



Department  
of Impresa e Management

Course of Intellectual Property Rights

## Fashion design's Low-IP Protection:

The relationship between copycats and  
innovation in the fast fashions' era.

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*Deixo a minha fé guiar,  
sei que um dia chego lá*

## Table of Contents

<b>Introduction</b>	<b>1</b>
<b>Chapter I: From Traditional Fashion to Fast Fashion</b>	<b>4</b>
1.1 A definition of Fashion	4
1.2 Fashion in the last 30 years: from the '90s until today	5
1.3 The raise of Fast Fashion and its implications	8
1.4 Fashion product lifecycle: two models	11
1.4.1 The Traditional fashion production cycle	12
1.4.2 The Fast fashion production cycle	14
1.5 Implications for the industry	15
<b>Chapter II: Legal Protection for Fashion Design</b>	<b>18</b>
2.1 Imitation Practices in the fashion system	18
2.1.1 Fashion's copying practices	18
2.1.2 Trends vs Copies	20
2.2 Intellectual Property and its protection forms	21
2.2.1 General IP protection forms	22
2.2.2 Fashion design IP protection forms	24
2.3 EU current design protection	25
2.3.1 European Union Design Protection	26
2.3.2 Italian Copyright Protection	32
2.4 Underuse of IP protection for Fashion Design	35
<b>Chapter III: The inverse relationship between innovation and IP protection in the fashion industry</b>	<b>38</b>
3.1 Why fashion houses do not exploit fashion design's protection?	38
3.1.1 Induced obsolescence	38
3.1.2 Anchoring	41
3.2 Extralegal Solutions	43

3.2.1 Social Shaming and Public Outcry	43
3.2.2 The Power of Designers Collaborations	45
3.3 Lux-meets-mass collaborations	48
3.3.1 H&M's intuition: an early adopter of the win-win-win strategy	48
3.3.2 Blatant Copying is no Longer Enough	52
<b>Conclusions</b>	<b>55</b>
<b>Bibliography</b>	<b>58</b>
<b>Executive Summary</b>	<b>62</b>
Introduction	62
Chapter I: From Traditional Fashion to Fast Fashion	63
Chapter II: Legal Protection for Fashion Design	64
Chapter III: The inverse relationship between Innovation and IP protection in the Fashion Industry	68
Conclusion	74

## Introduction

In today's marketplace fashion knockoffs are everywhere.

Copies are as old as fashion industry is. Indeed, in the past copying *haute couture* clothes was a real art. In the US there was a sort of tacit agreement between US department stores and the small European *atelier*: since American purchasers wouldn't have travel overseas to buy the original garments, the European fashion designers pretended not to know what was going on. De facto, in some cases were the same designers that selected some of their collection's pattern pieces to be given to the New York's department stores through an agreement regulating the production of these authorized replicas<sup>1</sup>. And besides that, everyone could reproduce at home that garments as, at that time, any woman in the World did know how to sew, owned a sewing-machine or knew a seamstress. It was the "heaven of copycats" but it was authorized or implicitly accepted and, most of all, there were no negative implications for anyone.

Nowadays, who copies the creations of both famous and new fashion designers are the large low-cost clothing chains as *H&M*, *Zara*, *Forever21*, etc.... and they do it with a pervasiveness such that they are affecting the whole fashion system.

In the past, difference inter-nations and between-companies in technology played a key role in the market competitiveness. Nevertheless, with globalization technological superiority has lost his status. Nowadays, the major growth engine is the human innovativeness. In other words, in the 21<sup>st</sup> century's international market, knowledge-based economy and design are the main powerful sources of competitive edge.

In any industry, the importance of design does not refer only to the field of art, but also – and especially – to the product's structure itself. However, there is an industry in which the relevance of design is particularly prominent: the fashion industry. Indeed, fashion design represents the essence of the items as it is one of the most important criteria in

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<sup>1</sup> Whitaker J., *Service and Style: How the American Department Store Fashioned the Middle Class* – St. Martin's Press, 2006

customer's purchasing decision. Fashion industry aims to meet the aesthetic desire of the customers, as they do not buy clothes and accessories just because they are functional but, most of the time, their purchases are driven by an emotional need. Furthermore, even if it reflects customer's desire and need, the creation of fashion design is a complete creative process. Undeniably it has an independent artistic value.

Despite its renowned importance, the protection of intellectual property in the fashion world seems to be particularly lacking. At first glance, it seems that this is the reason why piracy is so widespread in the industry. Indeed, various are the copying practices that can be identified in this field. Some of them, such as counterfeiting or the improper use of registered trademarks, are punished by law. However, there is a fundamental aspect of the fashion product that is not particularly protected: the fashion design. Fashion design is the art of the application of design and aesthetics or natural beauty to clothing and accessories. It is the essence of fashion, as it is the creation of a designer, who is an artist. This aspect is so little protected by law, that most of the almost-copies of a design that are available on the market are considered legal.

These almost-copies can be referred to as both fashion copycat or fashion knockoff: these two terms can often be used as synonyms as they both indicate a fashion product with a design very similar, but not equal, to the one created by another brand's stylist; the only *nuance* of meaning that differentiates them is that while knockoff implies a bad faith intention (that is why when we refer to fast fashion's products, we refer to them as knockoffs), the term copycat implies a more unintentional almost-copying, in the sense that since many designers are influenced by the context around them, it often happens that reproducing the design concept of another designer occurs more in an accidentally manner, rather than maliciously.

These products, combined with an increasingly modern and technologically advanced production chain, has enabled the rise and growth of the "democratization of fashion". Fast fashion retailers' business is entirely based on the fast production of lower-quality imitations of high-priced clothes and accessories design that are sold at a very lower price, compared with the original. Their stores are full of these knockoffs coming straight from the latest fashion week catwalks to meet new trends. Moreover, the time to market of

these companies is quite short compared to the one of the traditional fashion houses. In other words, the cheap copies will be purchasable in the fast fashion retailers' shops before being available in the stores of those who designed the original ones. And interesting enough, it is legal.

Since fashion design is not covered by copyright law, what fast fashion companies do is lawful and very common. Fashion trademarks are strongly policed and protected, but the underlying sartorial design can be copied with very few restraints. This "grey area" of the legislation made fashion more democratic than ever, giving to every customer the possibility to be trendy regardless of how much money she or he has in her/his wallet.

Fashion designers react to this not illegal copies inspired by them with a new creation. Indeed, the fashion system moves at an accelerated innovation speed if compared to other sectors in which copying is not allowed. Although copying is a permitted practice, creativity and innovation in the fashion industry keep on growing. All this copying has not destroyed the industry.

Whether it is defined as copying, taking inspiration or "referring" to another designer's work is a detail, what matters is that in fashion all these practices are allowed and little opposed by the fashion brands directly harmed.

How this is possible and which role the IP protection laws play in this field is what we will try to understand in the following pages.

## Chapter I: From Traditional Fashion to Fast Fashion

The value of the global fashion industry is of 3,000 billion dollars (3 trillion dollars), 2 percent of the world's GDP<sup>2</sup>.

Apparel has always been a labor-intensive and low-capital industry. It is a market with low entry barriers and – to a large extent – it is composed by players that use standardized production. Indeed, fashion industry is characterized by a very low degree of market concentration – that is, one or a small number of firms are not influencing the market production, so it is considered highly competitive.

It goes without saying that the advent of globalization and the ever-faster changes in technological development have had an impact on the apparel industry's structure. In fact, as a result, fashion companies outsourced the production more and more to developing countries.

It is thanks to this shifting of production that fast fashion was able to emerge and to establish itself in the fashion industry as a success story.

### 1.1 A definition of Fashion

There is not a single definition of the word fashion. This word has been defined in many ways over time, depending on the historical period and place. In 1987 *Perna* described it with the following words: “the style of dressing that prevails among any group of persons [...] which may last of a year or two or a span of years<sup>3</sup>”. In a general meaning fashion is a combination of clothes, accessories, hair style and cosmetic that in a specific place and at a specific time is considered *trendy* by most of the people. It concerns individual's appearance. Fashion clothing is a means through which individuals express themselves and create their own identity, indeed it became central in mass culture<sup>4</sup>. Fashion gives the

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<sup>2</sup> Fashion United, *Global Fashion Industry Statistics – International Apparel* - <https://fashionunited.com/global-fashion-industry-statistics/>

<sup>3</sup> Perna R., *Fashion Forecasting: A mystery or a method?* - Fairchild Books, 1987

<sup>4</sup> Wilson and De La Haye, *Defining Dress: object meaning and identity* - Manchester University Press, 1999



possibility to show whatever image of yourself you want in the everyday life. It is an instrument of projection for people to manipulate their appearance in society because it is visible when being used.

Furthermore, nowadays fashion is something that no longer belongs only to wealthy people. Fast fashion made fashion democratic by selling trendy products accessible to all. Fashion has changed and is changing. As claimed by *Jackson* and *Shaw*, clothing is fast moving from a functional and utilitarian product to an “aspirational and more psychologically uplifting aspect of consumer purchasing<sup>5</sup>”.

## 1.2 Fashion in the last 30 years: from the '90s until today

In the last thirty years, fashion is the manufacturing industry's sector that changed more than the others. One of the most important events that generated this shift is the globalization that since the '90s affected the environment in which companies operate by making it more complex and dynamic. By introducing the possibility of outsourcing, globalization changed the rules of competition of the markets. Thus, from then on, companies started relocating production in third countries – as Asia and East Europe – by concluding contracts with suppliers located outside of their target markets. The aim was to reduce the labor cost to increase investment to acquire knowledge in other business areas, that were considered “critical”. The consequences were several depending on the industry.

In the fashion sector, outsourcing meant the possibility to explore new business opportunities in markets other than the Western one, which was almost saturated. Furthermore, technological development globally standardized customers' needs, giving the possibility to exploit economies of scale and so to compete with the same products in different markets through a uniform strategy<sup>6</sup>.

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<sup>5</sup> Jackson T., Shaw D., *Mastering Fashion Buying and Merchandising Management* – Palgrave Macmillan, 2001.

<sup>6</sup> Enciclopedia Treccani, *Definizione di Globalizzazione* - <http://www.treccani.it/enciclopedia/globalizzazione>

Despite the merits of outsourcing, it led to significantly longer lead times, complicated supply chains due to geographic distances, inconsistency and variability in processes at both ends of the chain, and complex import/export procedures<sup>7</sup>.

The result was a negative impact on profits because fashion retailers failed to quickly translate the trends into the market, consequently, they were not able to sell the merchandise in the appropriate season time. And the situation worsened when customers changed their clothes purchasing decisions.

All these new developments triggered a fashion industry's restructuring process. Indeed, companies of this sector started looking for new competitive dimensions other than the price one. Most of the time innovation in the fashion world refers to product innovation; thus, in a changing environment – as the one we described above – it was essential to adopt a faster and more flexible production chain to reduce the time to market and to satisfy customers' needs faster than competitors<sup>8</sup>.

As fashion products are transitory products defined by low predictability, high impulse purchase and a high volatility of market demand, they are characterized by a short-life cycle<sup>9</sup>. The life cycle of a fashion product starts when the product enters the market and it ends with the substitution of that product with a new one. This cycle is analogous to other sector's product life cycle and it consists of the following stages<sup>10</sup>:

- **Development:** this is the very first stage. It is when a new product is brought to market, before there is a proved demand for it. In this phase the *opinion leaders* – pioneers in choosing and adopting the new fashion style – play an important role by influencing the future costumers' attitudes. The curve is characterized by low sales that grow along slowly.

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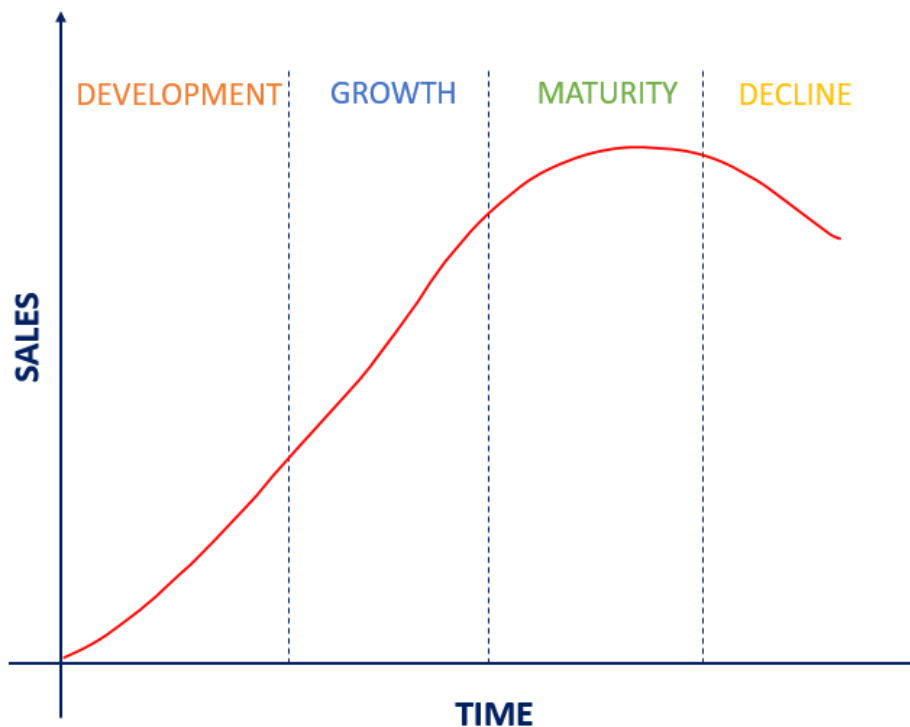
<sup>7</sup> Bhardwaj V. and Fairhurst A., *Fast fashion: Response to changes in the fashion industry* - Taylor & Francis Group, 2010.

<sup>8</sup> Bhardwaj V. and Fairhurst A., *Fast fashion: Response to changes in the fashion industry* - Taylor & Francis Group, 2010.

<sup>9</sup> Fernie J. and Sparks L., *Logistics and Retail Management Emerging issues and new challenges in the retail supply chain* - Kogan Page Ltd, 2009, 3<sup>rd</sup> edition

<sup>10</sup> Levitt T., Exploit the Product Life Cycle – Harvard Business Review, <https://hbr.org/1965/11/exploit-the-product-life-cycle>

- Growth: the new trendy product is purchased; demand begins to accelerate, and the size of the total market expands rapidly. At this point potential competitors who have been watching developments during the first stage jump into the fray<sup>11</sup>.
- Maturity: on this stage the product reaches its peak by reaching the masses. The first sign of its advent is evidence of market saturation. This means that most consumer companies or households that are sales prospects will be owning or using the product. Sales now grow about on a par with population.
- Decline: is the last phase and it occurs when the product begins to lose consumer appeal and sales decrease. It is when customers tend to buy the item only if it is significantly discounted.



Graph 1: Product Life Cycle

Most of the fashion products are seasonal products, which means that in nearly 4-5 months their life cycle expires because, after that time, costumers start considering it as obsolete and no longer fashionable. Indeed, fashion companies try to extend the lifetime

<sup>11</sup> Levitt T., Exploit the Product Life Cycle – Harvard Business Review, <https://hbr.org/1965/11/exploit-the-product-life-cycle>

of the products “exacerbating the idea of fashion season” by producing different new collections to be placed on the market for the same season.

As a matter of fact, major fashion design firms produce new apparel design continually, in fact the industry is characterized by a continuous development of creative projects.

In “traditional fashion” all the design outputs are seasonally introduced to the public through a series of runway shows, which mark the fashion calendar year: the two main events of the year are the autumn-winter (AW) fashion shows in February and March, and on September and October with the spring-summer (SS) collections presentation.

Looking at history, these fashion shows were exclusively reserved for fashion professionals as fashion designers, buyers and fashion managers. Still, from the end of the ‘90s on, these events became a public phenomenon: photos, videos and even live videos of the collections that come down the runway are available on the internet and on the newspaper; and this happens for almost every fashion event during the year, not only in the fashion weeks season. As a result, from there on customers, as everyone else, are constantly exposed to the latest news about fashion trends and collections.

Moreover, from some years now, due to the customers’ increasing demand and to the wild rise of fast fashion, many traditional fashion houses introduced also the concept of inter-season lines. These lines result in what is defined as capsule collection, that “is essentially a condensed version of a designer’s vision, often limited edition, which transcends seasons and trends by being functional — read commercial<sup>12</sup>”. But the category also includes the *resort* and *cruise* collections of the month of June, and the *pre-fall* collections that go on sale in November-December.

### 1.3 The raise of Fast Fashion and its implications

Those who capitalized on this situation exploiting the potential of this new fashion environment are those players that, nowadays, we call fast fashion companies.

Fast fashion companies can be defined as apparel companies that sell stylish and trendy products at a very affordable price, by exploiting economies of scale. This fashion sector “was developed in Europe to meet the rapidly changing preferences of primarily young

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<sup>12</sup> Business Of Fashion, *Capsule Collection definition* - <https://www.businessoffashion.com/education/fashion-az/capsule-collections>

women who want to follow trends in fashion but at a fraction of the cost”<sup>13</sup>. As a matter of fact, these companies are characterized by a high geographic coverage that allows them to modify their product assortments at very short intervals<sup>14</sup>.

Before retailers had to deal with large inventories and with the storage of a large amount of merchandise that could meet an entire season’s demand. Fast fashion has affected the fashion industry in two key aspects: from the business standpoint it significantly reduced the production times and the logistic processes by introducing a new supply chain model; under the customers point of view it encourages them to go to store more often by continuously introducing (or just re-positioning) new products.

The consequences of the raise of this phenomenon are clearly visible in how it affected the “fashion pyramid”. The fashion industry’s products are segmented by type of product and price into four main categories, which compose what has been defined as a fashion pyramid:

- *Haute couture* is the top of the pyramid and is the finest collection. This is the most expensive, labor-intensive and inaccessible segment. The garments are hand-made with high-quality materials and they are rich in exquisite details. *Haute couture* clothes are prohibitive expensive, indeed they are reserved for a very small *élite*.
- *Prêt-à-porter (or ready-to-wear)* is characterized by elegance and superior quality, involving material used and manufacture. The price level is more attainable compared to the *haute couture*’s tailored garments, still it is above what the majority would pay for clothing. Indeed, this line is designed for customers who want to stand apart from the mass. *Prêt-à-porter*’s life cycle is determined by the seasonal collections, which parade on the fashion weeks’ runways.
- “*Better*” *fashion* consists in a moderately priced apparel created by top designers with the objective to increase the sales volume, by reaching a larger proportion of customers. This clothing line can be qualified as a good solution to reduce the losses caused by off-brand knockoffs.

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<sup>13</sup> Linden Radner A., *An Analysis of the Fast Fashion Industry* – Bard College, Senior Projects Fall, 2016

<sup>14</sup> Corbellini E., Saviolo S., *Managing Fashion and Luxury Companies* – Etas, 2009.

- *Mass market* is the bottom of the pyramid. It is a basic or commodity category, which also includes the *fast fashion*. Here competition is based on the principle of the “best value for money” achieved by exploiting economies of scale and by investing on the as efficient as possible supply chain.

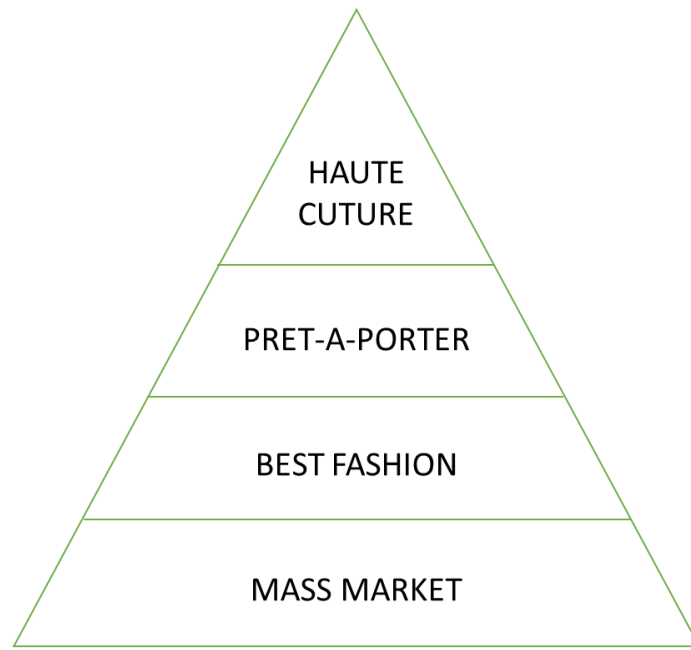


Figure 1: Fashion Pyramid

What emerges from the fashion pyramid is that one difference between these segments is the price: it decreases as one descends the pyramid. As the price, also the design and the fashion content decrease. But this is no longer true today. In fact, until some years ago only low-price and low-fashion garments belonged to the fashion pyramid’s mass market category. But, as we said before, with the advent of globalization and the offshoring of production the fast fashion phenomenon widespread. This new segment broke the model of the fashion pyramid. Before, to get a higher fashion content implied a higher price to be pay. Today, fashion trends change extremely quickly, and fast fashion companies know how to capitalize on these trends. Fast fashion model is a streamlined system characterized by rapid design, production, distribution, and marketing. That is, these retailers can rapidly manage small quantities of a wide range of products through their supply chain. This business model affected the fashion pyramid because it allowed costumers to buy a broad assortment of garments with a higher fashion content at a very low price.

Furthermore, fast fashion products changed the notion of *Veblen goods*, which are “goods for which demand increases as the price increases, because of its exclusive nature and appeal as a status symbol<sup>15</sup>”. In fact, these companies offer trendy products at a very reasonable price, allowing customers to renew their looks every day. These characteristics make these products high demand and this forced all the other industry’s players to change their strategies to stay competitive.

#### 1.4 Fashion product lifecycle: two models

To better understand the industry’s changes that fast fashion has involved, we must go into detail of how the fashion product’s lifecycle works. The manufacturing process of a fashion item is composed by a long sequence of specific stages, that ends with the sale of the garment.

Excluding the fast fashion segment, which has a rather a different process, the seasonal production cycle starts nearly 24 months before the sale when the textile fiber’s manufacturers develop the first ideas about color trends. Then, textile spinning companies incorporate these new ideas in industrial products, which give life to textile collections that are the bases of fashion designers’ and apparel companies’ work. As we descend this production chain, creative and immaterial components increase, and the industrial and material ones decrease. Nevertheless, the down-stream creativity is the cumulative effect of all the stages before, which also includes the up-stream textile companies’ work.

To create a fashion collection can be outlined in accordance with two models: the traditional fashion and the fast fashion models. The choice between one or the other implies a significant difference in terms of time management and steps of the production process to be followed. In fact, traditional fashion is based on an exact seasonal cycle – that is, the sequence of the steps to be followed is very specific – with the aim to create quality garments that resist the time; while the fast fashion approach generates a continuous flux of new products or mini-collections characterized by a very short

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<sup>15</sup> Investopedia, Veblen Good Definition - <https://www.investopedia.com/terms/v/veblen-good.asp>

lifecycle. Furthermore, in traditional fashion the process is driven by the company's production area or by the creative. In fast fashion the main role in production is played by the distribution network both in the design and in the production process.

Despite these differences, skills and competences required in the production method's main steps are very similar in both the two models.

<b>Creation steps</b>	COLLECTION POSITIONING DEFINITION
	TRENDS ANALYSIS
	SKETCHES AND PATTERN PIECES CREATION
	FABRICS, RAW MATERIALS AND SUPPLIERS SELECTION
	GRAPHIC DESIGN
	COLLECTION DESIGN (SKETCHES SELECTION)
<b>Industrialization steps</b>	PROTOTYPES CREATION

Table 1: Fashion Production Process

Both the production processes can be described with the same sequence of steps (table 1), which nevertheless are achieved using different times and methods.

#### 1.4.1 The Traditional fashion production cycle

The traditional fashion products cycle calendar is defined by the main fashion tradeshows. The AW collections debut at the end of January/beginning of February's tradeshows; these garments will then be delivered to the stores around July and August and will be purchasable from September. The SS collections are presented at the tradeshows between July and September, then the shopkeepers receive the merchandise in the months of January and February of the following year and the garments are available to customers from March.



Furthermore, fashion designers start drawing and creating the collections around five months before the tradeshows: they work on the SS collections since February and on the AW collections since the August of the year before the tradeshows.

Table 2, here below, resumes the traditional fashion production model.

		<b>FW COLLECTION year T-1</b>	<b>SS COLLECTION year T</b>	<b>FW COLLECTION year T</b>	<b>SS COLLECTION year T+1</b>	
<b>YEAR T-1</b>	JAN	orders / tradeshows	new collection desing			
	FEB					
	MAR	production				
	APR					
	MAY					
	JUN					
	JUL	stores delivery	orders / tradeshows			
	AUG	sale	production			new collection desing
	SEP					
	OCT					
	NOV					
	DEC					
<b>YEAR T</b>	JAN	final season sales	stores delivery	orders / tradeshows	new collection desing	
	FEB					
	MAR	sale	production			
	APR					
	MAY					
	JUN					
	JUL	final season sales	stores delivery	orders / tradeshows		
	AUG	sale	production			
	SEP					
	OCT					
	NOV					
	DEC					
<b>YEAR T+1</b>	JAN			final season sales	stores delivery	
	FEB					

Table 2: Traditional Fashion Production Cycle

As we can see, the product life cycle of a traditional fashion house starts one year before the sale to the general public. Moreover, can be clearly seen how the 12 months of preparation times are totally disproportionate to the 4 months of sale period.

From the table also emerges the constant overlapping of the production steps of different collections, which is something that enables us to understand how hectic a traditional fashion business is.

#### 1.4.2 The Fast fashion production cycle

The word *fast fashion* refers to a group of business models united by both the aims to reduce the production times and to eliminate the concept of seasonal production in favor of a constant products renewal, even if they differ in market positioning and degree of vertical integration. Retailers such as *Zara*, *H&M*, *TopShop*, *Primark*, etc... quickly introduce interpretations of the runway designs to attract customers in their stores and they can do it in approximately two-five weeks. This is possible thanks to their quick responsiveness, which allows them to forecast future trends, and so the needs and desires of the customers, using real-time data<sup>16</sup>.

Compared to the traditional fashion – which relies on a *push* scheme where the fashion designers define the collection based on his personal style – fast fashion companies use the *pull* method. In other words, while in the *push* model everything starts from the upstream actions, in the *pull* model downstream activities affect and direct the upstream ones. As it exploits a made-to-order basis production, the *pull* model allows fast fashion companies to avoid the mismatches between the trend in demand and the rate of production. As a result, the lead-time of these players is extremely short compared to the one of the traditional fashion houses. For the sake of clarity, *Zara* can design, produce, and deliver a new garment in two weeks; *Forever 21* six weeks, and *H&M* eight weeks<sup>17</sup>.

Even if it shows *Zara's* product life cycle, the following table can be considered as a generic example of how fast fashion's companies work.

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<sup>16</sup> Jackson T. and Shaw D., *Mastering fashion buying and merchandising management* – Palgrave Master Series, 2001

<sup>17</sup> Cline E.L., *Overdressed: the shockingly high cost of cheap fashion* – Portfolio/Penguin, 2012

		ACTIVITY			
TIME	week 1	SETTING OF PRODUCT'S IDEA, PRICE AND QUANTITY	FABRICS, RAW MATERIALS AND ACCESSORIES ORDER TO THE INTERNAL WAREHOUSE	PRODUCT'S DESIGN CREATION	PRODUCT'S DESIGN APPROVAL
	week 2	DESIGN'S AND PROTOTYPE'S FITTING	DEFECTS CORRECTION	PROTOTYPES APPROVAL	START PRODUCTION
	week 3	PRODUCTION			
	week 4	PRODUCTION			
	week 5	PRODUCTS' TAGGING		SHIPMENT TO STORES	

Table 3: Fast Fashion Production Cycle: ZARA model

As we can see, in 15 days they go from the setting of product's idea, prices and quantities to the start of production; this is followed by two weeks of production until the last step, which is the merchandise shipment to the stores. In five weeks, a design idea turns into a ready-to-be purchased final product.

### 1.5 Implications for the industry

As we said, fast fashion companies use a pull model by starting from the downstream actions. In other words, this means that their business relies on the practice of design piracy. As a matter of fact, copies based on designs shown on the runway each season make it to store long before the original, authentic design do<sup>18</sup>. This business model is based on the offering of design's line-for-line replicas of both established fashion houses and emerging design labels at a fraction of the cost. Such copies are clearly identifiable as retailers reproduce the most peculiar components, that unique detail that makes the difference of the designer's creation.

<sup>18</sup> Agins T., *Copy Shops: Fashion Knockoffs Hit Stores Before Originals as Designers* – WALL ST. J., 1994.

Furthermore, as IP scholars *Hemphill* and *Suk* noted in their study on fashion design's state of protection, "the most striking consequence of low-cost, high-scale, rapid copying is not in beating an original to market, but in the ability to wait and see which designs succeed, and copy only those. Copyists can choose a target after retailers have made their buying decisions, or even after the product reaches stores, and customers have begun to buy. Such copyists can reach market well before the relevant trend has ended<sup>19</sup>." This ability to quickly manufacture and sell copies undermines the production cycle of traditional and legal fashion design. From the designers' standpoint we should consider two main issues:

- The loss of business opportunities and sales: the costs of producing a collection and take it onto the catwalk during the fashion week is very high. Fashion houses can afford it by recouping these investments selling the ready-to-wear lines. Since the *Great Recession*<sup>20</sup>, customers habits changed. They became less loyal to their favorite brands<sup>21</sup>; they combine garments and accessories of different fashion segments, from high to fast fashion. In terms of sales, this results in two ways: the loss of sales caused by the *substitution effect*<sup>22</sup> – that is, instead of the expensive original product, the customer prefers to buy the cheap knockoff; and the loss of sales related to a pervasive presence of that specific design, caused by the large number of knockoff available on the market.
- The damage of brand's identity and the reputational harm: this aspect is less tangible but equally harmful. The saturation of the market with lower-quality knockoffs undermines the brand's reputation<sup>23</sup>. Most of the luxury customer's choices are driven by the *snob effect*<sup>24</sup> as their willingness to pay is directly proportional to the exclusivity of the item. When a brand or a product is associated with mass-market because there is a high availability of its fast fashion knockoffs, luxury costumers shift to another brand that still

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<sup>19</sup> Scott Hemphill C. and Suk J., *THE LAW, CULTURE, AND ECONOMICS OF FASHION* – Stanford Law Review at 61 STAN. L. REV. 1147, 2009

<sup>20</sup> The *Great Recession* was a period of economic downturn that lasted from approximately December 2007 to June 2009.

<sup>21</sup> Olenski S., *Only One Quarter of American Consumers Are Brand Loyal* – FORBES, Mar. 26, 2012 <https://www.forbes.com/sites/marketshare/%202012/03/26/only-one-quarter-of-american-consumers-are-brand-loyal/>

<sup>22</sup> The substitution effect is the decrease in sales for a product that can be attributed to consumers switching to cheaper alternatives when its price rises.

<sup>23</sup> Givhan R., *The End of 'Gown in 60 Seconds'?* – WASH. POST, Aug. 10, 2007.

<sup>24</sup> The snob effect occurs when the demand for a product by a high-income segment varies inversely with its demand by the lower income segment.

retains its exclusivity image. As a result, the brand loses a portion of its value and, therefore, “the dilution of a design can cut into sales [because] it becomes too widespread or associated with less exclusive image<sup>25</sup>”.

The strength of fast fashion companies is the ability to copy other designers’ designs and to copy them fast. This completely disrupted the fashion industry, bothering all the other players and forcing them to restructure their business models. But, at the same time, fashion remains one of the most creative industry. Thus, at this point, one might well wonder how this is possible, how it is possible that there are low or even no legal consequences for actions of this kind. Furthermore, as we said at the beginning, copies are as old as fashion industry is, which take us to the second question: how is it possible that the industry survives, and survived, in such an environment? These are the issues that we shall study in the following chapters.

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<sup>25</sup> Beltrametti S., *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, 160, 2010.

## Chapter II: Legal Protection for Fashion Design

In most industries IP protection is fundamental. As through its means the IP owner can benefit from the exclusionary power, IP is a very profitable resource for a company under both a legal and economical point of view. The protection of new creations provides incentives to allocate new resources for future innovations as it prevents copying practices. The issue is to what extent this applies to the fashion industry. There is no law that specifically protects fashion design from copying. Therefore, garment designs lie in what has been termed the "fringe" area of intellectual property<sup>26</sup>. As a result, fashion industry is studded with copies of various types.

### 2.1 Imitation Practices in the fashion system

Two categories of designer can be distinguished in fashion industry. To the first category belong the designers that create and produce high quality and innovative goods. These people, to some extent, are artists that showcase their new creations at the fashion weeks. The second type of designers are those which do not innovate but imitate the designs made by the first category's high-end designers. Fast fashion designers and copyists are included in this second category and, as the relationship between fashion industry and intellectual property's protection law might be defined as contentious, rampant copying and imitations are to some extent allowed.

#### 2.1.1 Fashion's copying practices

Beside this distinction, to understand the legal protection for fashion design it is important to first investigate the differences between the various copying practices that can occur in the industry.

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<sup>26</sup> Derenberg, *Copyright No-Man's Land- Fringe Rights in Literary and Artistic Property* – J. PAT. OFF. Soc, 1953. See also Pogue and Borderland, *Where Copyright and Design Patent Meet* – COPYRIGHT L. SYMP., 1955.

The main difference is between the original product and the not original one. The latter can result in many forms depending on which part of the original is copied: it can be a trademark counterfeit, the result of a design piracy, or a counterfeit good.

*Trademark counterfeit* means the use of a registered trademark by someone different from the owner of the latter<sup>27</sup>. In other words, it is when an established trademark is placed on a product different from the legitimate one offered by the trademark owner. In this case there is a misuse of a designer's trademark but not of its design. For example, someone produces a pair of sunglasses and place on them the *Chanel* mark.

*Counterfeit good* is the imitation of a product. It is a product that not only is identical to the original one, but also gives the impression of being the authentic one designed and produced by the genuine manufacturer or trader<sup>28</sup>. Furthermore, these goods are characterized also by a trademark infringement. A good is counterfeit when it both reproduces the design and shows the trademark of another one, which is the original one. An example can be a counterfeit *Louis Vuitton* handbag (using *LV* mark and design).

*Design piracy* occurs when someone copies the style or the design of another manufacturer. It is when someone reproduces the features of a garment or an accessory as the shape, the lines or colors. Design concerns the distinguishing features, the peculiarities that make an object unique. When someone copies the ornamental or aesthetic aspect of another designer's article<sup>29</sup> we are dealing with design piracy. A *H&M* dress using *Prada* design is just one of the infinite cases of design piracy, as fast fashion retailers build their business on this practice.

The diagram here below resumes the tree main imitation practices just mentioned and graphically explains how they inter-relate.

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<sup>27</sup> WIPO, *Introduction to trademark law and practice: the basic concepts*; WIPO publication, Geneva, 1993 (Second Edition) - [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_653.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_653.pdf)

<sup>28</sup> WIPO, *Introduction to trademark law and practice: the basic concepts*; WIPO publication, Geneva, 1993 (Second Edition) - [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_653.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_653.pdf)

<sup>29</sup> WIPO, *Industrial Design, What is an industrial design?* - <https://www.wipo.int/designs/en/>

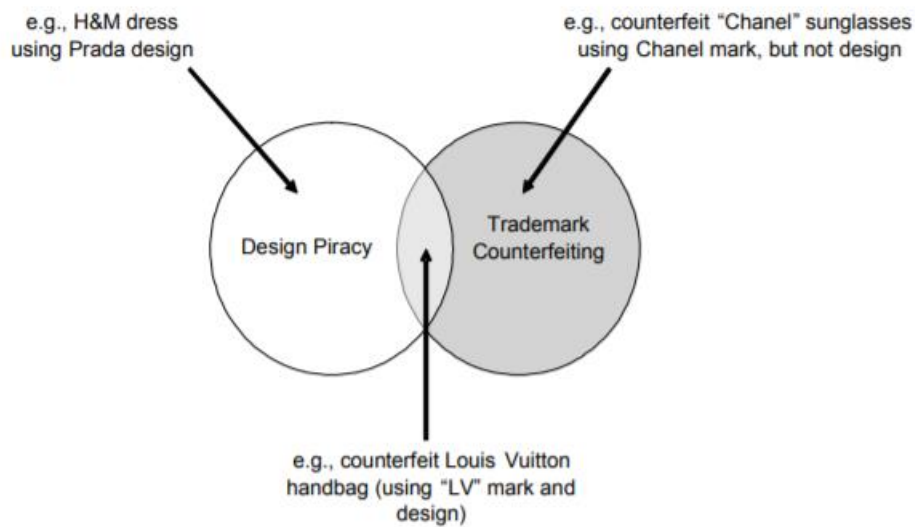


Figure 2: The three main fashion's imitation practices

### 2.1.2 Trends vs Copies

Another issue to be considered in this context is the difference between copies and trends. This is an important difference to be made in the fashion industry. A copy can be defined as “an imitation, transcript, or reproduction of an original work (such as a letter, a painting, a table, or a dress)<sup>30</sup>”. In other words, it is an identical or almost identical duplication of the original, a reproduction as accurate as possible. On the other hand, trend is a “current style or preference<sup>31</sup>”. It refers to a certain style that for a certain period and in a certain culture is considered popular and fashionable. The “recipe” to determine which kind of products and which details will be trendy in the next season is the difficult task, as predicting a trend always means taking a risk, this is a gamble. The volatility, the unpredictability and the variety of the factors that determine the success – or the total failure – of a garment, which will become the season’s best-seller (or bad-seller) are characterized by higher risks if compared to other industries. Estimates indicate that at

<sup>30</sup> Merriam-Webster Dictionary, definition of “copy” - <https://www.merriam-webster.com/dictionary/copy#synonym-discussion>

<sup>31</sup> Merriam-Webster Dictionary, definition of “trend” - <https://www.merriam-webster.com/dictionary/trend>



least the 20% of a collection's production costs is due to forecasts' errors<sup>32</sup>. Identify a future trend is a sort of *black box* as it is not characterized by a sequence of systematic steps. In this environment few are the actors that are willing to assume this risk. Indeed, as a matter of fact, in fashion we can find two different kind of companies: the trend-setters and the trend-followers. The former category is characterized by companies that always offer something new to the public, something that is not included in the "already seen" category. These are in the minority and they lead the latter category. In fact, trend-follower companies are companies that act as followers as they observe what the leader ones do and follow; some of the pieces of their collections – or even almost all – are inspired by the creations of the trend-setter's companies. This mechanism could be defined as a peculiarity of the fashion system, as it has always characterized this industry.

From a legal standpoint the issue is to understand when we are dealing with the following of a trend and when with a copy. In fashion industry is not always easy to differentiate between the two, as many companies' products based on the latest trends result in copies of other's fashion design. Furthermore, designers often choose to interpret, reference, take inspiration from prior works, other designs, or from the environment around us. This does not necessarily mean that the outcome will be an exact copy of the original one. But it often results in many designers converging around one trend. Thus, the boundary line is blurred.

## 2.2 Intellectual Property and its protection forms

As stated by the *World Intellectual Property Organization* (WIPO)<sup>33</sup>, "Intellectual Property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce<sup>34</sup>". Intellectual

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<sup>32</sup> Tartaglione C., Gallante F., *Il Processo Creativo nel Sistema Moda – Ares20 and Soges*, 2010

<sup>33</sup> WIPO, Inside WIPO, What is WIPO? : "WIPO is the global forum for intellectual property (IP) services, policy, information and cooperation. It is a self-funding agency of the United Nations, with 192 member states. Its mission is to lead the development of a balanced and effective international IP system that enables innovation and creativity for the benefit of all" - <https://www.wipo.int/about-wipo/en/#targetText=We%20are%20a%20self%2Dfunding,for%20the%20benefit%20of%20all>.

<sup>34</sup> WIPO, What is Intellectual Property? - [https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf)

property rights (IPR) are property rights that are meant to give the appropriate recognition and/or financial benefit to the creators or owners of patents, trademarks or copyrights. As outlined in *Article 27* of the *Universal Declaration of Human Rights*, “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author<sup>35</sup>”. The importance of IP was first recognized in 1883 at the *Paris Convention for the Protection of Industrial Property* and in 1886 at the *Berne Convention for the Protection of Literary and Artistic Works*. Both these treaties are administrated by the WIPO.

### 2.2.1 General IP protection forms

The IP protection is meant to give the appropriate recognition and/or financial benefit to the people for their innovations or creations. It is divided into two categories: industrial property which includes patents, trademarks, industrial design and geographical indications, and copyright – that covers literary works, film, music, artistic works and architectural design. As stated by the WIPO, the different purposes of these legal means are described here below.

For what concerns the industrial property:

- *Patent*: a patent grants an exclusive right to an invention, as invention means “a product or process that provides a new way of doing something, or that offers a new technical solution to a problem<sup>36</sup>”. Patents incentive individuals in recognize their creativity and, in doing so, in gaining a material reward for their inventions. With the protection and rewards provided by the patents, researchers and inventors have a great incentive to innovate, by producing better and more efficient products or processes. The owner of a patented invention benefits from a range of exclusive rights. In fact, patent protection implies that the product or process can be commercially made, used, distributed or sold only and only with the consent of the patent owner.

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<sup>35</sup> United Nations, *Universal Declaration of Human Rights*, Article 27 (2) - <https://www.un.org/en/universal-declaration-human-rights/>

<sup>36</sup>WIPO, What is Intellectual Property? - [https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf)

- *Trademark*: it is “a distinctive sign that identifies certain goods or services produced or provided by an individual or a company<sup>37</sup>”. It may be one or a combination of letters, words and numbers; it may consist of a drawing, a symbol, a distinctive design, logo or graphics that is affixed on the item sold. The system of trademark registration and protection helps to identify and distinguish a product from the others. A trademark “uniquely identifies a firm and/or its goods or services, guarantees the item's genuineness, and gives its owner the legal rights to prevent the trademark's unauthorized use<sup>38</sup>”. The owner of the marks has the exclusive right to use them and to authorize others to use them in return for payment.
- *Industrial Design*: “an industrial design refers to the ornamental or aesthetic aspects of an article<sup>39</sup>”. A design may consist of two-dimensional features – such as patterns, lines or colors – or three-dimensional features as the shape or surface of an article. Industrial design covers a wide range of products and handicrafts, which belong to different industries: from jewelry and luxury items to medical and technical instruments; from leisure goods to textile design; from architectural structures to house wares; etc.... The owner of a protected industrial design benefits of the exclusive right of produce and reproduce that specific design, which implies a protection against third parties' unauthorized imitations and copies. This system helps ensuring a fair return on investment. To be protected, an industrial design must be original or new and non-functional. The protection only refers to the aesthetic nature of the product, as the design is what makes an article appealing and attractive. In fact, all the other technical features of the article are not protected by the design registration. Nevertheless, they could be protected by a patent.
- *Geographical indication*: “A geographical indication is a sign used on goods that have a specific geographical origin and possess qualities or a reputation due to that place of origin<sup>40</sup>”. Most of the time it consists of the name of the place in which the good has been

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<sup>37</sup> WIPO, What is Intellectual Property? -

[https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf)

<sup>38</sup> Business Dictionary, Trademark definition -

<http://www.businessdictionary.com/definition/trademark.html>

<sup>39</sup> WIPO, What is Intellectual Property? -

[https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf)

<sup>40</sup> WIPO, What is Intellectual Property? -

[https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf)

produced. In other words, from where the product comes from, which are its origins. The geographical indication guarantees a product's specific quality and origin, as it highlights specific characteristics that may be related to the place of origin's manufacturing skills or typical raw materials. These aspects represent an added value for the customers, and so for who produced them.

About *copyright* laws, they are tools that grant “authors, artists and other creators protection for their literary and artistic creations, generally referred to as works<sup>41</sup>”. A copyright protected creation implies that its creator and his/her heirs and successors have certain basic rights under copyright law. These right holders own the exclusive right to use or authorize others to use the work on agreed terms. As reported by the WIPO in its report *What is Intellectual Property*, protecting copyright fosters human creativity by granting to creators, artists and authors both protection and a fair economic reward for their inventions.

### 2.2.2 Fashion design IP protection forms

Of the above listed categories, the ones that interests the fashion industry are trademarks and industrial design. Both the rights represent a tool to protect fashion items, depending on which aspect the designer wants to protect and in which environment he/she is operating.

As we said before, a trademark is a distinctive and specific sign that allows customers to recognize and distinguish the fashion article's source from the others. Designers can use it to protect their goods as, when applied on a product, it functions as a distinctive feature for the public. To protect a fashion design with trademark, the source of the article must be identified with the design itself; in other words it should be proved with evidence that the distinctiveness of the product's design is such that customers are able to recognize it and associate it to a specific designer and his/her brand. This process may be difficult to prove. In order to distinguish more clearly their designs, a solution adopted by different fashion houses is to incorporate their marks or logos in their fashionable pieces by

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<sup>41</sup> WIPO, What is Intellectual Property? - [https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf)

creating what is known as repeating-pattern mark<sup>42</sup>. For the sake of clarity, an example is the *Burberry check*, which is the famous brand's plaid design that is incorporated into its products designs. Nevertheless, this expedient does not guarantee the designer to completely avoid the piracy problem. Indeed, even if a logo incorporated into a fashion design obtains protection, remains the fact that copycats may use the same design without legal consequences since the protected part of the product is the logo, not the design. Furthermore, once the others use the same design, it becomes difficult to individuate and prove that the design belongs to the original creator.

For what concerns the other means of protection, as we said before, industrial design refers to the ornamental or aesthetic aspects of an article. In this case, the protection provided is related to the appearance of the product, which results from attributes such as its materials, shape or colors. Indeed, it is much more suitable for fashion products. Nevertheless, it is true that a protected design guarantees more rights than an unprotected one, but it is also true that it does not eliminates the copycat problem. In fact, what is under law protection is not each individual item composing the product on its own, but rather the specific combination of all that components. Thus, if someone copies a garment that is under design protection in all its details except one – for example, same shape, same material, but different color – it could not result in a breach of the law.

These gaps, both for trademark and design protection, are what fast-fashion companies exploit to run their businesses. This is what allows fast-fashion companies to exist.

### 2.3 EU current design protection

In the global fashion market, the European Union historically has provided protection for fashion design. IP protection is the core of most European fashion business models. As Europe is the heart of *haute couture*, fashion design's protection is part of its cultural

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<sup>42</sup> TMEP, section 1202.19, *Repeating-Patterns Marks* definition: "A repeating-pattern mark is a mark composed of a single repeated element or a repeated combination of designs, numbers, letters, or other characters, forming a pattern that is displayed on the surface of goods, on product packaging, or on materials associated with the advertising or provision of services. The pattern may appear over the entire surface or on just a portion of the relevant item" - [https://tmepp.uspto.gov/RDMS/TMEP/current#/current/ch1200\\_d24d81\\_13d65\\_2b9.html](https://tmepp.uspto.gov/RDMS/TMEP/current#/current/ch1200_d24d81_13d65_2b9.html)

identity. Indeed, its IP system offers a good level of protection to applied and utilitarian arts.

Copyright protection in Europe dates back to the XVIII Century in the United Kingdom and it took origin from the need to protect lines and cottons. Regulation has changed over the years and it was extended to both cover more fashion items and to be adapted to the European Union's requirements. Nowadays, fashion products – including apparel categories, footwear and accessories – may be protected under the EU design laws and national copyright laws<sup>43</sup>.

### 2.3.1 European Union Design Protection

In 1998 the European Council, with the purpose of always encouraging closer relations between Member States through the establishment of an internal market characterized by the free movement of goods and people, decided to foster an approximation of the laws of the EU Countries on the legal protection of design for the smooth functioning of the internal market itself. With this aim, the 13<sup>th</sup> of October 1998 was adopted by the European Parliament and the European Council the *Directive*<sup>44</sup> 98/71/EC on the legal protection of design. This implementation of a uniform protection approach for design rights was embraced by – at that time – the 28 EU Member States. It harmonized the national regimes across the EU by giving a unitary definition of the notion of design and of the requirements with which registered design rights must comply.

As reported in the *Article 1*<sup>45</sup> of the *Directive*:

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<sup>43</sup> Montalvo Witzburg F., *Protecting Fashion: a comparative analysis of fashion design protection in the United States and the European Union* - The Law Journal of the International Trademark Association (INTA), November-December 2017 - [https://www.inta.org/TMR/Documents/Volume%20107/Issue%20No.%206/vol107\\_no6\\_a1\\_montalvo\\_witzburg.pdf](https://www.inta.org/TMR/Documents/Volume%20107/Issue%20No.%206/vol107_no6_a1_montalvo_witzburg.pdf)

<sup>44</sup> EU official website, *Regulations, Directive and other acts*, Directive definition: "a directive is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals. One example is the EU consumer rights directive, which strengthens rights for consumers across the EU, for example by eliminating hidden charges and costs on the internet, and extending the period under which consumers can withdraw from a sales contract". - [https://europa.eu/european-union/eu-law/legal-acts\\_en#directives](https://europa.eu/european-union/eu-law/legal-acts_en#directives)

<sup>45</sup> *Directive 98/71/EC on the Legal Protection of Design*, Article 1 - [https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC_1&format=PDF)

- “(a) ‘design’ means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/ or materials of the product itself and/or its ornamentation;
- (b) ‘product’ means any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs;
- (c) ‘complex product’ means a product which is composed of multiple components which can be replaced permitting disassembly and reassembly of the product.”

For what concerns the protection requirements, the *Directive* established that to receive protection a design must be “novel” and possess “individual character”<sup>46</sup>. As reported in the *Article 4*, “novelty” refers to a design that is “considered new if no identical design has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority. Designs shall be deemed to be identical if their features differ only in immaterial details<sup>47</sup>”.

And, about the “individual character”, the *Directive* states that “a design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority<sup>48</sup>”. Moreover, when evaluating the individual character of a design, should also be considered “the degree of freedom of the designer in developing the design<sup>49</sup>”.

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<sup>46</sup> *Directive 98/71/EC* on the Legal Protection of Design, Article 3, paragraph 2: “A design shall be protected by a design right to the extent that it is new and has individual character.” - [https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC_1&format=PDF)

<sup>47</sup> *Directive 98/71/EC* on the Legal Protection of Design, Article 4 - [https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC_1&format=PDF)

<sup>48</sup> *Directive 98/71/EC* on the Legal Protection of Design, Article 5, paragraph 1 - [https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC_1&format=PDF)

<sup>49</sup> *Directive 98/71/EC* on the Legal Protection of Design, Article 5, paragraph 2 - [https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC_1&format=PDF)

Another aspect established with the adoption of the *Directive 98/71/CE* is the unification of the term of protection afforded by these rights. This issue is fundamental for the smooth functioning of the internal market. Indeed, the *Article 10* declares that a design that meets the requirements of novelty and individual character shall be protected for one or more periods of five years each “up to a total term of 25 years from the date of filing<sup>50</sup>”.

Even though the adoption of the *Directive* in 1998, only the Benelux Countries<sup>51</sup> had introduced a uniform design protection law. In fact, in all the other Member States of the EU, design protection was still under the national law and confined to the territory of the Member State concerned. In other words, identical designs were protected under different laws and for the benefit of different owners just because they belonged to different nationalities. As a result, this led to conflicts in the course of trade between the Member States themselves.

This was the prove that the objectives proposed could not be sufficiently achieved by the single EU States, therefore could be satisfied at Community level. Indeed, in accordance with the principle of subsidiarity<sup>52</sup> – as it is set out in *Article 5* of the TUE – the European Council adopted the *Regulation<sup>53</sup> No 6/2002 on Community Design*.

From a legal standpoint, while a directive only sets up the goals to be achieved leaving forms and methods for the implementation to the Member States, a regulation’s content

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<sup>50</sup> *Directive 98/71/EC* on the Legal Protection of Design, Article 10 - [https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC_1&format=PDF)

<sup>51</sup> World Population Review, *Benelux Countries 2019*: Benelux Countries is a term used to describe a group of nations located northwestern Europe. The name is derived from the three nations in the region: Belgium, the Netherlands, and Luxembourg. - <http://worldpopulationreview.com/countries/benelux-countries/#targetText=Benelux%20Countries%20is%20a%20term,%2C%20the%20Netherlands%2C%20a%20Luxembourg.>

<sup>52</sup> EU Parliament, *The Principle of Subsidiarity*: When applied in the context of the European Union, the principle of subsidiarity serves to regulate the exercise of the Union’s non-exclusive powers. It rules out Union intervention when an issue can be dealt with effectively by Member States at central, regional or local level and means that the Union is justified in exercising its powers when Member States are unable to achieve the objectives of a proposed action satisfactorily and added value can be provided if the action is carried out at Union level. - <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>

<sup>53</sup> EU official website, *Regulations, Directive and other acts*, Regulation definition: A "regulation" is a binding legislative act. It must be applied in its entirety across the EU. For example, when the EU wanted to make sure that there are common safeguards on goods imported from outside the EU, the Council adopted a regulation. - [https://europa.eu/european-union/eu-law/legal-acts\\_en#regulations](https://europa.eu/european-union/eu-law/legal-acts_en#regulations)



is mandatory in its entirety and is directly applicable in the Member States. In support of this, *Article 1*, paragraph 3 of the *Regulation* concerned, states that: “a Community design shall have a unitary character. It shall have equal effect throughout the Community. It shall not be registered, transferred or surrendered or be the subject of a decision declaring it invalid, nor shall its use be prohibited, save in respect of the whole Community. This principle and its implications shall apply unless otherwise provided in this Regulation<sup>54</sup>”.

The main issue of the *Regulation No 6/2002* is the establishment of two forms of protection: the short-term *unregistered Community design* (UCD) and the long-term *registered Community design* (RCD). The choice to implement this distinction is because there are sectors of industry which value the design’s registration for the great legal certainty it provides as the market life of their products is foreseeable, and so it requires the possibility of a long-term protection. On the other hand, there are also sectors – as the fashion industry – which produce “large numbers of designs for products frequently having a short market life<sup>55</sup>”; for companies operating in these fields protection without the burden of registration formalities and its costs is beneficial while “the duration of protection is of lesser significance<sup>56</sup>”. In view of these considerations, designs protected by RCD and UCD enjoy different benefits.

A first distinction must be made with respect to the notions of novelty and individual character. Indeed, for what concerns the requirements for protection, in case of a RCD a design shall be considered new and to have individual character if no identical design has been made available to the public “before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority<sup>57</sup>”. While in the case of a UCD the requirements of novelty and individual

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<sup>54</sup> *Regulation CE No 06/2002 on Community Design*, Article 1 (3) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>55</sup> *Regulation CE No 06/2002 on Community Design*, premises - paragraph (16) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>56</sup> *Regulation CE No 06/2002 on Community Design*, premises - paragraph (16) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>57</sup> *Regulation CE No 06/2002 on Community Design*, Article 5, 1 (b) and Article 6, 1 (b) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

character are satisfied if the design has been made available “before the date on which the design for which protection is claimed has first been made available to the public<sup>58</sup>”.

Another major difference between designs protected under RCD and the ones protected under UCD concerns the right conferred by the protection: the holder of a registered Community design owns “the exclusive right to use it and to prevent any third party not having his consent from using it<sup>59</sup>”; however, on the other side, an unregistered Community design confers the right to prevent the same acts as for the registered one but “only if the contested use results from copying the protected design<sup>60</sup>”. This means that, as reported by the EUIPO<sup>61</sup>, while a RCD is protected “against similar designs even when the infringing design has been developed in good faith<sup>62</sup>”, an UCD prevents from a commercial use of a design only in cases where we are in the presence of an intentional copy of the design it protects. In fact, the third paragraph of *Article 19* specifies that a design resulting from an “independent work of creation by a designer who may be reasonably thought not to be familiar with the design made available to the public by the holder<sup>63</sup>” does not meet the definition of “contested use” mentioned above; thus, the UCD does not protect from cases in where the infringing design is done in good faith, while the RCD does. In light of these distinctions, the legal protection conferred by the registered one is stronger and more transparent.

Further evidence for this UCD’s lower level of protection is related to the commencement and the term of protection. With regard to a design under the RCD the period of protection remained the same as the one established by the *Directive 98/71/CE*; that is to say for “one or more periods of five years each, up to a total term of 25 years from the date of

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<sup>58</sup> *Regulation CE No 06/2002 on Community Design*, Article 5, 1 (a) and Article 6, 1 (a) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>59</sup> *Regulation CE No 06/2002 on Community Design*, Article 19 (1) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>60</sup> *Regulation CE No 06/2002 on Community Design*, Article 19 (2) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>61</sup> EUIPO, About EUIPO: “EUIPO is the European Union Intellectual Property Office responsible for managing the EU trade mark and the registered Community design” - <https://euipo.europa.eu/ohimportal/en/about-euipo>

<sup>62</sup> EUIPO, *Designs in the European Union*, Scope - <https://euipo.europa.eu/ohimportal/en/designs-in-the-european-union>

<sup>63</sup> *Regulation CE No 06/2002 on Community Design*, Article 19 (2) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

filing<sup>64</sup>”. On the other hand, for designs under the UCD, *Article 11* of the *Regulation No 06/2002* states that they are protected for a period of three years starting from the date on which the design was first disclosed<sup>65</sup> within the European Community. Unlike the RCD, these three years cannot be extended or renewed. However, there is the *grace period*<sup>66</sup>: if the holder of an unregistered Community design wants to apply for a design registration, that is that he/she wants to turn an UCD in an RCD, he/she can still do so within one year of disclosure. A registration after that, might render the design concerned vulnerable to attacks<sup>67</sup>.

Moreover, always with a view of serving the needs of all sectors of industry in the Community, as for some among the latter there is a need to have easier and faster recourse to the registered Community design, the *Regulation 06/2002* introduced the possibility to file a multiple application (Article 37). As the name suggests, it is the option of combining several designs in one application. However, every design contained in a multiple application is considered separately from the others; in particular, it is independent for the purposes of “enforcement of rights, licensing, rights in rem, levy of execution, insolvency proceedings, surrender, renewal, assignment, deferred publication or declaration of invalidity<sup>68</sup>”.

For what concerns the application procedure for a registered Community design, there are two main paths: the application can be directly submitted to the EUIPO through their website, or it can also be registered “by filing an international application under the *Hague System* and designating the European Union or individual EU Member States to obtain

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<sup>64</sup> *Regulation CE No 06/2002 on Community Design*, Article 12 - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>65</sup> *Regulation CE No 06/2002 on Community Design*, Article 11 (2): “A design shall be deemed to have been made available to the public within the Community if it has been published, exhibited, used in trade or otherwise disclosed in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialized in the sector concerned, operating within the Community. The design shall not, however, be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality” - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>66</sup> EUIPO, Designs in the European Union - <https://euipo.europa.eu/ohimportal/en/designs-in-the-european-union>

<sup>67</sup> EUIPO, Disputes - <https://euipo.europa.eu/ohimportal/en/disputes>

<sup>68</sup> *Regulation CE No 06/2002 on Community Design*, premises - paragraph (25) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

design protection in the respective jurisdictions<sup>69</sup>”. With regard to the latter option, the *Hague System* is a system of international design registration that allows the applicant to register the design by filing a single application for multiple countries and regions<sup>70</sup>; it was established with the *Hague Agreement* – until now signed by 70 contracting parties covering 88 countries<sup>71</sup> – and it is administrated by the WIPO. In 2007 the EU joined it.

To evaluate the current state of the design protection system – established through the *Directive on the legal protection of designs* of the 1998 and the following *Regulation on Community design* of 2002 – and to identify potential areas of improvement, in December 2018 the European Commission launched a public consultation. This consultation to evaluate the performance of EU and national systems has the aim to help the Commission deciding on the need for modernization and further harmonization of the existing rules. Currently the results are not available.

### 2.3.2 Italian Copyright Protection

Italy, as other Member States of the European Union, protects fashion design also under its national copyright system. The *Italian Copyright Law (LDA)* – also known as the *L. 22 aprile 1941, n. 633* – is the main legislation concerning copyright and related rights protection of the Country. In fact, as claimed in the premise of the *Regulation on Community Design*, the latter “does not preclude the application to designs protected by Community designs of the industrial property laws or other relevant laws of the Member States, such as those relating to design protection acquired by registration or those relating to unregistered designs, trademarks, patents and utility models, unfair competition or civil liability<sup>72</sup>”.

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<sup>69</sup> Montalvo Witzburg F., *Protecting Fashion: a comparative analysis of fashion design protection in the United States and the European Union* - The Law Journal of the International Trademark Association (INTA), November-December 2017 - [https://www.inta.org/TMR/Documents/Volume%20107/Issue%20No.%206/vol107\\_no6\\_a1\\_montalvo\\_witzburg.pdf](https://www.inta.org/TMR/Documents/Volume%20107/Issue%20No.%206/vol107_no6_a1_montalvo_witzburg.pdf)

<sup>70</sup> WIPO, HAGUE, *The Hague System for the International Registration of Industrial Designs* - [https://www.wipo.int/edocs/pubdocs/en/designs/911/wipo\\_pub\\_911.pdf](https://www.wipo.int/edocs/pubdocs/en/designs/911/wipo_pub_911.pdf)

<sup>71</sup> WIPO, *Hague Agreement Concerning the International Registration of Industrial Designs*, Status on March 4, 2019 - <https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/hague.pdf>

<sup>72</sup> *Regulation CE No 06/2002 on Community Design*, premises - paragraph (31) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

The *L. 22 aprile 1941, n. 633* states that “works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theatre or cinematography, whatever their mode or form of expression<sup>73</sup>” are eligible for protection. Subsequently, in *Article 2* the text of law lists in a more specific way all the categories included in this first statement. These also include industrial design works that have creative character or inherent artistic character<sup>74</sup>.

There are two types of rights given by the Italian law: economic rights and moral rights.

Economic exploitation rights, in their turn, shall be divided into primary rights and related rights. Primary rights are granted to works that benefit of full copyright protection. They grant to the owner the exclusive right to publish and “the economic utilization of the work in any form or manner, whether original or derivate<sup>75</sup>”. In addition to these rights, the copyright holder has the exclusive right to reproduce, execute, represent or act in public, diffuse, distribute, translate, elaborate or transform, rent and lend the work in any form or method without his/her consent and without paying him/her a reward<sup>76</sup>. Related rights are “secondary rights” added to the primary ones, as they are characterized by a less relevance and a shorter duration.

Beside these rights, there are moral rights. Such rights consist of the right to be recognized as the author of the work and therefore to prevent others from modifying it without his/her consent. As established by *Article 20*, “independently of the exclusive rights of exploitation of the work [...] and even after the transfer of such rights, the author shall retain the right to claim authorship of his work and to object to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the work, which would be prejudicial to his honor or reputation<sup>77</sup>”. These shall be inalienable rights of the copyright, unless the author is aware of and has accepted the changes made to his/her

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<sup>73</sup> ITALIAN COPYRIGHT STATUTE, Law No. 633 of April 22, 1941 for the Protection of Copyright and Neighbouring Rights, Article 1 (1) - <https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf>

<sup>74</sup> ITALIAN COPYRIGHT STATUTE, Law No. 633 of April 22, 1941 for the Protection of Copyright and Neighbouring Rights, Article 2 (10): “Works of industrial designs which themselves have a creative and artistic value” - <https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf>

<sup>75</sup> ITALIAN COPYRIGHT STATUTE, Law No. 633 of April 22, 1941 for the Protection of Copyright and Neighbouring Rights, Article 12 - <https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf>

<sup>76</sup> Ufficio Brevetti, Copyright, *The types of rights given to the author by the law* - [https://www.ufficiobrevetti.it/en/copyright/?noredirect=en\\_US](https://www.ufficiobrevetti.it/en/copyright/?noredirect=en_US)

<sup>77</sup> ITALIAN COPYRIGHT STATUTE, Law No. 633 of April 22, 1941 for the Protection of Copyright and Neighbouring Rights, Article 20 - <https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf>

work. In that case, act to both prevent the performance or apply for its suppression are no longer options available<sup>78</sup>. Furthermore, after the author's death, moral rights "may be asserted, without limitation of time, by his spouse and children and, in the absence thereof, by his parents and other direct ascendants and descendants, and in absence of such ascendants and descendants, by his brothers and sisters and their descendants<sup>79</sup>".

For what concerns the duration, copyright protection – understood as economic exploitation rights – endures for the life of the right holder plus an additional 70 years after his/her death<sup>80</sup>. After this period, works end up in public domain, therefore can be freely published and used by others.

In Italy copyright registration is not mandatory but for some types of fashion products it is recommended as "the design registration may be too expensive or not cost efficient<sup>81</sup>". In these cases, copyright registration may be a valid alternative to design registration. This aspect should not be underestimate even more so in an industry as the fashion one as one of the main problems caused by fast fashion is the damage of brand's identity and the reputational harm caused by the saturation of the market with low-quality knockoffs. This problem would be contained thanks to the moral rights mentioned above. Nevertheless, it is true that some fashion products become iconic and never go out of fashion, but it is also true that forecast ex ante which of them will be so successful is a gamble with unknown outcome.

Designs also can be protected through an Italian design registration. Indeed, the Italian Industrial Property Code protects designs registered with the *Ufficio Italiano Brevetti e Marchi (UIBM)*, that is the Italian Patent and Trademark Office.

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<sup>78</sup> ITALIAN COPYRIGHT STATUTE, Law No. 633 of April 22, 1941 for the Protection of Copyright and Neighbouring Rights, Article 22: "The rights referred to in the preceding Articles shall be inalienable. However, if the author was aware of and has accepted modifications to his work, he shall not be entitled to intervene to prevent the performance thereof or to demand its suppression." -

<https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf>

<sup>79</sup> ITALIAN COPYRIGHT STATUTE, Law No. 633 of April 22, 1941 for the Protection of Copyright and Neighbouring Rights, Article 23 - <https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf>

<sup>80</sup> ITALIAN COPYRIGHT STATUTE, Law No. 633 of April 22, 1941 for the Protection of Copyright and Neighbouring Rights, Article 25: "The exploitation rights of a work shall subsist for the lifetime of the author and until the end of the seventieth calendar year after his death." -

<https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf>

<sup>81</sup> Gauss H., Guimberteau B., Bennett S., Litt L., *Red Soles Aren't Made for Walking: A Comparative Study of European Fashion Laws* – Landslide Magazine, 2013.

Italian law does not provide for unregistered design rights protection, although European Union does with its UCD protection, as discussed above.

## 2.4 Underuse of IP protection for Fashion Design

European law protects fashion design from copying and it does it on different levels. As we have already seen, in the EU fashion products may be protected under the national copyright and design laws and under the EU design law. The latter is divided into two types of protection: the registered Community design and the unregistered one.

The purpose of all these legal tools with the same subject is to provide protection in as many aspects of fashion design as possible. In this context, also the protection for UCD – that could be defined as less powerful compared to the registered one as it is conditioned on the claimant providing competent proof of copying – had shown its effectiveness in protecting fashion design. In fact, in January 2007, the British brand *Karen Miller* filed an action against the Irish multinational retail chain *Dunnes Store* based on an unregistered Community design right. The litigation was because in 2005 *Karen Miller* designed and placed on sale in Ireland a striped shirt and a black knit top. These two garments were purchased by representatives of *Dunnes* and subsequently the Irish multinational produced copies of these items manufactured abroad and placed them on sale in its Irish stores in 2006. In order to obtain injunctions to restrain *Dunnes* from using designs of which it claims to be the holder, *Karen Miller* appealed to the *Irish Supreme Court*. The latter, stayed the proceedings and referred two questions concerning the interpretation of the *Article 6*<sup>82</sup> and *Article 85(2)*<sup>83</sup> of the *Regulation no 6/2002* to the EU

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<sup>82</sup> *Regulation CE No 06/2002 on Community Design*, Article 6: “A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public: (a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>83</sup> *Regulation CE No 06/2002 on Community Design*, Article 85(2): “In proceedings in respect of an infringement action or an action for threatened infringement of an unregistered Community design, the Community design court shall treat the Community design as valid if the right holder produces proof that the conditions laid down in Article 11 have been met and indicates what constitutes the individual character of his Community design. However, the defendant may contest its validity by way of a plea or



Court of Justice (CJEU) which ultimately determined that: (1) “for the purposes of individual character, the overall impression a design produces on a user must be different from that produced by a design or designs taken individually, and (2) the right holder does not need to prove the individual character of the unregistered EU design in the infringement action; the right holder need merely indicate the features giving rise to the individual character of the design<sup>84</sup>”.

This decision was a success for fashion designers as it is the proof that their unique designs meet the requirements for unregistered design protection. Thus, in other words, the UCD protection is a legal tool that successfully reduces the risk of unpunished copycats.

Nevertheless, despite the availability of legal protection for fashion design, there are little litigations involving it in Europe. It probably sounds impressive, but it is not. Indeed, fashion knockoffs are becoming an increasingly widespread and important phenomenon. As observed by *Raustiala* and *Springman*, the issue is not about the presence or not of legal tools to protect fashion items, but rather the fact that fashion industry’s players do not use them.

In this context, even less use is made of RCD. To have an idea, it is enough to conduct a small research on the EUIPO’s database known as *Design View*, that is the centralized access point to registered designs information held by any of the participating National Offices of the EU Member States. Just for the sake of clarity, between January 2017 and September 2019 in the designated territories of France and Italy – the homelands of fashion and *haute couture* – were registered and fully published 12924 designs – formed out of the sum of 2D and 3D designs – belonging to the garment’s category<sup>85</sup>. This number, which seems to be comprehensive of only single designs, does however include the same 2D designs as viewed by different points of view. Therefore, what might look as a very big quantity does in fact amount to a much smaller number of fashion designs

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with a counterclaim for a declaration of invalidity” - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>84</sup> Hing R. and Cassidy L., *Karen Millen Fashions Ltd v. Dunnes Stores*, Dunnes Stores (Limerick) Ltd: Clarifying the Assessment of Individual Character in EU Designs, 105 TMR 1446, 2015; see also Woods and Monroig, *Fashion Design and Copyright in the US and EU* – WIPO, 2015.

<sup>85</sup> EUIPO, *DesignView*, advance search: Locarno classification: 02 – Articles of Clothing and Haberdash; Locarno sub-classification: 02 – Garments - <https://www.tmdn.org/tmdsview-web/welcome>



effectively registered. Furthermore, of this group, a good portion is represented by working clothes and uniforms, Carnival and Halloween disguises, sportswear and the official merchandising of some singers. Eliminating these kinds of garments, what emerges is that most of the top European fashion brands do not register their clothes designs. Indeed, the only brand names belonging to this category that we can find on the list are *Balmain*, *Moncler*, *Brunello Cucinelli* and some pieces of the *AEFFE Group*. In addition to these, we can also find few *Burberry*'s pieces all incorporating the famous brand's plaid design and a *Celine*'s shirt collar. Beside these brands, there is no evidence of other major fashion firms registering their clothing designs.

In light of what we have been analyzing so far, what emerges is that despite the straightening of the regulation, industry's practices with respect to design copying did not change. It is as if fashion brands were not sensitive to legal rules. "Europe thus presents a situation of pervasive but unutilized regulation<sup>86</sup>". If fashion design protection were an important element of success for these firms competing, the current EU legal system would be much more exploited within the industry.

Law is in place but, compare to the industry's production rhythms, fashion houses rarely employ it.

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<sup>86</sup> Raustiala K. and Springman C., *The Piracy Paradox: innovation and intellectual property in fashion design* – Virginia Law Review, December 2006.

## Chapter III: The inverse relationship between innovation and IP protection in the fashion industry

*"We let others copy us. And when they do, we drop it." – Miuccia Prada*

The little use of design protection persists. In fashion the regime of free appropriation is a stable equilibrium that does not significantly harm innovation. Thus, players are not incentivized to change it. This scheme may paradoxically serve the industry's interests better than a highly exploited IP-protection system. Nevertheless, the fashion system is not only made by fashion companies, but also by costumers. This is an aspect that should be not underestimated, given that fashion products are consumer goods, and consumer choices affect the revenues of these companies.

### 3.1 Why fashion houses do not exploit fashion design's protection?

Fashion industry presents a series of peculiarities related to both fashion products' lifecycle and customer's choice drivers. These characteristics trigger a complex mechanism that results in and explains the low-IP fashion design protection and its underuse.

#### 3.1.1 Induced obsolescence

Clothing is a status-conferring good. These items, as others, pertain to what the economists call *positional goods*. Indeed, fashion products' value results from desirability as they are status makers. The beauty of a garment does not only depend on the personal preference of a customer, but rather it is strongly influenced by the perception that it is valued by the others. "Positional goods are bought because of what they say about the person who buys them. They are a way for a person to establish or signal their status

relative to people who do not own them<sup>87</sup>”. Consequently, positional goods purchases are interdependent as the willingness to buy is in part due to social context. In other words, the desirability of a good rises as some possess it. At the same time, it falls as more possess it. Indeed, the positionality of these goods is often two-sided.

Many fashion goods are positional, and that positionality is often two-sided. The fact that a specific clothing style or handbag is from a brand rather than another has value because fashionable people have it, while unfashionable do not. This increases the demand for that items; but as those diffuse to a larger clientele, the prestige for the early adopters decreases. This observation is not new. Indeed, as stated by the sociologist Georg Simmel in his famous article called *Fashion*<sup>88</sup>, that dates back to 1904, fashion goods demand has unique properties that differentiate this sector from other industries’ consumption habits; “as soon as an example has been universally adopted, that is, as soon as anything that was originally done only by a few has really come to be practiced by all – as is the case in certain portions of our apparel and in various forms of social conduct – we no longer speak of fashion. As fashion spreads, it gradually goes to its doom. The distinctiveness which in the early stages of a set fashion assures for it a certain distribution is destroyed as the fashion spreads, and as this element wanes, the fashion also is bound to die<sup>89</sup>”.

Two main reasons may be identified to explain this social value’s dissipation resulting from the diffusion process of the item: the cheap copies diffusion and the loss of status-symbol’s role for the early-adopters. For what concerns the former, the diffusion of cheaper and lower-quality copies may blur by association the original item; nevertheless, there are differing opinions about this issue as some scholars argue that such copies are evidence of the original’s desirability, thus they enhance its value rather than undermine it. The second is a more valid argument as it is related to the fashion customers’ attitude; indeed, for early adopters and for the “fashion victims” the simple fact that an initially exclusive and chic design diffuses into broader public, is enough to diminish its value, say *Raustiala* and *Sprigman*. Furthermore, for this customers segment there is nothing less attractive than wearing previous season’s fashion trends.

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<sup>87</sup> The Economist, *Positional Goods* definition - <https://www.economist.com/economics-a-to-z/p#node-21529537>

<sup>88</sup> Georg Simmel, *Fashion* – 10 Int'l O. 130, 1904.

<sup>89</sup> Georg Simmel, *Fashion* – 10 Int'l O. 130, 1904.

This approach triggers a fast mechanism of products' induced obsolescence typical of the fashion industry: as a design is copied and reproduced in less-expensive derivative works, it becomes a mass-product widely purchased until a certain point where its wide diffusion erodes its positional value, and it becomes a burden for fashion-conscious people; thus, as for the latter category fashion represents a way to "set apart from the rest of the crowd", they will rapidly move to a new trend. These new designs, in their turn, "become fashionable, are copied, and diffused outside the early-adopters group. Then, the process begins again<sup>90</sup>". This is the fashion cycle.

In *The Piracy Paradox*<sup>91</sup> it is argued that this cycle – and so the induced obsolescence – is fostered by the low-IP protection as it does not slow down the designs' diffusion. The absence of a specific protection for fashion design accelerates the spread of copycats and knockoffs which implies a faster products' massification, thus, consequently a faster change in trends. Designers respond to this obsolescence with new designs. "Piracy paradoxically benefits designers by including more rapid turnover and additional sales<sup>92</sup>". Current fashion design IP protection contributes to this process of induced obsolescence in at least two ways. First, as was mentioned previously, what was elite quickly becomes mass. Second (and in this context more important), this legislative framework contributes to the creation of designs inspired by the original ones. These derivative reworkings implies additional sales for other players at all the pyramid levels, especially fast-fashion retailers. But, at the same time, they accelerate the diffusion of the design, and so the induced obsolescence process.

To alleviate the problem and to benefit from the above described situation, originating fashion houses should produce both the original design and its lower-price variations. The latter could be sold through a bridge line – that is the brand's lower-priced second line – as *Armani* does with *Emporio Armani* and its other labels; or, to maintain the exclusivity of the brand, the derivative reworkings could be introduced under a different brand of the same firm. Nevertheless, this would not be an impactful solution: the variations of a

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<sup>90</sup> Raustiala K. and Sprigman C., *The Piracy Paradox: innovation and intellectual property in fashion design*; Virginia Law Review, Volume 92, December 2006.

<sup>91</sup> Raustiala K. and Sprigman C., *The Piracy Paradox: innovation and intellectual property in fashion design*; Virginia Law Review, Volume 92, December 2006.

<sup>92</sup> Raustiala K. and Sprigman C., *The Piracy Paradox: innovation and intellectual property in fashion design*; Virginia Law Review, Volume 92, December 2006.

fashion item are countless and, most of the time, fast-fashion companies do not limit themselves only to copy or nearly-copy a design, but rather their derivative reworkings are a “mix and match” of more than one design. Moreover, even if a fashion house decides to opt for one or more bridge lines, the price range of their articles would be higher than the fast-fashion companies’ ones in any case as the costs involved for the latter are significantly undercutting. Thus, in this case, the diversification choice it is not a solution.

Regardless of this, however, to the current state, what emerges is that fashion firms do not attempt to reduce the copying problem through legal means. They are not incentivized to use or ask for a wider IP protection of the fashion design. This attitude might seem paradoxical, but it is not, as often designs originators are also copyists.

Fashion is an industry where few set the trends, and many follow them. Who set the trend of the current season may be following in the next, and it is difficult to predict which designers will be the leaders and which the followers of the subsequent seasons. It is a continuous roles alternation where one is more likely to be a copyist than to be copied. As we said, fashion is a fast-changing industry with infinite players where original ideas are few and trends are trends exactly because many actors rework and create variances of some originator’s design. “Some may originate more than others, but all engage in some copying at some point or, as the industry prefers to call it, “referencing<sup>93</sup>”. Furthermore, as mentioned above, the roles of copyist and originator are reversed every season. Thus, considering this, the result is a design’s free appropriation regime.

### 3.1.2 Anchoring

A second argument related to induced obsolescence mechanism is the *anchoring* process. As we know, fashion industry’s fuel is the introduction of one or more new styles each season, thus it is also important that customers understand when the style have changed; otherwise it would be difficult (if not impossible) to establish trends. The low-IP

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<sup>93</sup> Raustiala K. and Sprigman C., *The Piracy Paradox: innovation and intellectual property in fashion design*; Virginia Law Review, Volume 92, December 2006.

protection for fashion design helps the industry in doing so throughout a process that is defined as *anchoring*<sup>94</sup>.

This process relies on the existence of trends: in fashion each designer stylizes his/her collection, then from this group of designs “emerge” the season’s trends, that will define the style for that months. For this to happen, for a trend to arise it is necessary to pass through a undirected “process of copying, referencing, [...] testing design themes via observation of rivals' designs at runway shows, communication with buyers for key retailers, and coverage and commentary in the press<sup>95</sup>”. This process leads to a convergence of designs, where designers follow what could be defined as the guidelines established by the leading designers of that season until the emergence of certain themes. Furthermore, to anchoring occur, fashionable people need to be able to understand which are the trends.

In an environment full of options, trendy early adopters must individuate the major trends of the moment and recognize them among a myriad of minor ones. The widespread of copying practices substantially contribute to this design convergence process. A free appropriation regime helps in this practice as it speeds the emergence of these new trends. Thus, under costumers’ point of view, anchoring helps them comprehend the season’s dominant styles by giving them important information about when, how and to where fashion shifted.

This mix of creative intuition, reinterpretation and variation of others’ designs, and informal communication within the industry that results in the emergence of the season’s trends, benefits the whole fashion community. Indeed, the anchoring process’s output is positive for both designers and customers: the former category drives consumption by converging on a discrete set of designs, thing that assures to the most part of the industry players a profit; the latter one lives within a contest of endless choices, yet both fashionable, which is something that should not be undervalued in an industry in which status plays a role in customer behavior.

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<sup>94</sup> Raustiala K. and Sprigman C., *The Piracy Paradox: innovation and intellectual property in fashion design*; Virginia Law Review, Volume 92, December 2006.

<sup>95</sup> Raustiala K. and Sprigman C., *The Piracy Paradox: innovation and intellectual property in fashion design*; Virginia Law Review, Volume 92, December 2006.

Therefore, as for induced obsolescence, anchoring is a process intrinsic to the fashion system and, if where to have a more compelling protection of fashion design, all this would not be possible. Paradoxically, this cyclical effect of induced obsolescence and anchoring is what allows the industry to stay successful and creative.

Fashion industry is, to some extent, a self-sustaining system fueled by pervasive design copying and by the creation and the accelerated extinction of these trends.

### 3.2 Extralegal Solutions

If the legal system cannot offer an adequate means of fashion design protection and, even when it offers it, fashion designers do not use it, extralegal solutions may be a better fit. Indeed, there is a third actor that operates in this environment and that, until now, has not been considered: the community. The society, intended as a group of individuals who buy and use fashion products, has a role that is far from marginal in this context. Although the consumer may seem to be a subject outside certain industry dynamics, his or her opinion counts and, above all, he or she has the power to influence the dynamics themselves.

#### 3.2.1 Social Shaming and Public Outcry

Social norms, resulting from costumers' behavior, impact on the industry, especially if we consider that fashion outputs are consumer goods, which means that the end-user choice and opinion strongly influence the development of sales. Moreover, as we live in an interconnected world marked by instant communication, it takes nothing for an information to be shared with the broader public.

If a community is sufficiently tight, community approval matters. This results in a set of self-enforcing social rules that, even in the absence of legal protection, influence the behavior of the actors. The fashion industry does not seem to be the type of community where this mechanism would effectively work as it does not present a homogeneity degree such as to create a moral and ethical shared base. Rather, it is one made up of small

heterogeneous communities, each with its own values, as the one of the elite designers, the one of fast-fashion companies, and so forth.

Nevertheless, a further norms-based approach, that is particular effective today, needs to be considered here. It consists of “increase the reputation costs from copying by empowering costumers to enforce norms against copycatting through social media<sup>96</sup>”. The designs’ free appropriation regime is based on the idea that the willingness to buy is not affected by the fact that the product you purchase may be a copy or a reproduction of another’s artist design. Both elite designers and fast-fashion firms rely on this approach, as if it was a commonly accepted practice.

This is partly true, in the sense that in the fashion companies’ view, it is exactly how it works. But this vision is not shared by the society as a whole. Indeed, to the latter also belongs a group of informed and conscious people that negative value these behaviors. As an example, the American law Professor *Susan Scafidi*<sup>97</sup> was one of the pioneers in the field, being one of the first to found a blog that dealt with issues related to fashion law, *Counterfeit Chic*<sup>98</sup>; furthermore, she founded and is the academic director of *The Fashion Law Institute*<sup>99</sup>, that is the world’s first center dedicated to law and the business of fashion headquartered at *Fordham Law School* in New York City.

The blogs and the social networks’ pages dedicated to “calling out copying” of designs when they see it are a growing phenomenon that is assuming considerable media importance. Most of the time these initiatives do not come from fashion experts or insiders, but rather from common people that do this as a kind of fashion volunteer service. Their reason is “to educate about fashion law and give credit where credit is due<sup>100</sup>”, as the at the time law student *Julie Zerbo*, founder and editor in chief of *The Fashion Law*<sup>101</sup> website, said.

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<sup>96</sup> Oberman Khagi I., *Who’s Afraid of Forever 21: Combating Copycatting through Extralegal Enforcement of Moral Rights in Fashion Designs* – *Fordham Intell. Prop. Media & Ent. L.J.* 67, 2016.

<sup>97</sup> *Fashion Law Institute* website, About - <https://fashionlawinstitute.com/about>

<sup>98</sup> Scafidi S., *Counterfeit Chic*, Introductoin, *Welcome to Counterfeit Chic* - <http://intro.counterfeitchic.com/>

<sup>99</sup> <https://fashionlawinstitute.com/about>

<sup>100</sup> Smith R.A., *Hunting for Fashion’s Copycats*, *Wall Street Journal*, April 2012.

<sup>101</sup> Zerbo J., *The Fashion Law: an independent source for law, business and culture*, About - <http://www.thefashionlaw.com/about>



The most interesting part is that the ever-increasing media scrutiny in the form of these citizen-blog industry watchdogs successfully combat fashion copycats and knockoffs, especially when their posts or articles contents attracts the attention of the mass media. Indeed, the negative media coverage often results in the ceasing production of the copied designs or, at least, in the copyists settling with designers.

The fact that these kinds of actions come from those that could be defined as “marginal actors” in this context, should be a wake-up call for those that create fashion. It is the proof that, despite the design free appropriation is seen as a tacitly accepted behavior by those that have legal means and financial resources to fight it, there is a growing share of the population that does not see it that way. The will of the customers should not be underestimated as they are able to influence the development of sales, and so the revenues of the fashion companies.

Social shaming and public outcry and their success indicates that customers are changing their mind on the copying practices and that they are moving towards the creation of a set of moral and ethical values concerning these issues.

### 3.2.2 The Power of Designers Collaborations

Beside the growth of this social awareness, there is another practice that is spreading in the fashion system: the designer collaboration model. It is a popular marketing method that has already shown its extremely positive results. This is a relevant strategy in this context, as it falls within the extralegal solutions category to stem the copying practices that characterize the fashion system.

If until some time ago it was unthinkable to find luxury goods in the form of two-for-one, today this has become quite common. And, the fashion item in question bears not only one, but both the two monolithic brands.

In the world of luxury fashion, the passion for collaborations is spreading out. There are different types of collaborations, in the sense that it is true that the early and the most common ones are the ones between top designers and fast fashions, but, nowadays, there are countless of them and of all kinds: they can be made with singers, sport’s personalities, internet influencers, and so forth. It is a marketing model that has various possibilities.

These practices are also used to convey a message, as draw the attention to important social issues. An example is the 2015 collaboration between *Pharrell Williams* and *Adidas*: to re-launch its 70's iconic urban sneakers *Superstar*, the famous sportswear brand collaborated with the American singer. The project consisted of 50 different color shades of the above shoe model to underline the importance of the acceptance of any form of diversity.



Figure 3: Pharrell Williams x Adidas, 2015

As the singer explained, the 50 colors' variants allow the costumer to find the ideal shade of his/her personality.

A further reason why this strategy is spreading out is that, as fashion is a system that runs out extremely quickly, these collaborations are a means of introducing new designs that tend to be appreciated by the public by making the minimum effort in terms of time and creativity. In fact, very often these collaborations result in what could be defined as a simple “mix-and-match”. A collaboration between two fashion companies should result in the creation of new designs, but this is not exactly what happens. In many cases the final output is a simple mix of existing features of the two brands. Clear examples of this practice are the collaboration between the American skateboarding shop and clothing brand *Supreme* and the fashion luxury brand *Louis Vuitton*, and the one between *Fendi* and the sportswear company *Fila*: in both cases, no new models have been created, but rather they simply mixed already-existing peculiar aspects of the two brands, as shown in the photos below.



Figure 5: Supreme x Louis Vuitton, 2018



Figure 4: Fila x Fendi, 2019

Limited-edition collaborations have always been mutually beneficial for high end fashion designers and mass-market retailers or sportswear giants. Even the most extravagant and unexpected ones, such as the one just launched by the streetwear inspired brand *GCDS* with *Barilla* – a well-known Italian pasta brand – for the FW 2019-2020 season, are always a success for all the actors involved in it.

Collaborations allow brands to go beyond the traditional times of fashion. Through capsule collections in collaboration with other brands, the barrier of seasonality that until a few years ago characterized the fashion system is broken down. Moreover, this practice is a great way to surprise customers and encourage them to go to the store more frequently. “We are living in an era of abundance, with many brands competing for the consumer wallet. Surprise – with new products, new communication, new stores – is of the essence and that’s the main reason behind pop-up stores and collaborations<sup>102</sup>”, as explained *Luca Solca*, the ex-head of luxury goods at *Exane BNP Paribas*.

If once collaborations would have been seen as brand dilution for luxury brands, nowadays they are a form of brand enrichment.

### 3.3 Lux-meets-mass collaborations

The most common collaborations involve two fashion brands coming from the opposite sides of the fashion pyramid: a large chain store belonging to the bottom in terms of quality-price ratio, and a “coming from the top” well-known fashion designer. The latter designs a limited edition under its name for the former.

The outcome will be a low-price and lower-quality capsule collection of products designed by the famous stylist and made, where “made” means manufactured, by the large-scale fashion company. Moreover, these collaborations are always strongly hyped and accompanied by an increasingly creative marketing strategy.

#### 3.3.1 H&M’s intuition: an early adopter of the win-win-win strategy

Several are the brands that adopted this practice. One of the fast-fashion companies that most exploits collaborations with famous high-fashion designers is *H&M*<sup>103</sup>.

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<sup>102</sup> Osman A., *The Power of Designer Collaborations* - Vogue UK, 21 November 2018 - <https://www.vogue.co.uk/article/the-power-of-designer-collaborations>

<sup>103</sup> H&M (Hennes & Mauritz AB) is a Swedish multinational clothing-retail company known for its fast-fashion clothing. It is the second-largest global clothing retailer, just behind the Spanish Inditex group (parent company of Zara). In addition to the H&M brand, the company consists of five individual brands with separate concepts: Cheap Monday, COS, Monki, Weekday, & Other Stories. - <https://hmgroupp.com/about-us.html>

It was *Karl Lagerfeld*<sup>104</sup> himself who changed the course of fashion – both high and mass – when he became the first top fashion designer to collaborate with *H&M* in 2004. *Donald Schneider*, the creative consultant to *H&M*, who conceived the designer collaboration concept more than a decade ago, said: “In the hardcore fashion world in Paris, it would have looked a bit funny to walk around with a *H&M* bag, [but] suddenly, it was totally okay for a woman to walk into the Ritz wearing *H&M* with a Dior top. It opened up a lot of things<sup>105</sup>”.

In fashion the image and brand perception are everything, the choice to accept the proposal received from *H&M* was very bold. *Karl Lagerfeld* was the first to start the trend of designer collaborations with low-cost brands.



Figure 6: *Karl Lagerfeld x H&M Official Campaign, 2004*

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<sup>104</sup> *Karl Lagerfeld* (Hamburgh 1933 – Paris 2019): a fashion icon, Karl Lagerfeld was famous worldwide for his innovative and distinctive approach to style, which was a great source of inspiration. He has been working for Fendi, Chloè, Chanel and many mores. He founded his fashion *maison* KARL LAGERFELD. He was the first fashion designer ever doing a fashion collaboration with H&M in 2004. -

<https://www.karl.com/experience/it/biography/>

<sup>105</sup> Lauren Sherman, *The Business Logic Behind Balmain x H&M* - Business Of Fashion, 19 October 2015 - <https://www.businessoffashion.com/>



It is obvious that collaborations are a small part of the total sales for World's second apparel retailer, but the marketing benefits are significant as they help to implement the positive brand perception and increase the flow of customers in the store.

Before 2004, *H&M* was well known not for its products but rather for its advertising campaigns. Thus, to resolve this issue *Schneider* suggested to contact a top designer to collaborate with him, so that we would talk about fashion collections and no longer about advertising. Thus, they called the best one: *Karl Lagerfeld*.

It was a bet for both participants, but it was so successful that from then on *H&M* never stopped making fashion collaborations. In fact, since 2004 they have collaborated with designers of the caliber of *Stella McCartney*, *Jimmy Choo*, passing through the very successful capsule collection of 2015 with *Balmain*, up to the latter one with *Giambattista Valli* that will be worldwide available from November 2019.



Figure 7: *Balmain x H&M Official Campaign, 2015*

These types of collaborations are a win-win-win strategy for retailers, designers, and customers alike<sup>106</sup>.

The large low-cost clothing chains have substantial returns both from an economic point of view and, above all, from a legal point of view. As for the first aspect, in the eyes of customers the reputation of these retailers raises: the desirability and prestige of their garments increase and, with them, sales. Indeed, since these events are accompanied by large advertising campaigns, the flow of customers grows in the store and, even if they do not buy any piece of the capsule collection, it is very likely that they will not come out empty-handed. As regards the legal aspect, through these collaborations a new collection is made available to these retailers in such a short time that not even their super-technological supply chains could ever support, as the “copy step” is eliminated. And it is not “just any garments”, it is an exclusive capsule collection, which can only be purchased in their stores and that was created specifically for them by those designers whose creations they usually copy. This implies that all the effort made to “steal” and near-copy the designs of others is eliminated and, above all, the consequent risk of legal retaliation is eliminated.

This strategy is also very profitable for fashion designers for various reasons. Firstly, they have an economic return because they create collections for retailers instead of being copied without any kind of recognition or compensation. Secondly, these collections are sold at prices significantly lower than those of the designer’s brand, in the sense that they fall within the price range typical of fast-fashion retailers; this implies that the brand broadens its customer base and obtains revenue from a category of individuals who usually do not buy its products, in other words it gets new customers. Finally, these operations are also useful to educate the customer's eye to recognize the peculiar characteristics of the designer in question, to recognize his style. The latter aspect should not be underestimated for two reasons: firstly, because, as mentioned above, consumers are becoming increasingly aware of the practices of copying and knockoff; secondly, this is an excellent marketing strategy for those emerging or lesser-known designers, as it allows them to reach a much larger audience than they normally reach.

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<sup>106</sup> Cohen A.K., *Designer Collaborations as a Solution to the Fast-Fashion Copying Dilemma* – Chicago-Kent Journal of Intellectual Property, Volume 11, No. 2, January 2012.

Customers also benefit from these collaborations as they are a way for them to buy items of brands that, usually, they cannot afford.

Collaborations between top designers and fast-fashion companies are a source benefit for both the industry and the society, as they boost new creation. By guaranteeing to fashion designers to not be copied and to receive the right compensation for their creations, this practice is an incentive to create entire new collections.

### 3.3.2 Blatant Copying is no Longer Enough

Despite being a winning strategy for all participants, we can identify a further reason why fast fashion increasingly approach collaborations with fashion designers: copying the creations of others is no longer enough to generate revenues.

The fast fashion model grew rapidly for what it represented, i.e. accessibility to a hitherto exclusive world reserved for a small circle of people. By democratizing fashion and making it accessible to all, fast fashion established itself on the market and grew rapidly by copying and stealing the creations of others. Therefore, at first, the fact that those products were copies of creations of others was considered of secondary importance by most consumers.

As time went by, the enthusiasm due to the possibility of buying fashionable garments at a very affordable price has faded. This is due not only to a continuous desire for novelty, but also to the fact that in recent years there has been an increasing attention to themes such as sustainability and ethics, especially in terms of origin of products. As mentioned above, the society is developing a growing awareness of ethical and moral issues and a company that base its entire business on a “not sustainable” and unfair copying of others’ work is not frowned upon.

Some of the most famous fast-fashion firms perceived this trend and reacted by starting a series of actions to legitimize themselves in the eyes of the society. Under an environment and sustainability standpoint, some examples are *Zara*’s announce that by 2025 the 100% of its cotton, linen and polyester garments will be sustainable, as *H&M*,



*Uniqlo, Mango* and *Asos* already available eco-conscious collections, or *C&A*'s circular fashion initiatives<sup>107</sup>.

Under a legal standpoint, the situation seems to be a bit more articulated. For the reasons mentioned above, not even the directly interested “robbed designers” care enough about the fact that there are companies that generate revenues by using their designs by not giving them any kind of recognition; in fact, even when they were given the legal tools to defend themselves, they never used them much. Thus, while some fast-fashion companies perceived the new trends, even if under a legal standpoint nothing has changed until now, others have continued to limit themselves to shameless copying and the negative effects have not been slow to arrive.

An obvious example is the American *Forever21*<sup>108</sup> that, as reported by *Bloomberg* at the end of August 2019, is preparing for a potential bankruptcy filing<sup>109</sup>.

In recent years, *Forever21* has been accused of exploiting and underpaying employees and has failed to keep up with the new demands of customers, including the younger ones, who are much more attentive to the environment, workers' rights and even quality: *H&M*, its great rival, has, for example, created lines in which it uses organic fabrics or fabrics made in a sustainable way or of better quality, and has started collaborations with important designers. *Forever21*, on the other hand, has continued to offer the formula that led to its success years ago. The fast-fashion retailer has become increasingly irrelevant in shopping centers around the world. This is mainly due to the brand's lack of evolution. While its fast-fashion competitors like *Zara* have moved in step with industry trends and recently found innovative ways to be sustainable, *Forever21* has refused to evolve, continuing to offer low quality products.

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<sup>107</sup> Chain E., *Zara, H&M, Uniqlo, Mango, Asos. Le loro iniziative legate alla sostenibilità sono davvero efficaci?*; Vogue Italia, September 2019 - <https://www.vogue.it/moda/article/zara-hm-uniqlo-mango-asos-iniziativa-sostenibilita-efficacia-green>

<sup>108</sup> Forever21 is an American fast fashion retailer headquartered in Los Angeles. They have been involved in various controversies, ranging from labor practice issues to copyright infringement accusations to religion.

<sup>109</sup> Ronalds-Hannon E., Coleman-Lochner L., *Forever21 Prepares for Potential Bankruptcy Filing*; August 2019 - <https://www.bloomberg.com/news/articles/2019-08-28/forever-21-is-said-to-prepare-potential-bankruptcy-filing>

Moreover, it is enough to digit “Forever21” on the search bar of *Julie Zerbo’s* blog *The Fashion Law*<sup>110</sup> to access an endless list of legal actions involving the American fast-fashion retailer. *Vetements*, *Proenza Schouler*, *Gucci* and *H&M* are just some of those that undertook a legal action against the brand. But the list is not just limited to fashion companies, indeed we can also find law suits for sexual discrimination or for stealing the “name, likeness and other intellectual property to promote their brands for free<sup>111</sup>” of a celebrity, as it happened with the US singer *Ariana Grande* that suited them this year (2019) for co-opting her images and featuring a look-alike model.

Therefore, despite the peculiarities of the fashion industry, despite the little use of the existing legal instruments and despite the tacit acceptance of the copying practice, it seems that consumers are changing their point of view. The society in which we live is constantly evolving and it is moving towards a more sustainable and ethical World. This change impacts everyone, but surely it affects some more than others.

Fast-fashion retailers are among the most affected: “by compressing production cycles and turning out up-to-the-minute designs, these businesses have enabled shoppers not only to expand their wardrobes but also to refresh them quickly<sup>112</sup>”. Their own name, fast fashion, comes from the idea of copying quickly and creating almost disposable clothing items.

Those who perceive it and manage to adapt to change by innovating and renewing themselves survive, while those who insist in unsustainable blatant copying are fading.

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<sup>110</sup> *The Fashion Law: an independent source for law, business and culture*, Search - <http://www.thefashionlaw.com/tflsearch>

<sup>111</sup> Zerbo J., *Ariana Grande Names Ailing Forever21 in \$10 Million Trademark, Copyright Lawsuit* – The Fashion Law, September 2019 - <http://www.thefashionlaw.com/home/ariana-grande-names-ailing-forever-21-in-10-million-trademark-copyright-lawsuit>

<sup>112</sup> Remy N., Speelman E., and Swartz S., *Style that’s sustainable: A new fast-fashion formula* - McKinsey Sustainability, October 2016 - <https://www.mckinsey.com/business-functions/sustainability/our-insights/style-thats-sustainable-a-new-fast-fashion-formula>

## Conclusions

Fashion design's IP protection is a complex issue. To understand it, it is essential to go beyond simple regulation and enter in the dynamics that characterize the fashion industry.

The rapid growth of fast-fashion, due to the technological improvement that has made it possible to have an extremely efficient supply chain, has influenced and has accentuated the importance of this issue in recent times. However, despite the spreading out of this business model, this is not yet sufficient to change the course of events.

Fast-fashion retailers center their entire business on the sale of cheap, low-quality copycats and knockoffs. The time-to-market of these garments takes between the 2 and the 5 weeks, which means that the top-designers' new collections seen on the catwalk are available first in fast-fashion retailers' stores than in the stores of the *maisons* that created them.

Even though this happening for years now, no significant action has ever been taken against this attitude. One might assume that the reason is that the proper legal means to operate in this field are not available, but it is not exactly like that: the European Union provides two types of protection tools for industrial design, the Registered Community Design (RCD) and the Unregistered Community Design (UCD).

From a practical standpoint, it is true that undertaking the practices to register a fashion design is not worthwhile in an industry where the average life of a product is around six months, but it is also true that the European Union legislation has provided what could be defined "an almost perfect tool" for this type of situation. Indeed, garments and other fashion items could be perfectly guaranteed under the UCD protection which – just as the name suggests – does not require any filing application to be valid. Obviously, the protection provided by the RCD is more complete, while that of the UCD is valid only if the compliant is able to prove the intentionality of the infringement. But, in a context such as fashion, it is not so complicated to prove the bad faith of the design infringer; and there are cases, such as that of *Karen Miller vs. Dunnes Store*, that have demonstrated the effectiveness of this legal tool.

However, fashion houses seem not to be sensitive to legal rules. Few of them use these means to protect themselves, especially compared to the production rhythms of the industry.

The reason is to be found in the very structure of the fashion industry: we are in a context in which sooner or later all engage in some copying. Due to the induced obsolescence and the anchoring processes, copying practices are to be considered as an unavoidable intrinsic characteristic of the fashion industry itself. Fashion has always been characterized by a small group of trend-setters and a big one of trend-followers. Furthermore, regardless of who sets the trends and who follows them, we live in a globalized environment; thus, as stylists take inspiration by the context surrounding them, although everyone has his/her own way of interpreting the reality, it is possible that the end-works result in some common features.

Fashion, as an industry and as an art form, is celebrated for always being innovative and for often pushing the limits with its creations, nevertheless, designers' inspiration comes from a vast domain, as a result, the references they look at and how they reinterpret them is intrinsically cyclical. The practice of cycling and recycling trends implies enormous difficulties in determining the originality, and so the ownership of a fashion design.

The major implication of this mechanism is the blurred line between inspiration and imitation. From a legal standpoint, this means uncertainty about the outcome of a lawsuit. This is the reason why fashion houses do not exploit the available legal protection to safeguard their designs.

Nevertheless, if the solution cannot be legal for the reasons mentioned above, nothing prevents it from finding one (or more) extra-legal solutions. Two of them have been identified and analyzed here: social shaming and public outcry, and fashion collaborations. Both the two arise from the needs and attitudes of a third actor who is often considered marginal in this context, but it is not: the society. In this field, society means a group of individuals who use consumer goods, such as fashion products are. In other words, costumers. Indeed, the fact that copying is a commonly accepted behavior is true from the point of view of fashion companies, but not from the one of the society. The increasing number of followers and readers of pages and blogs dedicated to "calling out copying" of fashion knockoffs and their growing media coverage is the proof of it.

For what concerns fashion collaborations between top designers and fast fashion retailers, this practice satisfies customers' continuous desire for originality and exclusivity at affordable prices. From a design protection point of view, these partnerships are an excellent way to create copies authorized or licensed, recognizing the merits to those who owe them.

Even if they seem completely different among them, both the two solutions proposed here are guided by customers' needs. In the first case understood as a need for transparency dictated by moral and ethical factors, in the second understood as a need for consumption. However, what they both have in common is that if at first the democratization of fashion brought by fast fashion was enough to satisfy customers and let them ignore the unfair process hidden behind the availability of these low-price fashionable garments, today this is no more enough. This is not only because it has lost the "charm of the novelty", but also (and above all, I would say) because the today society is moving towards the creation of a set of moral and ethical values concerning these issues. The speed-to-market is no longer enough, rather social issues, transparency and sustainability are what customers are looking for. Therefore, a business based on copying others' designers in a not ecological way does not meet costumers' expectations.

Fashion industry's free appropriation regime is a stable equilibrium that few are incentivized to change, as innovation is not slowed down but rather boosted by these practices. This explains the underuse of the available legal tools. Nevertheless, the society is no longer willing to accept these behaviors. This goes beyond the legislation available and the use made of it.

The IP protection for fashion design is increasing in importance and, in this field more than in others, it is to be considered a cross-cutting matter and not a purely legal one.

## Bibliography

Agins T., Copy Shops: Fashion Knockoffs Hit Stores Before Originals as Designers – WALL ST. J., 1994.

Beltrametti S., 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, 160, 2010.

Bhardwaj V. and Fairhurst A., Fast fashion: Response to changes in the fashion industry - Taylor & Francis Group, 2010.

Business Of Fashion.

Chain E., Zara, H&M, Uniqlo, Mango, Asos. Le loro iniziative legate alla sostenibilità sono davvero efficaci?; Vogue Italia, September 2019 .

Cline E.L., Overdressed: the shockingly high cost of cheap fashion – Portfolio/Penguin, 2012.

Cohen A.K., Designer Collaborations as a Solution to the Fast-Fashion Copying Dilemma – Chicago-Kent Journal of Intellectual Property, Volume 11, No. 2, January 2012.

Corbellini E., Saviolo S., Managing Fashion and Luxury Companies – Etas, 2009.

Derenberg, Copyright No-Man's Land- Fringe Rights in Literary and Artistic Property – J. PAT. OFF. Soc, 1953.

Enciclopedia Treccani.

EUIPO, DesignView database.

European Parliament official website.

European Union Intellectual Property Office (EUIPO) official website.

European Union official website, Europa.eu.

European Union, Directive 98/71/EC on the Legal Protection of Design.

European Union, Regulation CE No 06/2002 on Community Design.

Fashion Law Institute website.

Fashion United, Global Fashion Industry Statistics – International Apparel.

Fernie J. and Sparks L., Logistics and Retail Management Emerging issues and new challenges in the retail supply chain - Kogan Page Ltd, 2009, 3rd edition.

Gauss H., Guimberteau B., Bennett S., Litt L., Red Soles Aren't Made for Walking: A Comparative Study of European Fashion Laws – Landslide Magazine, 2013.

Georg Simmel, Fashion – 10 Int'l O. 130, 1904.

Givhan R., The End of 'Gown in 60 Seconds'? – WASH. POST, Aug. 10, 2007.

Hing R. and Cassidy L., Karen Millen Fashions Ltd v. Dunnes Stores, Dunnes Stores (Limerick) Ltd: Clarifying the Assessment of Individual Character in EU Designs, 105 TMR 1446, 2015.

ITALIAN COPYRIGHT STATUTE, Law No. 633 of April 22, 1941 for the Protection of Copyright and Neighbourings Rights.

Jackson T. and Shaw D., Mastering fashion buying and merchandising management – Palgrave Master Series, 2001.

Lauren Sherman, The Business Logic Behind Balmain x H&M - Business Of Fashion, 19 October 2015.

Levitt T., Exploit the Product Life Cycle – Harvard Business Review.

Linden Radner A., An Analysis of the Fast Fashion Industry – Bard College, Senior Projects Fall, 2016 .

Merriam-Webster Dictionary.

Montalvo Witzburg F., Protecting Fashion: a comparative analysis of fashion design protection in the United States and the European Union - The Law Journal of the International Trademark Association (INTA), November-December 2017.

Oberman Khagi I., Who's Afraid of Forever 21: Combating Copycatting through Extralegal Enforcement of Moral Rights in Fashion Designs – Fordham Intell. Prop. Media & Ent. L.J. 67, 2016.

Olenski S., Only One Quarter of American Consumers Are Brand Loyal – FORBES, Mar. 26, 2012.

Osman A., The Power of Designer Collaborations - Vogue UK, 21 November 2018.

Perna R., Fashion Forecasting: A mystery or a method? - Fairchild Books, 1987.

Pogue and Borderland, Where Copyright and Design Patent Meet – COPYRIGHT L. SYMP., 1955.

Raustiala K. and Springman C., The Piracy Paradox: innovation and intellectual property in fashion design – Virginia Law Review, December 2006.

Remy N., Speelman E., and Swartz S., Style that's sustainable: A new fast-fashion formula - McKinsey Sustainability, October 2016 .

Ronalds-Hannon E., Coleman-Lochner L., Forever21 Prepares for Potential Bankruptcy Filing - Bloomberg News, August 2019 .

Scafidi S., Counterfeit Chic website.

Scott Hemphill C. and Suk J., THE LAW, CULTURE, AND ECONOMICS OF FASHION – Stanford Law Review at 61 STAN. L. REV. 1147, 2009 .

Smith R.A., Hunting for Fashion's Copycats - Wall Street Journal, April 2012.

Tartaglione C., Gallante F., Il Processo Creativo nel Sistema Moda – Ares20 and Soges, 2010.

The Economist.

Trademark Manual of Examining Procedure.

United Nations, Universal Declaration of Human Rights.

Whitaker J., Service and Style: How the American Department Store Fashioned the Middle Class – St. Martin's Press, 2006.

Wilson and De La Haye, Defining Dress: object meaning and identity - Manchester University Press, 1999.

WIPO, HAGUE, The Hague System for the International Registration of Industrial Designs.

WIPO, Introduction to trademark law and practice: the basic concepts; WIPO publication, Geneva, 1993 (Second Edition) .

WIPO, What is Intellectual Property? .

Woods and Monroig, Fashion Design and Copyright in the US and EU – WIPO, 2015.

World Population Review.



Zerbo J., Ariana Grande Names Ailing Forever21 in \$10 Million Trademark, Copyright Lawsuit –  
The Fashion Law, September 2019.

Zerbo J., The Fashion Law: an independent source for law, business and culture website.

## Executive Summary

### Introduction

Copies are as old as fashion industry is.

Despite its renowned importance in artistic and creative sectors, as the fashion one is, the protection of intellectual property in this field seems to be particularly lacking. Various are the copying practices that can be identified here. Some of them, such as counterfeiting or the improper use of registered trademarks, are punished by law. However, there is a fundamental aspect of the fashion product that is not particularly protected: the fashion design. Fashion design is the art of the application of design and aesthetics or natural beauty to clothing and accessories. It is the essence of fashion, as it is the creation of a designer, which is an artist. This aspect is so little protected by law, that most of the almost-copies of a design, technically known as knockoffs or copycats, are considered legal.

In recent times, this issue is gaining in importance as, nowadays, who copies the creations of both famous and new fashion designers are the fast fashion retailers: to this category belongs all the large low-cost clothing chains as *H&M*, *Zara*, *Forever21*, etc.... that base their business on the production and sale of these low-price and low-quality almost-copies of others' designs. Their stores are full of knockoffs coming straight from the latest fashion week catwalks to meet new trends. Moreover, the time to market of these companies is quite short compared to the one of the traditional fashion houses. In other words, the cheap copies will be purchasable in the fast-fashion retailers' shops before being available in the stores of those who designed the original ones.

Since fashion design is not covered by copyright law, what fast-fashion companies do is lawful – and very common.

Unable to fight this phenomenon with legislation, how do fashion designers react to this not illegal copies inspired by them? The answer is quite simple: with a new creation.

The fashion word moves at an accelerated innovation speed if compared to other sectors in which copying is not allowed.

## Chapter I: From Traditional Fashion to Fast Fashion

The value of the global fashion industry is of 3,000 billion dollars (3 trillion dollars), which is the 2% of the world's GDP<sup>113</sup>.

The advent of globalization and the ever-faster changes in technological development have had an impact on the apparel industry's structure. Indeed, before to get a higher fashion content implied a higher price to be paid. Today, fashion trends change extremely quickly, and fast fashion companies know how to capitalize on these trends. These companies with their disruptive business model fueled the rise and growth of the "democratization of fashion".

Fast fashion companies can be defined as apparel companies that sell stylish and trendy products at a very affordable price, by exploiting economies of scale. That is, these retailers can rapidly manage small quantities of a wide range of products through their supply chain. To have an idea, the product life cycle of a traditional fashion house starts one year before the sale to the general public and the 12 months of preparation times are totally disproportionate to the 4 months of sale period; while *Zara* can design, produce, and deliver a new garment in two weeks, *Forever 21* six weeks, and *H&M* eight weeks. This is possible because they adopt a completely opposite model to that of traditional fashion, that is the *pull* one instead of the *push* one. Fast fashion companies skip all the creative phase of fashion, as they copy the designs and creations of other designers. And they are not limited to this. Indeed, as in about five weeks they manage to turn a design idea into a ready-to-be purchased final product, these companies do not copy everything, but only the trend products of the season. Such knockoffs are clearly identifiable as fast fashions reproduce the most peculiar components, that unique detail that makes the difference of the designer's creation.

The pervasiveness of these companies undermines the traditional fashion houses' business. There are two main economic implications that we should consider here. First of all, the loss of business opportunities and sales: it results on one hand, from the fact

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<sup>113</sup> Fashion United, *Global Fashion Industry Statistics – International Apparel* - <https://fashionunited.com/global-fashion-industry-statistics/>

that instead of the expensive original product, costumers prefer to buy the cheap knockoff; and on the other hand it raises from the fact that costumers that would purchase that product shift their choice to another one, as the large number of knockoff available on the market make it loose its value. The second aspect, that is less tangible but equally harmful, is the reputational harm: when a brand or a product is associated with mass-market due to the high availability of its knockoffs, luxury costumers shift to another brand that still retains its exclusivity image. As a result, the brand loses a portion of its value and, therefore, of its revenues.

## Chapter II: Legal Protection for Fashion Design

In fashion, depending on which aspect the designer wants to protect and in which environment he/she is operating, there are two main legal tools to protect the fashion design: the trademark and the industrial design protection.

A trademark is a distinctive and specific sign that allows customers to recognize and distinguish the fashion article's source from the others. Designers can use it to protect their goods as, when applied on a product, it works as a distinctive feature for the public. To protect a fashion design with trademark, the source of the article must be identified with the design itself; in other words it should be proved with evidence that the distinctiveness of the product's design is such that customers are able to recognize it and associate it to a specific designer and his/her brand. This process may be difficult to prove. In order to distinguish more clearly their designs, a solution adopted by different fashion houses is to incorporate their marks or logos in their fashionable pieces by creating what is known as *repeating-pattern mark*. Nevertheless, this expedient does not guarantee the designer to completely avoid the piracy problem. Indeed, even if a logo incorporated into a fashion design obtains protection, remains the fact that copycats may use the same design without legal consequences since the protected part of the product is the logo, not the design. Furthermore, once the others use the same design, it becomes difficult to individuate and prove that the design belongs to the original creator.

About the industrial design, it refers to the ornamental or aesthetic aspects of an article. In this case, the protection provided is related to the appearance of the product, which results from attributes such as its materials, shape or colors. Indeed, it is much more

suitable for fashion products. Nevertheless, it is true that a protected design guarantees more rights than an unprotected one, but it is also true that it does not eliminate the copycat problem. In fact, what is under law protection is not each individual item composing the product on its own, but rather the specific combination of all that components. This means that, if someone copies a garment that is under design protection in all its details except one – for example, same shape, same material, but different color – it could not result in a breach of the law.

These gaps, both for trademark and design protection, are what fast fashion companies exploit to run their businesses. This is what allows fast-fashion companies to exist.

Under this point of view, the European Union has historically provided protection for fashion design, more than other Countries. As Europe is the heart of *haute couture*, fashion design's protection is part of its cultural identity. Indeed, its IP system offers a good level of protection to applied and utilitarian arts.

The first step towards the unification of Member States' design protection legislation was taken in 1998 with the adoption of the *Directive*<sup>114</sup> 98/71/EC on the legal protection of design. It had the aim to harmonize the national regimes across the EU by giving a unitary definition of the notion of design and of the requirements with which registered design rights must comply.

As reported in the *Article 1*<sup>115</sup> of the *Directive*:

“(a) ‘design’ means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/ or materials of the product itself and/or its ornamentation;

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<sup>114</sup> EU official website, *Regulations, Directive and other acts*, Directive definition: “a directive is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals. One example is the EU consumer rights directive, which strengthens rights for consumers across the EU, for example by eliminating hidden charges and costs on the internet, and extending the period under which consumers can withdraw from a sales contract”. - [https://europa.eu/european-union/eu-law/legal-acts\\_en#directives](https://europa.eu/european-union/eu-law/legal-acts_en#directives)

<sup>115</sup> *Directive 98/71/EC on the Legal Protection of Design, Article 1* - [https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC_1&format=PDF)

Regarding the protection requirements, the Directive established that to receive protection a design must be novel and possess individual character. As reported in the *Article 4*, novelty refers to a design that is “considered new if no identical design has been made available to the public before<sup>116</sup>”. And, for what concerns the individual character, “a design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before<sup>117</sup>”.

The adoption of the *Directive* improved the situation but not sufficiently, as – even after the entry into force of it – identical designs kept being protected under different laws and for the benefit of different owners just because they belonged to different nationalities. As a result, this led to conflicts in the course of trade between the Member States themselves. Thus, in accordance with the principle of subsidiarity – as it is set out in *Article 5* of the TUE – the European Council adopted the *Regulation No 6/2002 on Community Design*.

The main issue of the *Regulation No 6/2002* is the establishment of two forms of protection: the short-term *unregistered Community design* (UCD) and the long-term *registered Community design* (RCD). The choice to implement this distinction is because there are sectors of industry which value the design’s registration for the great legal certainty it provides as the market life of their products is foreseeable, and so it requires the possibility of a long-term protection. On the other hand, there are also sectors – as the fashion industry – which produce “large numbers of designs for products frequently having a short market life<sup>118</sup>”; for companies operating in these fields protection without the burden of registration formalities and its costs is beneficial while “the duration of

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<sup>116</sup> *Directive 98/71/EC* on the Legal Protection of Design, Article 4 - [https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC_1&format=PDF)

<sup>117</sup> *Directive 98/71/EC* on the Legal Protection of Design, Article 5, paragraph 1 - [https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:399f8f58-0b0e-4252-a0a8-8c8600f55c5e.0008.02/DOC_1&format=PDF)

<sup>118</sup> *Regulation CE No 06/2002 on Community Design*, premises - paragraph (16) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

protection is of lesser significance<sup>119</sup>”. In view of these considerations, designs protected by RCD and UCD enjoy different benefits.

A first distinction must be made with respect to the notions of novelty and individual character. Indeed, for what concerns the requirements for protection, in case of a RCD a design shall be considered new and to have individual character if no identical design has been made available to the public “before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority<sup>120</sup>”. While in the case of a UCD the requirements of novelty and individual character are satisfied if the design has been made available “before the date on which the design for which protection is claimed has first been made available to the public<sup>121</sup>”.

Another major difference between designs protected under RCD and the ones protected under UCD concerns the right conferred by the protection: the holder of a registered Community design owns “the exclusive right to use it and to prevent any third party not having his consent from using it<sup>122</sup>”; however, on the other side, an unregistered Community design confers the right to prevent the same acts as for the registered one but “only if the contested use results from copying the protected design<sup>123</sup>”. This means that an UCD prevents from a commercial use of a design only in cases where we are in the presence of an intentional copy of the design it protects. In fact, as stated at the third paragraph of *Article 19*, the UCD does not protect from cases in where the infringing design is done in good faith, while the RCD does.

One more difference between the RCD and the UCD is related to the commencement and the term of protection. If the RCD guarantees the protection for “one or more periods of five years each, up to a total term of 25 years from the date of filing<sup>124</sup>”, an UCD

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<sup>119</sup> Regulation CE No 06/2002 on Community Design, premises - paragraph (16) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>120</sup> Regulation CE No 06/2002 on Community Design, Article 5, 1 (b) and Article 6, 1 (b) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>121</sup> Regulation CE No 06/2002 on Community Design, Article 5, 1 (a) and Article 6, 1 (a) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>122</sup> Regulation CE No 06/2002 on Community Design, Article 19 (1) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>123</sup> Regulation CE No 06/2002 on Community Design, Article 19 (2) - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

<sup>124</sup> Regulation CE No 06/2002 on Community Design, Article 12 - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=IT>

protection is for three years starting from the date on which the design was first disclosed within the European Community and it cannot be extended or renewed. However, if the holder of an unregistered Community design wants to apply for a design registration, that is that he/she wants to turn an UCD in an RCD, he/she can still do so within one year of disclosure.

Moreover, always with a view of serving the needs of all sectors of industry in the Community, as for some among the latter there is a need to have easier and faster recourse to the registered Community design, the *Regulation 06/2002* introduced the possibility to file a multiple application (*Article 37*): as the name suggests, it is the option of combining several designs in one application; even if it is a single application, each design contained is to be considered as separate from the others.

In the light of what has been said so far, EU law protects fashion design from copying and it does it on different levels.

Nevertheless, despite the availability of legal protection for fashion design, there are little litigations involving it in Europe. It probably sounds impressive, but it is not. Indeed, fashion knockoffs are becoming an increasingly widespread and important phenomenon. As observed by *Raustiala* and *Springman*, the issue is not about the presence or not of legal tools to protect fashion items, but rather the fact that fashion industry's players do not use them. To have an idea, it is enough to conduct a small research on the EUIPO's database known as Design View, that is the centralized access point to registered designs information held by any of the participating National Offices of the EU Member States. What emerges is that despite the straightening of the regulation, industry's practices with respect to design copying did not change, as they were not sensitive to legal rules.

Law is in place but, compare to the industry's production rhythms, fashion houses rarely employ it.

### Chapter III: The inverse relationship between Innovation and IP protection in the Fashion Industry

The little use of design protection persists. And, as we have seen, this does not happen because of the absence of the legal means to protect fashion design. Indeed, the answer



lies in the structure of the industry itself. In fashion the regime of free appropriation is a stable equilibrium that does not significantly harm innovation. On the contrary, players are not incentivized to change it, as this scheme paradoxically serves the industry's interests better than a highly exploited IP-protection system.

Clothing is a status-conferring good. The beauty of a garment does not only depend on the personal preference of a customer, but rather it is strongly influenced by the perception that it is valued by the others. The fact that a specific clothing style or handbag is from a brand rather than another has value because fashionable people have it, while unfashionable do not. All this triggers a fast mechanism of products' induced obsolescence typical of the fashion industry: as a design is copied and reproduced in less-expensive derivative works, it becomes a mass-product widely purchased until a certain point where its wide diffusion erodes its positional value, and it becomes a burden for fashion-conscious people. There, they will shift to new designs that, in their turn, "become fashionable, are copied, and diffused outside the early-adopters group. Then, the process begins again<sup>125</sup>". This is the fashion cycle. The absence of a specific protection for fashion design accelerates the spread of copycats and knockoffs which implies a faster products' massification, thus, consequently a faster change in trends. Designers respond to this obsolescence with new designs. Current fashion design IP protection contributes to this process as, thanks to the spreading of knockoffs, what was elite quickly becomes mass. At the same time, this legislative framework contributes to the creation of designs inspired by the original ones; these derivative reworkings imply additional sales for all the actors in the industry, which is related to the second reason why fashion houses underuse design protection tools: the *anchoring*<sup>126</sup> process. Indeed, fashion industry relies on the creation and diffusion of trends. A free appropriation regime helps in this practice as it speeds the emergence of these new trends. This mix of creative intuition, reinterpretation and variation of others' designs, and informal communication within the industry that results in the emergence of the season's trends, benefits the whole fashion community. Indeed,

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<sup>125</sup> Raustiala K. and Sprigman C., *The Piracy Paradox: innovation and intellectual property in fashion design*; Virginia Law Review, Volume 92, December 2006.

<sup>126</sup> Raustiala K. and Sprigman C., *The Piracy Paradox: innovation and intellectual property in fashion design*; Virginia Law Review, Volume 92, December 2006.

the anchoring process's output is positive for both designers and customers: the former category drives consumption by converging on a discrete set of designs, thing that assures to the most part of the industry players a profit; the latter one lives within a contest of endless choices, yet both fashionable, which is something that should not be undervalued in an industry in which status plays a role in costumer behavior.

Fashion firms do not attempt to reduce the copying problem through legal means. They are not incentivized to use or ask for a wider IP protection of the fashion design. This attitude might seem paradoxical, but it is not, as often designs originators are also copyists. Indeed, it is a continuous roles alternation where one is more likely to be a copyist than to be copied. As we said, fashion is a fast-changing industry with infinite players where original ideas are few and trends are trends exactly because many actors rework and create variances of some originator's design.

Paradoxically, this cyclical effect of induced obsolescence and anchoring is what allows the industry to stay successful and creative. Fashion industry is, to some extent, a self-sustaining system fueled by pervasive design copying and by the creation and the accelerated extinction of these trends.

Nevertheless, if the legal system cannot offer an adequate means of fashion design protection and, even when it offers it, fashion designers do not use it, extralegal solutions may be a better fit.

The fact that fashion houses do not exploit the given legal tools because they are the first to be potentially accused for copying others' fashion designs, does not mean that the end users agree with this *modus operandi*. The designs' free appropriation regime is based on the idea that the willingness to buy is not affected by the fact that the product you purchase may be a copy or a reproduction of another's artist design. Both elite designers and fast-fashion firms rely on this approach, as if it was a commonly accepted practice.

This is partly true, in the sense that in the fashion companies' view, it is exactly how it works. But this vision is not shared by the whole society. Indeed, to the latter also belongs a group of informed and conscious people that negative value these behaviors. This portion of the community is increasingly developing a social norm-based approach

consisting of “increase the reputation costs from copying by empowering costumers to enforce norms against copycatting through social media<sup>127</sup>”.

The blogs and the social networks’ pages dedicated to “calling out copying” of designs when they see it are a growing phenomenon that is assuming considerable media importance. Most of the time these initiatives do not come from fashion experts or insiders, but rather from common people that do this as a kind of fashion volunteer service. Their reason is “to educate about fashion law and give credit where credit is due<sup>128</sup>”, as the at the time law student *Julie Zerbo*, founder and editor in chief of *The Fashion Law*<sup>129</sup> website, said. The most interesting part is that the ever-increasing media scrutiny in the form of these citizen-blog industry watchdogs successfully combat fashion copycats and knockoffs, especially when their posts or articles contents attracts the attention of the mass media. Indeed, the negative media coverage often results in the ceasing production of the copied designs or, at least, in the copyists settling with designers.

Social shaming and public outcry and their success indicates that customers are changing their mind on the copying practices and that they are moving towards the creation of a set of moral and ethical values concerning these issues.

Beside the growth of this social awareness, there is a second practice that is spreading in the fashion system: the designer collaboration model.

The most common collaborations involve two fashion brands coming from the opposite sides of the fashion pyramid: a large chain store belonging to the bottom in terms of quality-price ratio, and a “coming from the top” well-known fashion designer. The latter designs a limited edition under its name for the former. The outcome is a low-price and lower-quality capsule collection of products designed by the famous stylist and made – where “made” means manufactured – by the large-scale fashion company. Moreover,

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<sup>127</sup> Oberman Khagi I., *Who’s Afraid of Forever 21: Combating Copycatting through Extralegal Enforcement of Moral Rights in Fashion Designs*; *Fordham Intell. Prop. Media & Ent. L.J.* 67, 2016.

<sup>128</sup> Smith R.A., *Hunting for Fashion’s Copycats*, *Wall Street Journal*, April 2012.

<sup>129</sup> Zerbo J., *The Fashion Law: an independent source for law, business and culture*, About - <http://www.thefashionlaw.com/about>

these collaborations are always strongly hyped and accompanied by an increasingly creative marketing strategy.

Several are the brands that adopted this practice. One of the fast-fashion companies that most exploits collaborations with famous high-fashion designers is *H&M*.

It was *Karl Lagerfeld* himself who changed the course of fashion – both high and mass – when he became the first top fashion designer to collaborate with *H&M* in 2004. In fashion image and brand perception are everything, the choice to accept the proposal received from *H&M* was very bold. *Karl Lagerfeld* was the first to start the trend of designer collaborations with low-cost brands. It was a bet for both participants, but it was so successful that from then on *H&M* never stopped making fashion collaborations.

These types of collaborations are a win-win-win strategy for retailers, designers, and customers alike<sup>130</sup>.

The large low-cost clothing chains have substantial returns both from an economic and legal points of view. As for the first aspect, in the eyes of customers the reputation of these retailers raises: the desirability and prestige of their garments increase and, with them, sales. As regards the legal aspect, through these collaborations a new collection is made available to these retailers. And it is not “just any garments”, it is an exclusive capsule collection, which can only be purchased in their stores and that was created specifically for them by those designers whose creations they usually copy. This implies that all the effort made to “steal” and near-copy the designs of others is eliminated and, above all, the consequent risk of legal retaliation is eliminated.

This strategy is also very profitable for fashion designers for various reasons. Firstly, they have an economic return because they create collections for retailers instead of being copied without any kind of recognition or compensation. Secondly, the brand reaches a much larger audience than they normally reach. Finally, these operations are also useful to educate the customer's eye to recognize the peculiar characteristics of the designer in question, to recognize his style. The latter aspect should not be underestimated because,

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<sup>130</sup> Cohen A.K., *Designer Collaborations as a Solution to the Fast-Fashion Copying Dilemma* – Chicago-Kent Journal of Intellectual Property, Volume 11, No. 2, January 2012.

as mentioned above, consumers are becoming increasingly aware of the practices of copying and knockoff.

Customers also benefit from these collaborations as they are a way for them to buy items of brands that, usually, they cannot afford.

Collaborations between top designers and fast-fashion companies are a source benefit for both the industry and the society, as they boost new creation. By guaranteeing to fashion designers to not be copied and to receive the right compensation for their creations, this practice is an incentive to create entire new collections.

Even if social shaming and fashion collaborations seem completely different among them, both the two solutions proposed here are guided by customers' needs. In the first case understood as a need for transparency dictated by moral and ethical factors, in the second understood as a need for consumption. However, what they both have in common is that if at first the democratization of fashion brought by fast fashion was enough to satisfy customers and let them ignore the unfair process hidden behind the availability of these low-price fashionable garments, today this is no longer enough. This is not only because it has lost the "charm of the novelty", but also (and above all, I would say) because the today society is moving towards the creation of a set of moral and ethical values concerning these issues.

The speed-to-market is no longer enough, rather social issues, transparency and sustainability are what customers are looking for. Therefore, a business based on copying others' designs in a not ecological way does not meet costumers' expectations. An obvious example is the American *Forever21*<sup>131</sup> that, as reported by *Bloomberg* at the end of August 2019, is preparing for a potential bankruptcy filing<sup>132</sup>.

In recent years, *Forever21* has been accused of exploiting and underpaying employees and has failed to keep up with the new demands of customers, including the younger ones, who are much more attentive to the environment, workers' rights and even quality. It has

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<sup>131</sup> Forever21 is an American fast fashion retailer headquartered in Los Angeles. They have been involved in various controversies, ranging from labor practice issues to copyright infringement accusations to religion.

<sup>132</sup> Ronalds-Hannon E., Coleman-Lochner L., *Forever21 Prepares for Potential Bankruptcy Filing* – Bloomberg News, August 2019 - <https://www.bloomberg.com/news/articles/2019-08-28/forever-21-is-said-to-prepare-potential-bankruptcy-filing>

continued to offer the formula that led to its success years ago. While its fast-fashion competitors have moved in step with industry trends and recently found innovative ways to be sustainable, *Forever21* has refused to evolve, continuing to offer low quality products. Also, from a legal standpoint the brand's lack of evolution is clearly visible: *Vetements*, *Proenza Schouler*, *Gucci* and *H&M* are just some of the companies that undertook a legal action against the brand claiming that it was copying their designs.

Therefore, despite the peculiarities of the fashion industry, despite the little use of the existing legal instruments and despite the tacit acceptance of the copying practice, it seems that consumers are changing their mind. The society in which we live is constantly evolving and it is moving towards a more sustainable and ethical World. This change impacts everyone, but surely it affects some more than others.

Fast fashion retailers are among the most affected: “by compressing production cycles and turning out up-to-the-minute designs, these businesses have enabled shoppers not only to expand their wardrobes but also to refresh them quickly<sup>133</sup>”. Their own name, fast fashion, comes from the idea of copying quickly and creating almost disposable clothing items. Those who perceive it and manage to adapt to change by innovating and renewing themselves survive, while those who insist in unsustainable blatant copying are fading.

## Conclusion

Fashion industry's free appropriation regime is a stable equilibrium that few are incentivized to change, as innovation is not slowed down but rather boosted by these practices. This explains the underuse of the available legal tools. Nevertheless, the society is no longer willing to accept these behaviors. This goes beyond the legislation available and the use made of it.

The IP protection for fashion design is increasing in importance and, in this field more than in others, it is to be considered a cross-cutting matter and not a purely legal one.

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<sup>133</sup> Remy N., Speelman E., and Swartz S., *Style that's sustainable: A new fast-fashion formula* - McKinsey Sustainability, October 2016 - <https://www.mckinsey.com/business-functions/sustainability/our-insights/style-thats-sustainable-a-new-fast-fashion-formula>