

NJORD Estonia: Is plagiarism and copying inevitable in the fashion industry?

The problem of copying fashion pieces is as old as the history of fashion itself. Designers, including the world-renowned fashion houses, are often accused of plagiarism, i.e. copying another designer's creation.

Roberto Cavalli accused the American Designer Michael Kors of copying his creation, accusing the latter of being the „biggest copy designers in the world“. Even the prestigious Chanel fashion house was affected by a plagiarism scandal when the Scottish Designer Mati Ventrillon gave Chanel's design team his knitwear to be „studied“ and later saw very similar designs on Chanel's catwalk. The fashion giant later admitted to using Mati Ventrillon's designs.

Fast fashion brands like Zara, Forever 21 and H&M are criticized for creating a new business field, where the newest creations of designers are copied straight from the runway and the cheap fashion items reach the shelves before the designer of the original creations manages to get the items out. The Estonian fashion arena has also had some accusations of plagiarism. Designers admit that the theft of a physical dress is often less painful than the theft through copying the item.

Estonian law offers fashion designs relatively good protection compared to some other countries. There are countries in the world, where the legal protection of fashion designs is weaker. For example, in the United States, fashion designs as such are not protected by copyrights, since clothes and accessories hold a useful and practical function in addition to having an aesthetic value, which in that country does not deserve an automatic protection by copyright. In the US, the prerequisite for fashion pieces having copyright protection is having the design registered by the author. In Estonia, design and fashion pieces are protected by copyrights that automatically apply when the piece is created and in addition, creations can be registered as industrial designs. Trademarks, i.e. graphic signs that help differentiate your products from other similar types of products of the competitors, can also be used to strengthen the protection of a fashion brand.

Protection by copyright

The Estonian Copyright Act states that copyright in a work is created with the creation of the work and the registration or deposit of a work or completion of other formalities is not required for the creation or exercise of copyright. Copyright applies automatically: it is enough to have the designer's creative result expressed in an objective form which allows perception and fashion items, as results of creative work, are mostly precepted through sight. This means that any piece of clothing or fashion accessory falls automatically under the copyright protection from the moment of its creation and no additional criteria such as „novelty“ must be fulfilled. Copyright is valid through the entirety of the author's life and 70 years after their death.

The form of expression of a creative solution can be either a finished work or a work in its intermediate stages. Copyright protection is also granted to fashion designs, patterns, ornaments, and decorative elements. The protection is created when works that are expressed in both physical media (fabric, paper, leather, metal etc.) or in a digital form (clothing designs created through computer programs, patterns created with digital graphics etc.)

It is worth specifying that the object of copyright protection is not the material form of expression as such, but the creative solution created by the author. This means that giving the material form of expression of a creative work (clothing item, shoes, jewellery etc.) to someone, does not mean the transfer of the copyrights to the other person or giving them permission to use the copyrights.

Copyright cannot be used to protect ideas. That is why it is impossible to limit the use of the „little black dress“ concept (which has gone down in history as Coco Chanel's idea) in dress design or reserve the sole right to produce denim trousers or jewellery with personal engravings. Since ideas are free to use, designers can use the same theme to create their collection, that encourages the creation of fashion trends, i.e. a phenomenon where a certain fashion becomes popular in masses. The centre of such trends is usually an idea: e.g. in the 70's, there was the space theme, flower patterns, geometrical forms etc. Designers and fashion brands are free to use and interpret ideas, it is only forbidden to copy another designer's creation, i.e. to plagiarise. Plagiarism is a situation where an item is made that is identical to the item of another designer and is presented as their own. An infringement of intellectual property rights is also creating an item that is indistinguishable from the original creation. A product is indistinguishable when in the eyes of an average consumer it is not a new design, but an existing one, that has been modified a little.

The problem with copyright protection is the fact that while the protection is created automatically, there is no institution that would monitor possible copyright infringements as they happen. This means that the author is fully responsible for protecting their own copyrights.

Even though according to the Copyright Act the authorship is presumed and the person disputing the authorship must prove the opposite, in practice, ensuring their rights might prove to be complicated for the designer. In the global and fast-changing fashion world, it is often difficult, if not impossible, to determine who is the author of the original item and to prove that you were the first to create something. Designers often create similar items simultaneously, usually when they become inspired by the same trend, each other or the publications of the agency providing fashion trend predictions. When the dispute transfers to a courtroom, where the designer claims to be the author and accuses the opponent of stealing their design, the designer seeking justice in court might not find it easy to achieve it if they do not have a single evidence about the time of creation and time and place of publishing their design, to back their claims.

The paradox of the problem of copying fashion items is that the fashion world often sees copying as an inevitability and even recognizes the positive aspects of it. The authors of „The Knockoff Economy“ claim that there is a positive effect on copying since it helps to kill popular designs and birth new ones.

Design Protection

Fashion creations can generally be protected by design registration, and in addition to aesthetic function, they also have a practical one (clothes can be worn, they provide protection from the elements etc.). Although the downside of the registration process is its length and, design protection is much stronger than copyright and independent from it. Registration gives the author a sole right to the design and allows to ban the use of other identical or undistinguishable similar products. The outer shape of the product can be registered as a design. In addition, you can protect the flat layout design, like the pattern of a fabric, buttons, zippers, ornaments, colour schemes, textures and materials, logos etc.

If the competition makes, sells or distributes products under design protection without the author's consent, the designer has the right to demand for this activity to stop and to avoid further infringement as well as to claim damages.

Unlike the copyright protection, design gets a legal protection only in cases where the creation is new, distinguishable and which can be used to create products industrially or through handicraft. Legal protection starts with the registration of the object at the Patent Office's Register of Industrial Solutions. The registration is valid for 5 years from the day of submitting the application of registration and can be extended for five years at a time, for up to 25 years.

In order for the design registered in Estonia to be valid in other countries, you must apply for a registration in countries where you want to have the protection. Designs registered in the European Union Intellectual Property Office (EUIPO) are valid in all EU member states.

You should take into account that it is important to get the design protection before you release the item to the public. If the fashion design was publicly released before submitting the registration application, the design item might not meet the requirements for novelty, which is a precondition for receiving the industrial design registration.

Unlike copyright, which is free, a state fee must be paid for registering and extending the design. Due to the fact that fashion field is dynamic, the trends change quickly, and the designer must always create something new to keep up with the market demands, it might not be financially wise to register all new designs and their variations. But you should register design solutions as designs that are innovative and best express the creative signature of the designer.

You should also consider the nuance that the design registration might not guarantee the designer that an identical or undistinguished similar creative solution will not be used by another author, who in good faith and independently from the original designer, has developed a similar or identical design or has made significant preparations to use it. In this way the person can rely on the so-called early use right and continue to use the product, including to manufacturing, advertising, selling or the person can start using their product in an intended way.

Practical advice

Big fashion brands have lawyers who deal with intellectual property right issues daily and monitor the activities of their competition, making them ready to react to any infringements. Most of the designers cannot afford a constant legal support but can still implement practical methods that help prevent infringement of intellectual property rights and, in cases of infringement, protect their rights related to their creations.

- **Fix the stages of the creative process, including the dates of creating the designs, from making the first sketch, to production and sending the finished product to be sold. Save the data about the time and mediums of publishing the creations. Save your design sketches and drafts, take notes about your creative ideas. These measures will help you protect your intellectual property rights if someone copies your product and helps protect you if you get accused of infringement.**
- **Register your trademark. Trademark tells the consumer of the origin of your products and helps the consumer to create a stronger bond with your brand. Before submitting the application for registration, make sure that the trademark is distinctive enough and that no one else is using a similar name or logo.**

- If the need arises to show your idea, business plan or sketches to third parties during the development process, conclude a confidentiality agreement with said party, in which you should fix the other party's obligation to keep all information confidential and the condition that all intellectual property rights belong to you and will remain yours.
- Make sure that third parties with whom you form a contractual relationship (employees, business partners, manufacturers) give their intellectual property rights over to you correctly.
- If you give a license in respect of your intellectual property, then clearly specify in the contract to which objects and in which territory the license is valid, the period of validity of the license, the conditions for the calculation and payment of the license fee, and whether exclusive rights apply.
- When the infringement of rights occurs, rely on different legal protection options (copyright, design, infringement of the exclusive rights of the trademark owner, unfair competition).
- Develop and grow your unique brand, which includes elements such as the trademark, the organization, products, visual identity, organizational values, your reputation and its image in the consumer's mind. Like Stephen King, the well-known professor of marketing and brand recognition has said: „ A product can be copied by a competitor; a brand is unique. A product can be quickly outdated; a successful brand is timeless.”