

## FASHION FORWARD, LEGALLY PROTECTED: ANALYSING IPR LAWS IN INDIA AND THE WEST

Adrija Ghose\*

### Abstract

*The fashion industry is constantly revamping itself in evolving new styles and setting trends every season. Everyone wants to be “in” with the trend and keep up with what is in fashion. Keeping up with fashion comes with a huge price tag attached to it. The dilemma lies in that everyone wants to be fashionable, but not everyone can afford it. This causes people to resort to underhand means of getting what they want. Giving rise to an illicit market which takes advantage of the situation and provides for mass counterfeit imitation of pieces of clothing and accessories at low prices, thereby, making “fashion” available to all. The fashion industry and designers thrive on uniqueness who use their creativity and exquisite skill in creating unique and exclusive products which gets reduced to rubble when their work gets copied enmasse without their permission and counterfeit products are sold at cheaper rates. Intellectual creation is of extreme value in the fashion industry which ought to be protected and an environment must be created in which the designers can work without fear of counterfeiting and infringement. Rampant duplication, rip offs and cheap copies flood the parallel fashion black-market which is almost as big as the fashion industry itself. This kills creativity and related aspects of fashion and design of the designers. Intellectual property rights seek to address this lacuna by protecting the interest of these creative designers. This paper seeks to delve into the way in which intellectual property helps in protecting the rights of designers, design houses and brands in the fashion industry from the evils of counterfeiting, copying, duplication and unauthorised use of their work while comparing the Indian intellectual property regime which relies on a combination of design, patent and copyright protection for the designers to the West along with the different procedural protections offered by the two regimes and with the uniform aim of protecting the creativity of the fashion designers.*

**Keywords:** Fashion Industry, Counterfeiting, Intellectual Property, Design Protection, Creativity.

---

\* BBA.LL.B. Student, Bennett University, Noida.

## 1. Introduction

*“Fashion is not something that exists in dresses only. Fashion is in the sky, in the street; fashion has to do with ideas, the way we live, what is happening”*.<sup>1</sup>

- Coco Chanel<sup>2</sup>

‘Fashion’ is something everyone wants to keep up with, it never goes extinct. With each new generation or season it keeps changing rapidly, new designs are introduced, old ones become vintage; while there are some which are evergreen. Hence, it becomes imperative for designers and design houses to keep evolving in order to keep up with the times and be first to put out their creative works in order to earn fame, gain popularity and advantage economically. The primary source of competition lies in innovation of original creative expressions which requires their original work to be protected from being produced in duplicates, copied, and stolen without their permission. The fact that the fashion industry is expanding globally at a fast rate with an estimated market capitalisation by 2025 of about 2.25 trillion dollars.<sup>2</sup> Hence, requiring the works of these designers to be protected. Intellectual Property Law comes into the picture and protects the works, innovations, designs of these designers from duplication, counterfeit, piracy in the market misleading the customers.

WIPO defines Intellectual property (IP) as the “creations of mind, such as inventions; literary and artistic works; designs and symbols, names and images used in commerce”.<sup>3</sup> Intellectual Property Laws are a set of laws which give rise to rights and provide protection and enforcement of legal rights of an inventor/ creator over his original or new invention, creative and artistic work, designs. These protect the original creator against infringement and imitation.

Fashion designing is a form of art which requires the person to possess a keen eye and artistic thinking dedicated to the creation of clothing and lifestyle. Some of the most famous examples of products of applied intellectual creativity and skill include: Chanel’s No. 5 perfume, Sabyasachi’s Bridal Collection, Dr. Martens Boots, Versace’s

---

<sup>1</sup> Quotes of Coco Chanel, *available at*: <https://www.goodreads.com/quotes/12859-fashion-is-not-something-that-exists-in-dresses-only-fashion> (last visited on September 29, 2023).

<sup>2</sup> Iliana Papamichael, Georgia Chatziparaskeva, *et.al.*, “The Perception of Circular Economy in the Framework of Fashion Industry”, 41(2) Waste Management & Research 251 (2023).

<sup>3</sup> Uganda Registration Service Bureau, “What is Intellectual Property”, *available at*: <https://www.wipo.int/about-ip/en/> (last visited on September 29, 2023).

Medusa Motif. Nobody can ever contest the enormous contribution which intellectual capital makes to the development and promotion of goods in the fashion sector irrespective of it being high fashion or ready to wear. The fashion industry is heavily dependent on IP that continuously produces and commercially exploits innovative concepts.<sup>4</sup> Intellectual property law is needed to protect an industry which generates billions and thrives on passion and innovation. It is only when inventors and artists who have created their work with passion and creativity are given protection, the fashion industry may really prosper.

This paper seeks to research upon the role played by Intellectual Property Law (hereinafter as IP Law) in the Fashion industry by way of protecting fashion designers, fashion houses, boutique fashion companies from the ill practices of imitation, duplication and piracy. Delving into the need of IP Laws for protecting fashion designs and how they protect it. This paper lays specific emphasis on the applicability of various types of IP Laws in the Fashion Industry. It highlights how they protect the work of the various designers and design houses from piracy along with recent case-laws from the Indian perspective and highlighting the challenges faced. The paper further studies to get a global view on the trends from the European and United States perspective. Concluding with an analysis on protection, growth and benefit of these laws to the fashion industry in the future.

## **2. Who Needs Protection in the Fashion Industry?**

The fashion industry is a multibillion-dollar worldwide corporation which is involved in the manufacturing and selling clothing. Employing over a million people internationally it encompasses the conceptualising-designing of clothes and accessories for men, women, children from diverse backgrounds and cultures to manufacturing and finally selling, marketing and promotion. It provides the most expensive and one-of-a-kind customised haute couture and designer fashion to regular ordinary day-wear, lounge clothing: from couture ball gowns and hats to pyjamas and socks.

---

<sup>4</sup> “The Role of IP Rights in the Fashion Business: a US Perspective”, *available at*: [https://www.wipo.int/wipo\\_magazine/en/2018/04/article\\_0006.html](https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html) (last visited on September 29, 2023).

The Fashion Industry consists of four-tier system which include mainly:<sup>5</sup>

- Production of raw materials which includes textiles and fibres; wool, cotton, silk, linen and synthetic fibres, leather and fur. Including sustainable fashion.
- Production of fashion goods by designers, design houses, manufacturers who create high fashion collections ranging from haute couture to regular prêt-à-porter (“ready- to-wear”).
- Retail sales after they have been designed and manufactured.
- Various forms of advertising and promotion by way of fashion shows, publication in heavily illustrated fashion magazines and online media presence over the internet, fashion blogs.

This industry is a highly IP intensive industry which is constantly creating, inventing, producing and commercialising new designs and products. Intellectual property aims to create an environment where fashion designers can create and commercialise their creativity and hard work without unfair infringement. Intellectual property provides protection for the first two tiers that is the creation of raw materials and product designs which includes, colour, shape ranging from clothes to accessories as ruled by the Court in 2008 in the case of *Rajesh Masrani v. Tahiliani Design Pvt. Ltd.*<sup>6</sup> where it observed that “artistic work”<sup>7</sup> includes even the printed decorations and embroidery on the fabric and hence, would fall under the ambit of section 2(c)(i) of the Indian Copyright Act, 1957 under “artistic work” which would also include drawing/ sketches of fashion clothing.

Legal protection under IP law is mainly provided to designers, artists, inventors, businessmen and entrepreneurs who possess the exclusive rights by way of use and control and further earn profits over their registered intellectual and creative work. In the fashion industry Intellectual Property Law gives these rights to all creators doing artistic work including designers, design houses and brands from the evils of counterfeiting and imitation. Further, IP is an extremely valuable asset for designers, design houses and brands in the fashion industry as it acts as an important differentiating factor between the

---

<sup>5</sup> “Fashion Industry”, available at: <https://www.britannica.com/art/fashion-industry> (last visited on September 29, 2023).

<sup>6</sup> AIR 2009 DELHI 44.

<sup>7</sup> The Copyright Act, 1957 (Act 14 of 1957), s. 2(c).

work of one designer and another.<sup>8</sup>

### 3. Requirement for IP Protection in the Fashion Industry

Quoting Vivienne Westwood, “Fashion is very important. It is life-enhancing, and, like everything that gives pleasure, it is worth doing well.” Even though it is arduous to define what fashion is, due to the rapid speed with which it changes on a day-to-day basis. With the quick switch of what is in style with what isn’t in style this is known as “fast fashion”.<sup>9</sup> This is the reason behind why skinny jeans which were trending last month all of a sudden have become “old fashioned” this month and how all the racks in the stores currently are filled with straight fit jeans.

However, the only drawback with this giant industry is that it is filled with rampant practices of fashion piracy which include counterfeiting, duplication and knock offs having great moral and legal implications. Due to the fast paced ever growing nature of this industry designs often are prey to fashion piracy which include knockoffs and counterfeits being sold in the open market at cheaper rates.<sup>10</sup>

**Knockoffs:** It is when the original design or product or work is replicated and duplicated and after which it is sold/ marketed under a distinct label/brand name similar to the original brand name at rate significantly lesser than the cost of the original product or work or design in the open market under a different brand. For example, knockoff sports shoes being sold as “Hike” which are in a similar pattern and design as the sports shoes sold by “Nike.”

**Counterfeit:** It is when the original product is imitated and reproduced completely at cheaper rates than the original rates with an intent to infringe the original owners Intellectual Property Rights over that product/ design. The product/ design looks exactly the same as the original product and there is absolutely not the slightest difference between it and the original design/ product. For example, the bridal lehengas women buy from Chadni Chowk, Delhi are literally ditto of Sabyasachi Manish Malhotra at a rate

---

<sup>8</sup> IPR in Fashion Industry *available at:* <https://www.altacit.com/ip-management/ipr-in-fashion-industry/> (last visited on September 29, 2023).

<sup>9</sup> Role of Intellectual Property in the Fashion Industry *available at:* [https://enhelion.com/blogs/2020/10/28/role-of-intellectual-property-in-the-fashion-industry/#\\_edn2](https://enhelion.com/blogs/2020/10/28/role-of-intellectual-property-in-the-fashion-industry/#_edn2) (last visited on September 29, 2023).

<sup>10</sup> *Ibid.*

much lower than the original work and even the western clothes that we find in Sarojini Market in New Delhi or Bandra's Linking Road. Counterfeiting is unlawful with the government and designed spending millions on lawsuits trying to limit the sale of these counterfeit items. Big fashion brands like Gucci, Armani Exchange, Nike have won multi-million dollar lawsuits on counterfeiting their unique designs and products.<sup>11</sup>

As Gary Assim pointed out, "the damage actioned by the knockoff is twofold." Firstly, it robs the original designer of the profits from the sale of the original product which was a result of creativity and large amounts of research and development investment. Secondly, it does not recognise the designer as the original creator.<sup>12</sup>

In this "fashion forward" industry which is constantly revolutionising itself with its forward-thinking and cutting-edge approach to design evolving every day. The creativity, originality and rights of fashion designers ought to be "legally protected" in order to counter these evils that exist in the fashion industry of unauthorised use and replication; most legal systems around the world have a system of intellectual property in place to address this issue. It protects and encourages creativity and "*inventive creation of human intellect*".<sup>13</sup> Thereby, it aims to create an environment where innovation and creativity can flourish without any disruption. Owing to globalisation, digitalization and fast paced growth of technology today, it is necessary to extend this protection to creative minds who have nurtured the fashion industry to being what it is today having a market capitalisation over a billion dollars.

There are two ways in which Legal rights in the form of Intellectual Property Rights help the designer/ design house/ Fashion Industry:

- a. Providing Protection: IP rights prevent an unauthorised person from benefiting from the original creator's hard work, skill, creativity and investment by using or imitating his/her work, product, design, textile without authorisation.
- b. Preventing Exploitation: They prevent generating revenue off unauthorised usage of the original creator's work, designs, product by entering into licensing

---

<sup>11</sup> Yosha Dubey, "The Role of IPR in Fashion Industry" 10(1) *International Journal for Research in Applied Science and Engineering Technology* 1554 (2022).

<sup>12</sup> The Business of Fashion, available at: <http://www.businessoffashion.com/2011/07/fashions-intellectual-property-conundrum.htm> (last visited on September 29, 2023).

<sup>13</sup> What is Intellectual Property? available at: [www.wipo.int/about-ip/en/](http://www.wipo.int/about-ip/en/) (last visited on September 29, 2023).

agreements of these designs with other third parties without the original creator's permission.

### 3.1. Registration Requirement

A registered IP which is a valuable commercial asset, gives rise to rights which are enforceable against unauthorised infringement. Further the IP registration also gives exclusive rights on the manner of how it must be used and authorises the way other people may use it. It thereby becomes a type of personal property of the creator which can grow in value over time and be sold for profit.<sup>14</sup> Even though registration is not mandatory, it is recommended as it would be easier to seek benefit for an infringement claim.

## 4. Protection Under the Indian Law

An original creator as in the designer or the design houses and even brands have rights to claim protection of their fashion design and their original works under the following five IPR legislations in India. These include:

*The Indian Copyright Act, 1957 (Act 14 of 1957).*

*The Designs Act, 2000 (Act 16 of 2000).*

*The Trademarks Act, 1999 (Act 47 of 1999).*

*The Patents Act, 1972 (Act 39 of 1972).*

*The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act 48 of 1999).*

Though these Acts do not provide complete protection to the garment as a whole but it provides protection to particular aspects of the garment for instance the design, shape, colour, material, pattern, texture, colour.<sup>15</sup>

### 4.1. Protection under the Indian Copyright Act, 1957

“Copyright” means legal right of ownership over an intellectual property. In

---

<sup>14</sup> *Ibid.*

<sup>15</sup> “Protecting the Fashion Industry: How Copyright Act and Designs Act Accommodate Each Other in India”, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4466249](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466249) (last visited on September 29, 2023).

other words, it is the legal right to copy anything.<sup>16</sup> This ensures that only the original creator of the goods as well as those whom he grants authorisation to have the exclusive right to recreate and reproduce the work. Copyright covers exclusive rights of the creator over his artistic, literary and musical work.

With regard to the fashion industry, copyright confers protection on the designer's artistic work and creativity. The Copyright Act, 1957 defines an artistic work under Section 2 (c), so as to include paintings, sculpture, sketch or any other artistic creation.<sup>17</sup> It defines it in a broad way to include artistic work without visual appeal.<sup>18</sup> The registration is not a mandatory requirement to seek copyright protection.

As per Section 22 of the Copyright Act, 1957, the copyright protection in India lasts for the lifetime of the author/creator plus 60 years from the year following the author's/creator's death. However, for anonymous works, pseudonymous works, and works of joint authorship, the duration is 60 years from the year of publication. The fashion industry is one of the only industries in which the artist/ designer's work is highly regarded and it is only because of his creativity that he earns fame and profit. Hence, it is of crucial importance that the designer's creativity is safeguarded in order for the industry to progress by encouraging production and generation of artistic work by rewarding the owner of the copyright by way of economic gains and fame.

The Copyright Act, 1957 only protects artistic designs as artistic work, specifically in the form of graphic work such as painting and drawings which must be original, unique and novel. Only textile designs are protected under copyright, while the actual dress when produced along with its shape, silhouette and cut is not protected. This was further held in the case of *Star Athletica v. Varsity Brand*,<sup>19</sup> where an ex-employee of a company made uniforms for cheerleaders. He moved to a different country and started producing cheerleading uniforms which were of similar design as compared to the last company he worked at. The issue that arose here was whether a series of styles and shapes on clothing would come under the protection of the copyright law.<sup>20</sup> It was held that the copyright law

---

<sup>16</sup> "Copyright Definition, Types, and How It Works", available at: <https://www.investopedia.com/terms/c/copyright.asp> (last visited on September 29, 2023).

<sup>17</sup> The Copyright Act, 1957 (Act 14 of 1957).

<sup>18</sup> *Ibid.*

<sup>19</sup> 580 U.S. (2017).

<sup>20</sup> *Star Athletica v. Varsity Brand*, 580 US (2017).



would only protect the design and not the cut, shape or silhouette of the clothing. Hence, ruling that protection for sketches of the design, designs on the surface of the clothing and textile design were protected.<sup>21</sup> Further in the *Rajesh Masrani v. Tahiliani Designs*<sup>22</sup> case, the Hon'ble Delhi High Court ruled that Section 2 (c) of the Copyright Act, 1957<sup>23</sup> which defined 'artistic work' included drawings which were made in pursuance of the actual accessories and garments, further including printed pattern as well as the embroidery done on the fabric under the ambit of artistic work.<sup>24</sup>

There is an exception to seeking protection enjoyed by the creator over his creation under the Copyright Act 1957, where it will cease to be effective in protecting a person's design if the work has been replicated and reproduced on more than 50 pieces of articles or works. In the case of *Ritika Private Limited v. Biba Apparels Private Limited*,<sup>25</sup> a fashion brand copied the designs of a boutique fashion design house and used the design in all their products causing the original creator of the design, the plaintiff to suffer an economic loss. The design house which lifted another brands design, BIBA got away with the copyright infringement it had caused due to the loophole present in section 15(2) of the Copyright Act, 1957 which provides that if a design which is to be registered with the appropriate design authorities under the Design Act, 2000 has not been registered and further the design has been copied and reproduced on more than 50 pieces of articles or work, then the creator/ designer will lose his right under the copyright law forever.<sup>26</sup>

#### **4.2. Protection under the Design Act, 2000**

A design is a visual appearance of a product. Designs are what the fashion industry revolves around and hence, protection of designs is of utmost importance. Protection under the Design Act, 2000 with respect to the fashion industry is only available on designs which are both new and original. It cannot be similar to any design which has previously been produced or even sketched. Design protection is only given to the visual appearance of the product and not the material it is made of/ feel/ function.

As per Section 2(d) of Design Act, 2000, a design means only the features of

---

<sup>21</sup> *Ibid.*

<sup>22</sup> AIR 2009 DELHI 44.

<sup>23</sup> The Copyright Act, 1957 (Act 14 of 1957).

<sup>24</sup> *Rajesh Masrani v. Tahiliani Designs* AIR 2009 DELHI 44.

<sup>25</sup> 2008 PTC (38) 251 (Del).

<sup>26</sup> The Copyright Act, 1957 (Act 14 of 1957), s.15(2).

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. Protection is only given to registered designs. Upon registering the registered holder enjoys protection of his design against counterfeit/ knock-off designs. Irrespective of it being aesthetic or ornamental, new or original, two-dimensional features such as a textile print or a three- dimensional features- handbag or garment.<sup>27</sup> A three-dimensional design can obtain protection by being registered as an industrial model. On the other hand, printed designs on fabrics can be registered under the industrial design. Protection available to a registered design exists for a period of 10 years extendable to a maximum of further five years. The Design Act, 2000 imposes a heavy penalty in the form of damages extendable up to INR 25,000 recoverable as a contract debt on the person who has undertaken piracy of design.<sup>28</sup>

The Design Act, 2000 does not cover artistic work within the definition of design. In the case of *Pranda Jewelry Pvt. Ltd. v. Arya 24K*.<sup>29</sup> The Hon'ble Bombay High Court discussed the disparity between an artistic work and a design on issues relating to copyright infringement of gold sheets, articles of deities and non-secular symbols. The court held by using an analogy of reproducing a painting of a canvas that when a painting is copied onto a canvas its features such as its shape and configuration is not applied it is simply just copied. While on the other hand the features such as shape and configuration are applied to articles such as mixers or refrigerators. It was held by the court that even though they are in the form of drawings, diagrams or plans; they would be said to have artistic quality and hence included them in the ambit of designs.

#### **4.3. Protection under the Trademark Act**

Trademark is defined under the Trademark Act, 1999 under section 2(zb) “as mark” which is capable of being graphically expressed and has the ability to distinguish

---

<sup>27</sup> Department of Trade and Industry, Republic of South Africa, “Looking Good: An Introduction to Aesthetic Designs for Small and Medium-sized Enterprises”, 7.

<sup>28</sup> The Designs Act, 2000 (Act 16 of 2000), s.22.

<sup>29</sup> AIR 2015 Bombay 157.

itself from another person's product or service. It also includes the shape of items, colour combination and the packaging of the product.<sup>30</sup> In other words, a trademark protects any name, design, symbol, term or colour combination which is used to identify as well as differentiate products in commercial nature. For instance, the "Christian Dior CD" logo and the "Christian Dior Trademark" which distinguishes Christian Dior bags and accessories from other haute couture fashion design houses. Trademark focuses on the a) interest of the consumer, b) interest of the trademark owner and c) interest of the market competitors.

With respect to the fashion industry, a trademark is extremely valuable as it assists in preserving a brand's premium prestige and identity. The fashion houses place their brand equity at a high level as a majority of consumers purchase products of the brand only because of the brand name and value the product it holds, thereby playing an imperative role in the fashion industry by maintaining goodwill of the brand in the market. It protects its logo and brand name as well as its trade dress including the packaging, colour combination and shape.

Only a registered trademark can be protected under the Trademark law. In the case of *Micolube India Ltd. v. Rakesh Kumar Trading*,<sup>31</sup> it was observed by the Hon'ble Delhi High Court that with regard to the definition in section 2 (d) of the Design Act, 2000, it is not possible to simultaneously register a similar work/art as a design or trademark. Further post-registration, it is within the freedom to allow the registrant to use the trademarked design in any manner under section 11 of the Designs Act, 2000. As grounds for cancellation of trademark under section 19 of the Design Act does not lay the use of a registered design as a trademark. This judgement expanded the ambit of trademark protection of fashion designers, fashion houses, and brands who are registered under the Design Act, 2000. Thereby, it gives double protection and benefit to the registrant not under the Design Act but also the Trademark Act, 1999.

Trademarks usually attract the interest and attention of the customers, as the product are anyways new and unique concepts. Most designers in India seek to get a trademark protection rather than a patent and design protection as fashion patents are

---

<sup>30</sup> The Trademarks Act, 1999 (Act 47 of 1999), s. 2(zb).

<sup>31</sup> AIR 2014 DELHI 375.

much harder to get and further brands will go to any limit in order to protect their patent. For instance, in the case of *Christian Louboutin Sas v. Pawan Kumar & Ors.*<sup>32</sup> where the plaintiff claimed permanent compensation and prevented Kamal footwear and Andhara Steps from selling counterfeit Louboutin shoes having red soles at a lower price. Louboutin is one of the best luxury shoe brands having red soles is their trademark which was infringed by the respondent. The court ruled in favour of the plaintiff, imposing a penalty of INR 10.7 lakhs on the defendant to pay as damages to the plaintiff. Further it was also observed that Christian Louboutin red sole shoes were a well-known trademark. This case shows how a designer/ brand may protect its unique mark under trademark as a valuable IPR.

Trademarks are cheaper, convenient and take less time than the fashion designers and the creators have to only file an online e-trademark application on the Trademark Registry website to get a trademark.

#### **4.4. Protection Under Patent Law**

Patents are granted to protect inventive inventions. Patents protect innovations that are incorporated into products in order to produce new technologies. A patent is a government issued property right to the patent holder giving him exclusive right over that invention for a duration of 20 years from the filing date. During this period the exclusive rights over the patent rest with the patent holder with respect to manufacturing, selling and use of the invention.

Fashion industry is all about who can put out their products uniquely, innovatively in an ingenious manner so as to get an edge over its competitors. Patents are not something that strike a person's mind when it comes to the fashion industry as artistic creation cannot be patented. It is only the technology which is used for making these designs and creations of the artistic work is subject to be patented. Fashion patents give the designer/ inventor legal rights over their product/ process in connection with the fashion industry. In short, patent law gives protection to technology which is used to create a product or a process.

---

<sup>32</sup> PTC 2018 DELHI 403.

Patent protection is only granted on technology used to manufacture products such as CROCS shoes, wrinkle free fabrics and water repellent textiles.<sup>33</sup> Another classic example is Novozymes which is a biotech company registered in Denmark that specialises in enzymes and microorganisms. It developed a world class patented technology which currently is used for the treatment of ‘stone washed’ denim. It uses an enzyme called cellulase, which makes the denim fabric look like it has been worn.<sup>34</sup> This was a first of a kind invention by Novozymes and within 3 years all the other denim companies started using Novozymes patented technology under its licence. At present, Novozymes technology has been licensed worldwide for the purpose of improving fabric finishing and improving production mechanisms. It holds more than 4200 active patents worldwide.<sup>35</sup>

Under the law of USPTO, the designer has the choice to seek protection under both utility and design patents. The later design patent provides protection for a period of 15 years upon being issued to the patent holder whereas the former Utility patents are provided for a period of 20 years after being filed. After the expiration of the period, it falls within the public domain and it can be used by anyone without requiring a patent licence to commercially use it. Even though getting patents for technology is expensive as well as time consuming it can be used in the fashion industry for a long time and further it may not even get outdated if the invention is novel.

#### **4.5. Protection under Geographical Indications (GI)**

Geographical Indications are a form of IP rights which serves to identify a product in relation to the specific geographical area it originates from. Having the quality, reputation or other characteristics that are essentially attributable to that particular geographical region from where it has originated.<sup>36</sup>

India is a culturally rich country having a long history of fashion steeped in its rich

---

<sup>33</sup> Role of Intellectual Property in the Fashion Industry *available at*: <https://lexforti.com/legal-news/role-of-intellectual-property-in-the-fashion-industry/> (last visited on September 29, 2023).

<sup>34</sup> IPR in Fashion Industry *available at*: <https://www.altacit.com/ip-management/ipr-in-fashion-industry/> (last visited on September 29, 2023).

<sup>35</sup> IP and Business: Intellectual Property in the Fashion Industry, *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) (last visited on September 29, 2023).

<sup>36</sup> Protecting Local Products with Geographical Indications, *available at*: [https://www.wipo.int/ip-outrreach/en/ipday/2022/toptips/geo\\_indications.html](https://www.wipo.int/ip-outrreach/en/ipday/2022/toptips/geo_indications.html) (last visited on September 29, 2023).

traditions. It is diverse with each region having its own unique costume, traditional clothing and accessories, contributing to the country's rich textile heritage. Its diversity in its traditional knowledge as well as other indigenous art forms is protected by the Geographical Indications Act, 1999 (hereinafter GI) provides a list classifying goods which are protectable under the act under Schedule IV of the Act.

GI provides protection of the texture and artistic value of the textile which is used to create fashion clothing and accessories. If GI is used along with trademarks and copyrights it would be invaluable to the rural community. Across markets all over the world, there is an extremely high demand for Indian Traditional art forms and hence the government strives to protect and preserve the indigenous art from exploitation and piracy. Till now only 23 GI's, that also belong to the category of textiles, have been registered. For instance: Kotpad Handloom Fabric from Orissa, Kancheepuram Silk from Tamil Nadu, the Ponchampally Ikat, from Ponchampally near Hyderabad, Kutch Embroidery from Gujarat, Muga Silk from Assam, Kota Doria from Rajasthan.<sup>37</sup>

### 5. Position Prevalent in EU and USA

In the US even though copyright is more talked about as the main protection, when it comes to design trademarks are even more widely used by fashion houses to protect their brands. The case of *Star Athletica, LLC v. Varsity Brands, Inc.*<sup>38</sup> which was based on the Copyrightability of a design was a landmark case which impacted the United States Fashion design industry considerably and brought up the concept of 'separability' as a prerequisite for garments and other useful items to be protected under the US Copyright law. Copyright law in the US does not protect these articles as a whole such as garments, dresses, shoes and bags. It also laid down the separability test, where it held that only those features of a design that could be separated from the main garment would qualify for protection under the copyright laws. This was a serious problem amongst designers in the US as the copyright law only protected a certain aspect of the garments and not the whole garment.<sup>39</sup>

---

<sup>37</sup> *Ibid.*

<sup>38</sup> 580 US 2017.

<sup>39</sup> "Fashion Industry and Challenges for IP Protection", available at: <https://www.mondaq.com/india/trademark/1024232/fashion-industry-and-challenges-for-ip-protection> (last visited on September 29, 2023).

The IP regime with regard to the fashion industry in the United States has evolved with the changing times, where designers have moved towards acquiring design patent protection even though it is a lengthy process but effective. There has been an increasing popularity towards filing for trade dress; which protects the appearance and packaging of the product.

The stark difference between the IPR regime in US and Europe is that the latter provides protection for garments and accessories as a whole that is on each and every aspect irrespective of the fact if the design can be severed from the garment. The former only provides protection when the particular design is severable from the garment- test of separability and does not provide protection on the garment as a whole.

### **6. Challenges in Implementation of IP Laws**

Today, the fashion industry has come a long way when it comes to protecting inventions, designs, products, prints which are created out of the creativity and ideas of the designer/ brands and design houses which make them unique and new. Still there is a need to create an environment which encourages creativity and protects the rights of these creative designers and design houses from being misused in an unethical manner. By virtue of Intellectual property law which has strived to create a safe environment for designers to freely utilise their talent without it being disadvantageous to them. There still exist significant flaws when it comes to protection of intellectual property.

It is of crucial importance that the fashion designers must be attuned to their rights with respect to protection under Intellectual Property rights. In order to prevent their designs from being copied, duplicated, reproduced and sold for less money without the original designer's permission, they must also register their designs in order to obtain protection under IP law for their creations. An increased awareness of individual rights is necessary for a nation to grow its intellectual property. The same can be achieved by reducing existing legal gaps in the IP protection of the fashion industry.

It is imperative for designers and design houses to register their corporation, design and brand name, in order to seek more protection from infringement in the form of duplication, imitation, counterfeit products as well as give more power to the original designer; design house to seek redressal in the case of misappropriation of ideas and designs. Even though registering a brand name/ design/ trademark takes time and costs,

it helps the inventor in the long run when it comes to protecting their products and designs. Lastly, with changing times and technological advancement, different types of violations occur, hence the government must undertake to monitor these emerging trends and make legislations in order to safeguard the interests of the creators so that they can create designs without fear.

## 7. Conclusion

Copying ideas/ designs of another designer and design house is not only unethical but also causes a significant problem with regard to high end luxury brands as they create limited edition pieces which are high priced and when they are copied and sold in bulk at a cheaper rate, they affect the brands worth. This has a significant effect on the global economy and the global fashion industry. Imitation of a design has a significant and direct effect on the business of the brand. These brands stand to lose their credibility in the developing markets when imitations of their products are available in the market at a lower price and in larger quantities.

The fashion industry is constantly evolving at a rapid pace. Hence, there is a requirement of enforcing stricter laws which prevent the evils of counterfeiting and copying as it causes not only monetary loss to the designer, but also deters artists from creating something which is unique and innovative.<sup>40</sup> To keep abreast creativity and competition in the fashion industry, Coco Channel once said, *“In order to be irreplaceable one must be different”*. In order to make more sales the designer has to have unique, creative imagination and exquisite skills which would help the brand achieve higher popularity and profit. Hence, infringement of the intellectual creativity existent in the fashion industry not only discourages a designer, but also affects the economy.

Counterfeit fashion markets are booming due to prevalence of lenient laws and uninformed consumers, who are unaware of the legalities of purchasing counterfeit products. Even though it is recommended and not mandatory to register intellectual property, it is always wiser to do so. It acts as a concrete proof of ownership over the article in case of infringement and claiming rights over copyrights registration, design

---

<sup>40</sup> “Intellectual Property Rights in Fashion Industry in India”, available at: <https://lawbhoomi.com/intellectual-property-rights-in-fashion-industry-in-india/> (last visited on September 30, 2023).



registration, trademark rights over a brand. Despite the fact that it might not always be a financially feasible choice for up-and-coming designers and small brands due to the limited life span of the fashion design or product and the constantly changing trends in the fashion industry.

The author feels that even though it is a difficult task to eliminate the issue of unauthorised copying and counterfeiting, it can be tackled by securing the invention appropriately by registering it in order to gain exclusive IP rights over it. It would also be easier for the infringed original designer to claim damages and prove that the design was the designer's original work and that it has been copied. Another parallel can be drawn, the brand can create brand loyalty amongst customers, who not purchase counterfeit products because of the quality of products and services, benefits attached with the brand. Further, ex-employees of design houses could leak intellectual work of their ex-employers. Effective measures must be in place by both the ex-employer as well as the current employer who should not permit the use of original work of other designers as a product of their own creative work.

Hence, designers must be vigilant and strive to obtain protection over their work. Finally, the government must enact and effectively enforce the legislations pertaining to protecting the creative works of the designers in the fashion industry.