

PROTECTION OF FASHION DESIGNS AND THEIR COPYRIGHT IN THE FASHION INDUSTRY

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Abstract

This Research Paperwork is an attempt at a comparative study and analysis of the copyright law and designs law in the aspect of the fashion industry nationally and internationally. As we know Intellectual Property is the major segment of life and can be found in each and everything including the fashion industry as it widens its scope. And as of all the intellectual works, the fashion industry also needs protection by Intellectual Property. The most fundamental purpose of this paper is to compare both of the laws namely; Copyright Law and Designs Law and come up with an in-depth study to deal with the research problem.

In recent times, it has been noticed that the fashion industry of our country has been facing high piracy issues which are mainly the results of stealing of unprotected designs which damages the exclusive rights of its owners. Fashion is nothing but a form of art and it does not just include clothes but a wide variety of IP such as ornaments, jewellery, footwear, accessories and all kinds of works or property which helps to enhance human attire and looks. It comes under the 'artistic works' which is a subject matter of the Copyright Law. This makes it important to protect the industrial designs of these works under fashion by IPR. And here the conflict arises upon which the battle for both of these laws continue i.e. the Designs Law or the Copyright Law should protect the IP in the fashion industry.

Introduction

The Fashion Industry of not only India but every country plays a very essential role in boosting the economic growth of that nation. Though it generates a huge amount of revenue and also the people involved make great efforts in their works and also make big investments, it becomes seriously a mandatory step to provide IP protection to the fashion industry. But, there is an existence of major confusion which frustrates the people when it comes to how the IP laws protect fashion designs. The core reason states that the area of law relating to Intellectual Property has very complex and complicated machinery and functioning and it creates a sort of frustration when the scenario arises of how it effectively protects the fashion designers and their works. This makes it clear that there is a need for further clarity of IP

protection in the fashion industry and, how does the protection machinery of copyright work in Fashion Designs.

Works which are Copyrightable: Amongst various IP rights, there exists the most essential and popular right for IP protection called “Copyright”. This right acts as a property that can be owned by any person just as a normal form of matter such as; shares in a company, car, house, etc. Like various other properties, one needs to attain permission to use the work of another and can be licensed, or sold and the same permission can be given to other people to carry out such activities. The copyrightable works consist of literary works, dramatic works, musical works, and artistic works. Herein, the artistic works include works such as; paintings, drawings, costumes, jewellery, etc. This is the subject matter of copyright. The case is not the same in the United States as there is no system of copyright registration. This is because, in that nation, an individual automatically acquires copyright over his/her work if it is produced in material form and is original. Without the need for registering, that person gets the copyright ownership of his work.

Copyright protection for Fashion Designs: As stated earlier, artistic work is a category of the subject matter of copyright and copyright law can protect the fashion designs only when they fall under the category of ‘artistic works.’ From a fashion perspective, the artistic works may include costumes, patterns for clothes, and accessories. Many times, some photographic images and patterns are printed onto fabrics, such works can also be protected by copyright under artistic works.

Protection under Designs Law: The designs in the fashion industry can also be protected under the Design law. The copyright of designs need not be registered but the designs law demands registration of fashion designs to provide them protection. Originally, the IP of Australia consists of the government body which has the authority to look into and handle design registrations and applications. The new and distinctive designs are the only ones that qualify for design protection under the design law¹. This is because, if all the designs are

¹ <https://studiolegal.com.au/copyright-design-rights-fashion-industry/>
https://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html
<https://www.forbesindia.com/blog/legalese/copyright-vs-design-the-continuing-dilemma-in-the-fashion-industry/>

allowed to be registered, the market will become a monopoly market. A registered design remains protected for a maximum period of 10 years which is the same as the copyright law where also a copyrighted design remains protected for 10 years.

Research problem

The works of fashion designers should be given protection under Copyright Law or Designs Law as both of them are not in equilibrium. The problem of taking preference over the other has to be studied deeply. The legislation is not strong enough to protect the designs of fashion designers in the industry instead to attain copyright over them.

Objectives

1. To analyze a comparative study of both Copyrights and Designs for the protection of the fashion industry's IP.
2. To evaluate the core reason for the battle going on between the Copyright Law and Designs Law.

Research questions

1. What are the key points which state that Copyright Law dominates Designs Law or vice-versa?
2. Does being the rights of fashion designers come under the ambit of IPR and should be protected?

Hypothesis

The clear point is that the Copyright Law dominates the Designs Law with the concept that it can protect a work for a longer duration. Nevertheless, both of these laws provide the best means of protection for the works of original creators. But the applicability plays the most significant role in understanding the most relevant one according to the situation which the creator faces.

IPR has always shown the widening of the scope of the Fashion Industry. This industry generates a huge amount of revenue in the country and needs to be protected under IPR. This is because there are high chances of infringement and damage of rights of the creators of original works.

Review of Literature

It is clear that the fashion industry on a global level tends to produce a huge amount of creative goods to the market and this is how this industry benefits. This research paper provides an in-depth study of Copyright and Designs Law and an analytical overview of its aspects relating to the protection of works in the fashion industry. **“Using Design Protection in the Fashion and Textile Industry”** by ‘Ulla Vad Lane-Rowley’ is a book that elaborates the concept further. Also, **“Fashion Law”** by ‘Guillermo C. Jimenez and Barbara Kolsun’ is a good source for the topic. Also, the article titled **“IP and Business: Intellectual Property in the Fashion Industry”** published by WIPO in their magazine is also a very good literature material for the topic. **Fashion Law in India** authored by **Khurana & Khurana Advocates and IP Attorneys** published by **Mondaq**, **A Design for the Copyright of Fashion** by **Jennifer Mencken** and **Copyright Vs. Design: The continuing dilemma in the Fashion Industry** authored by **Rajdeep & Joyteeta Banerjee** published by **Forbes India Magazines**. These articles and journal articles play a very important role in refining the topic. Works in a fashion industry come under the ambit of artistic works which is the subject matter of copyright and should be given preference over the designs law which may not protect the fashion designs for a longer tenure.

Fashion: A Brief Introduction

Any individual of any country when hears the term **“Fashion”**, a familiar sort of concept revolves around their mind. It is not a new trend or word for any person because it is vested in each and everyone’s life as basic needs. From clothes accessories to shoes or jewellery everything is considered to be fashionable. Fashion is not just a venture, an enterprise or a company, it’s a whole of an industry in itself. And, not just a general sort of an industry such as; textiles, or hardware but a multi-billion dollar industry that is not limited to the national boundaries of a country. Fashion is connected to people through three major links namely; Designers, Retailers, and Consumers. The people involved here to create certain designs which are later transformed into fashion products are called the **“Fashion Designers.”** These

products are circulated among the consumers through retailers such as fashion shops including wardrobe outlets, etc. Then these products are purchased by the consumers who give their valuable feedback on the same after using them which later takes the form of trends. These three links of fashion follow the chain of international fashion. In recent years, the knowledge of consumers relating to fashion designs has dramatically increased. The expressions of the creative fashion designers now find a place in the national news coverage and various newsletters. The major community which holds a great space for fashion designers are the fashion models who proudly present the works of these designers in the public through fashion shows such as; '**Ramp Walks.**'

But, in today's world of frauds, cheats, and piracy, like all others, even the fashion industry is not safe and a serious requirement of protection is very necessary. Fashion designers have the right to protect their expressions and efforts in their fashion designs. The idea-expression dichotomy should be valued. There have been various cases and situations such as television shows and feature films where it has been seen that the fashion industry world has been exploited. In the year 1977 under the copyright revision, the former **Registrar of Copyrights "Barbara Ringer"** purposely stated that the design protection issue is "one of the most significant and pressing items of unfinished business." The granting of protection for fashion designs has become a debatable topic due to the opening and emergence of a new concept in the fashion industry known as "**Fast Fashion.**"

They are nothing but retailers who wait for the high-end designers to showcase their designs at Fashion Week. A fashion week is a press week for the fashion industry where the high-end fashion designers present their designs. There are also the fashion designers who just imitate the designs of high-end designers and though the copyright law is currently not protecting the fashion industry, these designs can easily be copied in the industry and this is the core reason for the emergence of fast fashion².

In nutshell, fashion is nothing but a form of art and it is an obvious right of the artists to protect efforts and hard works. The fashion industry is a global industry that can never fade

² <https://studiolegal.com.au/copyright-design-rights-fashion-industry/>
https://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html
<https://www.forbesindia.com/blog/legalese/copyright-vs-design-the-continuing-dilemma-in-the-fashion-industry/>

away. Can it be imagined that someday, style vanishes from people or the people stop buying clothes? No, this can never happen.

Reasons for Non-Protected Fashion

The protection of garment designs in the fashion industry is not allowed to be protected by copyright due to a conception which is wrong that the garments are anyways useful articles and they don't have the elements which can be copyrightable. The copyright law provides limited protection to such useful articles because there are elements relating to sculptural work, pictorial work, and graphic work which can be identified and exist separately and independently.

Historical Aspects: It has always been seen since 1914 that the proposals in the form of various bills have been given to Congress which advocates the protection of the designs of useful articles through copyright, but such protection of garment designs have always received opposition from the authorities concerned. What can be done on an otherwise basis is that protection can be granted on an argument to the purely utilitarian article and this and form a path for a monopolistic market of apparels.

Consequences of History: It has been noticed that an underlying utilitarian function is maintained by many of the garment designs and thus, numerous designers crossed the traditional boundaries of just wearable apparel and gave it a form of wearable art. Various copyright cases have stated the differences between an object which is artistic and utilitarian. This is because an artistic object can attain copyright protection despite its utilitarian function. The famous judgment of **Barnhart V. Economy Cover** clarifies it further by stating that the features of a useful article should be protected when it is not necessary for the performance of a utilitarian function. Thus, it is made clear that most of the garment designs can be treated as protectable and that is because their aesthetic features are beyond just a function of clothing. Though its history and the nature of fashion in today's time is different. The prohibition of copyright protection in garment designs is now outdated and now cannot serve the purpose of preservation of the ideas for the general public. It should also be clarified that just a piece of cloth or shape of the dress is not protected by copyright law. One

can never want copyright to protect the cut of a jacket because it is obvious that the jacket has two arms and buttons. A standard version can be a blazer³.

Another major example can be taken of the wrap dress by Diane Von Furstenberg wherein his wrap dress is not protectable, but its design is. The question that, whether a series of sizes and shapes of an article of clothing protectable? was sorted out in the case of **Star Athletica V. Varsity Brands (Athletica Case)** wherein the court made it clear that copyright protection cannot be given to cut off apparel but would protect its design.

The 30th Division Bench of Delhi got an opportunity to respond to the highlighted aspects of the above case in the judgment of *Rajesh Masrani V. Tahiliani Design, 2020 (Recent Judgement)*.

Copying in Fashion Industry

Copying in the fashion industry refers to the act done by an individual wherein the copies and carries out the same work of another individual and this violates the rights, efforts and hard work put in the work of the person whose work is being copied and is punishable under IPR law.

Piracy: In today's world, 'Piracy' is one of the most common ways of copying someone's work with the help of wrongful means. It is a common wrongful act in any industry relating to design and art. Piracy is a process in which a person without authority copy's the original fashion designs of another person. The Designs are counterfeited and knocked off. The designs made by the fashion designers are reflections of their efforts and hard works and need to be protected by law. They can be protected under various categories of Intellectual property such as; (1) Copyright Act, 1957 can protect sketch design as artistic work, (2) Design Act and Design Rules, 2000 can protect the designs under class 02, 03, 05, 10, and 11 of the third schedule, (3) Copyright law can also protect colour combinations, (4) Designs Act, 2000 and Patents Act, 1957 can protect fabric or any material which used in design or art.

³ <https://studiolegal.com.au/copyright-design-rights-fashion-industry/>
https://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html
<https://www.forbesindia.com/blog/legalese/copyright-vs-design-the-continuing-dilemma-in-the-fashion-industry/>

Accidental Copying: There have been various scenarios where lots and lots of designers carry out their works with the same textures, colours, and general trends of style at the same time. This leads to occasional instances of accidental copying. Accidental copying involves accidental similarities between the designs of different designers which is unknown to them and takes place due to the following general fashion trend going on. When this happens, a designer should prove that the design was created by him independently. This requirement on a usual basis is determined by observing the patterns in that design and this makes it clear how important it is to store such patterns with utmost care. A properly dated pattern can act as a major proof to state that the designer did not copy the design intentionally⁴.

This is a copycat economy and the designs and artistic works of the fashion designers are very easily copied in the fashion industry and there are very minor details that need to be taken care of by the designers to remain safe from major legal issues in this industry. And even the **Piracy Paradox** is a concept that cannot be completely denied as the industry works accordingly. What is needed is stronger legislation for the protection of the works under IPR in the fashion industry as it is a sort of broken system and is shifting balance.

Copyright in Fashion: The U.S. Scenario

Currently, by the laws functioning in the United States for fashion, fashion is not copyrightable, but it can be with the help of modifications in certain statutory provisions. As stated in the case law and statutory doctrine of copyright, a useful article can be copyrighted only if its original design's aspect gets separated from its utilitarian function. It has been observed in a majority of the cases that clothing is such a useful article whose utilitarian function cannot be separated from its elements of original design and that makes a reason that they cannot be protected under copyright. But, some of these cases don't hold a strong proposition and others are wrongly decided.

Statutory Language – Useful Article and its Separability: Under the current copyright statute of the US, pictorial, graphic, or sculptural work categorizes the fashion designs and they include 2D and 3D works relating to photographs, prints, maps, charts, globes, etc.

⁴ <https://studiolegal.com.au/copyright-design-rights-fashion-industry/>
https://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html
<https://www.forbesindia.com/blog/legalese/copyright-vs-design-the-continuing-dilemma-in-the-fashion-industry/>

Works of artistic craftsmanship are also included. The copyright of graphic, pictorial, or sculptural works is subject to certain limitations in statutes. The law of the US further defines “useful article” as;- “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” This states the statute of copyright itself puts limitations on the protection of fashion designs by covering and mentioning only those elements which can be considered independent and separate from the utilitarian aspects of that article⁵.

Current Case Laws relating to Useful Article: One of the major cases of a useful article is *Mazer V. Stein* wherein the Supreme Court had held that the works relating to art vested in the useful article are copyrightable and the court added that only their aesthetic form will be copyrightable and not the utilitarian function. Another case that illustrates such points is the *Masquerade Novelty Case*. This case relates to the protection of nose marks which were designed in resemblance to the noses of elephant, pig, or parrot. The District Court had held that these masks are useful articles and cannot be copyrighted. Copyright protection for Halloween costumes was argued in *Whimsically*. The issue of tiger costume was brought out in *Chosun International*.

Protection of Fashion Industry: Indian Scenario

There are various legal provisions relating to the fashion industry. The law of IPR in India offers protection to the fashion designs mainly under two legislations. But apart from these two, there are other legislations as well. These legislations do not protect the whole of a garment but only their aspects such as; pattern, colour, shape, etc. of the garment.

Protection under Design Act: This act called ‘Designs Act, 2000’ was drafted with a purpose to protect those aspects of an object which are non-functional and have visual appeals such as the design as it includes properties like pattern, shape configuration, the composition of lines or colours or the ornaments. The compositions of colours or lines can be in 3D or 2D form. The design right remains with the designer in force for 10 years and this duration can be extended by the conditions laid down for a total period of 15 years. Certain

⁵ <https://www.fibre2fashion.com/industry-article/7386/ipr-putting-an-end-to-heartbreaks-for-designers>
<https://99designs.com/blog/design-resources/copyright-infringement/>
<https://www.govinfo.gov/content/pkg/CHRG-109hhr28908/html/CHRG-109hhr28908.htm>

provisions of this act also deal with piracy. One such provision is Section 22 which states that when piracy takes place of a registered design, the person who is responsible for infringement will be held liable and will have to pay a fixed amount of Rs. 25,000 to the registered proprietor and this amount can be recovered as a contract debt. Also, an injunction can be issued and compensation of damages can be given on the election of the proprietor. The system of design registration in India is bound by time and can be considered as one of the fastest procedures among all the IP procedures. Once a design is registered under this act, the proprietor of that design holds exclusive and monopoly rights against the copies of the protected design and similar products as well.

Protection under Copyright Act: Those fashion designs which can get registered under the Designs Act, 2005 as per provisions get the protection of copyright only under the Designs Act. This states that copyright protection will remain for 15 years on the fashion designs which are registered. On the other hand, those designs which are capable of being registered but are not registered as designs under the Designs Act, 2000 will get the protection of copyright under the Copyright Act, 1957. This conveys that the copyright protection will be active till the 50th reproduction of that article for which the design has been applied. Any design which is capable of being registered or is already registered under the Design Act cannot get copyright protection as stated under Section 15 of the Copyright Act. The design anyways continues to fall within the ambit of artistic works under copyright and it will be entitled to a full-time duration of copyright protection. The limitations mentioned under Section 15 states the manifestation of original artworks created for industrial production. The Copyright Act, 1957 demands certain requirements from a fashion designer to attain the protection under its legislation. (1) A fashion designer's creation should be an original artistic work under the meaning of this act and not within the meaning of Design Act, 2000. (2) Also it should be ensured that the article like a garment that has derived the design from creation has been applied, is not produced more than 50 times by the owner of the copyright or by any other person on the license.

Copyright or Design: The Dilemma

It has always been a confusing question for fashion designers how do they protect their creations? Under the Designs Law or the Copyright Law. This is seriously a disturbing

question and needs to be solved to provide clarification to the designers and prevent their creative work from being copied.

Present Scenario: When it comes to designer clothes, the IP laws in India provide two different kinds of protections to them functioning under the legislation of The Copyright Act, 1957 and The Designs Act, 2000. These two specific kinds of protection provided by these laws are elaborative in themselves. The very first is the protection available for the works including drawings on the garment and this may not include the design or shape of that garment itself. One major example can be the copying of the design of a famous designer named Nashish Soni onto Alexander Wangny's Slogan. The second category is for the protection of the shape or design of the garment itself and is examined with the help of its unique tailoring and its fabric. It has been seen that the designers are aggressive in protecting their designs under this category. This is major to prevent Knock off and Design Piracy. The first designer of India who got copyright over his entire collection of fashion designs is Rohit Bal. This was achieved by him in the year 2017. The world's largest democracy exists in India and thus, the country's apparels have a global reach. But, such a huge sector of the country is messed up with laws. Majorly, it is regulated by Intellectual Property Laws in the present time. There are various laws, legislations, and regulations under this area of law but none of them enough to provide entire protection to this sector.

The Dilemma: Confusion prevails among the designers that they should protect their works under which law, the Designs Law or the Copyright Law. No designer would want his work to be copied by any other person in the industry after rigorous intellectual labour for its protection. The disturbing thoughts emerge that then they should take the protection of copyright over their original works or get their design registered to avoid its commercial exploitation. This dilemma first took its feet to the courtroom in the case of Ritika Private Limited V. Biba Apparels Private Limited where the plaintiff demanded an injunction to stop the reproduction of the original works as the plaintiff claimed to be the first owner. The court clarified and made the distinction between the designs that are eligible to get protection under the Copyright Act, 1957 and the Designs Act, 2000 and stated that the Copyright protects "artistic works" and its protection for commercial exploitation is limited. There was no sign of "Direct Lifting" which copy-pasted the copyrighted work. Whereas, the Designs Act, without always being original, protects the industrial application of the design. The favour

was given to the defendants and the suit was dismissed⁶. Thus, there is a need for a focused and comprehensive approach to be followed to cater for the interests of the fashion industry in the country.

Landmark Judgements

There have been various judicial decisions that have paved the path to success and led the protection criteria and scenario of the works of fashion designers under the fashion industry to another level. They have helped the public, the designers, and the courts to understand and get familiar with the actual essence of copyright and design law relating to the fashion industry. Let's take a look at these essential cases.

1. **Pranda Jewellery and Ors. V. Arya 25kt and Ors:** This case involves three plaintiffs and seven defendants. The facts of the case say that the first plaintiff used to carry out a business of branded jewellery and the 2nd and 3rd plaintiff had a share of 49% and 51% in his business. The first plaintiff worked under the brand name of 'Prima Art' and under this brand he used to make business in making, designing and selling the articles made of gold sheets which were deities and religious symbols. These designs were made by a graphic designer with the help of computer software working under the first plaintiff. Then the drawings were produced and based on those drawings the third plaintiff used to manufacture these articles in Thailand and they were also imported from Thailand and later were sold in India by the first and second plaintiff. It was the year in the year 2010 when the plaintiff came to know that the defendants were involved in producing identical articles of gold sheets and religious symbols and they had copied a total of 22 product designs from the plaintiff. This led to the cause of action and the plaintiff filed a suit for Copyright infringement. The House of Lords, after a deep and rigorous examination and analysis of the issues and legislation, held that any work can be considered as an "artistic work" till the time it falls within the ambit of the provision of Section 2(c) of the Copyright Act, 1957. But, when this work is put on for industrial use, the protection to it will be provided by the provisions of the Designs Act, 2000. And if this fails, the copyright in that article will not exist after a total of its 50 productions as stated by Section 15(2) of the Copyright Act, 1957.

⁶ <https://blog.ipleaders.in/copyright-versus-designs/>

2. **Louis Vuitton V. My Other Bag:** In this case, the company called “My Other Bag” printed the famous picture of “Louis Vuitton” in a tote bag manufactured by them. The court’s decision, in this case, paved paths for all the brands and products which fall within the ambits of parodies. This company and my other bag were sued and put on the charges of design theft and copyright infringement.
3. **Puma V. Forever 21:** Trade Dress Infringement was the main issue involved in this case. What happens is that “Puma” files a suit against “Forever 21” under the charges of design and copyright infringement. Plaintiff said that the defendant has infringed the copyright and design of their product of sneakers produced in the name of Creeper Sneaker, Fur Slide, and Bow Slide which was a part of the design collection of the celebrity Rihanna Fenty.

Conclusion & Suggestion

The fashion industry is one of the most essential and revenue-generating industries in the commercial market. The IP laws take the responsibility of protection of the works under this industry. A major point is that before deciding the applicability of the law whether the design law or copyright law, the intention of the fashion designer should be considered and understood. This should be done to eradicate the dilemma amongst the fashion designers that which law is applicable for them to protect their original creative works from piracy or from being copied.

The awareness for intellectual property in the fashion industry is increasing which gives rise to a serious need to reconsider the options of protection available to the fashion designs. Fashion designers need to educate themselves about the IPR so that they can know about the best protection available to them.

There are two different scenarios for the protection of two different IP laws. If the designer intends to go on with the development of ideas for the production of a design for the industrial process, then protection of designs law is suitable. But in a different scenario, the copyright law has an edge.

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