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A Comparative Study of Copyright Protection in Fashion Industry in India and USA

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ABSTRACT

Copyrights in today's world forms an integral asset in any industry and at the same time is crucial for protecting the expressions of the creator. Fashion industry generates employment at huge scale and creates a visible impact on the economy of any country. Statutes which deal with copyright protection in fashion world in India are The Copyright Act, 1956 and Designs Act, 2000, whereas that of USA is its Constitution and Copyright Act, 1976. The paper deals with a comparative study copyright protection granted in India and USA in the fashion world. Methodology adopted in doing this research is purely doctrinal. The goal of the author through this research is to demarcate the benefits available to the creators in fashion and also elaborate its limitations provided in the statutes.

I. INTRODUCTION

Imagine a situation where a fashion student creates a fashion line of her own. What she creates is never seen by anyone, anywhere and she decides to make her line available at local shops and online platforms. After a while, she starts receiving rewards for her designs. One day randomly she walks into a branded store, where she witnesses that her designs have been stolen by that brand. She complains this to the store manager but of no use. She indulges a lawyer for expert advice and asks her what options she has against that brand. The answer will largely depend on her residence and where the cause of action has arisen. So now this study will analyze the problem of copyright protection in the fashion industry in India as well as in the USA. Also, will try to figure out what are the recourses available with the designers in case of infringement of their designs depending upon the country they reside in.

The term infringement in laymen's language is denoted as any breach or violation of the existing law, agreement, or contract. Copyright law provides for certain exclusive and monopoly rights to the owner of the copyright and in case anyone violates these rights of the copyright owner that person will be held liable for infringement.² The person who infringes the

¹ Author is a LLM Student at RGSOPIL, IIT Kharagpur, India.

² Seltzer, Leon E. "Exemptions and Fair Use in Copyright: The Exclusive Rights Tensions in the New Copyright

right of the copyright owner is generally known as an 'infringer'.

Considered to be a global industry, the fashion world has its complexities. The rights of a fashion designer or fashion curator are not the same in India and the USA. Whether and how can fashion designers save their creations under copyright law are the two important questions that need addressing. Unlike older times where weaving and stitching were treated as something exclusive for women as a part of the household, today clothes have become more of a style statement and status symbol for everybody. Brands like Gucci, Prada, LV, Ralph Lauren, etc. cost wonders, and not every person can buy their products. So what most of the people do they buy a first or second copy of that product, which are also known as counterfeits. Not everyone who buys such counterfeits understands that it is an infringement of the original product and also that it is a crime. The bad effects of buying such counterfeits are directly proportional to the loss incurred in the economy. Other than that, child labor, trafficking, felony, etc. are few crimes which are committed during this whole process of making and selling counterfeits.

Sarojini Nagar or Lajpat Nagar of New Delhi are the famous destinations for customers who want to purchase 'branded look-alikes' for cheap prices. Similarly, Canal Street in Chinatown, USA is one such market that is heavily attracted by the tourists and also amongst locals for buying these counterfeits.³

II. PROTECTION IN INDIA

Considering the amount of money the fashion industry makes and its impact on the economy, fashion designers are provided with protection under two laws in India, The Copyright Act, 1957 (CRA) and the Designs Act, 2000. When the fashion industry is talked about, it is not just the fashion designers we are talking about; it includes industries like fabric and textile too.

1. The Copyright Act, 1957

The copyright act provides for a shield to artistic, musical, sound recordings, cinematographic films, literary and dramatic work.⁴ Drawings are included within the meaning of 'artistic works' under section 2(c)(i) of the Copyright Act, thus providing immunity for the fashion designers whenever they make a sketch/drawing of their designs. With copyright protection come certain exclusive rights to the rescue of copyright owner like- to reproduce the design, to sell it, to store it in any medium, to take pictures of it, to make videos of it, etc. All these rights

Act." *Bull. Copyright Soc'y USA* 24 (1976): 215.

³ Marcelo, Carolyn. "The crimes of fashion: the effects of trademark and copyright infringement in the fashion industry." (2011).

⁴ See The Copyright Act, 1957 at <https://copyright.gov.in/documents/copyrightrules1957.pdf>

are enumerated under section 14 of CRA. But once the copyright (designs or clothes in this case) are sold by the copyright owner then she loses her section 14 rights and Doctrine of Exhaustion⁵ would come into play. Also, to seek protection under CRA publication of that work is a must in India or that the person making it is a citizen of India.⁶

Still, the designer is protected by moral rights even after the sale of the work. Section 51 of CRA talks about infringement and says that if without having a license or consent of the copyright owner does anything prescribed in the section then would be liable for infringement.⁷

The remedies available with the copyright owner are twofold:

- Civil remedy: These can be in way of injunctions, damages, accounts of profit, as per section 55 of CRA.
- Criminal remedy: imprisonment for six months extendable up to 3 years + Fine of Rs. 50,000 which may extend up to Rs. 2,00,000 as per section 66 of CRA.

Even if the designer wishes to license her work or assign her work then also she is protected by moral rights which entitle her to sue the licensee or assignee in case these rights are infringed.⁸ Exploitation by the owner of the exclusive rights can be done for a duration of sixty years from the death of the owner.⁹

2. The Designs Act, 2000

This legislation was passed with the intent to protect the non-functional aspects of the designs, which include shape, color, pattern, combination of line and ornament.¹⁰ To get a design registered an application is submitted with the Controller General.¹¹ Criteria of being new and of individual character have to be fulfilled for grant of a design. Design should be able to be applied to an 'article' which includes articles of manufacture. Section 4 of the Act prohibits registration of certain designs which are not new or have already been disclosed to the public or not significantly distinguishable from known designs or comprises of obscene matter. Infringement in the case of design in India is legally known as 'piracy of design'.¹²

Remedies available with the design owner in case of piracy are:

⁵ Rub, Guy A. "Rebalancing Copyright Exhaustion." *Emory LJ* 64 (2014): 741.

⁶ See Section 13(2)(1) of The Copyright Act, 1957.

⁷ See Section 51 of The Copyright Act, 1957.

⁸ See Section 57(1)(b) of The Copyright Act, 1957.

⁹ See Ch. V of The Copyright Act, 1957.

¹⁰ See Section 2(d) of The Designs Act, 2000.

¹¹ See Section 5 of The Designs Act, 2000.

¹² See Section 22 of The Designs Act, 2000.

- Under section 22(2)(b) of the Design Act, the design owner can seek damages, costs, and injunction.
- Under section 22(2)(a) of the Design Act, the infringer would be liable to pay a sum of Rs.25,000 for every breach and the total of this fine should not be more than a sum of Rs.50,000.

Section 15 of CRA specifically deals with copyrights in designs. Under this, the copyright does not subsist with any work if it is registered under the Designs Act and secondly, if there is a copyright in design that is not registered under the Designs Act then once that article crosses the mark of fifty in industrial application said copyright will cease to exist.¹³

Now, coming to the problem we started this study, that fashion student when made the designs of her line, those 'drawings' are protected under CRA. The moment those drawings are converted into articles; they can be protected under either of the two laws. But, the time when such articles cross the mark of fifty in number in the industrial application that can be protected under Designs Act only. Passing-off being a common law remedy is available in these cases as well but subject to the classical trinity test.¹⁴ Thus it can be said that the fashion student can get a passing-off claim only if she can prove her case. Registration of copyrights and designs makes it easier to claim the statutory claims. Registration of design becomes important before showing that in the public domain because after that it cannot be protected. If in the current situation the student has launched the whole line without registering it under design laws, she cannot later claim the remedies out of it.

III. PROTECTION IN USA

The USA is a global power that has very elaborative and extensive laws. The fashion industry is one such exception where US laws have failed the fashion designers to ensure adequate protection and compensation in case of copying or adaptations. Copyright law has its foundations laid in the American Constitution¹⁵ and later came the Copyright Act, 1976. Any original work deduced into a tangible form of expression is protected under 17 U.S.C. 102. The basic ingredient needed for copyright protection in the US is 'originality'.¹⁶ The level of

¹³ Bharti, Sunanda. "Legal Protection of Fashion Design in Apparels in India: A Dilemma Under the Copyright and Design Law." *International Journal of Business Insights and Transformation* 10, no. 1 (2016): 32-38.

¹⁴ See *Perry v Truefitt* (1842) 6 Beav. 66. Also, see Cushing, Grafton Dulany. "On Certain Cases Analogous to Trade-Marks." *Harvard Law Review* (1891): 321-332.

¹⁵ See US Constitution Art. 1 section 8 Cl. 8

¹⁶ See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Also, see Ginsburg, Jane C. "No 'Sweat'? Copyright and Other Protection of Works of Information After *Feist v. Rural Telephone*." *Columbia Law Review* 92, no. 2 (1992): 338-388.

creativity must not be too high. Copyright protection is not yielded to 'useful articles' excluding utilitarian functions.¹⁷ And since clothing is seen as a thing that covers the body most of the time it fails to qualify the utilitarian doctrine. *Mazer v. Stein*¹⁸ is a landmark case where the court held that any 'useful article' used in the fashion industry cannot be granted copyright protection.

'Separability' test was the standard followed in the US for granting copyright to fashion designers. In *Star Athletica LLC v. Varsity Brands, Inc*¹⁹ US SC got an opportunity to solve few problems of fashion designers. The court iterated that the physical framework of the separability test is not needed in copyright law. Also, the court said that two conditions have to be fulfilled to get copyright protection in clothing lines:

- a. The 2D/3D feature of the artwork is separate from the useful article;
- b. If it can be imagined separately from the useful article it is placed in or on, making a pictorial, graphical or sculptural work of its own.

Designers also have an option to protect their designs under patent law. They are known as 'design patents' and are valid for a period of 14 years. Very few designs qualify under this because of the non-fulfillment of novelty criteria. Other than this various bills have been introduced by Congress to ensure protection to fashion designers but not many have come through, including the Designer Piracy Prohibition Act and The Innovative Design Prevention & Piracy Prohibition Act.²⁰

Answering the problem of the fashion student with US Copyright laws, she can get protection only if she can prove the two conditions lay above. Since she has launched her line without availing any protection earlier seeking recourse afterward becomes a difficult job.

IV. CONCLUSION

While comparing copyright laws of both countries in terms of protecting fashion designers it can be seen that India provides better mechanisms than the USA. Many designers are coming to India for protecting their designs. To achieve more in this area quick enforcement is required. Since what is fashion today may not be fashion tomorrow. Also, if the original design of the designer is stolen and early action is not taken then it becomes very difficult to prove

¹⁷ See *Chosun Int'l, Inc. v. Chishna Creations, Ltd.*, 413 F.3d 324, 328 (2d Cir. 2005)

¹⁸ 347 U.S. 201, 218 (1954)

¹⁹ 137 S. Ct. 1002 (2017)

²⁰ Emma Yao Xiao, "The New Trend: Protecting American Fashion Designs through National Copyright Measures," *Cardozo Arts & Entertainment Law Journal* 28, no. 2 (2010): 417-444

infringement later on.

To sum up, it can be said that only the creative aspect of the designer is under protection in the US, not the cut or appearance of the dress, whereas, in India from drawing to dress everything can be protected under law.
