

# Chapter I

## Introduction

"Fashion is not something that exists in dresses only. Fashion is in the sky, in the street. Fashion has to do with ideas, the way we live, what is happening."<sup>1</sup> Fashion is not limited to one person or one country or one region. Fashion can be perceived everywhere. Fashion remarkably influences every person's day-to-day life. Fashion magazines, fashion weeks, haute couture, ensembles, silhouettes, and off-the-rack have become so famous that they cannot be ignored. Fashion exerts a profound influence on society, shaping individuals' identities, social interactions, and cultural dynamics. As a multifaceted and ever-evolving phenomenon, fashion reflects and responds to societal values, norms, and aspirations. It is a powerful means of self-expression, allowing individuals to express their style, tastes, and affiliations. Fashion's significance and influence have called for robust legal protection for fashion designs to prevent unauthorised copying and free-riding. Nevertheless, some scholars argue that embracing a "piracy paradox" is crucial for growth and innovation in the fashion industry. According to this perspective, the absence of IP laws in the fashion industry thrives and facilitates the constant revolution of fashion.<sup>2</sup>

Well Known legal scholars like Kal Raustiala, Christopher Sprigman, and Metcheck, amongst others, firmly believe that piracy plays an outstanding role in the fashion industry's growth, especially in the USA. Metcheck opines, "Fashion is not art but craft. It is not piracy but a trend".<sup>3</sup> In their article, Kal Raustiala and Christopher Sprigman have advocated that copying in the fashion field should be

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<sup>1</sup> Quote by Coco Chanel.

<sup>2</sup> Kal Raustiala & Christopher Sprigman, *The Piracy and Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1695 (2006).

<sup>3</sup> L. J. Jackson, *The Genuine Article: Some Fashion Designers Say Their Work Deserves Copyright Protection, While Others Argue That Legal Protection Would Harm the Industry*, 97 A.B.A. J. 48 (2011).

permitted so that there is continuous growth in the field.<sup>4</sup> The piracy paradox stands in favour of copying fashion designs. Allowing copying in the fashion industry without the interference of IP laws fosters development in the fashion industry. Consequently, fashion designers would produce new fashion designs.<sup>5</sup> On the other hand, intellectual property rights are granted to protect a person's creativity and efforts. But these scholars argue that high IPR protection for fashion designs would result in a slow growth rate. To summarise their contention, intellectual property protection has an inverse relationship with the creation of fashion designs.

Intellectual property is based on the principle that 'anything worth copying shall be protected.' With the availability of fast internet and sophisticated technology, anybody can copy the designer's designs without putting much effort into copying. It is challenging to create a fashion design, but free-riding on the creation is effortless and unchallenging. Creating a fashion design requires high fixed costs, but the marginal cost to create additional pirated copies could be zero. On the one hand, the Piracy paradox, Low IP protection and IP negative space, which is followed in the USA, are outdated with the advent of new technologies. Like any other intellectual property, fashion designs deserve protection from unlawful exploitation and appropriation. Conversely, India claims to have high IP protection for the fashion industry, but they are not adequately protected due to the lacunae in the IPR laws.

The present intellectual property legislations to protect fashion designs are the Copyright Act 1957, the Designs Act 2000, the Trademarks Act 1999 and the Geographical Indications of Goods Act 1999. The Patents Act 1970, though, can protect the technology that manufactures the fashion designs; it per se cannot protect fashion designs as India does not grant design patents, and a patent requires an invention to be novel and non-obvious. Furthermore, there is an

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<sup>4</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 Stan. L. REV. 1201, 1211 (2009).

<sup>5</sup> Hilton, Brian & Choi, Chong & Chen, Stephen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 J. Bus. Ethics. 343, 352 (2004).

overlap between the Copyright Act 1957 and the Designs Act 2000, making it all the more difficult for fashion designers to obtain copyright protection under both Acts. The Trademark Act 1999 protects the brands of various fashion houses. However, it has been nearly impossible to tackle the issue of knockoffs and counterfeits. The Geographical Indications Act 1999 protects the goods with the product quality associated with a specific geographical area. However, Geographical Indications (GI) are not being honoured and are being misappropriated by the Big Fashion Houses. Intellectual property laws protect fashion designs but the adequacy of such protection needs to be examined.

The Patents Act 1970 protects inventions that are novel, non-obvious and have industrial applications. India grants process patents and product patents, unlike the United States of America (USA), that grants design patents. Design patents in the USA are granted for fifteen years to protect the look, appearance, configuration, shape and ornamentation. A few design patents granted in the USA include an ornamental design patent for a sunglass to Christian Dior, a perfume bottle to Prada S.A and spectacle case to Hermes<sup>6</sup>. A few of the utility patents granted in the USA are automated lacing systems to Nike Inc.<sup>7</sup> and swimming goggles to Adidas AG<sup>8</sup>. A few process patents in India that are related to the fashion industry are granted, Titan Company Limited for a colour-changing watch and a method thereof<sup>9</sup> and D. Swarovski for the process for the production of a piece of jewellery<sup>10</sup>. India does not have the concept of granting design patents under the Patents Act 1970. Only the new process and product can be protected. This research aims not to bring another mechanism, like design patents, to protect fashion designs but to highlight the shortcomings of the existing IP laws in protecting fashion designs. Though the Patents Act 1970 has a limited application in protecting fashion designs, it does protect competently.

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<sup>6</sup> US Patent No. D985267-S

<sup>7</sup> US Patent No. 20230138617

<sup>8</sup> US Patent No. 11642570

<sup>9</sup> India Patent No. 380138

<sup>10</sup> India Patent No. 246253

The Copyright Act 1957 protects the original expression of ideas on a fixed tangible medium with/without registration. Fashion designers like Manish Malhotra, Ritu Gupta, Sabyasachi Mukherjee and Anita Dongre have registered their works under the Act. Manish Malhotra has registered two logos as artistic works<sup>11</sup>, Sabyasachi Mukherjee has registered Tahiti and Sunderban as artistic works,<sup>12</sup> Anita Dongre has registered the "AD-18" design as an artistic work. With the IP awareness and IP gaining popularity, many well-known fashion designers are registering their works under the Act. Conversely, the Copyright Act 1957 needs to be adequately equipped to protect fashion designs. The Copyright Act 1957 protects works whether or not they possess aesthetic elements but does not protect a fashion design that is functional in nature. There are no specific guidelines in India to separate functional elements from artistic work. Additionally, the overlap between the Copyright Act 1957 and the Designs Act 2000 poses challenges to fashion designers in protecting their fashion designs.

In the fashion industry, trademarks are highly valued since they act as significant assets for fashion brands by building brand recognition and consumer loyalty. A well-protected trademark, such as a distinctive logo or brand name, allows fashion companies to distinguish themselves from competitors, develop trust, and communicate the quality, style, and reputation connected with their products. Trademarks also give legal protection against unauthorised use or copying, protecting the brand's unique identity and reducing consumer misunderstanding, all of which contribute to a fashion brand's overall success and durability. Trademarks offer legal protection and help fight against counterfeiting and unauthorised usage. The fashion industry is especially vulnerable to counterfeit merchandise and trademark infringement. Trademarks also serve as a deterrent, as potential infringers and counterfeiters are less likely to copy or misappropriate a

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<sup>11</sup> India Copyright No. A-105526/2013 & India Copyright No. A-105528/2013

<sup>12</sup> India Copyright No. A-120196/2017 & India Copyright No. A-120195/2017

brand protected by a registered trademark. However, the word ‘counterfeit’ is not defined, and the punishment for counterfeiting is so negligible that fashion designs are not adequately protected under the Trademarks Act 1999.

Geographical Indications (GIs) are essential in the fashion industry for an array of reasons. To begin with, GIs support the preservation and promotion of cultural heritage and traditional craftsmanship linked with specific regions or indigenous communities. Textiles, clothes, and accessories with a GI are related to a specific geographical origin and recognised for their exceptional skills, traditional processes, and genuine materials. This relationship adds value and authenticity to the products, allowing customers to appreciate and support the products' rich cultural past and talented craftspeople. GIs also help to preserve traditional crafts and local economies by incentivising the preservation of traditional techniques and processes and providing opportunities for sale for producers.<sup>13</sup> Second, GIs serve as quality indicators and consumer assurance. Fashion items with a GI label guarantee buyers specific desirable attributes like quality, craftsmanship, and unique features connected with a given geographic region. Irrespective of the Geographical Indication of Goods Act 1999, cultural appropriation torments the Indian fashion industry.

India protects fashion designs under IP laws, but they need to be protected adequately. While certain safeguards are in place, existing legislation needs to provide full and effective safeguards for unique and creative fashion designs. While copyright law protects original artistic expressions, it does not protect the functional or utilitarian aspects of fashion designs, leaving them susceptible to imitation and duplication. The Designs Act 2000 mandates the registration of fashion designs to claim protection but the life cycle of fashion ranges between three to six months. The Trademarks Act 1999 regulates counterfeiting, but has no definition for the word ‘counterfeiting’. But, fashion counterfeits have found their place in the infamous Indian markets like Chandini Chowk, Heera Panna etc. Additionally, the Geographical Indications of the Goods Act 1999 prevents

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<sup>13</sup> O. A. Ruzakova & E. S. Grin, *Legal Regulation of Relationships Pertaining to Geographical Indications*, 42 PERM U. HERALD JURID. Sci. 685 (2018).

cultural appropriation. However, the GI tags are being misappropriated in the fashion industry time and again.

## **1.1 Justification**

Fashion is very much present in our day-to-day life. The fashion industry contributes to the growth and development of our country. With the high imports and exports of fashion designs, Indian fashion has made a name for itself. Providing IP protection to fashion design ensures that fashion brands receive sufficient legal protection, which consequently fosters creativity, innovation and economic growth. In light of this, identifying the crucial gaps in the fashion industry and the IP regime is of primary importance to protect fashion designs adequately. The challenges faced by the fashion industry should be understood before amending the IP laws to protect them. This research analyses the existing IP laws and its adequacy of protection granted to the fashion designs. With the advent of artificial intelligence and technology, protecting fashion designs from piracy is a prime concern. The justification for conducting this doctrinal research stems from the legal gap and overlaps in the IP laws, economic impact and focus on the creative fashion industry.

## **1.2 Statement of Problem**

The original design of the fashion designer will be granted protection as ‘artistic work’ under Section 2 (c) of the Copyright Act 1957. Fashion designs devoid of functional elements are protected, but not those with functional elements. Separating the functional element from the artistic work is not always possible, especially in the case of fashion designs. The doctrine of separability concerning artistic works needs more clarity in India. This lack of clarity has been a stumbling block for fashion designers to seek protection for their fashion designs. Furthermore, according to Section 15(2) of the Copyright Act 1957, the copyright in any design capable of being registered under the Designs Act 2000 ceases to exist as soon as the article is reproduced more than 50 times. If a fashion design is manufactured more than 50 times but not registered under the Designs Act 2000,

it shall have protection neither under the Copyright Act 1957 nor under the Designs Act 2000. To claim copyright under the Designs Act 2000 registration is mandatory, unlike the Copyright Act 1957. However, the registration of a design takes approximately a year, but the fashion cycle changes thrice a year.

Counterfeits have been devious to the fashion industry. A counterfeit of a well-known brand is available at a low price and attracts consumers. Since luxury fashion is not affordable to the general public, they are inclined to purchase counterfeits and knockoffs irrespective of their quality. Counterfeiting is a lucrative business because of the less research and developmental costs. Counterfeiting is currently not defined under the Trademarks Act, 1999 but is penalised under Sections 103 and 104 of the Act and the Intellectual Property Rights (Imported Goods) Enforcement Rules 2007 read with the Customs Act, 1962. However, counterfeiting is still an unbridled issue in India. According to the Associated Chambers of Commerce and Industry of India (ASSOCHAM), the market for fake luxury goods in India is likely to touch 6,000 crores. Delhi produces approximately 70% of counterfeit fashion goods and sells them across the city.<sup>14</sup> The graph of counterfeiting has been up and sharp throughout the years in India. Considerable efforts have been taken under the Trademarks Act 1999 and the Customs Act 1962 to curb counterfeiting, yet it is common among enforcement agencies to treat counterfeiting luxury goods as a “soft” crime.<sup>15</sup>

The Geographical Indications of Goods Act 1999 protects Geographical Indications in India. GI is granted to those products with quality, reputation and other characteristics attributable to the geographical origin, environment and other natural and human factors. GI indicates the place of origin of the product, assures the quality of the product and promotes sales. Various GIs granted in India are associated with the fashion industry, like Gujrat Surat Zari, Kashmir Pashmina, Tamil Nadu Kanchipuram silks, etc. Any infringement of a GI is dealt with under

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<sup>14</sup> Jeevan Prakash Sharma, *Fake Bazar From Lipsticks to Toothpastes, Noodles To Milk, Counterfeit Products Make A Killing*, The Outlook India, Oct. 18, 2019, 2.29 PM IST.

<sup>15</sup> OECD, Organisation for Economic Co-Operation and Development, *The economic impact of counterfeiting and piracy executive summary* <https://www.oecd.org/sti/38707619.pdf>

Section 22 of the Act. Irrespective of the Act, many fashion houses have successfully misappropriated GIs. Sabyasachi Banerjee, in collaboration with H&M, has been alleged of misappropriation of Sanganeri in his collection Wanderlust. Ritu Beri and TRIFED (Tribal Cooperative Marketing Development Federation of India) allegedly infringed Chakhesang in her ‘The Naga Narrative’ fashion show. There are multiple cases of commercial exploitation of GI without giving due credit, attribution and compensation to the indigenous artisans. Considering the prevailing protection for fashion designs under the IPR laws, the examination of the existing IP laws is essential to understand the extent of protection granted to the fashion designs.

### **1.3 Research Objectives**

The objectives of the research are

1. To examine the extent of protection granted to fashion designs under the Copyright Act 1957 and the Designs Act 2000.
2. To analyse the overlapping between the Copyright Act 1957 and the Designs Act 2000 and their implication on protecting fashioned designs.
3. To evaluate the existing legal provisions to curb the counterfeiting of fashion designs under the Trademark Act 1999.
4. To review the protection granted to the GIs under the Geographical Indications Act, 1999 and analyse the misappropriation of GIs by fashion designers.
5. To suggest changes to the IPR laws of India to ensure that fashion designs are adequately protected.

### **1.4 Research Questions**

1. Whether fashion designs are protected under the Copyright Act 1957?
  - a. If yes, what extent of protection is granted to fashion designs under the Copyright Act 1957?

- b. If not, what measures can be suggested to adequately protect fashion designs under the Copyright Act 1957?
2. Whether fashion designs are protected under the Designs Act 2000?
  - a. If yes, to what extent are fashion designs protected under the Designs Act 2000?
  - b. If not, what modifications should be brought in the Designs Act 2000 to protect fashion designs adequately?
3. Whether the Trademarks Act 1999 is preventing counterfeiting of fashion designs in India?
  - a. If yes, to what degree is the Trademarks Act 1999 equipped enough to curb the counterfeiting of fashion designs in India?
  - b. If not, how can the Trademark Act 1999 be amended to prevent the counterfeiting of fashion designs in India?
4. Whether GI tags related to textiles and handicrafts are being protected by the Geographical Indications Act 1999?
  - a. If yes, what is the scope of protection granted to the GIs related to textiles and handicrafts under the Geographical Indications Act 1999?
  - b. If not, how can the misappropriation of GIs by fashion designers be prevented under the Geographical Indications Act 1999?

## **1.5 Research Methodology**

The research methodology for this study will be primarily doctrinal, involving an extensive examination of relevant statutes, review case law, academic literature, and international treaties related to the protection of fashion designs through IP laws. The relevant legal texts, such as the Patents Act 1970, Copyright Act 1957, the Designs Act 2000, the Trademarks Act 1999 and the Geographical Indications

of the Goods Act 1999 will be analysed to understand the legal framework governing the protection of fashion designs in India.

Analytical research has been adopted to critically evaluate the legal framework of the protection granted to fashion designs in India. This will involve an analysis of the strengths and weaknesses of the legal regime and identifying potential improvements. Comparative analysis is involved in this research to examine the legal framework governing the protection of fashion designs in other countries. This research aims to identify better mechanisms and potential improvements that can be tailor-made to the Indian legal regime. The international standards for the protection of fashion designs, as provided by international treaties such as the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) will be analysed to compare the Indian legal regime with the international standards.

## **1.6 Chapterization**

### **Chapter II - Literature Review**

This chapter deals with the comprehensive examination and analysis of the existing body of knowledge that helps to build a solid foundation for the present research. The first part of the literature review deals with the reputed articles that analyses the extent of protection granted to the fashion designs under the copyright law. The next few pages contain a review of the available literature on protection of fashion designs by the design law. Further pages encompass the existing literature on the extent of protection granted to the fashion designs under the trademark law. The next few pages consist of the review of literature to identify the extent of protection granted to the fashion designs by the Law of Geographical Indications. The final pages deal with the existing literature on the Indian IP laws and the extent of protection granted to fashion designs.

### **Chapter III - Protection of fashion designs - Need and Significance**

The first part of this chapter justifies the intellectual property protection of fashion designs under various jurisprudential theories. Scholars like William Fisher, Adam D Moore, and Justin Hughes have applied these theories to justify the need to have IP laws. Labour, utilitarianism, personality, and reward theories are the various theories that justify protecting intellectual property rights. This research applies these theories and tries to justify that fashion designs are IP and require IP protection. The second half of the chapter deals with the problems faced by the Indian IP law regime in protecting fashion designs. The IP law regime for the purpose of this research includes the Copyright Act 1957, the Trademarks Act 1999, the Designs Act 2000 and the Geographical Indications of the Goods Act 1999. The Patent Act 1970 is not considered for detailed analysis because the patent regime protects the fashion industry adequately if the fashion designs pass NUN (Novelty, Utility and Non-obviousness) and subject matter test.

### **Chapter IV - Protection of fashion designs under the Copyright Act, 1957**

This chapter is devoted to analysing whether fashion designs are adequately protected under the Copyright Act 1957. Artistic works, irrespective of their aesthetic element, are protected. However, artistic works with functional elements are not protected under the Copyright Act 1957. A fashion design that is both artistic and functional in nature is not adequately protected. A fashion design that is only artistic is protected, but not protected if the fashion design is both artistic and functional in nature. A fashion design that is only an artistic work is considered a 'work of art', and a fashion design that is both artistic and functional is called 'applied art'. Countries follow two types of legal regimes while granting protection to fashion designs that are both functional and artistic in nature. Firstly, few countries make no discrimination between the 'work of art' and 'applied art'; thus, there is no need to separate the artistic element from the functional element. Few other countries acknowledge that there is discrimination between 'work of art' and 'applied art'. and follow two doctrines, physical separability and

conceptual separability, to separate the artistic and functional elements. Such tests are absent in India, and so fashion designs are not protected adequately. The second part of the chapter aims to resolve the conflict between the Copyright Act 1957 and the Designs Act 2000. Furthermore, the legislative intent behind section 15 of the Copyright Act 1957 is also discussed to understand the significance of the provision. Additionally, it also examines if section 15 is in consonance with the Berne Convention.

### **Chapter V - Protection of fashion designs under the Designs Act, 2000**

This chapter is dedicated to determining the extent of protection granted to fashion designs under the Designs Act 2000. The Act mandates registration to claim copyright. On the one hand, registering a fashion design requires a year; on the other hand, the fashion cycle changes thrice every year. The designs that are capable of being registered under the Designs Act 2000 but are not registered lose copyright protection under the Copyright Act 1957 once the 51<sup>st</sup> unit is manufactured. The research aims to protect such unregistered designs by considering the UK and EU jurisdictions. The UK and EU are considered separate because of Brexit. The UK has a slightly different IP regime in the protection of unregistered designs compared to the EU. The research analyses if India could adopt the concept of unregistered designs to protect fashion designs in a better manner.

### **Chapter VI - Protection of the Fashion Industry under the Trademarks Act, 1999**

The Trademarks Act 1999 protects the trademarks of various fashion brands. Trademarks are crucial for a fashion house to build its brand and gain a reputation. The act of counterfeiting deprives the fashion brands of their very identity, business and reputation. This chapter looks into the extent of protection granted to fashion designs under the Trademarks Act 1999. Counterfeiting is regulated under the Act, but it is still a plague in the fashion industry. Counterfeiting of luxurious

goods is an everyday challenge faced by the fashion industry. Many markets in India survive on counterfeit goods, Delhi being the hub. It takes years for the fashion designer to build a reputation and a brand name but counterfeiting destroys it all in one go. Thus, it's very crucial to protect the trademarks of the fashion houses from counterfeiting. This chapter determines if the punishment prescribed for counterfeiting under the Act is sufficient enough to deter counterfeiters from counterfeiting fashion designs. It also considers the punishment of various countries for the crime of counterfeiting and compares it with India.

### **Chapter VII - Protection of Fashion Designs under Geographical Indications of Goods Act, 1999**

Several GIs have been granted to the textile and apparel industry in India. GIs are granted to Banaras sarees, Mysore silk saree, pashmina shawls etc. Irrespective of these GIs being granted, cultural appropriation has been witnessed in the fashion industry. Fashion designers have appropriated several indigenous fashion designs that are granted GIs. Allegations against Sabyasachi Banerjee, Ritu Beri, and Christian Dior for misappropriating GIs call for immediate attention. Indigenous artisans are not being duly credited, attributed and compensated by the big fashion houses. Irrespective of the Geographical Indications Act 1999, preventing the misappropriation of GIs is becoming nearly impossible. The chapter aims to determine the extent of protection granted to fashion designs under the GI Act 2000.

### **Chapter VIII - Conclusion and Suggestions**

With the extensive research conducted, the last chapter concludes the research and provides suggestions to protect fashion designs adequately under the IP laws of India. The suggestions are intended to amend the existing shortcomings of the IP laws to protect fashion designs adequately and not suggest sui generis or exclusive law to protect them.