



INTELLECTUAL PROPERTY IN THE FASHION INDUSTRY: DESIGN PROTECTION AND COUNTERFEITING CHALLENGES.

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ABSTRACT

The fast-evolving fashion industry, characterised by constant changes and creativity, poses a great risk in terms of intellectual property (IP) protection. Designers are constantly creating unique designs — yet, due to weak laws regarding fashion design protection, counterfeiting and copycats abound. This study provides an overview of the complexities regarding IP laws in fashion such as design protection and consumer counterfeiting. It examines the legal frameworks that exist today for design protection, assessing whether they meet the market need to prevent imitation or expose vulnerabilities exploited by counterfeiters. It also explores the economic and creative consequences of counterfeiting on fashion designers, brands, and firms overall. This research, through an analysis of case studies and legal precedents, uncovers critical issues shaping the enforcement of IP reforms within the fashion industry whilst determining strategic responses to improve design protection. The results are expected to assist in better understanding how IP laws can be improved to serve the fashion field, leading to an encouraging and challenging design atmosphere with outputs of counterfeit reduction. This research illustrates the need for legal systems to adapt with the changing environment surrounding fashion, where success hinges on being able excel at protecting designs as well as assets that others may exploit.

Keywords: Intellectual Property Rights, Fashion Industry, Artistic work

INTRODUCTION

Intellectual Property Rights (IPR) are exceedingly important in the field of fashion, as they help protect the investments done by designers, brands and companies that lead to new unique designs, names and products. Intellectual property rights (IPR) protection, therefore, has become a necessity in the industry to protect originality and promote innovation as larger threats from counterfeiting, unauthorized reproductions and fast-fashion replication keep looming closer. IPR cultivates a spirit of invention and individuality by permitting creators to safeguard their designs and maintain ownership of the same. Specifically, trademarks play a crucial role in developing brand identity and consumer loyalty

as these words or symbols symbolize quality, craftsmanship, and style. Intellectual property protection also safeguards and reinforces one of its most valuable assets—brand equity; opportunity to dilute or misrepresent the brand dissipates as market competitors fail to experience any derived benefits from imitation. From an economic perspective, IPR allows businesses to license their innovations to other firms, pursue partnerships or release new products before anyone else which further enhances the sustainability of the industry. In addition, IPR plays an essential role in fighting counterfeiting that typically reduces brand revenues while they also jeopardize consumer safety and trust. The industry is also embracing sustainability, and IPR will further protect those innovations which can encourage investment in sustainable materials or production techniques that are not easily imitable. In supporting creativity, attracting investments and stimulating sustainable approaches, IPR plays a vital role in building a more resilient fashion ecosystem that meets changing consumer and market needs. The diffusion and the challenges of these modes are explored, along with a particular emphasis on the legal structures, economic impacts and potential future outlooks linking to design protection and counterfeiting issues.

LITERATURE REVIEW

1. Role of IPR in Fashion Industry (Sreelatha 04 Apr 2024)

The paper highlights the importance of intellectual property rights (IPR) in the Indian fashion industry, emphasizing their role in protecting designers' creative works through trademarks, copyrights, patents, industrial designs, and geographical indications, thus ensuring economic value and market differentiation.

2. Fast fashion and challenges in IPR protection (15 Nov 2022)

The paper discusses IPR challenges in India's fashion industry, highlighting issues like copyright and design law loopholes that lead to infringement. It emphasizes the failure of current laws to protect designers and suggests potential solutions to counter these violations.

3. Issues with Ip law and fashion industries in India (Mehak Nawaz Khan 15 Nov 2022)

The Indian fashion industry faces significant challenges due to inadequate Intellectual Property Rights (IPR) protection, leading to the theft of unique designs and the proliferation of counterfeit goods, necessitating comprehensive legislation to safeguard innovative fashion products and support emerging designers.

4. IPR Registration in Fashion Industry of India (Vishaka Agarwal 01 Jan 2019)

The fashion industry in India faces low IPR registration rates due to awareness gaps, complex procedures, and costs. While 82% of respondents recognize IPR's importance, many still struggle with registration, highlighting the need for simplified processes and increased education

RESEARCH PROBLEM

In a fast-growing and dynamic area such as fashion, designers keep on generating more and more new designs that are hard to replicate. Unfortunately, because there are no strong legal safeguards for fashion-oriented design elements, these inventions are often pirated and counterfeited, causing harm to the artistic and commercial goals of designers, brands, and fashion companies. Existing IP regimes, which are not necessarily designed for the short life span of

fashion, create loopholes that counterfeiters thrive in. This study examines how appropriate current IP laws are in addressing the challenges within the fashion market and the role played by counterfeiting within the industry in question.

RESEARCH METHODOLOGY

This research employs a doctrinal approach to analyze the existing laws that provide protection to intellectual property (IP) within the context of the fashion industry, specifically as regards design protection and counterfeiting. Since doctrinal research primarily deals with the analysis of primary sources such as legal texts, case law, statutes and various regulatory policies, it would be possible to get an in depth understanding of the existing laws and the judicial interpretations that affect IP protection in the fashion industry.

RESEARCH QUESTIONS

1. What are the current IP laws and regulations applicable to the fashion industry, particularly regarding design protection?
2. To what extent do existing IP laws meet the needs of the fashion industry in preventing imitation and counterfeiting?
3. What are the primary challenges faced by designers and brands in securing adequate IP protection for their work?
4. How have judicial precedents and case law shaped the enforcement of IP rights in the fashion industry?

RESEARCH OBJECTIVE

The research seeks to study how the existing IP laws related to the fashion design protection are utilized and if they are useful in combating imitation and counterfeiting. The objectives of this study include identifying the crucial factors which make it difficult for designers and designers' brands to obtain and enforce legal protection for their inventions. It seeks to analyze legal gaps and vulnerabilities in current IP laws that allow counterfeiters to exploit fashion designs.. By looking at judicial precedents and case law, this research will be looking at how the existing IP laws are implemented and explore the possibility of reforms or strategies that could improve design protection. This study aspires to focus attention on IP laws providing an environment in tune with the rapid dynamic developments in the fashion industry offering heavy protection for designers while not stifling the industry growths and creativity.

IMPORTANCE OF IP PROTECTION IN FASHION INDUSTRY

The essence of fashion lies in crafting garments that captivate and inspire consumers to wear them. Fashion is a constantly evolving field, one that reinvents old styles to create new works of art that often become iconic. This constant innovation highlights the critical role of intellectual property (IP) rights in fashion, as they establish a secure and supportive environment where designers can trust that their creations are protected. Educating designers about IP rights and encouraging them to seek training and guidance on safeguarding their work is essential.

For clothing brands, establishing strong legal protection through IP registration is key to preventing unauthorized use of their image and combating counterfeiters who harm brands' reputations and economic success. A brand's reputation

is fundamental to its achievements, making its protection vital. While it is challenging to fully eliminate counterfeiting, effective IP legislation across various countries can help minimize risks and damage. This, in turn, supports the growth of the fashion industry and contributes positively to the overall economy. There are many challenges for the apparel industry, especially in this era when technological advances are advancing by leaps and bounds and the way fashion is advertised has taken on a new edge, using internet platforms and social networks as one of the main marketing mediums. This has the advantage of reaching a much wider audience, but with the disadvantage of being vulnerable to counterfeiters who use the content uploaded to the internet to promote their own fakes and reach their target audience through deception. This is why it is more important than ever to face these challenges with the proper protection of the intellectual property rights emanating from the creations of new designs. Only to the extent that legislation focuses on the protection and adoption of measures to make the protection of Intellectual Property rights effective, and that designers and brand representatives in the fashion industry themselves seek to prioritize the protection of their designs, despite the costs involved and the short life span of some garments, will it be possible to efficiently combat the dangers of counterfeiting, and thus establish a strong trademark identifiable by consumers in the fashion industry, which is constantly growing.¹

TYPES OF IP IN FASHION INDUSTRY

COPYRIGHT

Copyright is a property right given to authors that allows them to control, protect, and exploit their artistic works². It is the legal right to copy anything. In India, The Copyright Act of 1957 regulates copyrights. All creative, artistic, musical, and literary work is protected by copyright³. Under the Copyright Act, the artistic work related to printings/designs/patterns etched or imprinted on textiles/fabrics/apparel/garments are protected.⁴ Section 2(c) of the Copyright Act provides protection to artistic design work. It includes a painting, a sculpture, a sketch, or any other artistic creation. It safeguards works that are distinctive in some manner. However, the functional aspect of a design is not protected by The Copyright Act. Any design's aesthetic components, including its shapes, configuration, patterns, ornamentation, lines, and colors, are protected by the Design Act of 2000. The registered design will automatically be protected by copyright under this statute, and the design may be protected for up to a period of 15 years. Copyright protection covers a design for ten years from its registration date. The duration of copyright generally extends for the lifetime of the author plus an additional 60 years after their death. However, this protection applies specifically to artistic works or architecture; clothing, footwear, and other items typically associated with fashion are not included. Copyright is very important in the fashion industry as it protects the artist's creativity. For instance- a fashion illustrator can be protected to be copied by a copyright. This way, the art is protected and can only be used by the creator of that design or the people who are permitted to use that design.

¹ <https://igerent.com/intellectual-property-fashion-industry>

² <https://guides.library.unt.edu/SCCopyright/basics#:~:text=Copyright%20Claims%20Board-,What%20is%20Copyright?,circulars%2C%22%20about%20copyright%20law.>

³ The Copyright (Amendment) Act, 1992, No. 14, Acts of Parliament, 1992 (India).

⁴ [Bhawna Sharma and Oshmi Jaiswal, India: Textile Industry And Design Protection, monday.com, https://www.mondaq.com](https://www.mondaq.com)

Section 15(2) of the Copyright Act mentions that no copyright can subsist in the drawing and sketch under the Indian Copyright Act once it is produced more than 50 times.⁵ In the case of **Unicolor, Inc. v. Urban Outfitters, Inc**⁶; the court directed that the print pattern of a woman's dress can be copyrighted, and if anyone makes a replica of that design then he will be sued for infringement.

TRADEMARK

A trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises⁷. The Trademark Act of 1999 governs trademarks. Customers are less likely to become confused about the brand name, symbol, quotation, etc. when a trademark is used. A trademark gives a brand notoriety that no other business can imitate. Adidas utilizes three stripes as a trademark, Christian Louboutin uses red soles, Bettina Liano's uses pocket stitching on their clothing, and Nike uses a tick symbol to identify themselves. Other well-known companies, such as Louis Vuitton, Michael Kors, Zara, H&M, and others, employ their own trademarks to help them stand out in a competitive market. To be protected from imitation, a trademark brand needs to be registered. Brands are shielded by trademarks from having an identical mark that could mislead and turn away potential customers. If a designer uses a registered trademark, then his products are viewed with less style and quality. Moreover, consumers look down on such designers. Depending on the nature of trademark infringement, the offender is punished as per the provisions provided in the Trademark Act

Another phrase that is frequently used is "trade dress," which is a subset of trademark law. A product's appearance, interior design, packaging, size, texture, colour combinations, and organization can all be considered trade dress. It also includes the colour and sound of any product or item, such as the distinctive design and colour of an Adidas sneaker. The entire design of an item, including its trademarks, might be protected by trade dress. Since trademark registration is less expensive, more convenient, and takes less time, most designers choose trademark protection over designs and patents. For getting a trademark, the designer needs to fill out the e-trademark application of the Trademark Registry on the Intellectual Property India website under the Trademark Act to get his/her products registered for the same⁸

PATENT

The 1970 Patent Act and the 2003 Patent Rules regulate patent law. A patent indicates a development that creates products like fabrics and shoes using new technologies. A patent is a type of property right that grants the holder the sole right to profit from an invention for a set amount of time and forbids others from using, producing, or selling it. An innovation is a product or a method that, in general, offers a new way of doing something or a new technical solution to a problem. A patent is an exclusive right awarded for an invention⁹. There are three types of patents such as utility patents, plant patents and design patents. From the date for filing form for receiving the patent right, Design patents and utility patents grants exclusive rights to the patent holder for 14 years and 20 years respectively. After the expiry of

⁵ Section 15(2) of the Copyright Act of 1957.

⁶ Unicolors, Inc. v. Urban Outfitters, Inc., April 3, 2017, Orrick, H.

⁷ Trademarks, <https://www.wipo.int/trademarks/en/>.

⁸ Trademark Registry, Intellectual Property India, <https://ipindiaonline.gov.in>.

⁹ Patents, [wipo.in, https://www.wipo.int/patents/en/#basics](https://www.wipo.int/patents/en/#basics)

said period, the innovation is free to be manufactured by others. In order to get a patent, technical information about the invention must be disclosed to the public in a patent application¹⁰

Since artistic creations cannot be patented, the fashion industry does not employ patent law very often; instead, the technology sector uses it more regularly. A new pair of earrings cannot be granted a patent since they are just a new creation and not an innovation. Patents are primarily granted in the technical and industrial sectors because they have a high scope of producing new inventions. In fashion sector, Water-repelling textiles, wrinkle-free textiles, etc., may be eligible for patent protection as they are more of an innovation.

CHALLENGES IN DESIGN PROTECTION

Copying and Counterfeiting

The fashion industry faces significant challenges from copying and counterfeiting. Counterfeit products, including fake designer clothing, accessories, and footwear, are widespread and can cause substantial financial losses for legitimate fashion brands¹¹. The fast-paced nature of the industry and global supply chains make it difficult to effectively enforce IPR and prevent unauthorized copying¹²

Lack of Design Protection

The current IPR regulations in some nations might not provide sufficient protection for fashion creations. Fashion designs frequently fall into a gray area, in contrast to original works that can be copyrighted or inventions that may be patented. Without complete design protection, it is simpler for others to copy or duplicate designs without fear of legal consequences.

Fast Fashion and Trend Cycles

Rapid trend cycles govern the fashion sector, with new styles appearing frequently and rapidly becoming outdated, it becomes extremely difficult for IPR laws to keep up with the speed of innovation and creativity in this fast-paced world while yet providing sufficient protection for designers' rights. The potential impact of enforcement may be diminished if the trend has already subsided by the time legal action against infringers is taken.

Cultural Appropriation

The fashion industry has come under fire for cultural appropriation, which is the adoption of traditional features, motifs, or patterns from underrepresented and indigenous cultures without the appropriate credit or consent. It is difficult to strike a balance between protecting intellectual property rights, honoring the cultural heritage, and preventing exploitation, requiring a deeper understanding of cultural sensitivities and ethical considerations.

Complex Supply networks

¹⁰ Patents, wipo.int, <https://www.wipo.int/patents/en/#basics>.

¹¹ https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html

¹² <https://lawbhoomi.com/intellectual-property-rights-in-fashion-industry-in-india/>

Designers, manufacturers, suppliers, distributors, and retailers are just a few of the many organizations that make up fashion supply networks. It can be challenging to manage Intellectual Property Rights (IPR) as it requires clear communication, collaboration, and legal agreements to ensure the protection of intellectual property at each stage of the production and distribution process.

CASE LAWS RELATED TO FASHION INFRINGEMENT

Star Athletica vs. Varsity Brands¹³

In this case, the brand star atletica began creating cheerleading uniforms with certain designs like stripes, zig zag and other patterns and started selling them at a very reduced price, which was very similar to the varsity brand. The varsity brand features over 200 copyrighted designs, which comprises of variety of patterns, colours and forms. Star atletica printed one of these designs on their cheerleader uniforms which then was accused of copyright infringement. The district court ruled that because designs are unable to be physically or mentally detached from things, they are not entitled to protection under copyright. On the other hand, the sixth circuit decided that any form of images and goods can be easily distinguishable from each other and subsist independently. It further stipulates that any artwork can be protected by copyright when it is detached from the products, and if it is represented in graphic and sculptural form.

Reckitt Benckiser (India) Ltd. v. Wyeth Ltd.¹⁴

The issue in this case was regarding the registration of S-shaped spatulas. The defendant in this case i.e. Wyeth Ltd. claimed that the appellant's design was not original as it has already been registered in a foreign country before its registration in India. And also there was the suppression of facts regarding the prior registration in a foreign country. It was held that if it can be shown that the design was disclosed anywhere in India or a foreign country by means mentioned under Section 4(b) then the registration in India would be considered to be cancelled and it can be sought as a defence against alleged infringement under section 22(3)

M/s S K Industries v. Dipak Ghosh¹⁵

In this case, the Plaintiff claimed that there was a certain cup in which jelly was being packed and marketed and the defendant cannot use the design. It was held that, the cup which the plaintiff used has no novelty and was just any regular cup with no originality in its shape or dimension. The cup is the same as manufactured by most of the manufacturers for storing something.

Ritika Pvt. Ltd. vs Biba Apparels Pvt. Ltd¹⁶

¹³ 3 Star Athletica, LLC vs. Varsity Brands, Inc., Case no. 15-866, 580 U.S. (2017)

¹⁴ https://blog.ipleaders.in/a-critical-analysis-of-design-protection-in-india/#Issues_and_challenges

¹⁵ https://blog.ipleaders.in/a-critical-analysis-of-design-protection-in-india/#Issues_and_challenges

¹⁶ Ritika Private Limited vs Biba Apparels Private Limited on 23rd March, 2016, CS(OS) No. 182/2011

The registered design and copyright infringement are at issue in this case. Ritika claimed that Biba Apparels had copied the plaintiff's design and craftsmanship, which the plaintiff marketed under the Ritu Kumar trademark. The plaintiff claimed to be the original owner and claimed that the accused profited from the selling of the designs under their name without their permission. However, the defendant refuted the plaintiff's claims and assertions, claiming that the plaintiff had not registered the given design. They argued that the litigation is not maintainable and cannot be regarded as copyright infringement because it was manufactured more than fifty times. The court ruled that the design must be registered under the Designs Act in order to get copyright protection. Otherwise, after being manufactured more than fifty times, the design might no longer be protected.

Considering the clothing items were created in factories utilising the pattern or drawing, the court was determined that the defendant was not infringing any copyright. There existed no evidence that the defendant had attached an illustration from the plaintiff's artwork to the garments.

Puma SE vs. Forever 21¹⁷

Puma clothing filed a lawsuit against fast fashion retailer Forever 21 on the grounds that the designs in the shoes made by the fast fashion retailer were nearly identical to those of Puma's Fenty collection, which included the bow slide, fur slide, and creeper sneakers—all of which were created and marketed in partnership with the world-famous singer Rihanna. Puma argued that the defendant purposefully imitated the Fenty collection's designs in order to capitalize on the popstar's fame and the brands. However, forever 21 argued in defense that the designs were neither innovative or original and that they were created in the 1940s. Because the plaintiff could not prove non-functionality, the court rejected the claim. Furthermore, it was decided that the plaintiff's claims included unfair competition and false identification of origin in accordance with the Lanham Act and the California Business and Professions Code. The court did, however, give Puma a chance to amend and restate some of their claim. Finally, in November 2018, the plaintiff and the defendant had reached an agreement to end the matter.

Sree Vishnu Bottles v. The State Of Tamil Nadu¹⁸

In this case, the petitioners were engaged in the business of buying beer bottles and paper from Tamil Nadu and transporting the same to Karnataka and Madhya Pradesh. They were engaged in this business for a good number of 30 years. However, they were stopped from proceeding with their business, the reason being some of the bottles were registered under the Designs Act of 2000. They were held liable for violating section 22 of the Designs Act.

SUGGESTIONS

Since designers frequently copy the concepts and goods of other designers, the current intellectual property rights regulations are insufficient to safeguard the designs and styles created in the fashion sector. There are many gaps in the fashion industry's intellectual property protection. Strict IP laws are required to totally end this behavior, and individuals must be aware of their rights. Modifications must be made to India's current intellectual property rights framework in order to strengthen it and better safeguard fashion design from fraud and theft. The registration procedure

¹⁷ CV17-2523 PSG Ex, 2017 U.S. Dist. LEXIS 211140 (C.D. Cal. June 29, 2017)

¹⁸ <https://indiankanoon.org/doc/188080557/>

under Designs Act must be made uniform and simple. The protection should be given for 1 to 3 years to cope up with the fast moving phase of fashion sector. To decide which kind of intellectual property will work best for their items, fashion designers must thoroughly educate themselves on IP protection regulations.

Separate tribunals to be set up to deal with cases of infringing IPR in fashion sector. This ensures the pending litigations are decided soon. Many times, designers are reluctant to file cases for infringement as it might takes longer time to decide the dispute. Provisions to be made setting time limit for deciding cases in this sector as in case of consumer disputes.

The fashion sector should be encouraged to set up IP watch groups and share information about infringers to deter counterfeiting collectively. Awareness of individual rights is necessary for intellectual property to thrive. This can be accomplished by filling in the current gaps in the fashion industry's intellectual property protection.

CONCLUSION

It is clear that fashion is an art form, much like painting, sculpture, or music, and that those who produce it—artists, sculptors, musicians, and composers—should have legal protection for their work. Fashion designers are different from other artistic endeavors like music, literature, and visual art, in part because of the industry's cyclical nature and rapidly shifting trends. Subsequently, it is vital to recognise that such categories of work have unique qualities that necessitate distinct and additional adaptable legal procedures than generic standards.

Ensuring that all the legal requirements are taken care of is the first step towards safeguarding any fashion brand and taking action against counterfeiters. Without registered intellectual property rights such as designs or trademarks, which are essential to any successful fashion brand it is impossible to take legal action against counterfeiters. Although fashion is a highly competitive industry, legal protections for innovative designs are limited. The fashion sector significantly impacts both the economy and society, even though some may perceive it as superficial or short-lived. Globally, fashion is a sophisticated industry valued at \$2 trillion, acting as a universal language that enables countless individuals to communicate without words. To protect their designs, fashion designers must understand intellectual property rights, as effectively managing these rights helps safeguard and market their ideas, brand connections, and expertise. This approach empowers designers and brands to expand into new markets, increase their market share, and boost revenue.

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