33-AB44-4278

FASHION FAUX PAS: THE LAW AND ECONOMICS BEHIND THE COPYRIGHT-FREE INDUSTRY

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ABSTRACT

Apart from being one of the largest and most innovative industries, fashion also acts as a connective tissue between individuals and society. It provides a coherent platform for manifesting identities through its self-expressive nature. With billions of dollars at stake, it is imperative to ruminate over the legal, economic and political integrands of such a tremendously contributive industry. This paper firstly analyses the culture and cyclic nature of fashion as a social locus along with the industry structure. Secondly, it explores the Intellectual Property Protection currently governing key fashion markets, and examines how they instigate commerce and consumer behaviour in these regions. Thirdly, it revisits the highly debated position of IPR in fashion, and conclusively indicates a legal framework that harmonises the fragmented laws to collectively benefit the global fashion scene.

Keywords: Fashion, Intellectual Property Protection, Innovation, Clothing Culture

INTRODUCTION

Fashion is an industry that is most visible yet most overlooked. It acts as an illustrator of an individual's self-identity, while visibly marking a social collectiveness. In the constantly changing scene of fashion and style, the only thing that is permanent is the obvious need for fresh designs and trends. One might think that fashion trends are affected by cultural, traditional or other circumstantial factors such as weather. For example, one would need more breathable outfits for summer like skirts or shorts, and warmer clothes such as cardigans and coats for winter. However, we see people in cold countries pairing their denim shorts with stockings and tights and residents of warm nations wearing their cosy baggy sweaters as a single outfit. The application of fashion may have begun due to circumstantial factors, but it no longer is confined to them. Individuals put their own spin on predetermined styles to participate in specific trends (Hemphill and Suk, 2009, p.1155).

This industry is full of puzzling patterns that set it apart from its counterparts. One function of fashion's paradoxical behaviour is its intellectual property (IP) law. While the film, literature and music industries have heavy IP protection under the current legal regime, their combined sales are lower than those of fashion, which has minimal and almost non-effectual protection (Lessons from Fashion's Free Culture, 2010). This puzzling fact is the primary motivator behind this paper. The laws backing the clothing and apparel industry dictate its economics, which are directly governed by its culture and politics. The first part of the paper will provide an insight into the culture of clothing and its sociological aspect as it dictates consumer behaviour through the fashion pyramid. It will clear misunderstandings about the industry's structure, then move onto the legal frameworks of the key fashion markets in the USA, Europe and China, as well as examining the nascent market in India for our second part. It will discuss the effects of existing laws on the commerce of global fashion and suggest a solution by harmonising the fragmented laws in a way that could collectively benefit the global fashion industry.

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THE FUNCTION OF FASHION

Birth of Fashion and Its Semiotics

Most of what we know about modern fashion comes from the European Renaissance (Rublack, 2011). Up until this point in time, clothing was just a functional necessity and did not really change. The kind of garments people wore in the Classical era or in Ancient Greece and Rome remained more or less consistent until the Renaissance, when modern fashion came into play (*The Birth of Fashion, 2015*). This period saw an immense diffusion of objects and artefacts, including textiles and apparels. These objects were traded across seas by a huge number of merchants and at such a rapid pace that innovation and differentiation became key for survival and success. Tailoring saw an influx of complex cuts, fabrics and patterns and accessories such as handbags and hats. With the renewal of culture came a consistent change in clothing that we today term as fashion. People during the Renaissance become much more conscious about their appearance for two major reasons: the popularisation of mirrors and an increase in artist's renditions of their subjects. As art rebirthed, art became a form of media and artists' depictions and portrayals became precedents that common men tried to follow. An example of this phenomenon is the Klaidungsbüchlein (Book of Clothes), which started as nothing but a collection of 135 watercolour paintings of Matthäus Schwarz as he donned various garments from his twenties to his old age. He specified his waist measurements in all his portraits to appear fashionably slim as he associated weight gain with ageing and a lower appeal (Rublack, 2011). This brings us to the semiotics of fashion and how it communicates individuality to a society. Fashion and clothing not only dictate social ranks; they also communicate ethnicity, religion, political affiliation, marital status and even suggest gender roles. In modern times, clothing also suggests music tastes, for example through grunge attire, and often carries religious connotations through veils and hijabs.

Power Dressing and the Politics of Fashion

As fashion caused constant change in the "look of the day", the elite tried to maintain their higher social rank through finer clothing. The sumptuary laws of medieval times monitored social hierarchy through clothes. They regulated the expense that a certain class could incur on clothing and extended it to the type of materials used or patterns made. This created a structure of class-wise clothing due to the restrictive options that the law provided. This is what came to be known as Power Dressing. Velvets, laces and expensive furs like marten skins were reserved for the upper classes, ,while the lower classes could only use the remaining scraps and cheaper materials (Rublack, 2011).

Considering how art was a form of media during the Renaissance, with artists depicting the aristocracy in paintings and portraits, the poorer classes tried to emulate their style in their own way while striving for social acknowledgment. As these social climbers borrowed elements from the fashionably forward, the latter immediately looked for a newer trend to set themselves apart all over again. This is essentially the crux of fashion politics: a constant cycle of innovation and diffusion (Hemphill and Suk, 2009, p. 1164-1166). Fashion is a very different concept from clothing. Clothing is to a large degree motivated by the need to cover one's body to stay warm or for other bodily needs, whereas fashion is more 'positional' as a symbol of self-expression and status. As a designer or a stylist put up a look together, there will be early movers who want to stay ahead in the fashion game and quickly adopt the new style. Likewise, there will be many who want to follow their style but cannot afford the lavish designer version, so the lower end brands recreate those looks for mass consumption. As these styles trickle down the hierarchy and become mainstream, the elites again look for the next new thing to differentiate themselves and create a demand for a new innovation. This is where the conventional idea of IP protection backfires. IP protection is meant to provide an incentive to innovate; and yet, if fashion had such protection, styles would never trickle down the market,

create trends and stimulate the need to innovate. This is what is known as the Piracy Paradox. This phenomenon has been beautifully explained by Raustiala and Sprigman (2006, p. 33-34). People are looking to be distinctive while following a certain trend, so they flock towards a fad while adding an individualistic spin to it in an attempt to stand out. This pull between being a part of a collective craze and yet leaping out of a crowd is what fashion thrives on.

Consumer Behaviour

When a consumer is looking to partake in a trend, they are not necessarily doing it with an imitative motive. It is mostly due to their desire to be "in fashion". Who decides what is "in fashion"? It is dictated by the people in power in terms of wealth and aesthetic influence. Designers show their collections at the catwalk not with the intention to sell them but to make a statement. Most of the outfits we see in fashion shows are not functionally wearable; they are more art than clothing. It is a PR move to attain prestige and a certain status. Once these pieces are showcased, they form what is inherently "fashion". What happens next is that lower end designers and brands take the popular elements from these works of art and make them more functional. Over time, as these concepts make their way to the bottom of the clothing hierarchy, the bizarre elements disappear, while retaining a significant similarity between the clothes on sale and the costumes on the catlwalk. This is what fast fashion is all about. The success of brands like HandM, Zara, Topshop and others is based on their ability to take these trends and convert them into a more everyday outfit at a lower cost. Forever 21, another fast fashion retailer, has been the focal point of numerous lawsuits for violating the IP protection of high-end designers and fashion houses. What these designers and houses do not realise is that consumers further down the supply chain would not even recognise their designs if it were not for these fast fashion giants. They help in diffusing the styles created by the designers to the lowest end of the pyramid by recreating them, and therefore play a major role in setting trends. This in turn drives sales for the fashion show designers too, considering how the elite would not buy from a lower end brand and want to differentiate themselves from the masses. The elite will demand a new style quotient because the previous one is no longer exclusive. Fast fashion actually helps the high-end brands. The trends actually reduce the search cost of style. The lack of IP protection in the industry is what allows this quick diffusion of trends and gives an incentive to innovate. If the laws were more stringent, trends wouldn't develop and they would not die out, which – contrary to popular belief – would halt innovation and not promote it.

IP LEGISLATION GOVERNING KEY FASHION MARKETS

The European Union

Europe has always been the creative capital of the world. As the birthplace of fashion and a cradle of ideas, the EU decided some time ago that fashion was no less important than any other art form and needed protection. They implemented a blanket law across the EU for design protection. Since 2002, the EU has provided a dual protection system: registering for up to 25 years in 5 year blocks at a cost of 350 Euros per block, and an unregistered, 3-year protective term (Woods and Monroe, 2015). The law protects designs that are "novel" and have an "individual character", which is defined by whether the overall impression of the piece is different from other available pieces to an informed user. The key term here is "informed user". A dress in a particular fabric with a scooped neckline, and another in the same fabric with a V-neck, may be similar to an uninformed user, but to a fashion enthusiast or aesthete they are entirely different garments and hence applicable for protection. What this does is lower the threshold required to be distinctive enough to obtain design protection. This renders the entire point of copyright futile, because with the minutest changes in the design one can patent something as their own (*Lessons from Fashion's Free Culture*, 2010). The unregistered design protection is also granted to designers. As soon as a design is showcased, the design automatically has a 3-year protection at zero cost. Why would one spend large sums on lawyers

and registration when one is clearly able to acquire immunity against dead copies? Yes, unregistered community designs only protect one against "line-by-line copies" and not slightly similar or influenced copies. Majority of fashion designers believe that a fashion season lasts only a couple months. In an industry as ephemeral as fashion, you cannot protect something that is going to die anyway. Registered protection takes up a lot of time, which fashion does not have to begin with. This involves spending money that would be better spent on designs for the next season.

Europe's IP law has two sides: copyright protection and *sui generis* design rights protection (Monseau, 2011, p. 61-63). Designers have a choice to obtain either or both under the cumulative protection. However, the lines between the two concepts are not very clear, and often the courts of the member states fail to recognise the difference between copyright's "originality" requirement and design's "novelty" and "individual character" requirement. A prime example of this is *SAS Chausses v. SARL Menfort (Fr.)*, 3 June 2011.

The United States of America

To date, the United States has no particular copyright protection for fashion. This is due to its perception of fashion as "utilitarian" and "functional" rather than as a work of art (Shirwaikar, 2009, p. 115). This does not mean there is no protection whatsoever; the USA has one of the strongest IP systems in the world. It just means that the threshold for obtaining a copyright is too high. One would have to prove that nothing like their design has ever existed in human history to get legal protection.

However, designers have found ways around this. It is difficult to get protection for the functional aspects of a garment, like sleeve or a collar, but the pictorial or sculptural aspects of it that affect functionality can be protected. For example, Burberry plaid has been granted copyright. This concept is called conceptual separability: a design that demonstrates an idea separate from the clothing's function, or an addition that is not meant to enhance the functionality of the clothing (Woods and Monroe, 2015).

Congress proposed the Design Piracy Prohibition Act (DPPA) in 2009 and the Innovative Design Protection and Piracy Prevention Act (IDPPPA) in 2010 to amend the Copyright Act and create a *sui generis* protection law for fashion designs. It is important to dwell on how these bills will help the industry. The IDPPPA proposes amendments to the earlier DPPA that may prove helpful for the American apparel industry (Ellis, 2010, p. 195-198). The very beginning of fashion in America started with imitations and knock-offs of Parisian couture. When an industry's roots are in the culture of copying international fashion, it seems hypocritical to demand copyright protection to secure the interests of domestic designers. In 1932, the Fashion Originators Guild was established in the US to combat design piracy among American designers, but copying from French designers was permitted. The guild became defunct after the Supreme Court decided that the guild was violating the Sherman and Clayton Acts. Diane Von Furstenberg and other elite designers running the Council of Fashion Designers of America (CFDA) are asking for a more widespread copyright protection along the lines of France and the EU (Shirwaikar, 2009, p. 115). However, there is enough evidence that this is not what the entire American fashion industry wants. The California Fashion Association has made it clear that they do not want legal protection for fashion, and the American Association of Footwear and Apparel (AAFA) took a vote on the subject but could not reach a unanimous decision (Raustiala and Sprigman, 2009, p. 1123). A low-IP regime has a few downsides for the industry, but not without considerable benefit.

China

China is the prime manufacturing hub of the highly globalised fashion industry, while also being a cradle for counterfeit clothing. It thus becomes a key market whose legal framework in terms of IPR needs to be studied. We know how the EU and the US have strong and efficient

trademark laws in place. China, however, has a very different approach to trademarks (Lin, 2013). China has a first-to-file rule, meaning that the first person to apply for the trademark gets it. If a Chinese brand or company files for a trademark belonging to some international brand, therefore, it will be impossible for the latter to retrieve their trademark in China. A common problem this creates is trademark squatting. Individuals in China target known foreign brands and register them as trademarks in China, so that when international companies want to sell their product in China, they either have to pay huge sums of money to buy it back or indulge in long legal battles. Michael Jordan has been a victim of trademark squatting; a Chinese company called Qiaodan Sports Co. used a similar name, as the literal translation of Qiaodan is Jordan, pronounced in a similar way. It also used an identical logo to Michael Jordan's Nike-produced brand, Air Jordan, depicting a jumping basketball player. Jordan's claims were dismissing by the Chinese courts, which argued that "Jordan" is a popular western surname, "Jordan" is not the only interpretation of Qiaodan, and the logo did not possess any distinctive features that could be linked to Michael Jordan. These laws have been beautifully detailed by Bayntun-Lees (2015). Design patent laws in China differ from the ones in Europe, as China only provides registered protection that takes around a whole year to acquire and lasts for a maximum of 10 years. A design that enjoys unregistered protection in Europe also cannot receive a design patent in China if the design has already been made public. Copyright is fairly easy to obtain, considering how China is a part of the Berne Convention. Hence, the creator will automatically enjoy copyright protection in 164 member countries. The design registration will only add a proof of ownership and help in case of conflicts that may arise due to China's formal approach towards IP. The cost of paying for a trademark seems small when compared to the losses one may have to incur without one.

India

India has a very rich art and textile heritage due to its diverse cultural influences, and has a lot to offer the global fashion industry. However, in terms of copyright protection, India is still at a nascent stage. Shishir Tiwari (n.d.) has done impressive research over IPR protection of fashion design in India. Protection was initially confined to production houses like Satya Paul and Kimaya, but now individual designers like Ritu Kumar, JJ Valaya and Manish Malhotra are recognising the importance of copyrighting their works. Most of them realised the value of IP after being targets of counterfeiting at the hands of their distributors or collaborators. Ritu Kumar sued Pramod Kanodia for commercially distributing her fabric designs like "Kulah", "Ambi Bandhini" and "Sangmarmar". The Fashion Foundation of India (FFI) is a body formed of leading fashion houses that work along the same lines as the Fashion Originator's Guild of USA (Shirwaikar, 2009, p. 119). The Indian fashion industry is deeply rooted in the country's heritage. Most designers take inspiration from traditional motifs and crafts and create contemporary outfits to keep the "Indianness" of the clothing prominent. When a significant number of creators are influenced by ancient techniques and craftsmanship like dyeing, block printing and other indigenous methods like *chikan kari* or *phulkari*, one can notice significant similarities even if one does not do it with the motive of copying. Even though artwork and handicraft do not come under the purview of IPR, India has a decent IPR regime. It provides protection under the Designs Act 2000 and the Copyright Act, 1957 along similar lines as in the EU, but only for the non-functional aspects of clothing, as in the US. Another interesting protection it offers is under the Geographical Indications of Goods Act 1999, which protects indigenous art forms like the Kasuti Embroidery of Karnataka or the Kutch embroidery of Gujarat due to their regional significance (Shirwaikar, 2009, p. 120). This protection not only includes the apparel aspect, but also the artistic value of the product. Indian designers are only now realising the value that these protections can bring. Indian fashion houses are often more poorly valued than they deserve, because they usually never acknowledge the potential of protected products in terms of their extensions, licensing, or endorsements.

WHAT NEEDS TO BE FIXED?

We have gone over the culture of fashion, how it is legally protected in various markets and how it drives the economics of the regional industry. We can now move on to the most important part of the paper, where we interrelate the various aspects discussed and examine what exactly is going wrong and what needs to be fixed in terms of the legal regime.

Counterfeiting vs Copying

Most "stronger IP for fashion" crusaders claim that the reason behind their demand is the huge losses the industry incurs due to counterfeiting. Counterfeiting is defined by the Legal Dictionary as a copy or imitation of something that is intended to be taken as authentic and genuine to deceive another. We have already seen how each country has an efficient law regarding trademark protection in fashion. Trademark protection is fairly easy to obtain and lasts as long as used commercially and defended against infringement. The counterfeit losses that we are talking about can thus be fought against with or without stronger copyright and design protection.

Knock-offs or copies are the next concern for pro-IP propagators. Knock-offs, as per the legal dictionary, are an unauthorised copy or imitation. They are a cheaper version of an expensive or known product. This is something that is not protected efficiently in any of the markets. While the US demands IP legislation similar to that of the EU or Japan, what they fail to realise is that, even if the European laws protect a wider range of fashion designs, they are not really effectual. This is because the unregistered design protection offered by the EU decreases the stringency threshold for novelty and only protects the design against dead copies. One can thus make the most miniscule of changes to an already registered design and get another registration. This minimal novelty requirement renders the entire point of obtaining a copyright or design patent useless, and makes it similar to the law in the US, considering the very high novelty threshold (*Lessons from Fashion's Free Culture*, 2010). Even the registered community design of the EU is not that effective, considering only about 8% of the total registrations are for clothing. If designers truly thought that the registration of deigns is helping them, there would be a higher number of applicants and registered designs. The reason behind this low registry is timing.

Time Constraints and Fast Expansion

The fashion industry is fast moving by nature. Before a trend can take root, it is washed away by a new one. In an industry as transitory as fashion, the very idea of copyright seems futile. Fashion is born with an expiry date. According to the IP WatchDog, on average, design registration can take up to 25 months. Registration of designs under the current legal umbrella in China not only takes up an entire year, but the design also needs to be undisclosed (*Understanding and Using China's Design Patent*, n.d.). A designer creates an original design to create a new trend, applies for registration, and does not get one till two fashion cycles have gone by. By the time the registration is approved, it is too late, and the designer is left with a copyright for the coming ten years only to realise that the trend has already passed. Protection of designs in Europe and Australia last up to 25 and 10 years respectively, with renewal possible every 5 years (Monseau, 2011, p. 57). Such long protection regimes make it difficult for fashion to evolve, because no other designer can now try to recreate or take up elements of the design and re-launch it; nor has this protection helped the designer in any way. The fast fashion chains, through their immediate influx of the latest trends, further the cycle of fashion. They inject new ideas into the market at a blinding pace, causing consumers to demand newer designs at a faster rate. This proves just how momentary the designs are and how there needs to be a fast-track process for obtaining design rights, for a term that takes the trend cycle into consideration. Furthermore, China's first-to-file policy and trademark squatting represents a major hindrance to companies wishing to expand into the Asian market.

Who is IP Actually Helping?

Even if we do end up getting stronger, more stringent IP protection, who is it truly helping? Pro-IP propagators claim that the low level of protection is hampering new and upcoming designers. Yes, forthcoming designers need to scramble for a market place in the industry, but that is a trait observed across all industries and has nothing to do with fashion's loose IP. On the contrary, stronger laws will put them at a disadvantage, considering how the newcomers are poorly-funded. They do not have the money and power that large fashion houses do and can often be exploited by large corporations. This does not mean the lesser-known designers are always victims. They can be plaintiffs as well as defendants, but stronger IP laws will not benefit either party; it will benefit the lawyers alone. When talking about a stricter legal regime for fashion, it is always the designers whose interests are taken into consideration. Consumers, distributors, and retailers drive the industry as much as the designers do, and their interests should be factored in. The CFDA is largely made up of designers, and their opinion cannot be interpreted as the opinion of an entire industry (Raustiala and Sprigman, 2009, p. 1123). The elite designers and fashion houses are looking at monopolising the industry. They have now begun to cater to different income-groups through their diffusion line. For example, Giorgio Armani's signature line is now accompanied by Armani Collezioni, Emporio Armani and Armani Exchange. The fashion industry, unlike its counterparts is very decentralised. We need to acknowledge the fact that the terms "new" and "original" don't adhere to their conventional meanings when it comes to fashion. As David Wolfe suggested, "It is impossible to create a new textile, a new print, but a new design is almost impossible because all we are doing in creating a new one is putting together existing elements in a different way." There exists a highly symbiotic relationship among the contributors to the fashion industry. Designers are inspired by vintage designs, recreate the works of older designers, interpret or reference a contemporary's work, or collaborate with design chains. Balmain x HandM is a classic example of a collaboration. A luxury French fashion house teamed up with an alleged knock-off chain and created an accessibly-priced collection to reach a wider audience. The benefit for a fast fashion giant and a luxury label through such an alliance is mutual. The belief that fast fashion chains are eating away at the sales of high-end brands is baseless, considering a consumer who could afford Versace would not be shopping at Zara for a knockoff. We need to emphasise that both are targeting a different clientele, and that collaborations are a neat way of entering each other's markets. Repurposing and refurbishing are at the core of the industry.

CONCLUSION

The primary idea behind IP law was to enhance creativity and innovation, not reduce copying. That requires stronger jurisprudence. The industry has thrived without IP for years and will continue to do just as well, and maybe even better, without it, as demonstrated by Raustiala and Sprigman (2007). Scholars like Hemphill and Suk (2009) have argued in favour of copyright laws but have failed to realise the very alternative approach that is required to make such laws a reality. Fast-track procedures, shorter time periods, cheaper fees and, most of all, harmonisation across international borders needs to be achieved. To fill in the negative space of IPL that surrounds fashion, lawyers and policy makers need to start with a blank slate, erasing all previously applied knowledge of IPR in other creative industries and formulating laws specific to fashion, if they truly wish to advance the industry. The crucial question that this paper raises in terms of IPR is: can one size really fit all?

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