



ROLE OF INTELLECTUAL PROPERTY RIGHTS IN FASHION INDUSTRY

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ABSTRACT

This Research Paper is titled “Intellectual property rights in the Fashion Industry – Indian Perspective” and attempts to navigate the role of Intellectual Property Rights protection in the Fashion industry. The author attempts to discuss the protection of creations of intellect of the Fashion Industry under the Intellectual Property Rights Regime and focuses on its changing trends and wide subject matters. It discusses the scope of protection under various categorisations of Intellectual Property such as- Copyrights, Trademarks, Patents, Designs and Trade secrets, as provided by the Trade Related aspects of Intellectual Property Rights Agreement, of which India is a signatory. The paper is focused on protection as available in the Indian Intellectual Property Rights Regime. It discusses the problems faced by the Fashion Industry in India due to lack of a Uniform legislation, complexity in the protection process and the sheer multiplicity of fakes, knock-offs and counterfeits in the market, among others. The paper concludes with Suggestions to ensure and strengthen protection to rightful creations of the Fashion Industry.

Keywords: Intellectual Property, Fashion industry, Copyright, Trademarks, Patent



INTELLECTUAL PROPERTY RIGHTS IN THE FASHION INDUSTRY

“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

The history of all cultures is scintillated by the ever-changing trends in clothing, which are not mere representations of changing times but also of history, dynamism and growth. In recent times, the fashion industry has witnessed a spur like none other. Fashion is not merely about clothes, jewellery or shoes, it is an art of representation. Like other outputs of intellect, parts of fashion are also protected under the Intellectual Property Rights regime.

Globally, the Trade Related Aspects of Intellectual Property Rights (TRIPS) treaty negotiated at the end of the Uruguay round of General Agreement on Trade and Tariff, 1994 (GATT) governs and standardises the protection of Intellectual Property Rights among all member countries. The TRIPS treaty follows the “free determine “principle, wherein, member nations are free to determine ways in which they can comply with the requirements of the treaty and implement them in their domestic legal systems. Being a signatory to the TRIPS agreement, India must provide to the minimum standards of protection, as laid down by the agreement. In its implementation, however, it is free to determine its method of compliance.

The justification for protection of “Fashion” lies in the very definition of Intellectual Property, according to the World Intellectual Property Organisation, as- “Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce.” Consequently, Intellectual Property Rights are Rights over creations of mind as intangible and incorporeal property.

Intellectual property is protected not only because they are innovations of intellect but also because they are catalysts of growth. They encourage invention and development by protecting, promoting and enabling creators to benefit from such creations, financially and morally. Besides, they improve quality of life and also create employment opportunities. However, protection is accorded in a manner that strikes balance between personal growth and mutual benefit, i.e. Rights of the creator and public interest are in an equilibrium.

Trips categorises various intellectual properties into Copyrights, Trademarks, Patents, Industrial Designs and Geographical indications. However, despite such categorisation, the fashion industry is not as strongly protected and often suffers with problems of imitation, knock-offs and counterfeits, resulting in Fashion Design Piracy. The reason is that traditional legislations lack stringent provisions for optimum understanding and protection of the dynamic fashion industry.



Furthermore, the rights of designers in the fashion industry are prone to infringements due to the ease of duplication of their designs, patterns and techniques. Resulting products are often of low-quality and considerably much cheaper than the originals. These imitations can cause serious threat to the Market value and image of a brand, and therefore protection of their rights is of utmost importance to these creators. Often, creators in the fashion industry spend thousands and thousands of rupees in the process of formulation of their designs alone, even before they are released to the public, therefore it becomes essential to them that their works of art be protected and their legal rights upheld.

The Fashion Industry, under the Intellectual Property Rights regime, is protectable subject matter under the following heads-

COPYRIGHT-

Copyright affords protection to literary, dramatic, artistic works along with cinematographic works and sound recordings. It is a bundle of exclusive rights, negative in nature, by which the owner of copyright can enjoy his rights to the exclusion of everyone else i.e. it is a right in the work *erga omnes*. In India, the copyright law is governed by Copyright Act,1957.

Section 13 of the legislation sets out protectable subject matter. Under section 13(a) original literary, dramatic, musical and artistic works are protected. Works of fashion designers and fashion industry can thus be protected under “Artistic works”

The Copyright Act defines “artistic works” under Section 2(c). Designs in the form of sketches, paintings, sculptures and patterns for clothes, costumes or accessories are all capable of copyright protection. Similarly, a work of architecture and any other work of artistic craftsmanship are also protectable subject matters. The copyright act bestows the creator with exclusive economic rights under section 14, that include inter-alia, Reproduction of work, Issuance of copies, performance and communication of work and making an adaption of the work, among others. This implies that a Designer, who is an owner of a copyright, would have the exclusive right to reproduce the work, to save it in the form of photos or videos or have prerogative over its usage in any other work. He would also have the right to represent and showcase his work to the public in the form of Fashion shows.



All the aforementioned are exclusive economic rights of the creator of any protectable subject matter. Besides economic rights, the artist also has moral rights¹ or “droit morale” which flow from the fact that the work of an artist or a fashion designer is a reflection of their personality and therefore, their paternity and integrity must be upheld.

However, the following must be noted with regard to copyright protection in the fashion industry-

- Registration of any work, artistic or otherwise, is not a requirement for protection under the Copyright Act, 1957. Copyright in any work, falling in the category of protectable subject matter, subsists as soon as it is created in tangible form. Meaning, as soon as the industry formulates a simple paper plan for the creation of an output, it automatically becomes protected. However, in order to obtain remedies for Infringement of copyright, civil or criminal, such work must be registered.² In 2017, Rohit Bal, became the first fashion designer in India to get copyright protection over his entire collection.
- Copyright exists in expression of an idea and not the idea itself. (Idea- Expression dichotomy)
- Copyright can exist in sketches, drawing and sculptures, as long as they are original works of art. Absolute novelty or innovation is not the criteria for protection, however, some minimal degree of creativity is required.
- Copyright can subsist in original photographs as well, despite their artistic quality, provided it is a result of some labour and skill (such as in lighting, angles or backgrounds) and not a mere copy of another.
- Due to lack of a landmark judgement, it is difficult to say whether fashion shows in their entirety can be subjects of copyright protection. The tussle remains whether fashion shows are events open to public and therefore common property, or can be protected under the category of “dramatic works.”
- The term for protection of Copyright in India is limited to the lifetime of the author and Sixty years after his death i.e., 60 years *post mortem auctoris*.³

¹ The Copyright Act, 1957 (based on Article 6bis of the Berne Convention), S. 57

² Copyright Act, 1957, S.51

³ Copyright Act, 1957, S. 22



In *Louis Vuitton v. Atul Jaggi*, the Delhi High Court recognised the plaintiff brand’s Copyright contained in the “Toile Monogram” collection of the plaintiff, and due to infringing activities of the defendant awarded damages of 2.75 crores to the plaintiff along with payment of costs of proceedings.

DESIGNS

Design is defined under Section 2(d) of the Designs Act, 2000 and protects feature of shape, configuration, pattern, ornament or composition of lines or colours applied to an article and visible to the eye, it does not protect the article itself.

It is pertinent to understand that there are two aspects of design, one being the shape, pattern or configuration placed upon an article and the other being the cut and design of the article itself, and the Designs act protects only non-functional aspects of a design. Essentially, this implies that if an idea/ design is reduced to a 2d form and then converted into say, an apparel, then such an apparel would come under the protection of Designs act, having fulfilled all the criteria of protection. However, if an Idea/ design, not having been reduced to a 2D form, is made into an apparel directly, then such apparel can not be protected as “Design” under the Designs Act. Protection to such an item can be accorded as “an original Artistic work” under the Copyrights Act.

For protection under the Designs Act, 2000, the design must necessarily be registered, after due compliance to Section 4 of the Act that lays down criteria for registration such as new and original design, Distinctiveness, non-disclosure to public etc. The Third Schedule of Design rules, 2001 enumerates categories for which an application for protection can be made.

There is an intricate relationship between the Designs Act and the Copyright Act, owing to the overlap under section 15 of the Copyright Act. Section 15 of the Copyright Act which provides that-

- a. Copyright shall not subsist in any work registered under the Designs Act;
- b. That Copyright shall subsist under the Copyright Act in any work that is capable of registration under the Design Act, but has not yet been registered, although, such protection shall be terminated when an article to which the structure is applied has been recreated in excess of multiple times, more than 50, by an industrial process.



The interpretation of the aforementioned provision along with the definition of “design” has been amplified by the Delhi High Court in *Microfibres, Inc v. Girdhar & Co.*⁴, stating that the term “artistic work” has been given a very wide connotation under the Copyright Act. The legislative intent is to afford a higher degree of protection to pure artistic works and lesser to design activity which is commercial in nature.

This can also be justified by the fact that the term of protection of a design registered under the Designs Act, 2000 is 10 years from the date of registration which can be extended for another 5 years on an application of extension. On the contrary, the term of protection of a copyright is the lifetime of the author and 60 years beyond that. Therefore, it can be perceived that a designer shall be better protected if his design falls under the category of “artistic works.”

TRADEMARK

Trademark,⁵ as an intellectual property right, protects logos, words, names, symbols, configurations, shape of goods, packaging, combination of colours or any combination thereof. Trademark protection becomes essential because consumers can easily differentiate the goods of one producer from another. Further, trademarks that become very well-known not only represent the brand but also become a representation of its high values and standards. Brands like Cartier jewellery, Louis Vuitton and Raymond have been recognised as “Well-Known Trademarks.”

A mark⁶ includes a device, brand, heading, label, ticket, name, signature, word, letter etc and therefore covers a large ambit under its protection provision. Trademarks become extremely important when brands incorporate them in their articles as a part of its design. A trademark must be capable of being represented graphically and must be distinctive. For example, the name “Nike” and the well-known “Swoosh tick” sign are both trademarks of the globally known footwear and apparel company.

Protection granted to the design and shape of a product or its packaging is known as its “Trade Dress” and is much more visually distinguishable.

⁴ 2006 (32) PTC 157 (Del)

⁵ Trade Marks Act, 1999, S. 2(1) (zb)

⁶ Trade Marks Act, 1999, S. 2 (1) (m)



Trademarks can also be granted over perfumery smells that are distinctive and not derived from the nature of the goods itself, these are known as Non- Traditional marks or Modern Marks. For example, Channel was denied a trademark over its No. 5 fragrance because the scent of the perfume was its very essence. Another type of Non-Traditional marks utilised by the fashion industry are the “colour Marks.” Shades of colours or combination of colours have become increasingly popular with the fashion industry. However, colour marks are granted in exceptional circumstances, only when the colours have attained a well-known secondary meaning attached to the repute of the brand.

In, *Christian Louboutin v Abu Baker*⁷, the Delhi High Court denied the trademark of “Red Colour sole”, which is a Signature mark of Louboutin, among the top 5 women’s luxury footwear brands, on the grounds that the sine qua non of protection under the Trade Marks Act, 1999 is that they must be a “combination of colours” and therefore trademark protection could not be granted to one colour alone.

Like copyright, the registration of a Trademark is not essential for its protection. The common law rights in the trademark can exist without registration as well. Registration of a trademark merely affords further protection. While registration bestows the right to sue for Infringement of trademark⁸, remedy also exists for trademarks that are not registered in the form of “passing off” (under Section 27(2) of Trade Marks Act,1999). Under Section 25, the duration for protection of a trademark is 10 years which can be renewed from time to time.

PATENTS AND TRADE SECRETS

Patents⁹ are intellectual property rights over a new invention or innovation. Invention is a new product or process that involves an inventive step and which is capable of industrial application¹⁰. In India, patents are granted by the Patent Office under the Patents Act,1970. Therefore, a brand, industry or fashion designer can get a patent over a new product or process under the above-mentioned legislation. For an invention to be patentable, it must be new, non-obvious and unprecedented, include an inventive step and must be capable of industrial application.

⁷ *CS (COMM) No.890/2018*

⁸ Trademarks Act,1999, S.28

⁹ Patents Act,1970, S. 2 (1) (m)

¹⁰ Patents Act,1970, S. 2(1) (1)



A process patent protects only the process and not the outcome. Therefore, any person can recreate that outcome by using a process, other than the patented process. In a product patent, the outcome is the protectable subject matter. Therefore, no person can produce the patented product, except the patent holder, or with the licence or authorization of the patent holder.

To illustrate, Yves Saint Laurent has total eight patents granted by the U.S Patent office over products such as “Monogram Envelope Chain Bag, Classic Monogram Shopping Bag, and Moujik tote.” The technology to manufacture Crocs and wrinkle-free fabrics have also been patented. Novozymes, a Danish biotech company patented the “stone washed” jeans method in 1987 which was then licensed to multiple brands. A common invention now, but found and patented in 1955, is Velcro, which is a staple in the fashion industry.

While filing an application for patent protection, the Patentee must detail the invention in such a manner that any person ordinarily skilled in that art is able to understand it. This is one of the inevitable shortcomings of Patent protection because any Patentable innovation will ultimately be disclosed to the public and fall in public domain after expiration of its term of protection. However, this provision is to ensure an equilibrium of private rights and public welfare. The term of protection over a patent in India is 20 years.¹¹ Therefore, if an inventor of a new process or product in the fashion industry was to patent the invention, it would ultimately fall into the public domain after the expiry of the 20-year term.

An alternative that the inventor has is to keep the invention or innovation a secret. These secrets are known as “Trade Secrets” and are a widely recognised form of Intellectual property and may include anything from the list of suppliers to buyers, the information on warehouses and process of transportation or brand marking in the form of a formula, pattern, compilation, device, programme etc. In common parlance, they are protected by their owners by way of Non-Disclosure agreements with employees, among other techniques. However, once known, a secret cannot be unknown. This is one of the most crucial disadvantages of IP protection by Trade Secrets. Remedies available are monetary remedies in the form of compensation, which also require a valid non-disclosure contract. Recently, Nike was under the threat of loss of their trade secrets as three of their employees had been employed at their rival firm, Adidas. In this scenario, an organisation essentially gambles with its chances of protecting their secrets without much legal intervention or discourse.

¹¹ Patents Act, 1970, S. 53



COMPLEXITIES OF THE PROTECTION PROCESS

The process of attaining IP protection in the fashion industry is long, cumbersome and to an extent, even confusing. The process of an article being manufactured and consequently available to the public is extremely elaborate. It begins with an idea that is converted into a 2D form, followed by approvals, process of manufacturing and conversion into a 3D form, process of pricing such products and the process of transportation to sellers, following which an article is finally put up for sale and made available to the public. Interestingly, all these steps can be made subjects of IP protection under different categories. To illustrate, an idea, once converted into an expression can be protected as an Artistic work under Copyrights. The non-functional aspect of this expression is also protectable as a copyright in design. Protection has to be sought after undertaking sincere considerations owing to the difference between the terms of protection of Copyrights and Designs and Provisions of Sections 15 of Copyrights Act. A new, non-obvious and inventive process of manufacturing can be protected under the Patent Law as an Invention. Articles can also be protected as “inventions” if they satisfy the requisite criteria, by obtaining product patents. The method of pricing, warehousing, storage and list of whole sellers can all be Trade secrets.

CONCLUSION

The people involved in the fashion industry usually thrive on creativity and innovation. Yet, not many fashion brands adequately invest in IP protection, partly due to lack of a central legislation for a high gross revenue generating industry and partly due to the complex process of protection and the lengthy legal processes. To illustrate, it may take anywhere between 1-4 years in order to obtain a patent over an invention. However, lack of a legislation is not the only hurdle in IP Protection in the fashion industry. Insensitivity and lack of awareness among leaders in the Industry and smaller players is another complication. This often results in problems of counterfeits, knock-offs or fakes being sold in markets, that may seriously affect brand image.

One of the arguments is the short shelf life of fashion items such as clothes, jewellery and footwear. Fashion items are generally seasonal in nature, lasting about 6-8 months. Due to this issue, brands might not wish to invest time and money in IP protection. The very dynamism on which the industry is driven seems to become a hurdle in IP protection.

Another reason could be the complexity of legislations and lack of uniformity. Unlike the Cinematograph Act, 1952, the laws in the fashion industry are not centralised and largely governed



by independent contracts. Furthermore, brands in the fashion industry often find it difficult to initiate proceedings against every single wholesaler or seller of knock-offs or counterfeits mainly due to the sheer multiplicity of numbers.

Existing laws in the field also require clarifications and appropriate amendments to keep up with this ever-growing industry. Provisions such as Section 15 of the Copyright Act which limit protection up until 50 articles only can be understood as restricting the scope of IP protection. Considering the growing trends of the fashion industry and the revolutionary, ever changing trends in technological developments, the scope of protection when so limited might discourage the scheme of protection.

On the contrary, it can also be argued that imitation is the best form of flattery. In this sense, bigger brands give impetus to entrepreneurs just beginning to get involved in the industry. However, just because imitation is given the pretence of “homage” or “inspiration”, must not qualify as a valid defence to the unlawful act of Infringement. One of the well based defence usually is that IP rights like Copyright only exist in expressions and therefore, ideas of one can form the basis of innovation of another. Further, such imitation exhausts the right of the creator to grant licenses and earn commercial benefits.

Yet, protection cannot be undermined on the above-mentioned ground. Creations must be protected to give impetus to those already involved in the industry for their hard work and intellect. As one of the biggest growing industries, protection accorded must not only be adequate but also strict and vigilant.

It is necessary to have a simplified process supported by adequate legal provisions in order to effectively apply the minimum standards of IP protection, as provided by the TRIPS agreement.