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A COMPREHENSIVE ANALYSIS OF FASHION LAW IN INDIA**FASHION AND FASHION DESIGN:-**

Fashion is an artistic reflection of life. It can be conveyed through signs, symbols, icons, that communicate about individuals or groups. Fashion varies considerably within a society based on gender, age social class and generation and changes rapidly over time. In common parlance, fashion refers to a popular way of dressing during a particular time or among a particular group of people. It is best defined by the styles of clothing and accessories worn at any time by people. It is inclusive of bags, footwear and jewelries.

Fashion design is the application of design and aesthetic beauty to the items of fashion. It is considered as a “principle creative element” of fashion industry and is influenced by cultural and social attitudes and has varied over time and place. Modern fashion designs are divided in three basic categories:(1) haute couture, (2) ready-to-wear and (3) mass market.

HAUTE COUTURE :-

Until 1950, fashion clothing was designed and manufactured on Haute Couture basis. A Couture attire was tailor made for an individual customer from a cordon bleu, exorbitantly priced garment, sewn with extreme caution and attention to detail and finish, using arduous techniques. A designer has to be a part of Syndical chamber of haute couture and showcase his collection twice a year with a minimum of 35 designer outfits each time, so as to qualify as a haute couture designer. ‘Couture’ is a French word that means dressmaking, sewing or needle-work and ‘haute’ translates to high. Thus, haute couture is a well-protected term that may be used by firms who

meet certain standards. The Syndical chamber of haute couture follows a certain set of rules in order to distinguish couture wear from non-couture wear based on the following criteria:-

1. design made specifically for private clients,
 2. to own a workshop in Paris that employs at least fifteen full time staff members,
 3. to have at least twenty technical people full time, and
 4. to present a collection of minimum fifty designer garments to the public every fashion season.
- Haute Couture is prevalent in Paris, London, Milan, New York city and Tokyo.

READY-TO-WEAR:-

Ready-to-wear collection are made in small quantities to assure exclusivity, but are not stitched for individual people. These garments are of standard size, not tailor made and are suitable for large production. These outfits are presented by fashion houses during fashion weeks. Ready-to-wear outfits can further be distinguished between creature and confection. Creature collection is designer made, with higher quality and finish as well as a unique design. They are based on a particular philosophy and created to make a fashion statement. Just like Haute Couture, ready-to-wear garments are also showcased on International catwalks.

MASS MARKETS:-

Mass markets cater to large masses using cheaper fabrics and low-cost production techniques. Thus, it can be concluded that, fashion design is a representation of human intellect and creativity and fashion is a tangible form of intellectual property.

TEXTILE HERITAGE OF INDIA.

India has always been fashionable in its own way. The TEXTILE HERITAGE OF India began with Mahatma Gandhi's Khadi. India has rich heritage of art and craft which is reflected in textile and fabrics. Gandhi's Khadi was also known as freedom fabric. It was a part of his movement towards self-reliance (today known as ATMANIRBHAR BHARAT) for the colonized Indians.

Cotton is cultivated in India since ancient times and it was grown in the states of Bengal, Varanasi, Chanderi and Andhra Pradesh. The finely woven cotton is known as Jamdani, a style of weaving the fabric.

Geographical identification in handicraft sector was introduced to safeguard identity of product to prevent problems of duplication. The Kashmiri Pashmina received the geographical indications tag but the intellectual property rights have been washed away due to economic turmoil.

Piracy in fashion designing

Piracy is the unauthorized use or reproduction of another's work. It is illegal reproduction or use of materials protected by copyright, trademark or patent law. It is an act in which unauthorized copies are made of an intellectual property. Piracy in fashion designing includes:-

1. Copying the fashion designs
2. Piracy in logo or label of that brand.

Fashion designing piracy (FDP) involves unapproved copying of incipient fashion designs. FDP can be broadly categorized into the following two categories:-

1. Knockoffs
2. Counterfeits

KNOCK-OFF:-

Knock-off is an unsanctioned imitation or copy of an something popular, used without a license, in order to sell these original designs at a lower price than original. In the fashion world, a knockoff is a near copy of original design, mimicking its pattern and other elements, but is traded in the name of a label other than the label of the original design. It is sold at a much cheaper price than the original design. Knockoffs are deliberated to replicate the original design line for line, but with another designer's name attached to it. A line-for-line copy is a close identical emulation of the original design.

COUNTERFEIT:-

In contrast to knockoff, counterfeit is an unauthorized imitation of an original design along with the label or logo of that fashion brand. This attempt is intended to fool the buyers of the garment's true quality and origin. It is an attempt to deceive the public. It basically involves copying of the fashion design as well as the logo and the label of that brand. In some cases of counterfeit, only fashion labels are copied and these cases purely represent the piracy in logo or

label of fashion brand.

IPR protection of fashion design

Fashion designing is a product of human intellect and creativity and thus, it is a subject matter of protection under intellectual property laws. IPR protection for fashion designs is the need of the hour and plethora of blogs and articles have been return in the favor of it. Although, a substantial number of people are also of conflicting opinion that IPR protection is not necessary. The opponents of IPR protection of fashion industry argue that fashion industry is capable of surviving and flourishing without IPR protection. They profess that absence of IPR protection motives fashion designers to create multiple designs which ultimately results in growth of fashion industry. They support their claim by mentioning that copyrighting and trademark protection is a long and tedious process which could discourage the designers from showcasing their creativity with an open mind. Rausiala and Springman pointed out in a scholarly article the “angelic” qualities of “piracy” and say that piracy in fashion industry is a boon than a bane. They Write “The absence of IPR protection for creative designs and regime of free design appropriation, speeds diffusion and induces more rapid obsolescence of fashion designs....The fashion cycle is driven faster.... By widespread design copying, because copying erodes the positional qualities of fashion goods. Designers in turn respond to this obsolescence with new designs. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales.” These views of Rausiala and Springman are less than ideal. Their views that piracy of fashion designs lead to growth of the industry, hence IPR protection should be avoided at all costs. This ideology mostly originates from “trickle-down theory”, which resonates that piracy occurs between the upper-most and lowest layers of the fashion industry. But, in reality, copying of designs happens in all layers of the fashion industry. However, it is unfair for un-established designers and start-up business owners, who suffer maximum monetary loss due to competition, without the benefit of increased privilege.

Fashion industry is one of the most creative industries and fashion designs are the heart of fashion. Fashion designs are expensive to create and inexpensive to copy. The copyists will exploit the designers, discouraging them from making innovative and creative designs in future. Thus, copying retards creativity and innovation. IPR protection for fashion designs would ensure that the pay goes to the creator of the design and not to someone who merely pirated his designs

and this would encourage the budding designers. The designers suffer harm due to internet as designs can easily be downloaded by any person living around the world, which makes IPR protection even more necessary.

PROTECTION OF FASHION DESIGN UNDER INDIAN IPR DOMINION.

The IPR administration in India with respect to fashion designs is governed by The Indian Patents Act, 1970, The Indian Copyright Act, 1957, The Trade Marks Act, 1999 and The Designs Act, 2000. This can be further simplified into following :-

Patenting the unique process of manufacturing and processing of the fabric

Copyright protection for fashion design

Protection of Industrial design under the Designs Act

Trademark protection for fashion design.

COPYRIGHT PROTECTION FOR FASHION DESIGN :-

Copyright protection is an important legal aspect for protecting the creativity of the fashion designers displayed in their designs. The Indian Copyright Act, 1957 mentions the law relating to the copyright. Section 15 of the Copyright Act is relevant from the view point of protection of fashion designs.

Section 15: Special provision regarding copyright in designs registered or capable of being registered under the Designs Act, 1911. —

(1) Copyright shall not subsist under this Act in any design which is registered under the Designs Act, 1911.

(2) Copyright in any design, which is capable of being registered under the Designs Act, 1911, but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or, with his licence, by any other person.

There is an unusual overlap between the Copyright Act and Designs Act on the issue of design protection. When the Copyright Act is read conjointly with the Designs Act, it lays down a basic framework for design protection in India, which can be briefly classified as follows :-

1. Designs capable of being registered under the Designs Act, 2000 and registered under the provisions of the act to get protection under the Designs Act only.
2. Designs capable of being registered under the Designs Act, 2000, but not so registered to get protection under the Copyright Act, 1957.
3. Designs not capable of being registered under the Designs Act, 2000, as they are original artistic works, to get protection under the Copyright Act, 1957.

In the case of *Rajesh Masrani v. Tahiliani Design Pvt. Ltd.*, the plaintiff ran a private limited company under the creative leadership of Mr. Tarun Tahiliani and it claimed to have a major presence in the Indian fashion industry, enjoying global reputation with over 80 outlets in 20 countries. The plaintiff claimed that the drawings which were made in the course of developing the garments and accessories by the plaintiff were artistic works under Section 2(c)(i) of the Copyright Act, 1957. It was further claimed by the plaintiff that the garments or accessories themselves were works of artistic craftsmanship under Section 2(c)(11) of the Act, while the patterns printed or embroidered on the fabric were also artistic works in their own rights.

The plaintiff, alleged infringement of copyright by the defendant, Rajesh Masrani, on the ground that there was a colorable imitation or substantial reproduction of the plaintiff's copyrighted works including works of artistic craftsmanship or literary or artistic works. The plaintiff filed a suit seeking decree of permanent injunction, damages and rendition of accounts against the defendant for infringement of copyrighted designs of the plaintiff. An ex parte ad interim injunction order was passed in the favor of the plaintiff.

The defendant raised four contentions: firstly, the plaintiff had no right to claim protection under the Copyright Act, 1957 as the artistic work for which copyright was alleged to exist was actually 'design' that came under the Designs Act, 2000 and since the same was not resisted under the Designs Act, the plaintiff was not entitled to protection under the said act; secondly, the textile design did not constitute 'artistic work' within the meaning of Section 2(c)(1) of the Copyright Act and, was, therefore, not capable of protection; thirdly, as no copyright subsisted under Section 15 of the Copyright Act, 1957, the suit of the plaintiff had no right to claim protection under the Copyright Act, 1957 because he was also not registered owner of the copyright.

The Honorable Court, after analyzing the relevant provision of the Designs Act, 2000 and Copyright Act, 1957 and after examining the plaintiff's mode of creation and execution of the

artwork on a finished garment, held the plaintiff's work was entitled for protection under Section 2(c) of the Copyright Act and was an original artistic work which was not covered in under Section 2(d) of the Designs Act, 2000 it was not capable of being registered under the Designs Act, 2000 and the provisions of Section 15(2) was not applicable. The Court observed that it was settled law that registration of the work was not compulsory and was not a condition precedent for maintaining a suit for damages for infringement of Copyright. Copyright protection used to be forfeited by many designs because of section 15(2) of the Copyright Act.

PROTECTION OF INDUSTRIAL DESIGN UNDER THE DESIGNS ACT

Protection of Industrial designs is the most used legal protection method for fashion design as countries usually protect fashion designs as industrial designs. In India, the primary law employed by fashion designers to protect their fashion designs is the Designs Act, 2000.

Section 2(d) of the Designs Act, 2000 defines design as

“design” means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957”.

It means that only those products that fit into the definition of design, as mentioned under the section 2(d) can be registered as fashion designs. Apart from it, a design, to get registration must follow the following criteria as well :-

1. It must be new or original.
2. It must not have been published or disclosed or anticipated to the public in India or elsewhere or by use or any way prior to the date of filing of registration.
3. It must be distinguishable from already known designs or combination of such known designs.

4. It must not contain scandalous or obscene matter.

The Act does not protect the garment as whole, but only protects the color, shape, pattern etc of the garment. Thus, it is important for a design to be registered. Under the Act, the possessor of the registered design gets copyright for that design which means the exclusive right to apply the design to any article in any class where in the design is registered. It means that the Act grants protection against a class of articles as mentioned in Schedule III of Designs Rules, 2001. Goods produced by designers may fall under falling criteria:-

1. CLASS 2: Articles of clothing and haberdashery - undergarments, lingerie, corsets, brassieres, nightwear; headwear; footwear socks and stockings; neckties, scarves, neckerchiefs and handkerchiefs; gloves; haberdashery and clothing accessories including buttons, clasps for garments, for headwear and for footwear laces, pins, hand sewing, knitting and embroidery equipment and clothing accessories such as belts, suspenders ,braces etc.
2. CLASS 3: Travel goods, cases, parasols and personal belongings, not elsewhere specified- trunks, suitcases , briefcases, handbags, key-holders, cases specially designed for their contents, wallets and similar articles; umbrellas, parasols, sunshades and walking sticks; fans etc
3. CLASS 5: Textile piece-goods, artificial and natural sheet material -lace embroidery ;ribbons, braids, and other decorative trimmings; textile fabrics etc
4. CLASS 10: Clocks and watches , other measuring instruments, checking and signaling instruments - watches and wrist watches etc.
5. CLASS 11: Articles of adornment - jewelry etc.

As per the provisions of designs Act, copyright is granted for a period of ten years from the date of registration and on the expiry of the ten year period, it may be extended for a period of five years on re-application. The designs act protects the copyrighted design from piracy. A person who commits an act of piracy is liable to pay the proprietor a sum not exceeding twenty five thousand rupees or any injunction against that person. Proprietor of the design shall institute a suit in a court not below the District Judge.

In 2012, Louboutin initiated a suit against Dutch designer Van Haren for selling high-heeled shoes with red soles. In 2018, the Court of Justice of the European Union ruled in favor of

Louboutin and held that Van Haren must stop the sale of the red-soled shoes, pay damages to Louboutin, destroy all existing copies of its footwear, and provide details of outlets in which they are sold .

In making its decision , the Court analyzed two EU trademark laws; Articles 2 and 3 of Directive 2008/95 (Directive) and Article 2 of the Benelux Convention on Intellectual Property (Benelux Convention). Article 3.1(e)(i) of the Directive and Article 2.1(2) of the Benelux Convention generally state that “the shape which results from the nature of goods themselves” cannot be trademarked. However, in 2009 Louboutin filed an application for registration of a Benelux trademark for the color red applied to the sole of the shoe, later changed to limit the sole to high-heeled shoes.

Van Haren used Article 2.1(2) of the Benelux Convention to argue that the trademark was invalid because the trademark is a two-dimensional figure which consists merely of a red-colored surface. In considering Van Haren’s argument the court first looked to public recognition and the value the trademark provides for Louboutin. The court explained that “a significant proportion of consumers able to identify shoes as goods originating from that producer.” Therefore, the trademark could be perceived to be related to the product. Moreover, the red soles give substantial value to the shoes and “play an important role in a consumer’s decision to purchase them.”

However, more importantly the court had to decide whether the red sole was an unprotectable shape. The court stated that color red was linked to the shoe sole, and that the shoe sole was not part of the trademark and that the color, which identifies a source, was protected . Therefore, holding that Van Haren infringed on Louboutin’s protected trademark.

The dispute between the two designers may not be over yet. A representative for Van Haren has stated that the designer may decide to appeal the court’s decision. Moreover, European Union Intellectual Property Office is currently reviewing Louboutin’s red sole trademark for cancellation proceedings, and who else to have initiated the proceedings but Van Haren.

NO PROTECTION OF 9 DESIGNS : The designs act protects registered designs only. Hence, designs that are not registered cannot get benefits of the Act. The designers of unregistered designs do not have the right to file a suit of infringement for recovery of damages or imposing an injunction against it. Fashion industry is one of the most dynamic

industries that come up with fresh collection of items every season, the designers need immediate protection for registrations of their designs and the designer has to maintain secrecy about the design's features. During the pendency of application, fashion designs remain susceptible to exploitation by the employees of designers or by any other person in whose hands those designs might fall. The designer is at risk because the success of the designs remain uncertain. Once the registered designs hit the market, the designer might find out that the design is not appreciated and has not met the expected demand, thus making the whole cumbersome procedure undertaken by the designer for registration of the design as a futile one.

TIME CONSUMING REGISTRATION PROCESS: The whole process of design registration from the date of filing an application till the grant of certification of registration takes about 10-12 months. This is problematic because the projected life in a design store lasts for a period of one season i.e. three to four months. Thus, a designer is left with only an option to apply for design registration much before the expected date of presentation of his designs to the market.

Inadequacy of damages: Designs Act incorporates provisions for recovery of damages from any persons involved in the act of piracy of registered designs but puts a limit on the amount of money that can be recovered i.e. not exceeding fifty thousand rupees. The ceiling on damages is a mockery of the grandeur associated with couture creations which are worth crores of rupees.

TRADEMARK PROTECTION FOR FASHION DESIGNING

A trademark is a recognizable sign, symbol, logo or a phrase that denotes a product or a service and legally differentiates it from all others of its kind. A trademark in fashion is used to differentiate a brand in terms of sale and marketing of goods and services. This could be word, logo, symbol, color, scent or even a combination of these. It is safe and advantageous to get the trademark registered, in order to protect one's brand and following are the benefits of trademark registration :-

1. A registered trademark gives the brand owner additional benefits, presumed ownership and reduces the burden of proof. It gives a legal right to brand owner and restricts copyists from infringing upon their creation.

2. It ensures the brand owner that their trademark is not similar to any other registered trademarks and could save him from future infringement suits.
3. It gives the brand owner an exclusive right to operate, sale and manufacture under said trademark.
4. It also provides right to legal action against anyone that infringes upon it
5. If the trademark is registered, the symbol ‘®’ can be used on the product after the trademark.
6. This federally registered trademark can be expanded in foreign countries after foreign filing.

A trademark is useful for a fashion design, when it is integrated into the design in such a way that it becomes an element of the design. There is an increased tendency among designers to add a trademarked logo on the outside of the product during the creation of a logo or accessory design. Thus, the logo becomes a part of the design and provides protection against piracy. Section 2(d) of the Designs Act, 2000 defines design as “design” means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957”.

It means that a fashion design which has a trademark cannot be protected under the Designs Act and similarly if a fashion design is registered under the Designs Act, the same cannot be protected under the Trademarks Act, 1999.

The Delhi High Court in *Microlube India Ltd. v. Rakesh Kumar*¹ trading and Saurabh industries & Ors., the Hon’ble full bench by 2:1 majority held that the plaintiff would be entitled to institute an action of passing off in respect of design used by him as trademark provided the action contains the necessary ingredients to maintain such a proceeding. The

¹ *Microlube India Ltd. v. Rakesh Kumar* 199 (2013) DLT 740

Court held that:

Having regard to the definition of a design under section 2(d) of the Designs Act, it may not be possible to register simultaneously the same matter as a design and a trademark. However, post registration under section 11 of the Designs Act, there can be no limitation on its use as a trademark by the registrant of the design. The reason being :the use of registered design as a trademark is not provided as a ground for its cancellation under section 19 of the Designs Act. Further, the Court held that a suit for infringement of a registered trademark and action of passing off would not lie, but such a suit can be instituted simultaneously. The suit for passing off action could be instituted before expiry of statutory period under Section 11 of the Designs Act, 2000.

This judgement led to the development of trademark protection for design. Thus, a registered fashion design under the Act gets protection and can also be protected by instituting a suit for passing off provided that the design had a registered trademark as well.

Well-known Indian designers Anita Dongre, Gaurav Gupta, Payal Singhal have gotten their fabrics and garments registered as designs. Relaxo and Bata are a few footwear brands that have protected their products under the intellectual property regime, by safeguarding the trade dress. Fashion community in India is getting the hang of intellectual property for their designs.

In the case '*Pranda Jewellery Pvt. Ltd. And Ors. v. Aarya 24 kt and Ors*²', it was observed that the plaintiff's artistic work contained in the original drawings is a reproduction in a material in gold plate in a particular form. Such kind of imitation of images in a gold plate was a violation of plaintiff's copyright in them.

In the matter '*M/S Sabyasachi Couture v. Anil Kumar Batra &*³ Ors', the defendant owned a famous South Delhi store by the name of 'FRONTIER RAAS', which had replicas of the garments designed by Sabyasachi and also used the name of Sabyasachi in its couture line. This case was to be a well found instance of infringement where the defendant used the plaintiff's design and misused the trademark 'Sabyasachi' without prior permission of the designer.

² *Pranda Jewellery Pvt. Ltd. And Ors. v. Aarya 24 kt and Ors*

³ *M/S Sabyasachi Couture v. Anil Kumar Batra &* 1988 AIR 1353

Also, Designer Christian Dior settled a plagiarism battle with 'People Tree', through an out-of-court settlement, wherein People Tree had accused the French Label of plagiarizing one its block print pattern in January 2018.

Puma v. Forever 21 : In 2017, Puma, a German company filed a suit in the district court against Forever 21. Puma alleged that the later infringed its rights in a footwear line as a collaboration with Rihanna. The plaintiff sought a preliminary injunction and a temporary restraining order to halt the sales of Forever 21 of its shoe designs that were identical to their sneakers and sandals. Puma cited the case of *Star Athletica v. Varsity brands*⁴. The court held that the plaintiff failed to show irreparable harm and thus, was not entitled to an injunction against Forever 21.

CONCLUSION :-

Fashion is a colossal industry that strides in a competitive environment with minimal or absolutely no legal protection for its creative blueprint. The influence of fashion industry on economy and culture is enormous, albeit many people regard it as insignificant and transient. It is a highly sophisticated, 2.5 trillion dollar global industry. The origin of fashion designing dates as far back as 1826, Charles Frederick Worth being the first fashion designer of the world who set up his fashion house at Paris and thus, he is considered to be the father of fashion. Fashion is an international language which creates a wordless means of communication understood by millions of people. A fashion designer, trying to protect his designs must be aware of the differences in the intellectual property protections that cover designs in the United States as compared to those in the European Union. The United States awards minimal protection to designs under Patent and Trademark law, dress designs not being protected under copyright. The European Union offers substantially more protections for designers, which reflects upon its reputation as a fashion hub and a region for haute couture fashion houses. It is important for both, public and private institution to offer Fashion Law as a necessary subject. Fashion houses and accessory designers require attorneys who list out the advantages or disadvantages of intellectual property protection, the constantly evolving landscape of counterfeit goods, theirs of threats from copyright trolls, laws imposing "hazardous material", prohibitions for consumer products, complications inherent in international supply chains, industry-specific employment law concerns, and numerous other legal issues. The strategic management of intellectual property rights will allow a fashion

⁴ *Star Athletica v. Varsity brands* 580 U.S.__(2017)

designer or a company to effectively protect or promote its ideas , relationships and talent. This, in turn, will enable fashion designers to enter or expand in the market, obtain a bigger market share and improve profitability.



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