

Counterfeits, Copying, Class and Confusion

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Abstract

This paper asserts that manufacturers of aesthetics driven consumer goods are manipulating trademark law to engineer the conceptual conflation of counterfeiting trademarked goods, which is a violation of trademark law, with the copying of design features, which is not. This is the trademarks part of a two pronged effort by certain high end manufacturers to discourage and eventually illegalize the production of non-counterfeit knock offs. It is being pursued contemporaneously with an ongoing effort to instantiate copyright protection for certain elite classes of clothing and other high end consumables.

The purported economic harms that stem from the production and distribution of non-counterfeit knock offs are, in reality, the effects of legitimate competition based on attributes such as price, quality, selection and availability, in which trademark law should not interfere. Indirect asserted harms, such as diluted elitism, and loss of design distinctiveness, are outside the purview of trademark law altogether.

The vertical market diffusion of aesthetically pleasing designs should not be cabined by distorted applications of the Lanham Act. Repressing or illegalizing knock offs illegitimately prevents lower income people from procuring and enjoying goods with aesthetic attributes that aren't properly monopolized through trademark law.

This paper also considers the appropriateness of constructing counterfeiting as a crime. It further criticizes the imposition of trademark policing costs on the administrators of flea markets, swap meets, and online auctions, because liberal construction of secondary liability doctrine harshly burdens exchanges of consumer goods that are environmentally friendly and of substantial benefit to people with personal economic challenges.

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