Luxury Markets, Antitrust, and Intellectual Property: An Introduction

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1 Introduction

In this paper I look at markets for luxury goods and begin exploring the interplay among trademark law, antitrust law, luxury goods, and copies of luxuries. In the absence of empirical data and economic theories directly on point, I informally extend a model of luxury markets to account for copies of luxury goods and then look to trademark law cases for indications of how courts might evaluate luxury markets in an antitrust context.

Typical consumer goods have premium brands and standard or generic brands.\(^1\) The brand is generally a proxy by which customers are reassured of the quality of item. Generic brands and premium brands compete amongst themselves and with each other. Trademark law generally protects brands, preventing competitors from confusing consumers or from co-opting the goodwill developed by another brand.

Consumer goods might also bear luxury brands (and thus be called luxury goods). A luxury good is priced far in excess of the value the market places on the intrinsic functionality of the product as reflected in the price for premium or generic goods of that type.\(^2\) Consumers of luxury goods ("snobs" in the literature) buy them as symbols that

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\(^2\) For example, a woman spending in excess of $1,000 for a pair of shoes is probably not buying those shoes because of their role in comfortably protecting her feet. See Sophia Banay, Lifestyle Feature: Most Expensive Women's Shoes, Forbes.com (Dec. 19, 2005), available at www.forbes.com/lifestyle/2005/12/16/expensive-womens-shoes-cx_sb_1219feat_ls.html (describing the year's most expensive shoes and the market for them). Through a conversation with my wife, I have learned that a professional woman in New York City can buy shoes from $50 to $500 and expect improvements in durability (of the material) and comfort. See also Neal Santelmann, Connoisseur's
reflect the consumer’s wealth and elite status, setting them apart from the masses.³

Unsurprisingly, luxury goods are copied: copyists can reap large rewards if they can sell their copies at luxury prices, if they can sell to the masses that wish to emulate the elite, or if they can do both.

In the next section I present some necessary concepts from antitrust law (specifically the notion of a relevant market) and trademark law and explore branding theories and luxury theories at some length. I then introduce the notion of copies of luxury goods and review the impact three different categories of copies might have on suppliers of luxury goods according to the market model presented. I then compare these conjectures and the models that underlie them with the opinions of courts that have addressed the luxury market (typically in the context of trademark cases). I conclude that while the actual impact of copies in any particular situation is an empirical question, we can develop intuitions for how certain types of copies should affect suppliers of luxury goods and if those copies are part of the same antitrust market as luxury goods.

2 Markets, Brands, and Luxury Goods

2.1 Applying Antitrust Law Requires Determining the “Relevant Market”

One of the first steps in assessing an antitrust claim is to determine the relevant

Guide: The Most Expensive Ready-Made Men’s Shoes, Forbes.com (Nov. 16 2005), available at www.forbes.com/lifestyle/2005/11/15/shoes-mens-expensive-cx.ns_1116feat_ls.html (noting that men’s shoes may deliver more intrinsic functionality as prices rise, at least until approximately the $1,000 point). By comparing the two articles one realizes that the point at which premium pricing ends and luxury pricing begins may vary from market to market, something that I revisit infra.

³ Luxury goods most often set their purchasers apart in the eyes of social contact, but they can also reassure a purchaser that she is one of the elite. This helps explain the existence of luxury brands of lingerie, toiletries, and other private consumed goods (cite source) (noting the direct appeal to personal satisfaction reflected in L’Oreal’s “because you’re worth it” tag line).
market. The basic rule is that “commodities reasonably interchangeable by consumers for the same purposes” constitute an antitrust market. This willingness of customers to substitute one product for another is cross-elasticity of demand. Legal analysts endorse this approach to antitrust market definition. So does the FTC.

Generally, the identification of the relevant market in any particular case is an empirical matter and is closely related to the ability to exert monopoly power (“the power to control prices or exclude competition”). In order to have monopoly power one must

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4 See, e.g., Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993) (reversing lower court holding that identification of relevant market was not necessary). Identification of a relevant market is necessary for claims under both the Sherman Act (15 U.S.C. §§ 1 et seq.) and the Clayton Act (15 U.S.C. §§ 12 et seq.). The acts overlap to some extent: the Sherman Act is concerned with anticompetitive agreements and contracts by which entities seek to obtain or maintain a monopoly and the Clayton Act is concerned with price discrimination, tying, and mergers and acquisitions that may have anticompetitive effects.


6 See id. See also Jonathan B. Baker, Market Definition: An Analytical Overview, 74 Antitrust L.J. 129, 130, 132 (2007) (“U.S. courts have long emphasized that markets should be defined with respect to the economic force of demand (buyer) substitution. Accordingly, courts look to the buyer’s view of which products or geographic locations would be acceptable alternatives.”).

7 See Baker, supra note 6 at 129.

8 Id. at 133 (“Specifically, the current Horizontal Merger Guidelines define a market as a collection of products or services, and a geographic region, that would form a valuable monopoly. It if would be unprofitable for a hypothetical monopolist of a group of products within a region to raise price by a small but significant and nontransitory amount because buyers would substitute to other products or locations, then the candidate (provisional) market is too small and must be expanded. The Merger Guidelines suggest that the candidate market expand to include products or locations to which the most buyer substitution would occur, and the hypothetical monopolist question then be asked again.”).

9 Du Pont, 351 U.S. at 391.

10 See Du Pont, 351 U.S. at 393 (“Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.”). The Du Pont court observed that while stone, wood, and cement, and steel may all compete with each other as building materials in the eyes of a business person, they are too different from one another in most cases for them to be in the same relevant market (one can have a monopoly in the steel market and not exert price control over the stone market). See id. On the other hand, the court observed that although different colas may be formulated differently, they are not so different as steel and stone: all colas might be considered part of the same relevant market. See id.
be able to control prices such that consumers will pay them and not shift their demand to some other product which one doesn’t control. The set of products one has to have control over in order to retain the consumers is the relevant market.\textsuperscript{11} This is ultimately determined by observing or credibly predicting consumer behavior.

Within the broad market “defined by cross-elasticity of demand between the product itself and substitutes for it,” … “well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.”\textsuperscript{12} “The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”\textsuperscript{13}

\subsection{2.2 Trademarks and Trademark Law Enable Branding}

\subsubsection{2.2.1 Trademarks protect producers from impersonation and consumers from}

With respect to empirical evidence, one commentator suggests that “[e]vidence as to likely buyer substitution patterns in the event of an increase in price – the central economic issue at stake in market definition – can be grouped into five categories: past buyer responses; buyer surveys; product characteristics; seller conduct; and views of industry experts. Within each category, evidence may be quantitative or qualitative.” Baker, supra n.6 at 139.

\textsuperscript{11} Identifying appropriate substitutes is challenging and one of the reasons the analysis of markets is empirical. “Because most products have possible substitutes, [courts] cannot … give ‘that infinite range’ to the definition of substitutes. Nor is it a proper interpretation of [antitrust law] to require that products be fungible to be considered in the relevant market.” \textit{Du Pont}, 351 U.S. at 394. The first interpretation would essentially vitiate antitrust law by making relevant markets too large such that monopolies were impossible, and the second would make commerce exceedingly difficult by defining relevant markets to only include absolutely identical items.

\textsuperscript{12} \textit{Brown Shoe Co. v. United States}, 370 U.S. 294, 325 (1962) (recognizing, within the shoe market, separate submarkets of men’s, women’s, and children’s shoes; not finding separate submarkets based on “price/quality” with a sharp cut-off at $9.00).

\textsuperscript{13} \textit{Id.}
A trademark “permits the consumer to identify a particular product, to buy the product again if it has given him pleasure, or to avoid it if it has displeased him.” Trademarks allow consumer to benefit from the experiences of others and assess the value they will obtain from a good: “[w]ithout trademarks and the identification function they serve[,] buyers would be forced to guess about the quality of the goods they were considering buying.”

Because of their evocative power, trademarks have value independent of the underlying good that is marked. Trademark law not only protects consumers from those who might use a recognized mark to take advantage of that mark’s goodwill, but also protects the owner of the mark from those who might use the mark to obtain sales that would otherwise go to the rightful owner or who might place the mark on inferior goods and thereby degrade its power.

2.2.2 Trademarks enable branding and brand price differentiation

Trademarks thus enable branding: the use of a mark to identify a good as coming from

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15 Id. The author goes on to assert that if consumers had to purchase goods in order to evaluate them and could not rely on trademarks, “competition in product quality could not exist” in many industries. Id.

16 See, e.g., Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 205 (1942) (“The protection of trade-marks is the law’s recognition of the psychological function of symbols. … A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same--to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.”
a particular source. This in turn enables price differentiation based on brand value.

Branding serves a rational function when products may vary in quality and deliver
different intrinsic value. Brands may be associated with quality, and those brands will
thus command a higher. The inverse is also true: if seemingly equivalent goods are
priced differently, consumers may rationally expect that the more expensive is of higher
quality. The pricing effects of branding are particularly notable when products are
otherwise not well differentiated.

One commentator theorizes that a branded product embodies demand for: (1) the
intrinsic functionality of the product, (2) intra-brand information about the product’s

17 It is not necessary for the mark to tell the consumer from which actual source a good comes. For
example, a consumer may recognize the Nike ‘swoosh’ as identifying products from (or endorsed by) a
particular source, but not know that it is called “Nike” or have any idea what the corporate entity behind
Nike is or how it produces the goods. On the other hand, a mark may well remind the consumer of all
these attributes of the producer and more.

18 See William B. Dodds, Kent B. Monroe, and Dhruv Grewal, Effects of Price, Brand, and Store
Information on Buyers’ Product Evaluations, 28 J. of Marketing Research 307 (Aug. 1991). The
researchers created a theoretical model and conducted experimental research and reached a number of
interesting conclusions: Price as indicator of quality is not irrational, because in a perfect market, higher
quality items would command a higher price (Id. at 307–08); “Price can be both an indicator of the amount
of sacrifice needed to purchase a product and an indicator of the level of quality. … The cognitive
tradeoff between perceptions of quality and sacrifices results in perceptions of value.” (Id. at 308, 316);
“The link between perceived quality, evaluation, and choice can be explained in part by the acceptable
price range concept.” (Id. People don’t buy things that are priced too high, but are also suspicious of
things that are priced to low. Perception of value directly influences willingness to buy. Value increases
as price increases from below the bottom of the range, but value decreases again once it exceeds the top
of the range.).

Their experiment did not involve products, brands, or stores associated with luxury. See id. at 311.
However, the authors’ findings lead them to “expect that for higher priced products that are purchased
infrequently, the strength of the price cue may be diminished in the presence of other, more well-known
cues.” Id. at 317. The power of a brand when making purchases at unusually high price points suggests
a reason to buy established luxury brands. See infra, Section 2.3 for why luxury goods might be
purchased at all.

19 See Livermore, supra note 14 at 450 (“For reasons involving more than whatever small product
differences there may be, consumers are willing to pay more for major brand gasoline than for gasoline
marketed by independent stations. Similarly, Bayer aspirin continues to sell well despite a price
substantially greater than those of other aspirins. And consumers regularly buy higher priced ‘name
brand’ merchandise in preference to identical private-brand merchandise produced by the same
manufacturer.”).
credence qualities,” and (3) “the image or psychological pleasure associated with the mark’s fame.” This can explain the price disparities among brands of similar functionality and quality but with brands that evoke different psychological pleasure. This explanation also provides a consumer protection element to trademark law’s dilution provisions: diluting a brand robs the consumer of the psychic element of their purchase of a premium brand product.

2.2.3 Trademarks (brands) have implications for antitrust law

Established trademarks can be a barrier to entry. In the absence of known brands, a potential competitor might need only offer a product of equal quality at a somewhat lower price than that prevailing in the market in order to compete. If their presence, the competitor must persuade consumers to abandon their current brand by pricing at a discount, incurring the expense of developing and offering a superior product, or engaging in an expensive advertising campaign.

Trademarks, may also signal antitrust submarkets. “The branded product and the unbranded one constitute two different products that provide different values to consumers. Consumers who are willing to pay more for the nationally advertised label

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20 See Shahar J. Dilbary, Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs”, 14 Geo. Mason L. Rev. 605, 622–23 (Spring 2007). “[W]hen purchasing a branded good, the consumer receives three bundled products: a physical product (e.g., a watch, a car, or a pocketbook), information about the physical product (e.g., its constituent materials, durability, and the mode of its manufacture), and an intangible product, such as fame, prestige, peace of mind, or just a pleasant feeling.” Id. at 607–08. The author indicates that this can explain why luxury goods might escape the price discrimination provisions of the Clayton Act: suppliers of both luxury or name-brand goods and generic goods are not price discriminating, even if the underlying products are identical, because the different branding makes the complete products different. As evidence that brands may signify status to the consumer even if no one else observes the consumer enjoying the brand, the author cites the successful branding of L’Oreal skin care products with the slogan “Because You’re Worth It”.

21 See Livermore, supra note 14 at 450.
do not do so because they are ignorant or irrational. They are willing to pay more because they receive added value from the famous label. Consumers of the cheaper brand may not be potential consumers of the famous label." Economic research supports this: there is evidence that even for significant price discounts, customers of premium brand products will not purchase mid-tier or generic brands, although customers of lesser brands will purchase premium brands if those brands are discounted. When we discuss the luxury market we will see that this effect is even more pronounced: no discount that would allow a luxury brand to remain a luxury brand would be sufficient to enable non-luxury customers to afford the luxury good.

2.3 Luxury Goods

2.3.1 Luxury goods are an example of extreme brand differentiation

While premium brands might command higher prices because they are believed to be of higher quality or to deliver some desirable non-intrinsic utility, snobs are “willing to pay more for a product simply because it bears a famous trademark.” When this effect is taken to an extreme, the mark is a luxury mark and the good becomes a luxury good.

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22 Dilbary, supra note 20 at 641 (criticizing the ruling in F.T.C. v. Borden, 383 U.S. 637 (1966)).

23 See Robert C. Blattberg and Kenneth J. Wisniewski, Price-Induced Patterns of Competition, 8 Marketing Science 291, 306–07 (No. 4, Autumn 1989) (examining the competition pattern within retail industries among brands when one offers a price discount by theorizing and then analyzing data for tuna, toilet paper, flour, and margarine markets).

24 See infra, Section 2.3. The model from Blattberg and Wisniewski also shows that some consumers may not switch brands no matter what the price discount by competing brands. See supra note 23, at 294. Luxury brands could well be an example of this.

25 See supra, Section 2.2.2.

26 Dilbary, supra note 20 at 606.

27 See infra, Section 2.3.
Luxury goods are expensive in part because they are exclusive, and they are exclusive in part because they are expensive. Luxury goods are not just somewhat more expensive than something delivering comparable utility — they are vastly more expensive. Of course, affordable and expensive are dynamic notions: in an earlier era being a millionaire may have been synonymous with being exclusively wealthy. Today, “having a million dollars net worth doesn't mean you are really wealthy.” The implication of this is that luxury goods must always be wary of becoming affordable.

2.3.2 Defining luxury goods in terms of sociology and economics

Luxury goods are the result of conspicuous consumption, consumers willingly paying “a higher price for a functionally equivalent good.” Bagwell and Bernheim developed a model that accounts for the emergence of luxury goods. They modeled conspicuous consumption as having two motives: invidious comparison and pecuniary emulation.

Invidious comparison is the desire of a consumer to distinguish herself from members of

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28 See, e.g., Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 66 F. Supp. 2d 317, 323 (D.R.I. 1999) (“Baccarat products are hand-crafted and held to exacting standards. But quality alone does not account entirely for the prestige of Baccarat’s oeuvre. The Baccarat president described the company's long history of catering to the world's social and financial upper crust by designing the finest and most fashionable crystalware. ... Baccarat is a unique item; no substitute can be found on the market for these special products and the cachet attached to their label.”).

29 Nicola Ruiz, How to Live Rich, Men’s Health Magazine (April 8, 2008), available at www.luxuryinstitute.com/doclib/doclib_popup.cgi?file=538-3c12c6ea7bd61dbe3252bfbedacde229.pdf. By any measure, there are now millions of Americans with more than a million dollars in assets (see http://en.wikipedia.org/wiki/Millionaire, last visited May 11, 2008), and the “super rich” are those with more than $30 million. See id.; Ruiz. Thus, prices that were once prohibitively expensive are now affordable to a large number of people.


31 See Bagwell and Bernheim, supra note 30.

lower classes, and pecuniary emulation is the desire of a member of a lower class to be thought of as a member of a higher class.\textsuperscript{33} Luxury goods enable invidious comparison by being expensive, and they limit pecuniary emulation by being priced out of the range of the masses. Simply put, luxury goods are defined by their exclusivity,\textsuperscript{34} which is imparted through high price\textsuperscript{35}.

The Bagwell and Bernheim allowed for alternative forms of conspicuous consumption: the elite could consume large quantities of a standard good or pursue ever increasing quality products at ever increasing prices.\textsuperscript{36} But in certain conditions, the model predicts what we observe in some situations: the emergence of luxury goods that are of identical quality to standard goods but are labeled with luxury brands and sold at prices high above marginal cost.\textsuperscript{37} According to the model, when consumers expect to be socially or emotionally rewarded if they display their wealth, some producers will supply a good at a price close to the marginal cost of production for consumption by the masses and other producers will supply the same good at a highly inflated price for

\begin{footnote}
\textsuperscript{33} Bagwell and Bernheim, supra note 30 at 350. Consumers seeking invidious comparison could simply display the price tags of the items they purchase and not search for items that signal wealth, but because of social norms, people like a “functional alibi”, according to Cartier marketers. See id. at 367.

\textsuperscript{34} When Louis Vuitton withdrew some bags from the Italian market in the face of too much counterfeiting, it ran an ad campaign saying “Louis Vuitton is at least as upset as you are that such a bag won’t be sold anymore in Italy. But Louis Vuitton is as sure as you are that those who buy his luggage want, above all, an exclusive article.” See Jack G. Kaikati and Raymond LaGarce, Beware of International Brand Piracy, 58 Harvard Business Review 52, 58 (No. 2, Mar/Apr. 1980).

\textsuperscript{35} See Barnett, supra note 32 at 1403–05.

\textsuperscript{36} Bagwell and Bernheim, supra note 30 at 351.

\textsuperscript{37} Id. at 361. The authors noted that because these arbitrarily almost profitable brands emerge naturally through competitive behavior in a market with conspicuous consumption, their model also implied that “high profitability does not necessarily support inferences of either collusion or oligopolistic forbearance.” Id. at 351. The model is somewhat brittle in that if a supplier of luxury goods improves the product beyond the equilibrium point then it might become genuinely attractive to more consumers, lose its ability to signal, and thus no longer be a luxury item. See id. at 363.
\end{footnote}
conspicuous consumption by the elite. When extended to multiple types of goods, the model is indeterminate — it offers no guidance as to which goods get luxury brands.

2.3.3 The luxury goods life cycle

Luxury goods are seen to appeal to three different groups, and the death of a luxury good can be traced in terms of those groups. The preferred audience for a luxury good is the elite: they buy luxuries to separate themselves from the masses. But adoption by elites encourages the aspirational to emulate them, and if a luxury supplier can not preserve the exclusivity of its product more of the non-elite-but-still-wealthy will acquire it. To a certain degree, this emulation is beneficial: when it is limited to elites it reinforces the signaling capability of the luxury. But as the bandwagon grows, the masses will also seek to emulate possibly by obtaining copies and not the luxury itself. If the versions consumed by aspirational and the masses are difficult to distinguish from the originals or if too many people are able to acquire the original, then the original

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38 I like to think of this a type of commutative property of profits: assuming that the marginal cost to the supplier is ten dollars, suppliers to the masses will pursue profits of $1,000,000,000 by seeking to sell the product for about eleven dollars to 1,000,000,000 people. Suppliers to the rich will pursue profits of $1,000,000,000 by seeking to sell the product for about $100,000 to a market 10,000 wealthy people. $100 profit on each of one million sales is the same as a profit of one million dollars on each of one hundred sales. Cf. Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 66 F. Supp. 2d 317 (D.R.I. 1999) (discussing Baccarat’s desire to terminate a profitable business relationship that sullied its luxury image).

39 See Bagwell and Bernheim, supra note 30 at 367. They view this as a feature, because it reflects the seemingly haphazard nature of the emergence of luxury goods. More practical guides also support the notion that luxury markets can emerge from generic goods. See The Chilean American Chamber of Commerce, Snapshot of the U.S. Luxury Goods Market (2007), p.6. available at www.amchamchile.cl/files/Snapshot%20of%20US%20Luxury%20Goods%20Market.pdf (“One example of the growing gourmet foods category is a specialty soy sauce from Japan. Like premium olive oils marketed in the U.S., a Japanese producer created a super quality soy sauce, which demands a 200% premium over the other brands, and is considered a new luxury item –its taking a commodity and transforming it into the highest quality and price range, which converts it to a luxury good.”)

40 For an articulation of this model, see Barnett, supra note 32 at 1388–91.
good loses its exclusive appeal and luxury status\textsuperscript{41}, and the elite will move on to other ways of flaunting their status.\textsuperscript{42}

Suppliers of luxury goods have to assure consumers that an investment in the luxury good will be protected for the expected lifetime of that good\textsuperscript{43}. In addition to policing or managing third party copies, the supplier must take care not to dilute the cachet of a luxury brand by overexposing it or placing it on non-luxury items.\textsuperscript{44} Suppliers must also manage intertemporal effects.\textsuperscript{45} Controlling the distribution of their luxury products helps ensure exclusivity and limit discounting.\textsuperscript{46}

\textsuperscript{41} For example, fashion needs to be distinctive to convey position: as it spreads, it loses value. See Kal Raustiala and Christopher Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design, 92 Va. L. Rev. 1687, 1719–20 (Dec. 2006).

\textsuperscript{42} Widespread adoption of obviously inferior goods can redound to the benefit of the luxury good by highlighting its superiority. See, e.g., Barnett, supra note 32 at 1384–85. See also similar footnotes infra. Some adoption of high quality copies by deceived elites might help establish the luxury bona fides of the original and encourage other elites to purchase from the original supplier. See Barnett at 1410. This benefit must be balanced against the lost sale each copy purchased by an elite represents.

\textsuperscript{43} Which, as we have seen, may be relatively short for easily imitated products.

\textsuperscript{44} In the luxury goods market, if a manufacturer offers either non-luxury brands or non-luxury products bearing the luxury brand, and customers do not distinguish between the luxury and non-luxury offerings then the brand premium will drop: the luxury brand loses its exclusivity and luxury status.

\textsuperscript{45} See Lisa N. Takeyama, The Intertemporal Consequences of Unauthorized Reproduction of Intellectual Property, 40 J.L. & Econ. 511 (1997). The author focuses on managing copyright protected products, but its lessons can be applied to luxury goods. She posits that once there are initial sales, the demand for a product comes from people willing to buy the original and to buy copies. The supplier of a copied good can compete with the copiers by lowering prices. But if lowering prices would have a terminal impact on the supplier (by forcing them below marginal cost of production or, in the case of luxury suppliers, by eradicating any exclusivity signaled by a high price) then consumers will know this and will trust that supplier will not drop prices in the future to compete with copiers. These consumers will have confidence in the ongoing luxury status of their purchase, even in the face of copies. See id. at 512-514. See also Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 66 F. Supp. 2d 317, 320 (D.R.I. 1999) (“discounting was an anathema to an image-conscious company like Baccarat”). The author goes on to note that suppliers may want to seek legal remedies to prevent copies being sold to those who would otherwise purchase the original (luxury) good. Takeyama at 514. This is exactly the conclusion reached in this paper, although trademark law does not always offer the level of protection for luxury good that copyright does for informational goods.

\textsuperscript{46} See Robert Trent Jones II, Inc. v. GFSI, Inc., 537 F. Supp. 2d 1061 (N.D. Cal. 2008) (clauses in
Suppliers of luxury goods thus walk a fine line between promoting their brand as a signal for luxury and avoiding brand dilution. The two ways luxury goods seem to be promoted most are through endorsements and pricing.⁴⁷ Conspicuous consumption of the good by the right people signals that the product has snob appeal, while a high price reinforces both the impression and reality of exclusivity.

3 Copying Luxury Goods, Trademark Law, and Antitrust Law

3.1 Copying of Luxury Goods

Intuitively we know that copies are different from originals: an original work of art is worth more than a print, a visually similar counterfeit, or even a second edition by the same artist. “[T]he original carries a psychological freight that a copy does not.”⁴⁸ Similar examples of price differences between luxury goods and copies can be found online.⁴⁹ A brief search revealed that, broadly speaking, the better the copy and the more legal the copy, the closer the price of the copy to the luxury price.⁵⁰

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⁴⁷ See, e.g., David Hancock, Commerce and Conversation in the Eighteenth-Century Atlantic: The Invention of Madeira Wine, 29 Journal of Interdisciplinary History 197, 214–15 (No. 2, Autumn 1998) (Reporting that Madeira wine was promoted as a luxury by publicizing sophisticated use and that the price rose as it became a luxury so that “only ‘opulent people’ could afford to drink it.”).

⁴⁸ Dilbary, supra note 20 at 626.

⁴⁹ See e.g., www.radaronline.com/features/2007/08/counterfeit_shopping_handbags_vera_wang_ipod_rolex_ferrari_1.php (Ferrari: ~135,000 real v. 27,000 fake; Rolex: 7,000 v. 200; Chloe handbag: 1750 v. 200; Chanel No. 5: $95 v. $20).

⁵⁰ Also, it may be that copies that have a high intrinsic value (e.g., they are well made, come from
For the purposes of this paper, I categorize copies of luxury goods as imitations, illicit originals, or counterfeits\textsuperscript{51}. I believe these categorizations are useful when considering the various ways copies can affect luxury brand suppliers.\textsuperscript{52}

### 3.1.1 Illicit originals

Illicit originals are genuine instances of the luxury good that are sold against the wishes of the supplier. Parallel imports\textsuperscript{53}, resold goods, and stolen items are all examples of illicit originals. Illicit originals are a theoretical problem because they are distributed without the control of the supplier, often at a price that enables lower class consumer to buy and thus destroy the exclusivity necessary for a luxury.\textsuperscript{54}

The actual effect of illicit originals seems likely to depend on how they are sold. On the one hand, illicit originals do not represent additional supply of the luxury item.\textsuperscript{55} But if

\textsuperscript{51} This seems like a good place to note that I found a seemingly relevant paper (Gene M. Grossman and Carl Shapiro, \textit{Counterfeit-Product Trade}, 78 The American Economic Review 59 (Mar. 1988)) to not be relevant because it focuses on the international trade aspects of counterfeits and creates a model based on the counterfeiting of premium, but not luxury, goods.

\textsuperscript{52} There are other potentially useful categorizations. For example, copies could be classified based on price or proximity to the original.

\textsuperscript{53} See Reza Ahmadi and B. Rachel Yang, Challenges from Unauthorized Distribution Channels, 19 Marketing Science 279 (No. 3, Summer 2000). The article notes that suppliers can manage parallel imports to achieve an extra level of price discrimination in the more expensive market. \textit{See id.} at 281.

\textsuperscript{54} See Bagwell and Bernheim, \textit{supra} note 30 at 368.

\textsuperscript{55} With the exception of resales if the supplier expected the original purchaser to keep the item forever or destroy it.
the products are sold at a price below the luxury level in a given geographic market\textsuperscript{56} (an economically plausible result for all three types of illicit originals listed) then non-elites may obtain them and the good will lose its signaling and separating abilities. Unlike imitations and with counterfeits, wide distribution of illicit originals does not present an opportunity to contrast what the elites have with what the masses have: they are the same product.\textsuperscript{57} If the problem of illicit originals were to get out of hand, the luxury good would lose its exclusivity and cease to be a luxury.

On the other hand, if the illicit original is sold at or near the luxury price, then it will retain its exclusivity and signaling function. Of course, the supplier is now competing against unauthorized sellers of its products, and will likely seek legal or operational recourse.

The ultimate effect of illicit originals on both the pricing and luxury status of the original is largely in the hands of the illicit supplier. There is clear potential for illicit originals to be part of the same antitrust market as the luxury good and for the illicit original to have significant negative effects on the profits and brand of the original supplier.

3.1.2 Imitations

Imitations are legal goods that imitate the luxury good in some fashion, trying to capture

\textsuperscript{56} Moreover, at least one study found that “in the presence of a manufacturer’s name, consumers are not going to use low price as an indication of low or unacceptable quality,” so non-elite customers might not be suspicious of non-luxury priced luxury goods. Sunil Gupta and Lee G. Cooper, The Discounting of Discounts and Promotion Thresholds, 19 The J. of Consumer Research 401, 403 (Dec. 1992). This also suggests that if counterfeits convincingly replicate the luxury brand name they might deceive consumers despite a low price.

\textsuperscript{57} Although genuine, illicit originals may be inferior in terms of warranty and modifications based on country of origin. See Ahmadi and Yang, supra note 53 at 283. This inferiority can damage the brand.
the flavor of the original without running afoul of the law.\textsuperscript{58} By definition, there is no significant consumer confusion between the original item and an imitation because if there were, the imitation would be a counterfeit.\textsuperscript{59} Although consumers of imitations are not deceived, they may purchase the imitations and attempt to deceive others into thinking they are conspicuous consumers.

Imitations are thus targeted at aspirational and bandwagon consumers and their availability may accelerate a luxury good’s loss of exclusivity. Imitations will likely have no effect on the price of a luxury good: the elite cognoscenti will not purchase an imitation at any price, and aspirational or bandwagon purchasers can not afford luxury prices. In short, it is difficult to see, given our theory of luxury goods, how imitations and originals could be considered part of the same market.\textsuperscript{60}

\textsuperscript{58} The degree to which an imitation can legally replicate the original is a function of the law and the facts. Compare (intellectual property law has been construed to give very little protection to clothing designs) with (replicating a watch design may violate trademark and unfair competition laws) and (clothing designs incorporating a trademark may receive more protection). It is possible for the manufacturer of the luxury good to also produce imitations that are designed for non-luxury markets. See Raustiala and Sprigman, \textit{supra} note 41 at 1725–26 (reporting on fashion houses with “bridge brands” that bring their styles to a broad audience). Self-imitation is a dangerous game, because the attempt to capture the aspirational or bandwagon market (the pecuniary emulators), a supplier risks having their brand lose its association with exclusivity and the concomitant ability to charge luxury prices.

\textsuperscript{59} The line between counterfeits and imitations is incredibly fine in the “negative spaces” of intellectual property law, where protection afforded by the law is weak. See Raustiala and Sprigman, \textit{supra} note 41 at 1762–73 (negative spaces include clothing design, furniture design, and perfume: all areas that might also be luxury goods). The authors focus on fashion, and note that even very good imitations do not, by common law, infringe the rights of the original designers. See \textit{id.} at 1701–03. The trend of putting trademarks on fashion item (instead of on their labels) may be an attempt by some designers to limit the ability of imitators to offer exact duplicates. See \textit{id.} at 1723. This is born out by the case law. See main text, Section 3.2.1. Such effort would, of course, have limited impact on counterfeiters. The authors also suggest an entirely different possibility: knowing that their designs can be readily and exactly duplicated, luxury fashion designers make an extremely limited number of originals (haute couture) and iterate their designs so that although they move rapidly through the snob \to aspirational \to bandwagon cycle, there is always a period of time when a particular design be a luxury. See also Barnett, \textit{supra} note 32 (articulating a similar thesis).

\textsuperscript{60} Even highly priced imitations will likely not attract elite consumers, because the purchasing power of the masses constrains the price of the imitation and the elite desire a price beyond the purchasing power
3.1.3 Counterfeits

Counterfeits are illicit imitations. Like imitations, they imitate the appearance of the original. But unlike imitations, they are not limited by the law: counterfeits are meant to resemble originals as closely as possible, up to and including mimicking the luxury brand (trademark).\(^{61}\) Counterfeits may be sold deceptively (as luxury goods), or non-deceptively (as imitations).\(^{62}\)

Creation of counterfeits, like the creation of imitations, may be a sign that the original is indeed a luxury.\(^{63}\) Counterfeits, when clearly inferior to the luxury good, can also reinforce the value of the luxury.\(^{64}\)

Counterfeits also have a more powerful effect than imitations or illicit originals on the

\(^{61}\) Indeed, the fact that suppliers and customers are willing to break the law or push its boundaries (in the case of imitations) speaks to the value of the luxury brand itself. Unlike patents and copyright, which might protect the intrinsic functionality of a product, if customers of luxury goods simply desired the intrinsic functionality a counterfeiter or imitator could legally and easily meet that demand. See Gene M. Grossman and Carl Shapiro, Foreign Counterfeiting of Status Goods, 103 The Quarterly J. of Economics 79, 81 (No. 1, Feb. 1988). Grossman and Shapiro suggest that counterfeiters unbundle the demand for the luxury brand from the demand for a quality product. See \textit{id.} at 82.

\(^{62}\) See, \textit{e.g.}, Grossman and Shapiro, \textit{supra} note 61 at 80. It is also possible that some purchases of counterfeits are made purely for fun (knowingly and without any intent to deceive social contacts).

\(^{63}\) See, \textit{e.g.}, David Hancock, Commerce and Conversation in the Eighteenth-Century Atlantic: The Invention of Madeira Wine, 29 Journal of Interdisciplinary History 197, 216 (No. 2, Autumn 1998) (“The rise in the number of entrepreneurs selling imitation Madeira is evidence that … attempts to create a luxury product succeeded.”).

\(^{64}\) See, \textit{e.g.}, \textit{id.} at 217 (“… trash only served to underscore in the minds of discerning [consumers] what constituted a true Madeira.”). But because counterfeits are usually of worse quality, they “often compete instead in the submarkets for low-quality goods” and may do so at a disadvantage to imitators who do not have to go to the expenses of imitating and of avoiding infringement prosecution. See Grossman and Shapiro, \textit{supra} note 62 at 82. But this value of counterfeits has a downside: if the luxury comes to be seen as having a high intrinsic utility then the price may become less disproportionate to its utility and an increasing number of people may be able to justify purchasing it.
bandwagon effect: because they may bear a closer resemblance than imitations to the original and because there are probably far more counterfeits than illicit originals, counterfeits severely undermine the exclusivity of the luxury good. The overall effect probably depends on the quality of the counterfeit and the price point. An exact replica sold at a low price might completely destroy the luxury market for the original.

Indeed, counterfeits are typically sold at a discount, like imitations.\(^{65}\) Because price itself is often an indicator of luxury status, a counterfeiter wishing to deceive the elite will have to price the counterfeit at the luxury price. If the counterfeit is a good one, it will very much be in the same market as the original good. If such a counterfeit sells well, then its effect on the original supplier is similar to that of an illicit original, but more so: the counterfeiter is free to manufacture more copies, while the illicit originals are limited to those produced by the original supplier. Thus it behooves luxury suppliers and possibly courts to distinguish between accurate and inaccurate counterfeits.

3.2 Mining Case Law to Discerning the Implications of Copying for Antitrust Law

It is typical for an accused monopolist to claim that they are participants in a much larger market then the one they are accused of monopolizing.\(^{66}\) A luxury goods supplier might argue that a luxury widget is part of the much larger market for widgets, or that a luxury widget is part of a much larger market for luxuries. Antitrust law requires empirical evidence of consumer behavior in order to address these arguments. In the previous section we hypothesized in the abstract about the implications of copies on

\(^{65}\) Counterfeiter can profitably charge the marginal cost of production, plus any costs to account for the risk of operating illegally. See Barnett, supra note 32 at 1415.

\(^{66}\) See, e.g., Du Pont, 351 U.S. at 394 (claiming cellophane is part of larger packaging materials market).
market definitions. In this section we examine case law for some concrete examples.

3.2.1 *U.S. v. Gillette Co.* directly addresses a luxury antitrust market argument

When Gillette sought to acquire Parker (which they ultimately did), the United States claimed that this would violate the Clayton Act by limiting competition in the luxury fountain pen market.\(^{67}\) The U.S. defined the relevant market as premium fountain pens ("high quality refillable fountain pens that have an established premium image among consumers") and the defendants defined the relevant market as including all fountain pens, or even all writing instruments.\(^{68}\) The court had no problem acknowledging a distinct submarket for premium fountain pens and in fact found “the fountain pen market may be divided into three sub-markets: … base fountain pens (less than $50); premium fountain pens ($50 to $400); and jewelry fountain pens ($400 and up).”\(^{69}\) However, the court also credited defendants’ argument that although some consumers would want premium fountain pens and only premium fountain pens, a much larger number of customers would substitute other premium writing instruments (such as ballpoint pens


\(^{68}\) *Id.* at 81.

\(^{69}\) *See id.* at 82. The court credited evidence that fountain pens in the 50-400 range effectively don’t compete with fountain pens above or below that price: “In contrast to fountain pens with SRPs below $50, the fountain pens here at issue afford their users (as well as those who merely put them in their breast pockets) image, prestige, and status. In accordance with this prestige, manufacturers, retailers, and purchasers of the pens recognize that there is a distinction between these pens … and those pens which are priced below this threshold. The evidence suggests that, should the price of a fountain pen costing, for example, $60 be increased in a non-trivial, non-transitory fashion, consumers will nonetheless purchase the now costlier pen rather than substitute a less expensive, less prestigious model. In other words, there is a low cross-elasticity of demand between these pens and those priced below $50. … Similarly, fountain pens priced above $400 also are not interchangeable with pens costing less than $400. Again, there is a threshold beyond which the pens become mere collectors[’] items or jewelry pieces, and the evidence suggests that consumers will not substitute the $400-and-up pens if prices were to be raised on premium fountain pens.” *Id.*

The court reviewed a number of cases that held many premium items were not in distinct antitrust markets from their standard counterparts, just as I noted in this article, *supra* Section 2.3.1. *See id.* at 82 (mentioning cases involving beer, pet foot, table wine and ice cream).
or pencils). It also held that because of low barriers to entry in the premium markets, “even a merged company will have to innovate to stay competitive, so that there’s no real risk of a decrease in competition, new products, or innovation.”

It is not necessarily the case the court would have found a large cross-elasticity of demand among the “jewel” or luxury submarkets at issue, but it is plausible. The court’s reasoning about the necessity of regular innovation is similar to the conclusions of commentators on the fashion markets cited supra and indicates that luxury markets may be in some way easier to enter than other market, given the constant need to innovate. It is also interesting that the court accepts a form of the “the relevant market is luxury goods, not this particular luxury good” defense, although it is clear that the court is ruling on the facts presented and is not, for example, holding that luxury fountain pens are part of the same market as luxury scarves (although they may be!).

### 3.2.2 Trademark cases provide some insight into courts’ views of luxury markets

Courts resolving trademark disputes involving luxury goods may make findings that might indicate how those courts would define the relevant market for those luxury goods. This is because trademark courts often have to perform a likelihood of confusion test to determine if the alleged infringer is indeed a counterfeiter (trademark

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70 See id. at 83. “The reality of the situation is that, even though some customers are beholden to fountain pens, the average consumer is not; thus, the fountain pens must compete with other modes of writing and the fountain pen market is affected by and constrained by developments in that larger market.” Id. at 86 n.12.

71 Id. at 85.

infringer) or is an imitator. In performing this test, courts evaluate two factors that seem pertinent to antitrust law. First, courts look to see if the products are proximate — if they are sold in similar channels to similar customers. Second, if the products are not proximate, courts ask if the senior user is likely to bridge the gap and enter the market of the junior user (usually the imitator or alleged counterfeiter).

In *Malletier I*, Louis Vuitton claimed that there was no gap to bridge because both it and defendant Burlington Coat Factory were in the handbag market. This is the same argument Louis Vuitton might make if accused of having monopoly power in the luxury handbag market. The court disagreed; it distinguished discount handbags from luxury handbags. It then found no likelihood of Louis Vuitton entering the discount handbag market. Both of these holdings are in perfect accord with the idea that luxury goods are a distinct antitrust market from non-luxury versions and that a supplier of luxury goods will not enter the market for non-luxury versions, at least with the same branding. In *Malletier II* the Second Circuit made similar findings.

In *Cartier*, the court’s seemed to channel the models of luxury goods and branding

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73 For example, in the Second Circuit this is the Polaroid Test, established in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, 495 (2d Cir.1961).

74 One court phrased this as the question of whether or not the products “compete in the same price/retail arena.” *Malletier I* at *6.*

75 See id.

76 See Id.

77 *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108 (2d Cir. 2006) (Malletier II)

78 That court also used language similar to that used in this article: “We deal on this appeal with the trademark of a trendy luxury women's handbag, a handbag so instantly popular with purchasers that legions of *imitators* quickly appeared on the fashion scene after plaintiff Vuitton introduced it in October 2002.” *Id.* at 211 (emphasis added).
presented in this paper.\textsuperscript{79} The court also used language that indicated it believed luxury consumers would simply not purchase non-luxury watches unless deceived.\textsuperscript{80}

4 Conclusions

Historians have pointed to a connection between the emergence of luxury goods, attempts to copy them, and innovation.\textsuperscript{81} That connection remains, and is reflected in the connection between luxury goods, antitrust law, and intellectual property law.

A theory of conspicuous consumption can lead to a model in which the elite signal their

\textsuperscript{79} See Cartier, Inc., 348 F. Supp. 2d 217. The case included allegations of Lanham Act violation. The court said Cartier “sell luxury watches in exclusive boutiques, high-end department stores, and authorized retailers throughout the United States. Cartier’s watches relevant to this litigation range from $2,000 to $150,000.” Id. at 221. The court held that luxury watches were generally priced starting at $600 or $700 dollars and that “[a]lthough one can purchase a watch that performs its time-telling function for approximately $50 or less, luxury watch consumers purchase watches that reflect their lifestyle and express their personality, social and financial status and taste. Most luxury watches are also status watches … the purchaser and wearer of a luxury watch aligns him or herself with the elite status of the watch…. The key ingredients to retailing and manufacturing a successful luxury watch are brand name and watch design.” Id. at 221–22. The court said that “if a brand becomes too commonplace or overexposed, it cheapens the image and lessens customers’ incentive to purchase such an expensive timepiece.” Id. at 222. It also accepted testimony that “Cartier’s central focus is on the aesthetic value conveyed by the design of the watch” and not “functional superiority.” Id. at 224. The court noted the prestige and celebrity associate with the luxury watches. See id. at 228.

Given the price of the defendant’s watches (in excess of $1,000) and the lack of evidence that they were of poor quality, the court had no need to determine if luxury watches and generic watches constituted submarkets: the court found no gap fro Cartier to bridge. See id. at 247.

\textsuperscript{80} For example, the court gave more credence to market surveys with more upscale respondents (Id. at 228–29) and wrote that while “consumers of expensive goods may be held to a high standard of purchasing care,” such consumers may also pay more attention to and give weight to copied details, using their appearance to overcome doubts about authenticity inspired by low costs or questionable retailers (Id. at 246–47).

\textsuperscript{81} See, e.g., Maxine Berg, From Imitation to Invention: Creating Commodities in Eighteenth-Century Britain, 55 The Economic History Review 1 (Feb. 2002) (Copying of luxuries results in innovations and has, throughout history, led to improvements in welfare in that more and better items are available to more people); David Hancock, Commerce and Conversation in the Eighteenth-Century Atlantic: The Invention of Madeira Wine, 29 Journal of Interdisciplinary History 197 (No. 2, Autumn 1998) (Describing the process by which Madeira wine was refined into a luxury product and drawing tentative conclusions about how rising consumption can stimulate innovation and that luxury goods and counterfeits are both the results of and the drivers of innovations in process, product, and marketing).
status by purchasing luxury goods that are priced at prohibitively expensive prices relative to their intrinsic value. Luxury suppliers have the burden of ensuring that luxury goods remain exclusive, and are thus engaged in an ongoing struggle against copiers, who seek to reap the luxury prices without engaging in any of the innovation necessarily to maintain exclusiveness. In this struggle they employ the tools of intellectual property law to prevent confusingly similar copies, but they do so cautiously, because according to our models and the courts, if customers are truly confused by a copy then that copy is in the same market as the luxury good and the luxury good may well no longer be exclusive.

There is much to explore in this area and I believe this paper only scratches the surface.