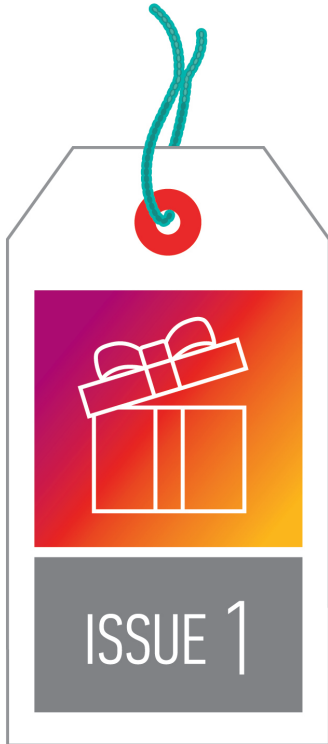


oliday Season



Consumers today are conscious of environmental issues. Younger generations in

particular have a clear preference for environmentally friendly products—74% of millennials and 62% of Gen Z are willing to pay [more for sustainable goods](#). Thankfully, consumer demand has caused a discernable and welcome shift towards sustainability in the fashion and apparel industry. Gone are the days of fast fashion and disposable clothes—consumers are now reducing waste by purchasing sustainable, and increasingly secondhand, goods.

Indeed, the resale, or "recommerce," market [is currently worth \\$36 billion, and is expected to double to \\$77 billion in the next five years](#). Today's secondhand space is also diverse. While brick-and-mortar resellers are still in the game, the future of recommerce is digital. Peer-to-peer apps—like eBay, Depop, Poshmark, and Facebook Marketplace—hold [the largest market share](#), and managed consignment marketplaces like TheRealReal and Rebag are important players. Even traditional retailers are vying for a piece of the sustainable pie. Pioneers like Patagonia, Eileen Fisher, and REI have established buy-back, trade-in, and/or resale programs. Other companies, like Levi's, Arc'teryx, and the North Face, have also tapped into the circular economy by establishing similar programs. More interestingly, though, is the luxury market's recent focus on recommerce. For example, retailer Net-A-Porter recently launched a resale concept, while luxury conglomerate Kering S.A. bought a 5% stake in French resale platform Vestiaire Collective earlier this year. This is a notable pivot given the luxury sector's historical skepticism of resale. This shift undoubtedly arose thanks to luxury recommerce sites like The RealReal, which helped to elevate the public's perception of resale beyond "thrifting" for inexpensive or undesirable products.

While recommerce is not new, its renaissance and shift to e-commerce has raised issues that resellers and brands will need to navigate—including possible expansion of secondhand dealer laws to e-commerce and avoiding IP infringement through proper product authentication. As discussed below, resellers and brands can navigate these issues through planning and leaning into strategic partnerships within the circular economy.

Compliance With Secondhand Dealer Laws

Traditional brick-and-mortar resellers are undoubtedly familiar with the complex secondhand dealer framework. State and local secondhand dealer laws were originally established to prevent against criminal activity and have proven effective against the trafficking of stolen goods. However, they place onerous requirements on resellers. For example, while they vary from state to state, secondhand dealer laws generally require resellers to be licensed, and to submit daily reports detailing their inventory, along with other information relating to the original owners—ranging from fingerprints, to photo identifications, to physical attributes. Secondhand sellers are also required to retain each piece of inventory for certain "holding periods" (often 30 days or more), and to comply with law enforcement audits on a day's notice. Finally, violations of secondhand dealer laws can result in criminal penalties like fines or imprisonment. Importantly, even those with small-scale trade-in programs are subject to secondhand dealer laws—for example, GameStop was subjected to California's particularly sticky secondhand dealer laws even though its trade-in program accounted for only 5% of its revenue from California stores.[1]

Online resellers have largely escaped enforcement of secondhand-dealer laws because they often pre-date e-commerce and sometimes contemplate physical stores. However, many secondhand-dealer laws are drafted quite broadly, such that they arguably encompass online recommerce. Given the recent trend towards heavier regulation in the e-commerce space—for example, the INFORM Consumers Act, which would place significant verification and disclosure requirements on online marketplaces—it is safe to assume that application of secondhand-dealer laws to the digital sphere could be on the horizon. If and when that day comes, it will pose significant regulatory challenges for online resellers. For example, it is possible that three or more sets of laws could apply where the buyer, seller, and warehouse are located in different states. The type of transaction could also affect whether secondhand dealer laws apply—certain transactions involving store credit instead of cash are exempted from secondhand dealer laws in Washington, other states exempt consignment transactions, and others provide very few or no exceptions at all. Further, some states require collecting and recording of fingerprints or other personally identifiable information—sometimes even as granular as eye color, weight, and height. The separate regulatory frameworks surrounding the collection of driver's license data, biometric data, and other personally identifiable information present a number of risks for resellers.

With this in mind, market entrants should work with trusted counsel to develop a multi-jurisdictional compliance strategy for satisfying relevant secondhand dealer laws, and to develop comprehensive privacy and data security programs for managing collected data.

Preventing Against Infringement via Proper Authentication

It is a tale as old as resale—recommerce offers numerous environmental and economic advantages for deal seekers, but often at a price: namely, the lack of a guarantee that you are purchasing an authentic product.

The threat of fakes poses challenges for both resellers and brands alike. First, while the first-sale doctrine limits trademark owners from controlling resale of authentic and unaltered trademarked products, the failure to police against counterfeits could result in the dilution or loss of a trademark owner's rights. Counterfeits also pose significant risks for resellers. For example, popular luxury consigner The RealReal took a serious reputational hit due to [Chanel's 2018 trademark infringement and counterfeiting lawsuit](#) accusing The RealReal of selling counterfeit CHANEL handbags, despite promising 100% authenticity. The RealReal also faces unique challenges because it is publicly traded. For example, The RealReal's stock prices plummeted in response to a [2019 CNBC report](#), which uncovered hundreds of consumer complaints of counterfeit and damaged goods. It was also recently subjected to a [shareholder's lawsuit](#) over its allegedly misleading authentication process.

The RealReal's woes demonstrate that behind well-meaning authentication policies there is still a margin for error.

Some brands have entirely written off resale and have opted for litigation (per above), [purchase quotas](#), and even the [destruction of overstock](#). Despite these efforts, though, consumer demand for secondhand products remains. This is perhaps why some brands have [proactively invested in established or up-and-coming recommerce retailers](#)—such as Vestiaire Collective (Kering), Sellpy (H&M), Stadium Goods (LVMH Moët Hennessy Louis Vuitton), and Fashionphile (Neiman Marcus)—or have otherwise partnered with resellers, such as a recent [Madewell x ThredUp pop-up shop](#) in Brooklyn, New York. By partnering with recommerce retailers, brands can participate in the authentication process, which allows them to prevent against brand dilution while still reaping the benefits of participating in the circular economy. Of course, the cache and credibility of brand partnerships surely boosts reseller reputations too.

Brands could also consider establishing their own resale sites, which would separately satisfy consumer demand for fully authenticated secondhand products.

Takeaways

There is consumer demand for eco-friendly, resale goods, and the recommerce market is growing at a rapid pace. However, resellers and brands alike should be careful to consider the various legal issues facing the secondhand space.

While still on the horizon, an expanded enforcement of secondhand dealer laws in e-commerce would come with numerous challenges, but proper planning can help to prepare online resellers for what's ahead. Compliance and privacy counsel can help resellers navigate this challenging and evolving regulatory scheme.

Separately, brands facing reseller infringement have various tools to address counterfeits without involving courts. For example, "informal enforcement" through demand letters, business-to-business discussions, and/or take-down requests can go a long way in addressing infringement. Brand owners should leverage trusted intellectual property counsel to craft an enforcement plan based on the facts of the specific infringement at hand.

Further, as demonstrated by several of the examples above, brands can hedge against infringement by proactively participating in the circular economy. Intellectual property counsel can help brands navigate establishing partnerships, including through licensing agreements, co-branding agreements, merchandising agreements, and other contractual arrangements. By partnering with resellers, fashion and apparel brands can contribute to sustainability while preventing against counterfeits.

Endnote

[1] *Gamestop, Inc. v. Bridgett*, No. 2:17-cv-00719-TLN-KJN, 2017 WL 1929332, at **1, 3 (E.D. Cal. May 10, 2017) (denying GameStop's motion for temporary restraining order against application of California secondhand dealer laws).

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