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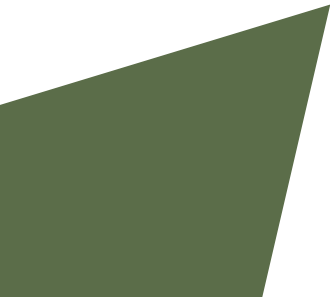
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Role of Intellectual Property in Fashion Industry

Rohan Gandhi

ABSTRACT

Ever imagined a social life without clothing, footwear and accessories or without brands which manufacture these products. Will you be able to distinguish between two goods and set out a status symbol? Fashion has always been part of our life since its inception and has exhibited a great role in depicting a symbolic social status. It acts as a source of massive employment and growth of various independent sectors which includes, branding, merchandising, marketing etc. As this industry focuses on creativity and intellect of a person, it has become a ground for proliferation of profit and duplication in industry. The tremendous growth of fashion industry has made designers and fashion houses realize the importance of intellectual property. An industry which prides itself for its innovation and growth. The author explores how it has been affected by unwarranted piracy and is managing to cope up with it. The article explores a two-dimensional approach which talks about the growth of fashion industry and importance of intellectual property in it. The author tries to simplify various aspects of different intellectual property and how it plays a major role in building brand equity and monetizing the same. With the help of actual examples, the author has tried to explain various fiascoes faced by fashion industry and how intellectual property has played a major role in protection of their original designs and products from infringement.

INTRODUCTION TO FASHION AND LAW

“Fashion is not something that exists in dresses only. Fashion is in the sky, in the street, fashion has to do with ideas, the way we live, what is happening”- Coco Chanel

“I am a fashion person, and fashion is not only about clothes – it’s about all kind of changes” - Karl Lagerfeld

The term “Fashion” is a diverse word. The definition of this term differs geographically, culturally as well individually. The fashion industry, also called as Apparel industry is not limited to garments and apparel. An organization can manufacture, build and monetize a distinctive brand by way of different valuable assets that range from distinctive branding elements to print and patterns, and proprietary design staples¹.

Fashion design is a form of art dedicated to the creation of clothing and other lifestyle accessories. One must possess a keen eye and artistic thinking to create such kind of garments and accessories. Some of the famous examples include The Hermès Kelly Bag, Manish Malhotra’s designed bridal wear collection, The Chanel No 5 perfume, or The Patek Philippe Nautilus are products of applied intellectual creativity and skill in Fashion Industry. The sheer importance of Intellectual Property for an industry which generates billions of dollars in a year and prides itself for its innovation and passion, is relatively low. It is a commonly misinterpreted body of law as the malpractice of “Counterfeit” or “Knock Off” have taken the front seat.

WHAT ENVISAGES THE FASHION INDUSTRY IN INDIA?

One of the largest and oldest Sector in the market and this industry is **India’s textiles sector**. Statistically, the exports from this sector stood at US\$ 38.70 billion in FY19 and are expected to increase to US\$ 82.00 billion by 2021². The abundance of raw materials coupled with the skilled workforce have made the fashion industry in India witness a paradigm shift and unprecedented growth.

With consumerism and disposable income on the rise, the **retail sector** has experienced a rapid growth in the past decade with the entry of several international players like Zara, Guess, Nautica, Gant and others into the Indian market. The Indian film industry and "Bollywood" in particular has been the evergreen mascot for promoting Indian fashion wear and designers both on and off screen³. Millions of Bollywood fans in India act as a target audience for the latest trendsetting attire worn by their favorite stars in theatres and on television and several different occasions. Popular

¹ <https://www.thefashionlaw.com/intellectual-property-rights-a-primer/>

² <https://www.ibef.org/industry/textiles.aspx>

³ <http://www.nishithdesai.com/information/areas-of-service/industry/fashion.html>

examples being Lehengas designed by famous designers like Sabyasachi for Deepika's wedding to any outfit or accessories worn by Salman and Shahrukh in their movies.

THE FASHION INDUSTRY IN INDIA IS DIVERSIFIED IN TO THE FOLLOWING SECTORS—

- Premier Fashion houses such as Hermes, Louis Vuitton, Chanel, Rolex etc.
- Luxury segment houses such as Gucci, Burberry, Prada, Dolce & Gabbana etc.
- Affordable luxury houses such as Michael Kors, Calvin Klein, Steve Madden, Armani exchange etc.
- Main Stream Brands such as Zara, H&M, Mango, Levi's, FCUK etc.
- Indian designers which hold international reputation such as Sabyasachi Mukherjee, Manish Malhotra, Tarun Tahiliani, Masaba Gupta, Ritu Kumar Rohit Bal, Abu Jani and Sandeep Khosla, Wendell Rodricks, Neeta Lulla, Kanika Goyal, Manish Arora etc.
- Local designers and small companies like Khadi naturals, Bon organics, fabindia, titan and others.
- Home grown brands coming from heritage cities that portray their culture like shawls from Kashmir.

Adding to this the e-commerce platform has changed the way of doing business in India. With the rise of increasing consumer wealth and 4G networks, the Indian e-commerce market is expected to grow to US\$ 200 billion by 2026 from US\$ 38.5 billion in 2017. Online retail sales in India are expected to grow by 31 per cent, led by Flipkart, Myntra, Amazon India and Paytm Mall⁴. These e-commerce platforms have made it convenient for their customers to buy fashion products with a click on their fingertips through their mobile application. With trends changing by the minute in today's world, Fashion sense and status is showcased by buying products from different brands classified above. However, purchasing power becomes a constraint for a lot of people and that is where contrabands and copies come into play.

A famous design, print, accessory is easily copied and sold at a reasonable rate to the masses which creates a problem for original creator. A Lehenga worn by Anushka Sharma at her wedding, designed by Sabyasachi Mukherjee and as of today, the copies of same are sold in Gaffar Market in Delhi, ranging from Rs 12,000-1,00,000. Duplication of designs and ideas prove to be a major

⁴ Ibid

loss to this industry. Therefore, to protect their creativity and at the same time bring action against such counterfeit products protection must be sought after under the Intellectual Property laws.

THE TELL-TALE OF DUPLICATION AND COPYING IN THE FASHION INDUSTRY

One of the most common practices in the industry is Fashion piracy. It involves unauthorized copying of original work by a Fashion designer or causing an imitation of the same. Fashion Design Piracy can be categorized into two heads namely:

- 1) **Knockoffs**: A knockoff is a close copying or imitation of original fashion design, but isn't exactly identical and is sold under a different label from that of the original designer at a cheaper price than the original one. As it is not an attempt to pass the original product, it is not illegal, but if a person proves that the resemblance is close to deceive a person, an action can be brought against it. Forever 21 and Zara are the mainstream examples for Knock off products.
- 2) **Counterfeit**: A Counterfeit is an identical copying or imitation of the original product at a cheaper price than the original product, with an intention to infringe the Trademark of the Original designer. Counterfeiting is illegal and millions are spent on litigation by the government and designers to restrict the sale of these products. Chanel, Coach, Cartier, Tory Burch, Gucci have all won judgments in million dollars litigation against the people selling Counterfeits of their original designs and products. Canal street in New York, Meena Bazaar in Dubai, Linking road in Mumbai are some of the major hubs which deal in counterfeit products of Big Fashion brands like Louis Vuitton, Armani, Moncler, Balenciaga, Prada, Hugo boss etc.

PROTECTION UNDER DESIGN ACT

The Design Act only protects registered design. Therefore, unregistered designs cannot claim protection and benefits under this act. The Design Act 2000 provides for protection of designs which are new and are in the form of features of shape, configuration, pattern, ornament or composition of lines or colors applied to any article, whether in two dimensional or three dimensional or in both, by any industrial process and it should be a finished article appealing to and is judged solely by the eye.

Such a design right grants protection for 10 years, which is extendable subject to certain conditions, for a total period of 15 years. In case of piracy of a registered design, the infringer shall be liable to pay registered proprietor of the design a sum not exceeding Rs 25,000 recoverable as contract debt, or if the proprietor elects to bring a suit for the recovery of damages for any contravention of right or Injunction against the repetition of it, damages maybe awarded and the person may be restrained by injunction. The Criteria to register a work under Design act 2000, is that it must be new without any prior publication and the novelty of the artist must reflect from design to get it registered.

PROTECTION UNDER COPYRIGHT ACT

An artist is entitled to protect “original artistic work” under Copyright law as soon as it is expressed in a tangible medium. The term of protection granted to copyright holders subsists during the life of the copyright owner and for 60 years thereafter.

The Copyright Act and Design Act overlap each other on the issue of design protection. According to section 15(1) of the Copyright Act, protection under the Copyright Act is not applicable to designs which are registered under the Design Act. Therefore once, a clothes design is registered under the Designs Act, the Copyright Act will not apply to it and work will enjoy protection under the Designs Act.

If a design (which is capable of being registered under the Designs Act) has not been registered, it will be protected under section 15(2) of the Copyright Act; However, the copyright protection will expire on an such design, if the design has been reproduced on more than 50 articles by any industrial process.

In *Rajesh Masrani v. Tahiliani Design Private Ltd*⁵ the first and foremost step in forming the jurisprudence to determine when a design is an “artistic work” and when it is a “design” in the sense of Design Act, 2000. In *Ritika Private Limited v. Biba Apparels Private Limited*⁶ the court made a distinction between designs eligible for copyright protection under Copyright Act, 1957 and Design Act, 2000. Rohit Bal in 2017 was the first designer in India to copyright his entire

⁵2008 PTC (38) 251 (Del)

⁶ MANU/DE/0784/2016

collection, which was later on followed by other prominent designers like Anita Dongre, Anju Modi, Ritu Kumar who also copyrighted their entire collection.

PROTECTION UNDER TRADEMARK ACT AND GEOGRAPHICAL INDICATION ACT

Section 2(zb) of the Trademark Act, 1999, defines Trademark as a mark capable of being represented graphically and distinguishing the goods and services of one person from another and may include shape of goods, their packaging and combination of colors. A trademark can be any word, name, symbol, design or any color combination thereof, used in commerce to distinguish and identify goods. For Example the Trademark of “Gucci” along with the “distinctive Gucci GG Logo” identifies the bags and garments made by Gucci and distinguish them from bags and garments made by other companies. Trademark helps to maintain a prestige premium for a particular brand, and can be quite valuable. Big Fashion houses value their brand equity. The Trademark law also protects the trade dress such as size, shape, color, packaging or even sales technique.

In *Louis Vuitton Malletier v. Atul Jaggi*⁷ and another, the Delhi high Court restrained the defendants for infringing and passing off their famous trademarks “LOUIS VUITTION” and “LV” by using identical marks and granted damages. Trademark Designers can use trademark law to protect not only logos and brand names, but also distinct features of a product. For Example, Burberry holds trademark rights in both the trademark “Burberry” and the “Burberry distinctive Plaid”.

The Fourth schedule of the Geographical Indication Act provides for a classification of the goods protectable under the Act. Noting India’s diversity in traditional knowledge and other indigenous art forms, the current regime is protected under the Geographical Indication Act, 1999. Till now about, 15 kinds of GI’s have been registered in respect of textiles in India like Kasturi Embroidery from Karnataka, Kutch Embroidery from Gujarat etc. The Indian designers have highly relied on ancient traditional and indigenous designs to create garments and have realized the preservation of same in International market from Fashion Piracy.

⁷ 2010 (44) PTC 99 (Del)

PROTECTION UNDER PATENT ACT

Patent may immediately not strike your mind when considering fashion industry as artistic creations cannot be patented and it is based more on technical and innovative aspect, but the technology used for making these designs or creation of this artistic work can be patented. A Patent protection has been granted to the technology used to manufacture CROCS shoes, wrinkle-free fabrics, UV filtering textiles that are resistant to fire and water-repelling textiles. Similarly, Novozymes, a Danish biotech company specializing in enzymes and microorganisms, pioneered the use of enzymes in the treatment of fabrics. The Company developed and patented a technology for the treatment of “stone washed’ denim jeans through these enzymes called cellulase to give the fabric a worn look and within 3 years most of the denim companies were using the technology under the license from Novozymes⁸.

Patent invention grants protection for 14 years for design patent and 20 years for utility patent from the filing date and after the protection ends it falls under public domain and anyone can commercially exploit it without infringing the patent. Though patent inventions can be extremely costly and time consuming it can be used to secure an innovation which can be used in Fashion industry for a long period of time and it will not get outdated if the innovation is novel and the process can be repeated every year in the industry. In 2016 Louis Vuitton has been granted 6 Design Patents followed by Bottega Venetta been granted three and Balenciaga have been granted two.

PROTECTION UNDER TRADE SECRETS AND NEW BUSINESS MODULES

Trade secrets may range from a list of key suppliers and/or buyers, to use of software tools for fashion design, to logistics management of the entire value chain. In some fashion businesses, core trade secrets serve to protect the computer-implemented, software-based business models, which underpin an entire business strategy, based on stealth and speed, to supply a limited quantity of fashion products.

The Spanish retail fashion chain, ZARA, uses a proprietary information technology (IT) system to shorten their production cycle – i.e. the time from identifying a new trend to delivering the finished

⁸ https://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html

product– to a mere 30 days. Most of their competitors take from 4 to 12 months. The company receives daily streams of e-mail from store managers signaling new trends, fabrics and cuts, from which its designers quickly prepare new styles. The fabric selected is immediately cut in an automated facility, and sent to work shops. A high-tech distribution system, with some 200 kilometers of underground traces and over 400 chutes, ensures that the finished items are shipped and arrive in stores within 48 hours⁹.

CONCLUSION

Indian Fashion designers have become more cautious about their IP and are taking steps against those who infringe their designs. They have started educating themselves and are careful with their IP. Designers have started operating different lines of products according to the purchasing capacity to tackle the Contrabands like “Forever 21” and “Forever New” or in Case of Luxury Fashion designer Armani operating 3 different lines like Armani exchange, Emporio Armani and Giorgio Armani catering needs of different category of people according to their purchasing capacity. With the rising importance of IP, brands have become more open to registration. The Fashion Foundation of India (FFI) has played a major role to protect IP rights against rampant copying, referencing and inspiration. It is important for counterfeiters as well as creators to understand the repercussions of copying work. One can design and create most beautiful and innovative designs, but it takes intellectual property rights to enlarge its monopoly and prevent it from Counterfeiting and plagiarism.

⁹ Ibid