

INTELLECTUAL PROPERTY IN THE FASHION DESIGN INDUSTRY

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INTRODUCTION

Fashion design is a form of art dedicated to the creation of clothing and other lifestyle accessories. To work as a designer, one must possess an artistic and creative personality. Fashion designers have a good visual imagination and put their ideas into garments. Fashion designers should not only show their interest in learning new things, reading magazines, journals and books on fashion design history and new trends. They need to be aware of the fashion market requirements such as protecting their Intellectual Property (IP). IP is the result of applying your mind or intellect to create something new or original. The fashion industry is an IP intensive industry, continually generating and commercially exploiting creative ideas and innovation.¹

In fashion industry creativity is not only limited to the act of designing, but also includes the ad campaign and marketing of products be it high fashion or ready-to-wear to achieve the competitive edge required for success. All of this intellectual capital linked to a unique brand becomes the greatest value of a fashion enterprise.² However, many businesses do not protect their IP, especially those in the fashion industry. For an industry that generates hundreds of billions of dollars every year, and which prides itself on innovation and aspiration, it has become common practice for designers to ‘steal’ ideas from each other because the IP laws are so lax.³ Business managers need to identify such valuable intangible assets in a timely manner, determine their business relevance, and agree on those to be protected and leveraged through the IP system.⁴

FASHION DESIGN and IPR

Copying is endemic in the fashion industry, but the effects are particularly acute for emerging designers for whom every sale counts. “The damage actioned by knock-offs is twofold,” noted Gary Assim, partner and intellectual property specialist at London law firm Shoosmiths. “Firstly it robs the designer of the proceeds from the sale of his or her product, which will often have been the result of a considerable

¹ <http://www.fashion-enterprise.com/files/2010/09/CFE-IP-Copyright-Download1.pdf> on 16th Oct, 2014

² <http://www.lexology.com/library/detail.aspx?g=6c596a24-c79b-4d39-a73f-9837529d9a78> on 18th Oct, 2014

³ <http://antwerpsex.wordpress.com/2013/09/03/fashion-101-intellectual-property-laws/> on 16th Oct, 2014

⁴ WIPO Magazine/May-June 2005

research and development investment”. “In addition, it denies the designer the rightful recognition as the original creator.”⁵

Legal rights can help a fashion designer in two distinct ways:

1. *Protection*: They can stop someone else benefiting from your hard work by copying or using your textile or product without your permission; and
2. *Exploitation*: They can generate revenue from your designs by allowing you to enter into licensing agreements for your designs with third parties.

IP rights are not just about protection against copying. Instead they may be viewed as performing a more subtle function, identifying the creator of content. By adopting an approach more akin to that taken within the media and entertainment industries, fashion brands can reach that next level of sophistication whereby they are strategically managing their IP rights distinctly from their commercial operations.⁶

Intellectual property law offers a raft of rights to fashion designers. Some of these will arise automatically, such as copyright, while others require registration, such as trademarks.

NEED TO REGISTER

A registered IP can be a valuable commercial asset. A registered IP gives a right to enforce the design against infringement. It also provides an exclusive right to use the design and authorize other people to use the design as specified in the registration. It becomes a personal property and can grow in value and be sold.

The legal protection of IP rights provides designers, artists, business people, entrepreneurs and inventors with the exclusive right to use and control, and therefore profit from, their intellectual and creative work. IP is a very valuable asset for those in the design industry and an important differentiating factor between one designer and the next.

The rights that are most likely to be relevant to a fashion designer are: trademarks, copyright and design rights.

⁵ <http://www.businessoffashion.com/2011/07/fashions-intellectual-property-conundrum.html> on 18th Oct, 2014

⁶ <http://www.businessoffashion.com/2011/07/fashions-intellectual-property-conundrum.html> as viewed on 20th October, 2014

Trade Mark and Fashion designing

Trademark is a word, phrase, symbol or design, or a combination of the same associated with a product or service which is used as market differentiators from similar products or services. Any product or service will always be identified with a name and logo in order to distinguish it from other similar products on the market. Designs are not the exception, as they will always bear a label distinguishing them from other creations.

These names and logos can be trademarked based on the type of products (clothing, shoes, accessories, fabrics, etc.). The slogans of advertising campaigns for each product can also be protected through trademark registration. Recently trademarks that generally do not fall within the standard categories but include marks based on visible signs (colours, shapes, moving images, and holograms) or non-visible signs (sounds, scents) considered as Non-conventional Trademarks or Non-traditional Trademarks can also be trademarked. Therefore, perfumes, fragrances and other aromatic products that play an important role within the world of fashion can also gain IP protection.

Trademark law not only protects a brand's right to revenue, but also helps consumers distinguish between genuine products and counterfeit products.

Copyright and Fashion designing

Copyright protects original artistic works. A design can be protected as an artistic work; specifically as a graphic work which includes a painting or a drawing. Textile designs may benefit from copyright protection but an actual dress (when made) does not. In this situation, it will be necessary to rely on the Designs Act 2003 for protection. Copyright protection is also likely to be available for works of artistic craftsmanship, such as one-off fashion garments and jewellery. However, for producing or making multiple copies of items, design law should be relied rather than copyright law.

Copyright protects artistic expressions "that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." This is commonly referred to as the *separability rule*, which was developed from the 1954 case of *Mazer v. Stein*. In this case, the Supreme Court ruled that Balinese statuettes that formed the bases of lamps were copyrightable because the aesthetic work (the

statuette) was separable from the functional article (the lamp). Even though they could be used as lamp bases, the statuettes had their own artistic merit and could be protected as such.⁷

With regard to copyright in fashion industry, in February 2008, Marc Jacobs was accused of plagiarizing an amateur Swedish artist named Gösta Olofsson. Olofsson, who passed away in 1982, ran a petrol station in a small village and made a living by selling postcards, scarves, and other tourist paraphernalia. Marc Jacobs (or rather one of his accessories designers) ripped off the design. The matter was eventually settled outside court when Jacobs offered monetary compensation to Gösta Olofsson's son. In this case the artistic work—Olofsson's original painting—exists beyond and entirely separate from the utilitarian aspects of the scarf. Hence design is subject to copyright laws.⁸

However, some cases aren't as straightforward. It can be argued that the panthers and pansies on Givenchy t-shirts are aesthetic works that exist separate from the utilitarian function of the garment (covering the body and dressing the human form). And yet we still see countless copies! What about a flower motif rendered by sequins on a Chanel dress? Or an ornate zipper on a Balenciaga backpack? Is the zipper "artistic" enough to be considered separate from its functional purpose, or does the purpose—to open and close the bag—supersede its aesthetic character? In most cases, the courts will decide that the *separability rule* does not apply to apparel because creative expression is usually inextricably tied into the functional elements of the garment.⁹

Patent and Fashion designing

Patents protect new technologies that are incorporated into products. Some examples of Patents include the technology used to manufacture CROCS shoes, wrinkle-free fabrics, UV-filtering textiles that are resistant to fire and water-repelling textiles.¹⁰ Patents are essential to the successful commercialization of inventions particularly that require large investments to complete development to the commercial stage. The artistic creations cannot be patented, so not many designers have a need for patents.

Adding devices to clothing is fast becoming a trend in this age of technology, which means patents for new devices and new methods of use for devices are an option worth considering. American designer Lauren Scott is currently adding radio frequency identification tags to her line of children's wear. The tags

⁷ <https://antwerpsex.wordpress.com/2013/09/03/fashion-101-intellectual-property-laws/>

⁸ Ibid

⁹ Ibid

¹⁰ <http://www.lexology.com/library/detail.aspx?g=6c596a24-e79b-4d39-a73f-9837529d9a78>

have previously been used to track shipments of freight. In clothes, the tags could carry medical information in case of an accident or emergency and could also prevent abductions by triggering an alarm if a certain perimeter is breached (e.g. tags inside pyjamas could trigger readers placed at various locations in a house if the child leaves the premises).¹¹

Novozymes, a Danish biotech company specializing in enzymes and microorganisms (www.novozymes.com), pioneered the use of enzymes in the treatment of fabrics. Though not previously involved in the fashion industry, in 1987 the company developed and patented a technology for the treatment of “stone washed” denim jeans. This technology is based on an enzyme called cellulase, which removes some of the indigo dye from denim so as to give the fabric a worn look. Within three years, most of the denim finishing industry was using cellulase under license from Novozymes. Today, Novozymes’ technology for improving production methods and fabric finishing has been licensed worldwide. The company holds more than 4,200 active patents and patent applications, and pursues a pro-active licensing strategy to maximize royalty revenue from these IP assets.

The Italian company **Grindi Srl** invented Suberis, an innovative fabric made of cork, said to be as smooth as velvet, light as silk, washable, unscratchable, stain-resistant, waterproof and fireproof. After testing and codifying the treatment, Grindi filed an international patent application under the PCT in 1998 to protect its unique product in a large number of countries. The Suberis fabric is used in the manufacture of clothing, footwear and sportswear, as well as in many other applications.

Industrial Design and Fashion designing

A design is the visual appearance of a product that is the decorative pattern on the garments. If the design is new and unique it can be registered. This means it can’t be the same or similar to designs already produced (even in a sketch). There are certain designs that can’t be registered, including designs featuring scandalous graphics. This gives the designer protection for the visual appearance of the product, but not its feel, material or function.

Among the range of IP tools, the protection of designs is most relevant to the fashion industry. Registering a design helps the owner to prevent all others from exploiting its new or original ornamental or aesthetic aspects, be they three-dimensional features, such as attractive shapes, or two dimensional features, such as aesthetically pleasing textile prints. Any three-dimensional design, such as a purse,

¹¹ <http://www.wipo.int/edocs/lexdocs/laws/en/au/au332en.pdf> as on 21st October, 2014

garment, or accessory, can obtain intellectual property protection by being registered as an Industrial Model.¹² Designs printed on fabrics can also be protected, not as an Industrial Model as there is no three-dimensional shape, but as an Industrial Design because of the combination of images, lines or colors that are incorporated into an industrial product for decoration purposes.

Trade secrets and new business models

Trade secrets may range from a list of key suppliers and/or buyers, to use of software tools for fashion design, to logistics management of the entire value chain. In some fashion businesses, core trade secrets serve to protect the computer-implemented, software-based business models, which underpin an entire business strategy, based on stealth and speed, to supply a limited quantity of fashion products. For example, the Spanish retail fashion chain, **ZARA**, uses a proprietary information technology (IT) system to shorten their production cycle – i.e. the time from identifying a new trend to delivering the finished product– to a mere 30 days. Most of their competitors take from 4 to 12 months. The company receives daily streams of e-mail from store managers signaling new trends, fabrics and cuts, from which its designers quickly prepare new styles. The fabric selected is immediately cut in an automated facility, and sent to work shops. A high-tech distribution system, with some 200 kilometers of underground traces and over 400 chutes, ensures that the finished items are shipped and arrive in stores within 48 hours.¹³

Other fashion houses use IT to make customized products in response to an individual customer's request. For example, **Shirtsdotnet** (www.shirtsdotnet.com) aims to reshape the traditional clothing industry by reversing the process of decision making and following the made-to-order business model. Shirtsdotnet is a Business to Business clothing software platform provider, offering made-to-measure, mass customization clothing solutions for mail order companies. Customers can design and order apparel directly from the virtual shop. The business relies on proprietary software, which is protected as a trade secret and by copyright law. The above examples show that the strategic use of new information technology, protected by the tools of the IP system, can play a critical role in establishing and consolidating a market position.¹⁴

¹² http://www.wipo.int/export/sites/www/sme/en/documents/guides/customization/stitch_in_time_pa.pdf as on 29th October, 2014

¹³ http://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html as on 29th October, 2014

¹⁴ Ibid

WHAT IS PROTECTED?

Type of IP protection	What's protected	What it means?	Term of Protection
Registered designs	Two and three dimensional product designs (e.g. a fabric pattern or the shape of a bag)	The visual appearance of a product is protected, but not the way it works. The owner has the exclusive right to use, sell or license the registered design or the appearance of the whole or part of a product resulting from the feature of, in particular, the lines, contour, colours, shape, texture and/or materials of the product itself and/or its ornamentation'.	Registration initially protects your design for five years from the date the application was filed. The design registration can be renewed for a further five years up to the maximum term of 10 years. If you do not renew your registration it will cease. You can't make an application to re-register the same design. Once the design has ceased it passes into the public domain and is free for others to use.
Trade marks	Letters, numbers, words, colours, a phrase, sound, scent, logo, shape, picture, aspect of packaging or any combination of these	A trade mark identifies the particular goods or services of a trader as distinct from those of other traders. The owner has the exclusive right to use, sell or license the trade mark.	A trade mark is initially registered for a period of ten years and continues indefinitely as long as the renewal fees are paid every ten years.
Patents	Inventions	A patent protects how an invention works or functions. The owner has the exclusive right to use, sell or license the invention	Term of the patent is 20 years from the date of filing for all types of inventions
Copyright	Art, literature, music, film, broadcasts, computer programs	The owner's original expression of ideas is protected, but not the ideas themselves. The owner has the exclusive right to use, sell or license the copyright work	For an artistic work, the copyright lasts for 60 years from the author's death. If a design is industrially exploited (which will usually be the case for textiles and fashion designs), the protection is reduced to 25 years from when the work

			is first exploited.
Other	Trade secrets, confidential information	These types of IP rights give creators certain rights and privileges depending on the type of IP protection. This means the owner has the right to use, sell or license the IP.	

CONCLUSION

The fashion industry invests huge sums every season to create new and original designs. Despite this significant investment, the fashion designers are reluctant in protecting their IP. However, a frequently cited explanation for not registering fashion designs is that the short product life cycle – often no more than one six-to-twelve month, season – does not justify the considerable time and financial cost involved. The arguments for registering a new design have to be considered on a case-by-case basis. Registering a design should help to deter others from copying it, and to fight unscrupulous competitors who do so. Moreover, design protection is not always a major financial burden, at least to begin with. For fashion items with a long life span, protecting the IP may be the best way to prevent others from using the design.¹⁵

The fashion industry is driven by creativity and by the intellectual capital invested in it. Protecting that intellectual capital in the form of IP assets serves to boost income through sale, licensing, and commercialization of differentiated new products, to improve market share, raise profit margins, and to reduce the risk of trampling over the IP rights of others. Good management of IP assets in a business or marketing plan helps to enhance the value of an enterprise in the eyes of investors and financing institutions.¹⁶

¹⁵ WIPO Magazine/May-June 2005

¹⁶ http://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html