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## Trends in Fashion Law: Striking the Proper Balance Between Protecting the Art Form and Sustaining a Thriving Online Market

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# TRENDS IN FASHION LAW: STRIKING THE PROPER BALANCE BETWEEN PROTECTING THE ART FORM AND SUSTAINING A THRIVING ONLINE MARKET

ELISABETH JOHNSON

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## I. INTRODUCTION

Carrie Bradshaw, the fictional television character known for her love of fashion and affinity of words, described her passion for couture by saying, “I like my money right where I can see it . . . hanging in my closet.”<sup>1</sup> Her words could be altered to reflect the ever popular fashion market on eBay and other similar venues by stating that many fashion sellers like their money where they can see it—in their bank accounts. In fact, as of January 31, 2018, eBay had approximately 170 million users and approximately 25 million of them were

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<sup>1</sup> Harper’s Bazaar Staff, *The 50 Greatest Fashion Quotes of All Time*, HARPER’S BAZAAR (Jan. 11, 2018), <http://www.harpersbazaar.com/fashion/designers/a1576/50-famous-fashion-quotes/>.

sellers.<sup>2</sup> Many eBay sellers make a living solely from eBay sales derived revenue.<sup>3</sup> Several sellers make their primary income from eBay, while others use eBay as a secondary stream of income to supplement primary earnings.<sup>4</sup> eBay has also created eBay sales tools, such as eBay marketing guides and store fronts, that assist sellers with selling items on eBay.<sup>5</sup>

However, the eBay platform is a source of intellectual property violations, which typically take the form of copyright, trademark, contributory trademark, and design patent infringements. The underlying conflict in these situations is the need to balance designers' intellectual property rights, while deterring hindrances to the internet free market. Because fashion as an art form should be protected without overregulating the internet free market, *Tiffany v. eBay*<sup>6</sup> must be reassessed and new solutions must be brought forth. Scholars in the area generally critique the holding of *Tiffany v. eBay*.

The vast amount of intellectual property rights violations that occur in marketplaces such as eBay pose a danger to the fashion design art form as a whole. The threats to designers' intellectual property take the form of either brand or design infringements.<sup>7</sup> Brand infringements relate to the creator's specific expression of an idea and are either copyright or trademark infringements.<sup>8</sup> A copyright protects original works of authorship, including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture.<sup>9</sup> Copyright violations manifest themselves on eBay through the sale of pirated artistic works and software.<sup>10</sup> A trademark infringement occurs when a party uses a word, phrase, symbol, and/or design that identifies and distinguishes the source of goods of one party from those of others.<sup>11</sup> Trademark infringements occur on eBay in a number of categories but are rampant in the sale of designer fashion and luxury goods.<sup>12</sup>

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<sup>2</sup> Craig Smith, *70 Amazing eBay Statistics and Facts (February 2018)*, DMR STATS, <http://expandedramblings.com/index.php/eBay-stats/> (last updated Feb. 3, 2018).

<sup>3</sup> Daniel Gross, *Economy: Making a Living on eBay*, NEWSWEEK (May 21, 2008), <http://www.newsweek.com/economy-making-living-eBay-89921>. As of 2008, 1.3 million people make a living selling items on eBay. *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* See generally Ryan Basen, *Learn to sell the eBay way*, BALTIMORE SUN (Aug. 21, 2005), [http://articles.baltimoresun.com/2005-08-21/business/0508200029\\_1\\_eBay-sell-teacher](http://articles.baltimoresun.com/2005-08-21/business/0508200029_1_eBay-sell-teacher).

<sup>6</sup> *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

<sup>7</sup> *Fashion Law: Protecting Brands and Designs*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/publications/landslide/2012\\_13/january\\_february/fashion\\_protecting\\_brands\\_law\\_and\\_designs/](https://www.americanbar.org/publications/landslide/2012_13/january_february/fashion_protecting_brands_law_and_designs/) (last visited Oct. 16, 2018).

<sup>8</sup> *Id.*

<sup>9</sup> 17 U.S.C. § 102; See also *Trademark, Patent, or Copyright?*, UNITED STATES PATENT & TRADEMARK OFFICE (Jan. 12, 2017), <https://www.uspto.gov/trademarks-getting-started/trademark-basics/trademark-patent-or-copyright>.

<sup>10</sup> Marsha Collier, *Copyright Infringement and Ebay*, DUMMIES, <http://www.dummies.com/business/online-business/eBay/copyright-infringement-and-eBay/> (last visited Mar. 30, 2017).

<sup>11</sup> 15 U.S.C. § 1052; See also UNITED STATES PATENT & TRADEMARK OFFICE, *supra* note 9.

<sup>12</sup> *Id.*

Design infringements are also frequent in the fashion industry and relate less to the expression and more to the design of an item. Specifically,

[c]opying in fashion is not news; in fact, it is an extremely common occurrence. The business of fast fashion brands, such as Forever 21, H&M, Zara, and Nasty Gal, exist [sic] entirely on copying on runway designs.<sup>13</sup> However, identifying examples of potential copyright infringement in fashion is often a difficult task, as copyright protection in the U.S. does not extend to the majority of useful articles (think: clothing and accessories, with some exceptions) in their entirety.<sup>14</sup>

However, the recent decision in *Star Athletica v. Varsity Brands*<sup>15</sup> did extend copyright protection to a useful article.<sup>16</sup>

There are two important reasons to understand and to seek to refine the complexities of intellectual property law in the context of Internet and second-hand markets, such as eBay. First, established designers need to be able to trust the value of their brands without devaluation by underground or secondary marketplaces.<sup>17</sup> Particularly in the high-end fashion arena, “[e]very brand has to specify its positioning, and then convey it through its products, its services, its price, its distribution and its communication. Positioning is the difference that creates the preference for a given brand . . . .”<sup>18</sup> Furthermore, emerging designers are not equipped with the means to fight design infringements.<sup>19</sup> In fact, “[t]he problem is that generally, there is not enough awareness about intellectual property in the fashion industry and designers will typically become interested in their IP rights only once things go wrong, or perhaps when an investor comes in.”<sup>20</sup> Thus, copyright and trademark violations in the fashion industry are a

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<sup>13</sup> *A Case of Copyright Infringement: Raf Simons v. Cihuah*, FASHION LAW (Apr. 14, 2016), <http://www.thefashionlaw.com/home/a-clearcut-case-of-copyright-infringement-raf-simons-vs-cihuah>.

<sup>14</sup> *Id.*

<sup>15</sup> *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

<sup>16</sup> A feature incorporated into the design of a useful article is eligible for copyright protection only if the feature can be perceived as a two- or three-dimensional work of art separate from the useful article, and it would qualify as a protectable pictorial, graphic, or sculptural work, either on its own or fixed in some other tangible medium of expression, if it were imagined separately from the useful article into which it is incorporated. *Id.* at 1007.

<sup>17</sup> Vincent Bastien, *Marketing To A High-End Consumer, Using the Luxury Strategy*, ENTREPRENEUR (Sept. 20, 2015), <https://www.entrepreneur.com/article/250745>.

<sup>18</sup> *Id.*

<sup>19</sup> *Addressing Fashion's Intellectual Property Conundrum*, BUS. FASHION (July 26, 2011), <http://www.businessoffashion.com/articles/intelligence/fashions-intellectual-property-conundrum>.

<sup>20</sup> *Id.* This statement was made by “Tahir Basheer, whose legal practice at London law firm Sheridans focuses on the management, exploitation and protection of intellectual properties across media, entertainment and fashion.” *Id.*

challenge, specifically for emerging designers and small businesses.<sup>21</sup> Additionally, “[t]aking legal action on the basis of alleged infringement can be an onerous process.”<sup>22</sup> In fact, “[i]n the US, the design patent system has high application costs, long procedural timeframes and an unusually high standard of invention, which means that fashion designers are left unprotected and vulnerable against increasingly bold copyists.”<sup>23</sup>

However, the increasing number of governmental regulations are harmful to small businesses, especially in the Internet free market context.<sup>24</sup> Small businesses create two out of three of net new jobs annually, employ more than half of the private-sector workforce, and generate nearly 50 percent of annual GDP.<sup>25</sup> Furthermore, “72 percent of small businesses reported that regulations were hurting their ‘operating environment.’”<sup>26</sup> As recently as January 2016, greater than two-thirds of more than 400 small business owners polled said they expected it to be more difficult for them to conduct business under the existing regulations.<sup>27</sup>

For its more than twenty-five million sellers, eBay provides flexibility and stability when operating an online small business.<sup>28</sup> First, eBay provides the platform for selling, as well as PayPal, its platform for processing payments.<sup>29</sup>

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<sup>21</sup> *Id.*

Copying is endemic in the fashion industry. But the effects are particularly acute for emerging designers for whom every sale counts. “The damage actioned by knock-offs is twofold,” noted Gary Assim, partner and intellectual property specialist at London law firm Shoosmiths. “Firstly it robs the designer of the proceeds from the sale of his or her product, which will often have been the result of a considerable research and development investment,” he said. “In addition, it denies the designer the rightful recognition as the original creator.”

*Id.* See also Robert W. Payne, *Dealing with Unauthorized Online Dealers: Sales of “Genuine” Products*, A.B.A. (July 2014), [http://www.americanbar.org/publications/blt/2014/07/01\\_payne.html](http://www.americanbar.org/publications/blt/2014/07/01_payne.html).

<sup>22</sup> BUS. FASHION, *supra* note 19.

<sup>23</sup> *Id.*

<sup>24</sup> Fareeha Ali, *Infographic: The Financial Impact of Regulations on Small Business*, NFIB (Sept. 30, 2015), <http://www.nfib.com/content/resources/start-a-business/infographic-the-financial-impact-of-regulations-on-small-business-bizhelp-71064/>.

<sup>25</sup> Jared Hecht, *Are Small Businesses Really the Backbone of the Economy?*, INC. (Dec. 17, 2014), <https://www.inc.com/jared-hecht/are-small-businesses-really-the-backbone-of-the-economy.html>.

<sup>26</sup> Benjamin Goad, *Poll: 72 Percent of Small Businesses Say Regulations Are Hurting Them*, THE HILL (Jan. 25, 2013), <http://thehill.com/regulation/business/279443-poll-72-percent-of-small-businesses-say-regulations-are-hurting->.

<sup>27</sup> Alfredo Ortiz, *America Must Tame Regulation, ‘Bring Small Businesses Back’*, BREITBART (Jan. 16, 2016), <http://www.breitbart.com/big-government/2016/01/16/america-must-bring-small-businesses-back/>.

<sup>28</sup> Marcia Layton Turner, *How eBay Sellers Can Increase Sales with Just a Few Tweaks*, FORBES (Jan. 31, 2017), <https://www.forbes.com/sites/marciaturner/2017/01/31/how-ebay-sellers-can-increase-sales-with-just-a-few-tweaks/#60aa22d96227>.

<sup>29</sup> *eBay to Intermediate Payments on its Marketplace Platform*, EBAY (Jan. 31, 2018), <https://www.ebayinc.com/stories/news/ebay-to-intermediate-payments-on-its-marketplace-platform/>.

Using the eBay website, sellers create their own listings or use eBay's "Quick Listing Tool."<sup>30</sup> Because eBay provides the platform for selling, but the seller is responsible for creating the content of the listing, sellers have a significant amount of control over how they choose to market an item. eBay also provides flexibility by allowing sellers to sell items at their own pace and on their own schedule, which is convenient for sellers who use the platform as an auxiliary source of income.<sup>31</sup> Furthermore, additional marketing tools are available for sellers who purchase an eBay store.<sup>32</sup>

In order to fully understand the implications of existing fashion law, it is important to understand the fundamental intellectual property law underlying the specific fashion law cases that will be discussed. Such an understanding will ensure a stronger analysis and understanding of such principles when applied to the evolving Internet fashion market.

## II. HISTORY AND BACKGROUND

### A. Trademark

To establish trademark infringement under 15 U.S.C. section 1125, "[i]n addition to demonstrating that the plaintiff's mark is protected, the plaintiff must prove that the defendant's use of the allegedly infringing mark would likely cause confusion as to the origin or sponsorship of the defendant's goods with plaintiff's goods."<sup>33</sup> Case law recognizes three iterations of likelihood of confusion: (1) a mistake between products, (2) a mistake regarding the source of a product, and (3) belief that the product is "authorized, sponsored, or approved by the original company."<sup>34</sup> Whether a likelihood of confusion exists is determined by an multi-factor balancing test that varies by jurisdiction.<sup>35</sup> One way

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<sup>30</sup> *Creating a Listing*, EBAY, [http://pages.ebay.com/help/sell/listing\\_ov.html](http://pages.ebay.com/help/sell/listing_ov.html) (last visited Jan. 28, 2017).

<sup>31</sup> See Gross, *supra* note 3.

<sup>32</sup> *Selling with eBay Stores*, EBAY, <http://pages.ebay.com/help/sell/stores.html> (last visited Jan. 28, 2017).

<sup>33</sup> 15 U.S.C. § 1125 (2012). See also *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 114 (2d Cir. 2009).

<sup>34</sup> Mark V.B. Partridge, *Likelihood of Confusion: Understanding Trademark Law's Key Principle*, PATTIS HALL, <http://www.pattishall.com/pdf/LikelihoodofConfusion.pdf> (last visited Mar. 30, 2017).

<sup>35</sup> *Starbucks Corp.*, 588 F.3d at 115. For example, the Eighth Circuit's test includes the following factors:

The eight 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.

for a plaintiff to establish a violation is by direct infringement.<sup>36</sup> However, protection for fashion designers is not necessarily provided for under the United States Trademark Act.<sup>37</sup>

Instead, trademark law protects brand names, logos, symbols, designs and other optional elements of apparel and accessories, and trade dress law protects the design, packaging or appearance of apparel and accessories, solely to the extent they identify the source and origin of such products.<sup>38</sup>

Trade dress may also become an issue for designers.<sup>39</sup> Specifically, “[u]nlike packaging and other elements where trade dress protection may be acquired through ‘inherent distinctiveness,’ trade dress protection of an apparel design requires distinctiveness to be acquired through ‘secondary meaning,’ a process whereby consumers come to recognize the design as a source identifier over a period of time.”<sup>40</sup> In understanding trademark infringement in the fashion context, it is critical to understand the elements test set forth in *Coach, Inc. v. Goodfellow*, which explains a “party proves trademark infringement by showing (1) that it owns a trademark, (2) that the infringer used the mark in commerce without authorization, and (3) that the use of the alleged infringing trademark is likely to cause confusion among consumers regarding the origin of the goods offered by the parties.”<sup>41</sup>

Contributory infringement is the second type of trademark infringement that occurs in online marketplaces such as eBay. To state a claim for contributory infringement against a service provider, a plaintiff must sufficiently plead that the defendant (1) “continued to supply its services to one who it knew or had reason to know was engaging in trademark infringement,” and (2) “had direct control and monitoring of the instrumentality used by a third party to infringe.”<sup>42</sup> However, the theory of contributory infringement has not been asserted widely

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*Id.*

<sup>36</sup> To prevail on a trademark infringement claim under section 32 of the Lanham Act, Plaintiff must show that Defendant used in commerce, without Plaintiff’s consent, any reproduction, counterfeit, copy, or colorable imitation of Plaintiff’s valid trademark ‘in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

*Spy Optic, Inc. v. Alibaba.com, Inc.*, 163 F. Supp. 3d 755, 764 (C.D. Cal. 2015).

<sup>37</sup> Oliver Herzfeld, *Protecting Fashion Designs*, FORBES, (Jan. 3, 2013) <http://www.forbes.com/sites/oliverherzfeld/2013/01/03/protecting-fashion-designs/#2d1ceaa973f8>.

<sup>38</sup> *Id.* “For example, the brand name and logo hang tag and distinctive pocket stitching on a pair of jeans could be registered as protectable trademarks, and the unique shape of a dress could be registered as protectable trade dress.” *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Coach, Inc. v. Goodfellow*, 717 F.3d 498, 502 (6th Cir. 2013).

<sup>42</sup> See Bastien, *supra* note 17.

outside of the manufacturer/distributor context.<sup>43</sup> “Moreover . . . under the doctrine of contributory infringement, that ‘if a manufacturer or distributor . . . continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement,’ the manufacturer or distributor itself may held be liable for infringement.”<sup>44</sup> Corporations may also be held liable for contributory trademark infringement.<sup>45</sup> Furthermore, courts in the Sixth, Seventh, Ninth Circuits, the Southern District of Florida, and the District of New Hampshire have found flea market operators to be liable for contributory infringement.<sup>46</sup> Finally, in some instances, Internet service providers may also be held liable for contributory trademark infringement.<sup>47</sup>

### B. Design Patents

An eBay seller may also infringe a fashion design patent, but this is more difficult to enforce. Design patents are addressed in 35 U.S.C. section 173 and provide fifteen years of exclusive industrial design rights for new and nonobvious ornamental designs of functional items.<sup>48</sup> A popular example in the fashion context is Alexander Wang’s Robyn Hobo Bag U.S. design patent No. D672,962.<sup>49</sup> Comparatively, design patent law is different in the European Union.<sup>50</sup> Because fashion is an international endeavor, such deviations between Eu-

<sup>43</sup> Polo Ralph Lauren Corp. v. Chinatown Gift Shop, 855 F. Supp. 648, 650 (S.D.N.Y. 1994).

<sup>44</sup> Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001).

<sup>45</sup> Luxottica Group, S.p.A. v. Greenbriar Marketplace II, LLC, 212 F. Supp. 3d 1375 (N.D. Ga. 2016).

<sup>46</sup> *Id.* at 2.

<sup>47</sup> See Ali, *supra* note 24.

<sup>48</sup> 35 U.S.C. § 173 (2012). “An industrial design may consist of three dimensional features, such as the shape of an article, or two dimensional features, such as patterns, lines or color.” *Frequently Asked Questions: Industrial Design Basics*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, [http://www.wipo.int/designs/en/faq\\_industrialdesigns.html](http://www.wipo.int/designs/en/faq_industrialdesigns.html) (last visited Oct. 29, 2018). See also Bastien, *supra* note 17.

Generally, design patents are granted for handbags, shoes, jewelry designs and more. Apparel designs are generally deemed unpatentable because they are considered functional. . . . More so, apparel designs are considered to be obvious and not novel. Although certain elements of a design are not novel or obvious, their combination in that design may be. Therefore, a designer can patent key elements and important parts of the apparel design.

*Id.* It should also be noted that, “a designer is not limited to obtaining a single design patent per product. Each element of a design can be covered under a separate patent, which expands the design’s protection.” *Id.*

<sup>49</sup> Alis Anita Manaila, *Design Patents are a Boon for the Fashion Industry*, CREATIVE ARTS ADVOCATE, (Jan. 13, 2017), <http://creativeartsadvocate.com/design-patents-are-a-boon-for-the-fashion-industry>.

<sup>50</sup> *Id.* “For example, in 2002, the E.U. passed a law that provides designers with up to three years of unregistered design protection and up to 25 years of registered protection. Contrast this with the law in the United States, which lacks any law that specifically targets fashion design protection.” *Id.*

European and American law makes it increasingly confusing to sellers, many of whom have a minimum knowledge of any intellectual property law.<sup>51</sup>

### C. Copyright

Copyright infringement is the third type of infringement that is common in online marketplaces such as eBay. Copyright infringement will either be direct infringement or contributory infringement.<sup>52</sup> To establish direct infringement, “two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”<sup>53</sup> Contributory infringement “turns on whether the activity in question ‘substantially assists’ direct infringement.”<sup>54</sup> Another way to determine whether an entity is a contributory infringer is to determine whether the entity is “an essential step in the infringement process.”<sup>55</sup> There is also a willfulness component to copyright infringement, which is often for statutory damages. Specifically, “a finding of ‘willfulness’ in [the copyright] context can be based on either ‘intentional’ behavior, or merely ‘reckless’ behavior.”<sup>56</sup> “To prove ‘willfulness’ under the Copyright Act, the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant’s actions were the result of ‘reckless disregard’ for, or ‘willful blindness’ to, the copyright holder’s rights.”<sup>57</sup> Furthermore, with regard to copyright infringement, it is critical that sellers in online marketplaces understand the idea/expression doctrine.<sup>58</sup> Etsy, an online marketplace for hand-crafted products and vintage items, offers non-legal advice to its customers by explaining that “[p]ursuant to the idea/expression doctrine, US copyright protects only the expression of the idea—not the idea itself.”<sup>59</sup> It may be difficult for a layperson to draw the line between an idea and an expression.

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<sup>51</sup> *Id.* “To bridge the gap between the lack of significant intellectual property protection and the need for such safeguards designers are increasingly turning to design patents to secure their rights.” *Id.*

<sup>52</sup> 17 U.S.C. §§ 105–122 (2012).

<sup>53</sup> 17 U.S.C. § 501; See also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>54</sup> *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 943 (9th Cir. 2011).

<sup>55</sup> *Id.* at 944.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Idea and Expression Dichotomy*, LAWTEACHER, <https://www.lawteacher.net/free-law-essays/copyright-law/idea-and-expression-dichotomy.php> (last visited Oct. 29, 2018). “This concept can be summed up in Lindley LJ’s statement that: ‘Copyright does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied, the copyright is not infringed.’” *Id.*

<sup>59</sup> *Copyrighting and Protecting Your Work*, ETSY, <https://www.etsy.com/help/article/263> (last visited Jan. 13, 2017).

### III. ANALYSIS

#### A. Analysis of Relevant Case Law

A notable case regarding the application of fashion-related intellectual property law in the online market context is *Tiffany v. eBay*.<sup>60</sup> There, the Second Circuit affirmed the district court's decision, which found eBay not liable for direct or contributory trademark infringement.<sup>61</sup> eBay operates [www.ebay.com](http://www.ebay.com), "an Internet-based marketplace that allows those who register with it to purchase goods from and sell goods to one another."<sup>62</sup> eBay "provides the venue for the sale [of goods] and support for the transaction[s], [but] it does not itself sell the items listed for sale on the site, nor does it ever take physical possession of them."<sup>63</sup> eBay generates revenue in several different ways including: (1) charging "insertion" and "final value" fees, (2) revenue from PayPal, a company owned by eBay, which allows users to facilitate and process transactions, and (3) other streams of revenue, such as eBay "store" subscriptions and at one point, revenues from eBay Valet.<sup>64</sup>

In an effort to combat the epidemic of counterfeit goods, specifically regarding online sales in venues such as eBay, Tiffany, a manufacturer of fine silver jewelry, conducted its own research operation.<sup>65</sup> In 2004 and again in 2005, Tiffany conducted "buying programs" in which it "bought various items on eBay and then inspected and evaluated them to determine how many were counterfeit."<sup>66</sup> However, based on the record at trial, it was difficult to determine the degree of presence of Tiffany goods in such markets.<sup>67</sup>

Based on its research efforts, Tiffany found that 73.1% of the purported Tiffany goods purchased in the 2004 Buying Program and 75.5% of those purchased in the 2005 Buying Program were counterfeit.<sup>68</sup> The district court found that Tiffany's Buying Programs were "methodologically flawed and of ques-

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<sup>60</sup> *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

<sup>61</sup> *Id.* at 96.

<sup>62</sup> *Id.* at 97. It "connect[s] buyers and sellers and enable[s] transactions, which are carried out directly between eBay members." *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* See also *Subscriptions and fees*, EBAY, <http://pages.ebay.com/seller-center/stores/subscriptions.html> (last visited Feb. 23, 2017, 5:08 PM). Please note, eBay Valet was discontinued in March of 2018.

<sup>65</sup> *Tiffany*, 600 F.3d at 97.

<sup>66</sup> *Id.* Tiffany sells its products by catalog, in store, on its website, and through its Corporate Sales Department. *Id.* Tiffany's products are never put on sale, liquidated, discounted, or sold as overstock. *Id.* "It does not—nor can it, for that matter—control the 'legitimate secondary market' in authentic Tiffany silvery jewelry." *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* Specifically, Tiffany purchased items from eBay that were being sold under the Tiffany name and inspected them to determine how many items available for sale on the website were counterfeit. *Id.*

tionable value.”<sup>69</sup> The court validated that counterfeit goods were being sold on eBay, but ultimately based its decision on the fact that a substantial number of authentic goods were also available on the site.<sup>70</sup> eBay’s Jewelry & Watches category manager estimated that, between April 2000 and June 2004, eBay earned \$4.1 million in revenue from completed listings with “Tiffany” in the listing title in the Jewelry & Watches category.<sup>71</sup> Thus, a portion of eBay’s earnings was derived from counterfeit Tiffany merchandise. Furthermore, the district court determined that 125 customers complained to eBay about purchasing “Tiffany” items during the last six weeks of 2004.<sup>72</sup> This could likely be an underestimate of the counterfeit Tiffany goods available on eBay considering that some buyers are not equipped with the knowledge to determine an item’s authenticity when purchasing from a third-party seller.<sup>73</sup>

eBay argued that Tiffany’s main goal was “to shut down the legitimate secondary market in authentic Tiffany goods.”<sup>74</sup> If Tiffany had been able to eliminate the sale of all Tiffany goods in the secondhand market, demand for its goods sold in the limited number of outlets would increase. Although fewer sales of any type of items on eBay would decrease eBay’s profits, the effects wouldn’t necessarily be negative.<sup>75</sup>

Regardless, the district court found that, because eBay “never saw or inspected the merchandise in the listings,” its ability to determine whether a particular listing was for counterfeit goods was limited.<sup>76</sup> The Second Circuit’s primary reasoning was that none of eBay’s uses of the mark suggested that Tiffany affiliated itself with eBay or endorsed the sale of its products through eBay’s website.<sup>77</sup>

The court reasoned that even if eBay had conducted a proper inspection of the goods, “in many instances it likely would not have had the expertise to determine whether they were counterfeit.”<sup>78</sup> Furthermore, the court noted that, “in many instances, determining whether an item is counterfeit will require a physi-

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 98. The court reasoned that the investigation was flawed because it “provide[d] limited evidence as to the total percentage of counterfeit goods available on eBay at any given time.” *Id.* at 97.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Fake products sold by places like Walmart or Amazon hold risks of everything from cyanide to rat droppings – here’s how to make sure what you’re buying is real*, BUSINESS INSIDER, <https://www.businessinsider.com/how-to-find-fake-products-online-shopping-amazon-ebay-walmart-2018-3> (last visited Oct. 29, 2018).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* “The immediate effect would be loss of revenue to eBay, even though there might be a countervailing gain by eBay resulting from increased consumer confidence about the bona fides of other goods sold through its website.” *Id.*

<sup>76</sup> *See supra*, note 60. The appellate court ultimately found that eBay’s use of Tiffany’s mark was lawful. *Id.* at 102.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

cal inspection of the item, and some degree of expertise on the part of the examiner.”<sup>79</sup> The court elaborated on eBay’s efforts to combat the sale of counterfeit items on their site.<sup>80</sup> eBay also implemented a “fraud engine,” “which is principally dedicated to ferreting out illegal listings, including counterfeit listings.”<sup>81</sup>

There are several cases aside from *Tiffany* that help to further explain the roles of both the seller and the third party in determining liability. These cases are increasingly more important as eBay’s business model and company practices continue to evolve. For example, in *Coach, Inc. v. Goodfellow*, the Sixth Circuit was asked to determine whether a flea market operator could be held liable for contributory trademark infringement for infringing products that were sold by one of its vendors.<sup>82</sup> In that case, Coach, Inc. brought a contributory trademark infringement action against Goodfellow, an individual who owned and operated a flea market that sold counterfeit Coach leather goods.<sup>83</sup> The court noted that “Goodfellow controlled the flea market and had ultimate authority in allowing and removing vendors who sold goods at the flea market.”<sup>84</sup> Coach first notified Goodfellow of counterfeit sales of Coach goods by a letter it sent Goodfellow on January 15, 2010.<sup>85</sup> Eventually, the flea market was shut down

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* eBay expended “as much as \$20 million each year on tools to promote trust and safety on its website.” eBay created a “Trust and Safety” department made up of approximately 4,000 employees “devoted to trust and safety issues,” with over 200 employees “who focus exclusively on combating infringement.” *Id.* Seventy of the approximately 4,000 employees that work for the “Trust and Safety” department solely work with law enforcement. *Id.*

<sup>81</sup> *Id.* In particular, “[t]he fraud engine uses rules and complex models that automatically search for activity that violates eBay policies.” The “fraud engine” also applies “Tiffany-specific filters,” applying “approximately 90 different keywords.” *Id.* In addition, “[d]uring the period in dispute, eBay also ‘periodically conducted [manual] reviews of listings in an effort to remove those that might be selling counterfeit goods, including Tiffany goods.’” *Id.* at 99.

<sup>82</sup> See *Coach, Inc. v. Goodfellow*, 717 F.3d 498, 499–500 (6th Cir. 2013); see also *Polo Ralph Lauren Corp. v. Chinatown Gift Shop*, 855 F. Supp. 648 (S.D. N.Y. 1994) (denying defendant’s motion to dismiss claims of trademark infringement, false designation of origin, unfair competition, and contributory infringement. The court of appeals agreed with a district court, holding that the contributory infringement test in *Inwood Laboratories* applied to a flea market operator who leased stalls to retailers selling infringing goods). See *Inwood Laboratories, Inc. v. Ives Laboratories*, 456 U.S. 844 (1982).

<sup>83</sup> See *Coach*, 717 F.3d at 500. Coach’s primary goods are leather goods, handbags, eyewear, briefcases, and footwear. *Id.* The defendant, Frederick Goodfellow, owned and operated a flea market in Memphis, Tennessee. *Id.* Furthermore, “Goodfellow controlled, managed, and oversaw the day-to-day operations of the flea market.” *Id.* The flea market rented booths to vendors on Thursdays through Sundays as well as rented storage containers for vendors to store their items when the flea market was not in operation. *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* Goodfellow received another letter on March 26, 2010, from the Shelby County District Attorney’s Office notifying him of the continuation of the sales of counterfeit Coach products at the flea market. *Id.* Finally, on April 23, 2010, the flea market was raided by law enforcement officers. *Id.* Coach filed the action against Goodfellow in June 2010, demanding a halt to the sale of fake Coach goods. *Id.* Upon discovery that sales of counterfeit goods continued in February 2011, another

completely.<sup>86</sup> Goodfellow admitted to knowing of the sale of counterfeit Coach goods and that he was aware of the raids and arrests.<sup>87</sup> Coach filed a motion for partial summary judgment in regard to the issue of liability to which Goodfellow did not respond.<sup>88</sup> Coach was awarded \$5,040,000 in damages.<sup>89</sup>

In *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, the United States Supreme Court determined that liability under the Lanham Act may be imposed on those who facilitate trademark infringement.<sup>90</sup> The Sixth Circuit court addressed the issue of “whether Goodfellow [was] properly held liable for the infringing acts of others.”<sup>91</sup> Ultimately, the court affirmed the district court’s decision, and held that Goodfellow was liable for contributory trademark infringement.<sup>92</sup> Specifically, the court in *Coach* focused on reasoning “stating that where a ‘distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, [it] is contributorily responsible for any harm done as a result of the deceit.’”<sup>93</sup> The analysis of *Inwood* has been applied in other instances of flea markets and contributory liability has been found on the part of flea market operators.<sup>94</sup>

For example, in *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*,<sup>95</sup> the Seventh Circuit found contributory liability on the part of vendors who engaged in trademark violations.<sup>96</sup> In *Hard Rock*, the court developed the willful blindness standard.<sup>97</sup> There, “[t]he court defined as willfully blind one who suspects wrongdoing and deliberately fails to investigate.”<sup>98</sup> Thus, pursuant to the *Hard Rock* willful blindness standard, “a flea market operator who deliberately fails to investigate suspected infringing activity by vendors and facili-

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raid was conducted by law enforcement officers on March 4, 2011. *Id.* On June 23, 2011, yet another raid occurred, resulting in the seizure of more than 4,600 “Coach” products. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 501. It should also be noted that “[t]he flea market’s employees never received any training to identify counterfeit goods.” *Id.* at 500. Similarly, vendors were not required to sign any sort of permit upon which they agreed that they would not sell counterfeit items. *Id.* However, there was some evidence of remedial measures. *Id.* at 500–01.

<sup>88</sup> *Id.* at 501. The court granted Coach’s motion and “[d]espite Goodfellow’s failure to respond, the court viewed the record in the light most favorable to him as non-movant, but still held that Goodfellow was contributorily liable for sales of counterfeit Coach products by his vendors.” *Id.* Goodfellow moved to set aside the motion for partial summary judgment, but his efforts were unsuccessful. *Id.*

<sup>89</sup> *Id.* “The jury awarded \$240,000 per mark for twenty-one total infringed marks.” *Id.*

<sup>90</sup> *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982).

<sup>91</sup> *See Coach*, 717 F.3d at 502.

<sup>92</sup> *Id.* at 506.

<sup>93</sup> *Id.* at 505–06.

<sup>94</sup> *Id.* at 503.

<sup>95</sup> *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143 (7th Cir. 1992).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

tates ongoing infringement by permitting such vendors to use flea market resources may be subject to contributory liability.”<sup>99</sup>

In a Ninth Circuit case, *Fonovisa, Inc. v. Cherry Auction, Inc.*,<sup>100</sup> the court “adopted *Hard Rock Café’s* application of *Inwood*, holding that the flea market operator was liable for contributory trademark infringement because it knew or had reason to know of the infringing activity.”<sup>101</sup> There, the court “observ[ed] that a flea market operator ‘can not [sic] disregard its vendors’ blatant trademark infringements with impunity.”<sup>102</sup>

While *Hard Rock* and *Fonovisa* both provide insights and analogous facts to *Tiffany* and other similar situations that arise in the eBay marketplace, there are other more recent cases that provide an additional layer to the analysis of contributory infringement in the Internet marketplace context. One example is the Fourth Circuit case, *Rosetta Stone Ltd. v. Google, Inc.*<sup>103</sup> While this case involved Rosetta Stone language learning software, several luxury and designer fashion brands filed amicus briefs in support of Rosetta Stone, the appellant.<sup>104</sup>

In 1992, Rosetta Stone began selling language-learning software and eventually came to be publicly traded in January 2010.<sup>105</sup> “Rosetta Stone owns and uses several registered marks in connection with its products and services: ROSETTA STONE, ROSETTA STONE LANGUAGE LEARNING SUCCESS, ROSETTASTONE.COM, and ROSETTA WORLD.”<sup>106</sup> Rosetta Stone engages in various types of marketing including: radio, magazines, television, kiosks and public venues, and the Internet.<sup>107</sup> In 2002, Rosetta Stone began advertising on Google.<sup>108</sup> Google operates AdWords, an advertising platform that allows “a sponsor to ‘purchase’ keywords that trigger the appearance of the

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<sup>99</sup> *Id.*

<sup>100</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

<sup>101</sup> *Coach, Inc. v. Goodfellow*, 717 F.3d 498, 503 (6th Cir. 2013).

<sup>102</sup> *Id.*

<sup>103</sup> *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012).

<sup>104</sup> *Id.* The amici curiae included: Coach, Inc., Chanel, Longchamp USA, the National Football League, Oakley, Professional Golfers’ Association of America, Tiffany & Company, Tumi, Swarovski North America, and Express, Inc. *Id.*

<sup>105</sup> *Id.* at 150. At that time, the corporation had 1,738 employees and a gross revenue of approximately \$252 million. *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* “From 2003 through 2009, Rosetta Stone spent approximately \$57 million for television and radio advertising, \$40 million for print media marketing, and \$12.5 million to advertise on the Internet.” *Id.* Rosetta Stone’s marketing efforts were beneficial, because “[i]n 2009, Rosetta Stone’s marks enjoyed the highest level of brand recognition by far in the domestic language-learning market.” *Id.*

<sup>108</sup> *Id.* “Google operates one of the world’s most popular Internet search engines.” *Id.* Specifically, “[w]hen an Internet user enters a word or phrase—the keyword or keywords—into Google’s search engine, Google returns a results list of links to websites that the search engine has determined to be relevant based on a proprietary algorithm.” *Id.* Google displays the results of the search, but it also displays “sponsored links,” which are paid advertisements. *Id.*

sponsor's advertisement and link when the keyword is entered as a search term."<sup>109</sup>

Advertisers using AdWords are required to register for an account before being allowed to bid on a key word.<sup>110</sup> Until 2004, Google's policy did not allow the use of trademarks in the text of the advertisement or as keywords.<sup>111</sup> However, in 2004, Google began "to allow the use of third-party trademarks as keywords even over the objection of the trademark owner."<sup>112</sup> In 2009, Google limited the use of a brand's trademark to four categories:

- (1) the sponsor is a reseller of a genuine trademarked product;
- (2) the sponsor makes or sells component parts for a trademarked product; (3) the sponsor offers compatible parts or goods for use with the trademarked product; or (4) the sponsor provides information about or reviews a trademarked product.<sup>113</sup>

"Rosetta Stone contends that Google's policies concerning the use of trademarks as keywords and in ad text created not only a likelihood of confusion but also actual confusion as well, misleading Internet users into purchasing counterfeit ROSETTA STONE software."<sup>114</sup> Furthermore, Rosetta Stone alleged that it was "plagued with counterfeiters since Google announced its policy shift

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<sup>109</sup> *Id.* "In other words, an advertiser purchases the right to have his ad and accompanying link displayed with the search results for a keyword or combination of words relevant to the advertiser's business." *Id.* Logistically, "[m]ost sponsors advertising with Google pay on a 'cost-per-click' basis, meaning that the advertiser pays whenever a user of Google's search engine clicks on the sponsored link." *Id.* The "sponsored links" appear to the right of the natural search results and three "sponsored links" also appear above the natural search results. *Id.* More than one sponsor may purchase a keyword and buyers purchase keywords through an auction style mechanism. *Id.* "Generally speaking, users of the Internet are apparently more likely to click on ads that appear higher up on the search results page." *Id.* Thus, "an advertiser will try to outbid its competitors for the top positions in order to maximize the number of clicks on the advertiser's text ads." *Id.* Advertisers seek an advertising spot that will generate the most clicks, because clicks convert into traffic to their respective websites, which will result in more sales in most cases. *Id.* Google also "benefits by placing the most relevant ads in the most desirable locations, which increases the likelihood of a high click-through rate and leads to increased advertising revenue." *Id.*

<sup>110</sup> *Id.* "Under AdWords' boilerplate terms and conditions, the account holder must agree to assume responsibility for its selected keywords, for all advertising content, and for 'ensuring that [its] use of the keywords does not violate any applicable laws.'" *Id.* Furthermore, "[a]ccount holders must also agree to refrain from 'advertis[ing] anything illegal or engag[ing] in any illegal or fraudulent business practice.'" *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* Google continued to promulgate the use of a third-parties' trademarks by introducing "a trademark-specific keyword tool that suggested relevant trademarks for Google's advertising clients to bid on as keywords." *Id.* Upon the trademark owner's request, Google would continue to block the use of the third-parties' trademarks. *Id.*

<sup>113</sup> *Id.* at 151-52.

<sup>114</sup> *Id.* at 152.

in 2009.”<sup>115</sup> Rosetta Stone filed an action against Google alleging: (1) direct trademark infringement; (2) contributory trademark infringement; (3) vicarious trademark infringement; (4) trademark dilution; and (5) unjust enrichment.<sup>116</sup> Google filed a motion for summary judgment, and the district court granted the motion for all of the claims except for the unjust enrichment claim, for which the court granted a motion to dismiss.<sup>117</sup>

The court also reasoned that “[i]t is not enough to have general knowledge that some percentage of the purchasers of a product or service is using it to engage in infringing activities.”<sup>118</sup> Instead, “[t]he defendant must supply its product or service to ‘identified individuals’ that it knows or has reason to know are engaging in trademark infringement.”<sup>119</sup> The district court acknowledged that Rosetta Stone had presented evidence supporting its contributory infringement claim.<sup>120</sup>

In fact, the district court based its decision primarily on *Tiffany v. eBay*.<sup>121</sup> However, the appellate court agreed with Rosetta Stone’s contention that “the district court misapplied the standard of review and incorrectly awarded summary judgment to Google where the evidence was sufficient to permit a trier of fact to find contributory infringement.”<sup>122</sup> However, the court in *Rosetta Stone* ultimately found that the application of the standard set forth in *Tiffany* was inappropriate because *Rosetta Stone* involved summary judgment, whereas the decision in *Tiffany* followed an extensive bench trial.<sup>123</sup>

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<sup>115</sup> *Id.* Between September 3, 2009, and March 1, 2010, Rosetta Stone claimed to have reported to Google 190 instances of sponsored links on Google that were marketing counterfeit Rosetta Stone items. *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Rosetta Stone specifically challenged the district court’s motion for summary judgment regarding the contributory trademark infringement claim. *Id.* Rosetta Stone derived its reasoning from the basic premise that “[c]ontributory infringement is a ‘judicially created doctrine’ that ‘derive[s] from the common law of torts.’” *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* “The most significant evidence in this regard reflected Google’s purported allowance of known infringers and counterfeiters to bid on the Rosetta Stone marks as keywords.” *Id.*

<sup>121</sup> *Id.* at 164. As previously discussed, the court in *Tiffany* found that eBay’s generalized knowledge of infringing conduct was not enough to satisfy the “knows or has reason to know” standard set forth in *Inwood*. *Id.*

<sup>122</sup> *Id.* The court further stated that, “[t]he only question in this appeal is whether, viewing the evidence and drawing all reasonable inferences from that evidence in a light most favorable to Rosetta Stone, a reasonable trier of fact could find in favor of Rosetta Stone, the nonmoving party.” *Id.*

<sup>123</sup> *Id.* Ultimately, the court in *Rosetta Stone* concluded that “the evidence recited by the district court is sufficient to establish a question of fact as to whether Google continued to supply its services to known infringers.” *Id.*

*B. Analysis in the eBay Fashion Context*

As eBay's business model and strategy have evolved, the analysis in *Coach* and other similar cases is more analogous to infringements that occur on eBay than the analysis in *Tiffany*. In several ways, eBay can be likened to a flea market operator in the flea market line of cases, such as *Coach*. First, eBay is profiting from its sellers in the form of insertion and final value fees, use of PayPal as a secondary stream of revenue.<sup>124</sup> Furthermore, eBay launched the Global Shipping Program in the years following the decision in *Tiffany*.<sup>125</sup> An eBay seller is automatically qualified for the Global Shipping Program if an item sells internationally to a buyer in an eligible country.<sup>126</sup> Sellers then ship their sold item(s) to a U.S. shipping center, where experts manage the international shipping and customs process and send the item to the buyer.<sup>127</sup> Because the court in *Tiffany* focused on the fact that eBay never actually took possession of the infringing items as part of its analysis in coming to the conclusion that eBay could not be held liable for contributory trademark infringement, that reasoning is significantly weakened by the fact that eBay once took possession of certain items.<sup>128</sup> eBay recently had a program called eBay valet, where sellers could ship items to an eBay "valet" that listed and sold the items for the seller.<sup>129</sup> This further dismantled the reasoning in *Tiffany* because, not only was eBay physically taking possession of the property, but it was also creating the copy and marketing for the item and shipping the item to the buyer when it sells.<sup>130</sup> Thus, in that instance, eBay exerted a significant amount of control over the entire sales process. This not only invalidated a key line of reasoning in *Tiffany*, but it significantly deconstructed the reasoning further by adding additional facts that prove eBay's direct involvement in sales. However, in March of 2018, eBay discontinued the eBay Valet Program.<sup>131</sup>

eBay is also more analogous to the "service provider" as it is addressed in *Spy Optic v. Alibaba.com*.<sup>132</sup> In that case, Spy Optic, a brand most notable for its sunglasses designs, filed a claim alleging that Alibaba.com used its trademarks and "product depictions on its websites in a manner which falsely indicates that the suppliers on the Alibaba and other websites are authorized sellers of genuine Spy products or that Plaintiff has in some manner endorsed the sale of these

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<sup>124</sup> See Ali, *supra* note 24.

<sup>125</sup> Ina Steiner, *eBay to Launch Brand New Export Program in the US*, ECOMMERCEBYTES (Aug. 23, 2012), <http://www.ecommercebytes.com/cab/abn/y12/m08/i23/s02>.

<sup>126</sup> *Using the Global Shipping Program*, EBAY, <http://pages.ebay.com/help/sell/shipping-globally.html> (last visited Jan. 14, 2017, 10:15 AM).

<sup>127</sup> *Id.*

<sup>128</sup> See EBAY, *supra* note 5.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Ina Steiner, *eBay Shuttles eBay Valet Consignment Program*, ECOMMERCE BYTES, <https://www.ecommercebytes.com/C/blog/blog.pl?pl/2018/3/1522086624.html> (last visited Oct. 16, 2018).

<sup>132</sup> *Spy Optic, Inc. v. Alibaba.com, Inc.*, 163 F. Supp. 3d 755 (C.D. Cal. 2015).

products.”<sup>133</sup> The court noted that, to state a claim for contributory infringement against a service provider, plaintiffs must sufficiently plead that the defendant (1) “continued to supply its services to one who it knew or had reason to know was engaging in trademark infringement,” and (2) “had direct control and monitoring of the instrumentality used by a third party to infringe.”<sup>134</sup> In *Spy Optic*, the defendant’s motion for nonsuit was denied because defendant was allegedly capable of removing an infringing user with its website service, AliProtect.<sup>135</sup> Thus, the defendant had “direct control and monitoring of the instrumentality used” by that party to infringe the plaintiff’s trademarks.<sup>136</sup> eBay has created the Verified Rights Owner (VeRO) Program, which allows intellectual property owners to report listings that infringe on their rights.<sup>137</sup> According to the eBay website, VeRO provides “expeditious removal of listings reported to eBay by more than 5,000 intellectual property rights owners . . . proactive monitoring and removal of listings that violate eBay policies designed to prevent the listing of infringing items on eBay,” as well as other benefits.<sup>138</sup> While rights owners are required to register for the VeRO program and report potential infringements themselves, eBay also has a significant amount of direct control over monitoring infringements.<sup>139</sup> For example, eBay may suspend repeat offenders.<sup>140</sup> Thus, eBay may likely have enough control to satisfy the standard of “direct control and monitoring of the instrumentality used by a third party to infringe.”<sup>141</sup> Progressive decisions such as the one in *Spy Optic* create the possibility that eBay may be liable for an increasing degree of responsibility and may want to consider taking stronger disciplinary actions against infringers.

*Louis Vuitton v. Akanoc*, which followed *Tiffany v. eBay*, also provides useful insights.<sup>142</sup> In that case, Louis Vuitton brought an action against a web hosting business in connection with allegedly infringing websites hosted on defendants’ servers, which directly infringed Louis Vuitton’s trademarks and copyrights.<sup>143</sup> Upon investigation, Louis Vuitton discovered websites selling goods that it believed infringed its copyrights and trademarks.<sup>144</sup> The websites sold the merchandise indirectly by listing an email address that buyers could use

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<sup>133</sup> *Id.* at 760.

<sup>134</sup> *Id.* at 766 (citing *Louis Vuitton Malletier v. Akanoc Sols., Inc.*, 658 F.3d 936, 942 (9th Cir. 2011)).

<sup>135</sup> *Spy Optic*, 163 F. Supp. 3d at 766.

<sup>136</sup> *Id.*

<sup>137</sup> *Verified Rights Owner Program*, EBAY, <http://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html#what-is-the-vero-program> (last visited Mar. 12, 2018).

<sup>138</sup> *Reporting Intellectual Property Infringements (VeRO)*, EBAY, <https://pages.ebay.ca/help/tp/vero-rights-owner.html> (last visited Mar. 12, 2018).

<sup>139</sup> *See Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

<sup>140</sup> *See id.*

<sup>141</sup> *See Louis Vuitton Malletier v. Akanoc Sols., Inc.*, 658 F.3d 936, 942 (9th Cir. 2011).

<sup>142</sup> *See id.*

<sup>143</sup> *Id.* at 940.

<sup>144</sup> *Id.*

to conduct a transaction.<sup>145</sup> Louis Vuitton discovered that the websites were using IP addresses assigned to the defendants.<sup>146</sup> Defendant Akanoc was similar to the flea market operator in the flea market line of cases because it leased packages of server space, bandwidth, and IP addresses to its customers.<sup>147</sup> The court used language from *Perfect 10 v. Amazon*<sup>148</sup> to ultimately reason that “there is no question that providing direct infringers with server space” satisfies the standard that material contribution turns on, that is whether the activity in question “substantially assists” direct infringement.<sup>149</sup> That case also relied heavily on reasoning from *A&M Records v. Napster*,<sup>150</sup> which found that Napster, a music sharing website, materially contributed to the infringing activity because “[w]ithout the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts.”<sup>151</sup> Similarly, eBay is providing services that are allowing buyers to find the alleged infringing goods with ease. Because eBay not only provides the venue, but also provides a payment mechanism through PayPal and physically takes possession of items that are part of the Global Shipping Program and eBay valet, eBay’s services are arguably much more encompassing than those in *Napster* and *Louis Vuitton*. Thus, under this line of reasoning, eBay could potentially be found liable for contributory infringement, especially since the facts demonstrate eBay’s control over the facilitation of the sale of infringing goods is much stronger than in *Napster* and *Louis Vuitton*.

### C. Economic Analysis

The lax enforcement of intellectual property violations, especially contributory trademark infringement, has serious economic ramifications. The detrimental consequences resulting from the lack of strict enforcement extend to both luxury brands and designers as well as small business owners using platforms such as eBay.

The difficulty in enforcement of contributory liability causes issues with the quantity demanded and supplied of certain luxury goods, which are inelastic by nature. An inelastic good is one in which the quantity supplied or demanded of the product is generally unchanged by a change in price of the good.<sup>152</sup> For example, a one percent change in the price of a particular good creates less than a

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir. 2007).

<sup>149</sup> *Louis Vuitton*, 658 F.3d at 944.

<sup>150</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001).

<sup>151</sup> *Louis Vuitton*, 658 F.3d at 944.

<sup>152</sup> *Inelastic*, INVESTOPEDIA, <http://www.investopedia.com/terms/e/inelastic.asp> (last visited Feb. 9, 2017).

one percent change in the quantity demanded or supplied of the good.<sup>153</sup> As a general rule, basic necessities tend to be more inelastic, whereas luxury goods lean toward being more elastic.<sup>154</sup> However, there are exceptions, specifically regarding high-end fashion. Because of their luxury nature, high-end designer fashions have a certain degree of reliability when it comes to quantity demanded and supplied.<sup>155</sup> Typically, a customer is willing to pay the much higher prices for a designer label regardless of the exact price.<sup>156</sup> A one percent increase or decrease in the price of a designer garment does not affect the buying patterns of customers as it might in the non-luxury apparel world.<sup>157</sup> Thus, high-end designer fashions are more inelastic than elastic. For example, consider the iconic Hermes Birkin bag.<sup>158</sup> On average, a Birkin bag sells for approximately \$12,000.<sup>159</sup> If that price were reduced by one percent, the price would only be adjusted by \$120, decreasing the price to \$11,880. However, the Birkin bag has an extensive waiting list.<sup>160</sup> Thus, although the one percent change in price is nominal and likely would not change the quantity demanded or supplied regardless; the waiting list creates an automatic replacement for any lost customers resulting from the change in price, not changing the quantity demanded at all. This is an example of the inelasticity of a luxury good. This is important to a particular designer's business strategy, because to a certain degree, the business can rely on a particular revenue stream due to its marketing strategy, specifically its product, place, promotion, and price.

The underground market for luxury goods in the flea market and eBay contexts significantly diminishes the business strategy efforts made by a particular designer by altering quantity demanded by introducing additional products or product substitutes into the market.<sup>161</sup> For example, in *Tiffany*, the court noted that Tiffany's channels of distribution were catalogs, online, and in-store, but also that Tiffany never placed items on sale or liquidated products through discount outlets.<sup>162</sup> The problems created for designers are two-fold. First,

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Fundamental Analysis Department Consumer Industry Report on U.S. Luxury Goods*, NUS INVESTMENT SOCIETY, <http://www.nusinvest.com/wp-content/uploads/2014/12/FA-Consumer-Industry-Report-on-US-Luxury-Goods-Sector-311214.pdf> (last visited Oct. 29, 2018). "Luxury goods tend to have a rather inelastic demand. Prices of luxury goods tend to be high even during an economic downturn."

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Hermes Bag and Accessories Price List Reference Guide*, SPOTTED FASHION (Aug. 2017), <http://www.spottedfashion.com/hermes-price-list-reference-guide/>.

<sup>159</sup> *Id.*

<sup>160</sup> Erika Adams, *Hermes Birkin Owners Reveal Crazy Tips for Buying the Bag*, RACKED (June 26, 2015), <https://www.racked.com/2015/6/26/8850883/hermes-birkin-bags>.

<sup>161</sup> *Quantity Supplied*, INVESTOPEDIA, <https://www.investopedia.com/terms/q/quantitiesupplied.asp> (last visited on Oct. 29, 2018) "The optimal quantity supplied is the quantity whereby consumers buy all of the quantity supplied."

<sup>162</sup> See *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

secondhand venues sell genuine items at lower prices than the designer retail value. Second, such venues also sell counterfeit items. The rampant sale of such counterfeit items creates confusion for the buyer, often resulting in a buyer purchasing a product he or she thought was genuine.<sup>163</sup> While the market will adjust for such changes, the effects are still detrimental to designers who have expended considerable time and financial resources to develop a luxury brand.<sup>164</sup> Many designers spend considerable time investigating intellectual property issues, but their problems will not be alleviated without stricter enforcement of contributory infringement.

As previously mentioned, small businesses are an important part of the American economy.<sup>165</sup> However, it is difficult for small businesses to survive with the increasing number of case law being placed on them.<sup>166</sup> Because of the harm that overregulation causes small businesses, contributory liability is the place for stricter enforcement. This becomes increasingly true as eBay's involvement in the entire sales process continues to increase likening it more to a flea market owner and operator. Thus, with some alterations, contributory liability can be enforced in a way that minimizes harm to both the fashion design art form and small businesses.

#### IV. POTENTIAL SOLUTION

##### A. *Specific Context*

An eBay seller will violate intellectual property law by infringing a copyright, trademark, design patent, or misusing a license. On its website, eBay offers Verified Rights Owner (VeRO) Training, which is meant to educate sellers on some of the intellectual property issues that arise when selling on eBay.<sup>167</sup> With regard to copyright, eBay suggests that a seller must make sure that he or she is writing the seller's own marketing content and using their own photos.<sup>168</sup> When an individual copies a manufacturer's pictures or product description or another seller's marketing content or photos, this individual is violating copy-

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<sup>163</sup> Many eBay message board entries address accidentally buying a fake item. See *Accidentally Bought Fake Item- Suggestions?*, THE EBAY COMMUNITY, <https://community.ebay.com/t5/Shipping-Returns/Accidentally-Bought-Fake-Item-Suggestions/td-p/27073978> (last visited on Oct. 29, 2018).

<sup>164</sup> *The Secret To Why Designer Clothes Are So Expensive*, THE FRISKY, <https://thefrisky.com/the-secret-to-why-designer-clothes-are-so-expensive/> (last visited on Oct. 29, 2018). "It's not always the end product that's going to cost you your first-born, explained Lanvin designer Alber Elbaz in a 2009 *New Yorker* interview. It's the research and development that goes *into* the end product."

<sup>165</sup> See *supra* Part I.

<sup>166</sup> *Id.*

<sup>167</sup> *Verified Rights Owner Program*, EBAY, <https://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html> (last visited on Oct. 29, 2018).

<sup>168</sup> *VeRO Tutorial*, EBAY, <http://pages.ebay.com/help/tutorial/verotutorial/intro.html> (last visited Jan. 14, 2017).

right law.<sup>169</sup> eBay also suggests that a seller will violate a trademark by inappropriately using a brand name to describe an item, when that item in fact is not manufactured by the brand.<sup>170</sup> A seller should never compare the appearance of an item to a name brand item.<sup>171</sup> More obviously, eBay also states that a seller will violate a trademark by selling an outright fake.<sup>172</sup> Counterfeit items take advantage of a recognizable brand name, which took a considerable effort for the originating company to establish.<sup>173</sup> Finally, eBay advises its sellers that, in most cases, software licenses do not allow a seller to resell the software once it has been installed.<sup>174</sup> Thus, once an eBay seller completes VeRO training, he or she will likely have a better grasp (or at least baseline knowledge) of the intellectual property issues that may arise.

### *B. New Test for Contributory Infringement*

Although *Tiffany* is a seminal case for fashion law in the Internet marketplace context, its holding is not up to date with the continued evolution of online selling. This raises difficulties in implementing the test for contributory trademark infringement. Because of the evolving nature of fashion selling on a third-party platform, the *Tiffany* test should be updated to reflect the particular challenges presented by the evolution of fashion in the most modern times. The implementation of a more comprehensive and appropriate standard for contributory trademark infringement will assist in bridging the gap between the law in *Tiffany* and that in the flea market line of cases. Thus, a new test consisting of the original elements test found in *Spy Optic* plus a totality of the circumstances analysis should be adopted.<sup>175</sup> Specifically, a factors analysis should be utilized for the second element, that the defendant “had direct control and monitoring of the instrumentality used by a third party to infringe.”<sup>176</sup> Based on key language from *GMA Accessories, Inc. v. BOP*, which says, “[w]hile the issue here is different, that Court’s language is indicative of a narrow test requiring a significant degree of knowledge,” the test will not be easy to meet.<sup>177</sup> The following factors should be considered: (1) whether the listing was subject to the typical methods of examination by the third party; (2) whether, and the extent to which, the third party was receiving compensation for its services; (3) whether, and the extent to which, the third party derives secondary businesses, such as payment platforms, from the instrumentality; (4) whether, and the extent to which, the third party

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Spy Optic, Inc. v. Alibaba.com, Inc.*, 163 F. Supp. 3d 755 (C.D. Cal. 2015).

<sup>176</sup> *Id.*

<sup>177</sup> *GMA Accessories, Inc. v. BOP, LLC*, 765 F. Supp. 2d 457, 464 (S.D.N.Y. 2011).

was on notice of the susceptibility of a trademark infringement of a certain brand and any steps taken to address this; (5) whether the third party, or its agent, actually takes possession of the property at any point in the purchasing process; and (6) whether the seller has ever been engaged in any behavior indicating prior involvement in infringement.

The first proposed factor, whether the listing was subject to the typical methods of examination, will be met if the online marketplace employs its usual procedures and screening processes in the context of the specific incident. If so, this factor will weigh in favor of the marketplace monitoring the seller's listing, at least on a fundamental level. The second factor, whether, and the extent to which, the third party was receiving compensation for its services, will be determined by facts that show that the third party derives revenue from the seller. For example, eBay derives revenue from final value and insertion fees and from sales of eBay "stores."<sup>178</sup> At one point, eBay also derived revenue from other sources, such as its eBay valet program.<sup>179</sup> Specifically, revenue from eBay valet was calculated differently than insertion fees and final value fees because eBay had more responsibility when it exercised its valet program.<sup>180</sup> As a general rule, the stronger this correlation, the more responsibility the third party has over the original infringer. This is apparent in the eBay valet model. The third factor, whether, and the extent to which, the third party derives secondary businesses, such as payment platforms, from the instrumentality, will weigh in favor of the third party having more control over the instrumentality if the third party derives a secondary business from the original business. For example, eBay owns PayPal and receives a fee for each transaction made through the site.<sup>181</sup>

With respect to the fourth factor, whether, and the extent to which, the third party was on notice of the susceptibility of a trademark infringement of a certain brand and any steps taken to address this, if the third party is aware and has made efforts to address or correct this problem, it leans toward having more control in monitoring the infringement.<sup>182</sup> For example, eBay would clearly be on notice that Tiffany products are susceptible to infringement because of its lengthy history with Tiffany as a result of Tiffany's investigations, and the *Tif-*

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<sup>178</sup> *Store selling fees*, EBAY, <https://www.ebay.com/help/selling/selling-fees/store-fees?id=4122> (last visited Oct. 29, 2018).

<sup>179</sup> *Frequently asked questions*, EBAY, <http://www.ebay.com/s/valet/faq> (last visited Mar. 30, 2017).

<sup>180</sup> *eBay Valet Sells High-Value Items for You*, EBAY, <https://www.techlicious.com/blog/ebay-valet-seller-assistance-sellforme/> (last visited Oct. 29, 2018). Note, eBay now has a Consignment program. See *eBay Consignment Sellers Do the Selling. You Get Paid*, EBAY, <https://pages.ebay.com/rcp/consignmentcenter/#/> (last visited Oct. 29, 2018).

<sup>181</sup> *What are the fees for PayPal accounts?*, PAYPAL, <https://www.paypal.com/us/selfhelp/article/What-are-the-fees-for-PayPal-accounts-FAQ690> (last visited Mar. 30, 2017 11:07 PM).

<sup>182</sup> This is derived from key language in *Luxottica v. Greenbriar* stating, "If the infringement is serious and widespread, it is more likely that the defendant knows about and condones the infringing activity." See *Luxottica Group, S.p.A. v. Greenbriar Marketplace II, LLC*, 212 F. Supp. 3d 1375, 1378 (N.D. Ga. 2016).

*fany v. eBay* case. Furthermore, there may be additional indicia of the third party's notice, such as the creation of a seller guide for a particular brand, or the fact that a specific brand has registered with eBay's VeRO program. This factor places an increasing amount of responsibility on the third party because "it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the [flea market] ... includ[ing], *inter alia*, the provision of space, utilities, parking, advertising, plumbing, and customers."<sup>183</sup> In the online context, eBay is analogous to the flea market operators because it is providing virtual support services for the facilitation of the sale of the infringing goods. However, the good faith effort of the third party to address the infringement should also be taken into consideration. The fifth factor, whether the third party, or its agent, actually takes possession of the property at any point in the purchasing process, is one that takes a situation from being more similar to that in *Tiffany* and makes it more analogous to the flea market line of cases. If the third party takes possession of the item, this factor weighs in favor of the third party exercising control and monitoring of the infringing item. The final factor, whether the seller has ever been engaged in any behavior indicating prior involvement in infringement, if proven, would weigh in favor of the third party having control over and monitoring the seller. For example, if an eBay seller has ever had an item "taken down" from eBay because it violated eBay intellectual property policies, eBay should be responsible for that knowledge. Each of the proposed factors should be looked at in the totality of the circumstances. Such an analysis would make it easier to distinguish between situations that are more analogous to *Tiffany* and those that are more comparable to the flea market line of cases that have recently emerged. The factors analysis would protect fashion designers by creating a standard for contributory infringement with more liability placed on the third party. However, because the test is comprehensive and difficult to satisfy, third parties like eBay are still protected from potential frivolity, thus not restricting the Internet free market to an extensive degree.

### C. Solutions for eBay

In order to further the goal of not only protecting the fashion design art form, but also promoting a thriving online marketplace, there are several steps eBay can take. One of the easiest solutions would be to make its optional VeRO training mandatory for all sellers before a seller is allowed to list an item on eBay. As previously mentioned, eBay "is like a flea market operator that is liable upon constructive notice of an infringement. VeRO represents an effort by

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<sup>183</sup> *Id.* at 1384 (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265 (9th Cir. 1996)).

eBay to categorize itself as the former.”<sup>184</sup> Because the VeRO training mechanism already exists, this solution would be at no additional cost to eBay. Participation in VeRO training is often reported by general staff members in an organization without a developed knowledge of the law.<sup>185</sup> Thus, expanding the VeRO program or making it mandatory might result in a stronger effort to combat IP violations.

Another potential solution is for eBay to create a strategy to encourage more designers to take part in and register for the VeRO program. The better the lines of communication are between the designer and the third party, the more likely the third party will be to deter future infringements. For example, consider Hermes, famous for its luxury leather goods and silk scarves and ties.<sup>186</sup> While it may seem logical that eBay could monitor certain listings that include the brand’s name, there are other “trigger words” that, if the third party was aware of, would also be worth monitoring. For example, Hermes is famous for its Birkin and Kelly bags.<sup>187</sup> Thus, it would logically follow that an infringing listing might use these key words as search terms. The only way to combat this type of infringement is to keep the lines of communication open.

#### D. Solutions for Fashion Designers

First and foremost, fashion designers should know their rights under valid U.S. fashion laws and federally register trademarks and copyrights as well as apply for design patents when appropriate.<sup>188</sup> Moreover, companies and designers may have the best success by being proactive about protecting their brand. For example, in *Tiffany*<sup>189</sup> and in *Hard Rock Café*,<sup>190</sup> the cases resulted from the trademark holders’ own investigations. One way sellers in the eBay context may do this is by applying for the eBay VeRO Program.

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<sup>184</sup> See Scott Pilutik, *eBay’s Secondary Trademark Problem and its VeRO Program*, <https://www.cs.cmu.edu/~dst/E-Meter/eBay-VERO-pilutik.html> (last visited Mar. 30, 2017) (author creating a survey determine the effectiveness of eBay’s VeRO program).

<sup>185</sup> *Id.* Seventy-five percent of those that took the survey reported that a staff member of their company reports the infringement. *Id.* Eleven percent of respondents indicated that counsel reports infringements. *Id.* This may indicate that the initial reporting of IP violations starts with a lower level staff member of the organization. *Id.*

<sup>186</sup> Milord A. Keshishian, *Hermès Sues Birkin Bag Imitators For Trademark and Trade Dress Infringement*, LOS ANGELES INTELLECTUAL PROPERTY TRADEMARK ATTORNEY BLOG (May 8, 2014) <http://www.iptrademarkattorney.com/2014/05/trade-dress-handbag-attorney-trademark-purse-hermes-birkin-bag-emperia.html>.

<sup>187</sup> *Id.*

<sup>188</sup> See *Herzfeld*, *supra* note 37.

<sup>189</sup> *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

<sup>190</sup> *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143 (7th Cir. 1992).

## V. CONCLUSION

Because the underlying law is complicated, it has become increasingly complex for fashion designers and operators of small businesses to understand the implications of intellectual property law. This predicament becomes even more confusing when a third party becomes involved and when the standard for contributory infringement is unclear. Although *Tiffany v. eBay* provided important guidance for intellectual property violations in the fashion context in the Second Circuit, it is inconsistent with the continuously evolving structure of the online marketplace. The underlying conflict is that eBay has created several mechanisms to further its business, such as the Global Shipping Program and eBay valet, which have, in effect, given it more control and monitoring power over sellers, which significantly weakens the reasoning in *Tiffany* in regard to contributory trademark infringement. While instituting these mechanisms is part of the natural business growth of eBay, it is important to look at the motive behind the growth. By focusing on growth, and by giving itself more power and control over sellers, eBay has placed itself in a category of more liability than even flea market owners in the flea market line of cases.

The ultimate goal is to protect the fashion design art form, while not hindering the Internet free market, but this will never be accomplished without change. Fashion has the unique ability to change with the times while still drawing on the traditions and foundations of the past. Fashion designer and movie director, Tom Ford, explained, “[r]eal fashion change comes from real changes in real life. Everything else is just decoration.”<sup>191</sup> Nowhere is this truer than in the ambiguities and complexities of modern fashion law.

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<sup>191</sup> Tom Ford, NEW YORK, [http://nymag.com/nymetro/shopping/fashion/features/n\\_8936/index1.html](http://nymag.com/nymetro/shopping/fashion/features/n_8936/index1.html) (last visited Mar.13, 2018 12:13 AM).





