

DIET IP: ROLE OF IPR IN PREVENTION OF COPYCAT CULTURE IN THE FASHION INDUSTRY

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Abstract

The fashion industry keeps growing every year with breakneck speed and the originality of the designs produced is one of the most essential factors behind the popularity of brands, designers and fashion houses. Fashion ‘design’ is an important element in the production and marketing of clothes, and therefore needs to be protected. While discussing the fashion industry, most scholars often direct the discussion towards aspects that protect branding and brand value, such as trademarks. This paper, however, focusses solely on the aspect of protection of ‘designs’ under the intellectual property framework, and the whether the level of protection provided to designs is enough to ward off any ‘copycats’. In the course of this paper, the existing laws of jurisdictions such as India, the United States, France and Italy – places where the biggest and most significant fashion houses in the global fashion market are located – will be briefly discussed, and the adequacy of these laws in protection of fashion designs and preventing unauthorised copies.

INTRODUCTION

For many centuries, fashion has been used as a tool of self – expression, just like art. Clothes are used as a means of expression by not only those who wear them, but also those who create them. The global fashion retail market including footwear and jewellery was valued at approximately two trillion U.S. Dollars in 2020.¹ The roots of the fashion industry as seen in the modern times can be roughly traced back to the early Renaissance period and its evolution started during the nineteenth century with Charles Frederick Worth, whom most sources credit

¹Common Objective, “Mapping the Global Fashion Industry: Key Findings”, *Common Objective.CO*, 2018, available at

https://static1.squarespace.com/static/5c59af0590f9041e3580eff2/t/5c62d674ee6eb0235cfe246a/1549981404832/CO+DATA_Mapping+the+Industry_Key+Findings.pdf (last visited May 05, 2021)

as the world's first '*fashion designer*'.² The emergence of fashion designers led to the creation of designer – specific styles, prints and silhouettes, and this is where intellectual property law enters the fashion industry scene.

Unique and innovative fashion designs can be considered as the intellectual property of its designers, provided it meets the legal requirements of course. Trademarks play a role in protection of the brand, patents play a role in protection of technical innovations and copyrights help protecting the designs i.e., the artistic work of the designer or the fashion house. Since the late 90s and early 2000s, fast fashion, understood as cheaper and quicker alternatives which '*take inspiration*' from the runways and celebrity trends, became a popular source of clothing for the general population as a consequence of the advancements made during the Industrial Revolution. The discourse over fast fashion in general has covered its effects on various aspects, mostly on the hazards to the environment, however, the relevant discourse here is the impact of fast fashion on encouraging '*copycat culture*' in the fashion industry by reproducing unique designs normally associated with specific fashion houses.

DESIGNS AS THE USP OF A FASHION NAME

The global fashion industry is estimated to be generating more than USD 2 trillion every year³, and protection of fashion designs under intellectual property is a major incentive which drives the players of the industry, and the fashion industry itself, as an outcome. The fact that the nature of the fashion industry is that of a business should not be foreseen whilst discussing the impact of protecting intellectual property in the industry. For any business industry and its players, protection of intellectual property is paramount as the ideas and concepts that are protected could also be interpreted as genuine business assets integral to the said business.⁴

It can be safely said that the blood of every industry is the newer ideas and innovations with respect to creativity of the products that it produces. Likewise, for the fashion industry, its growth and expansion thrives on the creativity expressed with respect to fashion, which is

² "History of fashion - A brief story of the evolution of fashion", *Sew Guide*, 2019, available at <https://sewguide.com/evolution-of-history-of-fashion/> (last visited May 12, 2021)

³ John Zarocostas, "The role of IP rights in the fashion business: a US perspective", *WIPO*, August 2018, available at https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html (last visited May 12, 2021).

⁴ "Why you need to protect your Intellectual Property", *The British Library*, 2015, available at <https://www.bl.uk/business-and-ip-centre/articles/why-you-need-to-protect-your-intellectual-property#> (last visited May 12, 2021).

mostly in the form of brand logos and designs. We will be focussing on the latter as a unique selling point in the industry. In a contextual but also general parlance, designs are understood as artworks, patterns, or any other artistic creation used in the making of a particular product, or otherwise. The Designs Act, 2000 defines a design as “... *only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device...*”⁵.

Most fashion designers and brands are known by their unique designs – a layman familiar with fashion can identify a Versace clothing easily when its peculiar Medusa motif is visible. The Royal Bengal Tiger motif has now been popularised by, and is identifiable with Sabyasachi Mukherjee’s brand ‘*Sabyasachi*’ and its products which include clothing as well as accessories. The spotted frog design is also usually associated with designer Diane von Furstenberg, popularly referred by her acronym, DVF. The above-mentioned are just a few examples out of many cases of certain signature designs being associated with specific brands.

The rise of fast fashion, however, has made it somewhat obscuring to distinguish between a real product of a fashion house, and its copycat produced by fast fashion brands. Fast fashion resulted in much cheaper alternatives for the average consumer by offering the option of rip-offs of designer clothing. Over the years, several drawbacks and non-beneficial effects have been associated with fast fashion – harmful for the environment, promoting excessive consumerism, etc., and infringing the intellectual property rights of the original fashion designer has also been generally recognised as one of the most noteworthy drawbacks. Most of the fast-fashion brands which are household names such as *H&M*, *Zara* and *Forever 21*, have cemented their position in the fashion industry by virtually reproducing designs showcased on the catwalk for ‘*a fraction of their original price*’.⁶

There is an entire instagram account – aptly called *Diet Prada* from whom this paper’s title takes inspiration from, to call out copycats and knock-offs produced in the fashion world. Fast

⁵The Designs Act 2000 (Act 16 of 2000), s.2(d).

⁶ Helena Pike, “The Copycat Economy”, *Business of Fashion*, 14 March 2016, available at <https://www.businessoffashion.com/community/voices/discussions/what-is-the-real-cost-of-copycats/fashions-copycat-economy> (last visited May 12, 2021).

fashion, also often referred by its infamous alternate name ‘*copycat economy*’ - has basically accelerated the copycat culture in the fashion industry to an extent where it results in actual and significant business harm to the original designer. Knock-offs and copycat pieces generated by fast fashion has led to a decline in brand loyalty and a dilution in the brand equity of luxury labels by making their products less desirable as a repercussion of their knock-offs being easily available.⁷

Furthermore, it would be an incomplete discussion on the issue if one fails to acknowledge that not just the bigger fashion houses, this knock-off culture also affects smaller and indie designers as well, who might not be as well – known as their fast fashion counterparts. Irrespective of popularity, fact remains that an original design should be attributed as the intellectual property of the designer who came up with it.

However, in most jurisdictions, even the strongest and the most stringent of laws are often unable to protect original fashion products from being copied. This is especially true in cases where the garments might not per se contain a distinguishing logo or prints that can be deemed as original creations.⁸ Zara had copied the original designs of Tuesday Bassen and sold it as their own. These included eerily similar designs of red erasers with the writing “erase you” and a heart shaped pink lollipop designed in a cartoonish style.⁹ Fashion Nova, a known fast fashion brand, has been accused by multiple designers of stealing their works. Jennifer Lopez’s iconic and bespoke green tropical jungle pattern dress by Versace, which she wore to the Grammys in 2000, and wore a reinvented version of the same by the same brand at the Milan Fashion Week runway in 2019, was ripped off and copied by Fashion Nova, which sold it at a much cheaper rate. Versace then sued the brand in California in 2019 for copying the iconic dress, as well as certain other “trademark Versace” designs in their clothes. The complaint read, “Fashion Nova’s Infringing Apparel is plainly a deliberate effort to exploit the popularity and renown of Versace’s signature designs, and to trade on Versace’s valuable goodwill and business reputation in order to drive profits and sales to line Fashion Nova’s pockets.”¹⁰

⁷ *Ibid.*

⁸ Julia Brucculieri, “Here's How Brands Like H&M Get Away With Copying Other Designers”, *HuffPost*, 9 April 2018, available at: https://www.huffpost.com/entry/fast-fashion-copycats_n_5b8967f9e4b0511db3d7def6 (last visited May 12, 2021).

⁹ *Ibid.*

¹⁰ Lisette Voytko, “Versace Sues Fashion Nova for Knocking off Famous Jennifer Lopez 'Jungle' Dress” *Forbes* 27 November 2019, available at <https://www.forbes.com/sites/lisettevoytko/2019/11/27/versace->

PROTECTION FOR DESIGNERS IN INDIA

The fashion industry in India has been thriving for years together, which can partially attributed to the rich cultural heritage of the country which includes attire as well. The Indian textile industry is worth USD 120 billion, and the fashion market was estimated to be worth USD 53 billion in 2020, making it the sixth largest national fashion market in the world.¹¹ Despite the immense growth and popularity of this industry, protection under intellectual property for fashion designs have been pretty sketchy, for the lack of a better word. We have all, at least once till date, seen a Manish Malhotra or a Sabyasachi knock-off at Chandni Chowk. While many designers are not too keen to enforce their rights on such knock-offs and some of them even consider it as a compliment to see their designs being reproduced in the non-label local fashion market, the real problem is when another designer or a fast fashion label reproduces the designer's work in mass quantity, often claiming the original work as their own. First, let us look into the legislations and certain case-laws which helped established a basic framework for the fashion industry with respect to protection of designs.

The relevant intellectual property based legislations for this discussion would be the Copyright Act, 1957 and the Designs Act, 2000. The Copyright Act defines 'artistic work' as "*(i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; (ii) a 1 [work of architecture]; and (iii) any other work of artistic craftsmanship.*"¹² The Designs Act goes on to define designs as "*only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged*

sues-fashion-nova-for-knocking-off-famous-jennifer-lopez-jungle-dress/?sh=223c6fc21d4c (last visited May 13, 2021).

¹¹ Amrita Nair-Ghaswalla, "Indian clothing market likely to be worth \$53.7 billion in 2020", *Business Line*, 04 December 2019, available at <https://www.thehindubusinessline.com/economy/as-fashion-world-braces-for-a-slowdown-india-shines-amidst-the-gloom/article30162822.ece> (last visited May 12, 2021).

¹² The Copyright Act 1957 (Act 14 of 1957), s.2(c).

solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device...".¹³

When someone decides to protect their designs and their work, the main question that often arises is with regards to which of these two abovementioned legislations is best suited to be applicable in that particular case or scenario. Original artistic works are examples of works with copyright. This concept of '*artistic work*' is very broad and isn't tied to any particular level of artistic quality. If a fashion design is original, it can be covered by copyright law, which also gives the copyright holder the exclusive right to use it in any material form. As a consequence, fashion designs seem to be covered under the Copyright Act. However, the Copyright Act contains special clauses that state that any design registered under the Designs Act would lose its Copyright Act rights. This issue was touched upon by the Delhi High Court in 2009 in *Microfibers Inc. v. Girdhar & Co*¹⁴ where it was observed that after reading the Preamble and the Statement of Objects and Reasons of the Designs Act, it is clear that the legislature's purpose is to provide increased protection to pure original artistic works. It also implies that design operation that is solely commercial in nature should be protected for a shorter period of time. Since business and art are treated differently by the legislature, pure artistic works have a longer period of security than commercial activities.

In the case of *Ritika Private Limited v. Biba Apparels Private Limited*¹⁵, the plaintiff, which is a boutique apparel designer brand run by well-known designer Ritu Kumar, filed a lawsuit against the defendants, a well-known ethnic wear company, seeking an injunction to prohibit the defendants from reproducing, printing, publishing, selling, or providing the prints or garments for which the plaintiff claimed to be the first owner. The legal question that arose in this case was whether the plaintiff loses control of her copyrighted works if they are used to make a dress that is produced in quantities greater than 50. The court distinguished between designs eligible for copyright protection under the Copyright Act and designs eligible for copyright protection under the Designs Act.

OTHER JURISDICTIONS

¹³ The Designs Act 2000 (Act 16 of 2000), s.2(d).

¹⁴2009 40 PTC 519 DEL DB

¹⁵Delhi High Court CS(OS) No. 182/2011

UNITED STATES OF AMERICA

The United States plays a vital role in the global fashion industry, and the industry is said to generate around USD 300 billion in the country every single year.¹⁶ The United States, hereinafter referred to as the US, is home to the fashion houses of multiple well-renowned designers including Halston, Ralph Lauren, Vera Wang, Marc Jacobs, Carolina Herrera and many other big names known throughout the fashion world internationally. The fashion scene in the US is ‘*very happening*’ as a millennial would phrase it, as it hosts multiple fashion events which are keenly watched by fashion enthusiasts around the world to discover new trends on the runway and couture, and other times, to relive vintage designs.

The New York Fashion Week, often referred by its acronym, the NYFW, which is a semi-annual event held in February and September of every year, is a part of the quadrumvirate of the major fashion weeks where designers display their newest designs and collections. The Met Gala takes place on the first Monday of every May, and is often referred to as “*fashion’s biggest night out*”.¹⁷

Despite the hullabaloo surrounding the fashion industry in the United States, the country’s legislation does not offer enough IP protection to the designs produced by fashion houses. The fashion designers have to instead take the route of gaining protection for the various aspects of designs through the combination of legislations for rights such as copyright, trade dress, design patent, etc.¹⁸ In 2011, an attempt was made to introduce a legislation specific to the protection of copyright of fashion designs in the form of “*Innovative Design Protection and Piracy Prevention Act*”, the attempt bore no fruition and fashion designs still do not have adequate protection at the federal level. Many scholars have argued for the Title 17 in the U.S. Code, which outlines the copyright law, to be explicitly extended to fashion designs as well.

An early endeavour to try and protect the designs of fashion designers was made in 1932 with the establishment of the “*Fashion Originator’s Guild*” to promote original designs and reduce

¹⁶ Christiane Schuman Campbell, “Protecting Fashion Designs Through IP Law” - Intellectual Property – *Mondaq*, 15 April 2015, available at <https://www.mondaq.com/unitedstates/trademark/388902/protecting-fashion-designs-through-ip-law#:~:text=> (last visited May 12, 2021).

¹⁷ Christian Allaire et al., “Met Gala 2021: Celebrities, Red Carpet, Theme & More”, *Vogue*, 2021, available at <https://www.vogue.com/tag/event/met-gala> (last visited May 12, 2021).

¹⁸ Kelly Tubman Hardy et al., “Snapshot: intellectual property for fashion goods in USA” *Lexology*, 2020, available at <https://www.lexology.com/library/detail.aspx?g=14348d01-709a-4a5f-95a2-019f58fc95b0> (last visited May 12, 2021).

design piracy in the fashion world of the US. However, the Guild was abolished within nine years of its establishment, in 1941.¹⁹ Trademark protections are not particularly helpful because they provide protection to the brand image and logo, not to the designs used in the clothes per se. Trade dress and design patents are comparatively better intellectual property tools to protect designs in the US. The former is defined to be encompassing “*the total image and overall appearance of a product, or the totality of the elements, and may include features such as size, shape, colour or colour combinations, texture, [or] graphics*”²⁰ and is able to offer protection to designs provided that the “consumers must associate the entirety of a design with a particular designer.”²¹

The latter, design patents provides for the granting of design patents to “*any person who has invented any new, original and ornamental design for an article of manufacture.*”²² While copyright would have been an ideal IP tool to provide for protection to fashion designs, according to the United States law, useful articles, like clothing, cannot be copyrighted. The lack of adequate protection to original designs in the United States also translates in the copying of these designs by fast-fashion brands, most of which hold office in the country.

FRANCE

Fashion has played an essential role in the social life as well as culture of the French, for centuries together. France is known as the global fashion capital²³ because of its history with fashion – in the context of royalty, the French Revolution and the evolution of haute couture in French high society, and also because of multiple big name fashion houses being associated with the country, such as Coco Chanel, Christian Dior, Yves Saint Laurent, Givenchy, Lanvin, Louboutin – the list is endless. France also hosts the Paris Fashion Week, which is also a part

¹⁹ Kal Raustiala & Christopher Sprigman, “The Piracy Paradox: Innovation and Intellectual Property in Fashion Design”, 92 *Virginia Law Review* 1687, 1726 (2006).

²⁰ Catherine P. Cain, “TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1202.02”, *USPTO*, 2018, available at <https://tmepp.uspto.gov/RDMS/TMEP/Oct2012#/current/TMEP-1200dle1.html> (last visited May 13, 2021)

²¹ Jasmine Martinez, “Intellectual Property Rights & Fashion Design: An Expansion of Copyright Protection”, 53 *University of San Francisco Law Review* 369 (2019).

²² “Design Patent Application Guide”, *U.S. PAT. AND TRADEMARK OFF.*, available at: <https://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/design-patent-application-guide> (last visited May 13, 2021)

²³ Mischa Smith, “How France Became the Fashion Capital of the World: a Brief History”, *Culture Trip*, 2015, available at <https://theculturetrip.com/europe/france/articles/how-france-became-the-fashion-capital-of-the-world/> (last visited May 12, 2021).

of the Fashion Week quadrumvirate, and a semi-annual affair. Perhaps it is this affinity for fashion that resulted in better laws for protection of fashion and fashion designs in the country.

“*Fabrication of textiles*” was granted protection as early as in the Fifteenth Century. In 1793, the National Convention had passed the Decree of 19-24 July, 1793 – which is an important and a very famous source for intellectual property rights, and basically confirmed ‘design-specific’ protection.²⁴ In 1806, and then 1909, these laws were further supported by special design laws which offered adequate protection to fashion designs. The French Intellectual Property Code also offers protection to “*original works of the mind, including those that “reflect the personality of their author” and expressly lists “the creations of the seasonal industries of dress and articles of” as a protected work of the mind in Article L. 112-2.*”²⁵

The Intellectual Property Code reported that even an unregistered creation of a designer can benefit from double protection under French law, “on the one hand by the copyright law (Copyright being free of registration) and by the design law (Unregistered Community Design Rights called DMCNE in French), in an alternative or a cumulative way. These protections are confirmed on a judicial level, no administrative office having jurisdiction over these questions.”²⁶

ITALY

Italy is one of the major fashion hubs around the world being home to designers such as Gianni & Donatella Versace, Elsa Schiaparelli, Domenico Dolce, Stefano Gabbana, Mario Prada, Giorgio Armani and many more. The Milan Fashion Week is also a part of the four major fashion weeks – or the quadrumvirate, as we have previously referred to it as. Additionally, one should take into consideration the fact that most countries in Europe have much stronger IP protection laws on fashion than the United States. Similar to France, Italy also covers fashion designs under the national copyright system.

²⁴ Primary Sources on Copyright, *Record Viewer*, available at http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_f_1793#:~:text=The Decree of 19-24 (last visited May 12, 2021).

²⁵ Francesca Montalvo Witzburg, “Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the U.S. and Europe” *Cardozo AELJ*, 09 September 2014, available at <https://cardozoaelj.com/2014/09/19/protecting-fashion-a-comparative-analysis-of-fashion-design-copyright-protection-in-the-u-s-and-europe/> (last visited May 12, 2021).

²⁶ Magda Voltolini, “French Fashion Industry Eyes Ways to Better Use IP Rights for Protection” *Intellectual Property Watch*, 15 December 2014, available at <https://www.ip-watch.org/2014/12/15/french-fashion-industry-eyes-ways-to-better-use-ip-rights-for-protection/> (last visited May 13, 2021).

The Italian Copyright Law protects 'mind works having a creative character and belonging, regardless of their expression or expression, to the literature, music, figurative arts, architecture, theatre or cinematography' and "in particular, protection shall extend to works of industrial design with a creative or inherent character. The defence of copyright does not rely on registration, fashion designer can apply for a temporary ex parte order to seize from Italian courts any copy of their designs of creative and artistic value."²⁷

CONCLUSION & SUGGESTIONS

Clothing has become a basic necessity for human civilisation and fashion has become a way of expression and lifestyle. The fashion industry, thus, consciously or subliminally ends up playing a role in everyone's lives. One might even remember Meryl Streep's famous monologue about the 'cerulean' sweater in the movie "*Devil Wears Prada*". For this industry to flourish, the originality and uniqueness of designs is a given. However, ironically, although it sounds contradictory – the ready-made availability and lower prices of runway designs are also factors running the growth of another part of the industry – the fast fashion industry, not excluding big designers themselves copying off original designs from other designers.

Some in the fashion world consider the copycat culture as a form of flattery, as the famous quote by Oscar Wilde goes – "*Imitation is the sincerest form of flattery*". Indian designers like Sabyasachi Mukherjee have gone on record to say they do not mind the local textile industry flourishing on the basis of occasional copying of the well-known designs from designer clothes, replicated by regional workers.²⁸ This is a fair approach when it comes to local clothing artisans because of various reasons including the amount of loss being insignificant, but more often than not, the real problem lies within the "industry" and its fast-fashion sub-class. Designers and fast-fashion brands often end up gaining huge amounts of profit by selling off copied designs as their original – robbing not only the monetary incentive that the original designer may have had, but also the attribution of the particular design to the original designer by the general public, especially in cases where the stealing brand is more well-known compared to

²⁷ "Introduction to Italian copyright law: full guides and online tools", *Ufficio Brevetti EN*, 2020, available at <https://www.ufficiobrevetti.it/en/copyright/> (last visited May 13, 2021).

²⁸ "Inside the \$50B World of Indian Weddings with Deepika Padukone and Sabyasachi Mukherjee" *BusinessofFashion*, *Youtube*, 2019, available at <https://www.youtube.com/watch?v=yoibpzA58IM>

the original designer. Therefore, protection of ‘designs’ used in the fashion world for producing clothing is vital and necessary.

It has been observed that most European countries, who are part of the European Union, especially France and Italy – considered as major fashion hubs – have adequate legislations under their intellectual property frameworks to protect ‘designs’. India, another country where the fashion industry is getting increasingly popular, does seem to offer some protection to ‘designs’ under the copyright framework, however it is not adequate. In countries where fast fashion is on the bloom, such as the United States – also a major fashion hub – unfortunately, the intellectual property framework does not offer adequate protection to original designs, despite its placing in the global fashion market. It is only reasonable to conclude that inadequateness of protection has resulted in fast fashion brands thriving in these countries. A common problem, however, in legislations covering intellectual property protection for original designs in fashion is that the standard of proof for ‘originality’ is very high and difficult to prove in most cases, even the genuine ones. On paper, holding the person to a very high standard of proof might sound like a great initiative to safeguard the ‘originality’ requirement, nonetheless, there needs to be a solution worked out which could promise the same without potentially causing major issues to a sizeable number of designers who wish to get their designs protected.

Another suggestion for countries such as the United States and India, where the fashion and textiles sector makes a significant contribution to the economy of these countries, is to either introduce a specific and detailed legislation for protection of original designs, and exceptional cases. However, amending the existing framework and legislation to explicitly address protection of fashion designs is better suited to the challenges of time, money and resources involved, as compared to the process of introducing and debating a fresh legislation. Fashion designers currently have to scurry their way through a patchwork of various intellectual property protection tools to protect their designs, hopefully, the situation will be different in the coming decade when the industry would have grown enough to be significant enough to press for reforms on protection of its designs.