

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 4 | Issue 1

2022

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Applicability of Intellectual Property Rights in the Realm of Fashion Industry

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ABSTRACT

The fashion industry is a fast-paced emerging sector that contributes to the economic growth of a country. Fashion designers work day & night to come up with a design or a product that is unique & never seen before, for which they gain fame, recognition and money. But as soon as such designs & products are released in the market, several people copy and make fake designs/ products ripped off from the original. Fashion designs & products are the intellectual property of the designers, and they need to be protected. This is where intellectual property rights come into the picture. The main objective of this research paper is to understand the role of Intellectual Property Rights in the Fashion Industry. The researcher has adopted doctrinal research methodology to carry out the research.

Fashion designs & products are sometimes copied wholly or partly, and certain people sell the exact replica of the designs and products at a lower price, without the authorization of the owner. The researcher has discussed the ways in which fashion designs and products are copied and pirated. Fashion designers can protect their intellectual property rights by obtaining a trademark, Copyright or patent for their creation. The researcher has shed light on how Copyright, trademark & patent protect the creation of fashion designers. In India, laws governing the fashion industry is not present in single legislation. Several legislations are applied to protect the designs and creations of the designers. The present research paper discusses the legislations that are available to fashion designers to protect their designs and creations.

Keywords: Piracy, Designs, Copyright, Trademark, Knockoffs, Counterfeits.

I. INTRODUCTION

The fashion industry is one of the largest multi-billion-dollar industries worldwide. Because of the world's progressive nature, fashion is transient and constantly changes. People modify

their fashion according to the occasions as well as their moods, & fashion can be regarded as a distinctive trait. The fashion industry not only consists of clothing but also consists of footwear, handbags, accessories, textile, etc. Fashion designers should add unique characteristics to

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their products and designs so as to appeal to customers and to captivate their interest in the brand.²

Plagiarism and piracy infest almost every industry, and the fashion industry is not an exception. The trusted and famous brands' products are often copied and made into fake products and sold at the same or cheaper rate. This might affect the original brand's profitability or brand image. It is crucial for fashion designers and brands to safeguard the uniqueness of their creations, and it can be done with the help of Intellectual Property Rights.

Intellectual property refers to the innovations/creations from the human intellect; it can be art, music, films, literature, designs, images, logos, etc. The owner of such creations/innovations can protect them from being copied, pirated or reproduced without their permission by Intellectual Property Rights. These rights encourage people to create innovative works that benefit them as well as a society without having to worry about plagiarism or piracy.³

Intellectual Property Rights (IPR) play an important role in the fashion industry by protecting the unique ideas, designs, garments, accessories of fashion designers. A fantastic and unique design can acquire numerous exclusive rights through Intellectual Property Law &

fashion industry can flourish tremendously with a global license. Fashion designers invest a lot of money into unique designs to entice buyers but often neglect to secure those designs because they are ephemeral. This kind of negligence causes huge losses to the designers as well as the brands. Companies in the textile & fashion industries are unaware of the potential of IPR and its ability to build an international market through licensing. In the fashion industry, the only way to prevent stealing and replication of distinct & fresh designs is by registering them under Intellectual Property Rights.⁴

(A.) Literature Review

- Naman Priyadarshini, in his article "Intellectual Property Rights: Crucial for Fashion Industry", discusses how manufacturing sectors and the fashion industry has played a role in boosting the growth of Asia's economy. The author is of the opinion that India is on the path of becoming one of the appealing consumer markets beyond the Western world. It is the government's duty to enact and enforce laws to prevent ideas, inventions and designs from getting plagiarised. In India, it is need of the hour to implement fashion laws to protect designers' ideas and designs.⁵

- The article "IPR Registration in Fashion of India" was written by Vishaka Agarwal in the year 2019. The author expresses her discontent

² Kayomi Rajeev Tumdi, *Role of Intellectual Property Rights in Fashion Industry*, LAW CORNER (Oct. 4, 11:00 PM), <https://lawcorner.in/role-of-intellectual-property-rights-in-fashion-industry/>

³ Shah Ishfaq, *Intellectual Property Law and Its Various Types*, LEGAL SERVICE INDIA (Oct. 5, 12:44 AM), [https://www.legalserviceindia.com/legal/article-681-](https://www.legalserviceindia.com/legal/article-681-intellectual-property-law-and-its-various-types.html)

[intellectual-property-law-and-its-various-types.html](https://www.legalserviceindia.com/legal/article-681-intellectual-property-law-and-its-various-types.html)

⁴ *Intellectual Property in Fashion Industry*, IP LAWS INDIA (Oct. 5, 1:40 AM), <http://www.iplawsindia.com/ip-in-fashion-industry>

⁵ Naman Priyadarshini, *Intellectual Property Rights: Crucial for Fashion Industry*, 4 INT. J. LAW MANAG. HUMANIT. 1545 (2021)

regarding unawareness of Intellectual Property Rights in the Indian fashion industry and urges to spread awareness regarding the importance of registering intellectual properties as the rate of registration is very low. Governments should appoint sufficient staff so as to assist the people applying to register their intellectual properties.⁶

- Kal Raustiala & Christopher Sprigman discusses the extent & efficacy of Intellectual Property Rights in their article “The Piracy and Paradox: Innovation and Intellectual Property in Fashion Design”. The authors state that as per the orthodox perspective, without robust protection of IPR, fashion innovations & creations will crumble. But to the contrary, fashion innovations are still emerging, which has resulted in fashion designers neglecting to secure their creation through legal protection.⁷

- In the article “Legal Protection of Fashion Design in Apparels in India: A Dilemma under the Copyright and Design Law”, written by Sunanda Bharti, the author has discussed how the Indian Legislations protect the work of fashion designers. The author is of the opinion that the protection provided by the Intellectual Property laws to the work of the fashion designers is not adequate. She suggests that two versions should be made of a product; one version to be protected under the Copyright Act and a second modified version for mass production.⁸

- Irene Tan, in her article “Knock It Off, Forever 21 – The Fashion Industry’s Battle Against Design Piracy”, argues that more than the established designers, small scale emerging designers are in need of protection from design piracy; as they are not aware of their rights, their products are most vulnerable and need to be protected from made into knocked off products, as they do not have any trademark to seek protection from. Therefore, intellectual property laws need to be strengthened to safeguard designers from piracy.⁹

(B.) Research Methodology

The methodology employed to carry out research in the present study is Doctrinal Research Methodology. To critically analyze the available data, an analytical study method has been employed. The data collected for this research is from secondary data sources.

(C.) Research Objectives

The present research paper has the following research objectives:

- To understand how fashion designs, ideas and products are copied or plagiarised.
- To study the significance of Intellectual Property Rights in the Fashion Industry.

⁶ Vishaka Agarwal, *IPR Registration in Fashion Industry of India*, 24 J. INTELL. PROP. RIGHTS 35-40 (2019)

⁷ Christopher Sprigman, Kal Raustiala, *The Piracy and Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VIRG. L. REV. 1687 (2006)

⁸ Sunanda Bharti, *Legal Protection of Fashion Design*

in Apparels in India: A Dilemma under the Copyright and Design Law, 3 DEL. UNI. J. HUMANIT. SOCI. SCI. 139 (2016)

⁹ Irene Tan, *Knock it Off, Forever 21 - The Fashion Industry's Battle against Design Piracy*, 18 J.L. & POL'Y 893 (2010)

- To shed light on the different legal provisions that protect the Intellectual Property Rights of designers in India.
- To interpret if the present legislation governing IPR in the Fashion Industry is adequate.

(D.) Research Questions

The research questions of the present research paper are:

- What are the ways in which fashion designs and products are pirated?
- What is the importance of Intellectual Property Rights in the Fashion Industry?
- What are the different legislations that safeguard Intellectual Property Rights in the Indian Fashion Industry?

II. WAYS OPTED TO PIRATE FASHION DESIGNS AND PRODUCTS

Piracy is very common in the fashion industry. Fashion piracy involves duplication of designs, symbols/trademarks, labels and unauthorized reproduction of the original design. Fashion Piracy is often done in two ways: i) Knockoffs ii) Counterfeits

Knockoffs: These are almost replicas, which are copied from the original designs. However, they are not exactly the same as the original one. The knocked off products are produced and marketed under a different brand or label & not that of the original brand or the designer's name or label. These products are often sold at a lower cost than

the actual cost of the original design or product. Since knockoff products are not attempted to pass on as the original design or product, it is not illegal. However, if the designer or brand of the original design/ product can prove that the knocked off the product is copied from their design/ product, then they can take legal action against it.¹⁰ Nobody, even the loyal customers, would like to pay a higher price when they can enjoy a similar trendy design or product with a good designer's name or brand for a lower price. This results in low brand loyalty. Designers often get inspired by other famous designers and brands and come up with a design or product that is somewhat similar to the original design but not entirely, therefore in several cases, inspiration cannot be distinguished from copying.

Counterfeits: Counterfeits are the exact copies of the original design or product. They have the same design, same logo and same brand name as well. These items are attempted to pass off as the original design or product. Counterfeits are sold at a much cheaper rate than the original. Counterfeits infringe the rights of the original designer or the brand. Counterfeit products are illegal; designers and brands spend lakhs or even crores on lawsuits to ban the sale of counterfeit products.¹¹ Counterfeit products are often made of those brands that are popular, such as Chanel, Nike, Adidas, Gucci, Ray-ban, etc., which are appealing to buyers. People who can't afford the original products often buy counterfeit products, but in some cases, customers don't realize that

¹⁰ Rohan Gandhi, *Role of Intellectual Property in the Fashion Industry*, LEXI FORTI (Oct. 5 ,1:46 PM), <https://lexforti.com/legal-news/role-of-intellectual->

[property-in-the-fashion-industry/](https://lexforti.com/legal-news/role-of-intellectual-property-in-the-fashion-industry/)

¹¹ *Id.*

they are buying the counterfeit products. Some counterfeits are so perfectly made that it is almost not possible to differentiate them from the original unless it is inspected very closely and examine the material used, it's the lining, stitching, etc. However, certain brands and fashion designers who intend on producing one-of-a-kind products and designs focus on superior-finish, intricate specifics and distinct manufacturing skills, which makes it almost impossible to duplicate their products.¹²

III. IMPORTANCE OF IPR IN THE FASHION INDUSTRY

Fashion Piracy is a great threat to the Fashion Industry. It takes a lot of effort by the fashion designers to create something unique and trendy that will appeal to the buyers. Though no fashion designers or brands can completely eliminate the chances of their designs or products being copied or counterfeited, they can take measures to protect them, which will decrease the chances of piracy and gives them the power to enforce their rights in Court and put an end to the production of knocked off products and counterfeits. Fashion designers and brands can protect their designs and products by Intellectual Property Rights. IPR that will be more effective and beneficial in the Fashion Industry are Copyright and Trademark; Patent plays a comparatively smaller role in the Fashion Industry.

¹² Priyadarshini Gouthi, *The Money's in the Fake: Profitability in the Fashion Knockoff Industry*, THE MICHIGAN DAILY (Oct. 5, 9: 28 PM), <https://www.michigandaily.com/arts/the-moneys-in-the-fake-profitability-in-the-fashion-knockoff-industry/>

Copyright

Copyright gives legal ownership of the intellectual property to its creator or innovator. It basically means the “right to copy”. Only the creators of the intellectual property and those who are authorized by the creators will have the right to the reproduction of that intellectual property. The protection of copyright can be obtained for literary works, music lyrics, designs, movies, books, etc.¹³ In the fashion industry, the work and efforts of the designers are highly valued, and they gain fame, recognition and money for their work, which makes it necessary to safeguard their designs by obtaining Copyright. However, in the Fashion industry, clothing, footwear and products as a whole cannot be protected by the Copyright; fashion designers can obtain Copyright only for their designs or patterns. In the case of *Rajesh Masrani v. Tahiliani Designs*, Plaintiff claimed that drawing/ sketch made for clothing & accessory comes under the “artistic works” as provided under Section 2(i)(c) of the Copyright Act, 1957. Plaintiff also contended that embroideries & printed designs on cloth fall under the ambit of artistic works. Satisfied with the claims made by the Plaintiff, Court passed an injunction order against the respondents.¹⁴

Trademark

A Trademark helps in identifying the owner company or the brand of a specific product or

¹³ Will Kenton, *Copyright*, INVESTOPEDIA (Oct. 6, 12:17 PM),

<https://www.investopedia.com/terms/c/copyright.asp>

¹⁴ *Rajesh Masrani v. Tahiliani Designs Pvt, Ltd.* 2008 PTC (38) 251 DEL (6)

service. Trademark can be a symbol/ logo, word, phrase. It helps in recognizing & differentiating the brand from other brands. It enables the labels/ brands to stand out in the market. Trademark plays a crucial role in the fashion industry. All fashion designers have a brand value and an image in the fashion industry based on their designs, products and creativity. Trademark is a type of intellectual property that safeguards the brand name and reputation of the designer and the company it belongs to. In the fashion industry, a trademark is not limited only to brand & logo; it also includes several components within its scope, like design, pattern, specific elements and aspects of fashion garments, footwear, accessories, handbags, etc.¹⁵ The case of Christian Louboutin v. Yves Saint Laurent is a landmark case that answered the question ‘If a colour can be trademarked?’. Plaintiff, who was a world-renowned fashion designer, approached the Court to seek a preliminary injunction against the respondent for infringing his trademark, which consisted of red outsoles. Plaintiff was denied an injunction by the Court; however, the Court recognized that Plaintiff had the trademark rights over the red-lacquered outsoles.¹⁶ Several other companies and brands have also trademarked their unique colour, such as Tiffany & Co.’s blue colour, Retailer company- Target’s red colour, etc. Indian courts have also acknowledged the trade-dress rights of companies and brands over specific colour

combinations. Trade-dress means the visual appearance of products; it includes colour combinations, shapes and packaging.¹⁷ In *Colgate Palmolive Company v. Anchor Health & Beauty Care*, the Plaintiff approached the Court to seek an injunction against using its trade-dress of colour combination “red & white” in a 1:2 ratio by the respondent. Plaintiff claimed that the respondent was attempting to pass off its product as Colgate by using its trade-dress. The Delhi High Court was of the opinion that customers buy products from the overall impression of the brand, by noticing the colour, shape and packaging, and in case of illiterate buyers, they might get confused between the new product of a different brand and the product that they actually want to buy because of their trust in that particular brand. The Court recognized colour as a trade-dress and issued an injunction against the respondent from using a red-white combination of colours for its containers as well as packaging.¹⁸

Patent

A Patent is an exclusive legal right granted to the inventor, by which he/ she can exclude others from using, producing and selling their invention for a certain number of years. Patents are provided to innovations that are novel and useful for society. They are often given to new and useful inventions in the technology &

¹⁵ Oishika Banerji, *Fashion Industry and Challenges for IP Protection*, IPLEADERS (Oct. 6, 5: 22 PM), <https://blog.ipleaders.in/fashion-industry-challenges-ip-protection/>

¹⁶ *Christian Louboutin v. Yves Saint Laurent*, No. 11-3303 (2d Cir. 2012)

¹⁷ Rituraj Shrivastava, *India: Trade Dress: Concept and Indian Practice*, MONDAQ (Oct. 6, 6:08 PM), <https://www.mondaq.com/india/trademark/262928/trade-dress-concept-and-indian-practice>

¹⁸ *Colgate Palmolive Company v. Anchor Health & Beauty Care Pvt. Ltd.* 2003 (27) PTC 478 Del

manufacturing sectors.¹⁹ In the fashion industry, patents cannot be obtained for artistic work/creation as they are not inventions. Though patents provide water-tight protection to intellectual properties, it is rarely useful in the fashion industry as it is a lengthy & complicated process & due to rapid changes in fashion trends. However, there have been some products that come under fashion as well as technology that was patented recently, such as U.V. protective clothing that are fire & water-resistant and wrinkle-free fabric.²⁰

IV. LEGISLATIONS THAT SAFEGUARD INTELLECTUAL PROPERTY RIGHTS IN THE INDIAN FASHION INDUSTRY

In India, the fashion industry is not governed under one single but a collection of laws that protects the intellectual property rights of fashion designers and brands. Legislations that govern the IPR in the Indian Fashion Industry are i) The Designs Act, 2000 ii) The Indian Copyright Act, 1957 iii) The Trademarks Act, 1999

The Design Act, 2000– The main objective of the Act is to safeguard and secure designs that are used for certain items through industrial processes & procedures. An industrial design is the commercial/aesthetic aspect of a product or article that draws the attention of buyers. It is essential for boosting a product's economic value, which results in growing its market value

& client base.²¹ Section 2 (d) of the Design Act, 2000 defines design as “the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device”²² For a design to get registered under this Act there are certain requirements that it has to qualify- It has to be original, must be applicable to a particular article, should be visible on the finished product and should not be published or disclosed previously.²³ In the case of Wimco Ltd. Meena Match Industries, the Delhi High Court held that publication of design means if it was available to the public, and publication of design can be in 2 ways - in the prior document and by the prior user. If the design is used privately and for trial purposes, then it will not amount to publication.²⁴

The registered proprietor of the design will have Copyright of the design for 10 years, and if he/she wants to extend his copyright ownership over the design, then an application has to be submitted before the expiration of 10 years to get an extension for five more years from the date of expiration of 10 years as provided in section 11

¹⁹ *Supra* note 4

²⁰ Diya Mehta, *Role of Intellectual Property in the Fashion Industry*, ENHELION (Oct. 7, 12: 17 PM), <https://enhelion.com/blogs/2020/10/28/role-of-intellectual-property-in-the-fashion-industry/>

²¹ Purna V Nair, *Origin and Development of Designs Act, 2000*, LEGAL SERVICE INDIA (Oct. 11, 8:40 PM),

<https://www.legalserviceindia.com/legal/article-475-origin-and-development-of-designs-act-2000.html>

²² The Design Act, 2000, § 2

²³ *Id.*

²⁴ *Wimco Limited v. Meena Match Industries*, AIR 1983 Delhi 537

of the Design Act, 2000.²⁵ Piracy of registered designs is dealt with in section 22 of the Act. It provides that “fraudulent or obvious imitation” of a registered design without the consent of the creator/innovator of that design is not lawful. If done so, then the person/ party guilty will be liable to pay compensation of an amount not more than fifty thousand if a civil suit is brought against them.²⁶

The Indian Copyright Act, 1957 – Under this Act, creators and innovators of drama, music, artistic & literary work will have Copyright over their creation until their death and an additional period of 60 years after their death. In the issue of protecting designs, the Designs Act, 2000 & the Copyright Act 1957 often overlap. Therefore, Section 15(1) of the Copyright Act provides that if a design is registered under the Design Act, then that design will not be protected under the Copyright Act. If a design is not registered under the designs act, then as per section 15(2) of the copyright act, that design will be protected under the Act. However, the protection ceases to exist if the design has been applied to an article, which has been reproduced more than 50 times by the copyright owner or with his license.²⁷ In the case of *Ritika Private Limited v. Biba Apparels Private Limited*, Plaintiff approached the Court to seek an injunction against the defendant from reproducing and selling prints/ garments that were similar to Plaintiff’s work. The Court held that the suit was barred by section 15(2) of the Copyright Act, 1957, as the protection for

Plaintiff’s design had ceased to exist as it was produced more than 50 times, and hence she cannot seek protection for her designs under the copyright act.²⁸

The Trademarks Act, 1999 – Trademark has been defined in section 2(zb) of the Trademark Act, 1999 as “a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include the shape of goods, their packaging and combination of colours.” Trademarks are beneficial for designs if it is clearly incorporated into the design to the point where it becomes a part of the design. Section 11 of the Act provides that to register a trademark under the Act. It should not be similar or identical to an earlier trademark that provided/provides similar products & services, as it results in confusion among the public.²⁹ The registration of a trademark will be valid for a period of 10 years, but it can be renewed from time to time, as per Section 25 of the Act.³⁰ The Act includes provisions regarding trademark infringement in several different ways and circumstances and the penalty & punishment for such offences under Chapter XII of the Act.

V. CONCLUSION AND RECOMMENDATIONS

In the fashion industry, designers put a lot of hard work and effort to create something new unique which stands out. Plagiarism and piracy are the dark clouds that surround the fashion industry;

²⁵ The Designs Act, 2000, § 11

²⁶ The Designs Act, 2000, § 22

²⁷ The Copyright Act, 1957, § 15

²⁸ *Ritika Private Limited v. Biba Apparels Private*

Limited, 2016 (67) PTC 665 (DEL)

²⁹ The Trademarks Act, 1999, § 11

³⁰ The Trademarks Act, 1999, § 25

whenever a new, trendy design or product is released, it will be shortly followed by several similar knockoffs and counterfeits. For protecting the original & unique creations of the designers, Intellectual Property Rights play a crucial role. Counterfeit products have a huge impact on the fashion designers, companies and fashion industry as a whole; they bring the brand value, trust and quality of the products down, which affects the profitability of the designers and the brand. Hence, fashion designers and creators should register their designs, patterns and unique elements of their creation under suitable legislation so as to safeguard their creation from being copied, pirated or counterfeited.

In India, even though there are several provisions that safeguard the intellectual property rights of designers and creators, several small scale fashion designers and fashion brands are unaware of their rights & fail to register their designs & creations, which puts them at a disadvantage. It is a dire need to make them aware of their rights which will help them in securing their designs and creations from being copied & counterfeited. Another reason why designers do not register their designs or creation is because of the complexity & the hassle of the registration process. The registration process should be simplified, and the staff in the registration offices should guide the designers/creators that approach to register the designs & help them through the process. The present fashion laws in India have several loopholes in them. One such loophole was observed in the case of *Ritika Pvt. Ltd. v. Biba Apparels Pvt,*

Ltd., where the original designer did not get protection from the copyrights act because her product was reproduced more than 50 times. The limit on the number of reproductions under Copyright should be increased to a reasonable number. Any company that makes a profit out of copying or counterfeiting products of another company, then the infringer company should be made to pay a part of that profit to the original company as compensation. The fashion laws in India are scattered, which makes it confusing & complex. Hence, the laws related to the fashion industry should be consolidated in separate legislation so as to simplify its applicability. Though fashion piracy can never be entirely eliminated from the fashion industry, it can be brought under control by safeguarding the rights of designers by encouraging them to register their designs & creations and by giving stringent punishments to people pirating fashion designs and products.

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