

## Fashion Copying and Design of the Law

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The paper provides an overview of the existing arguments towards grant of property rights in fashion creations, including a historic perspective of the fashion industry, piracy paradox as explained by Professor Raustiala and Professor Sprigman, and the current global fashion industry. In doing so, the article questions social cultural function of fashion as a subset of IP policy. As an integral constituent of 'negative spaces', fashion creations stand largely unprotected. The article takes into account development of American and European jurisprudence to propose a regime for protection of fashion creations in India.

**Keywords:** Piracy paradox, fashion industry, intellectual property, DPPA, trademark, FFI

Legal theory and jurisprudence have continued to question the rationale behind intellectual property, especially where the scope of intellectual property rights (IPR) is sought to be expanded or altered to address and include an aspect of human innovation or creation under its wings.<sup>1</sup> Theories, perspectives and justifications continue to be challenged at each point in the development of science, creativity, and law. Intellectual property through history has been justified though the Lockean concept of natural rights and the value added theory; through Hegel's property in personhood, economic incentive theory or incentive for invention and utilitarian theory and still continues to seek more from justifications and theories to explain the grant of such right. The utilitarian theory, one of the most popular and widely recognized justifications, based its reasoning in maximizing benefit of maximum number by adopting policies, founding legislative systems and laws which would maximize happiness of the greatest number of members of the community. It relies on delimiting and restricting property in order to promote innovation, creation towards the development of society. Various theories have been propounded but a widely accepted justification lies in the following premise: Intellectual property is a monopoly right that grants to its owner the right to exclusively enjoy the rights and benefits so granted. In order to exclusively enjoy the rights and benefits arising therefrom, the entrepreneur-owner is willing to induce capital, and

other investments to produce newer products. It is this grant of monopoly right coupled with the willingness to invest stands as an incentive for innovation. Thus, it is presumed that the grant of IPR would promote innovation and development.

This justification has surprisingly been inapplicable as far as certain aspects of human creation are concerned such as: Fashion industry<sup>2</sup> and magicians.<sup>3</sup> Professor Raustiala and Professor Sprigman<sup>2</sup> refer to a concept called 'negative spaces' which defy traditional justification for intellectual property law. 'Negative space' constitutes a set of creations where the traditional theories of IPR do not apply. Professor Raustiala and Professor Sprigman elucidated the concept of negative spaces *vis-a-vis* the fashion industry while studying justification behind granting IPR in the fashion industry and illustrated low equilibrium of IP and inapplicability of traditional justification to the fashion industry. Copying and unauthorized appropriation in the fashion industry has been criticized and but still stands accepted and tolerated on the grounds of 'homage', 'dedication', 'inspiration' rather than classifying such actions as infringement and taking appropriate legal action. The operation of the fashion industry requires large investment, constant innovation and production within short periods of time on a continual basis with or without the grant of protection of IPR. The life cycle of an element in fashion witnesses the following stages: A novel artistic creation, for the purpose of illustration, a silk scarf is introduced, to distinguish from the masses that have followed a trend 'chiffon

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scarves' until a new trend or fashion is introduced. This novel creation – 'silk scarves' would witness popularity, with a rapid and mass by imitation, forming yet another need to create and innovate and thereby enabling the act of distinction from the masses. The need to innovate springs from the need to distinguish from the masses and move away from standardization.

As Judge Rifkind, the co-chairman of the United States President's Commission on the Patent system critically analysed, 'The really great, creative geniuses of this world would have contributed their inventions even if there were a jail penalty for doing so'.<sup>4</sup>

Traditional justifications seem to be over turned with the nature and operation of the fashion industry. Looking for a justification is not easy.

This paper provides an overview of the current global apparel industry catering to the factual and legal perspectives thereon and outlines the historic development of the fashion and the protection thereof in Europe. It also depicts difficulties witnessed in affording traditional copyright protection. Further discussed is the development of the American jurisprudence *vis-a-vis* fashion industry and its distinction with the European perspective followed by difficulties in granting a copyright *per se* in respect of fashion creations. Also discussed is the applicability and requirements for IP protection through case laws. A review of the cultural function of apparel *vis-a-vis* intellectual property rights and the Indian fashion industry under its current IPR regime is also given.

### The Apparel Industry

The global apparel industry's total revenue in 2006 was valued at US \$ 1,252.8 billion. The percentage share of different regions of the world in the total trade revenue in 2006 was: Asia-Pacific (35.40), Europe (29.40), USA (22.30), and rest of the world (12.90).<sup>5</sup>

Plain figures and revenues would recognize fashion as an integral component of world trade. The industry is entirely dependent on creative content, the same being categorized as *passé* and development of new creative content. Unlike the other industries based on creative content such as music, films, and publishing industry, fashion stands on a rather different foot. The expression 'different foot' is explained since the need to innovate springs from a desire to stand out from the masses contrary to the justification for other creative content based products in the realm of intellectual

property. The need to innovate and re-design springs from a need to move away from standardization and deviate from the masses. However, this relation between IP and fashion has been addressed by several scholars.<sup>6</sup> The current scope of intellectual property law (*vis-a-vis* fashion) has been criticized as an unusual disconnection<sup>7</sup> with copyright law and a 'bizarre blindness towards the inherent artistry and creativity'.<sup>8</sup>

### The European Union

Historically Paris, France has been recognized as one of the fashion capitals, the others being Milan and New York. This makes it particularly relevant to study the development of fashion trends and therefore legislative enactments to protect such trends from misappropriation. Fashion trends formed an important aspect of the French lifestyles set in the early 17th century. Since the seventeenth century, French manufacturers and exporters have been known for their reputation for tasteful luxury products and have represented the French as possessing a more refined taste than other nations.<sup>9</sup> Lyonnais silk manufacturers took up the task of promoting and advertising the cultural ascendancy of the court of Versailles. These silk manufacturers sent dolls dressed in the latest styles in Paris to cities in the rest of France and other European cities to vie for orders for local dressmakers. This trend also witnessed circulation of cheaper versions of fabrics sowed. Although French haute couture has been known for its styling, exclusivity, copying has played a pivotal role in establishing a relationship in fashion.<sup>9, 10</sup> The logic of fashion was identified as conflict and constant tension between original creations and reproduction.

The changes brought about in women's couture in the 1920s and 1930s made fashion easier to copy and more accessible. Copying continued to be the biggest problem. American buyers, Ida H Oliver and Carolina Davis were accused of selling designs to manufacturers. Police raids unveiled the stealing operation consisting of sketches of inter alia coats, suits by Callot, Lanvin, Patou, Vionnet, Worth.<sup>11</sup> The copyright extension to fashion design finds its roots in the English and French copyright system that protects fashion designs. Sketches and designs were easy to copy and recreate. Vionnet the French designer protected the technique of wearing beading into fabrics through patents. However patent law was not designed to protect fashion and couture. Designers needed a system to protect designs before and after

being made public where imitations would seep into the market, undercutting the designers' prices, and creating a backward bending curve as far as a demand of designer apparel was concerned. The 19<sup>th</sup> Century France saw efforts to protect fashion designs under two separate French laws seeking to reward human creativity and innovation. The law of 1793 catered to protection of literary and artistic works while the 1806 law protected industrial designs catering to manufacturers needs and required the article to be deposited with the Conseil des Prud'hommes before sale of such products. The courts applied the 1806 law to protect fashion design. The jurisprudence began with the courts application of the 1806 law to a hat that was deposited with the Conseil des Prud'hommes. This law prevented servile imitations which has the effect of stifling future creativity. In 1860, the Court ruled the law of 1806 was inapplicable as far as clothing was concerned since 'it was neither a work of art, nor a new invention, but a compilation ...of objects of a known form.' This turn of the judiciary kept designers away from the courts and legal actions against counterfeiting acts for a while. It was only after the amendment of the law in 1902 that expanded the scope of protection of artistic and literary property to include designers of ornaments that paved the way for protection for clothing and apparel. After intense lobbying by the Chambers of commerce the legislature enacted a law that protected the interests of industrial designers to an extent by providing protection to objects that were distinct, recognizable which gave it a new and distinct physiognomy. Although this law did not categorically mention clothing as a component of protection, it gave rise to a new scheme of deposits at the National Industrial Property Office that protected designs and designers. Thus follows the French law that grants a copyright in respect of a fashion design as a work of art that constitutes the non-functional aesthetic aspect of the design. English law protects fashion design as soon as such design can be traced to a drawing expressed in a material medium. The European Union currently extends a right to its member countries in respect of its registered and unregistered fashion designs.<sup>12</sup> The Directive grants the applicant protection against unauthorized appropriation. The proprietor of a registered design has the right to prevent all unauthorized person from appropriating or using similar designs within the territorial limit of the European Union for a period of 25 years. An unregistered fashion design also enjoys protection like a registered fashion design, against deliberate copying

and imitation, however the period of protection is limited to 3 years.

### **The United States of America**

Fashion in the United States has traditionally and historically been denied copyright protection. The basis for this denial lies in the belief that garments and clothes are items of utility devoid of any copyrightable elements. Fashion has been an integral part of the copyists' regime, although it stands more prominent in current years. France was and continues to be the fashion capital with Milan and New York as developing markets. Although New York is recognized on fashion radar, the United States has been known for producing imitations and knock-offs from Parisian couture. The 'inspirational' nature of New York fashion was visible then and now. The race to create novel designs was reduced to laying eyes on French designs and bringing them from across the Atlantic before anyone else could. Soon there were several imitations of French designs within the US. The pace at which imitations and 'inspirational works' were created by various fashion houses resulted in a review of the intellectual property regime *vis-a-vis* fashion. The United States witnessed several bills since 1914 pressing for a copyright protection in respect of articles of utility<sup>13</sup> which have always stood opposed. In 1932, a limited cartel, called the Fashion Originators Guild (Guild) was established in the United States that sought to limit copying amongst the American designers. One of the most striking effects of the establishment of the Guild was that copying from French designers was tacitly permitted; but copying from amongst American designers came with an underlying sanction. The Guild registered fashion designers and their designs and sought to boycott copyists who copied from 'original' American designers. Although the guild was quite successful at controlling design piracy, the guild failed to perform its objectives after the Supreme Court's decision in *Fashion Originator's Guild v Federal Trade Commission*<sup>14</sup> that held the practices of the guild unfair and a violation of the Sherman Act and the Clayton Act.

Since this decision, there have been several efforts in the United States to draw a framework to protect and govern fashion designs without conflicting with the principles of anti-trust laws. France, the capital of fashion granted IPR in respect of its apparel design; a trend that soon spread across Europe through the EU directive, the Legal Protection of Designs.<sup>15</sup> The

growing trend to afford some protection to the apparel designs and intense lobbying efforts in the United States saw draft legislation- The Design Piracy Prohibition Act, still under the process of review for legislation. The Design Piracy Prohibition Act (DPPA) was introduced in March 2006 for extending copyright protection in respect of the appearance as a whole of an article of apparel, including its ornamentation. The Act proposes to address a plethora of creations and objects forming part of fashion and the fashion industry. A 'fashion design' is defined as the appearance as a whole of an article of apparel, including its ornamentation. The term apparel is defined to include 'men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear; handbags, purses, and tote bags; belts, and eyeglass frames.' Such an inclusive and broad definition ensures protection to a variety of creations falling within the ambit and scope of fashion and style. The bill grants the designer a 3 year term of protection in respect of his creations, provided such designs are registered with the US copyright office within 3 months of the design going public failing which, the designer forfeits his rights in respect of the creations. Although viewed as running parallel to traditional forms of IP, this legislation seeks to consolidate the actions taken in respect of protection and infringement of fashion creations and its ancillary creations thereby serving as a welcome change. An 'infringing article' is any article, the design of which has been copied from a design protected under the act, without the consent of the owner of the protected design but does not include an illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium. A design is not deemed to have been copied from a protected design if it is original and not substantially similar in appearance to a protected design. The phrase 'substantially similar' in appearance may lead to confusion regarding infringement which can only be clarified by the courts by laying down standards of similarity. Although they may not be radically different keeping in mind the standards of similarity for trade marks and design infringements it would be interesting to note the difference if any afforded under the DPPA especially after noting the broad definition of 'fashion apparel'.

The EU Directive grants protection in respect of registered designs for a period of 25 years as compared to the proposed legislation in the US that grants protection for a period of 3 years. The term of

copyright appears imbalanced given that fashion trends are known to last just over a few months, taken over by new designs with changing weather and seasons.

### **Copyright: To be or not to be**

The growth and development of fashion industry is evident from the transition of garments performing a mere utilitarian function to the artistic creation of the garment. Apparel and garments have gone beyond performing mere social and cultural functions to an expression of art and aesthetics. Garments and apparel as one of the constituents of fashion has transgressed boundaries from a mere garment to a work of art, more aesthetic than utilitarian in nature. Clothes today are more artistic than functional in character and distinction. The artistic or creative component is what differentiates the past from the current in fashion. The growth of intellectual property in the 20th century, especially copyright law and the incentives afforded to artistic works which served as a ray of hope to fashion designers to protect their artistic works in their apparel designs. A copyright is granted in respect of original artistic works. Hence for the purpose of ensuring a copyright protection it would be relevant to distinguish the functional or utilitarian elements from the artistic appearance and artistic elements of the object. Given that the artistic expressive component is rarely separable from the apparel, a grant of copyright would traverse beyond well defined boundaries. Even with a modern silhouette, the artistic element is 'distilled' into the garment as against a mere application. It is only a visible abundance of 'artistic expression' over the 'utility factor' would enable the grant of copyright. In spite of sever lobbying efforts and the courts stance to logically support protection of apparel designs, the difficulty in *inter alia* separating functional and non-functional elements resulted in inapplicability of copyright law *vis-a-vis* the fashion industry. It is also pertinent to note that an essentially artistic element today may form part of the functional aspect in coming years. Women's suits, pea coats and bell bottom trousers introduced by Chanel<sup>16</sup> were artistic in its times, but could be classified as just another wide legged trouser.

Further, as Professor Raustiala and Professor Sprigman<sup>2</sup> argued the fashion industry operates within a regime that fails to deter innovation irrespective of the free appropriation; in fact free appropriation may actually promote innovation. Although this proposition was explained *vis-a-vis* the American law

and referred principally to the American fashion industry, the fashion industry in essence being global in nature, the conclusions and proposition drawn would be applicable globally. The life cycle of a design in the fashion industry is based on the much acclaimed 'piracy paradox' to create a 'negative space'. The inapplicability of copyright law to the fashion industry has not caused any instability, nor has it adversely affected the incentive to innovate and create in the fashion industry. The continuing streak of innovation and creativity in spite of an absence of an IP right says a lot about the justification for such a right to limit or restrict copyist's trends. The traditional justification of the labour theory, property in person hood, economic incentive and the utilitarian theory have all failed to apply *vis-a-vis* the fashion industry. However, the rampant 'referencing' and 'inspirational works' after the fall of the Fashion Originators Guild shows that the industry is in need of a right; evidently not in the nature of a copyright. It is beyond doubt that the fashion industry needs to regulate dissemination of designs and art to reduce if not curb unauthorized use and appropriation of creative artistic works.

Notwithstanding the negative space and the low IP equilibrium, well recognized and applicable in the US; the European Union has granted rights in respect of its fashion design.<sup>17</sup> This right has become the subject of litigation of several high profile cases like *Yves Saint Laurent v Ralph Lauren*.<sup>18</sup> In this case Ralph Lauren was fined a sum of \$385,000 for copying a tuxedo dress designed by Yves Saint Laurent.

Although the EU directive serves to protect fashion design within the territorial limits of the European Union, fashion design in the rest of the world remains largely unprotected under copyright law. The global fashion industry turned to other aspects of property protection to protect their fashion creations-trademark law viewed initially as a mere logo. French designers took refuge under brand names, labels and logos. This logo ranged from the name, initials, signature or any other symbol seeking to identify the designs with the designers. Vionnet was known to use her signature, fingerprints, and numbers on her labels. Susan Scafidi explains refers to this trend as 'logomania'. Referring to the famous Armani logo, for the Emporio Armani line, the designer says:

I liked the eagle just fine, but I wasn't sure about my monogram on it, since I had always been a little finicky about the excessive use of monograms in the world of fashion, for instance,

the craze for initials everywhere, from belt buckles to overcoat linings, and then taking them from the lining to the exterior, using it as a decoration on the clothing itself. The problem was the growing phenomenon of copies, which were increasingly common. The imitators were really good at it. Sometimes I fall for it myself, and I would really have to look closely to see whether something was by me. We needed a logo, even if it did not constitute a foolproof deterrent.<sup>19</sup>

Trademarks being merely an indication of origin, the protection offered by trademark law are very restrictive in its ambit and scope of protection. Trademark law prevents unauthorized application and sale of products bearing the registered or unregistered trade mark. It merely prevents unauthorized persons from applying registered trademarks or unjustly benefiting from such application. Trademarks have precious little to contribute to prevent design piracy.

### Requirements for Protection

Currently, the intellectual property rights (besides trademark law) protecting fashion designs are the Design right and a Copyright- granted and claimed in respect of fashion or garments rests with the actual fabric design. Designers may choose to protect their three dimensional designs- i.e. the actual object constituting the cut, slope and pattern under the law of designs. A design right grants protection for a maximum period of 15 years but is limited to original, novel designs that have not been disclosed to the public whether in India or anywhere in the world, significantly distinguishable from any known designs or combination of designs.

As stated by Lord Justice Baggalay,

In order to justify design...articles of dress which are in constant and daily use, there must according to my view of the case have some clearly marked and defined difference between that which is to be registered as a new design and that which has gone before. If the difference of half an inch in the placing of a stud or any similar trifling difference from previous designs were to be taken as justifying registration...no one could have has a collar in his own house by his servants without infringing some registered design. It would be oppressive in the extreme if any trifling change in the shape of such an article would justify the registration of the design so as to preclude the rest

of the world from making an article of the same or like form.<sup>20</sup>

In qualifying what may constitute novel, Lord Justice Owen stated referring to the same case:

We must not allow the industry to be oppressed. It is not every mere difference of cut, every change in outline, every change of length or breadth of configuration in a simple and familiar article of dress that constitutes novelty in design....There must not be a mere novelty in outline, but a substantial novelty in design having regard to the nature of the article. It cannot be said that there is a new design every time a coat or waistcoat is made with a different slope or different number of buttons...to hold that would be to paralyze industry.<sup>20</sup>

In a case concerning design for a tie, the introduction of a pleat meant a mere difference in the number of stitches and was held to be incapable of registration.<sup>21</sup> As far as a weaving old design to create a new design or taking from old designs is concerned, courts have been restrictive in granting design rights. In the case of *Harrison v Taylor*<sup>22</sup>, the plaintiff's right in a combination of small and large honeycomb designs in spite of both consisting of known designs was upheld. The designs were never used as combination to form a new design. Similarly the case of *Rig v Farman* reiterated the right in a combination of more than one old designs as long as the resultant design is a one whole design and not a mere multiplicity of designs.

Hence for the purpose of ensuring an IPR, it is imperative that design confirms to the standards of novelty and registration. A design protected under design law can be used only in respect of the corresponding goods for which it has been registered. It is also pertinent to note that the law does not grant a copyright and a design right in respect of the same creation. A failure of register a creation capable of being registered as a design may result in loss of copyright and design. A copyright in the artistic work shall cease to exist as soon as the design has been applied to any article more than fifty times by an industrial process. This requirement requires prompt action by designers and authors seeking to protect their creations. The path to protection entails efforts towards registration wherever necessary and an even quicker response to infringement or threat to infringement.

The Second Circuit, in the US has denied copyright protection to clothing, stating that "clothes are particularly unlikely to meet ... [the test for conceptual

separability] – the very decorative elements that stand out being intrinsic to the decorative function of the clothing,"<sup>23</sup> but has granted copyright to fabric design, which it considered are "writings" for purposes of copyright law and therefore stand protected."<sup>24</sup>

Noting the difficulty in establishing a design right in the shape of garment, that designer may possible not enjoy any design of the apparel. A right if any, may however be claimed only in respect of the design or more precisely pattern affixed on the fabric that is used to make the apparel. One may rely on principles of copyright law to protect the artistic works in the fabric used to create the apparel. The copyright extends only to the artistic work in the fabric: designs, patterns and prints on the fabric, viewed in a two dimensional image; and not to the ultimate creation that is made from such a fabric. Such protection serves little relevance as far as protection of fashion design is concerned. Although grant of the right is relatively easy as compared to a design right, contesting a case of infringement has posed problems. In case of unauthorized use, the owner, author of such works is required to confront the following issues: The test of the ordinary viewer or the test of an ordinary man is likely to give greater advantage to the copyist- defendant rather than the author-plaintiff. A claim to damages for infringement must be supported by an 'evidence of access' and a 'substantial similarity' to the original work. Assuming that an access is proved, the works of the copyist must be 'substantially similar' to that of the original to conclude that both works look similar or the common man is able to conclude that one was based on the other. It is common in industry to come across similar designs re-created in various fabrics, using different materials having a drastically distinct visual effect and image from the original.

### **Cultural Function and Intellectual Property Rights**

The cultural value of intellectual property has witnessed different standards across different cultures. Clothes, attire and appearance are one of the various parameters distinguishing cultures across the globe. Granting monopoly rights over an integral aspect of a cultural attribute, performing a utility function is interfering with the social and cultural fabric. Against this backdrop, it is re-iterated that today clothes are more artistic than functional in nature and characteristic. With the advent of globalization, clothes and apparel have moved from mere products to brands and seem to be categorized, characterized

and identified with a logo. It would be interesting to note the transition clothes as a commodity or product have undergone. Until the early seventies, logos on clothes were generally hidden from view, discreetly placed on the inside of the collar. Small designer emblems appeared on the outside of the shirts but the same was limited to sporty attire that was restricted to golf courses and tennis courts of the rich. It was only about the late seventies that this style became the mass style for parents and kids. The Ralph Lauren Polo horseman was dragged decisively onto the outside of the shirt.<sup>25</sup> It is evident that the logo is an epitome of the price of the clothing and serves the same function when hidden or placed for social viewing. However the placing of the logo more prominently made way for a socially imperative flamboyance. Over the past decade the sizes of the logos have been so enlarged, that the clothing appears to be a mere carrier of the logo/brand. To put it simply, the brand has become more important than the product. The logos are metaphorically disassociating themselves from the clothing to employ it as a fashion accessory to propagate a brand. As elaborated by Naomi Klein, 'Hilfiger and Polo turned clothing into wearable brand billboards.'<sup>25</sup> It is this commoditisation and excessive consumerism that has caused an unrest in the social cultural balance *vis-a-vis* apparels and accessories.

### **Indian Fashion Industry and the Intellectual Property Regime**

Noting the rights guaranteed in Europe and the Bill proposed in the US, India stands not far behind. The Fashion Foundation of India (FFI) a newly constituted body consisting of leading designer from India seeks to protect IP rights against rampant copying, 'referencing' and 'inspiration'. It will actively research, through its Research and Analysis Cell, and commission studies to bring forth various aspects of the fashion industry. It will also set up a legal cell to assist the design houses in matters including IPR, licensing, contracts, and arbitration. Only design houses can apply for membership of the Foundation and a business representative nominated by each design house will be a member of the Foundation. A jury comprising of persons directly linked to fashion will review and analyse each membership application.<sup>26</sup> One can clearly map the similarities between the objects of the Fashion Originator's Guild in the USA and the Fashion Foundation of India. The current legal framework provides an interesting mode

to protect the creativity in fashion. The Indian fashion industry is presently valued at \$67.6 million and is poised to grow to \$187.7 million by 2012.<sup>27</sup> Indian designers have heavily relied on ancient traditional and indigenous designs to create garments. Designers continue to use ancient and indigenous art and craft to either create or embellish their garments.

'Indian designers have understood the needs of the international market and are working accordingly. With the clever use of embellishments, indigenous techniques and craft — the Indianness intact — they are creating modern outfits, which are receiving global response.'<sup>27</sup>

A substantial number of fashion designers rely on indigenous and traditional crafts, dyeing, block printing and embroidery techniques to create new designs and structures.<sup>28</sup> Indian designers and couture has relied and borrowed immensely from ancient methods and techniques of clothing and culture. Ancient traditional and indigenous art that was once limited to distinct regions identified by the expertise of a set of people is now a part of the ramp. Various methods such as dyeing, block printing, embroidery, have been used to create the basic fabric. Indigenous methods such as chikan kari, phulkari, kantha, and other forms of embroidery and cutting have been used to create apparel designs and revive ancient art forms. However, conflicts are bound to arise where ancient art forms and handicrafts stand outside the purview of IPR. It would logically follow that designs that primarily rely on such forms of art and handicraft naturally stay outside the purview of intellectual property regime. It is beyond the reason of justice to grant IPR to derivative fruits based upon ancient and traditional knowledge, where the roots of such knowledge and intellectual creations stand beyond property rights.

The intellectual property regime in India provides for protection under the Designs Act 2000, the Copyright Act, 1957 and the Geographical Indications of Goods (Registration and Prohibition) Act, 1999. Although there seems to be three distinct legislations, that protect three distinct characteristics in the process and lifetime of the fashion apparel or the accessory. The artistic work in the sketches of the designs (as soon as they are reduced to a material tangible medium) is protected under the Copyright Act 1957. The Designs Act 2000, is so drafted to permit protection of the non-functional aspects of an object, having visual appeal, such that design that include the

features of shape configuration, pattern, ornament or composition of lines or colours applied to any two dimensional or three dimensional or on both forms. The Third schedule to the Design Rules, 2001 provides an exhaustive list of products and articles in respect of which an application may be made to the Controller. Such a design right remains in force for a period of ten years, extendable subject to conditions, for a total period of 15 years. Noting India's diversity in traditional knowledge and other indigenous art forms, the current regime also affords protection through the GI Act, 1999. The Fourth schedule provides for a classification of goods protectable under the Act. As far as textiles as fabrics are concerned, the registration of geographical indications evidently depicts the protection of fashion apparel *vis-a-vis* the texture and artistic value in the fabric used to create apparels and accessories. In accordance with a report<sup>29</sup>, 15 kinds of GIs have been registered in respect of textiles. In addition to the law of designs. It is also pertinent to note that the Kasuti Embroidery from Karnataka, Kutch embroidery from Gujarat, and Sujini embroidery works from Bihar have all been granted GIs.

### Conclusion

This brings the basis of granting IP rights in respect of apparel. It is with this incentive of a monopoly right in mind that fashion houses or individual creators invest large sums to create, obtain and further benefit out of such a monopoly right. In spite of the various legislations, the fashion industry suffers seems to continually suffer from piracy. Inspiration, referencing and homage form an integral and operative of the fashion industry. The restrictive and limited monopoly and the term granted by the traditional copyright regime would have the effect of stifling and restricting the free distribution and dissemination of fashion trends- an integral aspect of the fashion industry. A brief history of the fashion design in 'fashion forward' countries such as France also depicts that an unauthorized use and infringement by fashion houses has caused concern amongst designers, nevertheless overlooking and turning a blind eye towards unlawful acts by small reproducers. It is the inherent nature of the industry that turns a blind and a deaf ear to the act of misappropriation. The social, cultural function of clothing and attire has gone through a sea of change. The flamboyance associated with the logo is worn louder today than yesteryears affording a larger and prominent visibility to the logo/trademark as against the quality of the

product. It may be argued that a curb on the term of the right granted may help in curbing piracy knowing the nature and lifespan of a trend in fashion.

It is evident from the way a large number of apparel houses operate that the revenue model consists of obtaining the huge returns by licensing the trademark to smaller production houses. This trend creates different markets under the same logo by creating different clothing lines. For instance, designer Armani operates about 3 different lines offering similar designs with a difference in quality depending upon the price, that are identified by different logos Armani exchange, Emporio Armani, and Giorgio Armani, each catering to different clientele differentiated by the ability to purchase. This trend of creating different lines makes the logo and brand available to the not so elite category for a cut above the lesser known brands, thereby limiting act of piracy and acts of referencing. Similarly some instances of unauthorized imitation may continue to occur in cases of personal consumption and use where individuals may have apparel and dresses created by the local tailor or seamstress as an imitation of a popular design for personal consumption. Notwithstanding the moral rights argument in favour of the author in respect of his creations, the fashion industry's response is its stimuli to a market that has survived for so long without an IP regime with its financial ability to withstand the acts of piracy. It is only of recent occurrence that the European Court granted an award of \$383,000 for an infringement of a tuxedo dress, while Yves Saint Laurent was fined a sum of \$11,000 in 1985.<sup>30</sup> It makes one sit back and think whether IP *vis-a-vis* the fashion industry should be viewed and expanded from the perspective of the industry that has shown a resilience to the continual piracy or from the perspective of the author who would want to exercise his moral rights in respect of the creative works and thereby benefit from such appropriation. In spite of a number of legislations to curb unauthorized imitations, piracy and other acts causing infringement of intellectual property, the inherent nature of this industry makes piracy a positive test of its popularity – because only the test of fire makes fine steel!

### References

- 1 Barnett Jonathan M, Shopping for Gucci on canal street: Reflections on status consumption, intellectual property, and the incentive thesis, *Virginia Law Review*, 91 (6) (2005) 1381; Priya Bharathi S, Comment, there is more than one way to skin



- a copycat: The emergence of trade dress to combat design piracy of fashion works, *Texas Tech Law Review*, 27 (4) (1996) 1667; Mencken Jennifer, A design for the copyright of fashion, *Boston College Intellectual Property & Technology Forum*, 1997, F. 121201, [http://www.bc.edu/bc\\_org/avp/law/st\\_onrg/iptf/articles/content/1997121201.html](http://www.bc.edu/bc_org/avp/law/st_onrg/iptf/articles/content/1997121201.html).
- 2 Raustiala Kal and Sprigman Chris, The Piracy Paradox: Innovation and intellectual property in fashion design, *Virginia Law Review*, 92 (8) (2006) 1687, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=878401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878401).
  - 3 Loshin Jacob, Secrets revealed: How magicians protect intellectual property without law, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1005564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005564) (6 October 2008).
  - 4 Report on the President's Commission on the patent system referred to in Ikechi Mgbefo, *Global Biopiracy: Patents and Indigenous Knowledge* (Cornell University Press, Ithaca), 2006, p. 23.
  - 5 <http://www.fashionproducts.com/fashion-apparel-overview.html> (6 October 2008).
  - 6 Litman Jessica, The exclusive right to read, *Cardozo Arts & Entertainment Law Journal*, 13 (1) (1994) 29; Barnett Jonathan M, Shopping for Gucci on canal street: Reflections on status consumption, intellectual property, and the incentive thesis, *Virginia Law Review*, 91 (6) (2005) 1381; Priya Bharathi S, Comment, there is more than one way to skin a copycat: The emergence of trade dress to combat design piracy of fashion works, *Texas Tech Law Review*, 27 (4) (1996) 1667, 1669–72; Susan Scafidi's blog, <http://www.counterfeit-chic.com>.
  - 7 Litman Jessica, The exclusive right to read, *Cardozo Arts & Entertainment Law Journal*, 13 (1) (1994) 29, 44–45.
  - 8 Hetherington Samantha L, Fashion runways are no longer the public domain: Applying the common law right of publicity to haute couture fashion design, *Hastings Communications & Entertainment Law Journal*, 24 (1) (2001) 43, 71.
  - 9 Stewart Mary Lynn, Copying and copyrighting haute couture: Democratizing fashion, 1900–1930s (28) *French Historical Studies*, 103, <http://fhs.dukejournals.org/cgi/reprint/28/1/103.pdf> (6 October 2008).
  - 10 Roche Daniel, The Culture of Clothing: Dress and Fashion in the Ancient Regime, trans. Jean Birrell (Cambridge, 1994).
  - 11 US Woman in Paris Court on Piracy charge' *Women's Wear Daily*, 22 December 1931 referred to in Stewart Mary Lynn, Copying and copyrighting haute couture: Democratizing fashion, 1900–1930s, <http://fhs.dukejournals.org/cgi/reprint/28/1/103.pdf> (6 October 2008).
  - 12 European Directive on the Legal Protection of Designs Council Directive 98/71, 1998 O.J. (L 289) 28 (EC).
  - 13 Schmidt Rocky, Designer law: Fashioning a remedy for design piracy, *UCLA Law Review*, 30 (1983) 861; Mencken Jennifer, A design for the copyright of fashion, *Boston College Intellectual Property & Technology Forum*, 1997, F. 121201.
  - 14 312 US 457 (1941).
  - 15 Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs, 1998 OJ L 289.
  - 16 [http://womenshistory.about.com/od/chanelcoco/a/coco\\_chanel.htm](http://womenshistory.about.com/od/chanelcoco/a/coco_chanel.htm) (6 October 2008).
  - 17 Although the European Directive for the protection of Designs came into force only in 1995, the French Copyright Act, 1793 granted copyright in respect of fashion design as 'applied art'.
  - 18 *Societe Yves Saint Laurent Couture SA v Societe Louis Dreyfus Retail Management SA* [1994] E.C.C. 512 (Trib. Comm. (Paris)).
  - 19 Renata Molho, Being Armani Baldini Castoldi Dalai Editore Inc (1 April 2008); [http://www.counterfeit-chic.com/legal\\_trends](http://www.counterfeit-chic.com/legal_trends) (6 October 2008).
  - 20 *Le May v Welch* (1884) 28. Ch. D.
  - 21 *Smith v Hope Brothers*, 6 Rep. Pat. Cas 200. (1859) r. H& N 301.
  - 22 *Whimsicality Inc v Rubie's Costume Co*, 891 F.2d 452, 455 (2d Cir. 1989).
  - 23 *Knitwaves Inc v Lollytogs Ltd*, 71 F.3d 996, 1002 (2d Cir. 1995).
  - 24 Naomi Klein, No Logo p.28, 37 (Picador, 2002).
  - 25 <http://businessofcinema.com/news.php?newsid=9404&page=2> (6 October 2008).
  - 26 [http://www.asianpacificpost.com/portal2/c1ee8c441bbda748011bc2832d8600aa\\_Indian\\_fashion\\_takes\\_off\\_on\\_the\\_world\\_s\\_runways.do.html](http://www.asianpacificpost.com/portal2/c1ee8c441bbda748011bc2832d8600aa_Indian_fashion_takes_off_on_the_world_s_runways.do.html) (6 October 2008).
  - 27 <http://www.zeenews.com/articles.asp?aid=429462&archisec=ARC> (6 October 2008).
  - 28 Press Information Bureau, Press release, 3 April 2008,
  - 29 <http://pib.nic.in/release/release.asp?relid=37074>.
  - 30 Teri Agins, Copy shops: Fashion knockoffs hit stores before originals as designers seethe, *The Wall Street Journal*, 8 August 1994, at A1; Christine Magdo, Protecting works of fashion from design piracy, <http://leda.law.harvard.edu/leda/data/36/MAGDO.html> (12 February 2009).