

Review Article

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Current Intellectual Property Regimes in the U.S. Fail to Protect Fashion Designs

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ABSTRACT

The United States does not offer adequate intellectual property protections for designs within the fashion industry. The quick pace and constantly evolving nature of the fashion industry creates obstacles for designers' ability to obtain lasting protection in their fashion articles. The intellectual property regimes for trademark, trade dress, patent and copyright will be analyzed in the fashion industry context. These intellectual property regimes in the United States do not adequately protect designers in the fashion industry.

Small fashion brands and independent designers are often left unprotected by the copying of their designs. Designers "remain vulnerable to knockoff artists who can steal ideas straight off the runway and produce copies before the originals even hit the stores." Due to the lack of intellectual property protection for fashion designers in the United States, fashion companies and retailers are able to "steal American designs, make low-quality copies in foreign factories with cheap labor and import them into the U.S. to compete with original designs." This presents a huge concern for young and emerging designers who can be "put out of business before they even had a chance." Emerging designers are left vulnerable to the threat of copying [1].

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Nature of Fashion Industry

When analyzing the intellectual property protections for designers in the fashion industry it is imperative to consider the nature of the fashion industry. The nature of the fashion industry consists of "emerging trends, with limited time and opportunity to maximize profits from these trends." "Fast fashion" often occurs when trends are developed at various fashion weeks around the world and fashion industry members rush "fashion styles and fashion articles to production [to] reach consumers through mass-market retailers." Before designers are able to distribute original copies of their designs, "exact runway design copies" can appear for sale. The fast fashion industry allows for "designs inspired by 'high-cost luxury fashion trends' to be provided to the consumer at affordable prices. The rapid emergence of fashion trends, disincentives large fashion retailers to develop new designs. Instead, large fashion retailers such as H&M, Forever 21, and Zara steal designs of independent designers, copy and replicate their designs, and mass produce strikingly similar fashion articles [2-3].

Luxury fashion designers as well as small independent designers suffer from the fast fashion trends where they are at risk of having their original designs copied. Independent designers are less likely to be able to obtain the "legal and economic resources" needed to protect their designs. Large apparel companies engaged in "knocking off" designs have a vast amount of resources to successfully defend themselves against infringement claims [3]. "Knock off" designs allow for a "copyist [to] creat[e] an item of his own expression that is substantially similar to the original, but

[sell] it under its own brand or trademark". Although consumers deserve to have access to affordable fashion, designers deserve protection over their creativity [4].

The prevalent sale of "knock off" items present obstacles for designers for small businesses. It is difficult for independent designers to obtain recognition and distinction in the fashion industry, when they are consistently at risk of their designs being stolen. Luxury brands are less likely to be harmed by the creation of "knock off" items. Much of the fascination of buying items from luxury fashion brands is the exclusivity of being able to afford the designer prices. Therefore, consumers of luxury designer brands are unlikely to stop buying designer items if "knock offs" are sold.

Designers typically will unveil their collections at various fashion shows and fashion weeks. "The traditional fashion design process from concept to consumer typically averages fifty-two weeks or more." Through fast fashion, the "production cycle" is altered which allows "knock off" designs to be produced in "as little as two weeks" compared to a designer creating and developing a design for "a year or more." A retailer selling "knock off" fashion articles "benefits financially and reputationally" without additional costs for development. The fashion life cycle includes the following stages: "1. Introduction of a style; 2. Growth in popularity; 3. Maturity of popularity; 4. Deterioration in popularity; and 5. Dismissal of a style or obsolescence." Therefore, this cycle reveals that once a design attains large popularity, "designers and trendsetters abandon these styles, as they are no longer exclusive

or desirable.” This pattern in fast fashion reveals the difficulties designers face in obtaining lasting intellectual property protections over their designs that are constantly coming in and out of fashion [4].

Functionality

The functional features involved in fashion articles raise obstacles for designers attempting to obtain intellectual property protection over their designs. Generally, in order to obtain intellectual property protection for a fashion article, “fashion companies must establish that the particular feature is non-functional”. Utility patents can protect “new or improved functional product features.” However, trademark, trade dress and copyright “protect only the non-functional elements of a fashion design.” Therefore, the functionality consideration “impedes protectability of fashion articles as a whole,” due to the difficulty in separating the functionality of the fashion design from the fashion article [5].

Trademarks

Trademarks can provide limited protection for fashion design. A trademark protects “any word, name, symbol, or device ... used by a person ... to identify and distinguish his or her goods” or services from those of another. Trademarks provide protection in the fashion industry “through adoption and use of word marks, including product style names used as trademarks, logos, branded hardware, and logo patterns.” The essence of trademark protection is to protect consumers. A trademark will be refused registration if the registration will cause confusion among consumers “when used on or in connection with the goods of the applicant.” Thus, when fashion brands obtain a trademark for their brand, their trademark rights can prevent others in the fashion industry from marketing and selling their products in a way that could mislead consumers [6-8].

Trademarks are highly beneficial for luxury brands and large fashion brands to prevent fast fashion designers and retailers from selling their fashion goods in a manner likely to cause confusion and false associations with their brand. However, trademark protection is much more limited for smaller fashion brands. Often small fashion businesses lack the financial resources to be able to defend their trademark rights against large retail companies engaged in fast fashion.

Although trademarks can offer designers protection over their fashion brands, trademark protection is limited for the fashion article as a whole. Trademarks “only protect certain aspects of a garment, not the entire design.” Therefore, fashion companies heavily rely on trademarks in “aggressively protecting their branding, especially word marks and logos.” Trademarks can provide “protection for logos that may be used exclusively on labels or hangtags but may also form a distinctive element of design on a fashion article.” Branding is expansive and can even “extend to stitching on denim pockets or distinctive markings on footwear.” Having an expansive view on what constitutes branding can offer wider protection for various fashion articles and designs [9,10].

Trade Dress

Trade dress provides an additional avenue for fashion designers to protect their designs. Trade dress is generally defined as the “total image and appearance” of an article. Additionally, features including “size, shape, color or color combinations, texture and graphics” can be protected through trade dress. Trade dress “can extend to the look and feel of a product or unique packaging if the fashion company can identify unique characteristics of that product

or packaging.” For a fashion company to obtain trade dress rights for a product design, the company is required to prove that the trade dress in the fashion article is “distinctive as to the source of the product and that it is aesthetic in purpose.” Additionally, the company must show the trade dress is not utilitarian or functional [11,12].

Few fashion articles qualify for trade dress protection. Often, to protect a fashion article through trade dress, “substantial advertising and marketing... necessitating many years of consecutive production and marketing of that fashion article” is required [12]. Consecutive production and marketing are difficult to establish in the fashion industry because of the “nature of the fashion industry, which demands product turn-over and innovation, with new styles introduced by fashion companies on a seasonal basis.” Fashion companies are required to “submit evidence of many years of advertising and promotional efforts” which is an expensive process. Therefore, qualifying for trade dress protection is difficult because an “a designer may not establish secondary meaning instantaneously... but must instead cultivate the trade dress until consumers come to associate it with the designer.” Thus, due to the amount of time required to establish secondary meaning, trade dress is not effective in the fashion industry, which changes trends frequently [13].

Patents

Patent law extends to inventions or discoveries of “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof”. In order to obtain a patent, the invention must be “nonobvious.” In the fashion industry, designers can obtain patents for “functional fashion designs or design elements that are substantially innovative”. Both utility and design patents can be obtained for “useful designs or long-term staple items, but the cost and time to obtain patent protection works sparsely for designers”. Additionally, protection for design patents primarily benefits “fashion companies that develop novel styles that could trigger copying or styles that are likely to be used for multiple seasons”. Due to the changing nature of the fashion industry, styles are unlikely to be used for multiple seasons [14-17].

Inventors may obtain design patents if they invent “any new, original and ornamental design for an article of manufacture.” A design patent provides protection for “the concept of the product, not the product itself, and must be novel and non-functional.” Design patents can protect the “appearance of a functional item.” Pursuant to the U.S. Patent Act, “protection for designs for shoes, handbags, jewelry, and other items [can be obtained through a] design patent valid for fifteen years.” However, design patent rights do not attach “until the design patent issues from the United States Patent and Trademark Office” which can be a long process. Furthermore, obtaining design patents is expensive and “can take anywhere from ten months up to two years to issue.” The high cost of patents along with the issuing process presents obstacles in the fashion industry. Therefore, the effectiveness of design patent protection in the fashion industry is limited because of the lengthy registration and USPTO approval process when styles are consistently changing and evolving [18-23].

Copyright

Copyright protection is provided to “original works of authorship fixed in a tangible medium of expression.” In determining whether a fashion article can obtain copyright protection, the “elements of the work” must be analyzed to determine which elements are copyrightable. Although designs themselves “are deemed

functional items”, specific elements of a design may warrant copyright protection. Elements of a fashion article including “pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article” may obtain copyright protection. A fashion company is in a better position to enforce its copyright rights in the “overall article” when the “primary element of the apparel article is copyrightable.” In *Star Athletica, LLC v. Varsity Brands, Inc.* 137 S. Ct. 1002 (2017), the court held that an artistic feature design of a useful article can receive copyright protection if it “(1) can be perceived as a two-or-three dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work either.” Therefore, a fashion article may obtain copyright protection if it meets the test of “conceptual separability.” This is a difficult standard to meet because many fashion items such as clothing articles, handbags, belts, and shoes are useful and difficult to separate from the work of art [24-29].

Contrary opinions to expanding copyright protection in the fashion industry include the belief that expanding copyright protection would allow “designers to claim copyrights over styles and features they did not invent.” This argument concerns the originality requirement in copyright. For a work to be original, the work must possess “some minimal degree of creativity” [30]. The originality requirement for designs is often difficult to meet in the fashion industry because fashion trends are constantly being derived from one another, and old trends are often brought back, revamped and recreated [31].

An additional argument against expanding copyright protection is that “judges would become the arbiters of fashion innovations, deciding whether garments were sufficiently unique or excessively similar.” The court in *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239 (1903) revealed that judges should not engage in aesthetic discrimination by judging the aesthetic quality of a work to determine whether a work fell within the fine arts deserving copyright protection. Although this case was discussed in the context of circus advertisements in the form of “pictorial illustrations”, the same concerns apply in the fashion context. The court held that it would be a “dangerous undertaking for persons trained only to law to constitute themselves final judges of the worth of pictorial illustrations.” Thus, there is a valid concern that judges, who are not experts in fashion law, would have sole authority to decide whether a fashion design is original.

Lastly, there is an argument that fashion occurs in cycles where “Innovations become trends” and without copying, trends would cease to exist. However, this argument is outdated and fails to consider the role that the internet and social media plays in the distributing fashion trends. “Social media platforms have become the cornerstone of most fashion house’s marketing strategy.” Fashion brands and designers often use social media to market their new clothing items. Social media influencers, with thousands of followers, are also able to market and rapidly spread various fashion trends. Additionally, social media allows for fashion businesses to “create targeted add that are catered towards a certain demographic.” Thus, the power of social media has allowed trends to expand rapidly [32-36].

The Internet is used among millions of users around the world to stay current with new fashion trends. The Internet is “intensifying fashion piracy” because “[w]ebsites reveal designs as soon as they are shown on the runways”, which allows low-cost manufacturers and fast fashion retailers to create, manufacture,

and sell “knockoffs” before the originals are available in stores. Thus, the Internet expands the use of fast fashion and allows fast fashion retailers to capitalize off new trends at the original designer’s expense. “Designers no longer benefit from a first-to-market advantage.” Rather, marketing in the fashion industry online can put the designer at risk for their designs being stolen.

Conclusion

In conclusion, current intellectual property regimes including trademark, trade dress, patent and copyright do not adequately protect designs in the fashion industry. Although trademarks provide protection for designers to protect their fashion brands, trademarks generally only protect certain aspects of a fashion article, rather than the entire design. Trade dress provides limited protection for designers due to the difficulty in establishing secondary meaning through extensive marketing, advertisements, and promotional efforts. The registration process and high cost of obtaining patents discourages designers from obtaining patent protection for their designs. Lastly, obtaining copyright protection for fashion articles is difficult due to the inability to meet the conceptual separability test. Therefore, these current intellectual property regimes fail to provide sufficient protection to protect fashion designs.

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