

CONTEMPORARY CENTRAL & EAST EUROPEAN LAW

COPYRIGHT – AN ALLY FOR FASHION IN THE INTELLECTUAL PROPERTY RIGHTS SYSTEM?

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ABSTRACT

In the Internet society, we are accustomed to the originators of creative works asserting strong protection of their output. Similarly, we witness extremely casual appropriation of works that is easier than ever to discover. Fashion products are an interesting case in this regard – through the relatively short history of the industry, protection of works has tended to be quite loose. Until recently, the consequences of copying in the fashion sector were not particularly serious, but the emergence of the connected society and the increased speed and scale of this copying threaten to cause more noticeable damage. The awareness that new threats call for a more serious approach to protection of creations requires examination of how and whether the familiar principles of copyright law can be applied to fashion designs and products, and to what extent. This paper outlines the background to such protections in the fashion industry, including examples of both strong and relaxed approaches by industry players. There is a brief presentation of case law that demonstrates how copyright principles can be applied to fashion, while also noting the role of society in applying the norms that determine the extent to which laws, once written, can actually be applied.

KEYWORDS

fashion law, copyrightability, fast fashion, fashion design

I. FASHION AS A BUTTERFLY. AT THE HEART OF THE CONUNDRUM

What is fashion, or the fashion industry? As noted by C. Breward, *Fashion is taken to mean clothing designed primarily for its expressive and decorative qualities, related closely to the current short-term dictates of the market.*¹ Just as butterflies are beautiful but short-lived, only a few fashion designs are simultaneously so graceful, genuinely beautiful and whimsical,² that they earn a place in fashion history, gaining masterpiece status and making the creator or fashion house a household name. On the contrary, today's global brands, such as H&M, Zara, Uniqlo or Topshop apply the strategy of introducing new collections every three weeks. According to a Goldman Sachs report, the ASOS brand reported a 30-percent rise in sales after applying the policy of short-term collections. This phenomenon became a cause for concern, mostly from the points of view of ethics, ecology and the planet's ability to sustain growth, but one has to note that fashion is also a manifestation of creativity, whether genuine or stolen. And here's the niggling question: is it possible that 'fast collections' are copyrightable at every turn, or is the creative spark instead so small that the 'fast garment' does not even come close to being a work of authorship? What may not seem obvious at first glance is that the sustainable fashion movement will at some point converge with copyright law, especially if a fashion design is to be perceived not only as a fast and cheap product, but also as a valuable part of a consumer's outfit, through which she expresses her style or respect for the designer's work. The fast fashion strategy triggers limit-testing with a view to identifying the boundaries of acceptable copying, the limits of inspiration and the reasons for imitations; it also prompts a similar search for the line between unauthorized use and quoting, within the scope justified by 'rights governing a given kind of creative activity'.³

The question as to whether, and to what extent, fashion design may be copyrightable, has so far only sporadically arisen in the legal literature, though with no firm answer and without triggering any in-depth analysis by way of follow-up. Also, if 'fashion' as a whole is to be defined *simply as the style or styles of clothing and accessories worn at any given time by groups of people*⁴ the concern arises as to whether it can be subject to copyright law in order to gain widely desired protection. Therefore, there is a need to re-examine both the scope of the protection for a fashion design and the copyright premises and concepts (including *ratio legis*) that underlie the protection of that work.

1 C Breward, *The Culture of Fashion: A New History of Fashionable Dress*, (Manchester University Press, Palgrave Macmillan 1995) 5.

2 N Taylor, 'From Insect-Covered Fashion Spreads to Whimsical Winged Monocles' (Trendhunter, 17 Oct 2012) <<https://www.trendhunter.com/slideshow/butterfly-fashion-editorials>> accessed 6 Dec 2019.

3 Compare Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 6 czerwca 2019 r. w sprawie ogłoszenia jednolitego tekstu ustawy o prawie autorskim i prawach pokrewnych [the Act on Copyright and Related Rights which has been adopted on 4 February 1994] [2019] JoL 1231, art 29.

4 JS Major, V Steele, 'Fashion Industry' (Encyclopaedia Britannica) <<https://www.britannica.com/art/fashion-industry>> accessed 6 Dec 2019.

2. FASHION DESIGN AND THE SPRINT FOR THE FINISH LINE

2.1. OVERVIEW

The fashion industry, which is valued at USD 3,000 billion, is in large part fuelled by the European market, which is home to most of the distinguished design houses, and for hosting three out of four – the fourth is New York City – major global fashion weeks (London, Paris and Milan).⁵ It is noteworthy that the fashion industry, at the manufacturing level, encompasses: 1) raw materials – in other words, fibres and textiles, 2) clothing, 3) footwear and 4) leather and fur.⁶ In this way it consists of ‘many but interdependent sectors’ that ‘operate at a profit’.⁷

For centuries, fashion served as a symbol of status and wealth. Only by the 1980s and 1990s had the fashion sector expanded such that voguish garments became available to people from all walks of life. Luxury – in other words, ‘slow fashion’ – surrendered to pressure for the democratisation of goods,⁸ which exacerbated the rise of ‘fast fashion’. The defining features of ‘fast fashion’ are: low prices, mass availability and frequently changing trends. At the beginning of the 20th century, people used to spend more than half their income on food and clothing, whereas today they spend less than one fifth. It led to a situation where an average consumer spends 400% more on clothing than 20 years ago.⁹ In effect, during the last 100 years, the fashion industry became one of the fastest-growing global businesses.

2.2. FASHION DESIGN FORMS

Fashion comes in a variety of forms – from sublime and thought-out designs to those stitched together for a quick profit. With a closer look, many variants can be distinguished. According to A. Devore, we can distinguish between artistic fashion (less practical, with an emphasis on artistic expression) and non-artistic fashion, which is further divided into five categories: avant-garde/wearable art, costumes, haute couture, ready-to-wear and mass market. A further issue that requires clarification is the scope of the definition of a fashion design, in order to determine which forms may be discussed as subject to copyright protection.¹⁰ It should be considered whether extrapolating between artistic

5 R Burbidge, *European Fashion Law: A Practical Guide from Start-up to Global Success* (Edward Elgar 2019) 5.

6 A Oleksyn-Wajda, *Rynek mody w Polsce. Wyzwania* [Fashion Market in Poland. Challenges] (KPMG 2019) 45.

7 JS Major, V Steele.

8 S Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law* (Rutgers University Press, New Brunswick 2005) 5–6.

9 A Oleksyn-Wajda 46; S Somers, ‘Fashion Revolution written evidence to the «Sustainability of the fashion industry» inquiry, U.K. Environmental Audit Committee’ (Fashion Revolution) <<https://www.fashionrevolution.org/fashion-revolution-written-evidence-to-the-sustainability-of-the-fashion-industry-inquiry-u-k-environmental-audit-committee/>> accessed 7 Dec 2019.

10 A Devore, ‘The Battle Between the Courthouse and the Fashion House: Creating a Tailored Solution

and non-artistic fashion is of any help in this regard, or whether this just confuses any potential attempt to classify fashion design as creative and individual.

From the perspective of quality and hand-made products, the fashion industry is divided into high fashion (*haute couture*) and the apparel industry (*prêt-à-porter* and *mass collections*).¹¹ *Haute couture* is, in other words, *couture creation*, which is characterized by handmade elements, the creation of individually ordered designs, an artistic approach to work, and singular items. The very concept is subject to legal regulation in France since 1945, meaning that a fashion house needs to meet specified criteria in order to be allowed to use the term.¹² On the other hand, *prêt-à-porter*, also referred to as ‘ready-to-wear’, covers serial collections, prepared mechanically, without taking client measurements, but still high in quality. Part of this genre is also so-called half-measured design, meaning that a client is able to pick patterns and elements and have influence on the final look of his garment. It was popularised in the USA in the mid-19th century, alongside the invention of the sewing machine. The concept of the *Mass collection* refers to clothes of standard sizes and patterns, sewn cheaply from downmarket fabrics.

2.3. BACK TO THE 20TH CENTURY

As pointed out by Nancy Green, the apparel sector has never fully accepted the notion of a division between art and their industry.¹³ Therefore, the two kinds of fashion need to be examined in a search for the common features and differences, as well as the scope for originality and the infringement spectrum. But in order to understand the core of the issue here, we need to go back to the origins of fashion and to the relationship between Paris and New York at the early stage of *couturier* operations. Paris had become not only a Mecca for French designers, but also the new spiritual homeland for many foreigners, who became French designers by choice.¹⁴ Low rents, and even lower salaries for seamstresses made it possible to refine a fashion design for countless hours and still make a profit.¹⁵ On the other hand, the designs were subjects of trade with the USA, which ordered selected designs in order to reproduce them commercially at greater scale. Charles Frederick Worth was aware that, against this backdrop, without the help of lawyers and financial advisors, he could not defend his own interests, being exposed – as was the whole Parisian fashion world – to constant prying and copying. He was the very first to conclude

for Copyright Protection of Artistic Fashion Designs’ (2013) T Jefferson L Rev 35(2), 197.

11 M Jankowska, M Pawełczyk, A Warmuzińska, *Prawo designu i mody. Kreowanie produktu* [Design and Fashion Law. Product Creation] (Ius Publicum 2020) 50.

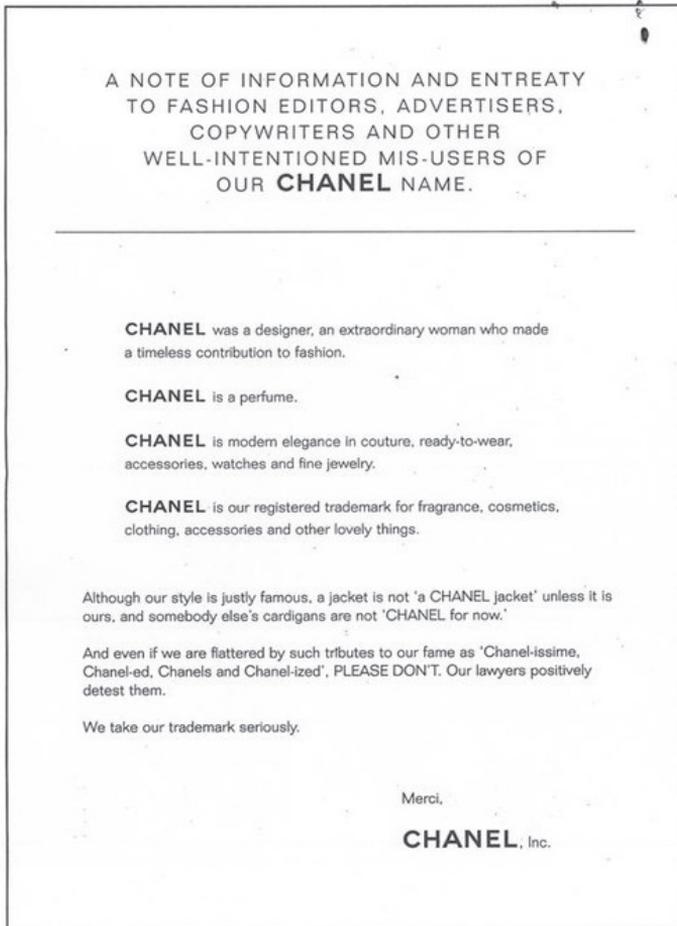
12 A Manfredi, ‘Haute Copyright: Tailoring Copyright Protection to High-Profile Fashion Designs’ (2012) JICL 21, 116.

13 NL Green, ‘Art and Industry: Language of Modernization in the Production of Fashion’ (1994) French Historical Studies 18(3), 725; cp. A Raciniewska, ‘Prawo własności intelektualnej w modzie. Historyczny rozwój prawnej ochrony producentów mody’ [Intellectual Property Rights in Fashion. Historical Development of the Legal Protection for Fashion Producers] (2015) RPEiS 77(2), 195.

14 E Hawes, *Fashion is Spinach* (Random House 1938) 6.

15 Ibid 17–18.

very detailed agreements regarding permission for mass production of his works in the United States, which contained clauses relating to such matters as, for example: templates for duplicating fashion projects, delivery of exclusive fabrics, and delivery of catalogues showing upcoming trends.¹⁶ The importance of controlling the flow of ideas and the use of a brand name or fashion design is plain to see from the example of the Chanel fashion house, whose name ‘Chanel’ was misused by constant reference to ‘Chanel-like products’ by most prestigious magazines, like ‘Vogue’. Beginning in 2009, the Karl Lagerfeld fashion house started to make public statements about how seriously they take and exercise their intellectual property rights.



Source: 'This is How Chanel Does Not Want You to Use its Name/Trademark' (The Fashion Law 8 May 2017) <<https://www.thefashionlaw.com/home/this-is-how-chanel-does-not-want-you-using-its-name>> accessed 10 Dec .2019.¹⁷

16 Y Kerlau, *Sekrety mody* [Secrets of Fashion] (Bukowy Las 2014) 33.

17 K Grzybczyk, *Ikony popkultury a prawo własności intelektualnej. Jak znani i sławni chronią swoje prawa* [Icons of Pop Culture vs. Intellectual Property Law. How Reputable and Famous People Protect Their Rights] (Wolters Kluwer 2018) 214.

3. FASHION DESIGN – A TEST FOR COPYRIGHTABILITY

3.1. WHY IS COPYRIGHT AN IMPORTANT ALLY FOR FASHION IN THE INTELLECTUAL PROPERTY RIGHTS SYSTEM? FASHION DESIGN AS A WORK OF AUTHORSHIP

According to the globally acknowledged definition, a ‘work of authorship’ has to fulfil four criteria in order to fall under copyright protection.¹⁸ As it is often not simple to qualify a work as a ‘work of authorship’, in the literature of copyright law there is a variety of copyrightability tests: 1) statistical uniqueness, 2) stamp of personality, 3) C. Shannon’s communication theory.¹⁹ Without doubt, a work of applied art may meet the criteria of a work of authorship, but this has rarely been subjected to a detailed analysis. Some examples of creative works of applied art are a candle or a bathroom sink. Using the example of a candle, a Polish court found that *neither the utilitarian nature nor purpose of the work deprive it of the character of a work of authorship*²⁰ and that *From expert opinion it resulted that the creative and individual nature of the evaluated product was not limited only to constructional and functional features or new technical solutions.*²¹ In relation to products of a utilitarian nature, it was assumed in the jurisprudence that the achieved result – which is not determined by the utility functions – must be significantly (sufficiently, clearly, particularly visibly, clearly, momentarily, characteristically) distinguished from other similar types of product.²² Also, in the example of the bathroom sink, the court noted that *due to the utilitarian nature of the product, the room left for the designer to design is scarce. Hence the judgment of the individual nature of the design is of necessity limited to this space.*²³

What needs to be examined in this regard is the realm of potentially copyrightable fashion works, such as fashion designs, buttons, perfumes,²⁴ patterns, fashion shows²⁵ and shop displays, in addition to the relevant case law and literature in France, Germany²⁶

18 Compare Art 1 s 1 of PCA also Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979 (1986) S Treaty Doc 99-27.

19 M Jankowska, *Autor i prawo do autorstwa* [Author and Right of Authorship] (Lex a Wolters Kluwer Business 2011).

20 Judgment of the PSC V CSK 202/13 [2014] Lex 1486990.

21 Ibid.

22 Ibid; Judgment of the PSC V CSK 337/08 [2009].

23 Judgment of the Court of Appeals in Szczecin I Acz 1129/06 [2016] Lex 516576.

24 M Jankowska, ‘Perfumy – czy nowy utwór w świetle najnowszego orzecznictwa w zakresie prawa autorskiego?’ [Perfume – a New Work of Authorship under the Current Copyright Law Jurisprudence?] (2007) MP 23, 1328–1332.

25 E Derclaye, ‘French Supreme Court Rules Fashion Shows Protected by Copyright: What about the UK? Roberts A.D. et al. v. Chanel et al., French Court of Cassation, 5.02.2008’ (2008) JIPLP 3(5), 286.

26 Compare Judgment of the Leipzig Regional Court 5 O 5288/01 [2001] (2002) GRUR, 424; Judgment of BGH IZR 65/53 [1954] (1995) GRUR, 445; Judgment of BGH IZR 158/81 [1983] (1984) GRUR, 453; JV Ahnefeld, *Rechtsprobleme der Mode- und Textilbranche* (Kohlhammer 2006) 31; G Schulze,

and the USA, in order to paint a detailed picture of the copyrightable elements. It is worthy of note that even the USA, which for a long time denied copyright protection to garments due to the functional character of the works, changed this view in 2017 in the *Star Athletica v Varsity Brands*. The Supreme Court of the USA concluded that the ‘design of a useful article’ is eligible for copyright protection as an artistic work if its features *can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article*.²⁷

Research can therefore be undertaken, which will reveal the existing Polish copyright jurisprudence related to fashion design, as well as the scholarship of works devoted to many forms of creativity that also exist in fashion: inspiration, derivative works, co-authored works, and works with borrowings. It should be noted that the Polish doctrine of copyright law is very extensive and comprehensive, though hardly ever cited in the international literature. It seems high time to add the Polish perspective to our consideration of potential fashion copyright issues. A further reason for taking Polish copyright seriously in the fashion sector, is the growing number of globally recognized Polish-based designers, including: Paweł Węgrzyn, who was the main designer at Mister Supranational 2019 held in Katowice, Ewa Stepaniuk, who participated in the project ‘Polskie Mosty Technologiczne’ (Polish Technological Bridges) thanks to which she was able to produce a collection for the United Arab Emirates. Polish brands sell globally, not only via the Internet, but through brick and mortar shops in Berlin, Paris, Prague and Budapest, not to mention bags and shoes made by Chylak and Kazar.

These are just a few reasons why it is worth investigating a particular unreported Polish case law of importance to the fashion sector.²⁸ One of the Polish courts noted in 2016, with regard to a show, that:

*The following armaments were exhibited: armor, swords, axes and other items from the Middle Ages (including archery target shooting, a spear and horseshoe). [...] The specific skills and predispositions of the person concerned gave the staged presentation creative character, it was not about the «performance itself» [...] but about showing the right technique of use of appropriate techniques and tools combined with arousing the interest of the show’s audience by creating a unique atmosphere affecting participants’ emotional experiences.*²⁹

‘Werke der angewandten Kunst’ in H Eichmann, A Kur (eds), *Designrecht. Praxishandbuch* (Nomos 2016) 179; A von Essen, ‘Frankreich’ in T Hoeren (ed), *Moderecht. Handbuch* (CH Beck 2019) 640 and ff.

27 Judgment of US Supreme Court 15-866 [2017] (2017) S Ct 137, 1002.

28 Such as Judgment of Court of Appeals in Poznań I Aca 211/13 [2013] unreported.

29 Judgment of Court of Appeals in Białystok III AUa 1115/15 [2016] Lex 2032390.

4. THE PIRACY PARADOX. TRIBUTE. TRADE-OFF. PARASITIC BEHAVIOUR

From the very outset, *haute couture* designers presented an ambivalent approach to copying, which was noted by Alicja Raciniewska.³⁰ On the one hand, they were selling licenses authorising others to reproduce their works, while also tolerating the fact that small sewing houses kept making imitations of their garments for individual clients. On the other hand, they were very concerned with the popularisation of fashion, with masses of fashion journals showing their works, and with freeloaders reproducing luxurious goods at great scale. Fashion is a creative sector, where this paradox arises as a result of many factors, including: the rules of sales of *haute couture* for foreign sellers, the intense promotion of fashion, the influence of the fashion press, the various aspects of copying indulged in by the designers themselves, and unclear intellectual property law rules for fashion.³¹ Some scholars argue that fashion does not need to be protected, invoking the so-called piracy paradox. According to Karl Raustiala and Christopher Sprigman, piracy works in favour of the fashion sector for at least two reasons: the faster flow of styles, and faster consumption.³² This tenet assumes that the best fashion design will be anchored, while the fast fashion design will be diffused, a setup for which comparatively weak IP rules are essential. According to Xinbo Li, this theory was sustainable before the emergence of today's real-time information systems. He argues that the 'perfect innovation-diffusion circle is destroyed by the FAST-fashion infringers'.³³ Raustiala and Sprigman differentiate between two kinds of appropriation 'line-by-line copying' and 'the creation of derivative works'. At the same time, it is argued in the literature that 'line-by-line copying' is nothing but stealing.³⁴ The question at stake is whether fashion should be covered by regular copyright norms, including the premises and period of protection.

The other burning question is the relationship between legal and social norms in fashion law. The interaction between law and social norms is indisputable. As pointed out by Giulia Dore, *While the former influences or enforces the latter, the impact of social norms may also extend to their sway to foster the observation or violation of a given legal rule.*³⁵ With regard to copyright law, an example of bypassing the law because of social

30 A Raciniewska 196.

31 Ibid; ML Stewart, 'Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900–1930s' (2005) *French Historical Studies* 28(1) 108 and ff.

32 K Raustiala, CJ Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) *Va L Rev* 92(8), 1721; K Raustiala, CJ Sprigman, 'The Piracy Paradox Revisited' (2009) *Stan L Rev* 61(5), 1201.

33 X Li, 'IP Protection of Fashion Design: To Be or Not to Be, that is the Question' (2012) *IP Theory* 3(1), 16 and ff.

34 Ibid 23–24.

35 MF Schultz, 'Copynorms: Copyright and Social Norms' in PK Yu (ed), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, vol. 1 *Copyright and Related Rights* (Praeger Publishers 2007) 8–9, 10–11; G Dore, *Plagiarism as an Axiom of Legal Similarity: a Critical and Interdisciplinary Study of the Italian Author's Right and the UK Copyright System on the Moral Right*

norms and social expectations of the use of a work is fan-fiction, as new ‘rights governing a given kind of creative activity’.³⁶ The question is whether fashion law should allow new concepts and ideas to reform copyright norms (‘copynorms’). One possible tool to help understand social expectations is a survey conducted among Polish fashion designers, sent both to individual designers and to big fashion companies. It will be also investigated which designers seek protection through border control agencies in Poland, and which intellectual property tools they take advantage of.

5. CONCLUSION

Slow fashion or fast fashion? This is the key question when considering copyright protection. How does a copynorm behave in the spectrum of social fashion norms, social expectation of cheap and fashionable products, and designers’ expectations of fame and admiration? Or, in this creative business, is the act of copying in fact a tribute? First of all, we must establish the boundaries of ‘fashion design’ along with surrounding elements like buttons, incrustations, shapes, trends, styles. Alongside ‘fashion design’ itself, there is room for works such as fashion shows, shop expositions or perfumes. An important part of the research is the search for a copyrightability test, enabling the establishment of a simple pattern to solve copyright issues in fashion regarding plagiarism (‘line-by-line copying’). This will require explanation of the boundary between inspiration, derivative works, works with borrowing, and plagiarism. In addition to this, there will be an attempt to explain the role of citation in fashion, whether it is possible and to what extent. In order to make the thesis touch on practical aspects and expectations, the author will also examine unreported Polish case law and conduct a survey of Polish fashion designers, in order to determine the true needs of the creators.

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