or perception with its target audience. In these circumstances, beyond termination, a company may consider additional remedies. This could include claw-backs of advanced payments, for example. For jointly-owned designs or trademarks, a breach could require the assignment of IP rights. Or, even liquidated damages of some sort. The type of reputational harm that can result from a collaborator's public demise is difficult to quantify. If the agreement is crafted in such a way that the liquidated sum is a reasonable estimate of the actual damages flowing from a breach, then a liquated damages provision may be a term to consider. Of course, it is risky to push these types of remedies as it may limit who will want to collaborate with the brand. Depending on the stature and leverage of the celebrity, the collaborator may also require reciprocal remedies from the brand because sometimes companies get involved in scandals that can damage the collaborator as well. Below are some examples of this.

Balenciaga's Controversial Advertisements

As the recent Balenciaga scandal taught us, fashion brands can self-inflict wounds on their own reputations if they are not careful. In a recent advertising campaign, Balenciaga featured elementary-aged school children holding fetish teddy bears, dressed in fishnets, harnesses, and other objects that evoke BDSM. In another advertisement—a Balenciaga collaboration with Adidas—there is a messy desk with a visible page of the 2008 Supreme Court decision *United States v. Williams*, a case upholding the constitutionality of child pornography convictions. Not surprisingly, these campaigns sparked outrage and the trending hashtag #cancelBalenciaga. Unfortunately, Balenciaga's initial response exacerbated the harm. The company filed a $25 million lawsuit against its set designer and advertising agency which was interpreted as an attempt to absolve itself from liability. This lawsuit was swiftly withdrawn, but not before the damage was done. Ultimately, the brand admitted that its internal controls had failed and outlined new review methods, including having an external agency to assess and evaluate Balenciaga's content.

Fashion Brands and Racial Backlash

Gucci learned the hard way that diversity in leadership is necessary to continue breaking creative norms without being offensive. The Gucci wool baklava jumper received backlash as people took to the internet to claim it was a display of black face. Gucci responded to

the controversy in several ways. In addition to donating money to several different community-centered causes, Gucci hired a global director for diversity and inclusion and formed an advisory council that includes notable celebrities and racial justice experts. Gucci is not alone in stepping into a racially insensitive fashion faux pas. Prada releasing merchandise of black-faced monkeys with large red lips, Dolce & Gabbana airing an ad with an Asian woman using chopsticks to eat Italian food with a narrator who purposefully mispronounced words to mock Chinese accents, H&M using a young black boy as the model for a sweatshirt that said "coolest monkey in the jungle," and the list goes on.

The fashion industry has a long history of creating offensive "fashion" and then apologizing and moving on. Mistakes can only be forgiven so many times before the public becomes disillusioned in the brand. One key takeaway for a brand seeking to better its internal controls and create a culture that avoids these controversies is to embrace diversity.

Embrace diversity: Diversity in fashion does not just mean runway models of different sizes and shapes. Diversity should be in the board rooms and the C-Suites of fashion houses. It is common for a fashion brand to rush to hire a Chief Diversity, Equity & Inclusion Officer as a reaction to a PR nightmare. In order to avoid those nightmares in the first place, a company should consider hiring these experts and dedicated advisors proactively. Having a specialized group within the company can help brands navigate the complicated and nuanced racial and cultural issues that can surface if one is not intentional about avoiding them.

Diversity includes not only ethnicity, gender, and race, but also diversity in educational backgrounds and experience. When reviewing content, there should be a balance of creative types and business types participating in the approval process. Lawyers, marketers, and artists should have a seat at the table to bring different perspectives. The more diverse the group at the outset the better the chances to avoid offensive and inappropriate output at the end. DEI is also just good for business. Consumers scrutinize everything from the most blatant exploitation to the tiniest detail on an advertisement. By investing in DEI and making it a part of the brand ethos at all levels, a brand can avoid calamities and gain the loyalty of the ever-growing number of conscious consumers.

Modernization of Cosmetics Regulation Act of 2022: What You Need to Know

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On December 29, 2022, President Biden signed into law the Consolidated Appropriations Act, 2023, which included the Modernization of Cosmetics Regulation Act of 2022 (MoCRA). MoCRA significantly changes the current regulatory framework for cosmetics in place since the enactment of the Federal Food, Drug, and Cosmetic Act (FD&C Act) in 1938.

Under MoCRA, cosmetic companies will be subject to facility registration and product listing requirements, good manufacturing practices (GMPs), serious adverse event reporting and recordkeeping, and safety substantiation. Furthermore, MoCRA grants the U.S. Food & Drug Administration (FDA or Agency) the authority to order a mandatory recall of a cosmetic product and to suspend a facility registration if the FDA determines there are serious adverse health concerns. MOCRA's key provisions are outlined below.

Facility Registration and Product Listing

Each facility (domestic and foreign) that engages in the manufacturing or processing of a cosmetic product for U.S. distribution must register with the FDA no later than one year after the enactment of MoCRA, which is December 29, 2023. After the one-year registration deadline, new facilities must register with the FDA within 60 days of initiating manufacturing or processing operations. Establishments that solely perform labeling, relabeling, packaging, or repackaging of cosmetic products are not required to register with the FDA. Furthermore, facility registrations must be renewed biennially, and the FDA must be notified within 60 days of any changes to information that is required to be submitted as part of registration. Note that foreign facilities must have a U.S. Agent.

A "responsible person" also must list each cosmetic product, including its ingredients, with the FDA no later than December 29, 2023. "Responsible person" is defined as the manufacturer, packer, or distributor of a cosmetic product whose name appears on the label. For products marketed after the enactment of MoCRA, a responsible person must submit the product listing within 120 days of marketing. Additionally, the responsible person must update product listing information annually.

Good Manufacturing Practices

Under MoCRA, the FDA is required to promulgate GMP regulations for cosmetic manufacturing and processing facilities. The regulations must be consistent with national and international standards. The regulations must also be intended to protect the public health and ensure that the cosmetic products are not adulterated. Furthermore, the FDA may promulgate regulations that would allow the Agency to inspect records necessary to demonstrate compliance with GMP.

In establishing GMP regulations, the FDA must take into account the size and scope of the businesses engaged in the manufacture of cosmetics and the risks to public health posed by such cosmetics. Additionally, the FDA must provide sufficient flexibility to be practicable for all sizes and types of facilities to which such regulations will apply. These regulations must also include simplified GMP requirements for smaller businesses and should not impose undue economic hardship for these businesses.

The FDA is required to issue a proposed rule within two years after enactment of MoCRA, and a final rule no later than three years after such date of enactment.

Serious Adverse Event Reporting and Recordkeeping

A responsible person must report to the FDA any "serious adverse event" associated with the use, in the United States, of a cosmetic product manufactured, packed, or distributed by the responsible person within 15 business days after it is received. Additionally, for one year after the initial submission, the responsible person must submit to the FDA within 15 business days of receipt any new and material medical information related to the initial report. A "serious adverse event" is defined as an adverse health-related event associated with the use of a cosmetic product that results in death, a life-threatening experience, inpatient hospitalization, a persistent or significant disability or incapacity, a congenital anomaly or birth defect, an infection, or significant disfigurement.

The responsible person is required to include on the label of the cosmetic product the domestic address, domestic telephone number, or electronic contact information in order to receive reports of adverse events.

The responsible person must maintain records related to each report of an adverse event associated with the domestic use of a cosmetic product manufactured, packed, or distributed by the responsible person for six years. Certain small businesses only have to maintain such records for a period of three years.

Safety Substantiation

A responsible person must ensure and maintain records supporting that there is adequate substantiation of safety of the cosmetic product. "Adequate substantiation of safety" is defined as tests or studies, research, analyses, or other evidence or information that is considered, among experts qualified by scientific training and experience to evaluate the safety of cosmetic products and their ingredients, sufficient to support a reasonable certainty that a cosmetic product is safe. Under MoCRA, "safe" means that the cosmetic product is not injurious to users under the conditions of use prescribed in the labeling or under such conditions of use as are customary or usual. Additionally, the law specifies that a cosmetic ingredient or cosmetic product is not injurious to users solely because it can cause minor and transient reactions or minor and transient skin irritations in some users.

In determining whether a product is safe, the FDA can consider the cumulative or other relevant exposure to the cosmetic product including any ingredient.

Mandatory Recall and Facility Suspension Authorities

MoCRA grants the FDA the authority to request a voluntary recall of a cosmetic product if the Agency determines that there is a reasonable probability that the product is adulterated or misbranded, and the use of or exposure to the product will cause serious adverse

health consequences or death. If the responsible person does not comply with the FDA's request, the FDA can order a mandatory recall after providing the responsible person an opportunity for an informal hearing. For any recalls issued under this provision, the FDA must ensure that a press release is published regarding the recall and that the image of the cosmetic product that is the subject of the press release is available on the FDA's website.

The FDA is also authorized to suspend a facility registration if the Agency determines that a cosmetic product manufactured by that facility has a reasonable probability of causing serious adverse health consequences and believes other products may be similarly affected. If the FDA suspends a facility registration, the facility is not permitted to introduce any cosmetic products into commerce until its registration is reinstated. Before suspending the facility registration, the FDA is required to provide notice and an opportunity for an informal hearing to the facility registrant.

Fragrance Allergens Disclosure, Talc Regulation, and PFAS Report

The FDA is required to promulgate regulations to identify fragrance allergens that must be disclosed on the label of a cosmetic product. In establishing these regulations, the FDA must consider international, state, and local requirements for allergen disclosure, including the European Union's substance and format for these requirements. Additionally, Congress has authorized the FDA to establish threshold levels of amounts of substances subject to disclosure. The FDA is required to issue a proposed rule within 18 months after the enactment of MoCRA, and a final rule no later than 180 days after the close of the public comment period for the proposed rule.

MoCRA also directs the FDA to issue regulations to establish and require standardized testing methods for detecting and identifying asbestos in talc-containing cosmetic products. The FDA must issue a proposed rule within one year after the enactment of MoCRA, and a final rule no later than after the close of the public comment period for the proposed rule.

Furthermore, MoCRA requires the FDA to issue a public report no later than three years after the enactment of MoCRA to assess the use of perfluoralkyl and polyfluoralky substances (PFAS) in cosmetic products, and the scientific evidence regarding the safety of such use in these products.

Preemption

MoCRA contains an express preemption provision that prohibits states from establishing any laws, regulations, or orders pertaining to cosmetics that differ from federal law with respect to registration and product listing, GMP, records, recalls, adverse event reporting, or safety substantiation. States are permitted to prohibit the use or limit the amount of an ingredient in a cosmetic product.

Branding Through Talent: Foreign Employee Recruitment for the U.S. Fashion Industry

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Foreign talent forms an important part of the U.S. fashion and design industry. Design and fashion houses in the U.S. rely on the highly developed skills and creative ideas of foreign talent in a variety of fields, including design, modeling, marketing, and production. Recruiting foreign talent requires prospective U.S. employers to sponsor talented foreign nationals for immigration benefits. The range of options vary based on the type of employer and the skills, experience, education, and nationality of the foreign national. However, the most common avenues for employers to recruit foreign talent in the U.S. fashion and design industry involve sponsorship in the H-1B or O-1 visa categories with U.S. Citizenship and Immigration Services ("USCIS").

Whether a U.S. employer is looking to recruit a fashion designer at Tom Ford, marketing executive at Dolce & Gabbana, user experience designer at Chanel, or jewelry designer for Marc Jacobs, the H-1B visa provides countless options for recruiting foreign professionals in the fashion and design industry. The H-1B visa is a nonimmigrant (temporary) classification

available to employers seeking to hire foreign nationals in specialty occupations or as fashion models of distinguished merit or ability. Fashion designers, creative directors, marketing professionals, software developers, art directors, graphic designers, and many more occupations may qualify specifically under the H-1B specialty occupation category, which requires at least a bachelor's degree in a specialized field or equivalent work experience.

Unlike the H-1B specialty occupation category, the H-1B3 category for fashion models does not require a bachelor's degree or its equivalent. Instead, the employer must show that the position offered requires prominence and that the foreign national is a fashion model of distinguished merit and ability. Distinguished merit and ability in fashion modeling is determined by prominence and requires the employer to show that the fashion model is renowned and has obtained a high level of achievement that is substantially above that normally encountered.

Although there are exceptions, typically an H-1B visa is initially granted for three (3) years and may be extended for a maximum of six (6) years in H-1B status. Initial H-1B visa petitions are subject to an annual cap and the prospective employer must first undergo a registration process, whereby only those employer registrations that are randomly selected, may file the H-1B visa petition on behalf of the foreign national with USCIS. Congress set the annual cap for the cap-subject

H-1B category at 65,000 visas. In this past Fiscal Year ("FY") 2023, USCIS received 483,927 H-1B registrations. On January 24, 2023, USCIS announced that this fiscal year's (FY 2024) registration period as running between March 1, 2023 and through to March 17, 2023. During this period, prospective H-1B employers were able to submit their registration in the H-1B registration system.

Another option for recruiting crucial foreign talent in the U.S. fashion and design industry is the O-1 visa. The O-1 nonimmigrant visa is available to foreign nationals with extraordinary ability in the sciences, arts, education, business, or athletics. To qualify, the employer must show that the foreign national has sustained national or international acclaim in their area of expertise. The O-1A category applies to those with extraordinary ability in the sciences, business, education, or athletics, while the O-1B category applies to those with extraordinary ability in the arts.

Business executives within the fashion and design industry may benefit from the O-1A category by demonstrating extraordinary ability in business.

Under the O-1A category, extraordinary ability means that the foreign national is one of the small percentage who have risen to the very top of their field.

Fashion designers, creative directors, fashion models, photographers, prominent fashion influencers, and other professionals may qualify under the O-1B category as individuals with extraordinary ability in the arts. The O-1B category requires distinction, which is a high level of achievement as shown by skill and recognition substantially above that ordinarily encountered.

The O-1 visa is initially granted for three (3) years and can be extended indefinitely in one (1) year intervals. The broad and creative nature of the O-1 visa categories provides employers with flexibility to recruit a variety of highly skilled foreign talent in the fashion and design industry.

Although the H-1B and O-1 visa categories provide the most common avenues for U.S. employers to recruit foreign talent in this industry, options for investors, self-petitioners, and those seeking permanent relocation to the U.S. are also available.

Win Gold: Guidance for Achieving ADA Website Compliance

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Companies in the fashion industry know that business has increasingly moved online. But did you know that just like a brick-and-mortar store needs to comply with ADA requirements, so does a website?

What is ADA Compliance?

The America with Disabilities Act (ADA) was established in 1990 to protect against the discrimination of people with disabilities in several areas, including employment, transportation, public accommodations, communications, and access to state and local government programs and services. When the ADA was established in 1990, lawmakers had no idea how important the role of the internet and other technologies would be in the future. As a result, the ADA does not directly address whether websites, mobile applications, and other technologies must comply with the public accommodation rule of physical structures. However, courts have seen a growing body of cases in recent years related to website compliance. And depending on what state your business is in, courts have disagreed on how the ADA controls a website and as a result, have developed different interpretations of the law. To combat this issue, the Department of Justice issued guidance on web accessibility this past year.

Website compliance falls within Title III of the ADA, which prohibits discrimination on the basis of disability in "places of public accommodation." 42 U.S.C. § 12182(a). Depending on what state your business operates in, your brick-and-mortar location will not be enough to comply with ADA requirements. In some states, such as California, a website needs to comply with ADA requirements if there is a sufficient nexus with the physical location. In other states, like New York, a website is independent of the physical space in terms of whether it must comply.

So, what do you need to do for a website to be ADA-compliant?

First, the best recommendation for a business, especially one that has a corresponding physical store, is to comply with the WCAG 2.0 or 2.1 AA "gold standard." Web Content Accessibility Guidelines (WCAG) promulgated by the World Wide Web Consortium (W3C) is the best standard to use to establish whether a website is ADA-compliant. Both the Department of Justice and courts currently rely on WCAG 2.0 to establish whether a website conforms to ADA requirements. Published June 5, 2018, WCAG 2.1 is the most up-to-date set of criteria. However, courts do not require compliance with WCAG 2.1 due to its recent formation. Companies that are seeking to be proactive about web design should start to implement features that were added in WCAG 2.1. You may have noticed a growing number of websites that have a small blue icon in the bottom corner with the image of a person. That icon opens a program that can manipulate a website and offers various accessibility functions for individuals who have mobility limitations, dyslexia, and visual impairments.

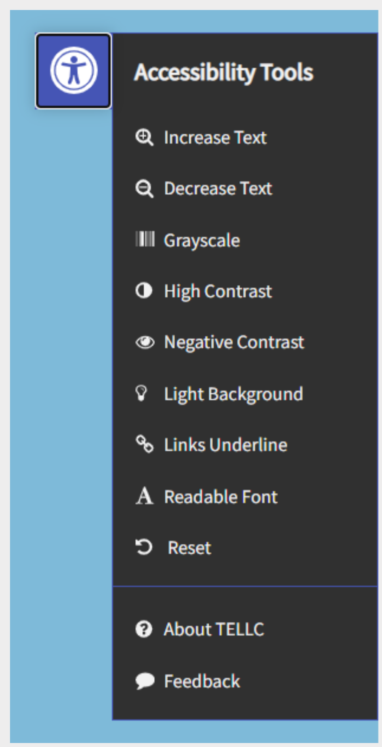
The WCAG provides in-depth guidance for the requirements to achieve an AA "gold standard" rating. This guidance necessitates the ability to provide alternative formats to convey information.

For example, for images and non-text content, provide text alternatives and descriptions as well as the ability to present information in various ways such as zoom and manipulation of colors. For videos, provide subtitles. For images that include text, provide the words as actual text rather than an image of text. This allows reader software to read the text as well as the ability to zoom in and magnify words without them becoming blurry. These are just some of the numerous examples and criteria to consider incorporating into your website, each provided by the WCAG on its website.

Second, generate an Accessibility Statement on your website. An Accessibility Statement helps describe the efforts your organization takes to ensure accessibility and the standards that the website complies with. W3C even provides a free accessibility statement generator on its website.

The combination of following WGAC guidelines and an Accessibility Statement should provide all of your customers visiting your store online an equal opportunity to browse your products and designs, no matter their disability.

Examples of images:



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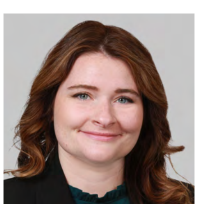

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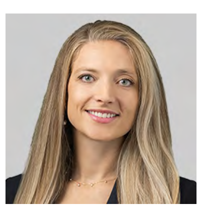

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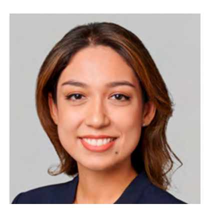

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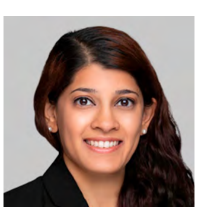

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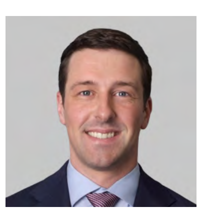

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