

LEGALFOXES LAW TIMES

COPYRIGHT PROTECTION IN FASHION INDUSTRY

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Abstract

This project determines the relevance of intellectual property rights to the development of innovations in the fashion industry of not just in India but also in United States and Europe. It examines how the protection under the IPR (Intellectual Property Rights) is given to the fashion industry, how the legislations protect particular features of garment.

Introduction

Fashion industry has a wide ambit of intellectual rights relating to clothes, jewelry, perfumes, shoes etc... Fashion industry with regard to its specialty is growing & includes protection under IPR such as Trademark, Copyright, Design, Patent etc...

Piracy

Piracy in fashion design is the illegal copyright of the original fashion design. Piracy can be distinguished into 2 kinds;

- Counterfeits- Counterfeit involves piracy and fraud as there is an attempt to deceive. It is a copy of the original design, the logo and its label etc...
- Knockoffs- Knockoff is the copy of the original fashion design but it is sold under a different label.

Subject Matter of Protection

IPR (Intellectual Property Rights) provides protection to the articles of the fashion designer. Some of those as stated as below:

- Copyright Act, 1957 provides protection for Color Combination.
- Copyright Act, 1957 provides protection for Sketch Design.
- Design Act, 2000 and Patents Act, 1970 provides protection for Fabric of the articles.
- Design Act, 2000 provides protection for Article Design.
- Trademark Act, 1999 provides protection for Logo Design.

Legislations

According to the Indian fashion industry perspective, the laws do not protect the entire garment, rather the particular features of the garment.

According to Design Act, 2000, an article, means “any article of manufacture and any substance, artificial, or partly artificial and partly natural and includes any part of an article capable of being made and sold separately;”¹

In *Hindustan Lever Limited Vs Nirma Pvt. Ltd. Ahmedabad*,² it was held that label put on a carton to be used as container for the goods can never amount to design within the meaning of section 2 (3) of the Designs Act, 1911.

In *Re Littlewoods Pools Ltd's Application*,³ application was made to register a form of football coupon consisting of a rectangular sheet of paper on which a pattern was formed by straight lines, the spaces between were filled with literary matter. Wynn-Parry J in holding that the paper was not an article stated that as the function of the paper was —solely to carry the imprint of the design and did not have any other function it was not an —article, within the meaning of the act. Explanation: It would appear to follow that paper or canvass could be considered an article. However, to be registrable an article must have some function other than that of merely carrying

¹ Sec-2 Design Act, 2000

² AIR 1992 Bom 195

³(1949) 66 RPC 309

the design. A drawing or painting on ordinary paper or canvas are not the same as wallpaper or wrapping paper or textiles. The paper used for printing or canvas used for painting have no function other than to carry the printing or painting. Therefore, they are not registrable.

The wallpaper, wrapping paper or textiles all perform a function other than just being a vehicle for the design. For example, the wallpaper is used for sticking on the wall to either enhance the décor of a room or for the more practical purpose of covering cracks or faults in the wall surface. Textile material is used for making up a variety of articles e.g. curtains, clothing, bed linen etc. This factor makes these registrable articles.

In *King Features Syndicate Inc. & Betts V O & M Kleeman Ltd.*,⁴ where comic strip drawings of —Popeye the Sailor were held not to be themselves design capable of registration under the act although when the features of shape and configuration depicted in the drawings were applied by industrial process to dolls and brooches a registrable design came into existence.

A design which cannot be repeated is not registrable. Thus an ornament made on an article of natural rock and when it would be difficult to get a multiple same varieties of natural rocks is not a proper subject for design registration.

In *The Sifam Electrical Instrument Co Ltd V Sangamo Weston Ltd.*⁵ it was submitted in this case that the proper interpretation was ‘susceptible of being sold separately’, but the court held that it was the actual intention at the time of registration that was important. The article in question, a face for an electric meter, was found not to be registrable, and Graham J observed —.... I find the matter difficult to decide, but on the whole I think the intention must be to grant registration only for such articles as are intended by the proprietor of the design to be put on the market and sold separately, such as for example a hammer handle....

Explanation: The inclusion in the definition of article —any part of an article capable of being made under sold separately is to prevent the registration of a part of an article which has no separate identity and which is really an integral part of an article, for example the shape of a portion of a chair leg which is really an integral portion of the chair. The design of a part of an article is not registrable as a design unless the part is made and sold separately as an article.

⁴ (1941) 48 RPC 207 at 222

⁵ [1973 RPC 899 at 909]

The primary object the Act is to protect shape and not the function or functional shape. The expression design doesn't include a method or principle of construction or features of shape or configuration which is dictated solely by the function which the article to be made in that shape or configuration has to perform. . In addition to the industrial drawing of the entire crane, the plaintiff also claimed copyright in the following key components

- i. the boom and slider assembly,
- ii. the lower structure assembly,
- iii. the main frame – axle assembly,
- iv. the differential housing etc.

The Delhi High Court observed that the aforesaid parts of the crane are made in a particular shape so as to interrelate with others mechanically. These parts of the crane are not made to appeal to the eye but solely to make the crane work or function. Most of the key components or parts, unseen in the crane for which they are required, had only to pass the test of being able to perform their function. They would be judged by performance and not by appearance. Consequently, the aforesaid key components or parts are incapable of being registered as designs. Escorts construction Equipment Ltd. Vs Action construction Equipment Pvt. Ltd.⁶

Marico Ltd. Vs Raj Oil Mills Ltd⁷. Bombay High Court held, phrase, —capable of being made and sold separately used in Section 2(a) covers cases not only of an article upon which a design article can be made but also can be sold separately - Therefore, such article which is separate from other parts of goods and registered separately as a design, if intended and or desired by the proprietor of the registered article, as capable of being made and sold, is saleable in the market separately - Only because such article in present circumstances may not be put up in the market for sale separately, it is not correct to say that the cap involved in the present case, cannot be said to have an independent life as an article of commerce - Therefore, cap is an article within the ambit of definition of —an article under Section 2(1) of the Designs Act.

⁶ 1999 PTC 36(Del) at pp 39,40,48

⁷ AIR 2008 Bom 11

There is a prohibition on the copyright protection, if the same design is registered under the Design Act, 2000 according to Section 15(1)⁸ of the Copyright Act, 1957. Section 15(2) of the Copyright Act, 1957 states that if a design is capable of being registered under the Design Act, 2000 but the same has not been registered, such design will cease copyright protection as soon as the article to which such design is applied is reproduced more than 50 times by an industrial process. Section 2(d) of the Design Act, 2000 excludes the artistic work defined under section 2(c) of the Copyright Act from the definition of design under the Design Act, 2000.

➤ Protection under Design Act, 2000

The Design Act protects the non-functional aspects of the object such as colors, pattern, shape etc. applied to both 2D and 3D forms. The design is registered for a period of 10 years and can be extended upto 15 years. In case of design piracy, according to Section 22 of the act, the infringer shall pay Rs, 25000 to the proprietor of the design as contract debt. The proprietor can also obtain injunction and damages.

➤ Protection under the Copyright Act, 1957

There is overlapping of the Design Act and the Copyright Act on the design protection. Section 15, Copyright Act, 1957 provides that copyright is not available where a design is registered or capable of being registered under the Design Act 2000. Also copyright in the design ceases as soon as the design is reproduced more than 50 times by the industrial process. Original artistic work, contrary to the applied artistic work, i.e. design would fall under the category of artistic work under the Copyright Protection.

➤ Protection under the Trademark Act, 1999

Fashion designers usually incorporate logos on the garment at the times of creation of clothing or accessory. In these circumstances logos become part of the design, trademark provides protection for design copying. Also the brand name is protected under the Trademark Act, 1999.

Overlap between Copyright and design laws in India

⁸ Sec. 15 Copyright Act, 1957 Special provision regarding copyright in designs registered or capable of being registered under the Indian Patents and Designs Act, 1911.

The exclusive right, known as “copyright in design” is recognized under the act. This right is different from the exclusive right which is categorized as ‘copyright’ under the Copyright Act, 1957. There arises a situation where the design can be granted registration under Design Act, 2000 and Copyright Act, 1957. The industrial and product design can be registrar under Design Act, 2000 & once the design is protected under the act, then it cannot be granted any protection under Copyright Act, 1957.⁹

In a case, where any design is capable of being registered under the Design Act, 2000, but the same has not been registered under any other act specially in Copyright Act, 1957, copyright in such design will continue to subsist and can be registered under the Copyright Act, 1957. But the copyright will cease to exist once the article to which the design is applied is produced more than 50 times.¹⁰ Thus, under the Copyright law if an article is an “artistic work”, then the same cannot be granted protection under the Design Act. And if the work is capable of registration under the Design Act, then it will cease to have copyright protection as soon as the work is reproduced more than 50 times by the industrial process.

The equivalence behind the drafting of Section 15(2), Copyright Act, 1957 was as follows:

- To prevent the overlapping of Intellectual Property Rights.
- Prohibition of enjoyment of copyright protection, once the design protection is granted.
- To forbade a person from enjoying copyright protection which is reproduced 5- times by the industrial process.

A landmark judgment was given in the case of *Microfibers v/s Girdhar*¹¹ to distinguish between artistic work and design. High Court of Delhi in the case of *Microfibers Inc. vs. Girdhar and Co. and Anr.*¹² had observed on the following guidelines:

- The definition of artistic work has a very wide connotation as it is not circumscribed by any limitation of the work possessing any artistic quality. Even an abstract work, such as a few lines or curves arbitrarily drawn would qualify as an artistic work. It may be two dimensional or three dimensional. The artistic work may or may not have visual appeal.

⁹ Sec-15(1), Copyright Act, 1957

¹⁰ Sec-15(2), Copyright Act, 1957

¹¹ 2006 (32) PTC 157

¹² 2006 (32) PTC 157

- The rights to which a holder of an original artistic work is entitled are enumerated in Section 14(c) of the Copyright act.
- It is the exclusive right of the holder of a Copyright in an original artistic work to reproduce the work in any material form. For example, a drawing of an imaginary futuristic automobile, which is an original artistic work, may be reproduced in the three-dimensional material from using an element, such as a metal sheet.
- The design protection in case of registered works under the Designs Act cannot be extended to include the copyright protection to the works which were industrially produced.
- A perusal of the Copyright Act and the Designs Act and indeed the Preamble and the Statement of Objects and Reasons of the Designs Act makes it clear that the legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc and lesser protection to design activity which is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure Artistic.
- The original paintings/artistic works which may be used to industrially produce the designed article would continue to fall within the meaning of the artistic work defined under Section 2(c) of the Copyright Act, 1957 and would be entitled to the full period of copyright protection as evident from the definition of the design under Section 2(d) of the Designs Act. However, the intention of producing the artistic work is not relevant.
- This is precisely why the legislature not only limited the protection by mandating that the copyright shall cease under the Copyright Act in a registered design but in addition, also deprived copyright protection to designs capable of being registered under the Designs Act, but not so registered, as soon as the concerned design had been applied more than 50 times by industrial process by the owner of the copyright or his licensee.
- In the original work of art, copyright would exist and the author/holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work per se.
- If the design is registered under the Designs Act, the design would lose its copyright protection under the Copyright Act. If it is a design registrable under the Designs Act but

has not so been registered, the design would continue to enjoy copyright protection under the Act so long as the threshold limit of its application on an article by an industrial process for more than 50 times is reached. But once that limit is crossed, it would lose its copyright protection under the Copyright Act. This interpretation would harmonize the Copyright and the Designs Act in accordance with the legislative intent.

In the case of *Ritika Apparels Limited vs Biba Apparels Private Ltd.*¹³, the Delhi High Court held that following the language of Section 15(2) of the Copyright Act, 1957, copyright does not subsist for drawing, design used for creating dresses, once there is manufacture of more than 50 dresses.

In the case of *Holland Company LP and Ors vs SP Industries*¹⁴, the court held that if a design can be registered under Section 14 (c), Copyright Act, 1957, copyright can be claimed. If the design is used for production of articles more than 50 times by the industrial process, the copyright ceases in the design.

In the case of *Aga Medical Corporation vs Mr. Faisal Kapadi and Anr*¹⁵, the Delhi High Court held that if a work is can be registered under the Design Act, 2000 but is not registered under the same, then that work cannot be granted copyright protection.

In the case of *Inter logo v. Tyco Industries*¹⁶ held that the objective behind the design act was to grant protection to work which lacked artistic independence and there was assumption of significance only on the application to the article. The court held that as the work falls under the Design Act, 2000 and has been produced more than 50 times, copyright protection cannot be granted for the said work. Also in the case, the plaintiff did not get the registration done for his work under the Design Act. Thus protection cannot be granted in favor of the plaintiff.

In the case of *Photoquip India vs Delhi Photo Store*¹⁷, the plaintiff made machine drawings and pilot molds from which flash lights was produced, thus copyright protection was given to both the molds and the drawings. The defendant's flash lights caused infringement of the copyright in

¹³ CS (OS) No. 18/2011

¹⁴ IA No. 1375/2014

¹⁵ 2003 (26) PTC 349

¹⁶ 1998 3 WLR 678

¹⁷ 2014 (60) PTC 563

drawings of the plaintiff. Plaintiff drawing was granted copyright protection as an artistic work. It was not possible for the defendant to reproduce the article without reverse-engineering and then he prepared illicit drawings which infringed plaintiff's copyright.

Copyright & Fashion in United Kingdom

The UK Government officially in 2006 embraced the expression "creative economy" to catch the feeling of the more extensive commitment of the innovative ventures to monetary and public activity. From that point forward, it has progressively perceived the significance of the innovative ventures, specifically the design business, as a generator of occupations, riches and social commitment. Nonetheless, regardless of its present and future potential significance to the economy, design isn't granted a similar degree of copyright insurance as other innovative businesses.

To the extent that the style business blossoms with copycat structures and occasional item life expectancies, some inquiry whether it has any longing or need to conjure copyright. Be that as it may, if the UK's imaginative ventures are to keep on thriving, assurance is principal. During a time where cell phone cameras, 3D printers and internet shopping consolidate to snap, reproduce and auction thump items in the time it takes to show an assortment at a style appear, originators should have the option to secure their works simply like different craftsmen.

The query emerges that why copyright law ought to ensure crafts or work by fashion industry when the presence of the item can be secured by the design laws?

Each unique work is consequently given insurance under the Copyright law. Be that as it may, under Article 2(7) of the Berne Convention for International insurance of Literary and Artistic Works gives some scope to the nations to secure their works of design. To be conceded copyright security under the UK law, the work must fall under the eight classifications given under area 3 of the Copyright, Designs and Patents Act, 1988. Work of style ought to be a unique masterful work, yet case laws are not for this contention as articles of clothing don't actually fall into the recorded sub-classifications of the aesthetic works. While, the most suitable

classification for crafted by style would be aesthetic craftsmanship. In this manner crafted by design should be both creative work and work of craftsmanship.

The significance of "masterful" has been talked about much of the time. "Artistic" can be characterized as the work stylishly engaging the overall population. On account of *Hensher v. Restawhile*¹⁸, the court held that a particular parlor suite which was structured with the goal for large scale manufacturing isn't masterful. Essentially, a child's cape was not held to be imaginative in light of the fact that the aim to make the aesthetic work was absent. Additionally, a bedsheet with an interwoven was not esteemed to be aesthetic on the grounds that in spite of the fact that the structure was not adequately inventive, in spite of the fact that it was satisfying to the eye. Additionally, the sweaters and cardigans were not held to be aesthetic on the grounds that despite the fact that it was shown in the Victoria and Albert Museum, they were shown as advancements in design instead of the masterful works. As of late for a situation the High Court held that the protective caps utilized in Star Wars films was not masterful on the grounds that the reason expected was not stylish. Later the Supreme Court held that caps were not models, subsequently they couldn't be secured in that way either. These cases show that judges are not ready to avow that works of style can be masterful.

Though "craftsmanship" can be shown much without any problem. Sewing and woven artwork making has been treated as art. Works of design are well on the way to be considered as works of craftsmanship on the off chance that they are one-off pieces, though the situation of the items that are mass created is indistinct. On account of *Hensher v. Restawhile*, Lord Viscount Dilhorne held that a hand-made work is craftsmanship, though Lord Simon held that craftsmanship can't be constrained to handiwork; nor is aesthetic work incongruent with machine creation.

Hence it very well may be deduced that there is a high edge fixed for indicating that the work is imaginative craftsmanship. The pieces of clothing are not ensured by copyright in the United Kingdom. Different nations like US, Germany and France any work which is unique can be ensured by Copyright law. These nations have the open rundown copyright frameworks, since they donot need to sort the work into a particular class for benefiting insurance.

¹⁸ 1976 AC 64, 1975 RPC 31

In France, innovation of work incorporates the work which "bears the stamp of creator's character". In Germany copyright secures the "individual scholarly manifestations". While in EU the "scholarly creation" test is followed. The test was utilized without precedent for the instance of abstract works in Infopaq, copyright assurance in the advanced news detailing administration.

Copyright Protection in United States of America

In the United States of America, copyright protects the original work of the author. The test is that the work should contain "modicum of creativity". The US copyright office has a voluntary registration system on the lines of Article 5(2) of the Berne Convention. The copyright registration system presumes the ownership and validity, and is a pre-requisite for filing an infringement action. Section 107 of the Copyright Act 1976 of the US provides for the fair use exception which is broader than the fair dealing exception of Europe. Fair use means that it must add value to the society or be "transformative". Thus, the scope of protection of the works of fashion is greater in the UK. For the purpose of registration, the designers have to publically stake a claim in their designs.

Differences between the Intellectual Property Laws in Europe Union and United State of America

The European Union has design right protection that give garments and accessories protection as a whole. This does not exist in U.S. and this a big advantage for the European designers.

European fashion markets existed before the US fashion industry, that's the reason behind the of the pre-existence and expansive IP laws in Europe. Whereas the New York's fashion industry started with the grant of license from the Paris designers for the production of low-cost garments and accessories. Now New York is a home for fashion licensing.

France was the first place in the world to produce original creative designs. Design has been protected in France since the 15th century, when the "fabrication of textiles" was granted protection. In France the Decree of the National Convention of July 19, 1793 granted the design protection.

The Christian Louboutin footwear designer case was regarding whether a single colour, i.e., red can be granted protection under the Intellectual Property Rights. Christian Louboutin was granted trademark protection in the U.S. over the red sole foot ware. The us trademark law also known as the Lanham Act registers trademark consisting of colour. There is a case in which a French fashion house named Yves SanitLaurant released its foot wares in various colours, including red. Louboutin filed a case against the YSL for claiming trademark infringement for the red-soul trademark. In defense, YSL challenged the grant of trademark protection to Louboutin, whether it was justified and whether the Louboutin's red sole qualified as trademark as it lacked distinctiveness and was ornamental. The United States Court of Appeals for the second circuit held that the Louboutin's red sole trademark is limited in cases where red outsole contrasts the color of the remainder of the shoe. These cases have led to a rise in litigation cases in various countries where Louboutin is seeking to protect its red-soled shoes.

Conclusion

Just as an artist puts a great amount of energy and time into creating a painting which is unique, so does the fashion designer's hard work and creativity is invested in creating a unique apparel. It is a fair thing to do to protect that the product of hard work and creativity. The competition would be promoted and not stifled if the copyright protection will be extended to the fashion industry. The fashion designs have a short product life-cycle, therefore many at times fashion designers are reluctant in protecting their IP rights because of the time and the financial cost involved. Registration of design prevents others from counterfeiting of the design and also prevents to fight against the unscrupulous competitors. Fashion industry is based on creativity and protection of the intellectual capital in the form IP rights protection helps in boosting of the economy through commercialization of the products. Also the good management of the IP rights helps in the enhancing of the goodwill of the business reputation of the eye of others.

In the Indian fashion industry, the entire garment is not given copyright protection, rather particular features of the garment. There is a prohibition on the copyright protection if the same design is registered under the Design Act, 2000 according to Section 15 (1) of the Copyright Act, 1957. Section 15 (2) of the Copyright Act, 1957 states that if a design is capable of being registered under the Design Act, but the same has not been registered, such design will cease copyright protection as soon as the article to which such design is applied is reproduced more

than 50 times by an industrial process. The European Union has design right protection that give garments and accessories protection as a whole. This does not exist in U.S. and this is a big advantage for the European designers.

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