

Copyright Law Protection for Fashion Design - Interfaces Between Copyright Act 1957 and Design Act 2000: An Appraisal

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Abstract

The fashion industry is a global industry, generating trillion in revenue. Consequently, the question of whether—and to what extent—fashion designers can protect their works under the intellectual property laws of their country is hotly debated. In India fashion designers can protect their creations under the Indian Copyright Act of 1957 and the Designs Act of 2000. India presently affords very limited copyright protection to fashion designs under its Intellectual Property Right Law Regime because designs must pass a stringent “separability” test to distinguish elements that can be copyrighted from elements that are utilitarian in their function. Present paper makes an analysis of the present law for the protection of fashion design and argues that, to attract new talent and to keep its fashion industry booming, India should strengthen its protection for designers' original works.

“Fashion is not about looking back. It's always about looking forward.”

-Ms. Anna Wintour

Introduction

The global fashion industry includes apparel, accessories, and luxury goods, and has a market value of trillion. Almost two-thirds of the industry's revenue comes from the Asia-Pacific region. Copyright is a form of intellectual property protection granted under Indian law to the creators of original works of authorship such as literary works (including computer programs, tables and compilations including computer databases which may be expressed in words, codes, schemes or in any other form, including a machine readable medium), dramatic, musical and artistic works, cinematographic films and sound recordings. Fashion is an emerging business in India, clothing manufacturing has been one of the nation's major industries for a number of years. Fabric and textiles represent about one third of the country's exports. However, these exports are “largely lower-end products for big Western retailers.” The exportation of textiles consequently employs a large portion of India's population of 1.2 billion people. While textile exports account for a large portion of business in India, fashion design is still a relatively small fraction of the country's economy. Overseas retail buyers are attracted to the unique textiles and exceptional fabric colours that India manufactures, and young Indian designers have the potential to be the future of India's emerging fashion industry. Many believe that the blending of Indian craftsmanship and Western silhouettes will create a huge opportunity for Indian designers to become worldwide fashion leaders in the future. However, globalization could create complications in determining the intellectual property rights of the designers. India's law is already prepared for the emergence of this new fashion industry.

The fashion industry is primarily based on creativity, but in general, creative derivation is an accepted premise of fashion. Ideas arise, evolve through collaboration, gain currency

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through exposure, mutate in new directions and diffuse through imitation. The constant borrowing, repurposing and transformation of prior works are all integral elements of creativity in fashion.

Creativity is considered to be fundamental in nature and impossible to own outright as a property. Creativity is too expansive and changeable for it to be owned as a legal entitlement. Designs are not standard outputs, but one-offs, yielding unique works which are strictly bound up with individual talent. In the 1960s the French designer Yves Saint Laurent (YSL) presented a collection called “Mondrian”, openly drawing inspiration from the famous Dutch painter's works. This raised many questions with respect to IP rights. The main issue was whether Mondrian's paintings were a part of common heritage and were therefore free to be used as a source of inspiration. If not, where was the overlap between Mondrian's creativity and YSL's creativity? The way that creativity is characterized makes it difficult to define, entitle, legitimize, enforce, evaluate and exchange Intellectual Property Rights.

In 1994 YSL famously sued Ralph Lauren in Paris for the “point-by-point” copying of a YSL dress design. YSL's successful lawsuit is in many ways the exception that proves the rule that fashion designs are “free as the air to common use”. According to YSL: “It is one thing to take inspiration from another designer, but it is quite another to steal a model point by point, as Ralph Lauren has done.”

The modicum of creativity seems to influence the fashion industry. The introduction of an element of creativity in establishing originality for copyright protection may raise concerns about the basic concept of creative derivation upon which the fashion industry operates. The issue lies in deciding the point at which the creativity of opposing parties is determined as sharing common characteristics. The Indian perspective on the protection of Intellectual Property Rights is still at a nascent stage, with few precedents available.

“The aim of art is to represent not the outward appearance of things, but their inward significance”. Textile Designs are also considered as a form of art which is an inception of mind and soul of an Artist. When an artisan spends enormous amount of time and energy in putting a design into an outfit in the textile industry, it is the duty of the owner of such precious works to protect his right legally so that no one can copy and take a readymade benefit for such work. An Artistic work connected to textile design can be protected under the Copyright Act, 1957 and the Designs Act, 2000.

Current Legal Protection Available to Designers in India

The two legal instruments in India's current legal doctrine that fashion designers can use for protection are the **Indian Copyright Act of 1957** and the **Designs Act of 2000**. The Indian Copyright Act of 1957 affords comprehensive protection to musical, dramatic, literary, and artistic works. The definition of “artistic work” includes drawings, which also accommodates drawings of fashion apparel. The accommodation of drawings of fashion apparel into the definition of “artistic work” came in 2008, when the Delhi High Court held that garments and accessories as well as printed patterns and embroidery on the fabric are “artistic works” protected under section 2(c)(i) of the Indian Copyright Act of 1957. Under the Indian Copyright Act, a copyright exists for the lifetime of the copyright holder and for sixty years after the holder's death. The author or creator of the work is the first owner of the copyright in a work. The owner of a copyright may also assign the copyright to any person, either in whole or in part.

In India, a copyright comes into existence as soon as a work is created. Under Indian law, the

copyright owner may request a certificate of registration. A derivative work is referred to as an “adaptation” and is protected under the Copyright Act. Only a creator of copyrighted work, however, has the exclusive right to prepare an adaptation of the original work. The other legal instrument Indian designers look to for copyright protection is the Designs Act of 2000. The Designs Act protects the non functional aspects of a design including the shape, pattern, composition of line, and colour and ornament. To receive protection under the Designs Act, a designer has to register the design with the Controller General. Once a government examiner approves a design, the owner of the design has a copyright in the design for ten years after the date of registration. The design owner has a right of action against any person who sells, imports for the purpose of sale, or publishes “the design or any fraudulent or obvious imitation thereof.” A successful suit may entitle a designer to monetary damages and injunction. India affords intellectual property protection to fashion designers through its domestic copyright laws, while other countries lack similar protection for the business of fashion.

India's Copyright Act of 1957 and its Designs Act of 2000 protect the new designer's line of dresses, including the sketches of the dress and the cut of the garment Certain aspects of the hypothetical designer's line of dresses are protected under the Indian Copyright Act of 1957 and the Designs Act of 2000. These two legal instruments provide protection for the designer's garment sketches, pattern of the garment, and the garment's overall appearance. Fashion designers in India have frequently turned to the Indian Copyright Act for protection. The Indian Copyright Act of 1957 and its amendments protect literary, dramatic, musical, and artistic works. Artistic works include “drawing[s] (including a diagram, map, chart or plan)” as well as “any other work of artistic craftsmanship.” Under this definition, the dress designer can start copyrighting her creation at the beginning stages of design creation. Many designers sketch their ideas to help them envision their work. If the designer starts his/her design career in India, he/she can protect his/her dress sketches under the Indian Copyright Act, because the sketches fit within the definition of “drawings.” Under the Indian Copyright Act, a copyright exists for the lifetime of the copyright holder and for sixty years after the holder's death. Indian law allows a copyright to come into existence as soon as a work is created, and acquisition of the copyright is automatic. However, during a copyright infringement suit, an Indian court treats a certificate of registration as prima facie evidence that a party owns the copyright. Consequently, the hypothetical designer's dress line is ready to receive copyright protection as soon as the dress sketches are in existence. A derivative work is a work that clearly borrows from a copyrighted work and is referred to as an “adaptation” under Indian law. The Copyright Act states that a creator of copyrighted work has the exclusive right to prepare derivative works based on the original work. This means that our designer is the exclusive rights holder and receives protection under copyright law, which enables him/her to bring an infringement claim against any work that recognizably, or substantially, copies her line of dresses. However, a copyright is assignable under Indian law. The designer may also assign her copyright over to a national retailer. If the designer assigns the copyright over to the retailer, she must specify the specific work, the rights assigned, the duration, and the territorial extent of the assignment. This allows the designer to control when and where her design may be sold and to what extent her design may be changed. Once the garment is in three-dimensional form, the shape and the ornaments of the designer's dress can be protected under the Indian Designs Act of 2000. **Under the Designs Act, a design's “shape, configuration, pattern, ornament or composition of lines or colours applied to any article”** is protected as long as it is original. This means that the designer's three-dimensional line-by-line design of the dresses could be protected. However, unlike the

Indian Copyright Act where a copyright exists at the mere start of the artwork, the Indian Designs Act requires a person to register the design with the Controller General of Patents, Designs and Trade Marks. It should be noted that the designer's sketch would not be afforded protection under the Designs Act because artistic works as defined under the Indian Copyright Act are excluded from protection under the Designs Act. Nonetheless, there are limitations to which designs may be afforded protection. A design that is not new or original, meaning a design that is not wholly unique is not protected. Perhaps the most important limitation on registering a certain design is the prohibition on registering a design that has been disclosed to the public anywhere in India, or in any other country, prior to the filing date. This limits our designer severely because if he/she does not register his/her new design before disclosing his/her dress line, he/she will be prohibited from registering his/her line and will thus lose protection for his/her new creations.

Interfaces between Copyright Act 1957 and Design Act 2000

The decision in *Rajesh Masrani v Tahiliani Design Pvt Ltd* 2009 (39) PTC 21 (Del) is a Division Bench decision which will have significant impact on fashion industry. The defendant in this case appealed against the decision of the learned single judge restraining them from reproducing, printing, publishing and distributing, selling and offering for sale prints in any form whatsoever that are colorable imitation or substantial reproduction of the plaintiffs fabric prints including underlying drawings, sketches.

The facts of the case are:

The plaintiff (respondent in this appeal) *M/s Tahiliani Design Pvt Ltd* is a private limited company under the creative leadership of Mr Tarun Tahilliani. It claims to have a major presence in fashion industry in India enjoying global reputation with over 80 outlets in 20 countries. He was the first Indian to showcase his work at the prestigious Milan Fashion Week and has won several prestigious awards.

The plaintiffs claimed that the drawings which are made in the course of developing garments and accessories are artistic works within the meaning of the artistic works under Section 2(1) of the Copyright Act, 1957. The patterns that are printed or embroidered on the garment are also artistic work in their own right and are developed by the plaintiff. The garments or accessories are works of artistic craftsmanship. The plaintiff does its creative work on computers and claims to be the author under Section 2(d)(vi) of the Copyright Act. The plaintiff also claimed to be the first owner of copyright of all products of the company under Section 17(c) of the Copyright Act.

The plaintiff alleged infringement of copyright by defendant on the ground that there is colorable imitation or substantial reproduction of the plaintiff's fabric prints including underlying drawings or sketches, The learned single judge had given an *ex parte ad interim* injunction against which this order has been filed.

The defendant contended that the plaintiff is not registered under the Designs Act, 2000, which is mandatory for seeking protection under it, forfeiting its right to claim protection under the Designs Act. The plaintiff is also not the registered owner of copyright and hence cannot claim protection under Copyright Act, 1957. They also claimed that the textile design is not covered The plaintiff is claiming copyright protection of a work which is actually a design which comes under the purview of Designs Act, 2000 and since the works are not registered under the Designs Act, the plaintiff is not entitled to protection under that Act.

The plaintiff responded that the prints, which are the subject matter of the present suit, belong to the couture line and not more than twenty or possibly fewer copies are made of any single costume. Artistic work is distinct from design and remains artistic work *per se* distinct from the garment to which it is applied and, therefore, is covered under the exclusion contained in Section 2(d) of the Designs Act, 2000. In order to get protection under the Copyright Act, there is no condition that copyright must be registered under the Copyright Act, 1957. In case the subject matter of the product is covered within the definition of Section 2 of the Copyright Act which is original artistic work, the case for infringement of copyright is made out within the meaning of Sections 13 and 14 of the Copyright Act.

The Court summarized main controversies involved in the case as below:

Whether the

- (a) pattern made by the plaintiff on the fabric is design or artistic work;
- (b) product in question is the subject matter of artistic work within the meaning of Copyright Act, 1957 as alleged by the plaintiff;
- (c) copyright subsists in the plaintiff's agreements in view of Section 15 of the Copyright Act, 1957;
- (d) registration of the work under the Copyright Act is compulsory or registration is not a condition precedent for maintaining the suit for infringement of copyright.

To analyse the contention of the parties, the Court dealt with the provisions of the Copyright Act, 1957, Designs Act, 1911 and Designs Act, 2000. Section 15 of the Copyright Act, 1957 which is relevant in the present case deals with the special provision regarding copyright in designs registered or capable of being registered under the Designs Act, 1911. As per this section, copyright shall not subsist in any design which is registered under the Designs Act, 1911 or which is capable of being registered under the Designs Act, 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.

It is the admitted case of the parties that plaintiff is not holding any registration under the Designs Act, it is clear that Section 15(1) as referred above is not applicable in the facts and circumstances of the present case. Section 15(2) of the Copyright Act is applicable to copyright in any design capable of being registered under Designs Act, 1911 but has not been registered and copyright in the said design ceases to exist as soon as any article to which the design has been applied has been reproduced more than 50 times by an industrial process.

In the present case, as per the averments made by the plaintiff, not more than 20 pieces of any single costumes have not been produced by the plaintiff due to the fact that the said costume are exclusive and element of this mode of business is very limited and only handful copies are made by the plaintiff. In view of this fact which could not be controverted by the defendant, it appears that the subject matter of the work in dispute does not cease to subsist by Section 15(2) of the Copyright Act, 1957.

The next question the Court addressed was whether the work in question is covered within the meaning of Section 2(c) of the Copyright Act or whether it is a design, or capable of being a design, within the meaning of Designs Act, 2000. To deal with this issue, the Court referred to certain definitions in Designs Act and Copyright Act.

Section 2(1)(5) of Designs Act, 1911 define designs as: Design means only features of shape, configuration, pattern or ornament applied to any article 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 trademark 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.

Section 2(d) of the Designs Act, 2000 reads: 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 an 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 trademark 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.

The Court noted that the definition of designs under the Designs Act, 2000 is different from the definition in the 1911 Act. Section 2(d) of the Designs Act, 2000 does not include any artistic work as defined in clause (c) of Section 2 of the Copyright Act. It is clear from the meaning of the design under the Designs Act, 2000 that the artistic work as defined in Section 2(c) of the Copyright Act, 1957 is excluded. Hence, the Court concluded that if any party is able to bring his case within the framework of Section 2(c) of the copyright Act, 1957 while claiming a copyright, then the suit for infringement of copyright is maintainable.

The Court reproduced Section 2(c) of the Copyright Act:

Artistic work means:

- (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
- (ii) a work of architecture; and
- (iii) any other work of artistic craftsmanship.

The Court then compared the mode of creation and execution of the artwork on a finished garment. The steps involved are:

- (a) First the pattern is created on the computer by Mr Tarun Tahiliani and/or other designers employed by the plaintiff. This stage continues till the finalization of the pattern to make it print-worthy.
- (b) Secondly, the print is sent for swatching i.e. preliminary printing in actual size.
- (c) The third stage commences with the evaluation of swatches. If the results are not satisfactory, changes are made which are tested on further swatches. The team then freezes the final, satisfactory outcome, and a master file is generated.
- (d) Fourthly, after further processing, samples are made for the purpose of showing to buyers. It is on the basis of these samples that orders are taken.

- (e) The fifth stage involves making of production files, which are sent on DVD to the production department which in turn sends them to a specialized printer.
- (f) In the sixth stage, the specialized printer reproduces the final print on the fabric.

The Court concluded that the plaintiffs work is an original artistic work entitled for protection under Section 2(c) of Copyright Act. Since the work is not an artistic work which is not covered under Section 2(d) of the Designs Act, 2000, it is not capable of being registered under the Designs Act and Provisions of Section 15 (2) of Copyright Act is not applicable.

On the plea that the artistic work are not registered under the copyright act and hence are not entitled for protection, the Court observed that it is settled law that registration of the work is not compulsory and is not a condition precedent for maintaining a suit for damages for infringement of copyright. Registration of such right under Section 44 of the Act is not a condition precedent for availing the remedy, such as suing for an injunction restraining infringement of the right, damages and for accounting. Provision for registration under Section 44 is not mandatory but only intended to provide for *prima facie* proof of the particulars regarding right as stated in Section 48. It was therefore held that the plea of plaintiff that to claim protection under Copyright Act, registration is compulsory is, therefore, untenable.

This case is important for Indian fashion industry as it clearly lays out the interfaces between Design Act 2000 and Copyright Act 1957. The provision of Section 15(2) used to be an area where copyright protection used to be forfeited by many designs. But this decision shows that in the cases of real fashion designers who make exclusive lines, where reproduction is limited, copyright law acts as a powerful tool of protection.

Conclusion

The Designs Act and Copyright Act provide an umbrella for the protection of artistic conceptions. One can design and create, and build the most wonderful designs in the world. But it takes intellectual property rights to enlarge its monopoly and prevent it from plagiarism.

A designer an Artist knows he has achieved perfection not when there is nothing left to add, but when there is nothing left to take away and Industrial Design Act ensures that your inceptions of your soul and intellect are not plagiarized. When an artisan seeks exclusive protection for his work then he should register it under the Design Act, 2000. But the criteria to register a work under the Design Act, 2000 is that your work must be new without any prior publication and the novelty of the artist must be reflect from the design to get its registration. In case an employee is attached to the creation of a design during his course of employment, the employer can only apply for the registration of such design. When the reproduction of an original artistic work is conducted by employing an industrial process, which resulted in a finished article and possessed appeal to the eye then the industrial process constitutes a "design", within the purview of the Designs Act. Original artistic work falls under original artistic work but its derivatives falls under the purview of Designs.

The fashion industry is at a pivotal point in its history. It has become a trillion dollar industry that employs a significant portion of citizens and is vital to the world economy. Designers play a major role in the fashion industry by constantly innovating new designs to help the business of fashion maintain its share of the world economy. India should abandon its

precedent of not protecting fashion designs and afford intellectual property protection to these critical players so that it can keep, and even expand, its current market share.

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“Until justice rolls down like water and righteousness like a mighty stream.”

- Martin Luther King Jr.