

## CHAPTER VIII

### Conclusion and Suggestions

*“What you wear is how you present yourself to the world, especially today, when human contact are so quick. Fashion is instant language.”*

– Miuccia Prada

The IP laws that intend to protect fashion designs are the Patents Act 1970, the Copyright Act 1957, the Designs Act 2000, the Trademarks Act 1999, and the Geographical Indications of Goods Act 1999. Even with these laws in place, there are various complications and challenges that arise when protecting fashion designs. Under the Copyright Act 1957 two issues were deliberated: firstly, adopting conceptual separability as a doctrine to distinguish between artistic and functional elements in a fashion design and secondly, the overlap that exists between the Copyright Act 1957 and the Designs Act 2000 that creates problems to the fashion designers to protect their designs. Dealing with the first issue, the practice followed in the U.S. and the EU was discussed. In the U.S., the doctrine of conceptual separability lays down two prong tests to separate the artistic element from the functional element. The EU follows a principle of non-discrimination; works of art and applied art are equally protected. Indian copyright law protects an artistic work irrespective of its aesthetic quality, but not with functional elements. The research has deliberated on the approaches followed by the U.S. and the EU to determine what's better suited for India. With respect to the second issue, sections 15(1) and (2) of the Copyright Act 1957 give rise to an overlap between it and the Designs Act 2000. The research considered the legislative history behind these provisions to disseminate the intent of the Parliament. Furthermore, the research also considered the stance of the UK because India being a commonwealth country, is influenced by the UK. It was identified that the UK also had a similar overlap provision, but it is now repealed. Indian Courts justified section 15 of the Copyright Act 1957 on the ground that

the commercialisation of any article should be protected under the Designs Act 2000 and is devoid of protection under the Copyright Act 1957. However, fifty units provided under section 15 seem to have been taken from the CDPA, 1988.

Fashion designs determine trends in society. What was fashion yesterday is not fashion today, and what is fashionable today is not fashion tomorrow. As quickly as fashion changes, the quicker are people to adapt to trends. There used to be three cycles of fashion. But with the advent of the internet and globalisation, a trend could be made overnight. Fashion designs, when it comes to shelf-life, are very volatile, except for haute couture fashion. Haute couture fashion is considered an art and couturier, an artist. Haute Couture, the top in the pyramid of fashion designs, does not change, at least not as often as luxury fashion and ready-to-wear fashion. Luxury fashion and ready-to-wear fashion are susceptible to change. The research considered if the Designs Act 2000 has any provision that could embrace this volatility of fashion designs. The Designs Act 2000 does not protect a fashion design as a whole; it protects only the features, a combination of lines etc. Consequently, a fashion designer has to file multiple applications to protect one fashion design. Even if a fashion designer considers applying multiple applications, the registration of a fashion design takes at least a year. By the time a fashion design is registered, it might not even be the fashion anymore. The research considered unregistered design protection in the UK and EU to solve this issue. Like copyright subsists upon the creation of the work, unregistered design subsists upon disclosure to the public. The difficulties faced by the UK and the EU were discussed to determine which approach India could follow.

Fashion designers may come and go, but brands remain forever. This statement is especially true about international fashion brands like Gucci, Prada, Chanel etc. These fashion brands have transcended generations and boundaries and have the potential to stay well-known across the globe for years to come. There are brands that we know about but do not know the designer behind them. That establishes the significance of a brand to a fashion house. But fashion counterfeits deprive a fashion house of its brand value and reputation. The free riders pose a threat to the

fashion industry. The research considered fashion counterfeiting as a problem under the Trademarks Act 1999. The Act does not contain the word ‘counterfeit’ in it but intends to regulate it to some extent under fewer sections. The chapter considered counterfeiting itself as an issue. Any solution to combat counterfeiting in the economy would also combat fashion counterfeits. To solve the crime of counterfeiting, the research considered Kenya’s step of establishing an exclusive and dedicated authority to counter counterfeiting. To throw more light on the Anti-Counterfeiting Agency of Kenya, a detailed analysis was made of the Anti-Counterfeiting Act 2008. Furthermore, to combat any crime, the punishment prescribed should create deterrence in the minds of the people. However, the punishment for falsely using trademarks and trade descriptions under the Trademarks Act 1999 is meagre. The Customs Act 1972 also combat counterfeiting in the course of imports and exports to and from the country. A comparative analysis was made of the punishment prescribed in India for counterfeiting against other countries. It was noted that India had prescribed the least punishment, and the fine is not also based on the value of the counterfeited goods, but instead, it’s pre-determined under the Trademarks Act 1999, unlike Customs Act 1972. Legal provisions, rules and regulations alone are not sufficient to combat counterfeiting in the fashion industry. Thus, employing technology and including NGOs to combat counterfeiting was discussed.

Culture and Fashion are often intertwined. Culture reflects fashion, and fashion reflects culture. Fashion borrows extensively from culture. Fashion designers consider cultural inspiration for their designs. The haute couture collection of Rahul Mishra was inspired by Indian crafts and arts. India is known for its artistic craftsmanship and handicrafts. Many handicrafts and fabrics are granted GIs to protect them from being infringed and appropriated. Many cultural appropriations of GIs are in real infringement of GI. However, GI, a community right given to indigenous people, is often not enforced. Post-registration measures set apart ‘Darjeeling Tea’ from other GIs. The TBI and its effective steps to protect Darjeeling Tea from infringing is commendable. The research analysed if similar steps could be followed by the registered proprietors of fashion-related GIs like

Kanjeevaram silk, Mysore silk, Chikan work etc. Furthermore, it was discussed if blockchain technology could provide more authenticity to fashion-related GIs.

After conducting extensive research on the shortcomings of the Indian IPR laws in protecting fashion designs, the following suggestions are put forth;

1. It is suggested that India should adopt Conceptual Separability to protect fashion designs. The Copyright Act 1957 protects works that are devoid of functional elements, irrespective of their aesthetic elements. Neither the Copyright Office nor the Indian Judiciary has laid down any tests to separate artistic work from the functional elements. After considering both the U.S. and the EU approach, it is suggested to follow the U.S. approach, conceptual separability. In the EU, works, whether functional or artistic, are protected under copyright law, but that's not so the case in India. Indian copyright law, like the U.S., protects only artistic elements in a work and not its functionality. It would be over-ambitious for India to follow the EU approach. So, the two-prong tests laid by the SCOTUS in the *Star-Athletica v. Varsity Brands* should be considered;
  - a. if the work can be perceived as a two- or three-dimensional work of art separate from the useful article and secondly,
  - b. if the work would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.
2. After a detailed discourse in Chapter 3, it is suggested that Section 15 of the Copyright Act 1957 overlaps with the Designs Act 2000, inspired by Section 52 of the CDPA 1988 of the UK. UK, before Brexit repealed the provision to give effect to the Cofemel judgement passed by the EU.

However, Indian copyright law still overlaps with the designs law and makes it difficult for fashion designers to claim protection under the Copyright Act 1957 and the Designs Act 2000. The designs manufactured over fifty times would lose their copyright protection under the Copyright Act 1957. This number fifty seems to have been taken from the CDPA Act 1988. With the advent of globalisation and the demand for fashion designs, the number needs to be relooked or unregistered design has to find its place under the Designs Act, 2000.

3. It is suggested that introducing unregistered design protection to protect fashion designs in India under the Designs Act 2000 is of prime importance. The Designs Act 2000 mandates registration to claim copyright protection, unlike the Copyright Act 1957. A fashion design as a whole cannot claim copyright protection. The features of shape, configuration, a combination of lines etc are protected as a design and a separate application has to be filed for each of the design features. Fashion changes very quickly, and the process of design registration takes a year. Thus, even a registered design loses its importance. To solve this, an unregistered design should be introduced. After analysing the concept of unregistered designs in the EU and the UK and identifying the problems faced by them in granting unregistered design protection, section 4 of the Designs Act 2000 could continue as conditions to claim design registration. A fashion design that is either original or novel can claim copyright protection. The EU provides a grace of twelve months to test the product before registering a design. It would be very much beneficial to our fashion designers if they are also given some grace time to decide whether or not to register their designs, based on the success of their design.
4. It is suggested that the Kenyan Model needs to be adopted to combat counterfeiting in the fashion industry. The Trademarks Act 1999 intends to protect various fashion brands from being infringed or diluted, but not

adequately protecting against counterfeiting. The word ‘counterfeiting’ has to be introduced and comprehensively defined under the Trademarks Act 1999. To define the word, India should consider the definition of the word ‘counterfeiting’ under the Anti-Counterfeiting Act 2008. Furthermore, Kenya is the only country to have a dedicated authority, Anti-Counterfeiting Agency, to combat counterfeiting. India should follow the strategy of Kenya and have exclusive authority to combat counterfeiting. Lastly, the fines prescribed for falsely applying trademark and trade descriptions are fixed under the Trademarks Act 1999, instead, the fines should be based on the value of the goods counterfeited.

5. A suggestion of Non-legal solutions are made to stop counterfeiting in the fashion industry. Consumers are the reason why counterfeiters manufacture counterfeits. After extensive research on the role of the consumer in the business of counterfeits, it can be concluded that creating awareness about counterfeiting could assist in combating counterfeiting. In France, there are two fashion industry-specific NGOs that work closely with governmental and international agencies to stop counterfeiting. Though India has ASPA, we do not have any fashion-specific NGOs to stop counterfeiting in India. The Fashion Design Council of India should consider this as a scope for improvement and join hands with the Indian government to make India counterfeit-free. Creating campaigns, road shows, and posters by the NGOs could help in combating counterfeiting in India. Another non-legal solution would be to introduce technology in checking counterfeiting. Indian fashion brands should employ various technological solutions to promote the authenticity of their products to the consumers and combat counterfeiting. Blockchain technology could also be utilised to stop counterfeiting.
6. It is suggested that fashion related GIs should adopt the Darjeeling Tea model to protect the GI tags adequately. The TBI has obtained a copyright registration for the logo as artistic work under the Copyright Act 1957,

certificate mark registration under the Trademarks Act 1999 and GI registration under the Geographical Indications of the Goods Act 1999 for 'Darjeeling Tea'. TBI has also applied for trademark registrations in various countries. Having an IP thicket is beneficial to catch infringement. The registered proprietors of fashion-related GIs should follow the model of TBI and secure multiple IP protections. Furthermore, blockchain technology also could be used to trace the authenticity and quality of GI-tagged goods.

7. It is suggested that India should consider ratifying the Lisbon Agreement and Geneva Act to ensure international registration of the GIs. The Lisbon Agreement and the Geneva Act enables protection for AOOs and GIs respectively across the member nations through one application. Since India has not ratified these international agreements, GI has to be registered in each country which is a tedious and burdensome process. Indian fashion-related GIs like Sangneri block print, Kanjeevaram silk etc have potential international markets and it's crucial to have such GIs registered in other countries. Ratifying these international agreements would mean that GI proprietors of the fashion-related GI tags could seek protection across member countries with one application.

This research focused on the problems and challenges with the current IP law regime of India in protecting fashion designs. Inadequate protection for fashion designs leaves designers open to infringement and copying. It is essential for policymakers to implement the suggestions to acknowledge the distinctive nature of fashion designs and build a strong legislative framework that effectively protects the rights of designers in order to promote innovation, creativity, and the expansion of the fashion industry in India. By doing this, India may foster an atmosphere that promotes innovation, financial investment, and industry expansion, ultimately benefiting both fashion designers and customers. From time to time, reviewing the laws and checking the viability of the laws are very important to protect a volatile fashion industry.