

# SAY “YES” TO THE [TRADE] DRESS: A COMMENT ON TRADE DRESS PROTECTION FOR THE “LOOK AND FEEL” OF LIFESTYLE BLOGS

*“Style is a way to say who you are without having to speak.”<sup>1</sup>*

*Shopping in brick-and-mortar stores has steadily become obsolete, with online shopping taking over the spotlight. More interesting is the role lifestyle blogs play in this shift in shopping dynamics, in part due to each blog’s unique “look and feel.” While lifestyle blogs are quickly gaining an upper hand in the online marketplace, whether their “look and feel” can be protected and enforced under either copyright or trademark law has yet to be answered. This Comment attempts to answer this question. As such, this Comment analyzes whether a lifestyle blog’s “look and feel” can receive copyright or trademark protection and concludes that although it will likely not be able to receive copyright protection, it may likely receive trademark protection for its trade dress depending on the facts. However, enforcing such protection may prove to be difficult unless there is initial interest confusion.*

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1. Andrea Cheng, *My Life in Ten Seconds: Designer Rachel Zoe*, INSTYLE (Feb. 10, 2015, 3:00 PM), <http://www.instyle.com/news/my-life-ten-seconds-designer-rachel-zoe> (quoting leading fashion designer Rachel Zoe).

## I. INTRODUCTION

Shopping, as we know it, has changed.<sup>2</sup> Traditionally, malls were the “center of the universe”<sup>3</sup> and an iconic feature of American culture,<sup>4</sup> with the success of the great American mall reaching its peak in the early 1990s.<sup>5</sup> However, since then, malls have experienced a steady decline in numbers and popularity.<sup>6</sup> It seems that shopping at brick-and-mortar stores is no longer the preferred method in America, with online shopping quickly taking over.<sup>7</sup>

With the rise of the Internet and social media, American culture has evolved into something that is more fast-paced.<sup>8</sup> Millennials expect immediacy in everything that they do, including shopping.<sup>9</sup> Going to an actual, physical store just takes too much time nowadays, time that could be spent doing other things. Thus, companies that only have an online presence, such as Amazon, seem to be a dominant force in the marketplace.<sup>10</sup> Even more interesting is the increase of blogs’ participation in online shopping. Blogs have expanded their reach from traditional online journals to modern-day indirect retailers overnight.<sup>11</sup> A certain branch of blogs, which this Comment

2. Hal Conrick, *It's the End of Retail As We Know It: How Can Marketers Adapt?*, AM. MKTG. ASS'N (Sept. 1, 2017), <https://www.ama.org/publications/MarketingNews/Pages/end-retail-as-we-know-it-how-can-marketers-adapt.aspx>.

3. Richard A. Feinberg & Jennifer Meoli, *A Brief History of the Mall*, 18 ADVANCES IN CONSUMER RES. 426, 426 (1991).

4. Josh Sanburn, *Why the Death of Malls is About More Than Shopping*, TIME (July 20, 2017), <http://time.com/4865957/death-and-life-shopping-mall/>.

5. Esri & Natasha Geiling, *The Death and Rebirth of the American Mall*, SMITHSONIAN MAG. (Nov. 25, 2014), <http://www.smithsonianmag.com/arts-culture/death-and-rebirth-american-mall-180953444/>.

6. *Id.*

7. Matthew O'Connor, Press Release, *UPS Study: Avid Online Shoppers Making More Than Half of Their Purchases with E-Commerce*, UPS (June 8, 2016), <https://www.pressroom.ups.com/pressroom/ContentDetailsViewer.page?ConceptType=PressReleases&id=1465390876904-365>.

8. See, e.g., Nicholas Gane, *Speed Up or Slow Down? Social Theory in the Information Age*, 9 INFO. COMMUNITY & SOC'Y 20, 20—21 (2006) (discussing how there is a consensus that “new media technologies” are speeding up the lived experience).

9. Sanburn, *supra* note 4.

10. Derek Thompson, *What in the World is Causing the Retail Meltdown of 2017?* ATLANTIC (Apr. 10, 2017), <https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/>.

11. See, e.g., BRIGHTON THE DAY, <https://www.brightontheday.com/> (last visited Sept. 4, 2018); CHRONICLES OF FRIVOLITY, <http://www.chroniclesoffrivolity.com/> (last visited Sept. 4, 2018); SOUTHERN CURLS & PEARLS, <http://www.southerncurlsandpearls.com/> (last visited Nov. 18, 2018); THE SWEETEST THING, <http://www.thesweetestthingblog.com/> (last visited Nov. 18, 2018); THE TEACHER DIVA, <https://www.theteacherdiva.com/> (last visited Nov. 18, 2018).

will refer to as “lifestyle blogs,”<sup>12</sup> advertises through affiliate programs with companies<sup>13</sup> and provides images of affiliate products with hyperlinks that direct readers to the affiliate’s website for purchase, a form of indirect sale.<sup>14</sup>

For a lifestyle blog to be successful, it must be unique and distinguishable from other blogs, which becomes difficult in an already saturated market.<sup>15</sup> Aiming to be unique and distinguishable, a lifestyle blogger meticulously chooses to showcase to her readers a particular “look and feel” that encompasses the blog’s theme, layout, color scheme, etc., that is reflective of the blogger as a person, and that demonstrates her personal interests.<sup>16</sup> This process often is timely and costly but also necessary for success.<sup>17</sup> Thus, obtaining intellectual property protection is ideal to protect a lifestyle blog’s “look and feel” as it appears to readers.<sup>18</sup>

This Comment examines whether the “look and feel” of a lifestyle blog is protectable under either copyright or trademark law. Part II provides a brief background as follows: first, all applicable laws, such as the Copyright Act and the Lanham Act; and second, the definition of lifestyle blogs as used in this Comment, and the considerations bloggers keep in mind when forming a blog. Part III analyzes whether the look and feel of a lifestyle blog is protectable under either the Copyright Act or Lanham Act. This Comment concludes that the look and feel of lifestyle blogs is likely not protectable under the Copyright Act but ultimately may be protectable under the Lanham Act depending on the facts.

## II. BACKGROUND

The U.S. Constitution grants Congress the power to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>19</sup> Promoting intellectual property rights is a vital

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12. See *infra* Subpart I.C.1.

13. See, e.g., *Become a Nordstrom Affiliate*, NORDSTROM, [https://shop.nordstrom.com/c/affiliate-program?origin=leftnav&cm\\_sp=Left%20Navigation--Affiliate%20Program](https://shop.nordstrom.com/c/affiliate-program?origin=leftnav&cm_sp=Left%20Navigation--Affiliate%20Program) (last visited Sept. 4, 2018) [hereinafter *Nordstrom Affiliate Program*].

14. See *supra* sources discussed in note 11.

15. Sina, *How to Start and Grow a Successful Lifestyle Blog in 10 Steps*, HAPPY GREY LUCKY (Mar. 14, 2017), <http://happygreylucky.com/how-to-start-and-grow-a-successful-lifestyle-blog-in-10-steps/>.

16. *Id.*

17. See *id.*

18. See Michelle Fabio, *Lifestyle Bloggers: How to Protect Your Intellectual Property*, LEGALZOOM (Aug. 2017), <https://www.legalzoom.com/articles/lifestyle-bloggers-how-to-protect-your-intellectual-property>.

19. U.S. CONST. art. I, § 8.

brick of America's foundation of law.<sup>20</sup> To protect a lifestyle blog's "look and feel" under intellectual property law, there are two possible paths: (1) the Copyright Act<sup>21</sup> for copyright protection; and (2) the Lanham Act<sup>22</sup> for trade dress protection. This Part addresses both copyright and trade dress protection as a general matter.

A. *Copyright's "Total Concept and Feel"*

The Copyright Act provides protection for "original works of authorship fixed in any tangible medium of expression" including "pictorial, graphic, and sculptural works."<sup>23</sup> The key to copyright protection is "originality," which the Supreme Court has recognized as work that "possess[es] at least some minimal degree of creativity."<sup>24</sup> The Court has previously noted that originality is not an equivalent standard to that of novelty.<sup>25</sup> Thus, two works that resemble each other may be separately copyrightable, so long as the similarity is "fortuitous" and not copied from another.<sup>26</sup> Originality is a standard analyzed from the author's point of view; if two people compose identical stories without knowledge of the other, then while neither would be novel, each would qualify as original works protected by the Copyright Act.<sup>27</sup>

Whether one work infringes upon another under the Copyright Act is determined by a "substantial similarity" standard.<sup>28</sup> This standard generally addresses two questions: "(1) whether the defendant copied from the plaintiff's work and (2) whether the copying, if proven, went so far as to constitute an improper appropriation."<sup>29</sup> The second prong is analyzed under an "ordinary observer" standard, of which Judge Learned Hand once stated that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."<sup>30</sup> This "ordinary observer" test, sometimes referred to

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20. *Conference Archives, Inc. v. Sound Images, Inc.*, Civ. No. 3:2006-76, 2010 WL 1626072, at \*9 (W.D. Pa. Mar. 31, 2010).

21. Copyright Act, 17 U.S.C. §§ 101–1332 (2012).

22. Lanham Act, 15 U.S.C. §§ 1051–1141(n) (2012).

23. 17 U.S.C. § 102(a)(5).

24. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

25. *Id.*

26. *Id.*

27. *Id.* at 346.

28. *Francescatti v. Germanotta*, No. 11-CV-5270, 2014 WL 2767231, at \*6 (N.D. Ill. June 17, 2014).

29. *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982).

30. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

as the “intrinsic test,”<sup>31</sup> should determine whether the second work has copied and captured the “total concept and feel” of the first work.<sup>32</sup>

Courts apply the substantial similarity standard differently within the context of filtration. Some courts invoke a filtration method before applying the standard, in which unprotected elements must first be “filtered” out so that the protected elements can be reviewed for substantial similarity.<sup>33</sup> Other courts reject this filtration approach, choosing instead to identify the unprotected elements before proceeding with the standard.<sup>34</sup> Lastly, some courts compare both works in their entirety, with no filtration or identification of unprotected elements.<sup>35</sup> If substantial similarity is found, then only the trier of fact is allowed to determine whether this similarity arises from protectable elements.<sup>36</sup> Regardless of the approach, every court must make a finding as to “protectible expression.”<sup>37</sup>

### B. Trademark’s “Look and Feel”

While the Copyright Act protects originality of tangible works, the Lanham Act protects source identification for products or services used in commerce.<sup>38</sup> The Supreme Court explained that the “universe of things that can qualify as a trademark” is intentionally written broadly in the Lanham Act.<sup>39</sup> Trade dress is a subset of trademark law that necessarily is left broad to encompass the “total image and overall appearance” of a business.<sup>40</sup> It may include “features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques,”<sup>41</sup> as well as the “arrangement of

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31. *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1226 (C.D. Cal. 1997).

32. *Atari, Inc.*, 672 F.2d at 614; *see also* *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (coining the term “total concept and feel” in 1970 as to greeting cards).

33. *See, e.g.,* *Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 493 (9th Cir. 1985) (“What is important is not whether there is substantial similarity in the total concept and feel of the works, . . . but whether the very small amount of protectable expression in [plaintiff]’s catalog is substantially similar to the equivalent portions of [defendant]’s catalog.”).

34. *See, e.g.,* *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 988–89 (9th Cir. 2009).

35. *See, e.g.,* *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1359–60 (N.D. Ill. 1989).

36. *Id.*

37. *Francescatti v. Germanotta*, No. 11-CV-5270, 2014 WL 2767231, at \*16 (N.D. Ill. June 17, 2014).

38. 15 U.S.C. § 1127 (2012).

39. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995).

40. *Blue Bell Bio-Med. v. Cin-Bad, Inc.*, 864 F.2d 1253, 1256 (5th Cir. 1989).

41. *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983).

identifying characteristics or decoration connected to a product.”<sup>42</sup> Trade dress refers to the way goods or services are presented to customers to identify the source of such dress.<sup>43</sup> Examples of trade dress include the decor of a restaurant,<sup>44</sup> the color and shape of pills,<sup>45</sup> the designs of magazine covers,<sup>46</sup> the shape of briefcase features,<sup>47</sup> and the layout and design of a website.<sup>48</sup> While trade dress traditionally protected “static and unchanging” items,<sup>49</sup> in contrast, lifestyle blogs involve nonstatic, changing elements, which may make trade dress protection difficult to apply.<sup>50</sup>

The proof required for trade dress protection is a lower burden than that required for copyright protection.<sup>51</sup> For trade dress protection, the designer must prove: (1) that the trade dress in question is distinctive; (2) that the trade dress is primarily nonfunctional; and (3) that there is no likelihood of confusion with another product’s registered trade dress.<sup>52</sup> When evaluating the first prong, distinctiveness is defined as “the mental association by a substantial segment of consumers and potential consumers between the trade dress in question and the source of that trade dress.”<sup>53</sup> The Supreme Court has held that “design, like color, is not inherently distinctive.”<sup>54</sup> For the second prong, functional is defined as

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42. *Ferrari S.P.A. Esercizio Fabriche v. Roberts*, 944 F.2d 1235, 1239 (6th Cir. 1991).

43. RESTATEMENT (THIRD) OF UNFAIR COMPETITION: CONFIGURATIONS OF PACKAGING AND PRODS.: TRADE DRESS AND PROD. DESIGNS §16 cmt. a (AM. LAW INST. 1995).

44. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765–67 (1992) (explaining that the distinctive way a restaurant is decorated can be protected under Lanham Act §43(a)).

45. *See CIBA-GEIGY Corp. v. Bolar Pharm. Co.*, 547 F. Supp. 1095, 1100–02 (D.N.J. 1982) (noting that Bolar deliberately copied CIBA-GEIGY’s trade dress by using the same colored capsules for its pills).

46. *See Time Inc. Magazine v. Globe Commc’ns Corp.*, 712 F. Supp. 1103, 1104–11 (S.D.N.Y. 1989) (concluding that Globe committed intentional copying of trade dress by using a similar typeface, logo, secondary photograph placement, and secondary billing format).

47. *See Ventura Travelware, Inc. v. A to Z Luggage Co.*, 1 U.S.P.Q.2d (BNA) 1552 (E.D.N.Y. Nov. 6, 1986) (granting a preliminary injunction because A to Z Luggage’s attache case was virtually identical to the ones Ventura had produced and built its reputation on).

48. *See Conference Archives, Inc. v. Sound Images, Inc.*, No. 3:2006-76, 2010 WL 1626072, at \*14 (W.D. Pa. Mar. 31, 2010) (declaring that a website’s “look and feel” can be protected by trade dress protection).

49. *Id.* at \*9; *see also Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 (1992) (discussing trade dress protection for a “festive and vivid color scheme” at Mexican restaurants).

50. *See Conference Archives, Inc.*, 2010 WL 1626072, at \*9.

51. *Id.* at \*16.

52. *Id.*

53. *Id.*

54. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 212 (2000).

“essential to the use or purpose of the article or if it affects the cost or quality of the article.”<sup>55</sup> The functionality requirement dictates that the elements sought for trade dress protection cannot be functional.<sup>56</sup> However, even if some product features are individually functional, it is the combination of *all* elements and the dress’s *overall* appearance that are the focal points of a functionality analysis.<sup>57</sup> The purpose behind nonfunctionality is to “protect advances in functional design from being monopolized” and to “encourage competition.”<sup>58</sup>

A type of functionality relevant for this Comment is “aesthetic functionality,” which “refers to situations where the product feature may not provide a truly utilitarian advantage in terms of product performance, but provides other competitive advantages.”<sup>59</sup> In *TrafFix Devices, Inc. v. Marketing Displays, Inc.*,<sup>60</sup> the Supreme Court limited aesthetic functionality to cases in which the nature of the mark made it difficult to determine functionality from a utilitarian standpoint.<sup>61</sup> Such cases include ones with “color marks and product features that enhance the attractiveness of the product,”<sup>62</sup> which may be found to be functional if they provide a real and significant competitive advantage, even if there is no utilitarian advantage.<sup>63</sup>

Even if a trade dress is found to be both distinctive and nonfunctional for registration purposes, there must also be no likelihood of confusion with another party’s registered trade dress<sup>64</sup> as to the *source* of goods or services.<sup>65</sup> *In re E.I. DuPont DeNemours & Co.*<sup>66</sup> set forth thirteen factors to consider when determining

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55. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995).

56. *See Conference Archives, Inc.*, 2010 WL 1626072, at \*17 (explaining that the feature plaintiff seeks to protect cannot be “essential to the use or purpose of the product” and cannot affect the “cost or quality” of the product).

57. *See LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 76 (2d Cir. 1985) (holding that a bag, when analyzed in its entirety, was nonfunctional, despite the functionality of some individual elements).

58. *Warner Bros., Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 331 (2d Cir. 1983).

59. U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURES (“TMEP”) 1202.02(a)(vi): AESTHETIC FUNCTIONALITY (Oct. 2012).

60. 532 U.S. 23 (2001).

61. *See id.* at 34 (noting that in this instance the dual-spring design is in itself functional and “assures the user the device will work”).

62. U.S. PATENT AND TRADEMARK OFFICE, *supra* note 59.

63. *See Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 168 (1995) (noting that if a product’s aesthetic value provides a significant benefit and significantly disadvantages competitors, it is functional).

64. 15 U.S.C. § 1052(d) (2012).

65. *See, e.g., Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 902 (C.C.P.A. 1973) (“[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source.”).

66. 476 F.2d 1357, 1361 (C.C.P.A. 1973).

likelihood of confusion.<sup>67</sup> Importantly, the *DuPont* court cautioned that “[t]here is no litmus rule which can provide a ready guide to cases.”<sup>68</sup> Not all of the factors may be relevant for a particular case; rather, it is the facts of the case that will determine which factors to consider and how much weight each factor should receive.<sup>69</sup> In most likelihood of confusion determinations, there are two factors that are key: “(1) the similarities between the [trade dress] and (2) the similarities between the goods and/or services.”<sup>70</sup> The first factor is the focus here, since it is this factor that would be the greatest hurdle for lifestyle bloggers to overcome, and it is this factor that separates websites from lifestyle blogs.<sup>71</sup>

Trademark law’s concept of “look and feel” is a relatively novel concept that has been addressed by some courts.<sup>72</sup> It “bears similarity to the ‘overall impression’ test for a claim of trade dress infringement . . . [and] must still be closely tied to the particular elements that are articulated by the plaintiff and which form the basis of the trade dress.”<sup>73</sup> The concept of “look and feel” of a trade dress has recently been addressed within the context of websites.<sup>74</sup> The leading case on this issue is *Conference Archives, Inc. v. Sound Images, Inc.*,<sup>75</sup> which held that websites could be subject to trade dress protection for their “look and feel.”<sup>76</sup> The *Conference Archives, Inc.* court analyzed “look and feel” as two separate elements, with “look” as the “aspects of a web site’s design including the colors, shapes, layouts, typecases, and shapes,” and “feel” as “certain dynamic navigation elements, including buttons, boxes, menus, and

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67. *Id.* (listing thirteen factors to consider when analyzing likelihood of confusion).

68. *Id.*

69. *Id.* at 1361–62.

70. *Austin, Nichols & Co. v. Stichting Lodestar*, Opp. No. 91155165, 2006 WL 236409, at \*6 (T.T.A.B. 2006).

71. This Comment only focuses on situations where the second factor of similar services is satisfied (i.e., where there are two lifestyle blogs with similar look and feels).

72. *Conference Archives, Inc. v. Sound Images, Inc.*, No. 3:2006-76, 2010 WL 1626072, at \*4 (W.D. Pa. Mar. 31, 2010).

73. Fred H. Perkins & Alvin C. Lin, *What’s Old is New in Web Site Protection: A New Look at the ‘Look and Feel’ Doctrine*, N.Y. L.J. (Jan. 20, 2009), <https://www.law.com/newyorklawjournal/almID/1202427496685/>.

74. *See, e.g., GMES, LLC v. Line of Sight Communications, Inc.*, No. 2:16-CV-04085-NKL, 2016 WL 3566254, at \*1 (W.D. Mo. June 27, 2016); *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, 70 F. Supp. 3d 1105, 1117 (N.D. Cal. 2014); *Salt Optics, Inc. v. Jand, Inc.*, No. SACV 10-828 DOC (RNBx), 2011 WL 13055856, at \*1 (C.D. Cal. Mar. 4, 2011); *Conference Archives, Inc.*, 2010 WL 1626072, at \*1–2; *Blue Nile, Inc. v. Ice.com, Inc.*, 478 F.2d 1240, 1242 (W.D. Wash. 2007).

75. *Conference Archives, Inc.*, 2010 WL 1626072, at \*1 (W.D. Pa. Mar. 31, 2010).

76. *Id.* at \*14–15.

hyperlinks.”<sup>77</sup> In simple terms, the “look” represents the “visual design” of a website, while the “feel” represents the “interface design.”<sup>78</sup> While the concept of “look and feel” for a website is still a developing one, it has never been addressed before for lifestyle blogs.<sup>79</sup>

### C. *Lifestyle Blogs*

Before analyzing whether a lifestyle blog’s look and feel can receive either copyright or trademark protection, the term “lifestyle blog” must first be defined as considered in this Comment. This Subpart proceeds as follows: first, the term “lifestyle blog” is defined for the purposes of this Comment; and second, this Subpart analyzes the considerations bloggers keep in mind when first forming a lifestyle blog. This is useful for the reader’s understanding of the subject in question and to identify lifestyle blogs as a unique subset of websites that deserves an analysis separate from that of websites, which has already been addressed by some courts.

#### 1. *Defining “Lifestyle Blog”*

The evolution of the term “blog” is indicative of its rapidly changing nature and the difficulties this poses in defining the term. The first recognized blogger was Justin Hall, dubbed by *The New York Times* as the “founding father of personal bloggers.”<sup>80</sup> In 1994 while as an undergraduate student at Swarthmore,<sup>81</sup> Hall created his website, Links.net, to review HTML examples.<sup>82</sup> This blog was originally referred to as a “personal homepage.”<sup>83</sup> Then, in 1997, Jorn Barger created his site Robot Wisdom and coined the term “weblog” to refer to his Internet log of lists of links he visited.<sup>84</sup> Finally, in 1999, programmer Peter Merholz, as a shorthand for “weblog,” coined the term “blog,”<sup>85</sup> which is the term that is now used. However, the numerous types of blogs that exist today make a uniform definition insufficient and impossible.

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77. *Id.* at \*14.

78. *Id.*

79. While lifestyle blogs are technically websites, they constitute such a distinct and unique subcategory of websites that warrants an individual assessment for their qualification for trade dress protection. This is due to their personalized nature to the blogger, representing an extension of the blogger.

80. Jeffrey Rosen, *Your Blog or Mine?*, N.Y. TIMES MAGAZINE (Dec. 19, 2004), <http://www.nytimes.com/2004/12/19/magazine/your-blog-or-mine.html>.

81. *Id.*

82. Amanda Zantal-Wiener, *A Brief Timeline of the History of Blogging*, HUBSPOT, <https://blog.hubspot.com/marketing/history-of-blogging> (last updated Aug. 27, 2017).

83. Rosen, *supra* note 80.

84. Zantal-Wiener, *supra* note 82.

85. *Id.*

The term “blog,” or any derivatives thereof, has not been defined by the courts, and there is not much general public consensus on a single definition.<sup>86</sup> The *Oxford English Dictionary* defines “blog” as a “frequently updated website, typically run by a single person and consisting of personal observations arranged in chronological order, excerpts from other sources, hyperlinks to other sites; etc.; an online journal or diary.”<sup>87</sup> This definition may be accurate for particular types of blogs, such as political blogs<sup>88</sup> or celebrity gossip blogs.<sup>89</sup> However, the definition fails to address the full scope of other types of blogs, such as lifestyle blogs. While the term “lifestyle blog” is far from novel, it has yet to achieve an agreed upon definition.<sup>90</sup>

One blogger in particular noted a relevant distinction between “lifestyle blogs” and “personal blogs” that is useful for this Comment. Blogger Ashley M. Coleman recognized that while both lifestyle blogs and personal blogs generally deal with “life,” lifestyle blogs focus on “personal interests,” whereas personal blogs focus on “personal stories.”<sup>91</sup> This does not mean that lifestyle blogs do not incorporate personal stories, but rather that the primary focus is more than just personal stories.<sup>92</sup> Personal interests include fashion, recipes, or home decor.<sup>93</sup> Additionally, Coleman identified a difference between the two in the “look, feel and tone” of each blog, where lifestyle blogs have a “magazine” style with more visuals than personal blogs.<sup>94</sup> While this distinction comes close to a definition applicable for this Comment, it is still lacking.

This Comment defines a lifestyle blog as a frequently updated webpage<sup>95</sup> or website<sup>96</sup> that: (1) details an individual’s personal interests through photographs oftentimes featuring the individual blogger and (2) provides direct links for visitors to purchase items

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86. Anthony Ciolli, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255, 258 (2007).

87. *Blog*, OXFORD ENGLISH DICTIONARY, (3d ed. 2002).

88. See, e.g., HUFFPOST, <https://www.huffingtonpost.com>; REDSTATE, <https://www.redstate.com>; VOX, <https://www.vox.com>.

89. See, e.g., PEREZ HILTON, <http://perezhilton.com>.

90. See Ashley M. Coleman, *Never Mistake Lifestyle Blogging for Personal Blogging Again*, WRITE LAUGH DREAM (May 3, 2016), <https://www.writelaughdream.com/the-blog/personal-vs-lifestyle>.

91. *Id.*

92. *See id.*

93. *Id.*

94. *Id.*

95. This refers to a hosted and commercial content publishing platform, where a blogger’s ownership rights are limited and subject to those of the publishing platform company. See, e.g., WORDPRESS, <https://wordpress.com> (last visited Sep. 13, 2018).

96. This refers to a “free open-source and self-hosted content publishing platform.” Marko Saric, *WordPress.com vs WordPress.org: What’s the Difference Between Them?*, HOW TO MAKE MY BLOG (Aug. 27, 2018), <https://howtomakemyblog.com/wordpress-com-org/>.

that are advertised in such photographs, leading to a commission for the individual blogger.<sup>97</sup> Moreover, the definition is limited to blogs where either the bloggers do customized coding themselves for the layout, or the bloggers hire professionals to do the coding.<sup>98</sup> The blogs where bloggers buy themes, and then customize those themes through built-in options, do not qualify as “lifestyle blogs” for purposes of this definition.<sup>99</sup> This definition is not meant to define lifestyle blogging for all purposes beyond this Comment but only to limit the scope of this Comment for simplicity and applicability.

This definition limits “personal interests” to those that are highly visual (through pictures) *and* profitable (through posted links).<sup>100</sup> Examples of highly visual personal interests include fashion, home decor, and essentially any other personal interest that would “get the most traction from promoting . . . content on photo-sharing apps like Instagram;”<sup>101</sup> thus, political blogs would not be considered highly visual.<sup>102</sup> In addition to being highly visual, the definition’s reference to “direct links” is meant to limit the scope to blogs that profit from partnerships with affiliate programs.<sup>103</sup>

There are two main types of affiliate programs: the pay-per-click program, and the commission-earning program.<sup>104</sup> For pay-per-click affiliate programs, lifestyle bloggers get paid every time a reader clicks on their link in the form of a commission from the sale and an average \$0.05 per click.<sup>105</sup> In contrast, commission-earning affiliate programs use “tracking cookies” in the links to monitor the number of times and the number of products readers purchase, from which a commission is paid to the blogger.<sup>106</sup> There are two subsets of commission-earning affiliate programs: (1) working directly with the brand; and (2) working indirectly with the brand through an intermediary.<sup>107</sup> When a blogger works indirectly with a brand through an intermediary, such as Nordstrom,<sup>108</sup> the intermediary

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97. See, e.g., BRIGHTON THE DAY, *supra* note 11; CHRONICLES OF FRIVOLITY, *supra* note 11; SOUTHERN CURLS & PEARLS, *supra* note 11; THE SWEETEST THING, *supra* note 11; THE TEACHER DIVA, *supra* note 11.

98. Saric, *supra* note 96.

99. This limitation serves to mitigate against any ownership rights violation that the creators of purchasable themes may have against customers who purchase said themes.

100. Kleia Paluca, *What Fashion Bloggers Should Know About Affiliate Marketing*, THIRSTYAFFILIATES (Feb. 16, 2017), <https://thirstyaffiliates.com/increasing-sales/fashion-bloggers-know-affiliate-marketing>.

101. *Id.* (discussing fashion as something that is “highly visual”).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See *Nordstrom Affiliate Program*, *supra* note 13.

gets a share of the commission, thus making working directly with the brand a more profitable route for the blogger.<sup>109</sup> But the benefit of working with an intermediary is that the blogger does not need to do the legwork of setting up the program, since that responsibility rests with the intermediary.<sup>110</sup> Thus, when the term “lifestyle blog” is used in this Comment, it encompasses blogs that make a profit through any three of these affiliate programs.

## 2. *Lifestyle Blog Considerations*

Bloggers often offer advice to readers on how to form a successful lifestyle blog, listing a number of considerations.<sup>111</sup> One consideration many bloggers agree on is picking a niche as a focal point of the lifestyle blog.<sup>112</sup> A lifestyle blogger’s niche is a topic that a blogger is passionate about and that is unique.<sup>113</sup> For a lifestyle blog to be successful, it must bring something new to the blogging world that has not already been done in a very saturated market.<sup>114</sup> For example, if a blogger’s niche is fashion, then a unique twist on fashion could be affordable fashion for broke college students. A niche gives a lifestyle blogger a necessary “edge.”<sup>115</sup> It is helpful for the reader to remember a blog’s name if it reflects the blog’s niche.<sup>116</sup>

Another consideration many bloggers agree on is carefully choosing a platform to host their blog by weighing the pros and cons of self-hosted blog sites against hosted and commercial blog sites.<sup>117</sup> WordPress.org<sup>118</sup> is an example of a self-hosted site, whereas Blogger.com is an example of a hosted and commercial site.<sup>119</sup> There are two similarities and one difference that are important to note for purposes of this Comment. First, both allow bloggers to post affiliate links on their sites.<sup>120</sup> Second, both provide for customization through

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109. Paluca, *supra* note 100.

110. *Id.*

111. Sina, *supra* note 15.

112. *See, e.g., id.*

113. Katey McFarlan, *Blogging Tips*, CHRONICLES OF FRIVOLITY (June 27, 2016), <http://www.chronicsoffrivolity.com/2016/06/blogging-tips/>.

114. *Id.*

115. Sina, *supra* note 15.

116. Caitlin M. Covington, *How to Start & Grow a Fashion Blog*, SOUTHERN CURLS & PEARLS (July 23, 2015), <http://www.southerncurlsandpearls.com/2015/07/how-to-start-grow-fashion-blog.html>.

117. Sina, *supra* note 15.

118. WordPress.org and WordPress.com are different. WordPress.org is a self-hosted platform whereas WordPress.com is a hosted and commercial platform, similar to Blogger.com.

119. *WordPress vs. Blogger – Which One is Better? (Pros and Cons)*, WPBEGINNER, <http://www.wpbeginner.com/opinion/wordpress-vs-blogger-which-one-is-better-pros-and-cons/> (last updated Jan. 15, 2018).

120. *See* Nicole Thomas, *How Do I Post Affiliate Links on Blogger.com?*, TECHWALLA, <https://www.techwalla.com/articles/how-do-i-post-affiliate-links-on->

coding, such as CSS or HTML.<sup>121</sup> These platforms allow for changes to a blog's layout, color scheme, or just overall design.<sup>122</sup> Related to this similarity is the difference between the two for ownership rights, where WordPress.org is like owning a house (or blog), and Blogger.com is like renting a house (or blog).<sup>123</sup> WordPress.org provides its customer-bloggers with full control, flexibility, and ownership of their blogs or websites.<sup>124</sup> On the other hand, Blogger.com requires its customer-bloggers to grant it a license to "use, host, store, reproduce, modify, create derivative works, . . . communicate, publish, publicly perform, publicly display and distribute such content."<sup>125</sup> Thus, control under Blogger.com is limited in scope and subject to restrictions set by Google, the owner of Blogger.com.<sup>126</sup> With that said, Google does not claim ownership rights in "any content submitted, posted, or displayed by an author on or through Google services."<sup>127</sup> But bloggers who add code or third-party widgets do so at their own risk."<sup>128</sup>

The ability to customize a blog's layout or theme is vital to the blog's success. Bloggers agree that a lifestyle blogger should choose a theme and then customize that theme to reflect the blog's niche.<sup>129</sup> A good theme is important because it "gives you the *look and feel* you want for your blog, allowing you to make a blog that looks exactly how you want it to look."<sup>130</sup> A theme helps readers "distinguish" one blog from another.<sup>131</sup> A lifestyle blogger chooses particular photographs to post that "are often cannily staged to ensure a particular aesthetic—one that obscures the staging itself" through the "Instagram filter"

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bloggercom (for Blogger.com); Bootstrapped Ventures, *Easy Affiliate Links*, WORDPRESS.ORG, <https://wordpress.org/plugins/easy-affiliate-links/> (for WordPress.org).

121. *Blogger Help*, GOOGLE, <https://support.google.com/blogger/answer/176245?hl=en> (for Blogger.com); John Regan & Danny Van Kooten, *Simple Custom CSS*, WORDPRESS.ORG, <https://wordpress.org/plugins/simple-custom-css/> (for WordPress.org).

122. *Blogger Help*, *supra* note 121.

123. *See* Saric, *supra* note 96 (comparing WordPress.org with WordPress.com).

124. *Id.*

125. *Terms of Service*, GOOGLE, <https://www.google.com/intl/en/policies/terms/> (last modified Oct. 25, 2017).

126. Ariel, *WordPress vs. Blogger – The Good, the Bad, and the Ugly*, ELEGANT THEMES (Oct. 13, 2014), <https://www.elegantthemes.com/blog/resources/wordpress-vs-blogger>.

127. *Blogger Help*, *supra* note 121.

128. *Id.*

129. Sina, *supra* note 15.

130. *See id.*

131. Dana Fox, *How to Start a Lifestyle Blog – Complete Beginner's Guide*, WONDER FOREST (Feb. 11, 2015), <https://www.thewonderforest.com/2015/02/how-to-start-lifestyle-blog-complete.html>.

effect.<sup>132</sup> If bloggers are not tech savvy or do not wish to spend money on hiring a professional to design their blog, then they can purchase themes.<sup>133</sup> However, to avoid any possible ownership issues, this Comment will solely focus on bloggers that either do their own coding for customization or hire a professional to do the customization.

### III. ANALYSIS

Before determining whether a lifestyle blog can receive some form of intellectual property protection for its “look and feel,” the elements of a lifestyle blog that constitute its “look and feel” must first be identified. To do this, it is helpful to separate the “look” from the “feel” to fully comprehend the concept as a whole, just like *Sound Images* did for websites.<sup>134</sup> The “look” is the blog’s “visual design” as seen by readers, such as “colors, shapes, layouts, typecases, . . . shapes,”<sup>135</sup> and images.<sup>136</sup> Moreover, most lifestyle bloggers maintain a consistent “theme” for their pictures that deliberately portrays an aesthetic “look” for their blog, such as a white border theme, a black border theme, rectangle photos theme, and a white background theme.<sup>137</sup> On the other hand, the “feel” refers to the “interface design” or “dynamic navigation elements,” such as drop-down menus, buttons, hyperlinks, or anything else that helps “facilitate user interaction with functionality.”<sup>138</sup> This Part will analyze whether a lifestyle blog’s look and feel can receive copyright or trademark protection.

#### A. Copyright Is Insufficient Protection

The greatest challenge the Copyright Act poses for protecting the look and feel of a lifestyle blog is the originality requirement for the blog *as a whole*.<sup>139</sup> At least three elements of the look and feel of a lifestyle blog clearly fall within the parameters of the Copyright Act. First, any text that may appear on a lifestyle blog clearly falls under

132. Brooke Erin Duffy & Emily Hund, *The Invisible Labor of Fashion Blogging*, ATLANTIC (Sept. 25, 2015), <https://www.theatlantic.com/entertainment/archive/2015/09/fashion-blogging-labor-myths/405817/>.

133. Sina, *supra* note 15.

134. *Conference Archives, Inc. v. Sound Images, Inc.*, Civ. No. 3:2006-76, 2010 WL 1626072, at \*14 (W.D. Pa. Mar. 31, 2010).

135. *Id.*

136. Kara Jensen, *What is the “Look and Feel” of a Website? And Why It’s Important*, BOP DESIGN (Nov. 21, 2013), <https://www.bopdesign.com/bop-blog/2013/11/what-is-the-look-and-feel-of-a-website-and-why-its-important/>.

137. See Alexandra, *21 Instagram Theme Ideas Using Preview App (+ Editing Tips)*, PREVIEW APP (Aug. 11, 2018), <https://thepreviewapp.com/15-instagram-theme-ideas-preview-app/> (discussing themes for Instagram photos, which is relevant since most bloggers also post the same photos on their Instagram feeds).

138. *Conference Archives, Inc.*, 2010 WL 1626072, at \*14.

139. *Id.* at \*4–5 (discussing this obstacle for websites).

the Copyright Act's protection because it constitutes a literary work.<sup>140</sup> Second, coding elements are clearly protected by copyright law because they are also considered literary works.<sup>141</sup> Third, any pictures or graphics on lifestyle blogs are protected by copyright.<sup>142</sup>

However, solely protecting copyrightable elements is insufficient for a lifestyle blog's *overall* look and feel for two main reasons. First, there is a substantial gap between a lifestyle blog's coding and its actual effect in appearance to the reader.<sup>143</sup> Coding can be problematic as protection because of its invisible nature.<sup>144</sup> Visitors cannot see coding, only the appearance of a lifestyle blog that the coding produces.<sup>145</sup> Two lifestyle blogs may use entirely different codes, with each having copyright protection for those codes, but which may appear very similar to the average visitor, such as "font, style and color of text and background, and the use of similar graphic design elements."<sup>146</sup> Thus, while copying code would fall under the Copyright Act, the similar appearance or look and feel of a lifestyle blog that coding may produce would not.<sup>147</sup>

Second, the look and feel of a lifestyle blog encompasses elements that are not copyrightable, in addition to copyrightable ones.<sup>148</sup> An example of an element that likely is not copyrightable for the look and feel of lifestyle blogs is a lifestyle blog's arrangement and layout.<sup>149</sup> Courts have held that the arrangement and layout of elements do not constitute copyrightable material due to a lack of a minimal level of creativity.<sup>150</sup> The Copyright Office traditionally denies "registration

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140. 17 U.S.C. § 102(a)(1) (2012); *see also* J. Scott Anderson, *Painstaking Semantics: Selecting Website Trade Dress Elements to Survive a Copyright Preemption Challenge*, 7 J. MARSHALL REV. INTELL. PROP. L. 97, 114 (2007).

141. § 102(a)(1); *see also* Anderson, *supra* note 140.

142. § 102(a)(5); *see also* Anderson, *supra* note 140.

143. Perkins & Lin, *supra* note 73, at 2.

144. *See id.*

145. *See id.*

146. *Id.*

147. *Id.*

148. *See, e.g.,* Conference Archives, Inc. v. Sound Images, Inc., Civ. No. 3:2006-76, 2010 WL 1626072, at \*13 (W.D. Pa. Mar. 31, 2010) (noting that individual elements of the website may be copyrightable, but as a whole the website was not eligible for copyright protection).

149. *See, e.g.,* Darden v. Peters, 402 F. Supp. 2d 638, 644 (E.D.N.C. 2005) (affirming the Copyright Office's denial for website registration due to "unoriginal formatting" and an "uncreative layout"). This issue has also been recently addressed. *See* Blue Nile, Inc. v. Ice.com, Inc., 478 F. Supp. 2d 1240, 1248 (W.D. Wash. 2017).

150. *Darden*, 402 F. Supp. 2d at 644; *see also* *Blue Nile, Inc.*, 478 F. Supp. 2d at 1248 (noting that not all courts have addressed this issue fully); *Conference Archives, Inc.*, 2010 WL 1626072, at \*13 (stating the website as a whole was beyond the subject matter of the Copyright Act). However, some courts have held that a synergistic arrangement of common elements can be protected under Copyright law. *See, e.g.,* Stillman v. Leo Burnett Co., 720 F. Supp. 1353, 1360

of the arrangement of elements on the basis of physical or directional layout in a given space, whether that space is a sheet of paper or a screen of space meant for information displayed digitally.”<sup>151</sup> If a lifestyle blogger were to apply for copyright protection for the look and feel of a blog with both copyrightable elements and noncopyrightable elements, the Copyright Office would likely deny the request on the basis that the request is “far too broad.”<sup>152</sup> As the look and feel of a lifestyle blog would be denied for copyright protection for a lack of originality, this Comment next considers whether a lifestyle blog’s look and feel would instead be protectable under the Lanham Act.

### B. Trade Dress May Be Sufficient Protection

Because copyright protection for the look and feel of a lifestyle blog ignores certain intangible elements such as arrangement and layout, trade dress may be a more suitable avenue to protect a lifestyle blog’s look and feel in its *entirety*.<sup>153</sup> Protecting the “look and feel” of a lifestyle blog would promote the purposes behind trademark law.<sup>154</sup> First, this protection would serve the purpose of protecting a lifestyle blog’s reputation since the appearance of a lifestyle blog is vital for the association with a particular brand.<sup>155</sup> Second, this protection would prevent unjust enrichment for undeserving imitators.<sup>156</sup> This is of particular concern given the appeal and allure the Internet exudes for inappropriate copying. Copying code is simple, and the vast nature of the Internet makes it difficult to notice when copying has occurred.<sup>157</sup> And third, this protection fosters competition and thus creates an incentive to produce high-quality work.<sup>158</sup> If trade dress protection were unavailable, then a blogger would likely not invest time and money in designing her blog’s look and feel. These purposes underline the requirements for trade dress protection: (1) distinctiveness, (2) nonfunctionality,<sup>159</sup> and (3) no

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(N.D. Ill. 1989) (“Although a plaintiff can protect neither his ideas nor his use of procedures and techniques to express these ideas, he can protect the *creative* arrangement and interaction of the techniques composing the expression.”) (emphasis added); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970).

151. *Darden*, 402 F. Supp. 2d at 644.

152. *See id.*

153. *See Perkins & Lin*, *supra* note 73, at 4.

154. *Conference Archives, Inc.*, 2010 WL 1626072, at \*15.

155. *See id.*

156. *Id.*

157. *Id.*

158. *Id.* at \*16.

159. U.S. PATENT AND TRADEMARK OFFICE, *supra* note 59, at § 1202.02.

likelihood of consumer confusion with another's registered trade dress.<sup>160</sup>

### 1. *Distinctiveness*

If a trade dress is not inherently distinctive, or has not acquired distinctiveness, then the Trademark Office will deny the registration.<sup>161</sup> Distinctiveness is defined as the “mental association by a substantial segment of consumers and potential consumers” between the trade dress in question and its source.<sup>162</sup> The Supreme Court has identified two types of trade dress: product design and product packaging.<sup>163</sup> If a given trade dress falls within the parameters of product design, then it can never be inherently distinctive and must acquire secondary meaning.<sup>164</sup> If a trade dress constitutes product packaging, then the dress may be inherently distinctive.<sup>165</sup> If a trade dress could fall into either category, then as a precaution, the trade dress should be considered product design.<sup>166</sup>

The look and feel of a lifestyle blog likely falls under the realm of product packaging.<sup>167</sup> The “core product” or service of a lifestyle blog is to advertise goods and connect buyers to sellers through indirect sales via hyperlinks.<sup>168</sup> This is a unique form of online shopping since the blog does not provide for purchases directly, but rather redirects the buyer to a different site for purchase.<sup>169</sup> However, like many retail distributors, blogs have no physical presence, and their online presence is their only “storefront” for their business.<sup>170</sup> The look and feel of a lifestyle blog is analogous to the trade dress at issue in *Two Pesos, Inc. v. Taco Cabana, Inc.*<sup>171</sup> In *Two Pesos*, the trade dress at issue included “a festive eating atmosphere . . . decorated with artifacts, bright colors, paintings and murals,” with the exterior

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160. See *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 523 U.S. 23, 29 (2001) (using distinctiveness, functionality, and risk of confusion as the factors to consider trade dress protection).

161. 15 U.S.C. §§ 1052(e)(5), 1052(f) (2012).

162. *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th Cir. 1985).

163. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 215 (2000).

164. *Id.* at 212 (“It seems to us that design, like color, is not inherently distinctive.”).

165. *Id.* at 212–13.

166. *Id.* at 215.

167. See CLARA RUYAN MARTIN & DAVID B. OSHINSKY, *INTERNET LAW AND PRACTICE IN CALIFORNIA* 3-103 (2018) (stating that “a court might find that a website user interface is product packaging trade dress and inherently distinctive”).

168. See, e.g., *BRIGHTON THE DAY*, *supra* note 11; *CHRONICLES OF FRIVOLITY*, *supra* note 11; *SOUTHERN CURLS & PEARLS*, *supra* note 11; *THE SWEETEST THING*, *supra* note 11; *THE TEACHER DIVA*, *supra* note 11.

169. *Id.*

170. See MARTIN & OSHINSKY, *supra* note 167.

171. 505 U.S. 763 (1992).

containing “a festive and vivid color scheme.”<sup>172</sup> This trade dress for the restaurant’s storefront and interior was found to be inherently distinctive as product packaging.<sup>173</sup> Under a similar analogy, the look and feel of a lifestyle blog constitutes product packaging of the lifestyle blog since it consists of how its service is showcased and delivered to the public.<sup>174</sup> “Like the packaging of a product, the look and feel of a web site invites the user in. It offers a familiar interface, with recognizable elements. Similar colors, sizes, and layouts make navigation and interaction facile.”<sup>175</sup> In this context, a lifestyle blog is similar to a website, and thus constitutes as product packaging for its look and feel.<sup>176</sup> But, even if the look and feel of a lifestyle blog is product packaging, it must also be inherently distinctive.<sup>177</sup>

In *Abercrombie & Fitch Co. v. Hunting World, Inc.*,<sup>178</sup> the court created four categories for trademarks: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.<sup>179</sup> This list illustrates a spectrum of classification, from no protection to full protection, where the latter two “are always considered inherently distinctive because their intrinsic nature serves to identify a particular source of a product.”<sup>180</sup> Since “there is a ‘virtually unlimited’ number of ways to combine elements to make up the total visual image that constitutes a trade dress, ‘a product’s trade dress typically will be arbitrary or fanciful to meet the inherently distinctive requirement.’”<sup>181</sup> However, this does not include generalized appearances.<sup>182</sup> The distinction becomes clearer against the backdrop of trademark law’s purpose to identify a product’s source and to distinguish a product from another.<sup>183</sup>

The key to a lifestyle blog’s success is to create a unique brand that is illustrated through a unique look and feel.<sup>184</sup> In such a

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172. *Id.* at 765.

173. *Id.* at 776.

174. *See* Conference Archives, Inc. v. Sound Images, Inc., Civ. No. 3:2006-76, 2010 WL 1626072, at \*21 (W.D. Pa. Mar. 31, 2010).

175. *Id.*

176. *See id.*

177. *See* Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 212–13 (2000).

178. 537 F.2d 4 (2d Cir. 1976).

179. *Id.* at 9.

180. Deborah F. Buckman, Annotation, *When is Trade Dress “Inherently Distinctive” For Purposes of Trade Dress Infringement Actions Under § 43(a) of Lanham Act (15 U.S.C.A. § 1125(a))—Cases After Two Pesos*, 161 A.L.R. Fed. 327 (2000).

181. *Best Cellars Inc. v. Grape Finds at Dupont, Inc.*, 90 F. Supp. 2d 431, 451 (S.D.N.Y. 2000) (quoting *Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 1000 (2d Cir. 1997)).

182. *Best Cellars Inc.*, 90 F. Supp. 2d at 451 (quoting *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 32 (2d Cir. 1995)).

183. *Id.*

184. McFarlan, *supra* note 113.

saturated market, it is difficult to find a unique theme or a unique layout. “There are only so many ways to shoot a certain . . . photo;” however, “if you have a personality and you showcase that personality, that’s the point of differentiation.”<sup>185</sup> What ultimately makes a lifestyle blog distinctive is this idea of a blogger’s “personality,” or what this Comment refers to as a blogger’s “digital persona,” which is manifested through a blog’s look and feel, and is synonymous with a blog’s “personal brand.”<sup>186</sup> Because a lifestyle blog represents an “extension” or “representation” of the blogger,<sup>187</sup> and because its look and feel facilitates this extension, the look and feel is inherently distinctive for purposes of trade dress protection, especially in light of the fact that there is a “virtually unlimited” number of ways a blogger could create her blog’s look and feel.<sup>188</sup> However, even if the look and feel of a lifestyle blog did not qualify as inherently distinctive, or even if a lifestyle blog was considered product design instead of product packaging, the look and feel could still acquire secondary meaning to satisfy the requirement of distinctiveness.<sup>189</sup>

Secondary meaning is established when, “in the minds of the public, the primary significance of a [trade dress] is to identify the source of the product rather than the product itself.”<sup>190</sup> As previously mentioned, a lifestyle blog is essentially a digital persona of a blogger, in which every single design decision to facilitate the blog’s look and feel is one that also facilitates the *blogger’s* look and feel as a person.<sup>191</sup> Everything from the decision of the blog’s theme or niche, to the decision of what pictures or personal stories to post, all reflect the blogger’s personal interests, daily life, and who she is as a *person*.<sup>192</sup> Bloggers devote a substantial amount of time and effort to craft a truly unique and customized “look and feel” for a blog in order to “distinguish” them from other bloggers.<sup>193</sup> This idea of a “digital persona” demonstrates that the blog’s “look and feel” serves as identification for the source (the blogger) of the product (the

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185. Meghan Blalock, *7 Secrets to Becoming a Successful Blogger*, WHO WHAT WEAR (Aug. 8, 2014), <http://www.whowhatwear.com/how-to-become-a-blogger/slide2>.

186. See Duffy & Hund, *supra* note 132 (“You [as the blogger] are your brand.”).

187. *Id.*

188. *Best Cellars Inc.*, 90 F. Supp. 2d at 451.

189. *Id.* at 450 (quoting *Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 999 (2d Cir. 1997)).

190. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982).

191. Duffy & Hund, *supra* note 132.

192. Evan, *What is a Lifestyle Blogger?*, MEDIKIX (June 5, 2015), <http://mediakix.com/2015/06/what-is-a-lifestyle-blogger/#gs.Ud2WLkQ> (“A lifestyle blogger creates content inspired and curated by their personal interests and daily activities.”).

193. Fox, *supra* note 131.

advertising services), rather than the product itself.<sup>194</sup> Thus, the look and feel of lifestyle blogs likely can establish secondary meaning.<sup>195</sup> But even if it can acquire distinctiveness, the look and feel of a lifestyle blog also must not be functional in order to receive trademark protection.<sup>196</sup>

## 2. *Functionality*

Functional product features cannot be protected as trade dress, even if a product has inherent distinctiveness or acquired distinctiveness.<sup>197</sup> In *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*,<sup>198</sup> the United States Court of Appeals for the Second Circuit developed a three-prong test to determine whether a design feature has aesthetic functionality: if the design feature is: (1) “essential to the use or purpose” of the product; (2) “affects the cost or quality” of the product; or (3) prevents competition, then the design feature is not protectable under trademark law.<sup>199</sup>

Turning to the first prong, a design feature is essential to the use or purpose of a product “if [it] is dictated by the functions to be performed” by the product.<sup>200</sup> Readers predominantly “use” lifestyle blogs to investigate “the latest must-haves, trends, lifestyle direction, and product recommendations.”<sup>201</sup> Brands predominantly “use” lifestyle blogs to advertise their products, which are normally featured on blog posts through photographs.<sup>202</sup> These two “uses” combined form the lifestyle blog’s purpose, which is to advertise products to buyers and connect buyers to sellers.<sup>203</sup> Some features of a lifestyle blog’s look and feel, individually, constitute functional features, such as the elements that compose the “feel” in the “look and feel.”<sup>204</sup> As previously mentioned, hyperlinks constitute part of a blog’s “feel.”<sup>205</sup> Without hyperlinks, it would be nearly impossible, or

194. This operates under the assumption that a blogger could satisfy the secondary meaning test, such as the one in *Gerffert Co. v. Dean*, 41 F. Supp. 3d 201, 215–16 (E.D.N.Y. 2014).

195. *Id.* at 215.

196. *Id.* at 211.

197. 15 U.S.C. §§ 1052(e)(5)–(f) (2012).

198. 696 F.3d 206 (2d Cir. 2012).

199. *Id.* at 220. The first two factors are the traditional functionality factors for utilitarian cases. *Id.* at 219.

200. *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 76 (2d Cir. 1985) (quoting *Warner Bros. Inc. v. Gay Toys Inc.*, 724 F.2d 327, 331 (2d Cir. 1983)).

201. Evan, *supra* note 192.

202. *Id.*

203. See, e.g., *BRIGHTON THE DAY*, *supra* note 11; *CHRONICLES OF FRIVOLITY*, *supra* note 11; *SOUTHERN CURLS & PEARLS*, *supra* note 11; *THE SWEETEST THING*, *supra* note 11; *THE TEACHER DIVA*, *supra* note 11.

204. *Conference Archives, Inc. v. Sound Images, Inc.*, Civ. No. 3:2006-76, 2010 WL 1626072, at \*14 (W.D. Pa. Mar. 31, 2010).

205. *Id.*; see *supra* notes 75–77.

at the very least impracticable, for lifestyle blogs to execute their purpose to connect buyers to sellers. Thus, the “feel” element of hyperlinks on its own, as well as other “feel” elements, may constitute functionality, since this element represents anything that helps “*facilitate* user interaction with *functionality*.”<sup>206</sup> However, it is the combination of all elements, functional and nonfunctional, and the dress’s overall appearance, that is the focal point of this functionality analysis.<sup>207</sup>

The “look” element of a lifestyle blog is not essential to the blog’s use or purpose.<sup>208</sup> As previously mentioned, the “look” is what readers see when they access the blog, such as “colors, shapes, layouts, typecases, . . . shapes,”<sup>209</sup> and images,<sup>210</sup> which all contribute to the blog’s aesthetic or theme.<sup>211</sup> If successful, the “look and feel” of a lifestyle blog encourages readers to purchase the advertised items.<sup>212</sup> However, the particular look and feel that is chosen is not “essential” to the blog’s purpose because a number of other looks and feels may equally encourage readers to purchase the advertised products.<sup>213</sup> Thus, the true “function” of a particular look and feel is to convey the blogger’s digital persona and does not serve as a necessity for the blog’s use or purpose.<sup>214</sup>

Turning to the second prong, a design feature of a product affects the cost or quality of the product when it “permits the article to be manufactured at a lower cost” or “constitutes an improvement in the operation of the goods.”<sup>215</sup> The look and feel of lifestyle blogs does not affect the cost or quality of the blogs as contemplated in *Christian Louboutin*.<sup>216</sup> When lifestyle bloggers decide to customize their blogs

206. *Id.* (emphasis added).

207. See *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 76 (2d Cir. 1985) (concluding that a bag, when analyzed in its entirety, was nonfunctional, despite the functionality of some individual elements).

208. See Lisa M. Byerly, Comment, *Look and Feel Protection of Web Site User Interfaces: Copyright or Trade Dress?*, 14 SANTA CLARA COMPUTER & HIGH TECH. L.J. 221, 259 (1998).

209. *Conference Archives, Inc.*, 2010 WL 1626072, at \*14.

210. Jensen, *supra* note 136.

211. See generally Alexandra, *supra* note 137.

212. See McFarlan, *supra* note 113.

213. See, e.g., BRIGHTON THE DAY, *supra* note 11; CHRONICLES OF FRIVOLITY, *supra* note 11; SOUTHERN CURLS & PEARLS, *supra* note 11; THE SWEETEST THING, *supra* note 11; THE TEACHER DIVA, *supra* note 11.

214. *Ingrid & Isabel, LLC v. Baby Be Mine, LLC*, 70 F. Supp. 3d 1105, 1138 (N.D. Cal. 2014) (noting that features constituting the “look and feel” of a website, such as the choice to use a specific script or wallpaper pattern, may be seen as nonfunctional).

215. *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 76 (2d Cir. 1985) (quoting *Warner Bros., Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 331 (2d Cir. 1983)).

216. See *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 219–20, 228 (2d Cir. 2012) (analyzing the cost or quality prong in the context of a single color serving as the mark of a style of women’s footwear).

to achieve a certain “look and feel,” they have actually decided on a more expensive method for creating the blog.<sup>217</sup> Bloggers can either do the coding themselves or hire professionals to design the blogs.<sup>218</sup> In either scenario, more time and money will be spent than if a blogger were to buy themes that limit customization to a certain number of options or limit themes to the ones provided by WordPress or Blogger.<sup>219</sup> Even if a blogger was knowledgeable enough to do the coding instead of hiring a professional, the blogger likely spent time and money on learning how to code through schooling or some form of educational program.<sup>220</sup> Moreover, the overall customization through coding does not constitute an improvement in the operation of lifestyle blogs, but rather an improvement in the blog’s visual display to the public.<sup>221</sup>

Turning to the third prong, the look and feel of lifestyle blogs through coding do not prevent competition. The purpose behind aesthetic functionality is to encourage “competition by preventing advances in functional design from being monopolized.”<sup>222</sup> If lifestyle blogs are granted protection for their look and feel, the existence of a monopoly on trade dress of websites would fail to interfere with competition since “there would be so many other equally efficient ways to arrange a [blog].”<sup>223</sup> A theme’s underlying color scheme is a good example of a design feature that has a large number of possible variations. There are approximately 16,777,216 unique colors.<sup>224</sup> A color scheme, often involving multiple colors with each color representing a particular element of a blog, would have a much larger number than 16,777,216 for possible variations.<sup>225</sup> When combining all the design features of a blog’s look and feel, such as color, layout, lettering styles, etc., the number of possible variations is infinite, and thus neither poses a threat to competition, nor creates a monopoly.<sup>226</sup> As such, a lifestyle blog’s look and feel would likely be considered nonfunctional as required by the Lanham Act.

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217. See Covington, *supra* note 116.

218. See *id.*

219. See *id.* Importantly, this Comment’s definition is limited to those bloggers that either do the coding themselves or hire professionals to do the coding. This is to prevent any ownership issues that may arise with purchasing themes online.

220. See generally McFarlan, *supra* note 113 (encouraging new bloggers to invest time and money into learning how to customize their own blogs).

221. See Conference Archives, Inc. v. Sound Images, Inc., Civ. No. 3:2006-76, 2010 WL 1626072, at \*5 (W.D. Pa. Mar. 31, 2010); Covington, *supra* note 116.

222. LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71, 77 (2d Cir. 1985).

223. See Byerly, *supra* note 208, at 259 (discussing websites).

224. Conference Archives, Inc., 2010 WL 1626072, at \*5.

225. See *id.*

226. See LeSportsac, Inc., 754 F.2d at 77.

### 3. Likelihood of Confusion

Even if a trade dress is found to be both distinctive and nonfunctional, it can still be barred from registration if it is likely to “cause confusion” with a registered trade dress<sup>227</sup> as to the *source* of goods or services.<sup>228</sup> With some exceptions, no two lifestyle blogs would be confused with each other under the traditional likelihood of confusion analysis for two main reasons. First, lifestyle blogs contain design elements that identify the blogger explicitly, such as photographs showcasing the blogger with the advertised items or the blogger’s name displayed somewhere on the blog.<sup>229</sup> If two blogs were almost identical in all design features, including an identical theme for photographs, no reader would confuse the two because: (1) the individuals featured in each blog’s photographs would be a different person; and (2) the names of the two bloggers would be different.

However, there are at least three scenarios where this may not necessarily be true. One scenario involves a blogger who looks similar to or physically mimics another blogger and intentionally posts pictures that contain a similar theme or aesthetic to that of the original blogger. If all other design elements are identical, then there could be a likelihood of confusion between the two.<sup>230</sup> A second scenario involves a blog that does not predominantly display photographs showcasing the blogger or the blogger’s name on the homepage of the blog. If two blogs are identical in almost every aspect, and neither conspicuously features the blogger’s name, then a likelihood of confusion is possible. A third scenario involves a blogger that takes a picture of or screen-shots another blogger’s photographs and transforms the picture. This concept is known as “re-photographing.”<sup>231</sup> Re-photographing is generally not prohibited

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227. 15 U.S.C. § 1052(d) (2012).

228. *See, e.g.*, *Paula Payne Prods. Co. v. Johnson’s Publ’g Co.*, 473 F.2d 901, 902 (C.C.P.A. 1973) (“[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source.”).

229. *See, e.g.*, *BRIGHTON THE DAY*, *supra* note 11; *CHRONICLES OF FRIVOLITY*, *supra* note 11; *SOUTHERN CURLS & PEARLS*, *supra* note 11; *THE SWEETEST THING*, *supra* note 11; *THE TEACHER DIVA*, *supra* note 11.

230. A claim under the right of publicity is also possible. The *Restatement (Third) of Unfair Competition* states that “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability.” *RESTATEMENT (THIRD) OF UNFAIR COMPETITION: APPROPRIATION OF THE COMMERCIAL VALUE OF A PERON’S IDENTITY: THE RIGHT TO PUBLICITY* § 46 (AM. LAW INST. 1995).

231. Jessica Contrera, *A Reminder That Your Instagram Photos Aren’t Really Yours: Someone Else Can Sell Them for \$90,000*, WASH. POST (May 25, 2015), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/05/25/a-reminder-that-your-instagram-photos-arent-really-yours-someone-else-can-sell-them-for-90000/?utm\\_term=.86c064e0a07d](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/05/25/a-reminder-that-your-instagram-photos-arent-really-yours-someone-else-can-sell-them-for-90000/?utm_term=.86c064e0a07d).

by copyright law because of the fair use exception.<sup>232</sup> In *Cariou v. Prince*,<sup>233</sup> the United States Court of Appeals for the Second Circuit held that some of photographer Richard Prince's re-photographed pictures fell under the fair use exception because the "composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work."<sup>234</sup> This indicates that re-photographing another's picture is permissible under copyright law to an extent.<sup>235</sup> Since copyright law does not sufficiently address this issue, a lifestyle blogger could instead seek trade dress protection under likelihood of confusion. Trade dress protection would exist if the transformative photograph still conveys the blogger's image, thus causing confusion as to the source of the blog if the other design elements are almost identical.

A second reason two lifestyle blogs may not be confused with each other is the same reason that actually furthered the blog's distinctiveness inquiry earlier in this Comment: a blog is a blogger's digital persona.<sup>236</sup> A lifestyle blog focuses on the blogger, including the blogger's personal interests and daily life events, and is thus a digital "extension" of the blogger.<sup>237</sup> Every decision a lifestyle blogger makes is a personal one from the very beginning, including initially choosing a niche or theme that she, as a blogger, can personally identify with, and can accordingly be inspired from to create content.<sup>238</sup> Each decision is a glimpse into a blogger's inner identity and life events<sup>239</sup> and thus adds more pieces to the puzzle of the blogger as a person. If a blogger's digital persona is distinct enough to primarily identify it as a source of the service via secondary meaning,<sup>240</sup> then the same digital persona would likely prevent consumer confusion from arising, even in the absence of photographs featuring the blogger. This is especially true given the type of cult-like following lifestyle blogs incite in their readers.<sup>241</sup> However,

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232. See generally *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (holding that re-photographing another's pictures, and transforming them, constituted fair use).

233. 714 F.3d 694 (2d Cir. 2013).

234. *Id.* at 706.

235. See *id.* at 707–08.

236. See Duffy & Hund, *supra* note 132.

237. Helene Sula, *How to Start A Profitable Lifestyle Blog from Scratch*, HELENE IN BETWEEN (Dec. 27, 2016), <http://heleneinbetween.com/2016/12/start-profitable-lifestyle-blog-scratch.html>.

238. See generally McFarlan, *supra* note 113 (discussing why and how the blogger started in the industry and chose her niche).

239. See Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 124 (2003) (describing consumer data profiling as an individual's "inner identity").

240. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982).

241. See *infra* note 248.

the same exceptions mentioned above are applicable here, and thus in those three scenarios, likelihood of confusion may be possible. More importantly, there may be a likelihood of confusion found in infringement cases under the initial interest confusion doctrine between two lifestyle blogs to enforce the trademark protection.

Initial interest confusion occurs “not where a customer is confused about the source of a product at the time of purchase, but earlier in the shopping process, if ‘customer confusion . . . creates initial interest in a competitor’s product.’”<sup>242</sup> For initial interest confusion inquiries, the *Sleekcraft* test that the United States Court of Appeals for the Ninth Circuit developed is viewed as the traditional test.<sup>243</sup> However, *Multi Time Machine, Inc. v. Amazon.com, Inc.*<sup>244</sup> held that for cases involving website designs, as opposed to confusion caused by mark designs like discussed in *Sleekcraft*, a different type of test should be employed to determine initial interest confusion.<sup>245</sup> The court articulated a two-prong test to address this issue: “(1) Who is the relevant reasonable consumer?; and (2) What would he reasonably believe based on what he saw on the screen?”<sup>246</sup> For the first prong, the court determined that because the goods were expensive, the consumer was sophisticated.<sup>247</sup> For the second prong, the court determined that because the products were labeled with the manufacturer’s name and brand, the consumer would not be confused.<sup>248</sup>

Since this Comment focuses on the design of lifestyle blogs through their look and feel, the *Multi Time Machine* test is more applicable than the *Sleekcraft* test. Lifestyle blog readers are sophisticated but for different reasons than those articulated in *Multi Time Machine*. The readers of lifestyle blogs are considered “followers,” a title derived from the fact that these bloggers have a large number of followers on Instagram.<sup>249</sup> Because the readers

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242. *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 792 F.3d 1070, 1074 (9th Cir. 2015) (quoting *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1025 (9th Cir. 2004)).

243. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979) (developing an eight-factor test to determine whether confusion between related goods exists: “(1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant’s intent in selecting the mark; and (8) likelihood of expansion of the product lines”).

244. 792 F.3d at 1070 (9th Cir. 2015).

245. *Id.* at 1084.

246. *Id.*

247. *Id.* at 1085.

248. *Id.*

249. *See, e.g.*, Caitlin Covington (@cmcoving), INSTAGRAM, <https://www.instagram.com/cmcoving/> (last visited Nov. 18, 2018) (with 960,000 followers); Emily Ann Gemma (@emilyannemma), INSTAGRAM,

follow everything that occurs on those blogs, they are “reasonably prudent consumer[s] accustomed to shopping online” through those blogs they follow.<sup>250</sup> Turning to the second prong, it is possible that even the most sophisticated readers, who religiously follow the blog in question, may have an initial interest confusion in the unlikely situation where almost all the original elements are the same in a second blog. This could happen because some lifestyle blogs do not have the blogger showcased in every single posted photograph. As a result, if a reader were to search for blog A but encountered blog B instead—with blog B having a similar look and feel to blog A—and the first pictures on blog B’s homepage did not feature the blogger entirely or the blogger at all, it may initially confuse the reader as to the source of the blog. Thus, initial interest confusion is possible. As such, a lifestyle blog may likely register its look and feel for trade dress protection, assuming it does not cause confusion with another registered trade dress. But, if another lifestyle blog tries to mimic a registered lifestyle blog’s look and feel, then depending on the circumstances—such as the presence of initial interest confusion—there may be cause for a trademark infringement action to protect the lifestyle blog’s look and feel.

#### IV. CONCLUSION

The look and feel of lifestyle blogs is likely not protectable under the Copyright Act but may be protectable under the Lanham Act. To receive protection under the Lanham Act, the lifestyle blog must be distinctive, it must be nonfunctional, and it must not cause confusion with another registered trade dress. This is possible for lifestyle blogs, especially considering how difficult it will be to prove likelihood of confusion under the traditional likelihood of confusion test. In order for lifestyle blogs to enforce trademark protection for their look and feel, they may likely succeed within the context of the initial interest confusion doctrine.

Even if two lifestyle blogs existed with similar elements, but not enough to constitute any likelihood of confusion, this would not necessarily be cause for concern. The strength of a blog’s following is what protects a lifestyle blog’s source of identification, even without any intellectual property protection. Lifestyle blogs create a dedicated following that leaves little room for confusion. Even if one blog were to copy almost all of a second blog’s design elements, the

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<https://www.instagram.com/emilyannemma/> (last visited Nov. 18, 2018) (with 632,000 followers); Brighton Keller (@brightonkeller), INSTAGRAM, <https://www.instagram.com/brightonkeller/> (last visited Nov. 18, 2018) (with 320,000 followers); Katey McFarlan (@kateymcfarlan), INSTAGRAM, <https://www.instagram.com/kateymcfarlan/> (last visited Nov. 18, 2018) (with 211,000 followers).

<sup>250</sup> *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010).

followers of the second blog would likely not purchase any items through the first blog due to confusion. In fact, if anything, the followers would likely bring attention to an imitator's failed attempts to mimic the original blogger's look and feel. Thus, even if a lifestyle blog's look and feel could not be enforced under intellectual property law, it would likely not face much risk of diversion of sales.

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