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# **EVOLUTION AND CONCEPTUAL FRAMEWORK OF FASHION DESIGN PROTECTION**

AUTHORED BY - KHUSHI

## **INTRODUCTION**

The fashion industry has become one of the most powerful and fiscally important sources of creative industry in the present world. Fashion is not restricted to apparel and other items that people can wear or to clothing; it encompasses art, culture, innovation, identity and a business. Fashion designs have in the course of years gained a lot of economic value through the rising consumer demand, globalization and the growth of technology. Designers put a lot of creativity, effort and money into creating one of a kind fashions thus protection of their designs by the law gains more and more importance.<sup>1</sup>

Fashion designs are directly related to intellectual property rights due to the unique artistic and aesthetics. Textile styles, embroidery, drawings, patterns and decorative motifs can also capture the measure of creative craftsmanship and invention. Since fashion products are particularly prone to copying and imitating, the protection of intellectual property is critical in ensuring the protection of designers and enhancing a healthy competition in the sector. The legally binding aspects of copyright, trademark protection and the industrial design law all significantly contribute to proper safeguarding of the fashion creations against copying and commercial use.

The evolving fashion industry in the world has affected the way the protection of fashion designing is created. In the past, the fashion trends were changed slowly over the long periods; due to the emergence of fast fashion trend and online commerce, our fashion products are now found to be replicated and traded across global markets within a short time. The coming up of online technologies and social media has further enhanced the diffusion of fashion designs, aggravating the chances of pirate, counterfeit, and violation. Consequently, civilizations worldwide have tried to enforce intellectual property safeguards to creations associated with fashion.

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<sup>1</sup> P. Narayanan, Intellectual Property Law (3rd edn., Eastern Law House, New Delhi, 2007).

In India, fashion design protection takes place in an intricate legal framework encompassing the Copyright Act, 1957 and the Designs Act, 2000. Whereas copyright ensures the protection of artistic works that are original, industrial design law upholds commercially applied designs. The intersection of these statutes has resulted in a competitive legal gray area as to the nature and the scope of protection to fashion creations. The Indian courts have brought to the fore many cases pertaining to the originality, industrial application and the infringement of the fashion designs.

The intellectual property law of fashion design protection thus needs an appreciation of the association between creativity and commerce and intellectual property law. The fashion designs take a special place as they are commercial products and expressions of art. In contrast to the classical pieces of art, fashion designs are designed to be used in the society and produced in large numbers and are prone to reproduction and unauthorized commercial exploitation. Meanwhile, overprotection has the negative impacts on the competition and free circulation of fashion trends and creativeness.<sup>2</sup>

This chapter looks at the evolution of fashion design protection and the notion behind it. It examines the history of intellectual property rights in the fashion industry, and connection between fashion and creativity and the global outlook on the legal protection of fashion designs. Another aspect that was mentioned in the chapter is the increasing relevance of protection of intellectual property in promoting innovation, maintaining originality, and in promoting economic development of the fashion industry.

### **HISTORY OF FASHION INDUSTRY**

The history of development The fashion industry as a human need has a long and rather complex course over the centuries to the creative and commercial industry on the international level. Origins of fashion Fashion initially evolved as a way of restricting the human body against weather factors like skin temperature, and exposure to weather like heat, cold and rain. During the pre-historic era of civilization, the clothing was basic and practical, constructed mainly of animal skins, leaves, and fibers of the plants and natural substances around the neighborhood. But, clothing started to gain certain social, cultural, religious and economical value as the societies became more structured and culturally developed. Fashion turned out to

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<sup>2</sup> P. Narayanan, Copyright and Industrial Designs (4th edn., Eastern Law House, New Delhi, 2017).

be more than a need and was a sign of identity, prestige, status and artistic interpretation.

The patterns of clothing in ancient civilizations like Egypt, Mesopotamia, Greece, Rome, India and China were indicative of social class, culture and wealth. Rich people and royal families donned clothes that were created using costly materials, including embroidery, ornaments and precious stones, whereas the simple clothes were worn by ordinary people. Linen robes were a sign of high financial means and better hygiene in ancient Egypt, but tunics and togas which were draped dresses became a fashionable aspect of culture in Greece and Rome. Likewise, Indian civilization also evolved a rich culture of textile work involving silk, cotton, muslin, brocade and hand-woven fabrics, which became to fully appreciate the skill and mastering of art all over the world.<sup>3</sup>

In the global textile and fashion industry, India has been significantly represented in the past. Indian artisans had been credited with creating a very advanced fabric and embroidery style, dyeing methods and decorative designs. Old fashioned clothes like sarees, lehengas, turbans, and shawls echoed the regional variety and cultural identity. Through trade routes, Indian textile was being exported to other regions in Asia, Europe, and the Middle East, and India was one of the most important producers of textile in the ancient and Middle East world. Banaras, Kanchipuram, Gujarat, Kashmir and Rajasthan weaving cultures were brought to the international scene in terms of artistic and commercial merits.

In the medieval times, fashion came to be closely related to the royal courts, aristocracy and the nobility. Dress was a political insignia of social status, wealth and economic strength. Kings, queens and nobility families had their effects on fashion and we were brought to the level of making elaborate clothes, discussing fabric and their ornaments. Fashion became more in line and sophisticated and techniques of tailoring were more sophisticated and better. Embroidery, lace, jewelry, and decorative designs became significant features of the design of clothes. Fashion trends in Europe kept on varying with royal tastes and court culture, which formed the basis of the modern fashion consciousness.

Renaissance also brought a change in the nature of fashion, due to the focus on individuality, creativity, and expression of art. There was a development of more elaborate styles of clothing.

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<sup>3</sup> David Bainbridge, Intellectual Property (9th edn., Pearson Education, London, 2012).

The growth of trade and intercultural interactions between the countries made new fabrics, colours, styles to be brought into fashion market. The consumption of fashion by rich merchants and city elites grew stronger, and fashion grew as a commercial venture. Gradually fashion became not only a matter of royalty, but also a more general social occurrence.<sup>4</sup>

One of the most significant historical events that influenced the history of the fashion industry was during the Industrial Revolution in the eighteenth and nineteenth century. Textile production and garment production were revolutionized with the use of mechanization. Spinning machines, power looms and sewing machines were invented and allowed mass production of fabrics and clothing at far less cost. Much of the handcraft skills were overtaken by factory based production leading to the availability of more clothes to majority. Industrialization further promoted the urbanization process, trading and economic development which left Esen huge consumer bases in fashion products.

Fashion houses, department stores, and organized retail markets were created with the help of the Industrial Revolution. Paris became a hub of high end fashion and design. Charles Frederick Worth was one of the pioneering designers deserving credit as the first designer who established the concept of fashion design as a creative industry. Even fashion magazines and adverts took their toll on the tastes and consumer behaviour of the people. Fashion trends were instantaneous across nation and continental boundaries with the improvement of transportation and communication systems.

The twentieth century saw the unprecedented development and change in the fashion industry. Fashion trends and consumer culture were greatly impacted by social, political, and technological developments. In the early twentieth century, the styles of clothing were made simpler and more practical to be worn by women; designers like Coco Chanel responded to the trend, considering social roles and the increased involvement of women in social life. Subsequently, Christian Dior, Yves Saint Laurent and Gianni Versace later transformed the luxury fashion industry with innovations in designs, brand, and marketing worldwide.

In the twentieth century the cinema, television and the media had significant influence in the

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<sup>4</sup> W.R. Cornish, David Llewelyn and Tanya Aplin, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights (8th edn., Sweet & Maxwell, London, 2013).

creation of modern fashion culture. Fashion idols who include celebrities, movie stars, and famous people affected the tastes of consumers across the globe. The fashion became a very lucrative international enterprise that was influenced by the advertisement, branding and the mass consumerism. The ready-to-wear sector grew at a high rate and popular garments could be accessed by broader groups in the society.<sup>5</sup>

In India, the fashion industry underwent significant change with the independence and more particularly with the economic liberalization in 1991. The liberalization policies allowed the Indian markets to be exposed to international brands, foreign investment and global trend in fashion. The reasons were urbanization, an increase in disposable income, and lifestyle changes that led to the increased demand of fashionable attire and luxury items. The Indian designers have managed to merge traditional craftsmanship with contemporary fashion designs and this has established a unique identity in the mode of fashion around the world.

The design house of Ritu Kumar, Rohit Bal, Manish Malhotra, Tarun Tahiliani, Sabyasachi Mukherjee, and Anita Dongre were prominent Indian designers who made a huge contribution to commercializing the Indian fashion abroad. The Indian embroidery, handloom, block printing, zari work as well as traditional textiles became the part of the modern fashion. Fashion weeks like India Fashion Week and Lakme Fashion Week only enhanced the Indian fashion industry as far as its visibility and commercialisation were concerned.

The fashion industry has been characterized by the growth of the digital age and globalization which is the driving force in the twenty-first century. Non-offline retail shopping, fashion blogs, social media, online advertising, influencer culture have disrupted fashion marketing and consumer interactions. Online and digital media have brought consumption of global fashion trends to the immediate attention of the consumers. Fast fashion businesses are fast to duplicate runway designs and sell them at a low cost which creates a lot of competition in the fashion industry.

Concurrently, high commercialization of the fashion industry has raised concerns associated with piracy, counterfeiting, and copying of designs without the owners consent. Designer

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<sup>5</sup> Susan Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law* (Rutgers University Press, New Brunswick, 2005).

fashion is often copied and counterfeited, without the designer owning the rights and losing economic value and exclusivity. Increased digitization has facilitated and augmented infringements. As a result, the protection of intellectual property has been of great importance in terms of protecting creativity, innovation and commercial concerns within the fashion industry.

The fashion industry today is one of the most creative industries globally with an enormous contribution to employment, exports, tourism and economic growth. Fashion is also a strong cultural and commercial force that has impacted ways of life, identity and consumerism. The rising economic worth of fashion designs has also shed some light on the issue of successful legal security using the copyright law, design law, trademarks and other intellectual property systems. The historical evolution of the fashion industry thus shows how closely creativity, commerce, culture and the law relate in order to determine the contemporary fashion markets<sup>6</sup>.

## **EVOLUTION OF INTELLECTUAL PROPERTY PROTECTION** **IN FASHION**

The development of the intellectual property protection within the fashion industry is directly related to the progress in the sphere of creativity, commercialization and globalization of the fashion markets. Fashion designs have been seen to consistently incorporate artistic expression, culture and innovation. Traditionally, however, the design of fashion pieces was not afforded some form of protection commercially by law due to the belief that such items were more utilitarian, as opposed to more artistic and warranting specific rights. With fashion slowly becoming a big commercial industry, there was a need to safeguard original designs, brand name, and creativity.

A legend, handiwork and exclusivity was the key factors in the early years of the fashion industry that influenced designer. Fashionist trends were spread gradually, and copying was restrictive, because there are no technologies of mass production. People could not be imitated easily, tailors and artisans created clothes one after another, and this was not so significant in business. But as industrialization and mechanized manufacture of textile began to emerge in the nineteenth century, fashion products were now able to be mass-produced. This heightened chances of copying and commercial exploitation of original designs illegally.

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<sup>6</sup> P. Narayanan, Copyright and Industrial Designs (4th edn., Eastern Law House, New Delhi, 2017).

The industrial revolution contributed significantly to the protection of intellectual property as regards fashion. The mechanized production allowed the manufacturers to copy the successful fashion designs fast enough, and make them a wide spreading and cheaper than before. With the more commercialized fashion came the need by designers and fashion houses to find legal ways to shield their designs against imitations. Trademark law was also one among the earliest methods of protection adopted in the fashion industry during this time. To identify their products in the competitive markets and retain brand recognition, the fashion houses relied on trademarks, labels and logos.<sup>7</sup>

The copyright law was also developed, which reinforced the protection of artistic and creative, in relation to fashion. Copyright protection was initially targeted at book, painting and music. With time courts and legal systems started realizing that certain aspects of fashion designs such as sketches, textile prints, embroideries, and other artistic motifs could be an artistic work which will be subject to copyright. Nonetheless, due to the fact that clothing also has functional uses, laws were not usually able to distinguish the degree to which fashion designs ought to adopt the protection of copyright.

Another significant-level of protection became industrial design protection that also defends fashion creations. The design laws were put in place to ensure that the appearance, shape, pattern and ornamental aspect of products meant to be industrial productions are safeguarded. Some fashion products including garment, handbags, footwear as well as accessories progressively became eligible to industrial design registration. Design protection was intended to ensure sufficiency in balance between the interests of creators and competition in society by providing few exclusive rights on commercially used designs.

France and Italy, among others, were the first ones in Europe to realize the need to safeguard fashion designs because of the development of luxury fashion markets. Paris became a world fashion hub, and fashion houses wanted the protection of fashion houses through the law in order to prevent duplications of haute couture designs. The Berne Convention protecting Literary and Artistic Work and the subsequent Agreement on trade related aspects of intellectual property rights (TRIPS) also helped in coming up with international principles in protecting intellectual property.<sup>8</sup>

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<sup>7</sup> Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases and Materials* (2nd edn., Oxford University Press, Oxford, 2013).

<sup>8</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn., Oxford University Press, New York, 2014).

In the United States, the design of fashion garments received less protection due to the traditional perceptions of clothing as utilitarian and practical. The general rule of the common law regarding copyright was that useful articles should not fall under the protection of the copyright law, unless it was possible to separate the artistic elements of the articles out of the functional ones. But fashion companies started to extensively use trademarks and trade dress protection as a means to safeguard brand identity and product appearance. To protect against counterfeiting and preserve exclusivity, luxury fashion brands became more dependent on trademark law.

The fashion industry has become highly globalized in the twentieth century and this has raised greater concerns on issues of piracy, counterfeiting, and other illegally duplicated works. The mass media, cinema, advertising, and then digital technology boosted the transference of fashion across borders. With fashion emerging as a multi-billion-dollar business, an increased importance was placed on intellectual protection of property in order to protect innovation, creativity and the economy. Fashion houses embraced a lot in branding, designing and selling and legal protection was necessary in terms of ensuring that one had a competitive advantage.

The protection of intellectual property in India in regard to fashion was mainly initiated by the Copyright Act, 1957, Designs Act, 2000 and trademarks. Protecting textile prints, embroideries, artistic drawings and fashion labels were also of greater concern to Indian designers. The high pace of development of the Indian fashion industry following the economic liberalization generated more awareness of the value of intellectual property rights. Nevertheless, the issue of overlap between the copyright law and design law put a lot of legal confusion when it comes to the protection of fashion design specifically when artistic works were industrially reproduced.

The introduction of electronic technology and internet shopping in the twenty first century further revolutionized protection of intellectual property in fashion. Online sites and social media platforms facilitated the quick spread of fashion images and designs, leading to heightened threats of online piracy and unauthorized duplications. Fast fashion firms started to copy the runway models in the short term and sell them under the same price. All these created controversies over the sufficiency of existing intellectual property laws to defend fashion creativity.

In the contemporary society, protection of intellectual property in fashion can involve copyright, trademark, protection against industrial designs, trade dress, geographical indications and in some instances patenting of technological advances. The law of fashion has developed to become a distinctive discipline serving the legal matters of creativity, branding, licensing, counterfeiting, and Internet infringement. History of intellectual property protection in fashion can be included in the growing appreciation of fashion designs beyond their functional character; that fashion designs are special creative property which merits protection by law.<sup>9</sup>

### **COPYRIGHT AS A TYPE OF ARTISTIC PROTECTION**

Copyright legislation is among the most significant types of intellectual property safeguards of artistic and creative products. It also bestows creators with exclusive rights under the law regarding the original works and safeguarding them against copying, reproduction, distribution, and other types of exploitation. The copyright law also promotes creativity and innovation by making sure that the creator gets recognition and economic rewards out of their creativity. Within the fashion industry, copyright protection can greatly contribute in protecting artistic features used as fashion designs like sketches, textile prints, embroidery, graphic illustrations, surface decoration and ornamental designs.

The idea of copyright was mainly aimed at literary and artistic creations such as books, paintings, music, sculptures etc. Copyright protection continued to be broadened over the years to cover many expressions of creativity. In some cases, fashion designs require a lot of artistic effort and originality and that is why they can be recognized as a subject of the copyright protection. Designers use their creativity, imagination, technical expertise and efforts to design fashionable items that are unique and the copyright law aims at ensuring that such innovative products are not used against their will.

The copyright protection in India is regulated by the Copyright Act, 1957. Artistic works under the Act encompass paintings, drawings, sketches, engravings, photographs as well as works of art craftsmanship. Fashion drawings, fabrics designs, embroideries or artistic prints might thus be considered artistic works provided that they meet the originality requirement. Protection of copyright is automatic since it is created when the work is produced and need not

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<sup>9</sup> David Bainbridge, Intellectual Property (9th edn., Pearson Education, London, 2012).

be registered, but may provide evidence in cases of lawsuits.<sup>10</sup>

Among the key characteristics of a copyright protection is that it securitizes the implementation of an idea, but not an idea. This applies in fashion law whereby general concepts, styles, trends and themes cannot be monopolized, but individual artistic expressions contained in a design may be granted protection. An example is that a pattern made by a designer is a protecting concept whereas a general thought of floral fashion cannot be patented. This principle balances the encouragement of creativity and freedom of artistic expression in the fashion industry.

Although of great importance, copyright protection in fashion is quite a challenging area in law, as fashion articles entail functional and utilitarian sides as well. Clothing is mostly created to be a practical use as a wearable product, which restricts the coverage of copyright. In determining the eligibility of garments to be copyrighted, courts in different jurisdictions tended to sequester artistic and functional aspects of the objects. The duplication in the copyright law in India between Copyright Act, 1957 and the Designs Act, 2000, poses further legal barriers to life of copyright protection of fashion creations.

15 This section of the Copyright Act states that in instances where an artistic work, which can be registered under the Designs Act, is reproduced industrially over fifty times then copyright is no longer enforced. This provision poses an ambiguity to the designers since fashion products are normally produced and marketed massively. This has made designers experience problems with regard to which law to protect their works by either copyright or design.

Protection of copyright, however, is very beneficial to the fashion industry due to the ability to retain originality, creativity and artistic identity. It helps designers to avoid unauthorized reproduction of original artistic elements and allows them to invest in creative innovation. Good copyright protection is also helping to expand the creative economy as it will stimulate artistic experimentation and business expansion in the fashion market.<sup>11</sup>

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<sup>10</sup> P. Narayanan, *Copyright and Industrial Designs* (4th edn., Eastern Law House, New Delhi, 2017).

<sup>11</sup> W.R. Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th edn., Sweet & Maxwell, London, 2013).

## **RELATIONSHIP BETWEEN FASHION AND CREATIVITY**

Fashion and creativity are closely interrelated as fashion as a phenomenon is essentially a mode of artistic and innovative expression. The fashion business is based on the creativity which helps designers to create new designs, patterns, forms and other aesthetic ideas that impact culture and consumer behavior. Fashion is not simply about clothes or looks; it is the imagination, individuality, culture, identity, and artistic vision. Constant creativity and innovation are essential in the success and development of the fashion industry.

Designers of fashion blend skills in art, technology, as well as cultural influence and individuality in creating original fashion items. All the fashion designs will have a creative process to them, which will entail conceptualization, sketching, fabric choice, colour matching, ornamentation, and designing. To create new and aesthetically unique products, designers often get the ideas of history, art, architecture, nature, music, cinema, and social movements. Imagination thus becomes the one that spurs fashion trends and styles evolution.

The association between fashion and inventiveness can also be comprehended on the basis of culture. Fashion mirrors the traditions, values and identities of societies of various time-eras. Cultural heritage and artisan work is commonly reflected in traditional clothing styles, textile patterns, embroidery and artistic elements used in decorative designs. India, in particular, embraces a wide variety of cultural styles in its fashion with handloom-textiles, local embroidery, block printing, zari work and traditional weaving methods. The Indian designers are known to mingle the traditional forms of art and the new fashion styles which makes them have their individual artistic expressions.<sup>12</sup>

Fashion comes with creativity, which is interconnected with innovation and originality. Fashion designers are always trying to do something new with their designs to make them unlike the existing designs in order to capture consumers so as to create brand identity. Creativity is a valuable economic resource since originality adds value to the commercial worth and exclusivity of fashion products. Considering innovative designs and artistic uniqueness is mainly involved in luxury fashion brands that need the reputation and demand of the market.

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<sup>12</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn., Oxford University Press, New York, 2014).

The process of commercialization of fashion has heightened the role of creativity in the fashion industry. Fashion firms spend a lot of resources on designing, marketing, branding and advertising to develop differentiated products and competitive edge. The designers have an opportunity to exercise their creativity on national and international fronts through fashion shows, runway events, celebrity endorsement, and digital media platforms. This is because creativity is not only an artistic aspect of the fashion business but also acts as commercial approach to the industry.

Simultaneously, there are issues in the interaction between fashion and creativity under the influence of commercialization and fast fashion. Competing manufacturers and retailers tend to imitate the popular trends in fashion and rapidly reproduce them. This imitation has the potential to decrease the economic worth and exclusivity of original work, thus deterring designers to invest in innovation. The creative freedom and commercial interests in the fashion industry are also at risk because of counterfeiting as well as piracy.<sup>13</sup>

IP is very instrumental in safeguarding creativity in fashion by bringing about legal rights, exclusive rights to writers. A combination of copyright law, trademarks protection and the design law help in upholding originality and promoting innovation by deterring unauthorized duplication and commercial misuse. Copyright of artistic content secures a designer to enjoy an economic reward of their creativity as well as enhancing future growth in the fashion industry.

Digital technology, social media, and international markets have led to the growth of the role of fashion creativity in the contemporary global economy. New styles and new creative products are in demand by consumers on a regular basis promoting designers to explore new artistic concepts. Creativity has thus been the key factor influencing identity, development and longevity of the fashion industry.

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<sup>13</sup> Susan Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law* (Rutgers University Press, New Brunswick, 2005).