



# **CONFESSIONS OF THE FASHION INDUSTRY: The Piracy Paradox**

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vi  
**Abstract**

This paper examines the role of intellectual property law as an umbrella for protecting the various works falling within the fashion industry such as artistic works, designs, brand names/ logos etc. It is the fashion designers and their ideas combined form the backbone of the industry. Currently, the protection granted to fashion brands, designs and articles varies across the globe. The objective of this study is to analyze the scope and extent of protection available for safeguarding the creativity and innovation of both luxury fashion houses as well as upcoming designers who are attempting to establish themselves in the global market.

‘Labels’ are as valuable to fashion designers as they are to potential consumers. Purchasing a garment or an accessory is most definitely perceived as making an investment and therefore, the item to be purchased must hold high value in the eyes of the customers. Similarly, having their brand recognized and appreciated by the public is the ultimate goal of each designer. Thus, the intricacies of the each design coupled with the time and effort put into creating them automatically makes the designs worthy of protection.

Incorporating evidence from journals, books, reviews, and personal knowledge, this study demonstrates the obstacles the industry needs to overcome adversities including design piracy, counterfeit, design and style theft, among others. These problems are particularly evident from the growth of fast fashion along with the speed with which items are replicated and sold in flea markets at prices much lower than the original retail prices.

This paper proceeds to argue how, on one hand, piracy is paradoxically beneficial to the fashion industry and on the other hand, imitation, as flattering as it may be, causes significant harm to the goodwill and reputation of the luxury designers who devote their time, labour, capital and most importantly, intellect, in creating each design whether it be a handbag, a shoe or even a unique piece of clothing. The study concludes that as different countries continue to embrace the digital age and navigate the complexities of the global creative economy, the indispensable need for intellectual property law remains to be a desideratum for nurturing a vibrant and thriving creative ecosystem.

*Keywords:* fashion, piracy, intellectual property, protection, goodwill.

vii

## Introduction

The term ‘piracy paradox’ is essentially based on the theory which lays down that imitation inspires innovation, ultimately benefiting consumers and the industry as a whole.

Renowned fashion Designer Ralph Lauren disclosed his mantra to reinvention in the year 2011: “*You copy. Forty-five years of copying; that’s why I’m here.*” He spoke, very honestly, about the foundation on which the fashion industry resides. This study is conducted to shed light upon the legality and need of this piracy paradox in order to comprehend how it fuels the fashion industry of the world.

### Objective of the Study

The current paper aims to examine the legal mechanisms circling fashion design protection, to establish the proportion i.e., the lesser the intellectual protection, the better it is for the fashion industry. This conclusion has been reached at considering the creativity levels, rewards for the designers, demand of the general public for trendy clothes and maintaining fair competition in the market of fashion designs.

It further establishes that high level of protection does not suit the seasonal nature of the industry and rather prevents its development in the context of innovation. Hence, the level of protection should be limited.

Additionally, emphasis has been given in studying the fashion design protection laws in India, United States and the European Union. A comparison is made between all the jurisdictions, to establish the difference in protection of fashion designs and the overall effect it has on the industry.

Ironically, despite their functional differences, piracy is experienced alike, by systems in the United States and the European Union. It is also suggested that for Europe, the present fashion design legislations should suffice and certain features of the European model may be imbibed by the United States.

## Chapter Briefs

### Chapter 1

Chapter 1 introduces us to the concepts of Fashion and Intellectual Property (IP). It proceeds to suggest that IP protection can be seen as an asset to the fashion industry, especially, since the industry comprises of highly reputable designers and they are the masterminds behind the creativity, on which the industry runs.

The chapter then builds up the base for IP in the fashion industry. The designers and their ideas combined are the backbone of the fashion industry, insinuating that protection is necessary to ensure stability and functioning of the fashion industry. The different types of threats such as knockoffs, counterfeits and fast fashion have also been discussed.

As the chapter proceeds, it familiarizes us with the forms of IP protection available for the fashion designs but continues to justify the prevailing limited protection. This chapter notes that, some degree of piracy is acceptable by the industry and forms the grounds for its success. The relevant issues discussed highlight the adversities associated with providing protection to fashion designs and concludes that, because Low IP recognizes the seasonal nature of the industry and the customer demand to be 'in fashion', it is regarded as the only acceptable solution.

### Chapter 2

Chapter 2 provides an insight into the theory known as 'Piracy Paradox'. While there are few legal commentators who criticize the current functioning of law and recognize the status of fashion as being an innovative field, capable of receiving protection against pirates, there are others who consider that piracy aids in accelerating, the process of creation and innovation.

The chapter further provides information about the occurrence of various forms of piracy and then, justifies why piracy should materialize. By talking about, the 'Fashion Originators Guild', the theory of anchoring, the competitive advantages created, and the consumer is king ideology, the chapter presumes the industry's acceptability of piracy. It maintains that piracy should continue to exist, as it is paradoxically beneficial.

### Chapter 3

Chapter 3 provides us with an overview of the legislations that have been governing and protecting fashion designs in India. It discusses the introduction of laws which were deemed necessary to provide adequate protection to the works related to the fashion industry.

The chapter further includes an analysis of various landmark judgments revolving around the fashion industry in the context of intellectual property rights, highlighting the growth and importance of protecting designs created by innovative and renowned fashion designers in India. As the chapter concludes, a clear transition of the legislations can be seen dating back to the very inception of intellectual property laws in the country and its evolution over the decades.

#### Chapter 4

This chapter focuses on the absence of adequate laws, which protect fashion designs in the US. It scrutinizes the different Acts and Design Piracy Bills that were proposed, by weighing the pros and cons of Innovative Design Prohibition and Privacy Prevention Act.

The failure of The Copyright Act, to include fashion designs due to the narrow separability test, the reliance on the Lanham Act, the primary governing statute in the US for trademarks and trade dress protection along with the time-consuming patent-protection procedure, is also talked about. The chapter ends on a suggestion that the US is in dire need of a revised model, to provide suitable fashion design protection, while also proposing US could do so, by drawing inspiration from the EU regime.

#### Chapter 5

The final chapter centers around the European Fashion Industry, which is driven by fast paced innovation, embodied in the creation of seasonal collections of new fashion designs. The chapter analyzes the changes that, have helped harmonize the law between the Member States. It shed lights on the EU Designs Directive along with the Community Design Regulation and the difference between two types of community design rights: registered and unregistered

designs. Designers are given multiple advantages as; EU specifically provides a cumulation of Copyright and design laws to relieve the designer of the burden of having to choose one over the other.

The chapter draws a comparison with the US and advises the changes that can be made in the US, by incorporating the features of EU protection. The US protection is meagre in comparison to EU's multilayered system of protection. In conclusion, the chapter affirms that, protection should continue to be limited, as trends come and go.

## **CHAPTER 1**

### **LAW IN FASHION**

#### **1.1 Introduction to Fashion and the Industry**

Fashion is recognized as a socio-cultural practice which is linked with beauty, style, personality, and glamour in a positive way. Likewise, fashion may be used as an indicator which aids to examine a person's lifestyle preferences and general outlook towards both themselves and their lives.

As rightly said by Fashion Designer Giorgio Armani, "Individual style is the correct balance of knowing who you are, what works for you, and how to develop your own personality."<sup>1</sup> Being fashionable or trendy has become synonymous with the concept of art and reflects beauty, grace and a positive attitude. Interestingly,

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<sup>1</sup> <<https://quotefancy.com/quote/1072326/Giorgio-Armani-Individual-style-is-the-correct-balance-of-knowing-who-you-are-what-works>>

fashion can be seen as transient and evolutionary in nature making it open to interpretation depending on the year and period of time.<sup>2</sup>

The Fashion Industry is a growing industry, currently at a market value of 1.5 trillion dollars in the United States and around 63.6 billion Euros in Europe, estimating to about 46.3 billion Pounds in the United Kingdom itself.<sup>3</sup> The demand for fashion rises consistently with the consumers demand for fashion apparel, throughout the year.

The industry is segregated into seven different levels, based on certain characteristics: composition, quality, accessibility, and targeted market. The said structure is divided into Haute Couture, Luxury Fashion, Bridged Brands, Diffusion Lines, High Street Fashion, Fast Fashion and Economy.<sup>4</sup>

The highest and the most expensive in the hierarchy is Haute Couture, comprising of the high-end or renowned designers. The level of originality in Haute Couture is the highest and the prices are exorbitant, which explains the limit of the number of buyers to those who can afford it. The lowest in the chain are Fast Fashion and Economy, comprising of brand labels showcasing latest trends at affordable prices.

## 1.2 The Industrial Dilemma

The glamorized fashion industry has been facing multiple threats, varying from counterfeiting of goods, production of knockoffs, copying, imitation and piracy of designs, circulation of 'fast fashion', among others, leading to the origination of the concept of 'piracy paradox'.

Piracy refers to the unauthorized and illegal reproductions, or distribution of materials protected by IP law.<sup>5</sup> The two main subcategories of piracy are: counterfeits and knockoffs. A counterfeited item is an unlawfully forged, copied, or imitated item, without authorization and with the intent to deceive or defraud, by presenting an item as genuine.<sup>6</sup>

On the other hand, a knockoff is a copy of another's product, usually for sale at a substantially lower price than the original, in the absence of a license.<sup>7</sup> Knockoffs as opposed to counterfeited goods do not display the logo or mark of the originating company on the item.

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<sup>2</sup> <<https://www.tutorialspoint.com/fashion-definition-and-meaning>> last accessed 17 Jan 2024

<sup>3</sup> Liam O'Connell, Global Apparel Market Statistics & Facts, available at <<https://www.statista.com/topics/5091/apparel-market-worldwide/>> last accessed 21 Jan 2024

<sup>4</sup> Alicia Amy Jones, The Market Levels of Fashion, (17 Oct 2017) <<https://aliciaamyjones.co.uk/the-market-levels-of-fashion>>

<sup>5</sup> Black's law dictionary (9<sup>th</sup> ed, 2009)

<sup>6</sup> Ibid, at 402

<sup>7</sup> Ibid

Louis Vuitton goods are often counterfeited and sold in abundance, by multiple number of vendors engaged in phony sales. For instance, *Louis Vuitton Malletier v Eisenhauer Road Flea Market Inc.*<sup>8</sup> observed the unauthorized selling of Louis Vuitton merchandise under the landlord's nose, on his premises.

Additionally, the imminent transformation in the initial stage of manufacturing is evident from the development in automation as machines powered by artificial intelligence are poised to take on labour-intensive tasks such as sewing as well as finishing touches.<sup>9</sup> This shift will, therefore, gradually eliminate the application of human intellect.

### 1.3 Understanding the Fast Fashion Industry

“Fast fashion plays into the idea that outfit repeating is a fashion faux pas and that if you want to stay relevant, you have to sport the latest looks as they happen.”<sup>10</sup>

As the name suggests, the fast fashion industry comprises of small designers, engaged in fast production of the pre-conceived creations of renowned designers. The fast fashion articles reach the markets well before the original designs sees the light of the day. Designs are easily the target of fast fashion industry, as they are faster and easier to replicate, as opposed to a trademark. The circulation of fast fashion increases accessibility to and affordability of consumers.

The fast fashion designers are practically creating nothing but, reap the benefits of the hard work invested by the original creator<sup>11</sup>, while the original designers fall prey to unfair competition. Therefore, from the economic aspect, to encourage creativity and innovation, the designs must be provided protection.

As compared to the other traditional creations, the level of creativity in a fashion design is relatively lower as, cutting the length of a skirt, adding sleeves to the shirt, or using different patterns for the same shirt can be treated as a new creation of fashion design.<sup>12</sup> Thus, excessive protection will further hamper the creativity level.<sup>13</sup> Although, piracy may weaken individual designers, it eventually helps to strengthen the industry and drive its evolution.<sup>14</sup> This will be discussed in the next chapter, in detail.

### 1.4 Evolution of the Fashion Industry

Throughout history, fashion has held noteworthy importance in the Western world. From the Dark Ages and the medieval period to the Tudor and Stuart times, as well as the Renaissance era, and the Victorian era, pivotal periods in British history<sup>15</sup> have also played crucial roles in shaping the global fashion trends. Both Britain

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<sup>8</sup> SA 11-CV-00124-HLH (W.D. Tex. Jan 2012)

<sup>9</sup> <<https://3dlook.ai/content-hub/fashion-industry-challenges/>> last accessed 30 Jan 2024

<sup>10</sup> <<https://goodonyou.eco/what-is-fast-fashion/>> last accessed 30 Jan 2024

<sup>11</sup> Xinbo Li, 'IP Protection of Fashion Design: To Be or Not to Be, That is the Question', (2012) 3 IP Theory

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> <<https://sewguide.com/evolution-of-history-of-fashion/>> last accessed 3 February 2024

and other European nations have exerted influence on world fashion, with their distinctive dressing styles disseminated to a global audience during periods of colonial rule, thereby gaining popularity worldwide.

The elite and highly globalized fashion industry has, over the decades, experienced major developments since Charles Frederick Worth who, beginning in 1858, was the very first designer to have his label sewn into the garments he created. In the 1900's, corsets were the popular item of clothing for making women's appearance the 'ideal shape' since the tightly laced waist and chest made the waist appear tiny and the hips were forced back.<sup>16</sup> However, as the 20th century commenced, a preference for more practical attire emerged among numerous women, alongside the continued popularity of the elaborate dressing styles from earlier periods.<sup>17</sup>

Moving on to the period of 1920's, also known as the golden era of French fashion. The corset was essentially replaced by a straight silhouette. Notable designers of that era included Jean Patou, Jeanne Lavie and the ever iconic Coco Chanel, who introduced and popularised her 'little black dress or LBD'.<sup>18</sup>

The Wall Street crash of 1929 majorly impacted the fashion scene alongside the frivolous dressing which made way for a conservative style of dressing.<sup>19</sup> Mass manufacturing began gaining popularity along with ready to wear clothes. The fashion scene shifted from the fashion capital i.e., Paris to London and New York.

Transitioning into practical and more comfortable clothing, James Dean, American movie star, popularized blue jeans in 1955 through the movie *Rebel Without a Cause*.<sup>20</sup> A combination of T-shirts, Jeans and leather jackets as worn by him became hugely popular. The 60's were all the rage when speaking in the context of unisex clothes. The A-line dresses without much body definition began winning over the public and the period from the 1970's to 90's acknowledged jeans as an essential in every wardrobe.

This brings us to the current century which recognises fast fashion, online websites, tech-savvy consumers, ethical concerns and sustainability, emerging trends, economic uncertainty etc. as the watchwords. These factors are the drivers of fashion forecasts of this period. Where, at one point of time, people wanted to look alike, today, everybody desires to be unique. Fashion, as studied previously, will continue evolving – from being a response to cultural changes to being a reflection of a person's individuality. Social 'conformation' is no more the idea behind fashion.

### 1.5 Types of Protection Offered

Intellectual property is a monopoly right, which allows its owner to exclusively enjoy the rights and benefits over the property.<sup>21</sup> The forms of IP Protection available are Copyrights, trademarks, and patents. Copyright protection is available for those objects which are deemed to be on the artistic side of the spectrum while,

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<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Xinbo Li, 'IP Protection of Fashion Design: To Be or Not to Be, That is the Question', (2012) 3 IP Theory

Patent protection covers the utilitarian side of the spectrum.<sup>22</sup> Copyright is preferred over Patent protection, for reasons that are two-fold in nature i.e., firstly, to receive the latter, it takes roughly two years and by then, newer trends will already be available in the market and secondly, the duration of protection provided for Copyright is comparatively longer.

The importance of trademark protection should not be underestimated as a registered trademark protects the brand/ label, name and/or the logo associated with it. This protection is essential to differentiate a particular designer, by identifying the source of the design and to prevent confusion in the minds of the consumers. For instance, the Gucci trademark on a bag indicates its source to the consumer.

## 1.6 Protection Justified

### 1.6.1 Innovation

The life cycle of an element in fashion, witnesses two essential stages: Stage one involves a novel artistic creation, for the purpose of illustration, upon the introduction of which, a trend is set.<sup>23</sup> The designers have to brainstorm new styles, fabrics, and techniques to create new designs and consequently trends to compete with other designers. The core ingredient of the creative designs is de facto, the designers themselves.

The designs are a symbolic representation of the designer's creative talent of turning the fabric into fashion, by using their profound knowledge of fashion and the art world, taking into consideration their prejudged notions of the latest trends. Maintaining the integrity of a design, while making adjustments to suit the client's body and their personal preference, is a delicate balancing act.<sup>24</sup> Since the fashion industry is highly focused on the creative elements of the designs and the various techniques employed to make beautiful garments from scrapes, intellectual property can be seen as an asset required to protect such creativity and innovation.

Stage two concerns the circulation and popularization of the trend in the market, resulting in imitation by the competitors. This cycle backs to the first step, demanding innovation. The vicious cycle may be appreciated by the fashion industry as, it fosters innovation, but in reality, it comes at the cost of the designers.

### 1.6.2 Social View

*'Clothing and fashion capture identities and beliefs, promotes and restricts freedom, adorn and protects the privacy and sanctity of the human body'*.<sup>25</sup> Fashion often results in bold statements being written all over the newspapers, attracting greater attention. For instance, in *Yves Saint Laurent v Louis Dreyfus*<sup>26</sup> a less expensive copy of 'Le Smoking', the very first tuxedo created for women by YSL's designer Stefano Pilati, an iconic demonstration of feminism and women empowerment, with distinctive qualities capable of receiving

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<sup>22</sup> Ibid

<sup>23</sup> Pranjali Shirwaikar, 'Fashion Copying and Design of the Law', (2009) 14 Journal of IPR

<sup>24</sup> Claire B Shaeffer, *Couture Sewing Techniques*, The Taunton Press Inc, Newtown, (2011)

<sup>25</sup> Mark Brewer, 'Fashion Law: More than Wigs, Gowns and Intellectual Property', (2017) 54 San Diego Law Review

<sup>26</sup> *Societe Yves Saint Laurent Couture S.A. et al v Societe Louis Dreyfus Retail Management S.A et al*, Judgement of the tribunal de Commerce de Paris, E.C.C 512 (1994)



protection, was copied, and found in a Ralph Lauren store. The IP law slipped in to protect the societies views and promote the powerful message of the tuxedo: ‘*If a man can wear it, so can a woman*’.<sup>27</sup>

Law thus promotes fashion with respect to its impact, on fundamental and human rights, psychology, research and development, health, and governance.<sup>28</sup> In the words of Judge D. Thompson, ‘the law is a matter of fashion as much as a man’s hat or a women’s bonnet’.<sup>29</sup> Just as a little black dress epitomizes fashion<sup>30</sup>, IP is seen as the darling of fashion law because it protects the main advantage in front of the competitors i.e., its originality.<sup>31</sup>

### 1.6.3 Reputation

Reputation is the most significant and valuable resource of the fashion houses. It is jeopardized, with fast fashion goods being produced and circulated. Designers pride themselves over their creations and the industry strives on the reputation of designers, to contribute towards the world trade system. One poor quality of material produced by the fast fashion selling vendors and the entire reputation of the industry acquired over the years could crumble down. *Calvin Klein Trademark Trust and Calvin Klein, Inc. v Linda Wachner, Warnaco Group, Inc. et al*<sup>32</sup> was one such case where, an improper distribution of Calvin Klein apparel harmed the company’s reputation, and the deception broke the consumer’s trust in the brand.

### 1.7 Prevailing Protection Level

The next step would be to consider the prevailing protection levels. It is often suggested that fashion articles have utilitarian functions, and their useful nature deprives them of protection under ‘artistic expression’ as, the intellectual property law requires the objects to either be non-functional or artistic.<sup>33</sup> The traditional approach followed across the globe, on the granting of protections, is the presumption that, such protections cover only a single and discrete market product.<sup>34</sup>

The dilemma occurs here as, rather than looking at IP protection on a subjective, case by case basis catering to the different levels and aspects of protection a designer is seeking, the IP law blindly provides a congressional scheme of ‘*one size fits all transactions*’.<sup>35</sup> Like the level of protection, a Christian Louboutin’s red sole shoes, should hold owing to it being a classic, may not be needed for a seasonal trend like the 2013 seasonal Chanel handbag. Every case demands for its own kind of protection.

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<sup>27</sup> Tamsin Blanchard, ‘Le Smoking’ <<https://www.independent.co.uk/arts-entertainment/le-smoking-1330731.html>> accessed 22 March 2024

<sup>28</sup> Xinbo (n 9)

<sup>29</sup> Seymour D. Thompson, *Fashion in Law*, (1899) 11 Green Bag 487

<sup>30</sup> Fred Davis, *Fashion, Culture and Identity*, The University of Chicago Press (1992)

<sup>31</sup> Alexandra Manfredi, ‘Haute Copyright: Tailoring Copyright Protection to High Profile Fashion Designs’, (2012) Cardozo Journal of Intellectual & Competition Law

<sup>32</sup> 129 F. Supp 2d 248 (S.D.N.Y 2001)

<sup>33</sup> Susan Scafidi, ‘Intellectual Property and Fashion Design’, in *Intellectual Property and Information Wealth* 115 (Peter K Yu ed 2007)

<sup>34</sup> Robert Merges, *Patent Law and Policy: Cases and Materials* (7<sup>th</sup> ed, 2007)

<sup>35</sup> Robert Merges, ‘Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations’, 84 (1996) California Law Review 1293-1363

## 1.8 Acceptable Solution: Low IP Protection

Copying and unauthorized appropriation in the fashion industry, although criticized continues to be accepted on a large scale, on the grounds of 'homage', 'dedication' and 'inspiration' rather than classifying such actions as infringement and taking appropriate legal action.<sup>36</sup>

### 1.8.1 Seasonal nature of the Industry

The industry is characterized by several marketing factors, such as low predictability, high impulse purchase, shorter life cycle and high volatility of market demand.<sup>37</sup> The fashion industry is fast moving as, trends are seasonal and this in turn, motivates the fashion designers to be fast moving, in their thinking, creation and execution. The seasonal nature makes it tougher for the designers to keep protecting their creations. By the time the designs receive protection, newer trends would be available in the market and eventually, the protection may not be required as, the product would have lost its newness and would be labelled as 'last season'. No individual would purchase last season's trends if they want to be 'in fashion'. As a result, constant protection is an insufficient and time-consuming method.

### 1.8.2 Inspiration Accelerates

The fashion designs are drawn from pre-existing vocabulary of color, pattern, form, and shape, carefully combined using technical and artistic skills, that are unmistakably original in the overall design but, the underlying issue is that this pre-existing vocabulary also originates from, inspiration and influence. It can be said that the small designers draw inspiration from popular designers to follow their footsteps. It is even plausible that, the high-end designers are inspired themselves, as it is often noticed the industry re-introduces styles.

The line between inspiration and innovation is often blurry causing confusion between originality and inspiration. After all, Adidas<sup>38</sup> also lost its trademark of stripes, because stripes could neither be qualified as distinctive, nor original, leading to confusion in the minds of the customers, with regard to the products sold by Adidas and those of their competitors.

The procedure to create apparel is elementary in theory: the designer adds their touch to the store-bought fabric, using familiar techniques and common patterns. For instance, prints such as florals, polka dots, checks, and stripes, items such as lace, thread, stickers and broches and fabrics such as leather, linen, cotton, and hosiery are not fashion as, they continue to be sold in the market, since the start of time.

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<sup>36</sup> Ximbo (n 9)

<sup>37</sup> Vertica Bharadwaj and Ann Fairhurst, 'Fast Fashion: Response to Changes in the Fashion industry', (2010) The International Review of Retail, Distribution and Consumer Research

<sup>38</sup> *AG v European Union Intellectual Property Office*, Case T-307/17

It is the distinctive artistic element that, the designer attaches to the fabric, that transforms ordinary fabric, into an original piece of work. The pattern of square checks is generic but, with one addition it can be transformed into the logo, registered under Burberry as 'Burberry plaid'. Since the groundwork is identical to all designers in the field, piracy would help stir up the competition.

### ***1.8.3 Imitation inspires innovation***

In the words of Coco Chanel '*Imitation is the highest form of flattery*'. It takes years for an individual to carve a niche and become a famous designer, in addition to the huge sum invested by them to buy fabrics, market, and advertise the product. The copying and imitation enable them to get an easy way in, in the industry. This further calls for innovation, on part of the big designers.<sup>39</sup> The latter then creates original designs to remove the nexus or connection between their products and the smaller designers. This is defined as the piracy paradox.

Piracy can be seen as an economic advantage in one sense to provide a wider choice in the market for the consumers and assist in the acceleration of innovation. The top, expensive, high-end, and innovative designers produce a garment which the small, inexpensive, and less resourceful designers imitate. Since the fashion industry is consumer driven, consumers are concerned with possessing the latest trends, by prioritizing a free economy and availability to the masses, as opposed to, heavy protection and artistic value of fashion.<sup>40</sup>

### ***1.8.4 Affordability***

An argument in favor of the fast fashion production process would be that the process increases accessibility to the latest couture at budget-friendly prices. It is agreed that, while the upper class of the society is able to afford couture from the big designers, lower classes are unable to purchase them.<sup>41</sup> This calls for a requirement on their end to buy cheap knockoffs, to be at par with the upper section of social hierarchy, as far as trends are concerned. The lower classes, thus, become the target of the knockoff and fast-fashion industries. The knockoff industry seems to flourish as the lower-class members are comparatively higher in number. In the eyes of the shoppers, knockoffs are a blessing to the wallets.

## **1.9 Conclusion**

In conclusion, it would be safe to say that lack of heavy protection, has not hampered the industry in any sense. This suggests that the prevailing protection should be limited to the socially accepted originality and reputation. Recognizing the seasonal nature of the industry, where fashion dies the minute it reaches the market, fashion designers themselves prefer low IP protection.

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<sup>39</sup> Nicole Giambarrese, 'The Look for Less: A Survey of Intellectual Property Protections the Fashion Industry' (2012) Tauro Law Review

<sup>40</sup> Kal Raustiala & Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', (2006) 92 Virginia Law Review

<sup>41</sup> Alistandra Burack, 'Is Fashion an Art Form That Should Be Protected or Merely a Constantly Changing Media Encouraging of Popular Trends?' (2010) 17 VILL. Sports & ENT, LJ.

Although, the state of flux of fashion design protection laws is acceptable, but nonetheless, IP protection should be offered, taking each case as a different one, by adopting a subjective approach. There are some designs termed as ‘The Classics’, which are evergreen. They never go out of fashion, such as the Hermes ‘Berkin Bag’, ‘The Chanel Suit’ designed by Coco Chanel and Christian Louboutin’s ‘Red Sole Shoes’<sup>42</sup>. For these exceptional creations, higher protection could be provided. However, the protection in general for fashion articles, should remain unchanged, from the consumer aspects of affordability and accessibility. Heavy protection is not ideal for all fashion articles, due to the time-consuming registration procedure, as well as the additional costs associated with filing for protection each time. Moreover, if heavy protection is afforded, it could hinder creative development, in the fashion industry.

## CHAPTER 2

### THE PIRACY PARADOX

#### 2.1 Introduction

*‘The law reflects a now archaic view of the fashion world, which is that imitation and copying one another drives innovation, ultimately benefiting consumers and the industry as a whole’.*<sup>43</sup> The industry is in danger, as it takes only one person to photograph an iconic creation at a fashion show or simply showcase it in a magazine and transmit it to the factories overseas within minutes, allowing the fast fashion industry to create replicas before the original prototype sees the light of the day. However, this danger is subjective, and the aim of the chapter is to accentuate the veracity about how the industry, dodges the challenges it faces and continues to flourish. The piracy paradox theory explains the final stage of the procedure of the circulation of fashion, where the trends are dumped as soon as they reach the market.

Copying is essentially a very broad term, which covers anything from following a trend, to outright design plagiarism.<sup>44</sup> This was famously put by Miuccia Prada himself: *‘We let the others copy us. And when they do, we drop it.’*<sup>45</sup> The designers themselves believe that once the fiber is converted into fabric and spreads around, it gradually goes to its doom.<sup>46</sup> While on one hand, design plagiarism is completely forbidden, piracy on the other hand, is acceptable by the industry.

The piracy paradox refers to the perception that copying enables the goods, which have acquired a status in the market, to become more popular and common in order to diminish the value of the goods, so that the trend setters are forced to move onto the next trend immediately, thereby, demanding the designers to be fast moving in producing a newer trend.

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<sup>42</sup> IP and Business: Intellectual Property in the Fashion Industry, WIPO Magazine, (May 2005) available at <[https://www.wipo.int/wipo\\_magazine/en/2005/03/article\\_0009.html](https://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html)>

<sup>43</sup> Mills, (n 1)

<sup>44</sup> Eleanor Rockett, ‘Trashion: An Analysis of Intellectual Property Protection For The Fast Fashion Industry’, (2019) Plymouth Law and Criminal Justice Review

<sup>45</sup> G Simmel, ‘Fashion,’ (1904) 10 International Quarterly, 130, 547

<sup>46</sup> Ibid

## 2.2 Forms of Piracy

Designers have been the victims of piracy by unscrupulous competitors and the competitors apply tactics that are appallingly flagrant.<sup>47</sup> Pirates continue to produce pirated designs, without fearing any liability or accountability. Instead, they are awarded attribution, which boosts their confidence to continue producing knockoffs and thereby increase revenue. There are multiple ways in which pirates undermine designers and a few have been discussed here.

### 2.2.1 Design and Style Piracy

Style piracy would refer to copying the general characteristics, found in the minor details of a fashion article, such as its length or shape, whereas design piracy would include basically everything that makes the article what it is, from fabric to the colors used.<sup>48</sup>

The fashion industry is more often ignored than appreciated, creating a safer avenue for design piracy.<sup>49</sup> Such piracy takes place through designers, who attend fashion shows, with the intent to sketch and copy the entire design of the outfit showcased on the runway. The design reaches their factories within seconds and the garment is created before the runway design is sold in the target market.

A salient example would be, A.B.S Clothing<sup>50</sup>, a fashion design firm whose sole business activity is centered around copying other designers, by sketching dresses delineated on television and re-creating the outfit, with inferior quality fabric, in order to sell them for cheap. Another case would be that of *Johnny Carson*<sup>51</sup>, where the defendant company purchased a suit designed by the claimant company, only to tear it apart, copy it using cheaper quality fabric and eventually try to return the sewed-copied version back to the claimant.

### 2.2.2 Counterfeiting

While fakes, copies, knockoffs, copycats are the synonyms of counterfeits, they are slightly different in their meanings.<sup>52</sup> Counterfeited goods comprise of both deceptive and non-deceptive counterfeiting. The former arises when the consumer is made to assume that the product purchased by them is a product from a genuine brand but is actually a fake. The latter exists when the consumers recognize that the product is a hoax by virtue of its quality, location of the store they are buying from and price of good.<sup>53</sup>

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<sup>47</sup> Peter K Schalestock, 'Forms of Redress for Design Piracy: How Victims Can Use Existing Copyright Law', (1996) University of Washington

<sup>48</sup> Rudolf Callmann, Style, and Design Piracy, (1940) 22 Journal of Patent Office Society

<sup>49</sup> Matthew Miller, 'Piracy in our Backyard: A Comparative Analysis of the Implications of Fashion Copying in the US for the International Copyright Community', (2008) 2 Journal of International Media and Entertainment Law

<sup>50</sup> Samantha L. Hetherington, 'Fashion Runways Are No Longer the Public Domain: Applying the common Law Right of Publicity to Haute Couture Fashion Design', (2001) 24 Hastings Commerce & Entertainment Law Journal 43,44

<sup>51</sup> *Johny Carson Inc v Zeeman Manufacturing Co.* C75-544A (N.D Ga. 4 Nov 1978)

<sup>52</sup> R Wilke and J.L Zaichkowsky, 'Brand imitation and its effects on Innovations, Competition and Brand Equity', (1999) Business Horizons

<sup>53</sup> G.M Grossman and C. Shapiro, 'Foreign counterfeiting of Status Goods', (1988) The Quarterly Journal of Economics, at 103

Often the consumers knowingly purchase the counterfeited good, by prioritizing its available price and the value it offers, as opposed to considering the possibility of it being a fake. In *Walmart v Samara Brothers*<sup>54</sup>, cheap knockoffs of US's most known children's clothing retailers were produced by Walmart, using the photographs of the latest collection introduced by Samara Brothers. While Walmart's gross profits exceeded to \$1.15 million, it was an infringement of IP law. *Isabel Marant v Mango France*,<sup>55</sup> is another case of counterfeiting, where Mango created a knockoff version of the Isabel Marant boots, that received great popularity in 2013.

It is not surprising 'Primark', a retailer chain, is famed for creating knockoff versions of high-end designer shoes and clothes to be up to date with the ongoing trends. Multiple cases have been filed against them for counterfeiting, but nevertheless, they continue to exist mainly due to consumer demand.

### 2.2.3 Style or Trend theft

Style theft, a common form of piracy, is a subset of knockoffs or counterfeits, and it stems from the desire to be 'in fashion'. Manufacturers want to embrace change and keep pace with the trends, compete with other manufacturers and fulfil the market needs of consumers.

Styles refer to an economic downturn<sup>56</sup> and a style sported by a celebrity, or a public figure, is appreciated to the extent that, it may inspire a trend.<sup>57</sup> An ivory coloured gown adorned with Swarovski crystals was created by an emerging designer Jason Wu, with no intentions of ever recreating it for sale purposes.<sup>58</sup> Fast fashion designers instantly copied the dress with the belief that, since the First Lady Michelle Obama wore it, many women would be inspired.

The style pants which get wider as we reach the legs, popularly known as 'bell bottoms' initially gained popularity in the 60's and 70's. Since they were a sensation, multiple designers till date try to bring them back in fashion. Some of the trends for spring this year as per the Harper Bazaars<sup>59</sup> latest issue includes, sheer, earth tones, metallics and feathery dresses. Unsurprisingly, they were already made familiar in the 60's. It can be said, the designers bring back styles, after every few years. While the fashion industry rides on innovation, it is merely an evolution of the previous styles.

## 2.3 Impact of Piracy

There is an ongoing debate about the impact of piracy. While the whole idea behind piracy in other industries is illegal, its positive impact on the fashion industry is exemplary.

<sup>54</sup> *Wal-Mart Stores Inc v Samara Brothers Inc*, 529 U.S 205 Supreme Court (2000)

<sup>55</sup> *Judgement of Tribunal de Grande Instance de Paris in the case Isabel Marant, IM Production et Isabel Marant v Mango France, Punto FA et Mango* Online n 2013/16593 (2016)

<sup>56</sup> David Colman, 'When Fashion Goes for Broke', N.Y. Times (Sept 3, 2008)

<sup>57</sup> Teri Agins, 'Over-40 Finds a Muse: Designers for the Middle-Aged Pin Hopes on Mrs Obama', (2008) Wall Street Journal.

<sup>58</sup> Cheryl Lu-Lien Tan, 'Jason Wu's 'Dream-Like' Vision for Michelle Obama', Wall St. J, (Jan 21 2009)

<<https://blogs.wsj.com/runway/2009/01/21/jason-wus-dream-like-vision-for-michelle-obama/>>

<sup>59</sup> Kerry Pieri and Lauren A Fisher, '12 Standout Trends That's Ruled the Spring Summer 2020 Runways', (8 Jan 2020)

The piracy paradox focuses on public interest, instead of paying attention to private rights for fashion design protection, it prioritizes strengthening the industry to drive its evolution.<sup>60</sup> Individual designers may get discouraged, but weighing the pros and cons, the betterment of the industry as a whole is the utmost priority.

### 2.3.1 Opponents of Piracy

The opponents highlight the antecedent fact that, innovation and inventions are prolific and beget life in the industry. In the absence of adequate protection, fast fashion houses and knockoff creators free ride on the hard work and efforts devoted by the true creator of the designs. While the big designers may not benefit from the protection as much, the small, upcoming designers who are thrown under the bus by the copyists, will benefit immensely in developing their reputation. IP protection would ensure that the designers are not discouraged from investing their time and money in the creation of new designs.

### 2.3.2 Pro-Piracy

According to the adversaries of IP protection, Kal Raustiala and Christopher Springman, the idea that the fashion industry has low IP protection is quintessential for its functioning.<sup>61</sup> They believe that due to the lack of protection, the designers' creativity is accelerated, and the cycle of innovation is driven faster than it would have been, had heavy protection been allotted to fashion designs.<sup>62</sup> The professors emphasize the importance of piracy, in the life of a fashion design. The trending cycle in the fashion industry calls for speedy diffusion and creation as the fashion designs become obsolete way before they are thoroughly acknowledged.

#### ▪ Fashion Originators Guild

Among other guilds in the US, The Fashion Originators Guild of America was created, to safeguard the member-designers from the freeriding copyists. The designer-members signed an agreement which overlooked their dealings with retailers.<sup>63</sup> Those who dealt in original creations were encouraged and those who engaged in non-complaint activities were faced with penalties in the form of red carding i.e. boycotting.<sup>64</sup>

The Judgment of *Fashion Originators Guild of America v FTC*<sup>65</sup> favors the concept of piracy paradox as the Supreme Court held that, while their design piracy policy was effective, it led to unfair competition, by promoting the creation of a monopoly and hence violated the sections 2&3 respectively of the Sherman and Clayton Acts.<sup>66</sup> Similarly, in *Millinery Creators Guild v FTC*<sup>67</sup>, the policy to prevent style piracy of women hat designs, was also considered an unfair method of competition and violated section 5 of the Federal Trade Commission's Act.<sup>68</sup>

<sup>60</sup> Kal Raustiala & Christopher Sprigman, 'The Piracy Paradox Revisited', (2009) 61 Stanford Law Review 1201

<sup>61</sup> Raustiala & Sprigman, (n 31)

<sup>62</sup> Ibid

<sup>63</sup> Robert Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations', (1996) 84 California Law Review, at 1293,1363

<sup>64</sup> Safia Nurbhani, 'Style Piracy Revised', (2002) 10 Journal of Law & Policy at 489,495

<sup>65</sup> *Fashion Originators Guild of America v FTC* 312 U.S 457 (1941)

<sup>66</sup> The Sherman Antitrust Act 1890, The Clayton Antitrust Act 1914

<sup>67</sup> *Millinery Creators Guild Inc v FTC* 312 U.S 469 (1941)

<sup>68</sup> 1914, 2006

### ▪ **Enhancing Competitiveness**

Around the 1890's US witnessed copying become a widespread practice, within the fashion industry and style was considered the very essence of the industry.<sup>69</sup> This led to the creation of a market with its own set of laws.<sup>70</sup> Women's clothing was rapidly copied, resulting in quick availability of copied designs in the market, at significantly lower prices.<sup>71</sup> Manufactures came up with a new strategy, to produce new styles as soon as their styles were copied, to be a step ahead of their competitors.<sup>72</sup>

In Nystrom's words '*an increase interest in fashion meant the continuous practice of one of the most outstanding evils of the apparel industry, style piracy and copying of the successful styles designed by other organizations.*'<sup>73</sup> While this was categorized as an evil by the US industries, engaging in competition allowed designers to apply knowledge faster than usual and explore unfamiliar designs.

The industry being a competitive industry, strives on innovation for its success and by competitive nature, we automatically assume the production of newer trends once the previous ones, are copied. That's how competition works, and it has always been encouraged, in every field. It is only fair that such competition should be encouraged in the fashion industry as well.

### ▪ **Anchoring**

As explained by Raustiala and Springman<sup>74</sup>, copying contributes in the process of defining trends. It is the process by which the fashion industry enables the consumers to identify the trends circulating in the market, to know which styles are 'in season' and which are 'out of season'.<sup>75</sup> Trends are not chosen, but evolve with time, through copying, referencing, trying, and testing the designs and then observing the reactions of the public and the competitors to such designs.

Designers follow other designer's footsteps and copying allows the designs to be coherent, thereby maintaining trends. Magazines, fashion journals and articles provide fashion intel, which assists the consumers in deciding their next purchase.

### ▪ **Consumer Response and Public Demand**

The pirates are serving a bigger purpose: public demand of consumers. This benefit is linked with anchoring as it enables manufacturers to make available the so identified trend the targeted market is interested in, at budget-friendly prices.

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<sup>69</sup> Sara B Marcketti and Jean L Parsons, 'Design Piracy and Self-Regulation: The Fashion Originators' Guild of America 1992-1941', (2006) Clothing and Textiles Journal

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Bertha J Richardson, 'The Woman Who Spends: A Study of her Economic Function' (Boston, MA: Thomas Todd Co 1916)

<sup>73</sup> Paul Nystrom, '*Economics of Fashion*', The Ronald Press Co. N.Y (1928) at 425

<sup>74</sup> Raustiala & Sprigman (n 31)

<sup>75</sup> Ibid



Allen Schwartz said: *if you can put a well-designed pant in a store for \$190 and another in a store not more than 20 feet away designed by Donna Karen for \$450, which would entice the average consumer more?*<sup>76</sup> The demand for fashion is inevitable. By offering a reasonable price, the copyists make the good all the more attractive. This stimulates the consumers to embody the latest trends without paying the exorbitant price, charged by the Haute Couture designers.

## 2.4 Should Piracy continue to exist?

The chapter highlights that, albeit piracy comes at the detriment of small designers, it benefits the whole industry and permits consumers to identify the upcoming trends. Since designs are created by designers for consumers, their opinions are of utmost relevance. Usually, designers find it flattering to have their designs copied, but this does not indicate that protection should not be afforded. While designers have a right to safeguard their creative pieces from piracy, heavy protection would hamper the industries innovation. This is also because in case of heavy protection, the designs may only reach a certain audience and may not be recognized in the fashion market, further narrowing its exclusivity.

Post the detailed analysis of the piracy paradox theory in this chapter it can be seen that, while there are few legal commentators who criticize the current functioning of law and recognize the status of fashion as being an innovative field, capable of receiving protection against pirates, there are others who consider piracy aids in speeding up the process of creation and innovation. Consumers are mostly pro-piracy, and this has been deduced via the Fashion Originators Guild, the theory of anchoring and the competitive advantages that the industry creates.

Piracy of the whole design should be avoided and for that protection is essential, but minor style piracy nourishes the fashion industry, in the long run. The fashion industry has flourished specifically because of piracy. Whenever a brand-new design is extensively copied, fashion's most formidable marketing force kicks in, that is the trend. Trends are a by-product of copying and these trends are exactly what sell fashion in the market. Thus, this paradoxically beneficial phenomena should continue to exist but should nonetheless be limited.

## CHAPTER 3

### WHAT'S NEW: THE INDIAN PERSPECTIVE

#### 3.1 Introduction

Considered as one of the niche areas of law, Fashion law, seems to be expanding its existence in India. It is the unique, artistic blend of creativity and legal expertise. Intertwining various legislative disciplines varying from IP and business law to international trade and even environmental law, Fashion law is thus, a multidimensional spectrum.

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<sup>76</sup> Patricia Lowell, 'Identity Crisis: Less-Expensive Copies of Designer Clothes are as Old as Fashion Itself', *Dallas Morning News* (Oct 5, 1994)

There is no particular law covering fashion law in India. Rather, Fashion law acts as an umbrella under which a variety of laws including but not limited to contracts, business finance and commercial law, competition law, labour law, consumer protection laws, international trade laws, civil laws and most importantly intellectual property laws encompass. We will study the kinds of protection that intellectual property laws in India provide, as the chapter goes on.

### 3.2 Fashion Design Council of India

The Fashion Design Council of India (FDCI) is a prominent organization which plays a pivotal role in promoting and nurturing the fashion industry in India. Founded in 1998<sup>77</sup>, the Council serves as the apex body for fashion design in the country, bringing together designers, industry professionals, and stakeholders to support and showcase Indian fashion on both national and international platforms.

The FDCI represents the interests of the fashion industry in India to Government bodies, trade associations, and other relevant organizations, advocating for policies and initiatives that support its growth and sustainability. Further, the Council facilitates networking opportunities for designers, buyers, media, and other industry stakeholders, fostering collaboration and business opportunities within the fashion ecosystem. The Council acts as a catalyst for the growth and development of the industry through various initiatives and activities such as the bi-annual Indian Fashion Week (IFW).

### 3.3 Legal Framework of Fashion

The issue of the absence of a specific legislation relating to fashion law has never been raised for the reason that fashion law falls under the ambit of various existing laws including contract law, business law and so on. While this makes the practice of fashion law intriguing, it can, on the contrary, be challenging. Being on the creative side, the fashion industry essentially concerns manufacturing, designing, and the creative way of styling fabrics. Parallel to fashion, the indispensable need for protecting various works of designers under trademarks, Copyright, patent, design etc. is observed to be evergreen. Intellectual Property laws deal in depth, with protecting the creation and invention of fashion designers, thus acquiring recognition as the highest form of protection in the context of fashion.

#### 3.3.1 Trademarks

A trademark refers to any mark which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.<sup>78</sup> The question arises as to how one mark can be so significant for a brand? The answer very simply is the association of a mark with the brand in question. When the public at first instance looks at a particular logo or a name, they immediately think of the brand and the quality of goods or services, as the case may be, provided by the said brand. A trademark, therefore, establishes goodwill between the source of the product or service and the consumers.

<sup>77</sup> <<https://www.fdc.org/>> last accessed 24 March 2024

<sup>78</sup> The Trademarks Act, 1999 s 2(zb)

Let us take a look at the Nike mark for instance, the ‘tick mark’ logo is so well-known that any product having such a mark is immediately recognised in the eyes of the public, to have an association with the Nike brand. The design or logo carries along the goodwill and reputation the brand has acquired due to its high quality and services. Goodwill of a trademark aids in commercialisation of the trademark. In the English case of *Trego vs Hunt 1869*<sup>79</sup>, Lord MacNaghten observed that goodwill is “the whole advantage, whatever it may be of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money”.<sup>80</sup>

In India, trademarks play a vital role in the fashion industry, serving as valuable assets for brands to distinguish their products and build consumer trust and loyalty. In the fast-paced world of fashion, where trends come and go, trademarks provide a means for brands to establish and protect their unique identity amidst a crowded marketplace. From iconic logos to distinctive brand names, trademarks help fashion companies stand out and communicate their style, quality, and ethos to consumers. They serve as powerful symbols of authenticity and reliability, influencing purchasing decisions and fostering brand recognition and loyalty.<sup>81</sup>

In addition to protecting brand identity, trademarks enable fashion companies to safeguard their creative designs and innovations. By registering trademarks for unique patterns, prints, or design elements, designers can prevent others from copying or imitating their creations, preserving their competitive advantage and market share. Moreover, trademarks facilitate collaborations, licensing agreements, and partnerships within the fashion industry, allowing brands to expand their reach and capitalize on new markets and opportunities. They provide a legal framework for businesses to monetize their intellectual property and leverage their brand equity for strategic growth and development.

Another important concept with respect to trademarks is the recognition of “well-known trademarks”. Such marks hold a special status in India, recognized for their exceptional reputation and widespread recognition among consumers. These trademarks enjoy broader protection beyond the specific goods or services they cover, extending to unrelated classes and sectors, thereby protecting their distinctive identity and preventing dilution or unauthorized use by third parties.

In the context of fashion, well-known trademarks hold significant relevance, as certain brands and logos become iconic symbols of style, luxury, and cultural influence. They represent the brands which have achieved widespread recognition and consumer loyalty, transcending geographical boundaries and cultural barriers. These trademarks often embody a distinct aesthetic, heritage, or ethos that resonates with consumers and sets them apart from competitors. They evoke notions of exclusivity, craftsmanship, and status, driving demand and commanding premium prices in the marketplace.

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<sup>79</sup> *Trego v. Hunt*, (1896) A. C. 7 (H. L.)

<sup>80</sup> *Ibid*

<sup>81</sup> <<https://fashionlawjournal.com/fashion-and-ipr-laws-in-india/>> last accessed 15 March 2024

Well-known trademarks not only serve as indicators of product origin and quality but also carry intangible value and aspirational appeal. They become synonymous with trends, lifestyles, and social status, influencing consumer behaviour and shaping industry trends. Since such trademarks represent more than just logos or brand names; they embody the essence of the brand, its heritage, and its relationship with consumers, the protection of such marks is crucial for preserving brand integrity, preventing dilution, and combating counterfeit goods. Recognizing the unique significance of these trademarks, legal frameworks provide enhanced protection and enforcement mechanisms to safeguard against unauthorized use and infringement.

Infringement of trademarks in the form of designs, logos etc. is a recurring event when speaking of the fashion industry. It occurs when a brand or individual uses a trademark in a way that creates confusion among consumers regarding the source of goods or services.<sup>82</sup> This confusion may arise when a similar or identical trademark is used on products that are related to those of the original trademark owner. Infringement can take various forms in the fashion industry, including: -

1. **Counterfeiting:** This involves the unauthorized production and sale of goods bearing a trademark that is identical or substantially similar to a well-known fashion brand. Counterfeit fashion products often mimic the design, logo, or packaging of the original products, deceiving consumers into believing that they are purchasing the authentic goods of the popular brands.
2. **Trademark Dilution:** Dilution occurs when the distinctiveness or reputation of a famous fashion brand's trademark is weakened by the unauthorized use of a similar mark on unrelated products. Dilution can occur even if there is no likelihood of confusion, if the unauthorized use tarnishes or blurs the distinctiveness of the original mark.
3. **Passing Off:** Passing off involves the misrepresentation of goods or services as those of another party. In the fashion industry, passing off may occur when a lesser-known brand uses a trademark or logo that is similar to that of a well-known brand, leading consumers to mistakenly believe that the products are affiliated with or endorsed by the established brand.
4. **Trademark Takedowns:** Infringing trademarks may appear on online platforms, such as e-commerce websites and social media platforms, through unauthorized listings or advertisements. Trademark owners may issue takedown notices to these platforms to remove infringing content and prevent further distribution of counterfeit or unauthorized goods.
5. **Parallel Importing:** Parallel importing involves the importation and sale of genuine products bearing a trademark without the authorization of the trademark owner. While parallel imports may not

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<sup>82</sup> <<https://www.indiafilings.com/learn/trademark-infringement-in-india/>> last accessed 19 March 2024

necessarily constitute trademark infringement, they can raise legal issues related to the exhaustion of trademark rights and distribution agreements.

To combat trademark infringement in this globalised industry, brand owners employ various strategies, including proactive monitoring of the market, enforcement of their trademark rights through legal action, collaboration with law enforcement agencies and customs authorities to combat counterfeiting, and implementation of brand protection measures such as holograms, serial numbers, and authentication technologies. Additionally, educating consumers about the risks associated with counterfeit products and promoting awareness of genuine trademarks may help mitigate the impact of infringement on brands and consumers alike.

In conclusion, trademark protection in India serves as a crucial mechanism for shielding and maintaining the distinct identity and reputation of various brands in the competitive marketplace. Through a robust registration process overseen by the Registrar of Trade Marks, trademarks acquire legal recognition, granting their owners the ability to enforce their rights and preserve their brand's integrity. As India's commercial outlook continues to evolve, trademark protection remains indispensable for fostering innovation, encouraging investment, and instilling the superior quality of the brands respective goods and services in the minds of the consumers.

### **3.3.2 Copyright**

The protection of Copyright in India plays a pivotal role in protecting the rights of creators and promoting creativity, innovation, and cultural expression. Enshrined in the Copyright Act of 1957 and subsequent amendments, India's Copyright regime provides legal protection for original literary, artistic, musical, and dramatic works, as well as cinematographic films and sound recordings. As laid down in Section 14 of the said Act, the term "Copyright" refers to a collection of exclusive rights that are granted to and enjoyed by the owner of the Copyright.<sup>83</sup> The comprehensive framework encompasses various aspects of Copyright protection, including the rights of authors, performers, and producers, as well as the duration of protection, licensing, and enforcement mechanisms.

The main objective behind a 'Copyright' is providing protection to the expression of a certain unique idea. The word "expression" is crucial here as numerous people may conceive the same idea, however, the expression or execution of the said idea would vary from person to person. For instance, a person may have the idea to write a book on the stock market. Such an idea may cross the minds of thousands of other authors. Will they all be entitled to Copyright protection for the same idea? The answer is no. It is the expression thereof which will be considered for protection. The unique way in which one author conveys his thoughts and frames them into words and sentences will determine the eligibility of his work and the scope of obtaining protection under Copyright law.

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<sup>83</sup> The Copyright Act s 14

One of the fundamental principles that is commonly applicable to Copyright law as well as the fashion industry is the concept of originality. To qualify for Copyright protection, a work must be original, meaning it must possess a minimum degree of creativity and not be a mere reproduction or imitation of existing works. This criterion ensures that Copyright protection is granted to works that reflect the author's skill, labour, and creative judgment, while also fostering a dynamic and diverse cultural landscape.

The relationship between Copyright law and the fashion industry is complex and multifaceted, with Copyright playing a significant role in protecting certain aspects of fashion designs and creative expressions. While fashion designs themselves are generally not eligible for Copyright protection due to their functional nature, Copyright law may apply to various elements within the fashion industry, including: -

1. **Textile Designs:** Original textile patterns and designs may be eligible for Copyright protection as artistic works. This includes prints, patterns, and graphics used on fabrics, garments, and accessories.
2. **Graphic Elements:** Logos, emblems, and other graphic elements used in fashion branding and design may be protected by Copyright as artistic works or as part of a broader trademark protection strategy.
3. **Photography:** Fashion photography, including editorial shoots, advertising campaigns, and product imagery, is protected by Copyright as a form of visual art. Photographers retain Copyright ownership over their images, which may be licensed or used with permission by fashion brands and publications.
4. **Written Works:** Copyright law protects written works such as fashion articles, blog posts, marketing materials, and promotional content. Authors and content creators have exclusive rights to reproduce, distribute, and publicly display their written works.
5. **Software and Digital Tools:** Copyright may apply to software programs, digital tools, and applications used in the fashion industry for design, pattern-making, and production management. Software developers retain Copyright ownership over their programs and may license their use to fashion companies.

In India, Copyright protection is not contingent upon registration. The moment a work is created and fixed in a tangible form, such as writing, recording, or painting, it is automatically protected by Copyright law. However, registration with the Copyright Office provides several advantages, including *prima facie* evidence of ownership, facilitating enforcement actions, and enabling creators to seek statutory damages and legal remedies in case of infringement.

The duration of Copyright protection varies on the kind of work. Generally, Copyright protection lasts for the lifetime of the author plus 60 years after their death. For works of joint authorship, the term extends to 60 years from the death of the last surviving author. In the case of anonymous or pseudonymous works,

cinematographic films, sound recordings, and government works, the duration of protection differs, as stipulated in the Copyright Act.<sup>84</sup>

While Copyright protection can safeguard certain creative elements within the fashion industry, it does not extend to functional aspects of clothing designs, such as the cut, silhouette, or overall garment construction. This limitation distinguishes Copyright law from other forms of intellectual property protection, such as design patents and trademarks, which may be utilized to protect the ornamental or branding aspects of fashion designs. In practice, fashion brands often employ a combination of intellectual property strategies to protect their creative works and brand assets. This may include trademark protection for logos and brand names, design patents for unique and non-functional design elements, and Copyright for original textile patterns, graphics, and creative content.

The law of Copyright in India, thus acts as a cornerstone of intellectual property protection, fostering creativity, innovation, and cultural development. By granting creators exclusive rights over their works, Copyright law incentivizes artistic endeavours, promotes economic growth, and enriches the cultural heritage of the nation. As India continues to embrace the digital age and navigate the complexities of the global creative economy, Copyright law remains essential for nurturing a vibrant and thriving creative ecosystem.

From the above discussion, it can be averred that while Copyright law plays a limited role in protecting certain creative expressions within the fashion industry, it remains an important tool for safeguarding intellectual property rights and fostering innovation and creativity in fashion design, branding, and promotion.

### **3.3.3 Patents**

A patent refers to an exclusive right granted by the Government for an invention, for a particular period of time subject to the disclosure of the said invention by the applicant. A patentee enjoys exclusive right to restrict any third parties from unauthorized acts such as manufacturing, using, selling or importing, among others, the patented product or process within the country during the term of the patent. After the expiry of the term of the patent i.e., 20 years or when the patent ceases to have effect, by non-payment of any renewal fee, the Government publishes the invention which results in the invention becoming a part of the public domain.

Defined under Section 2(1)(j) of the Patents Act, 1970, an invention refers to “a new product or process involving an inventive step and capable of industrial application.”<sup>85</sup> Thus, the eligibility of any invention to be patentable has been laid down as follows: -

- a. The invention must be novel i.e., new
- b. The invention must have an inventive step, and
- c. The invention must be capable of industrial application.

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<sup>84</sup> The Copyright Act s 22

<sup>85</sup> The Patents Act s 2 (1)(j)

Additionally, Sections 3 of the Act<sup>86</sup> talks about non-patentable subject matter including – frivolous inventions, mere discovery of scientific principles, plants and animals, computer programme, presentation of information, any work which falls under the ambit of Copyright law, etc. Section 4<sup>87</sup> further discusses the non-patentability of inventions relating to atomic energy.

In India, a patent may be granted either for a product or process. The difference between the two is that the former is an exclusive right given to the original inventor of a product, implying that no other manufacturer can provide the same product through the same or different process. The implication is that the producer will enjoy monopoly as there will be no competition in the market since it is the product which is provided protection. For instance, Apple is granted patent protection for its product, the iPhone and no other company or organisation is permitted to develop the iPhone.

Process patents, on the other hand, are the exclusive rights which are granted to a particular process used for manufacturing the product. This means that while another person is allowed to produce the same product, they are not, in any way, allowed to use the particular patented process to manufacture the said product. For instance, a patent will be granted to the process which is involved in dyeing clothes and not the end result i.e., the coloured cloth.

While fashion designs themselves, such as clothing designs, are typically not eligible for patent protection due to their primarily aesthetic or ornamental nature, certain aspects of fashion-related inventions may be patentable including innovative manufacturing processes, functional elements of clothing, technical textile innovations, innovative accessories and wearable technology and novel business methods.

Both product and process patents offer valuable protection for fashion-related innovations, but they serve different purposes and may be applicable to different aspects of the industry. Product patents focus on protecting the end result or physical embodiment of an invention, while process patents focus on protecting the method or process used to create that result. For fashion companies and designers, understanding the distinction between product and process patents can help them in identifying opportunities for innovation and strategically protect their intellectual property. By obtaining patents for both novel products and innovative manufacturing processes, fashion businesses can establish a competitive edge, enhance their market position, and capitalize on their investments in research and development.

Obtaining patent protection for fashion-related inventions can be challenging, however, it can, on the contrary, offer several benefits, including exclusivity in the marketplace, potential licensing opportunities, and the ability to enforce rights against competitors who may infringe on patented inventions. However, it's important for fashion companies and inventors to work closely with patent attorneys or intellectual property experts to

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<sup>86</sup> The Patents Act s 3

<sup>87</sup> The Patents Act s 4



navigate the complexities of patent law and determine the best strategy for protecting their innovations within the fashion industry.

### 3.3.4 Designs

In India, the Designs Act is a piece of legislation which governs the registration and protection of industrial designs. Enacted in 2000, the Act provides a legal framework for safeguarding the visual appearance or ornamentation of products, including their shape, configuration, pattern, or decoration. Under the Designs Act, designers and businesses can register their designs with the Designs Office to obtain exclusive rights and legal protection for a specified period.

The Act further aims to encourage innovation, creativity, and investment in design-intensive industries by providing incentives for the development and protection of original designs.

The Act offers legal safeguards for the aesthetic and ornamental aspects of various products, including fashion designs as it provides a mechanism for protecting the visual appearance and artistic features of clothing, accessories, and other fashion-related articles. Registered designs under the Designs Act provide exclusive rights to the owner to prevent others from making, selling, or using products that embody the protected design without authorization. This protection extends to substantially similar designs that would deceive or cause confusion to an ordinary observer.

Fashion designers or companies may apply for registration of their respective designs with the Designs Office under the concerned Act. To qualify for registration, the design must be new or original, not previously published or publicly disclosed, and significantly differ from existing designs or combinations of designs. The application process typically involves submitting drawings, images, or specimens of the design along with the necessary forms and fees. The protection granted to registered designs is valid for an initial period of ten years, with the possibility of extension for an additional five years. This provides fashion designers and brands with a window of exclusivity to capitalize on their innovative designs and establish market presence.

Although as the name suggests, 'designs' fall under the ambit of the Act of 2000, there remain certain designs which are not eligible to be granted protection, including designs that are dictated solely by the function of the product, designs that are contrary to public order or morality, and designs that are not significantly distinguishable from known designs or combinations of known designs.

One notable case involving the infringement of a fashion design in India is the 2010 case of *Micolube India Ltd. vs Rakesh Kumar Trading As Rakesh Enterprises*<sup>88</sup> wherein the plaintiff, Micolube India Ltd., was the registered proprietor of a design for a specific type of lubricating oil container. The plaintiff alleged that the defendant, Rakesh Kumar Trading, was manufacturing and selling lubricating oil containers that were

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<sup>88</sup> 199 (2013) DLT 740

substantially similar to their registered design, thereby infringing upon their design rights under the Designs Act. The Delhi High Court held that the defendant's actions constituted infringement of the plaintiff's design rights, as they were manufacturing and selling products that closely resembled the registered design without authorization.<sup>89</sup>

The above case underscores the importance of design registration and the enforcement of design rights in the fashion industry in India. It highlights the legal remedies available to designers and businesses to protect their original designs from unauthorized copying or imitation, thereby encouraging innovation and creativity in the fashion sector.

Piracy of fashion designs remains a significant challenge in India, posing threats to the fashion industry and undermining the creativity and intellectual property rights of designers and brands. Piracy in the context of the fashion industry typically involves the unauthorized copying, reproduction, or imitation of original fashion designs, often for commercial gain. Fashion knockoffs and copycats are prevalent in India, with manufacturers and sellers replicating popular or trending designs without permission from the original designers or brands. These imitations may be sold at lower prices, undercutting the legitimate market and diluting the value of original designs.

Further, the rise of e-commerce has facilitated online piracy of fashion designs in India, with unauthorized sellers offering counterfeit or infringing products through online marketplaces, social media platforms, and independent websites. Online piracy makes it easier for counterfeiters to reach a wider audience and evade detection. In addition, the informal sector, including street vendors, flea markets, and unregulated retail outlets, often trade in pirated fashion goods in India. These channels contribute to the proliferation of counterfeit products and pose challenges for enforcement authorities in combating piracy. Enforcement agencies face difficulties in identifying and prosecuting offenders, particularly in cases where counterfeiters operate across multiple jurisdictions or conceal their activities.

While piracy of fashion designs is typically viewed as detrimental to fashion designers and brands, some argue that it may offer certain benefits under specific circumstances such as exposure, promotion and market validation. It may also serve as a source of inspiration for designers, influencing trends and creative directions within the fashion industry. By observing pirated designs and adaptations, designers may gain insights into consumer preferences, market demands, and emerging styles, which could inform their own design processes.

These potential benefits may exist in theory, however, they are overshadowed by the significant drawbacks of piracy for fashion designers, brands, and the industry as a whole. Piracy undermines the integrity of creative work, erodes brand value and reputation, stifles innovation, and deprives designers of rightful income and

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<sup>89</sup> <[https://blog.ipleaders.in/an-overview-of-fashion-laws-in-india/#Some\\_major\\_case\\_laws](https://blog.ipleaders.in/an-overview-of-fashion-laws-in-india/#Some_major_case_laws)> last accessed 31 March 2024

recognition for their contributions. Ultimately, fostering respect for intellectual property rights and promoting ethical consumption practices is essential for sustaining a thriving and equitable fashion ecosystem.

Therefore, designers and fashion houses may face difficulties in choosing one form of protection. To overcome this dilemma, the option to utilize a combination of intellectual property rights is made available for the purpose of safeguarding the designs, brand identity, and market position effectively.

### 3.4 Landmark Judgments

The very first judgment that comes to mind in relation to trademark infringement is the case of *Christian Louboutin SAS v. Mr. Pawan Kumar & Ors.*<sup>90</sup> The plaintiff, requiring no introduction otherwise, is a luxury fashion house to high-end products including the iconic “Red-Sole” high heeled footwear. This particular footwear features a distinct shade of red, applied to the soles, which has become synonymous with the brand's identity. Due to the widespread recognition of this feature, trademark registrations have been obtained globally, including in India, specifically for the unique tone of red used on the outsole of the shoes.

The defendant, Pawan Kumar, operates as the sole proprietor of “Kamal Family Footwear,” a business involved in selling women's shoes and accessories. The defendant unlawfully utilized the plaintiff's trademark in the sale of women's shoes. Consequently, the plaintiff sought a permanent injunction against the defendants and any parties acting on their behalf, prohibiting them from manufacturing, selling, advertising, or offering for sale any footwear or goods containing the trademark “Red Sole”.

The Delhi High Court ruled in favour of the plaintiff, holding that the trademark in question “Red sole” was well-known and was being infringed by the Defendant due to the sale of the red sole shoes. The defendants were restrained, by virtue of an interim order, from engaging in activities to the effect of manufacturing, selling, offering for sale or directly/indirectly dealing in footwear, including ladies' footwear or any other merchandise bearing the plaintiff's registered “RED SOLE” trademark or any other mark which could potentially deceive consumers for reason of similarity to the goods of the plaintiff.

The case of *Rajesh Masrani v. Tahiliani Designs Pvt. Ltd.*<sup>91</sup> explores the scope and extent of Copyright protection afforded to fashion designers in relation to “artistic works”. The plaintiff, Tarun Tahiliani Pvt. Ltd., sought protection over the designs and sketches which were being copied by the defendant. The question of law before the Court was whether drawings and patterns fell in the category of “artistic work” under Copyright law.

The Court carefully evaluated the evidence presented by the plaintiff to support their argument that the garments they designed constituted original artistic work, as defined by Sections 2(c)(i) and 2(c)(iii) of the

<sup>90</sup> <[https://theamikusqrae.com/fashion-laws-and-its-scope-in-india/#\\_ftn6](https://theamikusqrae.com/fashion-laws-and-its-scope-in-india/#_ftn6)> last accessed 31 March 2024

<sup>91</sup> AIR 2009 Delhi 44

1957 Act. The plaintiff, brought the sketches drafted during the designing process, the patterns printed as well as the embroidery on the textile etc. within the purview of intellectual property.

After taking into consideration the contentions put forth by the defendant as well, the Delhi High Court held that, first of all, the Plaintiff's garments fell well within the ambit of "artistic work" under the Copyright Act, 1957 and that further, there was piracy of Copyright work by the Defendant, Rajesh Masrani. Furthermore, the Court emphasized that Copyright protection does not necessarily require registration in order to be enforceable. Referring to Section 44 of the Act and Section 48 of the Registration Act, 1908, the Court clarified that registration of Copyright is optional. Even without registration, the work is still protected against unauthorized infringement and imitation.

Another case that is significant in the context of fashion and its protection under intellectual property law is *Louis Vuitton Malletier v. Atul Jaggi*<sup>92</sup>, Louis Vuitton Malletier, a renowned French luxury fashion brand, initiated legal proceedings against Atul Jaggi for operating a website that sold counterfeit Louis Vuitton products. It was argued that Atul Jaggi's use of the Louis Vuitton trademark on his website, along with the sale of counterfeit products bearing the Louis Vuitton logo, amounted to trademark infringement. The plaintiff contended that such unauthorized use of its trademark was likely to confuse consumers and deceive them into believing that the counterfeit products were genuine Louis Vuitton merchandise.<sup>93</sup>

In addition to trademark infringement, Louis Vuitton alleged passing off, asserting that the defendant's unauthorized sale of counterfeit products misrepresented the origin and quality of the goods, leading to consumer confusion and dilution of the Louis Vuitton brand's distinctiveness.

The Delhi High Court ruled in favour of the plaintiff, Louis Vuitton Malletier, finding the defendant guilty of trademark infringement and passing off. The Court issued an injunction order restraining Atul Jaggi from using the Louis Vuitton trademark, selling counterfeit products, or engaging in any activities that could harm the reputation of the renowned Louis Vuitton brand.<sup>94</sup>

The above discussed case underscores the importance of safeguarding the rights of trademark owners and combatting the sale of counterfeit goods that infringe upon established brands' intellectual property rights.

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<sup>92</sup> 2010 Indlaw DEL 1326

<sup>93</sup> <[https://fashionlawjournal.com/fashion-and-ipr-laws-in-india/#\\_ftn2](https://fashionlawjournal.com/fashion-and-ipr-laws-in-india/#_ftn2)> last accessed 1 April 2024

<sup>94</sup> Ibid

## CHAPTER 4

## FASHIONABLY LATE: PROTECTION IN THE US

#### 4.1 Introduction

The famous movie 'Sex and the City' was the start of the biggest pop culture influence on fashion. An influence which appropriated to \$350 billion a year.<sup>95</sup> With every individual obsessing over the movie, the movie industry helped in demystifying the fashion world. Nowadays everybody aims to make a style statement, by accustoming themselves to the changing trends. However, while everyone has access to the latest trends, it possesses a threat to the originality of the design and US laws do very little to award protection to the designers. Under the rubric of Copyright, patent and trademark, no IP right protects a clothing design sufficiently.<sup>96</sup>

#### 4.2 Copyright

In the United States, Copyright law is the main source of protection for fashion. It protects fashion during the life of the author and 50 years after his death.<sup>97</sup> Despite the existence of intellectual property law, the law is inadequate to protect fashion. The Copyright Act does not protect designs themselves, but only those elements of the designs, that are identifiable such as graphic, pictorial or sculptural features and they exist independently, of the utilitarian aspects of the article.<sup>98</sup>

Professor Susanna Monseau perceives the Statutory Act as discriminatory, because it does not recognize fashion as any other creative industry, due to division in the eyes of the law between the fine arts such as literature, music, and art.<sup>99</sup> It is argued that fashion could not fall under the ambit of Copyright law, due to its inseparability, from its general functionality.<sup>100</sup>

In *Mazer v Stein*<sup>101</sup>, Justice Stevens justified the Act's utilitarian restriction. He pointed out that, the limited grant of monopoly over creative works can be seen as a means, by which an important public purpose<sup>102</sup>, of maintaining an optimal balance between providing incentives, for future creations to creators and securing use and dissemination of such works for the public to benefit from them<sup>103</sup>, is being achieved. The US Copyright Act allows fashion design to attain protection only if, the design meets the test for separability.

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<sup>95</sup> Lynsey Blackmon, 'The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion'. (2007) Pepperdine Law Review

<sup>96</sup> Laura Marshall, 'Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act', (2007) 14 Journal of Intellectual Property Law 305,309

<sup>97</sup> The Copyright Act 2016, s 35

<sup>98</sup> Ibid, s 103(2)

<sup>99</sup> Susanna Monseau, 'European Design Rights: A Model for the Protection of All Designers from Piracy' (2011)

<sup>100</sup> Arielle K Cohen, 'Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma' (2012) 11 Chicago Kent Journal of Intellectual Property

<sup>101</sup> 347 U.S 201 (1954)

<sup>102</sup> Ibid

<sup>103</sup> Robert P Merges, Peter S Menell & Mark A. Lemley, *Intellectual Property in the New Technological Age* (Wolters Kluwer, 6<sup>th</sup> edition, 2012) p 437

The test listed two conditions, the separate identification requirement and the independent existence requirement.<sup>104</sup> The first requires the useful article, to have two or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities and the later examines whether the identified feature has the capacity to exist separate from the utilitarian aspect of the article.<sup>105</sup>

The complexities arise in separating the utilitarian and artistic aspect of the design, accurately explained in *Star Athletica LLC v Varsity Brands Inc*<sup>106</sup>. The case questioned whether to classify cheerleading uniforms, as serving the purpose of covering the body, absorbing the sweat and moisture, while allowing the cheerleaders to move freely, or do the uniforms serve as an identification symbol, to distinguish between the teams cheerleading. Although, the uniforms appeared on the useful article, they met the separability test requirements defined by the Court and were qualified as valid, Copyrightable subject matters.<sup>107</sup>

On the same line of reasoning, *Walmart, Galiano v Harrah's Operating Co*<sup>108</sup> demonstrated that, since Copyright protects only two-dimensional artwork, it could not be extended to Casino workers uniforms as the functional and artistic elements were indivisible. In *Kieselstein-Cord*<sup>109</sup>, the Court held that decorative belt buckles, which were used primarily for ornamentation could be Copyrighted, since the aspect of the buckle was conceptually separate from its subsidiary utilitarian function.<sup>110</sup> However, a prom dress design could not meet the separability test.<sup>111</sup> In *Folio Impressions v Byer California*<sup>112</sup>, the Court extended Copyright to cover the design of a rose on a dress, indicating that Copyright safeguards fabric designs, such as patterns on a dress, but not design elements such as the cut, style, shape or dimensions of a garment.<sup>113</sup>

The reasoning behind the varied judgements was that the test does not address the question of how to decide whether the article has the capacity to exist alone, nor does it explain how the utility of the garment is to be defined.<sup>114</sup> Conversely, if the design met the test requirements, it must also be substantially similar to the competitor's product.<sup>115</sup> This is hard to determine, in itself. Furthermore, the threshold for originality is low, requiring only a minimum degree of creativity to be displayed, but even then, the utilitarian aspect would seize the possibility of receiving protection. Additionally, the protection period does not consider the temporal nature of the industry, which causes reliance on trademarks. Therefore, Copyright is rejected as a solution for fashion design piracy, though it would combat lengthy registration processes and high registration costs.

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<sup>104</sup> Dayoung Chung, Law, Brands, and Innovation, 'How Trademark Law Helps to Create Fashion Innovation', (2018) The John Marshall Review of Intellectual Property Law

<sup>105</sup> *Star Athletica LLC v Varsity Brands Inc* 137 S Ct 1002 (2017)

<sup>106</sup> 137 S Ct 1002 (2017)

<sup>107</sup> Chung (n 73)

<sup>108</sup> *Galiano v. Harrah's Operating Co., Inc.*, Civil Action No. 00-0071 (E.D. La. May. 15, 2002)

<sup>109</sup> *Kieselstein-Cord v Accessories by Pearl*, 632 F.2d 989 (2<sup>nd</sup> Cir, 1980)

<sup>110</sup> Jacqueline Lampasona, 'Discrimination Against Fashion Design in Copyright', (2015) 14 Journal of International Business and Law

<sup>111</sup> *Jovani Fashion Ltd v Fiesta Fashions*, 500 Fed.Appx. 42 (2<sup>nd</sup> Cir. 2012)

<sup>112</sup> *Folio Impressions v Byer California* 937 F.2d 759 (2<sup>nd</sup> Cir, 1991)

<sup>113</sup> Katherine B, 'Fashioning a Solution for Design Piracy: Considering Intellectual Property Law in the Global Context of Fast Fashion' (2011) 39 Syracuse Journal of International Law and Commerce p 219

<sup>114</sup> *Star Athletica* (n 74)

<sup>115</sup> The Copyright Act, s 52 (4)(c)

However, the Court is rightful in limiting protection under Copyright because, if useful articles start receiving protection, a monopoly will be created, leading the way to unfair competition and market practices, displeasing consumers, and eradicating any incentive for innovation. Therefore, the Copyright Act is justified to protect only those design elements, that can be physically separated from the useful article and on doing so the designs must be independent as a whole without hampering the utility of that article.<sup>116</sup>

### 4.3 Trademarks

The Lanham Act<sup>117</sup>, is the sole trademark governing Act in the US, extending trademark protection for 20 years. Trademark is defined as a mark used or intended to be used to identify or distinguish the goods and/or services of one seller or provided from those of others and to indicate the source of such goods and/or services.<sup>118</sup>

The source designating function of a trademark preserves free and effective competition by ensuring competitors can copy features that they need to, to compete effectively<sup>119</sup>. To acquire trademark status, the product must show it is inherently distinctive or has acquired a secondary meaning.

Trademark protection is highly discriminatory towards fashion industry in the context of extending protection to colors, albeit other industries grant protection over colors more liberally<sup>120</sup>. In *Qualitex*,<sup>121</sup> green-gold color was eligible for trademark protection, as it was a non-functional element. The aesthetic functionality theory asks whether a design feature is necessary for competition, or if an alternative design is available<sup>122</sup>.

*Christian Louboutin v YSL*<sup>123</sup> pointed out that the doctrine of aesthetic functionality, denies trademark protection only, where an ornamental feature is claimed as a trademark and its protection would significantly hinder competition, by limiting the range of adequate alternative designs<sup>124</sup>. It was also illustrated, on the basis of evidentiary facts that Louboutin had acquired secondary meaning, when used as a red outsole contrasting with the remainder of the shoe. If the shoe was red, it did not fall under the purview of trademark protection. While this was disadvantageous to Christian, it benefitted the industry by not limiting the color to the Louboutin shoes.

Rightfully so, it should have loopholes, giving other designers an incentive to create and be inspired from. If all designers start protecting color slowly, there will be a monopoly right over that color, which will cease the

<sup>116</sup> 17 U.S.C. s 101 (2018)

<sup>117</sup> 1946

<sup>118</sup> The United States Patent and Trademark Office, an agency of the Department of Commerce <<http://www.uspto.gov/trademarks/>> last accessed Dec 2019

<sup>119</sup> Thomas McCarthy, McCarthy on Trademarks and Unfair Competition 8 (Thomson Reuters, 14<sup>th</sup> edition, 2016)

<sup>120</sup> Haochen Sun, The Distinctiveness of a Fashion Monopoly, (2013) 3 NYU Journal of Intellectual Property & Entertainment Law, p 142

<sup>121</sup> *Qualitex Co v Jacobson Products Co* 5.14 U.S 159 (1995)

<sup>122</sup> *Chung* (n 73)

<sup>123</sup> *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206 (2d Cir. 2012)

<sup>124</sup> *Haochen* (n 89)

protection afforded by Copyright law, in the first place. In Justice Marrero's words, *Fashion is dependent on colors and imposing restrictions deprives designers from making artistic choices in creating their designs*<sup>125</sup>.

As seen in Louboutin, the Act possess certain drawbacks on account of establishing distinctively and its applicability to only the identifiable element of the design instead of the entirety design<sup>126</sup>. These problems target the emerging designers as opposed to the big fashion houses, which have both a standing clientele and an established reputation. Furthermore, Trademarks last for a longer time, which makes it impractical for the fashion industry, bearing in mind its temporal nature. Despite its drawbacks, trademark is favored, above all other forms of protection in the US.

#### 4.4 Trade Dress

The Lanham Act also extends protection in the form of trade dress.<sup>127</sup> Trade dress is the most viable solution to curb piracy, but it comes with its own reservations.<sup>128</sup> Trade dress is seen as the total image presented by the packaging or the product itself.<sup>129</sup> The trade dress is examined as a whole including both functional and nonfunctional elements<sup>130</sup> but it does not extend to functional products.

*Henri Bendel v Sears, Roebuck and Co*<sup>131</sup> was an example of the Courts failure, to distinguish between the design's aesthetics and functional components. It held that, the similarities between the defendants and the claimant's usage of a gold zipper, plastic fabric on bags were all functional elements<sup>132</sup>.

The conditions to satisfy a trade dress infringement case, were identified in *Wal-Mart Stores v Samara Bros*<sup>133</sup>. The trade dress must be 'inherently distinctive' or in other words the trade dress must show it has acquired distinctiveness through 'secondary meaning' to eliminate the probability of creating a monopoly in the market. The case extended trade dress protection from covering only product packaging to clothing design<sup>134</sup>.

In *Abercrombie and Fitch Stores Inc v Am Eagle Outfitters Inc*<sup>135</sup>, the claimant A&F wanted to stop the infringement of their alleged unregistered trade dress, by the defendant American Eagle. The Court established that, the designs A&F sought to have a monopoly on, were functional as a matter of law and therefore, could not be protected under trade dress.

<sup>125</sup> Free Fashion (2013) 17 Marquette Intellectual Property Law Review, p 123

<sup>126</sup> The Lanham Act 1946, s 45

<sup>127</sup> 15 U.S Code s 1125(a) (2006)

<sup>128</sup> Leah Bourne, 'Designers Face Uphill Battle when it Comes to Knockoffs', NBC News,

<<http://www.nbcnewyork.com/blog/threadny/THREAD-The-Uphill-Battle-Designers-Face-When-It-Comes-To-Knockoffs-119066364.html>>

<sup>129</sup> 15 U.S.C. 1125 The Lanham Act, s(43)

<sup>130</sup> Rudolf Callmann, *Unfair Competition, Trademarks and Monopolies* (4<sup>th</sup> edition, 1987) s20.34

<sup>131</sup> 25 F. Supp 2d 198 (S.D.N.Y 1998)

<sup>132</sup> Blackmon (n 64)

<sup>133</sup> *Wal-Mart Stores* (n 43)

<sup>134</sup> Ibid

<sup>135</sup> 280 F 3d 619 (6<sup>th</sup> Circuit 2002)



The Court refuses to grant trade dress and trademark protection to fashion designs, the option is not comprehensive and feasible. Even if the designer is able to bring an infringement claim, the protection would be limited to the trademark itself and not the entire design<sup>136</sup>.

#### 4.5 Design Patent

Design Patent offers protection for 14 years from the date of the grant and like any other patent, four requirements are laid down in the Patents Act. The designs must be: original, novel<sup>137</sup> non-obvious<sup>138</sup> and ornamental must be satisfied. The requirements are often hard to meet as, firstly, the fashion designs are often inspired, derivative of another<sup>139</sup> or of a designer's previous works, rendering them un-patentable due to anticipation by prior art<sup>140</sup>. Secondly, for the requirements to be met, the design must be straight out of the office, which implies that the innovation must be something that was never created before. Thirdly, the non-obvious element requires the invention, to not be an obvious one, at the time it was invented, to a person who possess the ordinary skills, in the art of fashion designing (objective test). Additionally, objective test usually sets the bar high, as it demands exceptional talent beyond the skills of an ordinary designer<sup>141</sup>.

After fulfilling these stringent tests, the registering for patent protection is another chaotic, time consuming and costly procedure, which does compliment the seasonal nature of the industry. Patents fail to provide the necessary protection, to the fashion article as patents usually are unattainable<sup>142</sup>. The aesthetic and useful value of tailoring is legally indistinguishable.<sup>143</sup> Despite this, if the patent protection is attainable, it would be granted for 7 years. Thus, technically patent protection deems to be impractical.

#### 4.6 The Innovative Design Protection and Prohibition Act (IDPPPA)

The IDPPPA<sup>144</sup> was intended to extend Copyright protection for 3 years to fashion designs, that are a result of a designers own creative endeavor, provide a unique, distinguishable, nontrivial and non-utilitarian variations for prior designs for similar types of articles<sup>145</sup>.

Some of the prominent features included, benefitting emerging designers in infringement cases involving designs, that were their independent creation with the exception of 'home sewing' which permitted individuals to make a singular copy of a design, for personal or immediate family use<sup>146</sup>. The condition was not to

<sup>136</sup> Ashley Marshall (n 91)

<sup>137</sup> 35 U.S.C s 102

<sup>138</sup> 35 U.S.C s 103

<sup>139</sup> Brooke Olausson, 'Design Patents: Fashion's Next Big Thing?', (2012) 4 Intellectual Property Brief

<sup>140</sup> The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment, Harvard Law Review, (2014) <[https://harvardlawreview.org/wp-content/uploads/pdfs/vol127\\_trademark\\_doctrine.pdf](https://harvardlawreview.org/wp-content/uploads/pdfs/vol127_trademark_doctrine.pdf)>

<sup>141</sup> *Nat Lewis Purses, Inc v Carole Bags Inc* 83 F.2d 475 (2<sup>nd</sup> Circuit 1936)

<sup>142</sup> Mills (n 1)

<sup>143</sup> Ibid

<sup>144</sup> Innovation Design Protection Act of 2012, 112<sup>th</sup> Cong (2012)

<sup>145</sup> Lampasona (n 78)

<sup>146</sup> IDPPPA, S 3728 ss 2(e)

commercially gain by copying and selling the design, during the protection period<sup>147</sup>. This would foster innovation and could also be seen as a means for the designer to experiment<sup>148</sup>.

Although, the protection offered under the proposed bill is the lowest offered in the history of fashion design, the three-year protection period is tailored to the transitory lifetime of a fashion design<sup>149</sup>. But the absence of a registration requirement and a clear definition of the term 'trivial', in addition to ambiguity, as to what could be protected and what was deemed an original, raised concerns.

Opponents perceive the bill as too weak, as the damages awarded are from sales made after the notice of infringement has been submitted to the infringing party and does not include any prior sales of the infringed article<sup>150</sup>. The damages would not reflect true profits made by the infringer and the impact of infringement on the designer, would be undermined.

Assuming the law was amended, nothing would change for the big fashion houses when chains like Forever 21, Primark, Zara, Urban Outfitters etc. close down as a result of copying. But the public will be deeply affected, as they will be denied the method of individual expression, while the expression would be reserved for the privileged, who have the means to afford originals.<sup>151</sup>

The small designers fear that they will have to bear the costs of research and development, to develop their own DNA, to make a lasting impact on the consumers, but instead they do not realize that the big fashion houses will be disproportionately favored<sup>152</sup>. With the introduction of the Act, due to the availability of resources at their disposal, high-end/established designers will resort to protecting all their creations. Either way, the small designers will bear the brunt, emphasizing the effects of the proposed bill are not substantial.

An argument in favor of the IDPPPA could be that similar systems have been established in other parts of the world such as the EU and the absence of any protection for the EU goods in the US, would lead to reduction in trade from the EU.

However, protection offered in EU has little impact upon the US industry, as EU based companies such as H&M and Zara are subject to design protection in the EU, which prohibits close copying and since the same products sold in EU, are also sold in the US, there will be relatively fewer copies of the products sold in US<sup>153</sup>. It could also be argued that, in the absence of an infringement system in the US, the EU struggles in providing

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<sup>147</sup> Ibid

<sup>148</sup> Laura Fanelli, 'A Fashion Forward Approach to Design Protection', (2011) 85 St John's Law Review

<sup>149</sup> Meaghan McGurrin, Protecting the Seasonal Arts: Fashion Design, Copyright Law and the Viability of the Innovative Design Protection & Piracy Prevention Act, (2012) 45 Connecticut Law Review, p 285

<sup>150</sup> Should Fashion Design Be Given Copyright Protection? (15 Jan 2013) <<http://mttlr.org/2013/01/should-fashion-design-be-given-Copyright-protection/>>

<sup>151</sup> McGurrin (n 116)

<sup>152</sup> Ibid

<sup>153</sup> Lampasona (n 78)

adequate protection, as the designers would have little incentive for innovating designs that receive protection in the EU, but on reaching the US market, are open to piracy, due to the lack of protection.

Although, the two systems of EU and United States differ, they actively engage in design copying, which leads us to the assumption that different laws have no substantial effect and should continue to remain the same<sup>154</sup>. Moreover, the establishment of such a system has not proven to be of any significance in the EU, considering the continuous existence of piracy. It would also be relevant to consider, that despite the availability of protection, designers prefer the status quo, to heightened intellectual property protection<sup>155</sup>. However, US could learn from the detailed protection offered by the EU.

#### 4.7 Conclusion

Copyright would be the most suitable form of protection for designers, considering time is of essence and no heavy costs would be generated. Patent protection is time consuming and the requirements to receive such protection are extremely complicated.

Trademark is a useful remedy protection for big fashion houses/designers, as its sole purpose is to identify brands but will not be useful to forthcoming designers. Additionally, with increasing reliance on trademark law, the effort to innovate would reduce, as focus would be diverted on generating logos to make the brand stand out. Although, this can be appealing for some designers to exhibit their brands, the other designers avoid protecting their designs, altogether.

Although trade dress protects the items distinctive traits, the criteria for proving distinctiveness makes it harder for fashion designs to receive protection under trade dress law.

The IDPPPA was a game changer, but a revised version is required, with a clear definition of the term trivial and specifying what is absolutely prohibited. At the same time, it should acknowledge the positive impact of copyists in the industry. Bearing in mind the temporary nature of the fashion, along with its ability to come back after a few years, the inspiration angle which plays a crucial role in the functioning of the industry and the circulation of trends among the consumers, the law must afford minimal protection of up to 12-18 months as trends last only a year. Additionally, in infringement cases, the damages should take into account the factors that influence how much a designer is injured by a copyist and should award remedies accordingly. Moreover, The US could draw inspiration from the EU system of protection.

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<sup>154</sup> Rustiala & Sprigman (n 31)

<sup>155</sup> McGurrin (n 119)

## CHAPTER 5

## TRENDING: PROTECTION IN THE EU

### 5.1 Introduction

Historically, three of the fashion capitals are located in the EU, namely: Paris, Milan and London. Europe remains the center of haute couture and the protection of fashion designs, is a core feature of its cultural identity and legal regimes<sup>156</sup>. Therefore, it will be relevant to study the protection system followed in the EU. There are two parallel systems of protection of fashion design that coexist: Copyright and Community Design Rights. This chapter focuses on the latter.

### 5.2 EU Design Directive

The Design Directive<sup>157</sup> requires all the Member States to enact laws which protect designs by registration and the specific mechanism for protection, was left to the individual Member States' legal regime<sup>158</sup>. This allows multiple legal protections for design to coexist. The Directive defines a design as, the outward appearance of a product or part of it, resulting from the lines, contours, colors, shape, texture, material, and/or its ornamentation, resulting from the lines, contours, colors, shape, texture, material, and/or its ornamentation<sup>159</sup>. The Directive's definition of design extends protection to ornamental, as well as functional aspects of the design on the condition that the design is not the only means to achieve a particular function<sup>160</sup>. This factor is missing from the US design protection system.

### 5.3 Design Regulation

Initially, to lay down a uniform legislation for design protection to be followed across the EU, the national legislations of each of the Member States were thoroughly assessed<sup>161</sup>. The efficacy levels that sprung from this measure differed for each Member States, thereby complicating the procedure. The Community Design Regulation (CDR) was introduced to harmonize these differences between the Member States, to build legal certainty and security.

The Council Regulation on Community Designs, later came to be known as the Design Regulation, was to be read along-side the Design Directive<sup>162</sup>. The requirements under this system are similar to those listed in the US Design Piracy Bills, 'novelty' and 'individual character' (originality) for registered designs<sup>163</sup>.

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<sup>156</sup> Francesca M Witzburg, 'Protecting Fashion: A Comparative Analysis of Fashion Design Protecting in The United States and The European Union', (2017) *The Trademark Reporter*

<sup>157</sup> Council Directive 98/71, 1998 O.J. (L 289) 28 (EC)

<sup>158</sup> Susanna Monseau, 'European Design Rights: A Model for the Protection of All Designers from Piracy', (2011) *American Business Law Journal*

<sup>159</sup> Basic Questions, European Union Intellectual Property Office, <<https://euipo.europa.eu/ohimportal/en/cd-general-questions>> last accessed 14 March 2019

<sup>160</sup> Council Regulation 6/2002, 2002 O.J. (L 3) 1 (EC)

<sup>161</sup> Christopher M Aide, 'The Community Design: European Union-Wide Protection for Your Design Portfolio', (2003) *Northwestern Journal of Technology & Intellectual Property*

<sup>162</sup> Fanelli (n 115)

<sup>163</sup> Council Regulation, Article 5

The Community Design Rights standard of similarity are far clearer than the ones proposed in the Design Piracy bills, as it specifies when designs are identical. According to Article 5, the design shall be identical, if their features only differ in immaterial details.

In *Karen Millen v Dunnes*<sup>164</sup>, the CJEU clarified the individual character and novelty requirement under the CDR. The CJEU concluded that, for a design to have individual character the overall impression it produces on the user must be different, from that produced by one or more designs taken individually and the designer must merely show, what the individual character of the design is, instead of proving that the design has individual character.<sup>165</sup> This allows designers to draw inspiration from previous designs and sets a higher hurdle for the infringer to prove their design's individual character.

The CDR also has an edge over the US fashion design protection, as registration of designs is not mandatory. There are two types of community design rights under the CDR: registered and unregistered.

#### 5.4 Registered Community Designs Rights (RCD)

The protection offered is up to 25 years, with the first registration period being 5 years and prolongation periods every 5 years from the filing date<sup>166</sup>. Registering a design is attractive to those designers who want their designs to have a longer shelf life. For example: the 'Kelly Bag' from Hermes or the 'Boy Bag' from Chanel which have remained evergreen, since their introduction.

The approach under the RCD, provides protection against any similar design without an evidence of original design being copied<sup>167</sup>. An additional advantage of the RCD, other than granting an exclusive right to prevent intentional, as well as independent creation of similar designs, would be that the applicant can claim infringement even if the person infringing did not copy or was unaware about the RCD application.<sup>168</sup>

##### ▪ Comparison with Trademarks

The issue that arises is that the RCDs overlap with Registered Trademarks. The RCD's consistent use is not required, for it to continue to be valid, unlike trademarks and RCD's do not require cancellation proceedings. The trademarks require prompt registration, to gain the first mover advantage, while the RCD applicant can enjoy the advantage of keeping the design a secret for up to thirty months pursuant to Article 50, thereby safeguarding himself from the fast fashion world.

As opposed to a trademark, the RCDs cannot protect services which are trivial for the fashion industry, in one sense, since the designer will hardly need to protect his/her services. Nonetheless if the designer was meant to

<sup>164</sup> Case-C-345/13, *Karen Millen Fashion Ltd v Dunnes Stores, Dunne Stores (Limerick) Ltd*, CJEU, June 19, 2014)

<sup>165</sup> Richard Hing and Leighton Cassidy, 'Karen Millen Fashion Ltd v Dunnes Stores, Dunne Stores (Limerick) Ltd: Clarifying the Assessment of Individual Character in EU Designs', (2015) The Law Journal of the International Trademark Association, p 105

<sup>166</sup> Council Regulation, Article 12

<sup>167</sup> Council Regulation (EC) No 6/2002 of 12 December 2011 on Community designs, OJ L 3,5,5.1.2002, p 1-24

<sup>168</sup> Aide (n 128)

extend the RCD to services, he/she can do so by covering goods that are complimentary to performing certain services with his/her designs<sup>169</sup>.

#### ▪ Comparison with National Copyright

When compared with the national Copyrights system of all member states, one single community design right offers more protection, as it is valid throughout the EU. Such protection would also be cheaper. The protection under the CDR is for a shorter period of time and therefore, it is best suitable for this industry.

### 5.5 Unregistered Community Design Rights (UCD)

These include the designs that could be protected for up-to 3 years, without registration, since it was made available to the public.<sup>170</sup> Here, the protection is dependent on the design's first disclosure. The Court clarified in *BHTPC*<sup>171</sup> that the event of disclosure must first take place within the geographical confines of the EU. This feature is beneficial for upcoming designers, who lack the necessary resources to curb piracy.

However, as opposed to RCD, evidence of copying is required to establish infringement. The problem arises in proving actual copying. To overcome this problem the Court, as seen in *Jimmy Choo v Towerstone*<sup>172</sup> is willing to infer copying from circumstances of the case, relevant factors including similarities between the designs, evidence of the defendant's access to the claimants work and the possibility of independent creation. In this case, the Court viewed the bags side-by-side, observed that, there were a large number of identical features and concluded it was an infringement. This case also highlighted the advantages of design rights over designs protected by national laws.

Despite the limited protection provided under the UCD, the ability to provide an initial important layer of protection, across the EU against counterfeiting and piracy, without formality or additional expenses<sup>173</sup> is appealing to the fashion industry where collections are intended to be renewed from time to time.

### 5.6 Comparison with the US system

While being mindful of the temporary nature of fashion designs, EU law provides designers with a 'grace period' lasting for twelve months, from the time the design was revealed to the public.<sup>174</sup> In fashion terminology, this could be called a trial-and-error period for the trend. Where a design gains popularity, a designer can subsequently register it, as opposed to when the design fails to stand out in the market. This helps

<sup>169</sup> Ibid

<sup>170</sup> Ibid

<sup>171</sup> *BHTBC v PMS Group* [2019] EWHC 2419 (IPEC)

<sup>172</sup> *Jimmy Choo v Towerstone* [2008] EWHC 346

<sup>173</sup> Press release, Office for Harmonisation in the Internal Market, Industrial Property Registration of Community Designs (1 April 2003) <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_03\\_77](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_03_77)>

<sup>174</sup> Guidelines for Examination of Registered Community Designs, European Union Intellectual Property Office

<<https://euiipo.europa.eu/tunnel->

[web/secure/webdav/guest/document\\_library/contentPdfs/law\\_and\\_practice/designs\\_practice\\_manual/Draft\\_Guidelines\\_2018/examination\\_of\\_design\\_invalid\\_applications\\_en.pdf](https://euiipo.europa.eu/tunnel-secure/webdav/guest/document_library/contentPdfs/law_and_practice/designs_practice_manual/Draft_Guidelines_2018/examination_of_design_invalid_applications_en.pdf)>

to reduce the burden of registering the design facilitates the study of the market. This feature cannot be found in the US.

The number of infringement cases in the EU are comparatively lesser than those in US<sup>175</sup>. This could be an indication that the laws in the EU are binding and lacking in adequate human resources and therefore the cases filed are comparatively less in number<sup>176</sup> while US is litigious with its well-established litigation system.

However, it could also be argued that US is the biggest infringer, due to lack of a protection system, consequently increasing the number of lawsuits notwithstanding, the European brands have filed numerous infringement cases against US brands, for copying. Chanel and Adidas filed cases against Amazon for counterfeiting, Puma and Gucci against Forever 21, Aquazzura against Ivanka Trump<sup>177</sup>.

The limited use of current framework of protection, does not in itself imply that, the EU provisions are faulty or unnecessary, but instead due to lack of information and disposable funds among the enterprises, the designers choose not to invest resources in registering their designs<sup>178</sup>. Additionally, lack of funds could also be the reason designers draw inspiration from other designers, again, stimulating the importance of piracy.

### 5.7 Can the US learn from the EU system of protection?

A proposed model for the US would be the combination of provisions under the EU along with eminent features of the IDPPPA:

- A. The time period of protection should be between 12 to 18 months from the date of disclosure of the design in the public. This time frame would give the designer ample time to experiment the design, gauge the response and be rewarded for their investment. Additionally, the time period would safeguard the designs, displayed during the two most crucial seasons in the year. Because the collections are viewed in advance of the runway-fashion weeks, this period would protect the designs, both during the preview and the post preview period, where designs are available for consumers to buy<sup>179</sup>.
- B. The US should adopt the community design rights system of the EU, offering protection under both the UCD and RCD.
- C. In order to maintain inflow of fashion designs from EU, US should have a provision which grants all the EU designs protection under the American law, as EU provides protection to American Designs<sup>180</sup>.
- D. Another addition that both the US and EU need is for a licensing period post the protection period which allows the designers to license their designs and continue collecting rewards for them as well.

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<sup>175</sup> A Bill to Provide Protection for Fashion Design, Hearing on H.R.5055 Before the Subcomm. On Courts, the Internet, and Intellectual Property of H Comm. On the Judiciary, 109<sup>th</sup> Cong. 2 (2006)

<sup>176</sup> Ibid

<sup>177</sup> Natasha Reed, From Runway to Replica: The Most Fashionable Intellectual Property Infringement Beefs of 2017, (8 Feb 2018) <<https://www.trademarkandCopyrightlawblog.com/2018/02/from-runway-to-replica-the-most-fashionable-intellectual-property-infringement-beefs-of-2017/>>

<sup>178</sup> Fanelli (n 115)

<sup>179</sup> Laura Marshall (n 65)

<sup>180</sup> Miller (n 41)

Although licensing during the first year would create complications for the designers as the design would be in public domain but will create opportunities for fast fashion houses to copy.<sup>181</sup> Subsequently, licensing in the second year would favor the designers to recoup costs associated with production and distribution and earn revenue<sup>182</sup> even if the designs are no longer in season. The pirates will benefit in determining which design they can copy; they will earn huge amounts after copying the season's most popular design to meet the public demand and reap the benefit of creativity without investing much time and effort on the design as compared to the original designer. Thus, licensing would benefit both the pirates and the original designers.

## 5.8 Conclusion

Although the EU provides sufficient protection, the fashion designers do not use them at their disposal. This does not invalidate the need for protection considering clothing will continue to be produced and purchased. The purpose of the law is to provide a solution for the designers, leaving the decision of registering the designs at their discretion. The UDR's are a favorable form of protection for the designers and a similar version should be incorporated in the US system. This would favor both the big fashion houses and small-emerging designers as well.

By doing so, the US will be able to administer the problem of lack of unanimity between the two systems in the future.

## CONCLUSION

The basic goal of intellectual property has been to provide incentives to the designers/authors, by granting them an exclusive right over their creation for a limited period of time. However, the drawbacks of heavy protection on both the industry and public, outweigh the harms suffered by individual designers. The level of creativity in this industry, is visibly lower than any other industry and thus, limited protection is an acceptable solution for it. The piracy paradox plays a crucial role in the development of fashion designs. As a result, this role cannot be eliminated, as doing so, would be the detrimental for the whole industry.

Effective enforcement measures, including legal remedies for infringement and piracy, contribute to maintaining a level playing field and upholding ethical standards within the fashion ecosystem. However, challenges remain, including the need for greater awareness and education on IP laws among fashion practitioners, improved enforcement mechanisms to combat online piracy and counterfeiting, and streamlined processes for registration and protection of designs and trademarks. In navigating the dynamic landscape of fashion in India, it is observed that a harmonious balance between fostering creativity and innovation and protecting intellectual property rights is crucial.

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<sup>181</sup> Linna T Loangkote, Note, 'Fashioning a New Look in Intellectual Property: Sui Generis Protection for Innovative Designer', (2012) Hastings Law Journal

<sup>182</sup> Ibid



US and EU are the major powerhouses of fashion in the world and on assessing the two protection systems followed, it is notably EU which provides a multilayered and stricter approach to protection, as opposed to US. The US relies on trademarks for protection and EU on design rights. Despite the differences, piracy exists, indicating that the industry stifles, with or without protection. Nonetheless, the thesis suggests protection should be offered and US law could reflect the salient features of the EU system.

It can also be deduced that, the designs copied, are mostly of renowned designers, as they influence the market, as a result, the upcoming designers are usually unaffected, as pirates will copy the designs produced by the top-notch designers. If heavy protection was to be provided, Haute couture designers like Gucci and Chanel will jump at every opportunity to protect every creation. This would be more hazardous for the small designers, than no protection, as this would deprive them of even the slightest possible chance to create fashion.

The proponents of heavy IP protection, believe in the orthodox view of rewarding the designers for their creativity, who spend every ounce of their time, curating designs, thinking out of the box, and going lengths to succeed, especially the up-coming designers. The opponents believe, pleasing the consumer is key, considering the fashion articles are purchased by them. From the analyses above, it can be concluded that, the designers themselves, do not believe in protecting their designs. Piracy appears to be socially acceptable by both the designers and consumers, provided the entire design is not pirated. It, therefore, seems reasonable to refrain from opening new doors of heavy protection for the industry.

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