

Chapter III

Protection of fashion designs - Need and Significance

3.1 Introduction

Fashion has played a prominent role for a long time in human evolution. Fashion and clothing are as ancient as the civilization itself. Fashion in India has evolved from the times of the Indus Valley civilization to the contemporary times of Bollywood. Fashion is ever-changing and trending across the country, and people are ever eager to keep abreast with the changing trends. India is a country that is rich in culture, traditions and customs. Indians adorn themselves according to the geographical climate they live in, the festivals they celebrate and the religion they believe in. Mekhela Chadar of Assam, Saree in South India, Ghagra Choli of Gujarat and Rajasthan and Salwar Kameez across India are prominent clothing in India. To protect the geographical importance of traditions and traditions, geographical indications are granted to Pashmina Wool, Mysore Silk Saree, and Santipur Saree of Kolkata. We have come a long way from using animal skins and grass as clothing during the Indus Valley civilization to manufacturing Haute Couture and luxury fashion. This chapter briefly discusses the history and types of fashion designs. Next, jurisprudential theories are applied to examine if fashion designs could be granted IP protection. Lastly, the lacuna in the IP laws in protecting fashion designs are highlighted for further discussion in the following chapters.

3.1.1 Brief Evolution of Fashion Designs in India

During the Harappan civilization, fashion was well-known to Indians. They used gold and other naturally available gems to make ornaments. There is also a record

of them applying lipstick.¹⁶ The historians have found proof at several Harappan sites of the ornaments made of gold, silver, ivory, copper, bronze, shell, faience, carnelian, steatite, serpentine, agate, amazonite, lapis lazuli, turquoise, amethyst, terracotta and bone. These ornaments are evidence to show that the Harappan people had an artistic sense and a love for self-adornment.¹⁷ Historians also suggest that there must be a large number of workshops and shops that sell large varieties of ornaments. These ornaments also suggest that the trade was inevitable. Harappan people not only made use of the domestically available precious metals but also imported long cylindrical beads of carnelian from Mesopotamia. During the Harappan civilization, they usually used one piece of clothing, but later in the Mauryan period, they accentuated their beauty using three pieces of clothing. They used one piece of cloth as a blouse to cover their bosom, one piece to cover their lower body and the last piece as a shawl over the head.¹⁸ During the Harappan civilization and Mauryan era, both men and women were equally fond of ornaments. They also used a varied colour of dyes to make their clothing look vibrant and fashionable.¹⁹ There was a cultural transition in clothing and fashion during the Mughal period in India. Mughal rulers became extensively fond of Indian silk and promoted it across the globe. After the advent of Europeans, crop tops, shirts, and suits have found their place in India. There has always been a craze in India for fashion. Along with their societal importance, textile and clothing have an economic impact in India.

At present Indian apparel sector value stands at \$ 200 billion and has contributed 3% to the Indian GDP.²⁰ Furthermore, India had been estimated to make \$59.3

¹⁶ Krishan Lal Grover & Ritu Singh, *Trade and Commerce in Ancient India*, 5 INT'L J.L. MGMT. & HUMAN. 2186, 2190 (2022).

¹⁷ D. R., Editor Bhandarkar. *India* (1929).

¹⁸ Guha & Sudeshna, "Negotiating Evidence: History, Archaeology and the Indus Civilisation." 39 (2), *Mod. Asian Stud*, 399, 405 (2005).

¹⁹ *Id* at 410 - Guha and Sudeshna

²⁰ Majumdar, Abhijit & Shaw, Mahesh & Sinha, Sanjib, *COVID-19 Debunks the Myth of Socially Sustainable Supply Chain: A Case of the Clothing Industry in South Asian Countries*, 24 *SCP*, 150, 152 (2020).

billion in the apparel market by 2022²¹, the sixth largest in the world. It also provides direct employment to around 45 million people.²² India is known for its yarn-spinning capacity and stands in second place in the world. India has 64% of the world's looms and is the largest country with looms in the world. India is the second largest textile producer in the world, second only to China. During the pandemic, in 2021-2022, India witnessed the highest-ever exports in the textile and apparel industry at \$ 44.4 billion. The export of ready-to-wear garments stood at \$16 billion in 2021-2022. There was a growth of 51% in man-made textiles in 2021-2022. The expected revenue from the fashion industry is likely to reach \$106 billion by 2026.²³ But economists believe there will be a global downfall of trade in the fashion industry in 2023.²⁴

Now, we have landed in the era of Metaverse fashion, where fashion shows are being organised digitally. The whole world is witnessing the echoes of the word 'metaverse'. Metaverse, though it was only a fantasy a decade before, is now a current reality. The U.S. research-based company Gartner has predicted that by 2026 quarter of people would spend at least one hour on Metaverse either for work, shopping or education.²⁵ Decentraland hosted the world's biggest and first digital fashion week from the 23rd to the 27th of March 2022, where famous brands like Tommy Hilfiger, Dolce & Gabbana, Vogue Arabia, and Jacob & Co participated.²⁶ Virtual fashion, to be manufactured, requires no fibres and factories but only digital infrastructure. Irrespective of this credible revenue generation and technological advancement, the Indian apparel and textile industry has a huge scope for improvement. The present research takes into consideration only the IPR laws that could potentially help and support fashion designers in protecting

²¹ Vaishali Dar, *A paradigm shift in the Indian fashion industry*, May 14, 2023, 01:00 IST, <https://www.financialexpress.com/lifestyle/how-rules-of-fashion-industry-is-being-rewritten-for-wider-customer-reach/3086622/>

²² Khurana K. *The Indian fashion and textile sector in and post COVID-19 times*, 9 *Fash Text* (2022).

²³ Tripti Mehta, *How the Year 2021 Panned for Businesses and Where are they headed in 2022*, *Business of Fashion*, Dec. 2021, at 27.

²⁴ Imran Amed, Sarah André, Achim Berg, *The State of Fashion 2023: Holding onto growth as global clouds gather*; <https://www.mckinsey.com/industries/retail/our-insights/state-of-fashion#/>

²⁵ David Brinbam, *Metaverse for Fashion Industry*, *Fibre2Fashion*, Mar 2022 at 24.

²⁶ *Id.*

their fashion designs in India, and this can promote the business of the Indian textile and Apparel industry. However, there are various other economic reasons: lack of governmental schemes, outdated equipment, lack of infrastructure, and lack of digitalisation that stalls the growth of the sector and those areas have scope for future research.

3.1.2 Defining a fashion design

Defining fashion design is very crucial for this research as it aims at finding if the fashion designs are protected adequately under the IP law regime. It is of prime importance to know what constitutes a fashion design for the purpose of this research. One can experience fashion designs as merely utilitarian i.e. to cover one's body or can consider aesthetic appeal and decoration along with its utilitarian function.²⁷ One person might spend hours making himself/herself look fashionable but the other might not care at all. Whatever they choose to wear, they do it for themselves and the world. People tend to express themselves to the community mainly through fashion. Given these different perceptions, defining fashion might be complex and challenging. The term fashion design used throughout this thesis would include “shape or combination of shapes, colour or combination of colours, designs or combination of designs, ornamentation, the overall appearance of the fashion design and the design itself”. There are five types of fashion designs; haute couture fashion, luxury fashion, fast fashion, economy Fashion and ready-to-wear fashion. Their brand value and reputation are also considered with utmost focus in this research.

1. *Haute Couture fashion* is a customised unique embellished garment that is not mass-produced. Haute Couture, a French word, would mean ‘high sewing’ in English. To attain the status of haute couturier one has to register at the Chambre Syndicale de la Haute Couture in France and the French Ministry of Industry shall be the appropriate authority to grant such status.

²⁷ Kristin L. Black, *Crimes of Fashion: Is Imitation Truly the Sincerest Form of Flattery*, 19 KAN. J.L. & PUB. POL'y 505, 510 (2010).

Currently, there are seventeen haute couturiers recognised, and none of them belong to India. They exhibit their fashion designs twice a year. Haute Couture fashion and luxury fashion houses invest millions of money to create customised, intricate and embellished designs. For example, back in the 1920s, a gown of dove grey chiffon decorated with precious metals and more than fifty thousand Swarovski beads amounted to \$90,000 and took more than 150 hours of labour.²⁸ Haute Couture designers in India include Sabyasachi Mukherjee, Manish Malhotra, Neeta Lulla, Tarun Tahiliani, and Anita Dongre. Couture collections are usually handmade and thus are time-consuming. Haute Couture is looked at as a work of artistic craftsmanship coupled with perfection. The consumer market is not huge for this type of fashion but irrespective of this haute couture is considered to be at the top of the fashion pyramid because of its market value.

2. *Luxury fashion* is high-quality, expensive and custom-made clothing which are sold to a particular segment of the population. Luxury fashion consists of six fashion cycles; spring, summer, transitional, fall, resort and holiday. They are made using high-quality materials that have a popular trademark etched on them. The consumer market is bigger for luxury fashion compared to that of haute couture. Consumers are ready to spend exorbitant amounts of money to procure exuberant and exclusive luxury fashion. Dolce and Gabbana, Rolex, Prada, Tiffany, Zara, and Hermès are the few renowned luxury brands with a cross-border reputation. Luxury fashion brands like Ritu Kumar, House of Masaba, and Anju Modi are prominent in India. Louis Vuitton in 2002 the first international premier luxury brand to arrive in India. The luxury market in India was valued at over \$%5 billion in 2021

²⁸Lauren Sherman, The Cult of Couture, June 28, 2006, 12:30 AM ET, https://images.forbes.com/2006/06/27/haute-couture-fashion_cx_ls_0628feat_ls.html

and now the expected growth is predicted to be another 10% in the coming 5 years.²⁹

3. Ready-to-wear fashion is also known as prêt-à-porter where the garments are available in all sizes, further tailoring of the garment is not required and sold as a finished product. Ready to wear is often machine-made fashion. FabIndia, Biba, Flying Machine and Louis Philippe are a few of the prominent players in ready-to-wear fashion in India.

4. Fast fashion consists of mass-produced garments at a cheaper price without paying much attention to quality and style. Fast fashion is blooming because they introduce the current fashion trend at a cheaper price so as to monetise as quickly as possible. Koai, Urban Suburban, Nori, and Basque are a few well-known Indian fast fashion brands as reported in Vogue.

3.1.3 Subjective element of Fashion

Fashion has different meanings to different people based on how they perceive the word 'fashion'. What is fashionable to one person may not be fashionable to others. Fashion is very subjective and is not perceived alike by all. To begin with, clothes mean different things to different people based on their social life, status, lifestyle and context. A fashion design or object could be aesthetic or art for a few people; few might consider it functional or utilitarian.³⁰ Suppose a fashion design has a utilitarian aspect, it has to be protected under patents. However, it cannot be protected under patent law because patents demand an invention to be new and

²⁹ Dana Givens, *India's Luxury Market Is Booming as Consumers Spend on High-End Goods and Travel*, Oct. 31, 2022, <https://robbreport.com/lifestyle/news/more-luxury-brands-are-coming-to-india-market-1234766968/>

³⁰ Morganosky, M., *Aesthetic and Utilitarian Qualities of Clothing: Use of a Multidimensional Clothing Value Model*, J. Home Econl, 13, at 15 (1984).

non-obvious. Fashion designs are not usually new, but are original. It must be protected under copyright if it's an artistic work irrespective of its aesthetic quality. However, copyright law cannot protect fashion designs adequately because of its functional or utilitarian aspects. This dichotomy makes protecting fashion designs under the IP law regime challenging. Irrespective of a fashion design being utilitarian or aesthetic, they can be protected as trade dresses under the trademark law and their brands, logos, and labels can be protected as trademarks. However, counterfeiting of fashion designs are not properly tackled by the Trademarks Act, 1999.

3.1.4 Considering Fashion Design as Intellectual Property

According to the World Intellectual Property Office (WIPO), intellectual property refers to the creation of the mind that includes inventions, literary and artistic works and symbols, names and images used in trade and commerce. WIPO further distinguishes between industrial property and copyright. Industrial property includes patents, trademarks, industrial designs and geographical indications. Copyright includes literary works, films, music, artistic works and architectural design. Additionally, intellectual property also finds its place in the Universal Declaration of Human Rights under Article 27. Fashion design is the creation of the mind. It is an art. The sketches of the fashion design can be protected as artistic work under copyright law. The marks, the name of the fashion brand and their logos can be protected as trademarks. The fashion design itself can be protected as an industrial design, provided it is devoid of functional elements. A new fashion design or a new manufacturing process in the fashion industry becomes the subject matter of patents. A fashion design attributable to a certain locality can be granted a GI tag. These are the various ways how a fashion design can be protected under the IP laws of India.

3.2 Jurisprudential justification to protect fashion designs

Scholars in the US are divided in their opinions. One set of scholars like Kal Raustiala, Christopher Sprigmann, and Metchek believe that fashion designs need not be protected under the IPR law regime because applying low IP protection to the fashion industry substantially increases creativity. Another set of legal scholars like Karina K. Terakura, C, Anne Theodore Briggs, Hetherington and others believe that fashion designs, like any other IP, are prone to piracy and deserve to be protected. Before identifying the problems fashion designers face in protecting their designs, it must be determined if the jurisprudential theories of IP support protecting fashion designs under the IP laws. Labour theory, personality theory, economic theory, utilitarian theory, and reward theory justify IP protection. The study aims to apply these theories and evaluate if fashion designs can be protected under IP laws.

The chapter explores the justification to protect fashion designs in the background of the philosophies and theories that have justified IP rights protection. Exclusive rights granted under the IP laws can vary from country to country, but the fundamental foundation that backs the IPR laws remains the same. Various philosophical theories justify granting IP rights to the creators. The advocates of Labour theory believe that IPR should be granted to the creator of the work for the labour that he invests in creating a particular work. As an alternative to labour theory, the personality theory believes that the created work is an extension of the creator's self.³¹ Utilitarianism as a theory concerns itself with economic theory and maintains that IP should be protected as it maximises the welfare of the society and promotes 'the greatest happiness of the greatest number'. Reward theory advocates believe that IP creators should be rewarded either by paying some royalty or by granting an exclusive right over their creation. Claiming that fashion designs deserve to be protected should be justified in the backdrop of the aforementioned jurisprudential theories.

3.2.1 Justification of Labour Theory to Protect Fashion Designs

³¹ Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 292 (1988).

The labour of his body, and the work of his hands, we may say, are properly his.

- Locke, *'The Second Treatise*

The eminent advocate of Labour theory, John Locke, considers that labour is the foundation for claiming rights over the property.³² Locke also puts forth conditions that require to claim property rights; that enough and as good is left for others and no harm principle. The legitimate appropriation of a new property is justified only if it leaves enough and as good is left for others and no harm is done to the rest of the society. Mixing labour with the pre-existing object creates a property right in favour of the person responsible for creating the property as long as no one else is worsened off.³³ The labour so invested in creating the work and the possession of the work itself will create a prima facie claim to the work, provided that the proviso 'no harm, no foul' is met with.³⁴

A fashion design isn't a natural property that is available in nature. When one takes a handful from the 'common knowledge' and puts in in his labour, a new work of his own is created. If labour theory is to be applied to the fashion industry, it would be just to say that the designers take from the common property and mix labour to it and create an original fashion design altogether. A fashion designer can claim a property right over his fashion design, provided he has invested labour and has caused no harm to the community. The pain, hard work, anxieties, long nights of work, disbanded appointments, and impatience of a fashion designer are sketched vehemently by Christian Dior in his autobiography 'Dior by Dior'.³⁵

Creating a fashion design in itself is a very lengthy process. After putting in enormous labour, a designer will build a design, and then on a well-planned base,

³² Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 80 (1997)

³³ *Id.*

³⁴ *Id.*

³⁵ CHRISTIAN DIOR, *DIOR BY DIOR THE AUTOBIOGRAPHY OF CHRISTIAN DIOR* (2007).

the model is constructed. Selection from the already existing collection begins, and once it is accomplished, draping on the mannequin begins. The designer continuously suggests changes and repeatedly re-drapes the mannequin until he is satisfied with the result. At the end of the process of re-drapes and changing the collection, the fashion designer is pretty much dried up with all his ideas and is exhausted mentally. Despite this excruciating process, it is the joint labour, according to Christian Dior, that brings triumph. After finalising the design of the mannequin, he begins the photographs for the fashion house and for the magazines. In the afternoon, the mannequins of the collection are made visible to clients. Such being the extent of labour that a fashion designer has to invest in bringing an idea to life, it is equitable to testify that fashion designs should be protected under the IP regime.

The focal point of labour theory is to use one's productive capacities in purposive activity.³⁶ In other words, a line of demarcation needs to be drawn between purposive labour and aimless toil. Labour is invested with the purpose of creating a work or bringing some change to the commonly held property. On the other hand, aimless toil is where a person puts in work but without any intention of what end to be achieved. Intentional labour is what deserves protection and not aimless toil. When intentional labour has created something valuable, it entrusts the creator with some economic rights and others are excluded from exercising their common rights over such property created. Intentional labour justifies a property right and acts as a certificate to obtain title over the property.

From the outside world, the fashion industry looks very glamorous and spontaneous, but the fashion designers from inside the industry perceive it differently. The industry is neither spontaneous nor do the fashion designers indulge in aimless toil. From the beginning, the designer works towards creating an intended idea, and with effort, they invent new techniques. A lot of hard work, dedication and perseverance enables a designer to create fashion designs. The fashion industry is not only about art but also about work, strategy and business.

³⁶ Bryan Cwik, *Labor as the Basis for Intellectual Property Rights*, 17(4) *ETMP*, 681, 688 (2014).

Charles James, considered an ‘Architect of Design’, draped the mannequins and took months and, at times, years of hard work perfecting his silhouettes. He is one of the kinds who accepted that fashion designs were evolutionary and not merely spontaneous creativity. The labour invested by a fashion designer is not only enormous but also intentional.

Locke, when wrote his treatise on labour and property rights, IP was unknown. Scholars continued his legacy by applying labour theory to grant rights over intellectual property.³⁷ Furthermore, labour theory needs to be applied to analyse whether fashion designs deserve IP protection. The creative idea of a fashion designer is not materialised by his labour alone, but rather by the efforts of his team. The creative idea of the fashion designer flows to the entire team that includes apprentices, seamstresses etc and inspires those working on the toiles (canvas). A great number of hours is spent on working and reworking and questioning and cross-questioning the designs. By identifying issues and resolving them, solving various problems, the creative process becomes an unending cycle of labour. The designer, at the end of this laborious creative process, creates his fashion design. Christian Dior believes that neither administrative nor financial support could lead a fashion designer to success but only his indulgence in creativity and hard work can take him a long way. The beginner’s enthusiasm will wear out, it is only long hours of hard work that brings a fashion designer's ideas to life.

Locke though, is the totem of labour theory, his theory has attracted much criticism when applied to intellectual property rights. Labour is the nucleus of his theory, where a person creates something that is non-existent from the existing common property by investing in labour. However, the major setback of his theory would be when a person has created some new work from scratch without taking anything from the pre-existing object.³⁸ The criticism holds true when we try to apply labour theory to justify IP protection to fashion designs. A fashion designer

³⁷ PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY, ANU eText The Australian National University, (2016).

³⁸ Adam D More, supra note 32 at 73.

might come up with a fashion design that is entirely new, then labour theory offers very less justification to claim protection. Furthermore, if labour theory is applied in its strict and concrete sense, IP protection should also be granted to the ideas and not the expression of ideas alone. Labour theory is still very much a significant philosophical justification to protect IP, irrespective of the criticisms. To overcome these shortcomings, an alternative theory originated; personality theory. In Yen's words, the products of intellectual labour are "practically an extension of the author himself".³⁹

3.2.2 Justification of Personality Theory to Protect Fashion Designs

The personality theory exclusively focuses on the relationship between the personality of the person and the property created by him. This theory justifies intellectual property rights irrespective of their economic or efficiency considerations.⁴⁰ Personality theory primarily advocates that IP should be protected because the work created by an author is an extension of his own self. The primal concepts underlying the personality theory are 'personhood' and 'self-actualisation'. For a person to achieve self-development, he must have access to natural resources in the external environment.⁴¹ Through such access, an idea can be transformed into a creation, and such an idea is the manifestation of the creator's personality. This justification is consequential with respect to those works closely connected to the creator's personality.⁴² Every man is allowed to create a work as long as he does not infringe the rights of others.⁴³ The influence of personality theory is found significant in moral rights. It includes disclosing and withdrawing works to and from the public, getting appropriate credit for the works created and protecting them from mutilation or distortion. Personality

³⁹ Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO St. L.J. 517, 525, (1990).

⁴⁰ Kanu Priya, *Intellectual Property and Hegelian Justification*, 1 NUJS L. REV. 359, 363 (2008).

⁴¹ *Id* at 372.

⁴² PETER S. MENELL, INTELLECTUAL PROPERTY: GENERAL THEORIES, Edward Elgar at 134 (2000).

⁴³ Daniel Stengel, *Intellectual Property in Philosophy*, 90(1) Arch fur Rechts Sozialphilosophie, 20, 25 (2004)

theory needs to be applied to the fashion industry to determine whether this theory justifies intellectual property protection for fashion designs.

According to Christene Barbreich, fashion is art; it is commerce, it is function and expression.⁴⁴ Fashion is a form of expression without the use of any words.⁴⁵ Fashion expresses itself. Fashion designs can be considered at par with any other art as, in recent times, fashion designs have found an impeccable place in museums alongside paintings and other prized art objects. Against this backdrop, fashion designers should be accorded authorship status, providing them with two moral rights; the right to integrity and attribution. Moral rights are significant to fashion designers as they prevent others from misattributing or modifying, or distorting their works. A right of attribution is crucial for a fashion designer because he/she would build a reputation and brand name of his/her own based on the designs created.⁴⁶ Furthermore, fashion imitation, fashion appropriation and fashion misappropriation call for protection in the fashion industry.

Immanuel Kant, an ardent supporter of personality theory, considered a literary work to be an extended arm of the writer and hence not alienable. But he considers only the copyright as intellectual property and closes the door on patents and trademarks as he believes that there exists already a detailed discourse on these types of intellectual property rights.⁴⁷ Applying the theory of Immanuel Kant to the fashion industry, fashion designs can claim only copyright protection. Hegel, a well-known advocate of personality theory, states that mental ability is inalienable, but the act of expression is alienable. In other words, creation in its abstraction cannot be protected, but once it is expressed on a tangible medium, it needs to be protected. According to Hegel, fashion designers' mental creativity cannot be alienated, but the expression of their creativity in the form of fashion designs is alienable. He also believes that 'an individual free mind owns

⁴⁴ Leandra M Copen, *I Asked a Bunch of Industry People: What's the Point of Fashion?*, 02 July. 2018, <https://repeller.com/meaning-of-fashion/>

⁴⁵ *Id.*

⁴⁶ Margaret E. Wade, *The Sartorial Dilemma of Knockoffs: Protecting Moral Rights without Disturbing the Fashion Dynamic*, 96 MINN. L. REV. 336 (2011).

⁴⁷ Daniel Stengel, *supra* note 43 at 33.

attainments, erudition, talents and other things and are internal to a person, but such things can be transformed into external and alienable upon expression.⁴⁸ The talent and the creativity of a fashion designer being internal to himself are not protected unless his talent and creativity are translated into expression. The personality of the author and his work become inseparable and have no independent existence. Consequently, the property rights over a creation is alienable but the moral rights over a creation are inalienable.⁴⁹

Clothing itself has been one of the cultural expressions since time immemorial. Fashion is also considered an art of self-expression in modern society. It is a form of expression of the fashion designer expressed in his fashion design. On the one hand, fashion designs are the very expression of the fashion designer. On the other hand, fashion helps people to express their personality and create an identity in the community. As Christian Dior expresses, Haute Couture constitutes a mode of self-expression that can be compared to architecture or painting.⁵⁰ In a book on Ralph Lauren, the author commented that he thrived in the pool of ambition, pride and disapproval, self-expression and limitation.⁵¹

As much as imitation fashion has gained popularity, self-expression fashion is also significant in the fashion industry. Fashion designers are often recognised with their fashion designs. They acquire recognition in society through their fashion designs and other fashion accessories. Chanel is known for its 'little black dress, No. 5 perfume and "Chanel Suit". Charles James is celebrated to date because of his famous and unique ball gowns like "Clover Leaf," "Butterfly," "Tree," and "Swan". Ralph Lauren is well known for its famous sportswear line, 'Polo Ralph Lauren'. Fashion designs reflect their fashion designers and vice versa. Hence, fashion designs can be considered an extended self of fashion designers, and personality theory defends protecting fashion designs.

⁴⁸ Justin Hughes, *supra* note 31 at 305.

⁴⁹ Christopher S. Yoo, *Rethinking Copyright and Personhood*, 2019 U. ILL. L. REV. 1039, 1045-1050 (2019).

⁵⁰ Christian Dior, *supra* note 35.

⁵¹ MICHAEL GROSS, *GENUINE AUTHENTIC: THE REAL LIFE OF RALPH LAUREN*, New York: HarperCollins, 100-120 (2003)

The application of personality theory to the IP is more relevant when the creation is an art like haute couture fashion. The work of art is created using mental labour which embodies the true essence of a human being rather than merely physical labour. Artistic works are often inseparable from the artists.⁵² Fashion design is “an art form, an extension of a designer’s creative soul, and thus deserves some form of protection.”⁵³ Through fashion designs, fashion designers express themselves, and by wearing suitable fashion, people also try to express themselves. Fashion designs are very part of a designer’s identity. It manifests the internal self of its designer.⁵⁴ Fashion design is a designer’s own reflection that comes into existence by putting in long hours of labour. This way, we can also find a connection between labour theory and personality theory with respect to protecting a fashion design. Fashion is a creative expression; copyright protects creative expression. Unauthorised use of such creative expression amounts to transgressing on the designer’s personality and creativity.⁵⁵ Few scholars propound that fashion designers should be accorded moral rights as fashion designs are presently being considered as work of art and fashion designers as artists.⁵⁶

Given the extent of justification provided by the personality theory to protect fashion designs, it is still not adequate enough to protect the economic value of a fashion design. Personality theory protects authors’ rights as personal rights translated into moral rights but not property rights. Alongside protecting fashion designs as personality rights, they should also be granted property rights. Fashion designers invest huge money, especially in haute couture, and luxury fashion, so

⁵² Kanu Priya, *supra* note 40 at 381.

⁵³ DESIGN LAW-ARE SPECIAL PROVISIONS NEEDED TO PROTECT UNIQUE INDUSTRIES? Bibliogov, 15-17 (2010)

⁵⁴ Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 Notre Dame L. Rev., 1925, 1956 (2006).

⁵⁵ Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible*, 38 VAND. L. REV. 1, 23 (1985).

⁵⁶ Brittany West, *A New Look for the Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Prevention Act (IDPPA)*, 5 J. Bus. Entrepreneurship & L. 57, 62-63 (2011).

property rights also become cardinal. The secret of a new collection that is only known to the fashion designer and his immediate staff evaporates from showing the collection to one person and then the other. The new line of collection loses its novelty and its commercial value.⁵⁷ An apparel is considered to be a status-laden good whose value is inversely proportional to its scarcity and novelty.⁵⁸ Fashion has economic and commercial value in society, and that calls for utilitarian theory to justify IP protection to fashion designs.

3.2.3 Justification of Utilitarian Theory to Protect Fashion Designs

Utilitarian theory proposes that incentives must be granted to the creator of the work, otherwise, one might not invest labour, money and time in creating them and piracy would become a daily ordeal. The paramount consideration of the utilitarian theory is to maximise net social welfare. If the IP rights are overly extensive or nearly minimal, the welfare in the society would diminish. Proponents of utilitarian theory advocated that the term of protection granted to any IP should be proportional to the ‘usefulness’ of such IP to society as a whole. The term of the IP should balance between the exclusive rights granted to the creator and the social welfare of the society. To ensure welfare maximisation, IPs are protected for a stipulated term and later are dropped in the public domain. This way both creators and society benefit from the IP. Thus, the utilitarian theory focuses on the cost-benefit analysis of the creation of the work.⁵⁹ The utilitarian theory makes use of economic justification to analyse how a balance can be struck between social costs and benefits with reference to IP rights.

The important focus of economics in intellectual property is ‘propertizing’ the creation so that the owner of the creation could derive monetary benefits from exploiting or selling his creation. Fixed costs incurred to create intellectual property are often more than the variable costs that are incurred to distribute such

⁵⁷ Christian Dior, *supra* note 35.

⁵⁸ Kal Raustiala & Christopher Jon Sprigman, *Faster Fashion: The Piracy Paradox and Its Perils*, 39 CARDOZO Arts & ENT. L.J. 535, 549 – 551 (2021).

⁵⁹ Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1750 (2012).

property to consumers. The creator, to recoup fixed costs, sharply increases the marginal cost. However, with the rapid technological development, the marginal cost to make copies of creation could cost even zero. Pirating the already pirated works will cause grave injury to the creators. This would disincentive creators and might demotivate them from creating any work in future. This theory justifies that intellectual property needs to be granted to avoid free-riding over the creations. The term of protection of intellectual property can be used as a device to navigate between the problem of over-rewarding and under-rewarding.⁶⁰ An over-rewarding system would limit the dissemination of knowledge, and an under-rewarding system would result in reduced innovations.⁶¹ According to utilitarian thinkers, IP laws are believed to increase the social and economic welfare of society. However, the piracy paradox is a doctrine which tends to establish that providing intellectual property rights to the IP negative space or low IP equilibrium industries like the fashion industry, haute food industry, magicians etc., hampers economic efficiency and social welfare rather than promoting it.

Few scholars advocate the piracy paradox doctrine to be beneficial to the fashion industry. Low IP protection - patents, copyright, trademarks should provide minimum protection to the fashion industry, and that limited protection is considered adequate and efficient by them. Free appropriation of fashion designs is healthy appropriation because, paradoxically, low IP protection incentivises fashion designers. Furthermore, copying of the positional goods, goods that gain and lose value as per the perceptions of people, would give impetus to the fashion designers to create more and more fashion designs. In other words, fewer people buy such goods- more is the value, and vice versa will inspire fashion designers to cater to the demands of the consumers with more distinguished and elegant designs. This vicious cycle of creation, copying and creation continues in the fashion industry and is beneficial to the industry. Low IP protection simultaneously expedites the rapid production of substantially new designs. This

⁶⁰ Richard A Posner, *Intellectual Property: The Law and Economics Approach*, 19 (2) J. Econ. Perspect, 57, 60 (2005).

⁶¹ Livia Ilie, *Intellectual Property Rights: An Economic Approach*, 16 *Procedia Econom*, 548, 550 (2014).

is termed ‘induced obsolescence’.⁶² Without copying, the growth in the fashion field would be very slow, and the industry would struggle to bring in new designs and style diffusions. The process of ‘anchoring’; is where the trends and the changes in the trend are communicated to the consumers because of the free appropriation or piracy of the fashion designs.⁶³ To be more precise, consumers are informed of the current trend and the changes in the trend from those who copy from the fashion designers in the higher hierarchy. Thus, the benefits of free appropriation of fashion designs are twofold; firstly, copying results in new fashion designs and styles and thus promotes growth in the fashion industry (induced obsolescence) and secondly, copying informs the consumers of the current trends and changes in the trends (anchoring). They advocate negative IP space, those industries that IP could theoretically protect but practically cannot, to the fashion industry. However, with the advent of technology, copies can be made in the blink of an eye. Fashion designers might even lose first mover advantage because of the immediate availability of fashion designs in the consumer market. The marginal cost to copy and produce a fashion design would be meagre compared to the fixed costs that the original designer has invested in creating his fashion design.

As a response to the piracy paradox, many scholars critiqued the doctrine and opined that the doctrine is outdated.⁶⁴ Piracy paradox was considered harmless by Kaul Raustiala and Christopher Sprigman in the fashion industry in 2006, but fifteen years later, in another article, both scholars explore the perils of the piracy paradox in fast fashion; cheap clothes with a short shelf life. Their recent article (2021) considers it treacherous to continue advocating piracy paradox in the fashion industry when copies of an original fashion design appeared in less than 48 hours. Fashion designers would be drained of their creativity as competing with those who copy the designs is impossible. Though they consider the piracy paradox harms the fashion industry in the era of fast fashion, they also believe that

⁶² Kal Raustiala, *supra* note 2 at 1688.

⁶³ *Id.*

⁶⁴ Silvia Beltrametti, *Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community*, 8 NW. J. TECH. & INTELL. PROP. 147, 162 (2010).

intellectual productions are possible without intellectual protections. But to claim IP protection, the mere presumption that having IP protection would induce creativity is not sufficient; evidence needs to be produced.⁶⁵ In this article, the scholars agree that fashion designs require IP protection initially, only to disagree later.

One of the two main reasons why the piracy paradox is outdated is because of the emergence of fast fashion. What is fashion today was not fashion yesterday and is not going to be fashion tomorrow. This is how volatile the fashion industry is. Another reason is technological advancement. With the advent of artificial intelligence and non-fungible tokens (NFTs) piracy paradox, if anything, will harm the fashion industry. NFTs in the fashion industry are becoming popular every passing day. Owning an NFT would grant the owner an exclusive right over it in the digital space. The revenue generated by selling the fashion NFTs is so promising that many big houses and fashion brands do have the prospective intention to launch their respective NFTs in the near future.⁶⁶ Dolce and Gabbana, an Italian luxury fashion house made US\$ 6 million last year by selling their fashion NFTs. Brands like Louis Vuitton, Burberry Blankos, and Gucci have entered the metaverse with their respective Fashion NFTs. Well-renowned Indian fashion designer Manish Malhotra launched his digital sketches on WazirX in collaboration with Lakme Fashion Week, and all the NFTs were sold within 2 minutes. Since NFTs are visible to everyone in the digital space, it is advantageous for copyists to copy the design. With the introduction of fast fashion and NFTs, the piracy paradox can be disastrous to the fashion industry. It would cost less than the marginal cost for the copyists to disseminate fashion designs to the consumers. As the economic philosophy of intellectual property advocates, the term of protection is the device to balance between the over-rewarding of intellectual property and the under-rewarding of intellectual property. Since the fashion industry is ever-wavering, the term of protection can bring balance to the

⁶⁵ Kal Raustiala, *supra* note 58 at 558.

⁶⁶ Sean Sullivan, "NFTs: Future or Fad?" *Excerpts from a Practical Discussion of NFT Use Cases and Copyright Concerns Raised by NFT Offerings*, 45 COLUM. J.L. & Arts 365, 367 (2022).

industry. Rather than promoting the IP-negative space for the fashion industry, a lesser term of strict protection would seem reasonable.

Troy Anthony considers signature labels or luxury fashion as “a signifier of value which, in fashion as in art, is a function of rarity.”⁶⁷ Considering the labour and monetary investments made in the haute couture industry, it is a tragedy even to say that the piracy paradox could accelerate the industry's growth. A couturier has to put in a minimum of 150 hours to produce a basic haute couture design. It took 1600 hours of work to produce Chiara Ferragni's, Dior haute couture designed by Maria Grazia Chiuri. To produce one haute couture, it would cost anywhere between EUR 9000 to 1 million EUR.⁶⁸ Couturiers have different opinions on copying their designs; few of them believe copying their fashion designs would democratise fashion by eliminating class divisions, and the rest invoke copyright laws to protect their fashion designs. Comparatively, copied haute couture costs less than the original design.⁶⁹ With technological development, copying continues to be a problem. Copied designs started circulating in the market even before the originals were introduced in the market. Few haute couture can even be copied merely from their sketches.⁷⁰ In light of this, it can be stated that fashion designs need to be protected from piracy through IP laws.

3.2.4 Justification of Reward Theory to Protect Fashion Designs

Reward theory suggests the creator should be rewarded for his creation of original work either in the form of royalty or an exclusive right over the IP created. The reward theory justifies IP rights to be granted to the creator as the author has contributed to the ‘social utility’ that would benefit the consumers at large. Rewards must be granted for two reasons; firstly, for his labour in bringing the

⁶⁷ Felicia Caponigri, *Fashion's Brand Heritage, Cultural Heritage, and The Piracy Paradox*, 39 CARDOZO Arts & ENT. L.J. 557, 564 (2021).

⁶⁸ Joris Hendrik, *The history of haute couture in numbers*, 06 July. 2020, <https://www.vogue.in/fashion/content/the-history-of-haute-couture-in-numbers>

⁶⁹ Mary Lynn Stewart, *Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900-1930s*, 28, Fr. Hist. Stud, 103, 121 (2005).

⁷⁰ C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 Stan. L. REV. 1147, 1151 (2009).

creation and secondly, for the societal benefit of the creation. The rewards could be economic or moral rights granted to the creator. They consider reward as an inducement to bring more and more creations.⁷¹ A reward is both exclusive and excludable in nature. A creator is granted IP would be that he alone has exclusive rights over his creation, and this would also imply that he could exclude anyone from making use of his work without valid authorisation. Reward theory is more appropriate where the dissemination of information is promoted by the grant of intellectual property.⁷²

Applying reward theory to fashion designs, it can be stated that a fashion designer who designs an original piece of clothing deserves IP protection as the clothing would contribute to social utility. While looking at the social utility, clothing is not only a means to cover the body but also acts as a status symbol. Clothing, in other words, fashion designs, increase societal welfare as people consider fashion as a mode of expressing themselves to society. As a reward, fashion designers can claim protection under copyright, patent, designs, trademark, trade secrets and geographical indications. Such rewards would motivate fashion designers to create more designs. Reward so granted to the fashion designer is both an exclusive and excludable right. A fashion designer holding a valid IP can use it exclusively without much intrusion and also can stop or exclude anybody from using his creation without due authorisation. Thus, reward theory justifies the protection of fashion designs under the IP regime.

3.3 Observations

Locke's straightforward theory of labour presupposes that a person has a property right over himself and his labour. Based on this presupposition, Locke advocates that a person can claim IP right over the creations that he has created. A person removes a thing from the state of nature which belongs to everyone and adds

⁷¹ Gideon Parchomovsky & Peter Siegelman, *Towards an Integrated Theory of Intellectual Property*, 88 VA. L. REV. 1455, 1464 (2002).

⁷² Mikhalien du Bois, *Justificatory Theories for Intellectual Property Viewed through the Constitutional Prism*, 21 Potchefstroom ELEC. L.J. 1, 21 (2018).

something more to it by putting in the labour. His addition to the existing state of nature deserves IP protection. Fashion designers might not, like other creators or inventors, put in exhaustive labour but their creativity calls for IP protection. Personality theory believes that the work created by a person is an extension of his own self. Fashion designers are known widely because of their work. Their identity is deeply embedded in their fashion designs. Fashion designs reflect their designers, and fashion designers consider their designs as their extended selves. Furthermore, the utilitarian theory, from the consumer point of view, fashion serves the community to express themselves. Protecting fashion designs increases social welfare and ensures welfare maximisation. From the designer's point of view, fashion designs need to be protected so that nobody free rides on his creation. Also, the piracy paradox is an outdated doctrine as copying has become the order of the day due to the advent of digital technology. Pirated versions of fashion designs are available in the market even before the original designs are released, and as a consequence of that, the fashion designer loses the first mover advantage. The creator of his creation would expect something in return and reward theory justifies the grant of suitable IP for his creation as a reward.⁷³

3.4 Protection of Fashion Designs under the Intellectual Property Laws of India

Having established that the jurisprudential theories of IP support protecting fashion designs, we should now turn towards each of these IP laws and the extent of protection granted to fashion designs. Issues that are considered hereon are; firstly, fashion designs could have both artistic or aesthetic and functional or utilitarian elements in them. This dichotomy in fashion design poses a challenge to both patent law which protects inventions that have utility, and copyright law which protects artistic works that have no utilitarian aspect in them. Secondly, the Trademarks Act 1999 protects not the fashion designs per se but their fashion labels, brands, logos and trade dresses. Trademark law also consists of a few

⁷³ Seth A. Cohen, *To Innovate or Not to Innovate, That Is the Question: The Functions, Failures, and Foibles of the Reward Function Theory of Patent Law in Relation to Computer Software Platforms*, 5 MICH. TELECOMM. & TECH. L. REV. 1 (1998-1999).

provisions that aim at combating the counterfeiting of fashion designs. But the word ‘counterfeit’ has no mention in the Act. Design law protects only the registered designs, and so unregistered designs have no protection under the Designs Act 2000. The Geographical Indications of Goods Act 1999 protects the fashion industry by granting them GI tags, but clearly, it is not sufficient as fashion designers in India and abroad have successfully misappropriated the GI tags without giving either compensation or due credit to the indigenous community to which the GI tag belongs.

3.4.1 Fashion design protection under Patent Law

Fashion designs usually is both functional and ornamental in nature. Ornamental elements in a fashion design can obtain design patents, and functional elements can seek utility patents. The US grant's design patents along with utility patents but, in India, design patents are not granted. To claim a design patent in the US, the ornamental features should be novel, non-obvious and non-functional, whereas to claim a utility patent, the invention must be novel, non-obvious and functional or should be useful. The only difference being design patents are granted for non-functional elements, whereas utility patents are granted for the functional aspects of an invention. The dual nature of a fashion design, ornamental and functional, creates confusion in granting design patents.

3.4.1a Design Patents in the US

The U.S. grants three types of patents; design patents, utility patents and plant patents. Design patents can be obtained for the decorative and ornamental features present in a fashion design. Design patents can be claimed as long as the decorative or ornamental element in a fashion design is new, non-obvious to the person having ordinary skill in the art (PHOSITA) and non-functional.⁷⁴ Design patents are often granted to fashion accessories like handbags, shoes or jewellery. Apparel, on the other hand, is functional in nature but can possess decorative or

⁷⁴ Peter Lee & Madhavi Sunder, *Design Patents: Law without Design*, 17 Stan. TECH. L. REV. 277, 280 (2013-2014).

ornamental elements in it. In such cases, only the decorative or ornamental elements will be granted design patents. In the case of multiple decorative or ornamental elements present in a fashion design, separate design patents may be claimed for each of the decorative or ornamental elements. This widens the scope of design patent protection in fashion designs.⁷⁵ Design patents are granted for the design per se and not for the article. To be more precise, ornamental decoration is what a design patent is granted for. For instance, Christain Dior has numerous design patents for the fashion accessories like handbags, sneakers, sunglasses, jewellery, briefcases etc. Dior's patent application for jewellery claims a patent for its distinctive ornamental features and not its functional aspect. A fashion design, if it is both functional and ornamental, a line has to be drawn between what is functional and what is ornamental. The U.S. courts have interpreted functional and ornamental features in such a way that the entire claimed design must be driven by the functional element to be refused a design patent and not individual claimed features being functional. It has been an arduous task for the courts to draw a line of demarcation between functional and ornamental elements.

It has been burdensome for fashion designers to claim design patents because the ornamental design or decorative element has to be new. Fashion designs are decoratively or ornamentally different from one another but meeting the criteria of novelty poses a challenge to the fashion designers. For instance, bell bottoms were reintroduced in the community in the late 1990s as 'boot cut' pants, but 'boot cut pants' cannot obtain a design patent due to the lack of novelty. Fashion designers "borrow, imitate, revive, recombine, transform and share design elements" in the process of creating a fashion design.⁷⁶ So, it's difficult to prove novelty in the case of fashion designs claiming design patents. It is very expensive to obtain a design patent compared to obtaining other IPs. Also, the design patent is granted for 14 years from the date of filing of the application and it roughly takes 20 months to obtain a design patent. In that meantime, fashion cycles would have come and

⁷⁵ Christiane Schuman Campbell, *Protecting Fashion Designs Through IP Law*, Apr. 14, 2015, https://www.duanemorris.com/articles/protecting_fashion_designs_through_ip_law_5516.html

⁷⁶ Xinbo Li, *IP Protection of Fashion Design: To Be or Not to Be, That Is the Question*, 3 IP THEORY 14, 22 (2012).

gone which might render the design patent not useful enough for the inventor to monetize it. The term of 14 years for a design patent is too lengthy protection for a fashion design as the fashion cycles are ever-changing. It is because of the above-mentioned reasons; design patents are not an agreeable form of IP protection to fashion designers.

India grants only utility patents and there is no concept of design patents. Further research might be required to determine if design patents need to be introduced in India to protect fashion designs. This study aims not at introducing a new mechanism like design patents to protect fashion designs in India, but rather to analyse the already existing IP laws to determine if fashion designs are adequately protected in India. We should delve into the Copyright Act 1957, the Trademarks Act 1999, the Geographical Indications of the Goods Act 1999 and the Designs Act 2000 to determine if the fashion designs are protected adequately.

3.4.2 Fashion design protection under Copyright Law

Copyright Law protects original artistic works that are fixed on a tangible medium. The prerequisite to obtaining copyright is originality and not novelty as in the case of patents. Originality is not concerned with the idea but with expression of the idea. To elaborate, ideas need not be original, but expression of the ideas should be original. A fashion design need not be altogether a novel or a new one to get protection under copyright law, but the expression of a fashion design should be original to claim copyright protection. Another requirement to claim copyright protection is that the work should be devoid of any functional element. Copyright Law protects artistic works irrespective of whether they have aesthetic quality or not, but works must be devoid of functional elements. The artistic element in a work is what is protected and not the functional or utilitarian aspect of it.⁷⁷ A fashion design can be; either fully artistic, fully functional or both. If a work is entirely functional, it can claim protection under patent law and if it's purely artistic work, it can claim protection under the copyright law. But,

⁷⁷ Francesca M. Witzburg, *Fashion Forward: Fashion Innovation in the Era of Disruption*, 39 CARDOZO Arts & ENT. L.J. 705 (2021).

confusion crops up when the fashion design is both functional and artistic in nature. Functional elements need to be separated from artistic elements to claim copyright protection. The doctrine of separability presupposes that artistic elements and functional elements should exist independently of each other to claim copyright protection.⁷⁸

The U.S. has a wide range of cases in which the courts have distinguished between the artistic and functional elements in a fashion design whereas it has not been dealt with in India. In the U.S. the court was called upon to distinguish between artistic and functional elements in a two-buckle Winchester belt. The artistic element of the buckle needed to be distinguished from its functional element; holding the pants on the waist securely. The Appellate Court by reversing the order of the lower court held that the buckle could be used as an ornament or jewellery around the neck or any other parts of the body and thus the artistic element in the belt can be separated from its functional element. In addition, Oakes J, in this case, held that the belt buckles were no less than any sculptures. So, the two-buckle Winchester belt was considered an artistic work after separating from it the functional element. The U.S Courts also have developed various tests to determine separability, however, it is a matter of grave concern that Indian Courts have no precise set of tests to separate functional elements from artistic elements. Fashion designs that are both functional and artistic cannot claim protection either under the Patents Act 1970 or under the Copyright Act, 1957. The exclusion of artistic elements from the patent law regime and the exclusion of functional elements from the copyright law regime has put fashion designers into a dilemma and are confused under which Act they could claim protection.

The second issue that fashion designers would face in protecting their fashion designs would revolve around Sections 15 (1) and 15 (2) of the Copyright Act 1957. Section 15(1) of the Act says that copyright would cease to exist in those works that are registered as designs under the Designs Act, 2000. Section 15(2)

⁷⁸ *Id.*

says that any work that is capable of being registered under the Designs Act 2000 but is not duly registered would lose copyright protection under the Copyright Act 1957 as soon as any article is produced more than 50 times through the industrial process to which the design is applied. According to section 15(1), copyright would cease to exist under the Copyright Act 1957 if the work is registered as a design under the Designs Act, 2000. Upon registration, the copyright would subsist for ten years plus five years upon renewal under the Designs Act 2000. Interpreting section 15(2) would mean that copyright would cease to subsist under the Copyright Act 1957 in the works that are capable of being registered under the Designs Act 2000 after the manufacturing of the 51st article to which the design is applied. If the 51st article is manufactured and is not registered under the Designs Act 2000, such design can claim copyright neither under the Copyright Act 1957 nor under the Designs Act 2000. Such unregistered designs have no copyright protection and are dropped in the public domain. However, to register under the Designs Act 2000 it would take at least 12 months.

There are two issues in protecting fashion designs under the Copyright Act 1957; firstly, only those fashion designs that are devoid of functional elements are granted copyright protection. A fashion design that consists of both artistic and functional elements should get protection only to the extent of its artistic work. But to separate functional elements from the artistic elements, Indian courts have not devised any tests like the U.S. Secondly, the fashion designs that are manufactured more than 50 times but not registered under the Designs Act, 2000 are stripped of copyright protection by both the Acts. The registration of a design under the Designs Act 2000 is so time-consuming that upon registration, the fashion design might not even be in the trend as the trend changes every three months. These glaring issues need to be addressed so that fashion designs get the deserved copyright protection.

3.4.3 Fashion Design Protection under the Law of Designs

The Designs Act 2000 was enacted with the objective of protecting non-functional elements in a product that possesses aesthetic elements. Non-functional elements in a product include the arrangement of shapes, patterns, decorations, or lines or colours applied to any two-, three-, or both-dimensional form by any industrial process or means, whether manual, mechanical or chemical, separate, combined, which in the finished article appeal to and are judged solely by the eye. The definition of a design under section 2(d) excludes 'artistic work' explicitly from being protected as a design. It is noteworthy to highlight that this exception was not present under the Designs Act 1911. In *S.S. Sarna Inc. & Anr. v. Talwar & Khullar Pvt. Ltd., & Anr*⁷⁹, the Delhi High Court opined that the legislative intent behind the Designs Act 2000 is clear that commercial exploitation of an artistic work by the owner of the copyright has to be granted protection under the Designs Act 2000 and should be made devoid of protection under the Copyright Act 1957. However, under the Copyright Act 1957 registration of the work is not mandatory, unlike the Designs Act 2000, which mandates registration as a prerequisite for protection.

Section 2(d) of the Designs Act 2000 states that a design consists of features that are merely ornamental and are applied to another article through an industrial process or means, whether manual, mechanical or chemical, separate or combined. However, work under the Copyright Act, 1957 loses its copyright right protection if such work is capable of being registered as a design under the Designs Act 2000 once such design is put through industrial process for more than 50 times. So, an inference can be drawn that there is no copyright protection in the designs that are unregistered under the Designs Act 2000, and they also lose copyright protection under the Copyright Act 1957 once the 51st unit is manufactured. However, the issue is that it takes at least a year to obtain design protection, and the fashion life cycle changes every three months. Upon registration, the designs are protected for ten years, and additional five years of protection can be claimed upon renewal, but this extended length of protection is

⁷⁹ I.A No. 6597 & 6944 in suit 1481 (1991)

not necessary in the case of fashion designs as the lifespan of a fashion design is too less.

3.4.4 Fashion Design Protection under Trademark Law

‘What’s in a name?’ Shakespeare once said. In the current fashion business, ‘name’ is everything. Sabyasachi Mukherjee, Ritu Kumar, and Manish Malhotra in India and Hermes, Louis Vuitton, Chanel, and Dior are known by their very names. These fashion houses have a cross-border reputation and have struggled to reach where they are. Competition is very high in the fashion industry, so it is tough for a fashion house to find a place for themselves in the market. It is more difficult to sustain in such a competitive market. A fashion brand cannot be built overnight. It takes years of hard work and creativity to be recognised as an international brand. A brand name helps a fashion house to build its identity. A brand is associated with specific trends, lifestyles, and status in the fashion industry. People become aware of a particular fashion brand by identifying their trademark. Stripping a fashion brand of its trademark equals stripping its business itself. Such being the significance of brand names and trademarks to the fashion industry, counterfeiting fashion and knockoff fashion have adversely affected the fashion houses.⁸⁰

There is a slight but significant difference between knockoffs and counterfeit fashion. The knockoffs look very similar to the original fashion design but are made with low-quality materials and do not have the trademark of the original fashion brand on them. Counterfeit fashion is identical to the original fashion design, is of cheaper quality and has the imprint of the identical or similar trademark of the original fashion brand on them. The Trademarks Act 1999 does not define the words ‘knockoff’ and ‘counterfeit’. However, certain legal provisions under the Trademarks Act 1999 aim at controlling counterfeiting. Irrespective of such provisions in place, counterfeiting goods, especially in the

⁸⁰ David Fagundes, *The Knockoff Economy: How Imitation Sparks Innovation*, 3 IP L. BOOK REV. 51 (2013).

fashion industry, is a rampant issue. Association Chambers of Commerce and Industry of India has estimated that the market for luxury goods might touch 6,000 crores. Delhi is currently the hub of counterfeit goods in India. One of the reasons why India found its place in the U.S. Priority Watchlist in 2021 and 2022 is because of the lack of counterfeiting laws. Adding to this, the United States Trade Representative (USTR) in 2021 considered Palika Bazar of Delhi, India Mart (an online shopping website), Heera Panna of Mumbai, Kidderpore of Kolkata, Tank Road of New Delhi have been categorised as ‘Notorious markets’ due to the extensive counterfeiting business. India Mart, an online shopping website, is also listed as a ‘Notorious market’. The USTR report further reported that IndiaMart failed to implement best practices relating to anti-counterfeiting, including verification of the sellers, penalising the sellers who involve in selling counterfeit products, and monitoring of infringing products. However, India Mart ostensibly claims that it has a notice-and-takedown system, but the trademark owners reported that it is a burdensome process, time-consuming and less transparent.⁸¹ Despite these facts and figures, enforcement agencies consider counterfeiting of fashion designs as a ‘soft crime’.⁸²

3.4.5 Fashion design protection under the Law of Geographical Indications

Copyright, trademarks and designs law aims at protecting the fashion industry from fashion piracy, whereas geographical indications prevent traditional fashion products from being misappropriated either by the big fashion houses or by other communities who have no right to make use of such GIs. GIs have been granted to various handicraft and textile products in India. GIs like Dharmavaram Pattu sarees of Andhra Pradesh, Pashmina of Jammu and Kashmir, Muga Silk of Assam, Banaras Brocades and Sarees of Uttar Pradesh etc., are related very much to the fashion industry. A registered GI can be used only by the registered proprietor that has registered the GI and its authorised users. Any person who is

⁸¹Saptaparno Ghosh, *Explained | What is the Notorious Market List*, The Hindu, Feb. 22, 2022, 10.57 AM IST, <https://www.thehindu.com/news/international/explained-i-what-is-the-notorious-market-list/article65070654.ece>

⁸² OECD *supra* note 15.

not an authorised user uses a GI on their product, it amounts to infringement of the GI. However, irrespective of the GI of Goods Act 1999 in place, misappropriation of the GIs is still a rampant issue in the fashion industry.

There are many instances where a fashion designer has misappropriated the GIs in India. Ritu Beri and Ritika Mittal have been accused of misappropriating Chakhesang textiles in their respective fashion shows and designs. Sabyasachi Mukherjee has been accused of misappropriating Sanganeri block print GI in his Wanderlust collection. In 2018, Christian Dior was accused of cultural appropriation of the ‘Dabu print’ that belonged to Rajasthan. This act of Christian Dior cannot be considered as GI misappropriation because ‘Dabu Print’ is not yet a registered GI. Recently in February 2022, Udyam Protsahan Sanstha applied for a GI tag for ‘Dabu print’, and the application is still pending before the Registrar of Geographical Indications. The designers should not be allowed to copy or misappropriate traditional cultural expressions that belong to an indigenous community. The above-mentioned cases are merely an overview of the extent of cultural misappropriation in the fashion industry of India. GIs are to be protected adequately in India to avoid their misappropriations by the fashion designers.

3.5 Observations

There is no one-stop solution to protect fashion designs under the IP law regime. A fashion design is protected in bits and pieces under the laws of patents, copyright, trademark, designs and geographical indications. Patents offer limited protection to the fashion industry. Copyright law can protect only the artistic element in a fashion design, and not its functional element. Oftentimes, it is strenuous to distinguish between the artistic element and the functional element, especially with respect to fashion design. Copyright law can protect fashion designs better if the clash under section 15 with Designs Act 2000 is resolved. An unregistered design neither gets protection under the Copyright Act 1957 nor under the Designs Act 2000 once such a design is manufactured through an industrial process for more than 50 copies. The Trademark Act, 1999 though has

provisions to regulate counterfeiting in India, but fashion designers face counterfeiting of their designs every day in various markets in India. The Geographical Indications of Goods Act of 1999 offers protection to handicrafts and textiles, but GI misappropriation is still a torment in the fashion industry.

The research considers fashion designs created in India and in any foreign countries but is concerned only with the Indian IP laws. There are still issues that require further research to protect fashion designs like defining the word ‘artistic craftsmanship’ under the Copyright Act 1957, protecting the single colour mark under the Trademarks Act 1999, appropriation of traditional cultural expressions and the legal status of fashion NFTs and are not considered in this research. This research mainly focuses on identifying and analysing the shortcomings of the Copyright Act 1957, the Designs Act 2000, the Trademarks Act 1999 and the Geographical Indication of Goods Act 1999. It is to be noted that the research does not focus on the Patents Act 1970 as it protects fashion designs to the best possible extent. Patents are granted only if they are novel and non-obvious. Fashion designs rarely fulfil these conditions. If a fashion designer is able to satisfy the requirements of patent law, the Patents Act 1970 adequately protects their fashion designs. Another reason not to delve into patent law is that India does not grant design patents. Recommending a new mechanism like design patents or a sui generis legislation is not the objective of the research. It studies the existing IP regime, the extent of protection granted to fashion designs, and the scope for improvement in the laws to protect fashion designs adequately.