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EVOLUTION OF LEGAL PROTECTION OF FASHION IN THE EUROPEAN UNION

Master's Thesis

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INTRODUCTION

Clothing, which began as a physiological need at the dawn of civilization, evolved into an aesthetic and cultural expression. Today, fashion surrounds our daily life and work; what we wear is a means to express ourselves instead of mere protection from cold and nakedness.[1] It is representative of the location, country, people, and culture. Civilizational advancement had a significant impact on this expression and style of clothes, which finally gave rise to the fashion business.

Evolution from clothing into fashion has created opportunities for a new business sector to emerge and flourish over time. Today, fashion is an essential phenomenon of daily life that defines the temporary innovation that enters the life of society with the need for change or the desire to embellish. It is a form of social admiration and excessive fondness for something topical for a certain period. Temporariness, suitability for innovation, and social taste are the hallmarks of fashion.

When we hear the word "fashion," we usually think of style and clothing, but fashion is a broad concept that can be seen in most areas of life, such as art, architecture, and literature. Everything from the carpets in our houses to our glasses, from electronic devices to the movie theatre we go to, is the manifestation of current or previous fashion trends. The word fashion alone encompasses all that is appreciated in a period. The act of the designers determining their idea before creating the design and forming it afterwards is referred to as "design." Fashion design also includes trending design. A trending design can be in any design category. Such designs do not necessarily have to be primarily from the clothing and accessories industry. For instance, some car designs and models also can be trendy designs. Likewise, it is common for different designs to be fashionable at certain times.

[1] Li, Xinbo (2012) "IP Protection of Fashion Design: To Be or Not to Be, That is the Question," IP Theory: Vol. 3: Iss. 1, Article 3, p14.

According to the definition in fashion theory, "fashion in a broad sense is the appreciation and acceptance of clothing styles created by the combination of certain silhouettes, fabrics, colors, and details by a group of people at a certain time or place."[2]

Textile and fashion designs, with which every person comes in contact at least once in their life, are designed according to fashion trends. Creating or following fashion is not a basic need, but it is a vast and endless field where you can reflect your unique character and personality, express yourself and stand out from others. Today, people generally use "need" for physical or tangible things, but moral needs must also be met for a quality life. That's the point of fashion's creation - to be unique. In short, you can get help from fashion on self-improvement.

Furthermore, today, the fashion industry has become an essential economic resource connecting many different fields. The textile and apparel industry are crucial aspects of the European manufacturing industry, with many regions of Europe relying on it for economic and social well-being. According to 2013 figures, there were 185,000 businesses in the industry, employing 1.7 million people and earning €166 billion in revenue. In total manufacturing in Europe, the sector accounts for 3% of value-added and 6% of employment. Small enterprises are the backbone of the industry in the European Union (from now on, EU). Companies with fewer than 50 employees employ more than 90% of the workforce and generate about 60% of the value contributed. Italy, France, Germany, and Spain are the industry's top producers.[3] They account for almost three-quarters of EU production.[4] Moreover, in 2019, the EU exported €61 billion of textile and clothing and imported €109 billion.[5]

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[2] Alicia Kennedy, Emily Banis Stoehrer, Jay Calderin, "Fashion Design, Referenced: A Visual Guide to the History, Language, and Practice of Fashion," Rockport Publishers, Massachusetts, 2013, p11

[3] European Commission, "Textiles and Clothing in the EU"

https://ec.europa.eu/growth/sectors/fashion/textiles-and-clothing-industries/textiles-and-clothing-eu_en

[4] Ibid

[5] European Commission, "Euro-Mediterranean dialogue on the textile and clothing industry", accessible at

https://ec.europa.eu/growth/sectors/fashion/textiles-and-clothing-industries/international-trade_en

Fashion refers to changing, rising preference trends in many fields which spread through imitation and inspirationThe word fashion literally means a popular clothing style is due to all kinds of investments in the clothing industry in this field. Fashion, which is in constant motion, often appears as a reinterpretation of previous trends. So new and utterly original fashion trends are usually very rare.

Thanks to the emergence of the internet, the global marketplace had grown as never before, which led to more brands and products marketing and higher demands. Thus, fashion became easier to access and affordable to use. To keep their places in the global marketplace, brands compete with each other for international recognition.

Today, counterfeiting is a severe issue for the fashion industry. With the emergence of fast fashion companies, big fashion houses struggle to protect their creations. Fast fashion companies tend to mimic, imitate, or copy their intellectual creations and products, which result from vast investments in finance and time. That is why fashion houses would like to be able to protect their products from being copied by imitators. Today's advanced technology makes it possible to imitate the most original inventions and designs quickly and at a very low cost. The only tool that can prevent this, is legal protection. The protection of the intellectual property is necessary from two perspectives. The first one is the general economic reason that encourages innovation and competition to be possible in this way. The second is from a moral perspective. It is desired to prevent the right holder from unfairly losing his right.

According to article 2 (viii) of the Convention Establishing the World Intellectual Property Organization[6]

"*"intellectual property" shall include the rights relating to:*

- *literary, artistic and scientific works,*

- *performances of performing artists, phonograms, and broadcasts,*

[6] Convention Establishing the World Intellectual Property Organization (as amended on September 28, 1979). Available at https://wipolex.wipo.int/en/text/283854 (31.3.2022).

- *inventions in all fields of human endeavor,*

- *scientific discoveries,*

- *industrial designs,*

- *trademarks, service marks, and commercial names and designations,*

- *protection against unfair competition,*

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields".

The European Union's multi-faceted approach to fashion law is primarily affected by its efforts to harmonize intellectual property law, customs enforcement, and the operation of the internal market. The EU is involved in efforts to protect fashion designs through intellectual property rights at both European and international levels. In addition to intellectual property rights (hereinafter IPRs), other legal tools exist to protect the fashion industry, which are analysed in the thesis.

The thesis aims to identify potential problems that fashion designers are facing and recommend the available IPRs and other legal remedies to overcome the issues. The author also estimates whether the existing regulatory framework adequately meets the demands of the fashion industry and makes recommendations on how to improve it.

The hypothesis of this thesis is that the lack of a universal and international system to protect intellectual property leaves innovating companies open to potentially ruinous infringements. Therefore, different aspects of intellectual property law, and other applicable laws in general will be analysed. It is also concluded that the copyright law is not sufficient to protect the fashion designs. Moreover, there is a thin line between the inspiration and fashion copying, and the aim is to identify the deficiencies.

Main objectives of the work are as follows:

- Identifying the main types of infringement
- Determining whether the terms knock-off and counterfeiting cause a violation of rights within the scope of industrial property laws
- Offering potential solutions

The following research questions will help determine the validity of the hypothesis:

- How have the fashion designs been regulated and how this protection has been improved in international instruments in EU?
- What are the main infringement types and what kind of legal protection is available for intellectual properties in Fashion?
- Why is the copyright law protection not sufficient to protect the interest of fashion industry? What are the other protection options to protect fashion industry?

In order to answer the research questions, analytical, comparative and case study methods are used from the international and EU law perspective. CJEU case law is also examined to find out contradictions and legal gaps in the regulation and implementation.

The thesis consists of three chapters. In the first chapter, the relationship between fashion and intellectual property law and in addition, the concepts related to fashion law such as knock-off and the relationship between these concepts and intellectual property law were analyzed. Besides the concept of industrial property rights and in general its relationship with fashion industry in general is explained. In the second chapter problems that fashion designers face today, existing ways of protection and alternative laws to intellectual property laws in fashion design protection will be explained. Finally, the last chapter will examine legal gaps and contradictions, and will evaluate potential solutions.

The importance of the fashion industry, and impact of fashion design protection in our society and economy will be highlighted. Moreover, possible solutions and suggestions will be given at the end of the thesis.

The core resurces that are used in this thesis are mainly regulations (e.g., Berne Convention, French Civil Code, Italian Copyright Law, Czech Republic Civil Code, etc.), EU directives (Unfair Commercial Practices Directive, EU Design and Copyright Directive, etc.), caselaw, research articles and etc.

Keywords: Protection of Fashion Designs, Protection of Fashion Designs in Comparative Law, Fashion Law, Design Law, Fashion Industry, Fashion Design, Fashion Designer.

CHAPTER I. FASHION AND FASHION DESIGN PIRACY

1.1 History of Fashion

Fashion is a phenomenon that covers all areas of our lives and deals with at any time and anywhere. The inclusion of fashion-inspired designs in every moment of life is not unique to our day. Clothing and textile designs hav

e been used as status symbols in many societies, besides their functionality and decorative purpose. Textile products have mediated the development of international trade relations and shaped economic activities between the East and the West from past to present. Textile has pioneered many sectors for centuries, has been a tool for the development of countries and has become a sector expressed in billions of dollars today.

Explaining the historical development process of fashion is essential in understanding at what stage fashion designs are considered works and at what stage they can benefit from design protection. Therefore, in this section, the historical development of fashion designs will be briefly mentioned.

The history of fashion dates back to ancient times. Clothing and accessory designs that came to light as a result of archaeological excavations are an indication that fashion designs existed in prehistoric times. Especially when we look at ancient Egypt's history, we can see that people used to wear simple, primarily white garments with heavy accessories made from gold. In 3100 BC, the understanding of fashion in the Egyptian Empire consisted of straight-cut dresses made of linen fabric. However, the Egyptians revived these simple dresses with the accessories they designed from precious or semi-precious stones.[7] One of the important clothing objects in terms of Egyptian history is the solid gold mask, which was designed to be worn by Pharaoh Tutankhamun, who died in 1322 BC.[8] This tradition continued during Ancient Greece and the Roman Empire.

In the Middle Ages, textiles became the subject of trade. Especially wool, linen, and silk fabrics have started to be in demand throughout Europe. It was determined that spinning wool was done

[7] J. Bingham, A History of Fashion and Costume the Ancient World, Bailey Publishing Associates Ltd, Hove. 2005, p.7-9

[8] Ibid., p.11

by women and weaving by men. For this reason, men who were weavers came together to establish a union where they could sell the fabrics they produced and carry out other commercial activities.[9]

Queen Elizabeth I of England, who reigned between 1558 and 1603, besides being a fashion icon of the period, also determined the rules of fashion in society. One of the most important regulations of this period was the law that allowed certain colours to be worn only by members of the royal family and upper class.

Fashion became an industry with the Industrial Revolution in the 18th century.[10] Before the industrial revolution, fashion designs were designed in line with the consumer's demands and were created especially for the person who demands them. After the revolution, with the invention of the industrial tools, fashion designs, besides being produced individually by a tailor, have become mass-produced in the industrial environment. Competitiveness and the developments in supply and demand accelerated by the competition, especially the reflection of the craftsmanship that attracted the attention of customers, had led to new product demands. The rapid pace of innovation has made new production techniques with lower cost, larger production units that supply and stimulate the needs of the growing consumer market possible.[11]

The designing of clothing without demand and mass producing them with the general measurements and modifying them according to the consumer was carried out for the first time by British-born fashion designer Charles Frederick Worth.[12] The fashion design workshop, located in Paris, the fashion center of the period, and since the second half of the 1800s, Worth who prepared tailor-made dresses for Napoleon III's wife, Empress Eugene, was one of the first fashion designers to organize fashion shows for the fashion designs.[13]

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[9] Philip Steele, A History of Fashion and Costume the Medieval World, Bailey Publishing Associates Ltd, Hove. 2005, p.17.

[10] https://www.britannica.com/event/Industrial-Revolution

[11] John Heskett, Industrial Design (World of Art), London, 1987, p.12

[12] https://www.britannica.com/biography/Charles-Frederick-Worth

[13] Ibid

The functionality factor played a significant role in the fashion designs that emerged in the 20th century. With the influence of World War II, men's clothing mainly concentrated on military uniforms, while women's fashion concentrated on suits consisting of skirts and jackets with functional pockets.[14]

Although new seasonal fashion designs are trending, old fashion trends are starting to become a new trend from time to time again. From the end of the 20th century, fashion trends were mainly influenced by musical genres, such as rock, pop, etc. Lately, the fashion trends have changed drastically from the previous trends. Thus, comfortable, sport-style fashion became trendy.

Fashion trends emerge heavily in France, Italy, and the United States, and these trends are mostly followed in other countries of the world. These countries, which are the pioneers of fashion, set an example for other countries in terms of protection of design as well as fashion trends. Not a surprise that one of the first modern regulations in this field was also established in France. It is the Literary and Artistic Property Act of France which was published in 1793.[15]

1.2 Counterfeiting and Knockoffs

Saying that a product is fashionable and in trend, in fact, means that there will be similar products in the market already. That particular product will look-alike to the products produced by the competitors, and all will be considered the fashion and trend of that period. However, we have to be careful when saying “counterfeit” or “copy” as there is a fine line between copying and adaptation to the current fashion trends. A person can be influenced by another person and can wear the same style of clothing consciously or unconsciously. A designer can be influenced by another design and create a novel and unique product without copying as a result of inspiration. As opposite, copying or counterfeit products are a result of direct replication of the original product or design.

Counterfeiting refers to making or trading in goods that are copies of other things without permission from the owner of original rights. This is considered an offence across Europe, and

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[14] https://fashionhistory.fitnyc.edu/1940-1949/

[15] http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_f_1793

different countries have their definition of what counts as counterfeiting. For instance, under the Italian Criminal Code Article 471, counterfeiting may include the unauthorized reproduction of trademarks or any other distinctive signs belonging to someone else which are used for commercial purposes.[16] There has been a significant effort made by various parties to eradicate this market, even though it can never truly be done away with completely.

Counterfeiting in the fashion industry is a complex phenomenon, including all types of fashion products. Counterfeiting activities are related to deception. Thus, they are often called deceptive fashion products. These are goods marked with trademarks or similar signs that look identical to the original product but have no connection to it. Then they are sold under its name or brand illegally, without any authorization given by the real product owner.

For example, suppose someone produces and sells fake Louis Vuitton (hereinafter LV) bags using its symbols on them in order to deceive the customers who want to buy an original LV bag. In that case, this person commits trademark infringement since he uses Louis Vuitton's symbols for commercial purposes without annidation. This way he is copying the original brand and deceiving its customers, who most probably would not buy such a bag if they knew it is not an original one.

There are many different ways in which counterfeiting can be carried out. It may include:

1. copying an original product;
2. using similar symbols or signs that look like trademarks or copyrighted works;
3. using a similar brand name;
4. using identical marks;
5. using an altered trademark (altered a significant part of the sign). Even something as small as changing the color of the logo on the jeans.

Statistically, counterfeiting makes up a significant portion of the trade in goods and products. For example, according to a joint report released by the Organization for Economic Cooperation and Development ("OECD") and the European Union Intellectual Property Office ("EUIPO") in 2019, the value of imported fake goods worldwide was 509 billion USD based on 2016 customs seizure

[16] Codice Penal, https://www.studiocataldi.it/codicepenale/codicepenale.pdf

data which represented as much as 3.3% of total world trade in 2016.[17] Considering how big the fashion industry has become, the value of counterfeit fashion products in the market is huge. There are several factors that give rise to counterfeiting in the fashion industry. Essentially, copying of fashion design and trends can express itself in different ways.

There are also "Look-alike" goods, which means goods having design or shape characteristics that make them resemble famous brand's products.

It must be noted that producing deceptive products or copying others' designs or other elements of a fashion product does not always come under the definition of counterfeiting. There could be several variations of infringing one's rights in relation to fashion designs and products. There could be knockoffs, counterfeits, or replicas of a fashion product.

Knockoff is a near-identical product that contains almost all of the same features as the original brand but is sold under a different brand name and label. Knockoffs are generally not illegal; however, the brand may challenge that "inspired" design before the court. If any brand claims that the knockoff is illegal, it must prove that the similarity is close enough to mislead the consumer. Being different from knockoffs, counterfeits are usually containing both elements and original brand names and labels which is produced by those other than the original owner of the product. While the knockoff is a similar design, counterfeiting aims to give the consumer the impression that they are buying an authentic product. As a result, it misleads the customer by appearing to be the original brand. It does not always include all of the characteristics of the copied goods, but it usually includes the brand name, label, and logos.

Sometimes, in some resources, the knockoff is called "copycat". However, in the fashion world, knockoffs are a source of inspiration rather than a counterfeit product and are considered necessary in supporting the product to reach and spread to all segments of society. As an example, to knockoffs, we can say orange "Homies" sweatshirts designed by Brian Lichtenberg and on the other hand the logo of the luxurious high-end brand – Hermès.[18]

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[17] OECD/EUIPO, "Illicit Trade - Trends in Trade in Counterfeit and Pirated Goods", 2019, p. 45

[18] https://www.theguardian.com/fashion/2016/apr/08/copy-right-how-fashion-learned-to-embrace-the-imitations

Reference for photos: Homies

At first, fashion designers accepted knockoffs and copies as their influence and saw it as they are being well-known, and their design is popular. Even though high-end fashion brands object to copying, as long as fast fashion companies don't go beyond of the "limits", high-end brands "close their eyes" for knockoffs. For instance, Chloé did not file a complaint about infringement when

one of the biggest fast-fashion brands Zara produced bags inspired by Chloé.

Reference for photos: Hello Magazin

Reference for photos: Laiamagazine

However, when it started becoming a massive issue, apart from morally it also economically influenced fashion designers.

Fast fashion companies do not spend hours and hours creating a design and do not need any creativity, any inspiration. But when they start to produce copies of the original work and if consumers buy more copies than the original, then it drastically reflects on the sales of original

brands and in incentives of the designers and discourages them. It is a possibility for all fashion designers, the fashion industry is likely to weaken and disappear if we do not take action and protect their intellectual property.

When it comes to a design, it is normal to be inspired by something, and the source of inspiration is not necessarily another design. In fact, the sources of inspiration that influence designers can vary, including cultures, traditions, previous fashion trends including garments, historical events, and even movies.

At this point, we should make it clear that cross-brand imitation is not just typical of high-end and fast fashion companies. In other words, the institution that copies or inspires a product may not always be a fast-fashion company. A good example is when a 1949 Dior-designed "Junon" dress was presented in high-end brand Zuhair Murad's 2009 creation.[19] Dior did not take any legal action against this "infringement", instead, it was judged as Dior's influence or the design of Dior's reinterpretation. This example shows us the extent of tolerance towards imitation in the fashion industry, but the identity of the imitator is important and the approach to identifying imitation or inspiration differs each time.

Reference for photo: Junon

[19] http://partnouveau.com/2013/01/junon/

1.3 Fast and Slow Fashion

In general, fast fashion is inexpensive garment collections imitating the products of high-end fashion brands.[20] Looking back at history, fashion shows were the biggest inspiration for the fashion industry. These trend shows were primarily restricted to designers, buyers, and other fashion managers. However, starting from the late 1990s, fashion shows became a public phenomenon, where photographs of the recent fashion shows could be seen in magazines and on websites which lead to the demystification of the fashion process.[21] Over time, as the internet started to play a bigger role in our lives, and especially the emergence of smartphones made it easier to get exposed to fashion shows and trends which were once restricted only to certain categories of persons.

The motivation behind fast fashion is quite simple. The first and foremost reason is related to monetary issues. After a designer showcases her seasonal line, fast fashion retailers started the process of mimicking the garments. This process can be done at a low price as fast-fashion retailers do not have to hire designers to create an entirely original line.[22] Moreover, since the business model of the fast fashion companies is to copy and manufacture the designs of luxury brands, the risk of failure in such businesses is so low that they are likely to make high profits instead.

Unlike luxury high-end fashion brands, fast fashion companies target affordable fashion for all segments of society and frequently renew their product range. In the fashion world in general, luxury brands produce only two seasonal period collections which are spring-summer and autumn-winter. Unlike this, fast fashion companies do not limit themselves to collections in these two seasons, they realize their manufacturing business in a constantly changing rhythm. As a matter of fact, the luxury high-end fashion designers use two-season collections, while mass-market brands

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[20] Joy and Others, "Fast Fashion, Sustainability, and the Ethical Appeal of Luxury Brands", Fashion Theory, Volume 16, Issue 3, (2012), p.273

[21] Vertica Bhardwaj and Ann Fairhurst, "Fast fashion: response to changes in the fashion industry", The International Review of Retail Distribution and Consumer Research, 2010, Vol. 20, No. 1, p. 168

[22] Amy L. Landers, "The Anti-Economy of Fashion; An Openwork Approach to Intellectual Property Protection", Fordham Intellectual Property, Media & Entertainment, 2014

use a separate calendar for each season to ensure that new products come to the stores monthly and have a rapid circulation.[23]

While fast fashion offers several benefits, it does not come at no cost. Fast fashion companies rarely reduce the price of their products by compromising revenues. The only way to accomplish this is to lower production costs. As a result, either the worker who is responsible for the production's completion is unable to obtain the required skills (in some cases it even connects to labor issues, such as child labor, working under dangerous circumstances, etc.), or low-cost raw materials are used, or both. Rapid production, synthetic raw materials, and products made in low-wage countries emit massive volumes of carbon, which has a hidden cost. At the end of the day, it's about our money and, more importantly, our health. However, because the intense pleasure of buying cheap goods blinds us, we are oblivious to the fact that we are contributing to a loop that damages our health indirectly.

Slow fashion is the opposite of the fast-fashion in terms of the concept, following the "slow food movement".[24] It is more sustainable, eco-friendly, cruelty-free, aims to support the local workforce, resources, people, and production, to educate consumers about ethical values on trade, to increase awareness on social responsibility since in general main goal of it is to provide consumers with timeless products – high-quality, long-time durability, wise and cost-effective solution. We can say that motto of this fashion concept is "if you do not need it, do not buy it". In another word, instead of purchasing cheap and not quality products often, it encourages consumers to buy less often and fewer garments with better quality while supporting local manufacturers and handicraftsmen. This concept was introduced by Kate Fletcher who is a professor in the Centre for Sustainable Fashion (Centre for Sustainable Fashion).[25] Thanks to the efforts of the supporters of this movement, some big fashion companies such as Nike, H&M also joined this line.[26]

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[23] Alfredo Cabrera and Matthew Frederick, "101 Things I Learned in Fashion School", 2010, p.89.

[24] https://www.slowfood.com

[25] Madeleine Hill, "What is Slow Fashion?", 28 May 2021; https://goodonyou.eco/what-is-slow-fashion/

[26] https://www.reuters.com/article/us-britain-fashion-recycling-idUSKCN1IH2EU

The ultimate goal of slow fashion is not to sell products to consumers. It aims to make consumers question under what conditions, where, by whom, and using what kind of material apparel is produced. In short, it teaches you to read labels, that is, to be a conscious consumer and to slow down and reduce the negative effects we leave on the universe. Because we have only one Earth where humans live and where future generations can live. The rapid production that continues today is realized by excessive consumption of textile materials, human labor, and energy. A slow fashion brand should be able to tell its consumers, "Don't buy my product if you don't need it".

There are controversial thoughts when it comes to piracy and counterfeiting. According to some authors, piracy accelerates the fashion industry's advancement, encourages fashion designers to enhance their designs, and ultimately develops the entire industry, resulting in more sales and profit for brands and companies. As a result, they are in favor of the fashion sector having no intellectual property protection. However, this is not a perfect solution or method in and of itself, as while it may benefit well-known and large brands, it also has drawbacks for small businesses and mass market firms. Because they are not well-known, it is simpler for high-end brands to "erase" them from the industry.[27] Fashion designs are hard to create and make, but relatively easy to copy. Therefore, it may discourage the designers for their future improvements, creativity, and innovations.[28]

[27] Kal Raustiala & Christopher Sprigman, “The Piracy Paradox Revisited”, Stanford Law Review, 2009

[28] C. Scott Hemphill & Jeannie Suk, “The Law, Culture, and Economics of Fashion”, Stanford Law Review, 2009, note 19

CHAPTER II. LEGAL PROTECTION OF FASHION DESIGN IN COMPARATIVE LAW

1.4 Historical Development of Fashion Design Protection

Fashion designs are products that find use in all countries of the world. Many countries have accepted legal protection for these designs. Each country has regulated protections for designs in accordance with its own legal system. In this sense, differences emerged between the civil and common law systems in terms of terminology and practice. This differentiation has manifested itself in the country's legal regulations and judicial decisions. Thus, design protection has been weakened or strengthened at the territorial level.

After the industrial revolution, designs gained international importance. With the development of communication channels, the fact that a design in one country can easily reach another country, a design designed within the country is produced in another country, and the acceleration of the globalization of the economy has caused the design protections in domestic law to become insufficient. Countries have realized the need for industrial designs, which have an important place in terms of international trade, to be covered by standard protection at the international level. Therefore, since 1883, international negotiations on design protection led Paris Convention to be accepted.[29] The process continued with accepting the Bern[30] and Universal Copyright Conventions[31] in 1886 and 1952, respectively. Finally, the TRIPS Convention of 1994 included the term "industrial design", which combined the provisions of previous conventions.[32]

One of the leading countries in terms of legal regulations on fashion designs is France. After the artistic and industrial developments in these countries, the intensity of the demands for the protection of designs pushed the legislators to make legal arrangements for designs. Later, these regulations did not remain at the national level but spread to the international dimension. With international conventions, many countries have accepted legal protection for designs.

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[29] https://www.wipo.int/treaties/en/ip/paris/

[30] https://www.wipo.int/treaties/en/ip/berne/

[31] http://www.unesco.org/new/en/culture/themes/creativity/creative-industries/copyright/universal-copyright-convention/

[32] https://www.wto.org/english/tratop_e/trips_e/trips_e.htm

The basis of all these practices is the developments in the field of fashion that emerged in France towards the end of the 17th century. In this period, the fashion industry transitioned to a different dimension with the combination of silk fabrics and fashion. As well as, for the first time, fashion designers started to make decisions to change the styles of their products annually and seasonally and to produce them with strategic planning methods.[33]

As early as the 15th century, the French king granted privileges to those engaged in the textile business, and again in France in 1711, it was decided to punish those who copied the patterns on the handkerchiefs.[34]

In France, the first design protection, known as Design Copyright, came into effect in 1737. However, this regulation included the issue that the use of the design right could be permanently transferred to the traders within the scope of the contract, instead of protecting the rights of the designer.[35] This law, which was put into effect, created an unfair situation for designers and caused an increase in conflict between textile designers and manufacturers. In order to prevent these conflicts, an amendment was introduced in 1787, and the right to use the design provided to the trader was subject to a certain time limit.

With this regulation, the usage period of the design right was determined as six years for clothing designs and fifteen years for furniture patterns, and it was obligatory to notify the Trade Union of the designs. Thus, for the first time, legal protection was provided for the rights of designers on their designs in France.[36]

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[33] C. Poni, "Fashion as Flexible Production: The Strategies of the Lyons Silk Merchants in the eighteenth Century", World of Possibilities: Flexibility and Mass Production in Western Industrialization, C. F. Sabel and J. Zeitlin (Ed.), Cambridge University Press, 1997, p.38

[34] Diana Flavia Barbur, Fashion Law: Concept and Beginnings in European Union and Romania. Juridical Tribune, Volume 8, Special Issue, Vol.8, 2018, p.14-15.

[35] S. R. Epstein and M. Guilds Prak, Innovation, and the European Economy, 1400– 1800, Cambridge University Press, Cambridge, 2008, p.237

[36] C. Poni, "Fashion as Flexible Production: The Strategies of the Lyons Silk Merchants in the eighteenth Century", World of Possibilities: Flexibility and Mass Production in Western Industrialization, C. F. Sabel and J. Zeitlin (Ed.), Cambridge University Press, 1997, p.69

The French legislator has envisaged different protection methods in terms of fashion designs over time. In this way, French fashion houses that make special designs had the right to simultaneously benefit from the legal protections within the scope of the Copyright Law of 1793 and the Industrial Design Law of 1806, in case their designs are copied.[37] With these regulations, the French legislator provided both design and copyright protection, as long as fashion designs met the conditions.

The regulations in the domestic laws of European countries and their transfer to the international dimension were realized with the Paris Convention for the Protection of Industrial Property signed in 1883.[38]

The content of the convention, which is organized internationally, includes legal protection methods for industrial designs. The content of the document was revised in Brussels in 1900, Washington in 1911, The Hague in 1925, London in 1934, Lisbon in 1958, Stockholm in 1967 and rearranged in 1979.[39] Within the scope of the convention convened in Stockholm in 1967, the World Intellectual Property Organization (WIPO) was established.[40] Besides the Paris Convention, another treaty that has legal importance in terms of designs is the Locarno Treaty, which categorizes industrial designs. With the agreement signed in Locarno, Switzerland in 1968, the designs to be protected within the World Intellectual Property Organization were determined.[41]

The acceptance of wide-ranging design protection by the European Union countries took place within the scope of the Community Design Regulation.[42]

There are several reasons why protecting intellectual property took such a long time. As an example, we can say that in Medieval Europe, there were only seven categories in liberal arts,

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[37] S. Scafidi, "Intellectual Property and Fashion Design", Intellectual Property and Information Wealth, Vol 1, Praeger Publishes, Westport, 2006: p.117.

[38] https://www.wipo.int/treaties/en/ip/paris/summary_paris.html

[39] Ibid

[40] https://www.wipo.int/treaties/en/convention/

[41] https://www.wipo.int/treaties/en/classification/locarno/summary_locarno.html

[42] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002R0006

which were grammar, rhetoric, geometry, logic, mathematics, astronomy, and music.[43] As a result, other categories of intellectual property would not get any protection and benefits as they were not seen as art.

1.5 Consumer Protection Law

For customers, the design of a fashion product is at least equally important as the brand name of a fashion product or its utilitarian aspects. Surprisingly innovators use indirect protection for their innovations by differentiating themselves through branding, rather than protecting the intellectual property embodied in these fashion designs.[44]

Fashion has many sources, but the most important one of them is the creativity of designers. Fashion trends stem from the designs made by fashion designers using their own unique creativity. As a result, there will be many people who are inspired by these designers and fashion trends and tend to follow them. However, some of these designers, who make designs in accordance with the fashion trends created by creative fashion designers, cause violations of the right to design. Fashion designs are the cultural and historical heritage of the society, they also have a great impact on the economy and add high value to the owner as being a part of intellectual property. Thus, these designs, which bring millions of euros every year, form the basis of the fashion industry. Therefore, for the existence and continuation of the industry, providing legal protection to fashion designs is paramount important.

The fashion industry can benefit mainly from intellectual property rights, as it is the most fit means of legal protection available in the fashion industry. Other than intellectual property rights, there are some other less effective means of protection that exist in the fashion industry. These are consumer protection law and unfair competition law.

A fashion designer or company wishing to bring legal action against an imitator can rely on several legal remedies. Intellectual property rights - especially design rights and copyright are the main

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[43] https://www.britannica.com/topic/liberal-arts

[44] Alexander Wulf, "A Comparative Approach to the Protection of Fashion Innovations", Berkeley Center for Law and Technology, 2007, p. 4

legal tools that can be used to bring legal actions against imitators or in general to prevent potential imitation from happening. The protection of the fashion industry by intellectual property rights will be explicitly analyzed in the next chapters.

The fashion industry can be protected through consumer protection law. In fact, consumer protection laws aim to safeguard consumers against defective products and deceptive, fraudulent business practices. Fashion retailers that mimic other original products mislead consumers and thus it may give rise to a violation of consumer protection laws. However, there are some significant nuances to be taken into consideration when it comes to applying consumer protection law in the fashion industry. First of all, the similarity between the deceptive and original product may not necessarily be considered as resulting in liability. There has to be proof of consumer deception. Secondly, this is not a direct safeguard for fashion designers and brand owners to consume. Consumer protection law addresses consumers who are natural persons acting for purposes that are outside their trade, business, craft, or profession. Thus, if a fashion company wants to benefit from consumer protection laws in order to protect its products, then it will be able to exercise consumer protection laws but may assist consumers to bring legal actions against producers of deceptive products. However, it must be noted that not all fashion mimicking will give rise to consumer protection laws to be applicable. This is due to the fact that fashion designs will not always try to make the consumers believe that their products are original products. As there may be just copying of designs with minor changes compared to the original design. Consumer protection will be applicable when the producer of deceptive products aims to market its products as being original.

The EU consumer protection law may be applicable in protecting consumers against deceptive and misleading products. The main piece of a legislative act adopted in the EU in the sphere of consumer protection is the Unfair Commercial Practices Directive.[45] The Directive defines

[45] DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC, and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), amended in 2019

'business-to-consumer commercial practices' as any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers. Pursuant to the Directive commercial practices shall be considered unfair and thus prohibited if they are, inter alia, misleading. Article 6 of the Directive sets forth that "a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer…. and causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise".[46] The same article lists the misleading actions which lead to unfair commercial practice against the consumers. Accordingly, misleading information about the commercial origin of the product is considered an unfair commercial practice and is prohibited under the EU consumer law (Article 6.1(b)).

Other than misleading actions the Directive also stipulates misleading omissions as unfair commercial practices. According to Article 7, "a commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise".[47] Misleading omissions shall also encompass instances where a trader hides or provides in an unclear, unintelligible, ambiguous manner any material information about the product which is required by a consumer to make a transactional decision.

It must be noted that directives are not directly applicable across the EU and must be transposed into national laws of the Member States to be applicable in those particular states. It creates some disadvantages as it may include some deviations from the Directive when transposed into national laws and also it will lead to a lack of harmonization of laws in the EU.

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[46] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1585324585932&uri=CELEX%3A02005L0029-20220528

[47] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:en:PDF

It is a fact that intellectual property rights and consumer protection laws are better placed to protect the fashion sector. However, these legal remedies are not free from shortages. The former legal remedy, while it seems like the main tool to be utilized for the protection, it, however, is too costly and time-consuming. For example, the Paris-based luxury goods conglomerate LVMH ("Moët Hennessy Louis Vuitton") employs dozens of civil and criminal enforcement lawyers across the world and spends a reported 17 million USD annually on anti-counterfeiting legal action.[48] Besides, it is known that legal actions can take tens of months and even years until it results in a final award. That is why relying on intellectual property as the main legal remedy becomes questionable.

The other available remedy - consumer protection law is also not the perfect match for fashion houses and fashion designers. The main issue with consumer protection law is that the applicant will have to prove consumer deception and misleading in order to be able to prove liability of the imitator and mere similarity between the original product and imitating product will not result in liability. Secondly, even a deliberate imitation will not result in a legal remedy for consumer deception if the source product lacks distinctiveness and/or the impugned product is clearly marked with the imitator's brand.[49]

According to the above-mentioned facts and arguments, it seems that intellectual property rights and consumer protection law alone might not provide sufficient remedies for protection. A fashion house may then rely on other legal remedies if there are any. A possible solution could be to rely on competition law.

1.6 Competition law

Intellectual property rights are one of the essential issues that make it necessary to maintain a balance of interests since they are in conflict with free competition. Infringement of intellectual

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[48] The Fashion Law, "The Counterfeit Report: The Big Business of Fakes", 2019 (https://www.thefashionlaw.com/the-counterfeit-report-the-impact-on-the-fashion-industry/)

[49] Violet Atkinson and William van Caenegem, "The fashion sector: copyright, designs or unfair competition?", Journal of Intellectual Property Law & Practice, 2019, Vol. 14, No. 3, p. 216

property rights is basically a tort. If these acts take place in commercial life, they will also create unfair competition. In this case, it will be possible to rely on unfair competition provisions as an alternative to special provisions against all kinds of tortious acts regarding the design right. The most important difference between the protection provided by design law and unfair competition law is the subject and purpose of these two institutions. Indeed, while the subject of design law is the product that emerged as a result of an intellectual effort, the subject of unfair competition law is to prevent abuse of the right of competition and to act within the framework of the rule of good faith. Again, while the purpose of design law is to protect the design and the owner of this design, the purpose of unfair competition is to create and protect an honest and undistorted competitive environment as a result of the protection of labor. Since the purpose of the protection under design law and the purpose of the protection related to unfair competition provisions and the interests protected are different from each other, it is possible to benefit from both protections without being subject to a sequence if the cumulative protection principle is adopted and the conditions are met.

Since a registered design gives exclusive powers to its owner, unauthorized use of the design by another person constitutes infringement. The right owner may request protection according to the design or unfair competition provisions. If necessary, conditions are found, unfair competition provisions can be applied directly besides design law. In practice, it is seen that in cases filed regarding design, protection is often demanded by stating that the act constitutes both an infringement of the right protected by a special provision and unfair competition. In this context, the intellectual property right, and the function of this right, on the one hand, and the principle of free competition, on the other hand, confront each other. Because the establishment of a healthy legal infrastructure is considered to be almost synonymous with competitive advantage.

In Article 96 of the Council Regulation EC) No 6/2002 on Community Designs, this matter is mentioned as “The provisions of this regulation shall be applied without prejudice to the provisions of Community law or the laws of the member states regarding unregistered designs, trademarks or other distinctive signs, patents and utility models, typefaces, civil liability and unfair competition. A design protected by a Community design also benefits from the intellectual property protection of the member states from the date the design was created or determined in any way. The scope

and conditions of the protection enjoyed, and the level of originality sought are determined by each member state."[50]

The issue of whether the protection of registered designs whose protection period has expired or whose registration has not been renewed will continue according to the provisions of unfair competition is another issue that needs to be discussed. Whether the protection of such a design under unfair competition provisions means "indefinite protection of the design" creates doubts. Because although the protection within the scope of unfair competition provisions is not limited to the duration, the protection that will continue after the design protection ends will not be design protection. Therefore, the continuation of unfair competition protection instead of expired design protection cannot be interpreted as preferring individual interests to those of society. The limited-term protection granted to the owner of the design in intellectual property law is an incentive for his investment in this field. At the end of the limited protection period, there is no sufficient justification for the design owner to leave all his rights under the cumulative protection to society.

The fact that the owner of the design has obtained the return of the effort and expenses for the design with intellectual property protection and has ensured the return of his investments in this subject does not sufficiently explain the complete termination of the protection. However, if the protection conditions required by the unfair competition law are not met for the design whose protection period has expired, it is now possible to talk about the design as public property. Despite the expiry of the protection period, providing protection by applying the provisions of unfair competition will constitute a violation of this basic principle.

Protection of designs whose protection period has expired according to unfair competition provisions does not occur automatically. It cannot be concluded by itself whether such designs will be protected by unfair competition provisions. For this reason, it should be evaluated whether the works in question are in a position worthy of unfair competition protection as soon as the design protection ends. Because, in order for unfair competition protection to come into effect instead of or after design law, its own conditions must be present.

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[50] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs

https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002R0006

Since unregistered designs are also protected from copying the design for three years from the date, they are first presented to the public within the scope of design law, within this period, in accordance with the cumulative protection principle, they can also be protected based on unfair competition provisions. Cumulative protection refers to the possibility of the design owner to rely on other industrial property law rules, copyrights, or unfair competition provisions, as well as design protection, if conditions are met.

Competition law, in general, is a body of law that regulates anti-competitive behavior by businesses in order to encourage or preserve market competition. The competition law for the purposes of protecting the fashion industry is not a legal tool available across the EU (i.e., as an EU regulation which is applicable across the whole EU, or as a directive which shall be transposed into national laws to be applicable). It is rather a mechanism of a particular country in the EU.

France provides for a special category of competition law which may be an example of a workable action against parasitic conduct that distorts competition in the fashion industry. In the French civil law system, a remedy for unfair competition (also referred to as "parasitism") is available even in the absence of proof of consumer deception.[51] Parasitism, or free riding is the practice of following in the footsteps of others and gaining clients through the efforts and initiatives of an economic operator, whether a competitor or not. In terms of behavior, the parasite is a follower who adopts the same or nearly same characteristics as individuals who have contributed to an undertaking's success in order to gain from them at no cost to itself, i.e., without any intellectual, promotional, or financial effort. Parasitism can take the form of parasitic behavior or parasitic competition, with the interested parties in a relatively close competitive situation and a common end customer base, or parasitic acts, with the parties not in a competitive situation because they have no customers or a completely different set of customers.

It must be emphasized that in order to be able for protection against unfair competition or parasitism mere imitation of a product is not sufficient. Merely taking a concept or an idea or

[51] Daniel Mainguy, Jean-Louis Respaud and Malo Depince´, Droit de la Concurrence (LexisNexis Litec 2010) 96–107 ('De´loyaute´ par parasitisme')

adopting a fashion trend does not amount to unfair competition or parasitism.[52] The crucial element is that unfair competition liability ("concurrence deloyale") does not arise solely from copying or imitation. The plaintiff must show that the defendant committed a separate and different improper conduct ("comportement fautif") - in other words, there must be more than merely claimed copying. "Concurrence deloyale" (unfair competition) generates delictual liability under Article 1382 of the French Civil Code, which imposes a general obligation to compensate for damage caused by fault. The applicant must show that there was a wrongful act, that the loss was compensable, and that there was a direct link. Concurrence deloyale extends beyond just deliberate imitation and also considers associated competitive actions. For instance, that may be the case in relation to so-called "effet de gamme" cases: the wrong is not the simple copying of one item but of a whole range. The Court of Appeal of Paris has ruled that reproducing several pieces from the same collection constituted an act of unfair competition distinct from counterfeiting due to the introduction of the risk of confusion.[53]

This view of the French legal system is taken from the legal doctrine of unjust enrichment which implies commercial benefits based on the investments of a competitor without any matching effort, risk, or expenditure. The doctrine of unjust enrichment (also referred to as unjustified enrichment) takes its roots from the Roman law. According to the Roman law, the enrichment of one person owing to the impoverishment of another is manifestly unjust, and this would seem to give rise to an obligation to make restitution which is based on principles of natural justice. Furthermore, famous Roman jurist Sextus Pomponius wrote the famous dictum - *jure naturae aequum est,*

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[52] Violet Atkinson and William van Caenegem, "The fashion sector: copyright, designs or unfair competition?", Journal of Intellectual Property Law & Practice, 2019, Vol. 14, No. 3, p. 216

[53] CA Paris, pole 5, 1st Ch, 20 February 2013, no 11/06089, JurisData no 2013-002827 - CA Paris, pole 5, 1st Ch, 1 February 2012, no 10/00762 'obviously the use, under such conditions, of the same selection of jewelry lines can encourage an averagely informed consumer to confound the collections sold by each of the two companies, creating a risk of confusion or association which is to the detriment of UBU...'; Violet Atkinson and William van Caenegem, "The fashion sector: copyright, designs or unfair competition?", Journal of Intellectual Property Law & Practice, 2019, Vol. 14, No. 3, p. 217

neminem cum alterius detrimento, et injuria fieri locupletiorem, which literally translates as by natural law it is just that no one should be enriched by another loss or injury.[54]

It should be noted that in case the product is protected by intellectual property rights, the French courts tend not to regard this type of misappropriation of investment as an act distinct from intellectual property rights infringement as the investment in the development of a particular product is already protected by intellectual property rights.[55]

It must also be noted that this doctrine of unfair competition/parasitism was first adopted in relation to the infringement cases of trademarks. It was aimed at preventing those who try to ride of the coattails of others. The origin of the doctrine of legal protection against parasitism was complemented by a judgement of the European Court of Justice. In *L'Oréal v Bellure* case the European Court of Justice decided that free-riding, or taking advantage of the reputation enjoyed by an earlier mark, is actionable per se.[56]

A similar remedy is provided in the Czech Republic under the Act 89/2012 also called as the New Czech Civil Code. [57]

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[54] E. J. A. David, "The Doctrine of Unjustified Enrichment: II. Unjustified Enrichment in French law", Cambridge University Press, 2009, p. 205

[55] Cour de cassation, civile, Chambre commerciale, 19 Jan 2010, no 9-10.980, setting aside a judgement that ruled that 'a separate penalty than the penalty for counterfeiting the designs, on facts which are not distinct from those which establish the existence of the said counterfeiting' (counterfeiting of belt designs).

[56] The ECJ, L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd., 18 June 2009

[57] http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf

CHAPTER II. INTELLECTUAL PROPERTY RIGHTS PROTECTING THE FASHION INDUSTRY

2.1 Overview of IPRs in the Fashion Industry

The evolution of the fashion industry has brought about several benefits for both manufacturers and consumers alike. However the legal framework within which this business operates has been shaped by legislation governing intellectual property rights. This legislation serves several purposes such as: protecting well-known designs from being copied; giving right owners control over reproduction, imitation and use of their protected articles; promoting innovation through the creation of original designs, ensuring compatibility between various IPR regimes.

IPRs are legal tools that can be used to protect a fashion creation. There are several IPRs which can be utilized for this reason. Accordingly, copyright, trademark and design rights may be applied for design protection. Intellectual property is the mainstream way of protecting fashion.

It must be emphasized that intellectual property infringement does not always happen against big companies as smaller companies or fast fashion houses mimic, copy and imitate their products. This is quite natural as bigger companies have financial and organizational resources to engage famous and well-known designers to work and to create unique creations, which is not the case for smaller companies. These companies choose to copy the creations of other big houses and do not intend to pay high fees for designing new, authentic creations. However, it is worth mentioning that intellectual property infringement also happens the other way around, big brands can violate the rights of minors because it is about fashion, creativity and artistic talent, a work of art and skills. Protecting intellectual property rights is often costly, and not always small business owners choose it, making them more vulnerable.

As mentioned before, the fashion industry has considerable issues such as counterfeiting, knockoffs, and unfair competition. Thus, developing an effective IP strategy and taking a proactive approach to protecting your fashion brand is crucial in this situation. Its intellectual property system, in fact, provides adequate protection against these threats. Below we analyze in detail the two main intellectual property rights that are most relevant to fashion design, copyright and

industrial design right, as well as the copyright laws of a few European countries to get a sense of the protection framework that exists across the continent.

High-quality designer brands integrate the functional side of their designs with artistry. This situation enables fashion designs that meet the requirements to benefit from both design protection and trademark or patent protection at the same time within the scope of the cumulative protection principle. Thus, every brand owner is interested in the protection of his intellectual property: brand name, logo, design, etc., and they are searching for more effective means to distinguish themselves from their competitors and have a distinctive image in the market. Thus, the fashion industry falls under the protection of intellectual property law, accordingly industrial property which is a part of intellectual property law and has a huge impact in relation to the fashion industry, including copyright law, design law and trademark.

In the field of intellectual property law, industrial property protection covers the way of expressing these ideas which are recorded in the physical environment and thus embodied, such as inventions, designs, trade names etc., not the ideas itself. Moreover, the protection does not cover the physical or material object either, but the notion behind it. Abstractness or intangibility is the main characteristic of intellectual property rights. Another characteristic of the rights on intellectual property is having a "sui generis" feature. First of all, it has the absolute right quality. For this reason, the owner of the intellectual property can claim the rights they have on them against everyone and use these rights freely within limits set by the law. Another feature is that it gives exclusive privileges to its owner. In this context, the authority to use the intellectual property right belongs only to the intellectual property owner. Within the scope of this authority, the owner of the intellectual property can give permission to use the right to the people he or she wishes and prohibit the unauthorized use of the rights by others.[58]

Intellectual property rights are territorial. According to the principle of territoriality, the intellectual property right is valid only in the country in which it is acquired. As an example of this issue, a design registered in Estonia can only benefit from legal protection within the borders of

[58] World Trade Organization – WTO, "What are intellectual property rights?" https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm

Estonia and cannot be claimed in other European countries unless a design registration is provided in that particular country or through European Union Intellectual Property Office (EUIPO) for the EU protection, or through World Intellectual Property Office (WIPO) for the international protection. For this reason, when it comes to the registration of their designs, fashion companies apply for registration separately in each country they operate.[59]

The subject of intellectual property is subject to the principle of exhaustion. Accordingly, the person who brings the idea into a tangible form and sells it, can no longer prevent it from being subject to legal transactions such as reselling or renting the product. When it comes to fashion designs, second-hand sales of design products, which has become a common practice today, can be cited as an example. Within the scope of this principle, the right owner who sells the product to which the fashion design is applied can no longer prevent that product from being sold for the second time.[60] Thus, this resulted in resale companies taking a prominent place in the fashion world. However, a problem encountered in practice is the sale of counterfeits of fashion design products. The most recent example of this is the lawsuit filed by high-end luxurious brand Chanel against The RealReal firm in New York Federal Court. As part of this lawsuit, Chanel claimed that at least seven of the bags designed by Chanel were allegedly found to be counterfeit which were on resale on the RealReal's website and its advertising and marketing tactics implied any connection with Chanel deceiving the consumers.[61] Chanel, who claimed allegations of trademark infringement, sale of counterfeit products and unfair competition within the scope of the lawsuit, said that only the experts working at Chanel could determine whether a product is authentic or not.[62] In such cases, a designer cannot prevent the resale of the design product under the exhaustion principle but can prevent infringement regarding selling counterfeit products.

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[59] Lydia Lundstedt, "Territoriality in Intellectual Property Law", Stockholm University, 2016, p. 1

[60] UK Intellectual Property Office/EY, "Exhaustion of Intellectual Property Rights", 2019, p. 4

[61] Case 1:18-cv-10626-VSB, Chanel, Inc., v. The RealReal, Inc., Chanel, Inc. v. The RealReal, Inc., 1:18-cv-10626 – CourtListener.com

[62] The Fashion Law, "Chanel is Suing the RealReal for Allegedly Selling Counterfeit Bags" https://www.thefashionlaw.com/chanel-is-suing-the-realreal-for-allegedly-selling-counterfeit-bags/

It is common practice that a fashion design has multiple features that can be protected under different legal regulations. For example, a shoe design may be protected as a design by appearance, while functional aspects may be patent protected. However, a company's logo can be protected both as a trademark, as a pattern design by transforming it into a pattern, and by copyright law if it is unique enough.

Although copyright can protect fashion design from being directly copied from others, copyright merely protects the expressions, instead of ideas and functionality of creations. In fashion design, the artistic form cannot be separated from the functionality.[63] Therefore, copyright law provides only limited protection when it comes to fashion industry, as they protect only the technical inventions, artistic appearance, or the unique elements, but does not protect the work from other aspects.

Design law is an effective, however at the same time costly way of protection. It prevents other people from making, using, and selling designs, but it can result in a lot of costs for the business owner. Design law also includes limitations related to the protection of the brand itself.

Trademarks can provide a more effective and beneficial way of protection, as it prevents the limitation of mark and protects the rights and reputation of the business owner. It serves both to protection of the trademark of the business owner and prevents the hindering of fair competition in the market. Since the trademark is a big asset of the company in the fashion industry, it is a way of protection that enables consumers to distinguish between brands. Often times the main asset of the fashion company is the brand.

[63] Christine Cox & Jennifer Jenkins, Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property, 2005, p. 6

It is common for design and mark to be intertwined in the fashion industry. As an example of this, the use of monogram, a registered trademark of Louis Vuitton, as a textile design can be shown.

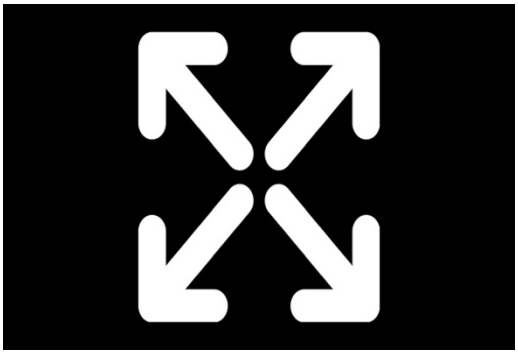
Reference: LV Monogram

Reference: Louboutin

Another example is the red bottom of Louboutin shoes which is also protected as a trademark,[64] as a result trademark protection should be interpreted in a narrow manner covering only the name of the fashion brand – Louis Vuitton or Louboutin. Today, the lifespan of many fashion designs is limited by the fashion season. However, the mark is used as a symbol that represents the fashion company and reflects its spirit. In this way, the fact that marks become a value that provides a great return to their owners in terms of the fashion industry causes companies to consider their marks rather than their designs. The most up-to-date example of a trademark becoming the identity of a fashion brand is the Off-White logo of the American designer Virgil Abloh, consisting of a square-shaped presentation of lines intertwined in the

[64] https://www.legalzoom.com/articles/trademark-protection-of-color-louboutins-red-soled-shoe-is-a-clever-logo

form of a cross. The company, which owns the trademark right of the logo in the USA,[65] and many countries, has made it a symbol of the company by using this logo in its designs.



Reference: Off-White logo

2.2 Design Rights

There are two types of design protection: registered and unregistered. The former was provided under the EU Design Directive (Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs), and in 2002 the EU adopted a regulation – EU Design Regulation (Regulation (EC) No 6/2002 of 12 December 2001 on Community designs) which expanded the protection of what was then known as the Community design right to encompass both registered and unregistered rights.

2.2.1 Registered designs in the EU

By initially implementing the EU Design Directive (98/71/EC) (the "EU Design Directive"), the European Union adopted a consistent approach to design rights protection that has been supported by the 28 EU Member States. The EU has uniformed the national design protection regimes by requiring member states to register "designs" and has defined “designs” as " the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation".[66] The design must be "unique" and exhibit "individual character" to qualify for protection. In this sense, "novelty"

65 Image Trademark of Off-White LLC - Registration Number 5541738 - Serial Number 87248672: Justia Trademarks, https://trademarks.justia.com/872/48/n-87248672.html

66 EU Design Directive (98/71/EC), article 1, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31998L0071

refers to the fact that no similar designs are currently available to the general public.[67] If "the overall impression, from the standpoint of an informed user, varies from other designs available to the public," a design has "unique character."[68]

The emergence of the concept of the informed user has occurred as a result of the European Union's effort to create a common regime regarding design law. In fact, in the Green Paper dated 1991, which is the first study conducted for this purpose, it was stated that the distinctiveness evaluation of the designs would be made by the ordinary consumer of the relevant products.[69] However, in the Commission's (Commission of the European Communities) Regulation proposal published in 1993, it is seen that the ordinary consumer has been replaced by the concept of "informed user".[70] The Commission based this change on the justification that the informed user has a certain level of knowledge and awareness about the designs, so that he will make a more accurate choice in detecting the differences between the designs compared to the ordinary consumer. Accordingly, the informed user has the knowledge and experience to find striking differences that might escape the attention of a regular consumer without expert evaluation of the designs. Since the European Parliament and Council did not object to this approach, the concept of the informed user has gained an important and unchanging place in design law.

With the design approach, it is aimed to highlight and protect the functions of the designs in the relevant markets.[71] For this reason, many concepts and institutions in design law are handled within the framework of distinctiveness. Because all the features that make a design distinctive from the others are considered worthy of protection. The request for registration of a design that is not distinctive, and the realization of the objection registration is also considered as a reason for

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[67] Ibid, article 4

[68] Ibid, article 5

[69] Green Paper on the Legal Protection of Industrial Design, Working document of the services of the Commission of the European Communities, Brussels, June 1991, III/F/5131/91, p. 69-73. http://aei.pitt.edu/1785/

[70] Proposal for a European Parliament and Council Regulation on the Community Design, Commission of the European Communities, COM (93) 342 final-COD 463, Brussels, 3 December 1993, p. 7-16. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51993PC0342&from=EN

[71] Annette Kur, Marianne Levin: "The Design Approach Revisited: Background and Meaning", The EU Design Approach: A Global Appraisal, Edward Elgar, Cheltenham 2018, p.7-8.

invalidation. Violation of a distinctive design may constitute the subject of an infringement lawsuit. Here, the person whose opinion is taken as basis in all these matters regarding distinctiveness is determined as the "informed user".

The concept of the informed user has been developed as a result of a certain purpose and need. That is, if the distinctiveness evaluation of the designs is carried out by people with the title of "expert", even very small details between the designs can be characterized as different in terms of general impression. This leads to the undesirable result that although there are too many design registrations, very few of them have the right to be protected on the grounds of infringement. If this evaluation, which is another possibility, is made by ordinary consumers, some differences between the designs regarding the general impression may be overlooked. Therefore, in spite of very few design registrations, it becomes possible to form a monopoly right for certain designs.[72] As can be seen, it is necessary to achieve the targeted balance with design protection.

In the ECJ, who could be an "informed user" was discussed in detail in PepsiCo Inc. v. Grupo Promer Mon Graphic SA case. In 2003, PepsiCo applied to the Office for Harmonization in the Internal Market (Trademarks and Designs) (OHIM) for the registration of gaming “metal plate” designs used for promotional purposes and especially of interest to children between the ages of five and ten.[73] As the registration has been granted, in 2004, Grupo Promer has applied for the declaration of the invalidity of the designs on the basis of having similar registered designs before PepsiCo’s application. During the proceedings, one of the arguments brought by Grupo Promer was about the “informed user” - they have claimed that the informed users of their designs are not the marketing managers working in a company. Still, they are children between the ages of five and ten. Thereupon, the court emphasized that the informed user, in this case, could be a child between the ages of five and ten or a marketing manager working on the marketing of such designs, and the important point here is that these people know what the concept of "metal plate" means. However, as a result of the lawsuit, PepsiCo’s request was rejected because the informed user could not distinguish the difference between the two designs. PepsiCo appealed and although they

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[72] David Stone, “EU Design Cases Looking Up”, Managing Intellectual Property, 259, 2016, p. 29.

[73] European Court of Justice, T. 20.10.2011, E. C-281/10 P. https://curia.europa.eu/juris/document/document.jsf?text=&docid=111581&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1312108

noted differences between the designs in the appeal procedure, the appeal was also dismissed for lack of evidence.[74]

The most basic feature of the informed user is to have knowledge about the design and the related corpus. Accordingly, having knowledge about the sector in which the design belongs to does not mean to be fully aware of all designs in the relevant field or their features. Here, it seems sufficient to have knowledge about the design corpus above the average, but at a level that cannot be qualified as an expert in this field. Considering the knowledge level of the informed user, it is assumed that the experience of using the product to which the design is applied also takes place at a high level of attention compared to that of an ordinary user. In this respect, the informed user has the level of attention to notice the important elements that play a key role in correctly determining the distinctiveness rather than the details of the design. As also stated in the decision of the ECJ, being a permanent user of a design is a sufficient criterion to be evaluated as an informed user.

An application for a registered community design can be submitted directly to the EUIPO office. In order to achieve design protection in their various jurisdictions, an EU design can also be registered by submitting an international application under the Hague System and mentioning the European Union or the individual EU Member States. The Hague system is an international design registration method run by the World Intellectual Property Organization ("WIPO") that allows a design's owner to submit a single international application and specify more than 66 countries that have acceded to the Hague system.

A design registration application can be made by anyone.[75] The fact that the applicant is a natural or legal person does not prejudice the application.

Countries implement laws to protect designs through registration and offer owners exclusive rights for a term of 5 years from the date of filing, which can be extended for another 5 years up to a maximum of 25 years. The design directive left the specific mechanism of protection to the legal systems of individual European states, allowing them to accumulate legal protection for design,

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[74] Ibid
[75] European Union Intellectual Property Office, Guidelines for Examination in the Office, Registered Community Designs, EUIPO, Alicante, 2018, p.7

such that France, for example, continues to offer two simultaneous protection options for designs: copyright and the necessary registered design rights. EU member states that have not secured their designs under copyright could still comply with the guideline by just providing the bare minimum of design protection.

A Registered Community Design may be voided if it does not meet the required conditions. These conditions are that the design is not a protectable design, does not have a new or unique character, the design does not belong to the alleged designer and the design right conflicts with another right that has been registered before it.

2.2.2 Unregistered designs in the EU

The fashion industry has economic importance for the European Union, as in many other countries in the world. The protection of unregistered designs is needed in terms of sectors where there is a high number of designs and new designs are constantly being developed, such as the textile fashion and jewelry sector, where seasonal production and rapid consumption are present, and designs are changing rapidly. Because the slow operation of the registration system or the neglect of the registration process can cause many original designs to be completely deprived of protection. In addition, there may be cases where some designs produced and developed with intellectual labor, effort and capital cannot be registered just because of market conditions, and registration procedures and expenses are a problem for small and medium-sized industrial organizations. Due to the rapid transition of fashion trends, registration protection could not be established on time, or the designs may lose importance without resorting to this protection, leading to loss of rights. For this reason, unregistered design protection is included within the scope of the European Union Design Regulation. Thanks to this arrangement, fashion designs presented to the public within the borders of the European Union will benefit from design protection as Unregistered Community Design, if they meet the requirements of novelty and distinctiveness.

In the 1st paragraph of Article 7 of the Regulation, making it available to the public is exemplified as “publishing, displaying, using in commerce, or disclosing in a way that experts in that sector

can be aware of". In this case, making it public means "disclosure of a design within the borders of the European Union in a way that experts in the field become aware of".[76]

Despite the fact that the EU Design Directive already provided registered design rights, EU Design Regulation added a new sui generis design right for unregistered designs in the EU. The Regulation grants 3 years of protection from the day the design was first made available to the public in the EU. This time restriction is strictly set and is not extended. The term "disclosure" is used in the rule to refer to the act of making the design available to the public, which is the most important step in securing the protection of an unregistered community design. In this case, the design of a fashion designer who displays his fashion collection on the runway or publishes one of his designs in one of the fashion magazines will be protected as Unregistered Community Design for three years from the exhibition or publication.

Unregistered community designs must meet the same standards as registered designs in order to be protected. The difference between them is that registered designs are protected from similar designs. Unregistered designs can only be protected if the infringement was done in bad faith, even if it was a genuine infringement. Unregistered designs, on the other hand, are well suited to protect "short-lived products (e.g., fashion industry products)," as the registration procedure can be lengthy and costly.

Besides, while EU provides copyright protection to fashion designs through unregistered community design right, in certain EU countries (i.e., France and Belgium), designs protected by copyrights will also benefit from registered and unregistered protection pursuant to cumulative protection principle.[77]

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[76] https://euipo.europa.eu/ohimportal/en/unregistered-community-design?TSPD_101_R0=085d22110bab20000750ae825250e469b2fbb871fd5848305c2bf911f98acada069c49fe8a1098b5088369d57714300038d929baf57b052f3876dcc91c3143ff19b5b20e5d6700bcae7bbb7f8a9e33d1fed8bb92480a07d8fab4e234d97461fd

[77] https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf

2.2.3 Comparison of Registered and Unregistered Design

While a lot has been set forth above in relation to the registered design rights and unregistered design rights, this section aims to provide an overview of the essential differences. The main difference is that the former needs to be applied for and get registered in order to merit protection, while the latter automatically confers rights across the EU. As the registration is required for benefiting from registered community design rights, there is a fee associated with it. In the case of unregistered community designs there are no fees applicable since there is not any formal requirement of registration. These are the pros of the unregistered community design compared to registered designs. However, there are drawbacks of not registering your design rights in the EU. The main drawback lies in the scope of these rights. The unregistered design protects only against the intentional copies made in bad faith while the registered design right protects against the identical and similar designs even if made in good faith by coincidence or not knowing. Further, the duration of validity for the registered design may be 25 years from the date of application, the duration of unregistered rights is limited to 3 years.

Design rights terminate when the design is declared as invalid; protection period expires; registration is not renewed, or right holder withdraws his design rights. Another important aspect of design protection is design infringement. A design infringement occurs when a design that is identical to a previous design or is identically similar to it in general appearance is created. In such a case, for example in European Union, according to Regulation (EC) No 6/2002 on protecting Community designs, registered designs are protected against both copying and the independent development of similar designs, whereas unregistered designs are protected only against copying.

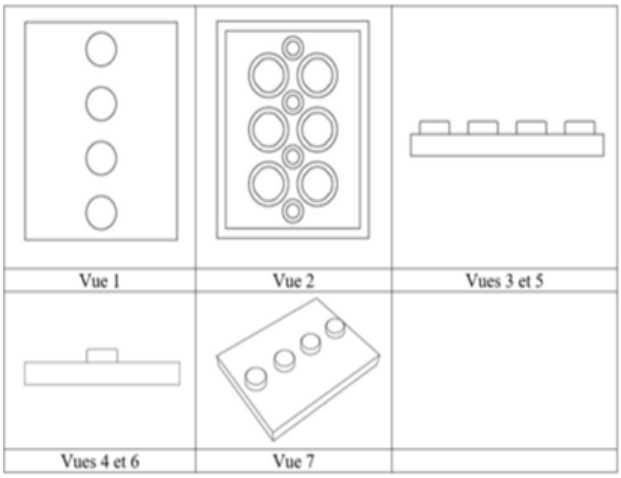
2.2.4 Lego A/S v. EUIPO and Delta Sport Handelskontor GmbH case

One of the important and most recent decisions of CJEU in community designs is Lego A/S versus EUIPO and Delta Sport Handelskontor GmbH case.

Danish toy manufacturer Lego has won the support of the General Court of the Court of Justice of the European Union, challenging EUIPO and Delta Sport in order to protect the design rights for the colourful plastic-made building bricks that millions of children around the world are playing with.

On March 24, 2021, the General Court of the European Union Court of Justice (CJEU) decided that the European Union Intellectual Property Office (EUIPO) annulled its 2019 decision on the grounds that "even if an interconnect should be excluded from design protection simply because it has the appearance of being mandated by the technical function, it is still possible to obtain protection for an interconnection for modular products when its claim is proven".[78]

In February 2, 2010, Lego A/S applied to EUIPO for registration of a Union design. The design in question is described below[79]:



The design to be registered for the Locarno Class 21.01 "Building blocks from the toy building set" was registered in 2010. On 8 December 2016, Delta Sport Handelskontor GmbH requested the invalidation of the design in accordance with Article 52 of the Regulation No. 6/2002.[80] In particular, Delta Sport claimed that the design had only the appearance features required by the technical function and should therefore be excluded from protection pursuant to Article 8 (1) of the Regulation. On October 30, 2017, the EUIPO Cancellation Unit denied Delta Sport's request and determined that the contested design was valid.

Delta Sport applied to the EUIPO the Board of Appeals for the annulment of this decision and the Board annulled the decision of the Cancellation Division and concluded that the design was invalid. For the current design, the Board of Appeal has concluded that all 6 features (the row of

[78] Lego A/S v EUIPO and Delta Sport Handelskontor GmbH decision of CJEU, T-515/19, 24.03.2021 https://curia.europa.eu/juris/document/document.jsf?docid=239258&doclang=EN
[79] Ibid
[80] Ibid

spikes on the top face of the brick; a series of smaller circles on the underside of the brick; two rows of larger circles on the underside of the brick; the rectangular shape of the brick; the thickness of the brick walls; the cylindrical shape of the spikes) in the design only function to allow the assembly and disassembly of other bricks, and that the design whose nullity is claimed essentially has only the appearance features required by the technical function.[81]

Lego appealed this decision before the CJEU General Court. Lego based its claims in the case on Articles 8(3), 8(1) and 62 of Regulation 6/2002[82]:

First of all, the Board misinterpreted the features of the product related to the design whose invalidity was claimed. Second argument is that the Appeals Board overlooked the creative aspects of the controversial design, particularly its smooth surface on either side of the four rows of uprights.[83] Third, the applicant alleges that the findings of the Board regarding the functional nature of the "two rows of larger circles on the underside of the brick" were contradictory and insufficient. Fourthly, the applicant had finally criticized the Board for placing the burden of proof on them that the design subject to the invalidation claim did not have a purely technical function, even though the invalidity claimant had not been able to prove the existence of such a function.[84]

The Court of Justice has stated that in order to determine a product only has the appearance features required by the technical function, it should be determined that the only factor determining these features is the technical function whether there are alternative designs or not.[85]

In short, for the features of a design to violate this requirement, it must be proven that technical function is the only factor determining the shape of these features. That is, considerations of visual aspects should not play a role in the designer's choice. For the present design, the Board of Appeal

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[81] Ibid

[82] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002R0006-20130701

[83] https://curia.europa.eu/juris/document/document.jsf?docid=239258&doclang=EN

[84] Ibid

[85] Decision of DOCERAM GmbH v. CeramTec GmbH, C-395/16, 8 March 2018

https://curia.europa.eu/juris/document/document.jsf?text=&docid=200064&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=784900

concluded that all features in the design only functioned to allow the assembly and disassembly of other bricks, had the appearance features mandated by the technical function, and therefore decided that the design was invalid. However, the Court emphasized that the six features evaluated by the Board were not an exhaustive list of all features of the design. In particular, the smooth surface on both sides of the studs on the top surface of the brick was not taken into account in the assessment by the Board of Appeal. Therefore, the Board should not conclude that the overall design has arisen solely out of functional necessity. In this respect, the decision was annulled by the General Court.

The Board also emphasized Article 8.2 of the Regulation that the design subject to objection, has such features forming the properties of the connecting piece, and since the product fulfills the function of assembly and disassembly, it is only the appearance features of the product necessitated by the technical function. However, article 8.3 defines an exception to this, and according to this article, "despite paragraph 2, a design that performs a function that allows multiple assembly and interchangeable connections within a modular system under the conditions specified in articles 5 and 6 (provided that they are novel and distinctive) is protected as a community design."[86]

It is important to note that, not all designs of fittings in modular products will be considered within the scope of the said exception provision. With this provision, only designs that allow multiple assembly in a modular system and designs of interchangeable fittings are protected. Other connection parts in modular products, that is, connection part designs that are not interlocking and interchangeable, should be evaluated within the scope of article 8.2 and should not benefit from design protection. To emphasize, only designs that reflect the interchangeability feature of modular products are protected.

First, it is assumed that there is overlap between the technical function and the connecting piece. It has also been pointed out by the Court that it is possible for a fitting to have a form designed with visual considerations. For such a fitting, it cannot be said that it only has the appearance required by the technical function. The General Court has shown that there is a possibility of obtaining design protection even if the appearance of the fittings in modular products is due to technical necessity. This is in line with preamble 11 of the Regulation, "The mechanical parts of

[86] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002R0006-20130701

modular products should nevertheless be protected as they are the most important innovation feature of modular products and constitute a great market value".[87]

Therefore, even if a fitting should be excluded from design protection just because it has the appearance required by the technical function, it still seems possible to obtain protection for it when the claim to be a fitting for modular products is proven.

2.3 Copyright

The copyright law tries to safeguard creativity while establishing freedom of expression in whatever form. The most significant aspect of copyright legislation is that it protects the expression of an idea, not the idea itself. Ideas, in particular, cannot be protected under copyright legislation since this would stifle creativity and innovation.

In Europe, copyright protection dates back to the 17th century in the United Kingdom, when it was necessary to preserve linens and cotton. Over time, the regulation has changed and been broadened to encompass additional fashion goods as well as fulfill European Union criteria. The Berne Convention is the foundation of copyright law as a tool against design infringement. According to the Convention "a member state must provide the same copyright protection to nationals of other member states as it does to its own citizens." The Berne Convention establishes minimum requirements for member countries' national copyright laws.

Each Member State's national legal systems give copyright protection. The member states are in charge of determining the conditions and degrees of this protection, which implies that each member state has its own copyright protection requirements (some tougher, some less so), but all are subject to the EU Copyright Directives' harmonization. Copyright protection is automatic, which means that no formality is required to protect the author. It is presumed that the person who creates a work becomes its author, and that if his or her production is original, he or she will be protected by the law.

[87] Ibid.

2.3.1 Copyright in France for Fashion Industry

Because it is home to some of the world's most prominent haute couture fashion houses, France's copyright system has always protected fashion creations since they are considered as “wearable art”. Today, the most up-to-date design protection in France is provided in the French Intellectual Property Code 92-597 (Code de la propriété intellectuelle) which was adopted in 1992.[88] This law, which has been subject to changes over time, includes special regulations in terms of fashion designs. Article L 112-1 of the French Intellectual Property Code (the "IPC") protects original mental works, including those that "reflect the author's personality," while Article L 112-2 expressly defines "creations of the seasonal garment and clothing business" as a work protected from the mind.[89] The problem for designers is to show their creations' originality, as fashion designs tend to follow current trends and hence lack originality. As previously noted, design that is considered conventional in France is protected not just by French copyright law, but also by EU design rights sui generis.

2.3.2 Copyright in Italy for Fashion Industry

Italy, like France, has a national copyright system that protects fashion designs. The Italian Copyright Law protects "intellectual works with a creative character that belong to literature, music, the performing arts, architecture, theater, or cinematography, regardless of their nature or expression," and "in particular, protection extends to... industrial design works with a creative or inherent artistic character." Fashion designers can seek an *ex parte* interim injunction from the Italian courts to confiscate any replica of their designs with creative and aesthetic merit, and then petition for a permanent injunction and damages for unregistered works under the Italian Copyright Law.[90] A designer's copyright is valid for the period of the designer's life plus 70 years after his or her death. Since the Italian Industrial Property Code ("CPI") protects designs registered with the

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[88] French Intellectual Property Code, https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf

[89] Ibid

[90] Revue Internationale du Droit d’Auteur, no. 236 (April 2013), pp. 100-295, with a full-text translation in French by Margaret PLATT-HOMMEL and in Spanish by Antonio MUÑOZ.

Italian Patent and Trademark Office ("IPTO"), as well as any applicable international design registries, fashion designs can be covered by both national and European design protection.[91]

[91] Ibid

CHAPTER III. IMITATION VS INSPIRATION

3.1 How to fight imitation?

Inspiration is exactly what it sounds like: admiring other people's work and ingenuity, and then using the qualities and ideas from that piece of work to create your own piece of art. Inspiration has always been used to make new things out of old ones throughout history, with a twist thrown in for good measure. It's also a way to acknowledge the work that inspired the current creation, so it's an approach to value the ideas that came before it. Taking inspiration is a fantastic and healthy technique to produce your own inventions. You are selecting and sampling specific elements that are appealing to you and your preferences while excluding anything that may not fit you. However, on the other hand, some people may react to strong influences by emulating and possibly copying the majority of what they observe. Therefore, there is a line between being inspired by someone's work and adapting that work or a particular feature of it to your own creation and being influenced by something and copying it for your own use.

A quick search of the internet suggests that a broad range of fashion designs are copied, and imitations offered for sale at low prices: jewellery, handbags, leather belts and wallets, perfumes, watches, sunglasses, and men and women's apparel. The imitation of design originals is a major concern of designers and, in particular, their financial backers. Indeed, imitations of designer products can be produced and marketed very shortly after (and even before) the original appears on the market. According to S. C. Sackel, fashion design creations often leak before the actual product lunch, so counterfeit production sometimes starts even before than original design.[92]

Fashion houses and fashion designers wishing to fight the imitation of their intellectual creations can either turn to legal actions in order to prevent others from imitating or copying their intellectual creations or to make those who mimic their products pay for the damages suffered by them, or a second option is, to carry out campaign which does not concern any legal actions.

[92] Shelley C. Sackel, Art is in The Eye of The Beholder: A Recommendation for Tailoring Design Piracy Legislation to Protect Fashion Design and the Public Domain, 35 AIPLA Q. J. 478 (2007), p.478

In the first case, fashion companies can bring legal actions for the violation of their intellectual property rights, including trademarks, copyright, and design rights. Otherwise, they can apply consumer protection laws in order to have defense from the sale of the copies of their original creations. It must be noted that consumer protection law cannot be enjoyed by businesses as thus fashion houses, designers cannot directly rely on this legal remedy for protecting their products. A feasible way of fighting imitation through consumer law is to assist consumers to sue imitators. Another legal remedy is the one that is available in some European Union countries such as France and the Czech Republic - unfair competition law (or fight against parasitism).

In the event legal actions are not feasible or preferable, fashion firms have other measures to apply. Fashion companies have utilized various counterstrategies to fight imitations. Among these is the practice that a fashion firm buys up copy products and destroys them, usually in a public event witnessed by the press (as this has been done in the case of Cartier watches).[93] Another strategy is that the fashion firm offers consumers who have bought a copy to have it replaced, at no cost, with an original. This has been seen in the case of designer T-shirts and caps of the brand Von Dutch. The strategy is usable for items produced in smaller numbers ("limited editions").

Imitation is a normal practice in this creative industry. Other than this, there may be natural occasions where two products end up being similar. This may be due to imitation of the product and the common trend dependency, inherent similarity between functional products, established leader/follower structures, and short innovation cycles (i.e., seasons). In other words, although there is much rivalrous creativity, numerous factors naturally generate similarity between competing products. It is in any case, inherently very difficult to draw the fine line between actionable imitation and mere inspiration.

When it comes to make distinction between inspiration and imitation, there is no consistency in court cases, and this discourages potential applicants. This basically means that when considering taking a legal action, a fashion company will not be able to predict the outcome of its legal actions as there is inconsistency in decisions concerning this matter. That is why applicants especially those with limited financial resources are discouraged from taking legal actions. Big fashion

[93] https://www.nytimes.com/2000/01/11/technology/for-luxury-watchmakers-the-web-is-the-enemy.html

brands can spend millions in the court cases in all over the world to protect their creations, designs and products but this is not the case for smaller fashion houses, and it is almost impossible for individual designers to afford. Lawsuits, generally, take long time and it takes millions as the imitator products come from all parts of the world.

3.2 Potential gaps and how to address them?

In the European Union, laws, or legal remedies available for fashion houses and companies to protect their products from imitations and copying seem to be mostly concerned with intellectual property rights. A fashion designer or company wishing to bring legal action against an imitator can rely on several legal remedies. Intellectual property rights - especially design rights and copyright are the main legal tools which can be used to bring legal actions against imitators or in general to prevent potential imitation from happening. While it may seem that the EU laws existing at the moment provide relevant and sufficient level of protection, it may however be enhanced through several amendments to the existing IPRs.

First of all, laws of some particular EU Member States provide for an express protection for the fashion industry. For example, French Intellectual Property Code, Article 112-1 provides that "The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose" and "The following, in particular, shall be considered works of the mind within the meaning of this Code: 14°.creations of the seasonal industries of dress and articles of fashion. Industries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of articles of fashion and of footwear and the manufacture of fabrics for upholstery shall be deemed to be seasonal industries".[94] This express inclusion and protection of the fashion industry does not exist at the EU level. That is why it could be beneficial for fashion houses and companies across the EU to be able

[94] French Intellectual Property Code, accessible at https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf

to rely on this level of intellectual property protection. An amendment would be needed in order to pass this provision as a binding law applicable in the whole EU.

Another example of the need for harmonization of the laws in EU level is described in CJEU decisions (e.g., C-168/09, C-5/11). For example, the condition of originality, provided that it includes the characteristics of the owner, has been regulated under different conditions in various member states and different cases have come before the CJEU. Therefore, it is of utmost importance to ensure a uniform application by applying the conditions regulated by EU legislation and directives with priority over national legislation.

However, IPRs are not the only tools to protect the fashion industry. The fashion industry can be protected through consumer protection law. In fact, consumer protection laws aim to safeguard consumers against defective products and deceptive, fraudulent business practices. Fashion retailers that mimic other original products mislead consumers, and thus it may give rise to a violation of consumer protection laws. However, the mere similarity between the deceptive and original product may not necessarily be considered as resulting in liability. There has to be proof of consumer deception. Besides, this is not a direct safeguard for fashion designers and brand owners to consume. Consumer protection law addresses consumers who are natural persons acting for purposes that are outside their trade, business, craft, or profession. Thus, if a fashion company wants to benefit from consumer protection laws in order to protect its products, then it will be able to exercise consumer protection laws but may assist consumers to bring legal actions against producers of deceptive products. That creates another burden for fashion houses to pursue a legal remedy against the imitators. If there was an intermediary to act between the fashion houses and consumers to collaborate to fight against the fashion infringement that would ease the exercising of the rights of fashion companies. Such an initiative could be established at national level or at the EU level, or at both levels.

Another issue is in relation to competition law which was enshrined in the previous sections. French legal system provides a special category of competition law that may offer a workable action against parasitic conduct that distorts competition in the fashion industry. In the French civil law system, a remedy for unfair competition (also referred to as “parasitism”) is available even in the absence of proof of consumer deception.[1] Parasitism is the practice of following in the footsteps of others and gaining clients through the efforts and initiatives of an economic operator,

whether a competitor or not. In terms of behavior, the parasite is a follower who adopts the same or nearly the same characteristics as individuals who have contributed to an undertaking's success in order to gain from them at no cost to itself, i.e., without any intellectual, promotional, or financial effort. This sort of legal remedy is provided for at national levels and is inherent to legal systems of countries such as France and the Czech Republic. However, if this remedy was to be recognized at the EU level, all the EU member states could benefit from this remedy. For this reason, we believe that there is a need to provide this concept of law in the EU legal system. It could be in the form of a regulation (either new regulation or an amendment to existing regulations) which would have direct effect of all EU member states or otherwise could be in the form of a directive which would lead to better harmonization of laws across the EU.

CONCLUSION

Fashion designs are not only objects of necessity that we use on a daily basis but also products of ideas that have aesthetic value. These designs, which extend the need for clothing that emerged with the first human, have had importance throughout the ages. From hundreds of years ago to the Egyptian Empire, from the Middle Ages to the French Revolution and the Industrial Revolution, fashion designs have always been at the center of attention.

The very first regulations regarding fashion designs were about dividing the society into the segments rather than regulating rights or protecting against the infringements. One of the examples can be law published in the late 1500s in England initiated by Queen Elizabeth I. Within the scope of the regulation, it was stated that the purple color could only be worn by members of the royal family, and the red color could be worn by dukes and knights.[95]

Today, a fashion designer is a person who is responsible for the design of clothing, bags, shoes, and accessories to become fashionable.[96] This person, who uses his creative intelligence in his designs, almost directs the clothing habits of the society with the designs he creates. For this reason, besides the protection of the rights of fashion designers arising from their designs, it is foreseen to impose certain limits on these rights. The issues constituting the limits of the design right have common features. According to the article 6 of the Paris Convention, designs contrary to public order and general morality, containing public interest, in terms of religious, historical, and cultural values, and signs, coats of arms cannot benefit from legal protection for which the relevant authorities may not allow registration.[97]

The fashion industry is making an impact around the world. Although many other industries had to stop operating and lost a lot in terms of profit etc., the clothing industry continued growing in a different dimension today, when the COVID-19 epidemic, which threatens the health of the whole world, is in the center of the attention.[98] Many factories producing in line with fashion trends have

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[95] https://www.bl.uk/learning/timeline/item126628.html

[96] Yuniya Kawamura, Fashion-ology, An Introduction to Fashion Studies, Bloomsbury Publishing, 2016, p.98.

[97] https://wipolex.wipo.int/en/text/288514

[98] https://www.who.int/health-topics/coronavirus#tab=tab_1

directed their production to medical clothing and mask designs due to the epidemic.[99] Masks produced purely for medical reasons and used only for scientific requirements or hygiene purposes can be considered as useful designs. Since these designs are now part of daily life, if they are innovative and distinctive enough, they can benefit from design protection and even be considered as fashion design. Some fashion houses and brands have already added them to their new collections.[100] For this reason, it will be possible for medical clothing and mask designs to benefit from the legal protection of fashion designs in the near future.

Intellectual property law, together with industrial aspects, provides a solid structure to the dynamics of the industry and meets its legal needs to increase the fashion industry's economic volume, to ensure that fashion brands can protect their values and be one step ahead of their competitors. The methods of protecting fashion designs serve essentially for the same purpose, despite the conceptual differences in the legal systems. The underlying idea of legislation is the protection of designers and entrepreneurs who invest large sums in their production. Today, the fashion industry provides employment opportunities for millions of people. The basis of this industry is the desire of people to catch up with current fashion trends. The legal protection of the designs that a fashion designer put forward after long processes is important in encouraging the designer's creativity. In addition, entrepreneurs who invest in this field due to their belief in the economic power of fashion designs will continue to bring vitality to production and the economy, thanks to the assurance that their rights arising from their designs will be protected.

In order to answer to the second research question, several violations of the rights of fashion creators were examined throughout the paper. As a result of the assessment, knockoff concept has been evaluated as a concept that is cloth to both inspiration and imitation. However, we can conclude that although counterfeiting can be clearly accepted as an infringing act from the trademark law and design law perspective, knockoffs which is a controversial matter of fashion law cannot be evaluated as an “inspiration” or “imitation” without a concrete case is considered.

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[99] https://www.lvmh.com/news-documents/news/lvmh-maisons-repurpose-facilities-to-make-face-masks-and-gowns-for-hospital-staff-helping-battle-covid-19-in-france/

[100] https://www.vanityfair.com/style/2020/09/louis-vuitton-luxury-covid-face-shield

To fight against counterfeiting and copying, fashion designers may refer to IPRs or other legal remedies to protect their rights. The fashion industry mainly benefits from intellectual property rights, as it is the fittest means of legal protection available in the fashion industry. As we can conclude, copyright law provides only limited protection for the fashion industry, as they protect only the artistic appearance, or unique elements but does not protect the work from other aspects. Design law is an effective, however costly, way of protection in registered community design perspective. It prevents other people from making, using, and selling designs, but it can result in a lot of costs for the business owner. However, also includes limitations related to the protection of the brand. In contrast, it gives protection to the owner for a long period of time. Unregistered community design protection may be the better choice in terms of costs.

Other than intellectual property rights, there exist some other less effective means of protection in the fashion industry. These are consumer protection laws and unfair competition laws as expressly provided for in the above chapters for the assessment of the third research question.

To conclude, additionally, effective protection of industrial designs will be possible if the following are taken into account: intellectual and industrial rights law being taught in universities, especially in non-law fields (such as art, music, etc.) the subject should be added to the programs, and in this field promotion of scientific research; raising public awareness on this issue. An effective organizational structure for the relevant sectors to fight counterfeiting and piracy might also be another solution, for example, one way can be for customs authorities working closely with relevant authorities and detect replicas and not allow to enter the country. It might be difficult when it comes to the personal level. However it is an effective way regulation the business activities in this field. Furthermore, besides producing such products, people who use and encourage the businesses to produce can also be punished/fined as in a way they engage in supporting the production.

Several suggestions were provided in this paper about the EU laws to enhance the level of protection for the fashion industry. These suggestions are based on the experience of other countries or are logical outcomes of the author.

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