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“The Wirkin”: An Antitrust and Intellectual Property Intersection.

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What happens when one of the world's most exclusive luxury bags gets a budget-friendly twin at a major retailer? A legal showdown is almost inevitable. In December 2024, the Walmart “Birkin” – a look-alike of Hermès’ infamous Birkin—went viral on TikTok.

The Hermès Birkin retails for between \$10,000 and over \$1 million.¹ Its exclusivity, craftsmanship, and distinct aesthetic have made it a symbol of wealth and status. However, with Walmart offering a similar-looking alternative at a fraction of the price, the situation raises important questions about trade dress protection, design patents, and the broader implications of luxury brand imitations.

For a trade dress claim to succeed, a company must prove that its product design is (1) distinctive and (2) non-functional.² In *Hermès International v. Rothschild*³, Hermès successfully argued that the Birkin bag's design was a protectable trade dress, largely due to its association with the brand and its long-standing reputation. Unlike the *Rothschild* case, Walmart may argue that it does not have the same logo, and branding, which would constitute clear infringement. Courts have been inconsistent in trade dress cases, with some ruling favoring high-end designers and others siding with companies producing lower-cost alternatives.

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¹ Aurélie Vassy, *The Top 6 Most Expensive Hermès Birkin Bags, Sotheby’s* (Dec. 16, 2024), <https://www.sothebys.com/en/articles/the-top-6-most-expensive-hermes-birkin-bags>.

² *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

³ *Hermes Int’l v. Rothschild*, 678 F. Supp. 3d 475 (S.D.N.Y. 2023).

A major concern for Hermès with this infringement is the dilution of their brand. Hermès has been clear, through selling practices⁴ and high-price points, that its Birkin is an exclusive and rare product to obtain. If high-end companies like Hermès cannot protect their signature designs, it could discourage innovation and investment in craftsmanship. Some argue that rampant copying in fashion ultimately devalues creativity and intellectual property rights.

In addition to trade dress, Hermès holds design patents on various elements of the Birkin bag. A design patent protects a product's ornamental, non-functional aspects for 15 years.⁵ If Walmart's bag copies any patented design features, Hermès could have a strong patent infringement claim. Hermès must prove that an "ordinary observer" would find the two bags substantially similar. Walmart would likely be found infringing the design, as evidenced by TikToks and articles referring to their product as "The Wirkin," aka the Walmart Birkin.⁶

Corporations advocating for greater accessibility to luxury items can argue that public policy should favor consumer choice and economic inclusivity. By allowing affordable alternatives to high-end designs, companies enable broader participation in fashion and reduce the monopolization of style by elite brands.⁷ They can contend that rigid intellectual property protections on aesthetic elements stifle competition and innovation, ultimately limiting consumer options. Additionally, increased accessibility to luxury-inspired designs fosters economic opportunities for manufacturers, retailers, and consumers who might not otherwise engage with high-fashion markets. From a policy standpoint, ensuring that style and craftsmanship are available to more people aligns with the principles of fair competition and consumer welfare.

From a consumer perspective, affordable alternatives democratize fashion by making high-end aesthetics accessible to a broader audience. Owning a lookalike Birkin allows many shoppers to participate in luxury fashion without the hefty price tag. In that sense, Walmart's bag could be seen as a positive force in fashion inclusivity.

Fashion inclusivity and intellectual property rights may serve as the starting point for further antitrust lawsuits and, perhaps, a change in the fashion industry.

⁴ Judy Taylor, *How To Buy An Hermès Bag: Everything You Need To Know*, *Madison Avenue Couture* (Nov. 19, 2023), <https://madisonavenuecouture.com/blogs/news/how-to-buy-an-hermes-bag-the-hard-way-and-the-easy-way>.

⁵ 35 U.S.C. § 171.

⁶ *Supra* note 1.

⁷ Nathaniel Meyersohn, *Birkin bags are too hard to buy, shoppers allege in antitrust lawsuit*, CNN (Mar. 21, 2024)

<https://www.cnn.com/2024/03/21/business/hermes-birkin-bags-antitrust/index.html>.