

Kluwer Copyright Blog

Copyright originality in fashion: industry-induced bias against small designers in a sector dominated by seasonal trends

Ioanna Lapatoura (The University of Nottingham) · Monday, February 21st, 2022

Fashion is an industry largely led by seasonal trends. Status-conferring new designs are being launched bi-annually, during the Autumn/Winter and Spring/Summer fashion shows, to meet the needs of our capitalistic society. Even though fashion designs are often inspired by the prior art, seasonal trends precondition innovation – new design themes that make the highly desirable ‘hot’ looks of the season. Trends are set by only few designers at premium prices, while others, both high-end designers and adopters of a fast-fashion business philosophy, such as [Zara](#) and [Stradivarius](#) – both owned by Inditex, the [fourth largest fashion company globally](#) – recreate variations of the looks for less, so as to sell them fast and in large quantities. This practice leads to trends’ diffusion into wider society.



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By becoming readily available, while decreasing in price over time, the once exclusive designs, that only few ‘status-seeking’ consumers could afford, become widely purchased. Their loss of exclusivity signifies a decrease in their value and desirability. As such, trends gradually go to their doom, typically after the passing of a season. ‘Status-seeking’ consumers constantly want to differentiate themselves from the masses and seek to adopt new looks, leaving the door open for new design themes to dominate the industry the following season. This fashion cycle is arguably the economic driving force for designers to innovate and be among the trend-setters, to enjoy the perks of staying at the forefront of the industry and manage to sell their designs at premium prices, before it is too late.

But is innovation in seasonal trends’ designs sufficient to the level of meeting the EU originality standard for attaining copyright protection? That is, creations that reflect the ‘[author’s own intellectual creation](#)’, expressed in a ‘[precise and objective manner](#)’, while reflecting the designer’s personality and demonstrating that he/ she has made ‘[free and creative choices](#)’. Copyright subsists in such works for the duration of the creator’s lifetime and 70 additional years. When it comes to

setting trends, there are certain factors that can influence and shape the designing process. Designers have an extremely short timeframe at their disposal to produce new styles for the upcoming season, whilst being aware that their creations will inevitably become outdated soon after their launch – the moment the following season’s trends are introduced. Due to trends’ time-sensitive nature, they follow a shortcut path in their designing. For instance, it typically takes up to **one year** to prepare a new collection, although the most successful fashion brands have significantly reduced the length of this process to **less than six to eight weeks**, from research and product design to delivery of products to the market. Also, their designs conform with the ‘hot looks’ of the season, frequently sharing similarities with hundreds of others, new and old. After all, their goal is to sell large quantities fast, being aware of the limited duration of a trend’s lifespan. As such, they are not particularly concerned with generating designs worthy of copyright, but rather opt for securing the much shorter 3-year unregistered design protection. This is because producing a design that meets the Community Unregistered Design Right (CUDR) threshold of ‘**novelty**’ and ‘**individual character**’ is more easily attainable, than developing a work that reflects the ‘**author’s own intellectual creation**’. In fact, sharing similarities with the prior art does not automatically exclude them from CUDR protection, as they might still produce a different overall impression to the informed user, notwithstanding the fact that they may have used the same seasonal trend as inspiration. At times, they can even possess creativity and reflect the designers’ personality, but the likelihood of meeting the copyright originality threshold is low.

So, does that mean that, as a general rule, garments, footwear and accessories cannot attract copyright protection? Although the possibility of coming across seasonal trends’ designs as copyright eligible works is small, the same cannot be said for timeless fashion designs. Iconic pieces, like a **Rolex**, **Ray-ban’s aviators**, **Burberry’s beige trench coat and checked scarf**, **Chanel’s 2.55 quilted bag**, or **Manolo Blahnik’s bejewelled pumps**, never go out of fashion. This type of designs may occupy a smaller portion of the industry’s produce compared to seasonal designs, but a noticeable shift in consumer behaviour has been noted during the Covid-19 pandemic, **with retailers and fashion brands witnessing an increase in sales of timeless fashion**. As with trend-inspired designs, there are certain factors that influence the kind of investment in the designing of this type of works. Instead of creating a product with a short life cycle, following a speedy development process, here the end-goal is to create a versatile design that will survive the market long-term. Timeless designs, unbound by the urgent need to conform with trends, allow their creators to take some extra time to meticulously plan the details that would make their creations unique. Even though a signature colour or a shirt’s cut would unlikely suffice as features capable of attracting copyright, a combination of different fabric textures and prints, surface decorations, such as embroidery, zips and buttons, unusual stitching and trims on a garment, could all potentially meet the copyright originality criteria.

Other than timeless designs (see the copyright-protected design of **Hermès’ classic ‘Birkin’ bag**, **Dr Martens’ yellow stitching and grooved sole** or **Versace’s ‘Barocco – 57’ print**), fashion designs which could also potentially bear original features are one-off or haute couture pieces, selling at premium prices. **Vogue France** reveals that a couture dress – made-to-measure on a ‘**toile beige**’, **an off-white cotton fabric**, and sewn around a wooden mannequin – can take several hundred hours of labour to come to life, which translates to around **four months** of designing it to its last detail, hand-stitching every seam, button, embroidery or bead. It is this meticulous planning and great attention to detail that goes into these works, that increase their chances of bearing features that meet the EU copyright originality standard, even if it means that the creation of a single couture piece requires almost the same amount of time that a whole seasonal ready-to-wear collection would require.

The creation of classic or hand-crafted fashion pieces, capable of attracting copyright protection, is not reserved exclusively for large fashion brands. But does the size or success of a designer's business play a role in the decision to create copyright works in fashion? It turns out that, in this context, there is an industry-induced bias against small emerging designers, as opposed to fashion designers with an established business and a large following. The reasons are few and simple: Based on the above analysis, copyright-worthy fashion designs are often presented with an expensive price tag before consumers. Equally, fashion design creation and development not only is a time-consuming process, but also comes with notable costs, which often go beyond small emerging designers' financial capabilities. Creators need to test out fabrics, order physical samples of the designs from their manufacturers, which necessarily entails wasting some of the materials, as well as pay for labour, usually a whole designing team. *Vogue* reveals that a price tag seen in store represents the value of a fashion item's production costs, packaging, shipping and an added x 2.2 profit margin. Accordingly, a pair of shoes that costs 100 € to the fashion brand, will sell for 220€. Especially when it comes to custom-made couture items, superior quality fabrics, beads and jewels are being used and hundreds of hours of labour are required. With a starting price of \$25,000 for a couture dress, that can even reach millions, it is expected that the production costs of a single piece would be at least \$10,000, let alone a whole collection.

Spending a small fortune and investing a substantial amount of time to develop a design might not be a problem to larger fashion brands. However, individual designers with a limited budget, who are trying to make a living from their work, cannot afford to wait several months to launch a single design, the success of which is a gamble. Particularly when one is new to the business and without an established reputation, this very investment could even determine their survival to the industry, as months may pass until a small designer manages to sell his/ her inevitably expensive garments. As such, given that products aligned with a trend are highly desirable by a large segment of consumers, this often means that small designers are compelled to make smaller investments and create trends' derivative designs, to ensure that they will sell within a short timeframe. This is a less risky way to sustain their business, allowing them to recoup their investment quickly.

As a result, and in effect, the process of producing garments that would likely attract copyright protection, is indirectly reserved for large industry players, due to the substantial investments in time, labour and resources required. This leaves independent designers and small fashion brands on the outside, not necessarily because they lack in talent, but because their circumstances and limited resources make their decision to create copyright-eligible designs a great risk.

One could argue that this industry-induced inequality among large and small fashion designers is balanced out with the fact that the EU copyright originality threshold is low. In reality, however, a substantial portion of fashion designs may find it difficult to satisfy the EU originality standard. Nonetheless, *Cofemel* has arguably opened the door for more designs to become eligible for protection, by scrapping the requirement under some EU national laws (such as Portugal and Italy) that industrial designs must meet a higher level of originality (see [analysis here](#)). Even though the desirability of this outcome might be questionable overall, one possible effect from that lowering of the protection threshold, is the possibility small designers may now be able to enjoy copyright protection to a greater degree than before.

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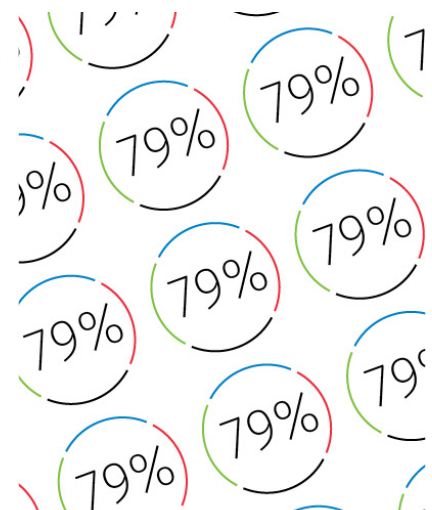
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