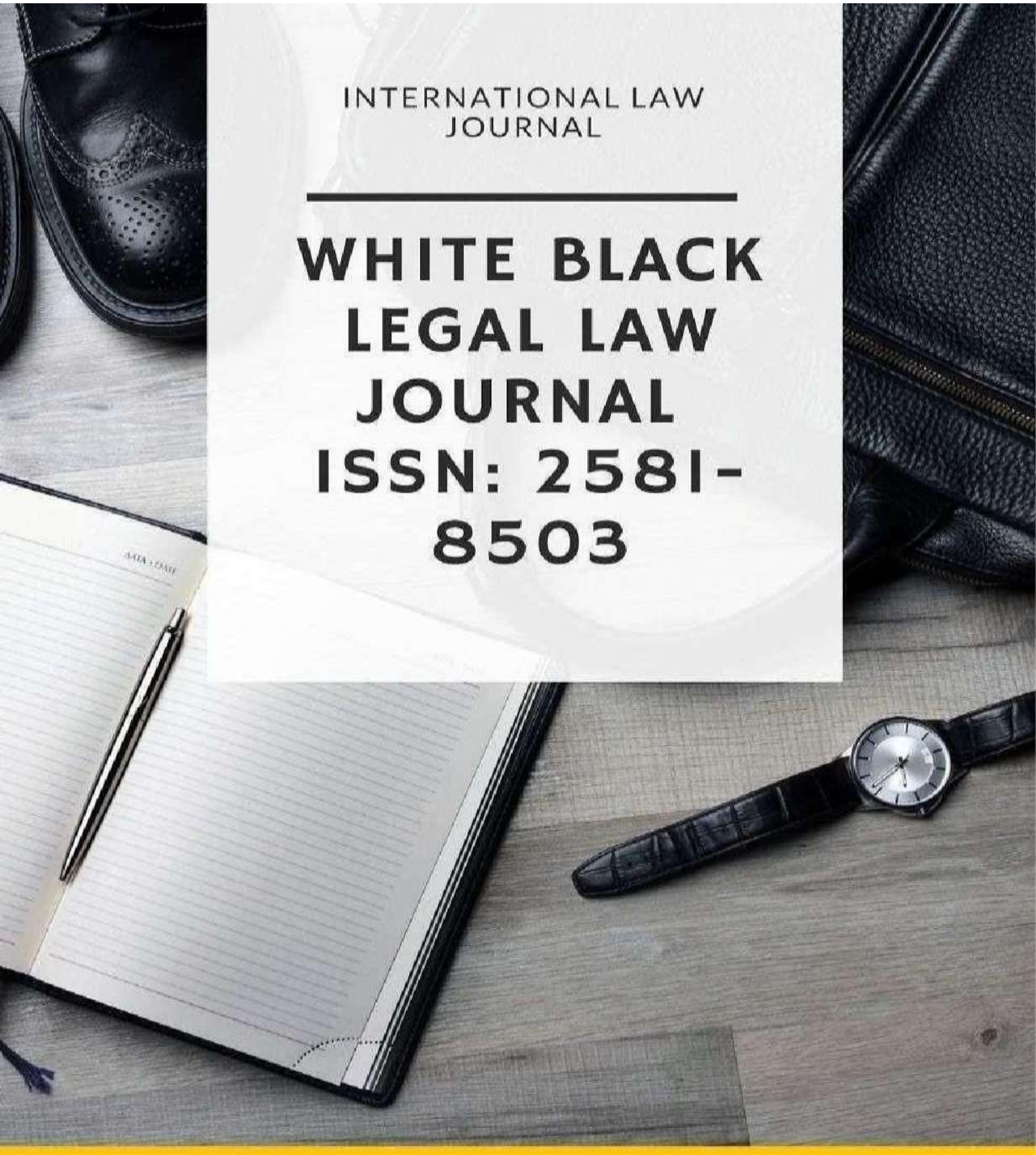

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

FASHION AND IP

AUTHORED BY - DR. RAJU NARAYANA SWAMY IAS

Introduction

Fashion has been defined as "everything that is the current trend in a person's appearance and attire, particularly in clothing, footwear and accessories". It is more than just clothes, jewellery and shoes, but is a form of expression. To quote Ralph Lauren himself [i]. "fashion is not ecessarily about labels. It's not about brands. It's about something else that comes from within you".

IP and fashion are inextricably linked. In fact, copyright and related rights, trademarks, patents, utility models, registered and unregistered designs, domain names, geographical indications, trade secrets, know-how etc. can all be used to protect fashion designs. In the Indian context, special mention should be made of the Copyright Act 1957, Industrial Designs Act 2000 and Trademark Act 1999. To be more specific, sketch design and color combination can be protected under the Copyright Act whereas article design can be protected under the Designs Act.

Legal provisions

No discussion on fashion and IP can be complete without a reference to Section 2(d) of the Designs Act and Section 15 of the Copyright Act. The former defines designs to mean "only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined which in the finished article appeals to and is judged by the eye". It is noteworthy in this context that the Designs Act does not incorporate a specific definition of "fashion design". The Act does not protect the entire garment, rather it only protects individual aspects like shape, pattern, colour etc of the garment. The need of the hour is a term that should facilitate the overall appearance of a particular piece of apparel rather than the current definition which protects each aspect of a garment individually. As regards the latter, it stipulates that

(1) Copyright shall not subsist in any design which is registered under the Designs Act. Thus designs

that are capable of being registered under the Designs Act, 2000 and are registered according to the Act's provisions are exclusively protected under the Designs Act. It needs to be mentioned here that for a design to be protected under the Designs Act, it should satisfy the conditions as laid down in Section 4 of the said Act.

(2) Copyright in any design, which is capable of being registered under the Designs Act but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or with his license, by any other person. It also needs to be mentioned here that designs that are not eligible for registration under the Designs Act, 2000 because they are original artistic works are protected under the Copyright Act, 1957.

Special mention must be made in this regard of the case Ritika Private Limited Vs Biba Apparels Private Limited in which a boutique apparel designer firm that was the first to copyright a design which was commercially in use by the defendant sought an injunction. The Court ruled in favour of the defendant pointing out that the copyright was given under the Copyright Act of 1957 which states that if a design is reproduced more than fifty times, the designer loses his copyright on the work. To be more specific, the Court looked into the legislative perspective and made a clear inference that the protection afforded to a work that is commercial in nature is less than that granted to a work of pure art and that they are not to be compared.

The Microfibres Case

Aland mark case in the annals of fashion and IP is the Microfibres case[ii] wherein the Delhi High Court endeavoured to formulate the Indian legal stance on copyright protection for fashion designs. In this case Microfibres, an American corporation involved in the business of selling and exporting upholstery materials sued the defendant contending that the Berne and Universal Copyright Conventions provided copyright protection to its artistic works in India and that the defendant's textiles bear works that were identical or colorable imitations of the originals. In fact, the claim of the plaintiff was that their work constituted original artistic work within the meaning of Section 2(c) of the Copyright Act, 1957 which would entitle them to enjoy copyright protection. The defendants argued that the plaintiff's artistic works were actually designs and fell within the scope of the Designs act 2000. To fortify their arguments, they pointed out that the plaintiff had registered some of the

upholstery designs in UK under the local Designs Act and that the Indian Design Office had confirmed in writing that the subject works are registrable.

The Court accepted the argument that the only category in which fabric designs could potentially fit under Sec 2(c) of artistic creation is 'painting'. The Court made a distinction between paintings in the meaning of M.F Hussain's works and fabric patterns holding that only the former may be classified as a "painting" under the concept of artistic work. The comparison to M.F. Hussain's painting in the present case would be otiose. In a design, the characteristics are merely ornamental and are applied to another object, as opposed to an artistic painting which has its own existence. The goal with which such arrangements were undertaken in the present case (viz) to employ them in a commercial setting must not be overlooked. Establishing a sixty year monopoly (as envisaged in Copy right Act) on industrial and commercial designs will render the law of designs obsolete and hamper competition, nay industrial innovation.

Given that a particular design had been manufactured more than fifty times in Microfibres, the Division Bench dismissed the appeals as frivolous and upheld the Single Judge's decision that any copyright in the designs was abandoned upon such commercial production of the articles to which the design had been applied.

Rajesh Masrani Vs. Tahiliani Design, AIR 2009 Delhi 44

This is a case which has a significant impact on the fashion industry. In this case the defendant asserted that the plaintiff cannot claim protection to their designs as the designs were not registered as per the Copyright Act, 1957. The Court noted that it is well established law that registration of the work is not mandatory. The registration u/S 44 of the Act is not a prerequisite to pursuing remedies such as seeking an injunction to prevent infringement as well as damages. It is merely there to provide prima facie verification of the details of the right as mentioned in Section 48. The Court also observed that the plaintiff's work is an original artistic work entitled to protection under Section 2(c) of the Copyright Act and that as it cannot be registered under the Designs Act, the provisions of section 15(2) of the Copyright Act do not apply. The Court held that the plaintiff's work is at least inventive and unique, if not novel and that the respondent had copied the work, which should not be allowed. It was categorically held that registration is not necessary for claiming protection to designs under the Copyright Act.

Trademark protection for Fashion Design

In India, the Designs Act 2000 under Section 2(d) while defining "design" expressly excludes the trademark. To put it a bit differently, a fashion design which is a trademark cannot be protection under the Designs Act. But the judgment rendered by the Delhi High Court in Micolube India Ltd Vs Rakesh Kumar trading as Saurabh Industries & Ors [iii] has expanded the ambit of trademark protection for design. The full bench by 2:1 majority held that the plaintiff would be entitled to institute an action of passing off in respect of a design used by him as a trademark provided the action contains the necessary ingredients to maintain such a proceeding. The Court observed that: "post registration under Section 11 of the Designs Act there can be no limitation on its use as a trademark by the registrant of the design. The reason being : the use of a registered design as a trademark is not provided as a ground for its cancellation under Section 19 of the Designs Act."

Thus a fashion design registered under the Designs Act not only gets protection under the Act but can also be protected by instituting an action for passing off provided that design was being used as a trademark post-registration.

Fashion Design & Piracy

Fashion design is the application of design and aesthetics beauty to the items of fashion. Modern fashion design is divided into three basic categories: (1) haute couture, (2) ready-to-wear (Pret-a-Porter) and (3) mass market. [iv] A couture garment is made to order for an individual customer from high quality, expensive fabric, seen with extreme attention to detail and finish, using time consuming techniques. Ready- to-wear collections on the other hand are not made for individual customers, but are made in small quantities to guarantee exclusivity. Both haute couture and ready to wear collections are presented in international catwalks. The Mass Market on the contrary caters for a wide range of customers using cheaper fabrics and simpler production techniques.

Piracy is the act of duplicating without permission. Unauthorized replication of original fashion designs is known as fashion design piracy. It can be divided into two broad categories-knock-offs and counterfeit. Knock-offs do not have the original company's logo or mark on the product. To put it a bit differently, they are exact replicas of another designer's style, but without IP infringement. This is in sharp contrast to counterfeiting which involves making replicas with the same brand name

as original commodities. To be true to facts, there are two forms of counterfeiting in fashion industry: deceptive and non-deceptive. Deceptive counterfeiting occurs when a consumer is uninformed that he or she is purchasing a false or fraudulent object [v]. Non deceptive counterfeiting occurs when a customer buys a duplicate of the actual brand intentionally and with complete awareness.[vi] In our image-based buying society where shoppers seek the optimum mix of trend and affordability, we have the perfect environment for counterfeiting. No wonder why counterfeiters are mostly targeting major fashion houses-Gucci, Prada and Adidas, to name few.

The Piracy Paradox

The "Piracy Paradox" was coined by Kal Raustiala and Christopher Sprigman to describe the idea that copying leads to new creations[vii]. Their contention is that imitation not only coexists with creativity but also encourages it. They point out the 'angelic' qualities of piracy and substantiate that piracy in fashion design may prove more a boon than a bane.Elucidating it further they write:-

"The absence of IPR protection for creative designs and the regime of free design appropriation speeds diffusion and induces more rapid obsolescence of fashion designs… The fashion cycle is driven faster....by widespread design copying because copying erodes the positional qualities of fashion goods. Designers in turn respond to this obsolescence with new designs. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales".

However the paradox is a weak argument for the endless duplication that occurs in the fashion apparel sector all over the globe. In fact the paradox has been challenged especially by Hemphill and Suk (2009) who highlight that there are various forms of copying in the fashion industry - ranging from actual imitation to borrowing, remixing and reinterpreting. Copying someone else's work is unethical and theft is morally wrong in every aspect of law. To put it a bit differently, the paradox runs counter to the notion of uniqueness, which is the driving force behind the fashion industry. Another fundamental flow in the paradox is that it is predicated on the 'trickle-down effect' which assumes that fashion designs are copied from the top. This is erroneous as local enterprises which employ indigenous designers are the hardest hit by counterfeits. Due to shortage of finances, these employees are unable to generate new designs in accordance with the Piracy Paradox. Thus the Paradox overlooks the fact that plagiarism is a two-way street.

Claiming protection for Fashion Designs under the Indian Law: Issues and Cchallenges

Claiming protection for fashion designs under the Indian law is not an easy process. First, to claim protection under the Copyright Act, the work should qualify as an original artistic work (which is dealt with u/s 2(c)). As regards the Designs Act, it should fall under the category dealt u/s 2(d) of the Act. Apart from it, a design to get registration and consequently to get protection under the Designs Act must satisfy the following conditions as well:

1. It must be new or original
2. It must not have been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the date of filing for registration.
3. It must be significantly distinguishable from known designs or combination of known designs
4. It must not comprise or contain scandalous or obscene matter.

Under the Act, the proprietor (as explained in Section 2(j)) of a registered design gets copyright in the design which means the exclusive right to apply the design to any article in any class in which the design is registered. Thus the Act affords protection not in a particular article but against a class of articles as enumerated in Schedule III of the Designs Rules, 2001. Goods manufactured by the fashion designers may fall under the following classes:-

1) Class 2: Articles of clothing and haberdashery
2) Class 3: Trade goods, cases, parasols and personal belongings, not elsewhere specified
3) Class 5: Textile piece-goods, artificial and natural sheet material.
4) Class 10: Clocks and watches and other measuring instruments, checking and signaling instruments
5) Class 11: Articles of adornment.

The overlapping between Designs Act and Copyright Act however has an adverse effect with regard to the protection of fashion designs.

It is also worth mentioning here that in the absence of registration the design law provides no

protection and that the registration process is not only expensive but also time consuming. In India, the entire design registration procedure (from filling an application to receiving a certificate of registration) takes roughly 10 to 12 months. This is troublesome because a garment's anticipated life in a designer store is limited to one season or 3-4 months. [viii] In this situation, a designer is left with only one option-to apply for design registration well ahead of the anticipated date of market debut of his works.. This leads to a new challenge (viz) maintaining the secrecy behind design elements. Moreover, once the registered design reaches the consumer market, the designer may discover that the design is unappreciated, rendering the entire design registration worthless. It also needs to be mentioned here that though the Designs Act provides for recovery of damages vis-a-vis infringement of registered designs, the amount of money that can be collected is minimal (ie) not exceeding Rs.50000/-. The grandeur associated with couture designs worth lakhs of rupees is mocked by this damage barrier.

Fashion designers who have not registered their designs are unable to seek damages and injunction to prevent unauthorized copying of their designs. Needless to say, in an era of fast-paced fashion sector development, where design houses release new collections of fashion goods on a regular basis-usually every season-fashion designers require automatic and instant protection for their designs that is not dependent on registration [ix] It is here that the Indian law falters. Thus the Indian law denies designers the opportunity to test their unique interventions in the market, observe how they are received and then decide whether or not the design is worthy of registration.

The International Scenario

In comparison to the Designs Act of India, the EU's 2002 Regulation (Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs) , the UK's CDPA (Copyright, Designs and Patents Act) and the US's ID3PA and IDPA (Innovative Design Protection and Piracy Prevention Act of 2011 and the Innovative Design Protection Act of 2012) establish an effective regime for the protection of the fashion design industry by providing protection against unregistered design copying. In fact, unregistered design is the real innovation of European Design Right. [x] The most vivid example regarding unregistered design protection is Karen Millen Vs Dunnes Stores [xi]

(a) The EU context

In the EU, industrial design rights are provided at both the Community level by virtue of the

Community design and at the national level under individual national laws. A community design is a unitary industrial designs right that has equal effect across the EU and regulated by the 2002 Regulation. The 2002 Regulation includes provisions relating to "registered community design protection" and "unregistered design protection". Although unregistered community design protection is shorter (three years) and limited in comparison to the term of the registered community design protection (twenty five years) it is more suitable to those industries which are producing large numbers of possibly short -lived designs over short periods of time, particularly fashion industry.

(b) <u>The UK scenario</u>

Fashion designers in the UK are protected from the evil of piracy as they may institute a suit for infringement of their design right and may get relief by way of damages, injunctions, accounts or otherwise under the CDPA without having to go through the pain of registration of design. It is worth mentioning here that an unregistered design right is limited in nature. It does not allow monopoly rights but the owner is protected from copying of his/her design.

(c) <u>France and Italy</u>

France has long considered fashion design to be a protectable form of expression. It first granted protection to fashion design as an applied art under the Copyright Act of 1793 before extending protection in the Copyright Act of 1909 to patterns and other nonfunctional aspects. It explicitly specifies fashion designs in listing protected works under Copyright Law. French copyright law grants moral and patrimonial rights to authors. The former affirm the designer's rights of integrity and attribution, extend to his or her heirs and do not expire. In fact, under Section L 121-9 of the French Intellectual Property Code, the designer has four main categories of moral rights: the droit de paternite, the droit au respect de l integrite de l ceuvre, the droit de divulgation, the droit de repentir ou de retrait. The latter grant the holder the exclusive rights of reproduction, distribution and financial returns from the sale of the design.

Under French Law, fashion designs receive protection upon creation as opposed to the laws of the European Community where rights attach at publication or registration.

Mention must be made here of the suit filed by Yves Saint Laurent against Ralph Lauren for infringement based upon moral and patrimonial rights, stemming from a haute couture dinner – jacket

dress featured on a 1992 runway[xii]. The Court found that the Ralph Lauren ready-to-wear version was so strikingly similar that an ordinary customer would not be able to tell the difference. The striking similarly infringed upon the moral and patrimonial rights of Yves Saint Laurent as the right of attribution and rights of reproduction, distribution and financial returns were violated.

Like France, Italian fashion has a rich history and reputation for luxury. Copyright protection in Italy comes automatically with creation of the work. Under Italian copyright law, "works of industrial design displaying creative character and per se artistic value" are protected. [xiii] Ancillary to its statutory protections, Italy has established the Jury of Design, an independent body that determines whether a design is worthy of protection .[xiv] It is comprised of ten experts, jurists, designers, marketing experts and entrepreneurs. Though not binding, decisions of the Jury of Design are largely respected by both the parties.

(d) The US situation

The US legislations are audacious attempts to protect fashion designs exclusively and facilitate increased design innovation and dissuading of knock offs.

Impact of technology on the fashion -IP synergy

In New York, Intel partnered with numerous designers including Erin Fetherston, Prabal Guning and Band of Outsiders to live broadcast their shows in virtual reality. Similarly the London- based fast fashion retailer Topshop provided shoppers with headsets enabling them to see its catwalk show in real-time through a 3D virtual world. Meanwhile designer Rebecca Minkoff turned to augmented reality via a partnership with shopping app Zeekit which allowed viewers to upload a picture of themselves to see what they would look like in their favourite items following the show, However one of the most interesting innovations came in mixed reality space. This time it was on creating a experience layed over the real world through holograms. This was used on a runway by the legendary Alexander Mc Queen when a hologram version of Kate Moss modeled a dramatic organza gown. Holograms have recently appeared in the fashion shows of Diesel, Guess and Ralph Lauren creating optical illusions and taking the fashion-technology relationship to the next level.

But the synergy does not stop there. In a fashion show in Milan, luxury designers Dolce and Gabbana did not trot out handbags on the arms of humans. Instead drones did the heavy lifting, emerging from

backstage.

All these raise innumerable questions on the fashion- IP law front. For instance, can holograms and drones be considered performers? Who is the author of the collective work created by artificial intelligence? These questions are to be viewed in the backdrop of the fact that traditionally the requirement of originality has been linked to the physical person of the author. To put it a bit differently, machines and AI seem to be excluded from the notion of authorship. However this does not mean that algorithmic artworks cannot afford copyright protection as long as human choices are involved. These questions assume all the more importance as rapid technological progress has exacerbated the inadequacy of IPRs against plagiarism. Introducing a separate sui generis protection for Al-generated works is perhaps the need of the hour.

Conclusion

Ralph Lauren once said, “I do not design clothes. I design dreams”. Fashion law incorporates the legal questions inherent to the design, manufacture, distribution, marketing and promotion of all types of fashion products. Whether the subject is haute couture or ordinary clothing, this branch of law encompasses a wide variety of legal issues that accompany a fashion item throughout its lifecycle. Contract law, company law, tax law, international trade and customs law are of fundamental importance in defining the new area of law. But the most important of them all is IP law. For instance one cannot ignore the discussions related to the manipulation of photographed images made possible by programs such as Photoshop. Expressions through digital technology raise questions regarding transparency, veracity of commercial communications and consumer's freedom of choice as new technologies could facilitate the sale of counterfeit goods. Needless to say, fashion is going through a metamorphosis. Even catwalks which have traditionally represented private sales channels for select wealthy customers have taken on a new function-entertaining the crowd rather than sale of chic clothing. As the industry reinvents itself post the pandemic, the new frontiers thereof revamp, revitalize and rejuvenate the debate on the appropriateness of rights and remedies provided by IP law in this ever emerging field.

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