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Publication Date

2016-10-10

Berkeley Center for Law and Technology

*Law and Technology Scholarship (Selected by the
Berkeley Center for Law & Technology)*
(University of California, Berkeley)

Year 2007

Paper 39

A Comparative Approach to the Protection of Fashion Innovations

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A Comparative Approach to the Protection of Fashion Innovations

Abstract

This paper determines the relevance of industrial property rights to the development of innovations in the fashion industry. It examines how the level of innovation can remain high despite a free exchange of intellectual property – fashion designs – within the industry:

The importance of innovation for a fashion business in the industry is determined by the choice of its competitive strategy. That is, either to be an innovator who creates fashion innovations or to be an imitator who adopts them once they have proven their ability to prevail in the market. The success of innovators depends largely on their ability to react to fashion trends, reinforced by the social role of fashion products and to the extent of their potential to confer status on the owner. Thus the duration of a temporary monopoly gained by an innovation is limited not only by the market entrance of imitators – a period of time that can be prolonged by making use of industrial property rights protection – but also by the constant changes in fashion, a process barely affected by the utilization of intellectual property rights protection. A monopoly maintained by using intellectual property rights might very well not extend the product life cycle beyond the limits posed by the shifting changes of fashion; moreover, an extended life cycle maintained in these circumstances could seriously limit the innovators agility in satisfying consumer demand in line with fashion trends and provoke an inappropriate allocation of resources to developing unfashionable innovations, resulting in a much greater risk of product failure.

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All Translations of Statutes and Judgements from German are made by the Author

1. Introduction

Even though the design is the most important element of a fashion product, little is done to legally protect this intellectual asset. Under the jurisdiction of the European Union the legal framework does indeed provide intellectual property protection rights for fashion designs, but it is astonishing how infrequently this option is used.

Intellectual property is the key element for success in the industry, and fashion designs upgrade normal apparel from mere utilitarian to luxury product, which fulfill a significant social and psychological role in society; fashion is a social institution that confers status on the wearer. (cf. König, 1971:23).

For customers the design of a fashion product is at least equally important as the brand name of a fashion product or its utilitarian aspects. Surprisingly innovators use indirect protection for their innovations by differentiating themselves through branding, rather than protecting the intellectual property embodied in these fashion designs.

Recent scholars have described and analyzed this phenomenon. (cf. Cox and Jenkins, 2005 cf. also: Hilton and Choi and Chenm). The question they addressed is, whether the fashion industry is an example for a creative industry in which innovation is high despite the lack of intellectual property rights protection. In the light of the recent debate on the extension of intellectual property rights protection for such industries, the fashion industry could provide serious counter arguments against such initiatives.

2. Approach

The paper contributes to this debate by posing the question, is the creation of fashion design innovation dependent on intellectual property rights protection, and its corollary, do such innovations actually need such protection? It follows an interdisciplinary approach and combines legal, economical and business theories in order to describe and analyze the relevance of intellectual property protection for the development of fashion designs innovation. Further, this paper looks at whether the answer to this question is of any relevance for other industries.

An analysis of the innovation process in the fashion industry has to deal with the problem that innovation itself can never be fully determined or predicted by a model. The monopoly granted to an innovator by intellectual property rights protection is an external factor to this innovative process and thus subject to the same problem. How can the question “Do Fashion Design Innovations need Intellectual Property Rights?” still be comprehensively addressed?

A concept which analyzes the development of innovation in order to determine the influence of intellectual property rights protection must not only address the innovative behaviour itself, but also has to take into consideration the underlying competition which forces businesses to innovate as well as the role which intellectual property rights may play within this competition. This issue is also of interest in determining the relation of other creative industries towards intellectual property rights protection, an issue that is of growing importance to most consumer industries. Creative design is increasingly playing an important role in the products of industries not traditionally considered to be creative in the first place. These industries, such as consumer electronics or mobile phones, are becoming subject to competition for design innovations and fashion trends. The importance of design for these consumer goods is continuing to grow as technological differentiation is becoming more expensive due to an overall slowdown in technological advancements in these industries.

Fashion trends have the power to create a constant consumer demand for new products. Fashionable products are consumed for two primary reasons: their ability to satisfy consumer desire for something new and their ability to confer status on the consumer. The first characteristic is referred to below as the ‘innovation factor’ or the ‘level of innovation’ of a product, the second as the ‘fashion content’. Such fashionable products often lack a significant new utilitarian function. They are simply consumed to satisfy the desire of consumers for something novel and for something that will improve their social standing.

This overall social trend indicates that the role of fashion design is important not only in the apparel industry, but is becoming the dominating force behind demand in all other consumer industries. However, no where else can the importance of design and the role of fashion be observed as clearly as in the apparel fashion industry. This example is a good model for determining the overall relevance of intellectual property rights protection for products that are subject to dynamic changes in fashion.

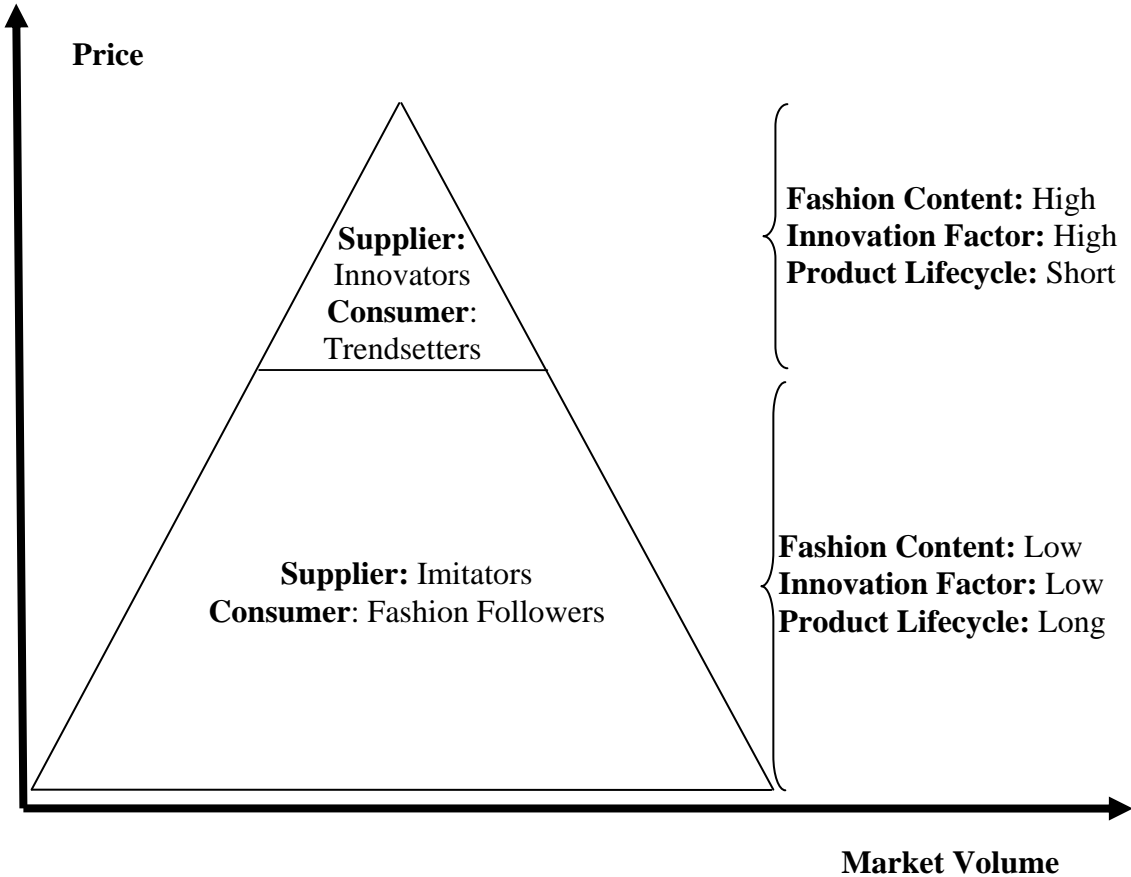
3. The Fashion Industry

The fashion industry is characterized by its frequent innovations that form the entire basis of competition as well as the fundamentals of its structure. These characteristics distinguish the internal organization and strategic management of businesses in this industry. They aim at competitive advantage through temporary monopolies, on the basis of new fashion design innovations that will satisfy consumer demand. Apparel that only fulfils a protective function and is mainly perceived as a mere utilitarian item is valued less than apparel seen as a luxury item, which in addition to its utilitarian also has a psychosocial function and serves as an object of prestige. As a result, competition is determined far more by fashion content and innovative product design than by the price or any utilitarian function of apparel. Competition in this industry therefore depends on the rate of creating new innovations in line with social trends. The speed and flexibility of response to fashion trends are decisive for attaining competitive advantage and setting up a temporary monopoly.

Consequently, the organization and orientation of a business is aimed at gaining such a competitive advantage, which is more dependent on the ability to create innovations in line with new consumer needs than the ability to optimise operational efficiency of the business. The relative importance of innovations in contrast to operational efficiency in the fashion industry is determined by the choice of competitive strategy; in other words, whether to choose the role of innovator or imitator.

3.1 The Sectors of the Fashion Industry

The fashion industry can be divided up into different consumer market sectors, with each sector consuming its own products. These differ most of all in the proportion of the fashion content to the price of the product, a ratio that determines the entire nature and dynamic of competitive innovation, which in turn is the basis of the market. Fashion products and their consumers are shown in the pyramid below, with the poles of the “trendsetters” and the “fashion followers”. The other market sectors lie between these two extremes, characterized by gradual nuances with no clear dividing line:



Ill. 1: The Fashion Pyramid (cf. Doeringer, Peter and Crean Sarah, 2004: 4)

Products are distinguished by their comparative fashion content. The more one moves down the pyramid the less important the content of fashion becomes as a competitive factor and the more crucial the price. For the provider of products positioned lower down the pyramid innovations, and high fashion content are of far less importance in gaining a competitive advantage than price. They are the imitators in the industry, as opposed to the innovators, shown at the top of the pyramid.

In the context of the fashion industry differentiation between “trendsetters” and “fashion followers” takes place with reference to the expenditure on fashion innovations. “Trendsetters” spend far more than average for their consumption of innovative fashion in contrast to the majority of the population, “fashion followers”, who spend much less.

In addition to this material differentiation, the contrast in attitudes to life has to be taken into consideration. “Fashion followers” are the consumers less interested in fashion, they are the “latecomers” in fashion. “Trendsetters” possess the ability to communicate fashion trends visually and verbally to others, and have a markedly greater interest in and knowledge of fashion compared with other sections of society. Their expensive taste and sensitivity to social developments, as well as their social status implied by their dress, lead to the recognition of this market sector as opinion makers with regard to the clothes worn by “fashion followers”. (cf. Brannon, 2000:44).

Likewise, an average or below average in fashion is demonstrated by “fashion followers”, for whom clothing fulfills primarily a utilitarian function as opposed to a means of social communication. Consequently for this market sector the price plays a much more important role than the fashion content of the product. Their consumer behavior displays far less interest in experimentation, rejecting a high innovation component in fashion products. “Fashion followers” align themselves with the tried and true in the market place and follow the “trendsetters”, aspiring to their higher social standing by purchasing the same products. (cf. Brannon, 2000: 44).

3.2 Fashion Content and the Innovation Factor

The consumption of a fashion innovation is ensured by the ability of a product to arouse and satisfy consumer demand for this particular fashion item. This demand springs from two sources. Firstly, the awakening of the consumer’s desire for something novel in a fashion product – in other words, a high innovation factor – and secondly, via fashion’s social function, the creation of the desire for a higher fashion content in a product.

The consumer’s desire for a new product goes hand in hand with the constant experimentation in the fashion sector, which is particularly applicable to “trendsetters” due to the opportunities offered by greater wealth. Consumers purchase innovative goods not only for purely utility considerations, but primarily because of the search for new products they are willing to try out and experiment with. This applies in particular to fashion goods. Bored by the old products, consumers are constantly looking for fashion innovations which have a high level of innovation to them, in contrast to the products they already own. In the fashion industry this tendency is greatly increased by its intensely seasonal nature. Consumers are highly motivated to buy new products with each successive season, so that the devaluation of the old, familiar products takes place particularly rapidly. The consumer desires a continuous stream of new, seasonally appropriate and innovative fashion goods, made all the more desirable by direct contrast with the products that preceded them. In the following this will be referred to as a high innovation factor. The longer a consumer possesses a fashion innovation, the greater the motivation to purchase a new and innovative item with a higher innovation factor than that of the foregoing product.

The other reason for the need of the consumer to purchase new fashion innovations is to be found in the intrinsic social function. Fashion can be understood as a community system of regulation, which functions like an independent social institution, indicating a consumer’s standing in society. (cf. König, 1971: 23). A fashion innovation with a high fashion content has a particularly potent effect because it bestows a positive social standing on its consumer.

As a rule, a product with a high fashion content also contains a correspondingly high innovative factor. Such a product is distinguished from already existing products by its innovative factor, so that it more effectively satisfies the newly minted fashionable need for

social belonging. For businesses aiming for a high fashion content in their products, thereby imparting a particularly high social standing to their customers, the development of frequent innovations is of crucial importance; this standing can only be achieved by a coupling of a product's fashion content with the fashion currently in circulation. Fashion's demands on a product, in order to effectively bestow the highest possible social standing on the consumer, undergoes a constant dynamic shifts. A high fashion content of a product can only be arrived at if its creation is synchronized with this continual change.

The characteristics expected by the industry from a fashion innovation that can suggest a high social standing and its associated high fashion content, are determined by the section of society who consume the innovation. A new fashion tends to have a high fashion content when it is exclusively consumed by "trendsetters". Other members of the society copy the lifestyle of this group by buying the same product, thus endeavoring to become part of – as they see it – this highly regarded group. As the product reaches a wide circulation, however, its consumption amongst "trendsetters" will decrease, at the same time increasing among "fashion followers". The upshot is that the fashion content will tend to be low as membership of the "fashion followers" group is not attractive for consumers.

3.3 Fashion Risk

Since fashion is subject to constant, unforeseeable change, there is a risk that the innovator might fall wide of the mark in striving for a high fashion content – the fashion risk. It implies the danger that not every innovation will be accepted by "trendsetters" and the fashion content is not as high as the innovator intended.

Products with a high fashion content are predominately consumed by "trendsetters" eager to experiment. With such innovations the fashion risk of non-acceptance, is relatively high, as the new creation differs from its long-proven predecessor. Given this high risk factor along with the high prices, the innovators can produce only small quantities of the product. The longer an innovation is on the market and the more successful it proves to be, the more its fashion content decreases. Market success and the corresponding decline in fashion content leads to a continuous falling of the risk of non-acceptance. This leads to imitators manufacturing the product in large quantities, necessary for undercutting the monopoly prices of the innovators, and because of the reduced risk they can then sell it for a better price.

4. Innovations in the Fashion Industry

4.1 Fashion Design Innovation

To be able to reach a conclusion about innovations in the fashion industry it must first be established whether fashion designs can really be seen as innovations at all. The majority of new items that, due to seasonal changes alone, are launched onto the fashion market, and the constant revision of already familiar products, contradicts to the general nature of innovations which are characterized by a large amount of new elements in comparison to previous products. A minor alteration to an already familiar design does not in itself fulfil the criteria of an innovation.

As a rule a new fashion is an innovation, when the design is first launched in a particular season, regardless of whether it is strongly similar to design that appeared prior to this season. This assessment is based on the fact that fashion designs seldom have a life-span that lasts beyond a season. The existence of previous, similar designs in seasons gone by must be assessed as already existent knowledge that is available anytime in sufficient quantities, but which first must be converted into marketable products. A fashion product fulfils the criteria of an innovation when the innovator introduces it onto the market for the first time to gain a temporary monopoly.

Thus, from the point of view of the supplier, new fashions can in most cases be counted as true innovations. Each fashion design has to be completely newly developed and marketed. While this development is carried out using an established business routine, it must however still be repeatedly done, using the business's resources. The same goes for subsequent marketing and distribution of the design. Thus each fashion design proves to have its own product life-cycle and from the perspective of the supplier can be seen as a discrete and self-contained innovation.

From the consumer's point of view fashion designs can also be seen as innovations. They satisfy both "trendsetters" willingness to experiment and the "fashion followers" desire to copy the trendsetter life-style by consuming the designs once they have become more widely distributed and the price has correspondingly decreased. Thus, from the consumer's perspective fashion designs are also a case of true innovation. From the subjective view of consumers it is always a question of the perceived characteristics of the new, by far the most overwhelmingly important grounds for purchase. (cf. Brosche, 1993: 35). These characteristics of fashion innovations are sufficient in order to regard fashion innovations as true innovations in the context of the innovation theory.

4.2 Innovation Competition in the Fashion Industry

Innovation competition in the fashion industry is a hybrid process that is determined by both, the highly fragmented supplier side and the widely diversified, constantly changing demand side. (cf. Fine and Leopold, 1993: 93). In order to elucidate the emergence of innovation competition, the behavior of the two determining forces, that of supply and demand, must be examined. These are: the supply sector, made up of the innovators, in other words, the businesses that follow the strategy of differentiation or targeting according to

Porter's generic strategies, and the imitators, that is, the businesses that employ the strategy of cost-efficiency. (vgl. Porter, 1998). Set against that we have the two divergent poles of consumers, the "trendsetters" and "fashion followers".

Fashion innovations are launched onto the market by an innovator. As the fashion risk that a fashion trend won't catch on is large, in other words an attendant non-acceptance of the innovation, the design is sold to "trendsetters" in small quantities for large prices in order to guard against any potential resultant losses. If the innovation is taken up by the "trendsetters" and becomes established on the market they will be copied by the other supply sector, the imitators. Since as the risk of non-acceptance becomes diminished the imitators take up the innovation. They produce them in large quantities at lower prices so that the "fashion followers" can also afford the innovation.

A fashion becomes more desirable the more it is consumed by "trendsetters". By a certain degree of distribution it has proved so popular that it is necessary for almost all the members of this sector to consume it so as to maintain their social status as "trendsetters". If the popularity increases beyond this point then the masses will start to consume it too, which causes the innovation to lose exclusivity and "trendsetter" consumption correspondingly declines. With greater distribution amongst "fashion followers" and its loss over time of the fashion content, the new fashion has lost its function as a status symbol and is no longer attractive to "trendsetters". (cf. Fine and Leopold, 1993: 121, cf. also: Pesendorfer, 1995). They now turn their backs on this innovation in favor of a new fashion innovation whose exclusivity for "trendsetters" is in turn assured by the commensurately high price, and moreover satisfies the desire for the new with its high level of innovation.

For "fashion followers", on the other hand, an innovation becomes more attractive the greater the number of "trendsetters" consuming it. Only when it reaches a certain level of distribution among "trendsetters" does the product become attractive to "fashion followers", since only then the item is considered sufficiently well represented amongst this group to be regarded as a symbol of the life-style of the wealthy. As a result of this devaluation the whole begins over and the innovation is replaced by another gaining wide distribution among "trendsetters" and will likewise also lose its function as a status symbol.

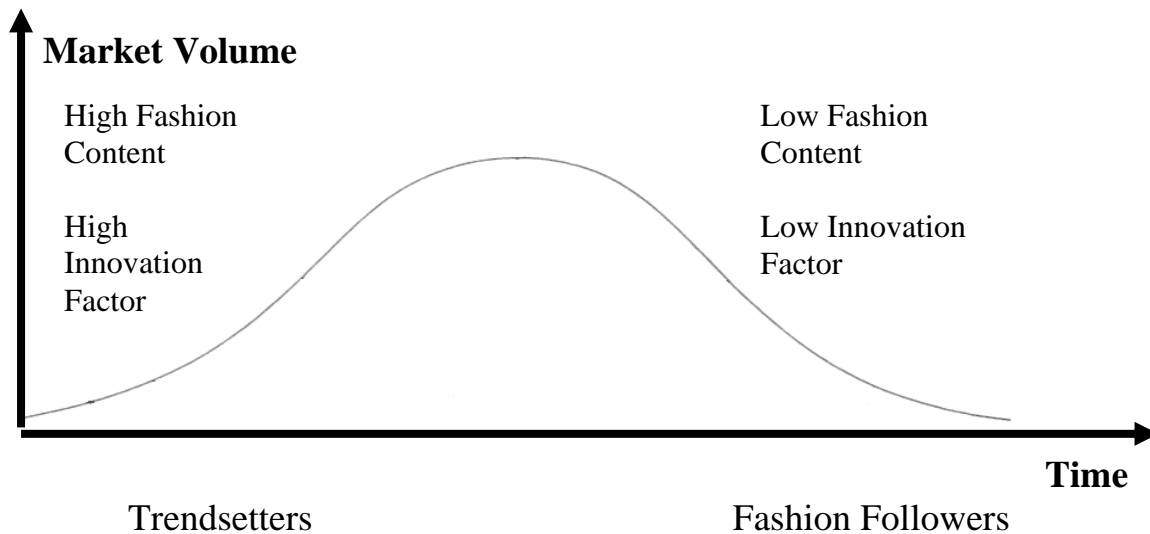
The suppliers, both innovators and imitators, react to this pattern by constantly exchanging information with consumers about which fashion is being consumed by which consumer group via the market's communication medium, the prices. The innovators are those businesses that directly target the "trendsetters" and seek to differentiate their products from those made by manufacturers who are targeting the "fashion followers". This innovative behavior of businesses with targeting and differentiation strategies, and the subsequent imitation by businesses using a cost-efficiency strategy, leads to the innovative competition described above that is the basis for the creation of innovation in the fashion industry.

4.3 Life-cycle of a Fashion Innovation

Every fashion innovation follows the diffusion process described above that evolves through innovation competition and affects its life-cycle. If an innovation is launched onto the market it will – as mentioned above – first of all be consumed by "trendsetters". The more the diffusion process proceeds the more consumers have the opportunity to approve of the innovation by buying it and to thereby signal to the imitators that it is also being consumed by the "fashion followers". As a result the number and also the type of consumers during the

course of this diffusion process, as does the fashion content with its function of status symbol changes.

The longer an innovation remains on the market and the wider the distribution, the more the level of innovation and the fashion content decrease. The decline in the level of innovation is determined by the length of time it remains on the market and is increasingly consumed by “fashion followers”, with a corresponding decline in fashion content. Thus the diffusion process causes both the level of innovation and the fashion content to gradually diminish and means that by the end of its life-cycle an innovation has only low levels of these factors.



Ill. 2: The Diffusion of a Fashion Innovation (cf. Brannon, 2000: 39, cf. also: Rogers, 1995: 262)

Depending on the fashion content and level of innovation, and to what extent it is accepted by the market, the duration of the diffusion process determines its diversification between the “trendsetters” and the “fashion followers” and the innovation’s expected life-cycle. A high innovation factor and a high fashion content will mean that the innovation is consumed by the “trendsetters” above all. A high innovation factor is by contrast more of a hindrance to consumption by “fashion followers” who are far less happy to experiment and accept the accompanying high price. Many innovations with a high fashion content and high innovation factor will only have a short life-cycle, discarded by “trendsetters” following initial experimentation before they have a chance to be taken up by “fashion followers”. (cf. Brannon, 2000: 52). If an innovation, however, does get taken up by “trendsetters”, it will be made available to “fashion followers” by virtue of its success and hence diminished fashion risk. Such innovations have a lower fashion content because of the long-term place in the market and a lower level of innovation. These characteristics are in accordance with consumption patterns of “fashion followers” and their greater reluctance to experiment.

5. Comparative Intellectual Property Law for Fashion Designs

Legal Protection of innovations in the fashion industry differs in the different countries of the world. (cf. Belhumeur, 2000). While there is no legal protection in the United States of America in spite of new activities concerning that issue (cf. Library of Congress, 2006) the European Union guarantee's such a legal protection within it's member states. (cf. Magdo, 2002, cf. also: Mencken, 1997).

The fragmentation and decentralized structure of the fashion industry makes it difficult to pursue an infringement of the property right. To assert compensation claims in the case of infringement of the copyright the innovator has to initiate their own investigation. Basis of such an investigation is the ascertainment or fact finding of the infringement and the infringer. Depending on the structure of the market an innovator can only detect and persecute a small part of this infringement in a cost-effective manner. (cf. Schäfer and Ort, 2005: 623).

Copying and imitating of fashion design in the fashion industry is as frequently found in the European Union as in the United States. (Hilton and Choi and Chen, 2004: 345-354). This is astonishing and shows that the fashion industry in Europe – in spite of the protection of innovations granted by law - makes insignificant use of this law: a relatively free usage of intellectual property is taking place. (cf. Cox and Jenkins, 2005: 16, cf. also: Hilton and Choi and Chem, 2005). This becomes also obvious in the small amount of publications that are found in the legal journals concerning court decisions in the field of the fashion industrie that refer to property rights. (cf. Zentek, 2003, cf. also: Helferich, 1993). The small number of publications of court decisions or judgments is disproportionate to the economic importance of the fashion industry and its dependence on intellectual property. Therefore, the real cause of the fact that intellectual property rights in the fashion industry are of such little importance is to be found in the structure of the competition for innovation.

5.1 The Legal Protection of Fashion in Germany

The Law on Copyright and Related Trade Mark Rights [Gesetz über Urheberrecht und verwandte Schutzrechte]

Copyright protection of fashion designs for the key sketches, drawings, outlines, patterns, and the manufactured models based on these, is possible if the fashion design is a work of art according to copyright law. Copyright does not explicitly name novelties in fashion as works to protect them legally, but they can be subsumed under the category of work of art and applied art referred to in §2 I 4¹. A fashion design thus can be protected by copyright, in principle, if it is to be regarded as a work of art. The Federal High Court [Bundesgerichtshof, BGH] defined the notion of “work of art” as an “individual's own personal creation (...) determined preferably by the stimulation of aesthetic feeling by being looked at and whose aesthetic content has reached a level high, enough to (...) speak of an artistry.”² Copyright protection is thus only possible if the artistic value of the creation of fashion and the skills necessary for its realization are far above those of a conventional fashion design that serves the consumer primarily in its function of protection. Furthermore, the fashion design has to fulfil the condition of being a personal intellectual creation named in § 2 II. This is the case

¹ UrhG §2 I 4 (protected works): works of art including works of the art of building and of applied art and of outlines of such works; (...)

² UrhG § 2 II (protected works): Works according to this law are personal intellectual creations only.

only if the design differs considerably from models hitherto known and shows essential novelties. So a mere further development of fashionable line and form or their combination with something already known is insufficient. (cf. LG Leipzig, 5 O 5288/01 in GRUR, 2002: 424; cf. also: Zentek, 2003: 365). In practice, copyright can be applied predominantly to protection of costumes and similarly unusual designs of the “haute couture”. Yet, in principle, ready-made clothing can be protected, too, if the above mentioned demands for protection are fulfilled. (cf. Damenmantel, BGH, I ZR 65/53 in GRUR, 1955: 445 cf. also: Zentek: 2003: 365). For each single case, the decision as to whether an article of clothing fulfils the high demands of copyright has to be checked by court and, if necessary, with the help of an external expert witness.

Case Example

Stag's robe [Hirschgewand]
Regional Court Leipzig [LG Leipzig]
Judgement October 23rd, 2001, 5 O 5288/01

In this case, a designer produced an Haute Couture dress with high-quality textiles. The court certified copyright for her, because by using very unusual textiles for evening wardrobe and depicting a motif usually belonging to the category of trash, the roaring stag, she had created a dress that had never existed before and which surpassed the conventional mass of everyday fashion products. Though the cut of the dress did not surpass forms usually applied in the fashion business, the degree of striking alienation was enough to assign artistic merit to the design. Therefore, according to the court, individuality is by far guaranteed where it is necessary to regard the work as a personal intellectual creation. Thus, the fashion design is protected by copyright.

Design Act [Geschmacksmustergesetz]

The right of design patent is an unproved trademark right, a so called register right. A design patent to be protected has to be declared with cost at the German Office of Patent and Trademarks [Deutsches Patent- und Markenamt, DPMA]. Upon registration, the DPMA does not check whether the design really fulfils the conditions for protection. So, it may happen that a patent is registrated by the DPMA, but in a case at court the necessary criteria for protection by law are not fulfilled and thus a protection by design act is not granted.

A fashion design can be a pattern according to § 1 I³ of design act. § 1 I names as conditions for protection, that the fashion design is a novelty possessing peculiarity. According to § 2 II, a fashion design is to be regarded as new, if no identical fashion design has been published before the day of registration. To decide, if a fashion design is to be regarded as new, there will be an individual comparison with the most similar pattern from the variety of forms accessible to the informed expert. It is irrelevant if individual elements of the fashion design have already been applied. Relevant for the decision is only if the composition of the individual features is already known in the same combination.⁴

³ GeschMG §1 I (defining terms): According to this law, a pattern [Muster] is the two- or three-dimensional appearance [Erscheinungsform] of a whole product [Erzeugnis] or a part thereof, resulting especially from the features of lines, contours, colours, form, surface structure, or the working material of the product itself or of its decoration; (...)

⁴ Cf. BGH GRUR 75,81,83: To make a decision/judgement [Beurteilung], there will be an individual comparison with the most neighbouring [nächstliegenden] patterns [Muster] of a known variety. This means, a pattern whose

According to § 2 III, a design has peculiarity, if the overall impression it evokes in the informed user differs from the overall impression of another patent published before the day of registration. This is to be proved by a trait analysis, a direct comparison of features. There is no defined degree of minimal deviation; it is sufficient if the dissimilarity of the overall impression is attestable. Thus, even those patterns can have peculiarity that differ only slightly from foreknown designs, because there are already many patterns on the clothing market and the designer's scope of composition therefore necessarily is reduced. (cf. Brosche, 1993).

Law Against Unfair Competition [Gesetz gegen den unlauteren Wettbewerb]

In addition to other trademark rights, fashion designs can be protected by the law against unfair competition, if there is an action of unfair competition according to § 3⁵. For that, the fashion design (or some elements thereof) has to have a competitive idiosyncrasy, a "new product surpassing the average, whose overall impression is determined by individual features of design and deviates from the trend of fashion". (cf. BGHZ, 60, 168 (172)). The fashion design is to be regarded as peculiar, too, if it refers to already known features, but introduces these as novelty to the current fashion season or puts them together in a new combination. For the protection of fashion designs, it is relevant only how far the imitation is copying the competition peculiarity of the design. The peculiarity of the original has to be pronounced to a degree that the average consumer can identify the origin of the design; this does not necessarily mean to be able to name the producer but to know that there is a unique producer. (cf. Jeans Leitsatzentscheidung, BGHR, I ZR 151/02). If by an imitation according to §4 VIII⁶ there is the danger of confusion on the market, thus not only in a direct confrontation, this is to be judged as unfair. The danger of confusion depends first of all on the original's degree of distribution, since a high degree of distribution makes confusion more probable, and secondly, on the similarity of the imitation. If the copied original lacks peculiarity, usually there will be danger of confusion only by a very exact imitation.

Case Example

Jeans landmark decision [Leitsatzentscheidung]

BGHR

Jugement September 15th, 2005, 5 I ZR 151/02

In this case a producer of trousers had copied the design of another producer without providing information to help the consumer to distinguish between the two products. Since the original product had a unique design and sold more than 400.000 copies in Germany since 1996, the producer of the imitated product had intentionally deceived the consumer.

overall impression is determined by a combination of features, is in lack of novelty only if the complete summary of the combination features is notable in a single product of the foreknown variety.

⁵ UWG § 3 (prohibition of unfair competition): Actions of impure competition, that are able to affect/impair competition to the disadvantage of other competitors, consumers or other market participants more than insignificant [unerheblich], are not allowed [unzulässig].

⁶ UWG §4 VIII (examples of impure competition): Impure according to § 3 is especially acting, whoever offers goods or services that are an imitation of goods or services of a rival competitor [Mitbewerber] (...)

Utility Patents [Gebrauchsmusterschutz]

Fashion design can not be protected by patents, if their distinctive feature is only based on the design. This is explicitly stated in § 1 III 2.⁷ Therefore the protection of fashion design is only possible, if the product is based on a textile worth being protected or on a special function of the apparel.

5.2 The Legal Protection of Fashion in Europe

In addition to the possibilities of legal protection guaranteed by the specific laws of the member states of the European Union, as stated above for Germany, the fashion designs are protected as community designs [Gemeinschaftsgeschmackmuster] in the entire European Union by the “Council regulation (EC) No 6/2002. Protected therein are those fashion designs that fulfill the prerequisites for protection, that is, novelty and idiosyncrasy.

This regulation distinguishes between registered and not registered community designs. The registered community design is a so called register right for the protection of fashion design, which is registered at the European Office of Harmonization. After the registration the fashion designs are universally protected, so that no other competitor is allowed to use this design. (cf. Council Regulation (EC) No 6/2002 Community designs, cf. also: Ortner, 2006: 189-194).

In contrast, non-registered community designs also protect fashion designs that are not registered. However, the protection is weaker since the holder of the rights is only protected against direct imitations of his fashion design but not against similar or identical fashion designs that are demonstrably developed by a competitive counterpart as part of their own work and independently of the plaintiff. Because of this, comprehensive and effective protection of fashion design is provided only by the registered community design (cf. Lane-Rowley, 1997:134).

5.3 The Legal Protection of Fashion in the United States of America

Copyright

Since apparel is primarily intended to be worn and used, the US Copyright does not provide legal protection for apparel. The copyright protection for apparel is only provided for those components of the design, which can be physically and conceptually distinguished from the usage of the product. To distinguish physically or mechanically between components of the artistic design and components of usefulness is not easy. But it is even more difficult to distinguish conceptually between the aesthetic components and the components of usefulness and to identify artistic components without referring to the usefulness of the product. Since in fashion industry the design can hardly be distinguished physically and conceptually from the use of the products these criteria of distinction can only be applied to products of fashion with great difficulties.

Design Patent

Design patents belong to a specific type of patents, intended to protect new and aesthetically decorating and innovating designs. Those patents can not protect textile, since

⁷ PatG § 1 III 2: artistic designs and creations are not considered as patents

new textile are not accepted as inventions. Designs in the apparel industry are never totally new but always refer to already existing designs and are therefore not enough innovative to be accepted as inventions.

Critique of the American legal protection of fashion design

There has been a lot of critique of the legal practice applying “usefulness” as the main criterion for the legal protection of fashion products in the States. Perhaps it would be better to decide first whether a designer wanted to produce an artistic product or a product for daily use. This decision could serve as a base for providing better legal protection for those designers of fashion products who have artistic intentions and consider their products to be works of art.

Some critiques suggest that legislation should include articles on fashion, architecture, computer chips etc in the Annex of the Copyright Laws. The Law for the legal protection of architecture expressly includes the protection of artistic components embedded in products of daily use. A similar legal protection could be also specified for fashion design.

The lack of legal protection for fashion design has been assessed as a strategy to protect the American fashion industry. Since the American legislation defends intellectual property rights emphatically all over the world, it is surprising that the American legislator excludes the fashion industry from legal protection. Some critiques argue that the American fashion industry takes advantage of this situation and imitates European designs.

6. Do Fashion Design Innovations need Intellectual Property Rights?

The legislators have created protection laws designed to meet the requirements of the fashion industry – at least this is true for Germany and all member states of the European Union. These, however, are not used to the extent that might be expected in an industry where value creation is to a great extent based on the usage of its intellectual property. The creation of an innovation takes place through the competition for innovation, even in the absence of intellectual property rights. The monopoly profit, which is earned by the innovator from the establishment of an innovation in the market through the new combinations of already known styles, until the first imitations enter the market, seems sufficient to cover the costs involved in the development of the innovation and the insurance of the fashion risk and beyond that, to generate profit. Despite this, it is astonishing that innovators do not try to maximize their profits by extending the duration of their monopoly through the use of the protection laws and greatly postponing the entry of the imitators into the market.

This can be explained by looking at the demand side in the competition for innovation in the fashion industry. Innovation finds a market at first only in the ranks of “trendsetters”, in other words, amongst those consumers interested in fashion, since they alone are prepared to pay for the innovation despite high fashion content and high prices.

The consumer patterns of “trendsetters” imply that the natural life-cycle of the product is thus circumscribed by fashion innovation. This group is constantly looking to experiment with highly innovative fashions that set them apart in the social hierarchy. As soon as the fashion content of an innovation decreases to the extent that it no longer functions as a status symbol or satisfies the search for the new, the innovation is discarded, most of them after a relatively short period of time. Thus it is part of the nature of this consumer pattern that a constant look-out for new innovations must be maintained, including experimentation, to see how an innovation awakens interest and an above-average fashion content is ensured, so that the interest in this innovation may be used as a status symbol by wealthier sections of the population. This pattern of consumption implies a high fashion risk for the supplier as many of the fashion innovations tested in this way are deemed unsuitable for the market and discarded. These clearly need no protection laws as they disappear from the market within a short time without being copied by imitators.

Innovations, deemed by “trendsetters” to be useful and find a wider distribution in the market as a result, are copied by the imitators. These products have already proven themselves on the market and the high production volumes necessary to undercut the monopoly price of the innovators are acceptable due to the reduced fashion risk. Because of the corresponding fall in the price and the reduction of the innovation factor, the product will now be consumed by “fashion followers”. It is necessary to explain here why the fashion industry itself don’t make use of protection laws. Since innovators are in the position to halt the decline in price by preventing imitators to enter the market through the usage of intellectual property rights, they would clearly profit in this case from their implementation.

The entire competitive strategy of innovators who introduce fashion innovations into the market, which are initially exclusively consumed by “trendsetters”, is aimed solely at this group of consumers. They have no intention of marketing their product to the “fashion followers”. This is not compatible with their strategy, which implies the acceptance of a high

fashion risk and along with that, large profit margins as well as an image enhancing high fashion content. All these characteristics are not congruent with the large production volume necessary to market to the “fashion followers”. For the innovators the life-cycle of their product finishes at the point where the “trendsetters” loses interest due to the declining innovation factor, and demand new innovations to experiment with.

This contradicts the underlying assumption of protection laws, which claim that this point of decline is reached as soon as imitators enter the market. In fact, it is far more closely tied to the fact that the no longer innovative product has become less attractive for “trendsetters”. Thus while protection laws may delay the entry of the imitators into the market and maintain the long-term fashion content of the product, this in itself in the long run does not prevent the “trendsetters” from turn to a new and more innovative product.

Intellectual property right protection may well be in a position to halt the influence of suppliers on the diffusion process in the market by delaying the entry of imitators. In theory this should lead to the extension of the period of time in which the innovation maintains its attractiveness to “trendsetters” on the grounds of the product’s high price and hence exclusivity, thus its continuing potential to differentiate them from other social groups.

As fashion innovations will naturally again be initiated by innovators, the infrequent use of the protection laws would seem to suggest that the entry into the market by the imitators and the corresponding rapid discarding of an innovation doesn’t necessarily point to a potential profit loss for them. On the contrary, they are able to take advantage of the fact that “trendsetters” are in this case more quickly prepared to purchase new innovations.

While the entry of the imitators might at first appear to be a negative factor, it appears rather to have a positive effect, with the “trendsetters” far more willing to invest in the new innovations and thereby maintain social status.

Thus the question becomes whether the advantage of the more rapid consumption cycle of a new innovation described above outweighs the disadvantage of stagnation in consumption of the earlier innovation.

The fact that the life-span of the earlier innovation is limited leads to the situation that innovators’ industry organization and competitive strategies is focused on a high innovation content and a high frequency of consumption. Thus the shortening of a product’s life-span by the market entry of imitators is in fact far more advantageous than the lengthening implied by the resorting to the protection laws. It can be said that a short life-span is an elemental component of competitive strategy and goes in hand with the internal business focus which gives innovators a clear competitive advantage that allows them to aim at high level of profitability.

In other words, by applying the protection laws, thereby delaying the entry into the market of imitators and extending a product’s life-span, would hamper innovators in taking full advantage of their competitive strategy that is in fact an integral part of their commercial orientation. Protection laws would effectively lead to a production of goods with a long life-span, which conversely would necessitate a high market share and a large production volume – a contradiction of innovators’ competitive strategy and internal business organization. They would forfeit their competitive advantage, achieved through the flexible satisfaction of fashion requirements and a quick turnover of products.

The utilization of protection laws would in effect put innovators in a disadvantageous position vis-à-vis their competitors, the imitators, as this would necessarily lead to innovators having to engage in an – in regard to their competitive strategy - inappropriate production of fashion articles with a long life-span. This kind of production is an integral part of an imitator's competitive strategy that gives them for such products a market advantage over innovators based on cost-efficiency.

The process of a rapid turn-over and discarding of high fashion products seems, in fact, not to work against the economic interests of innovators. Although protection laws are ostensibly intended to support the innovators, they would appear to have a very limited application for the fashion industry, where innovation primarily takes place in response to the diffusion process set in motion by imitators. The less the diffusion process is restricted (i.e. via protection laws) the greater the rate of innovation. The diffusion process can at best be slowed rather than significantly held back, as protection laws have a slowing effect on only one of the causes of the diffusion process, namely on the reduction of the fashion content but not on the other cause, the reduction of the level of innovation. As noted above, the short life-span of an innovation does not necessarily work against the interests of innovators and their fashion conscious, trend-setting customers.

In view of the relatively high cost of litigation where transgressions of protection laws are pursued, which is caused by the highly fragmented and decentralized fashion industry, the facts described above are sufficient to explain the low level of protection of intellectual property and the resultant liberties taken with them by imitators. It could be successfully demonstrated, using the example of the fashion industry, that innovative competition in an industry can be configured in such a way that it does not necessarily require protection laws. In the particular case of the fashion industry, the effect of protection laws is not consistent with the industry's innovators competitive strategy.

7. Outlook: Do Fashion Design Innovations need Intellectual Property Rights? The Application of the Finding in this Paper to other Industries

It has been shown that in the case of the fashion industry, innovative competition of an industry can be configured in a way that the existence and utilization of intellectual property laws is not really necessary for innovations to emerge. For businesses operating in this particular industry they appear to have little importance. Innovators, for the reasons outlined above, do not appear to profit from the effect protection laws have on the life-cycle of their innovations.

The use of protection laws to increase the innovative ability of an industry and overall social welfare is therefore dependent on the specific structure and resultant handling of innovations. The findings arrived at in this paper could be applied to other industries where innovations are subject to fashionable appearances. Where this is the case the emergence of innovations is characterized by a close contact and exchange of information between the supply and demand side of the market. This contact arises through the short life-cycle of the innovations that can be regarded as a test phase which allows innovators to tailor their products to meet the constantly shifting consumer needs. Innovations that arise in this way will be less dependent on the availability and utilization of protection laws since the restrictive effect on the diffusion process lengthens a product's life-span. This is not in the interests of innovators in such industries, as it erodes the close contact between the supply and demand side, a contact essential to an agreement on up-to-date fashion trends and the reduction of the fashion risk.

The exchange of information mentioned above is the wellspring of the new, on which successful innovations are based and which become established in the market. The unforeseeable and frequent shifts in consumer taste and demand that takes place as a result of social changes, requires the very close consultation and exchange of information between the innovators and the market referred to above. Only in this way there can be a successful development and establishment of innovations in accordance with the market requirements that these innovations satisfy.

Protection laws have a restrictive effect on the information exchange between the supply and demand side that takes place via the communication medium of the market – the prices. (cf. Hayek, 1945). They are based on the assumption that the development of innovations are carried out solely by the supplier. This sort of development process, dependent on a limited number of unpredictable variables, can be planned long-term and here it is possible for protection laws to work in tandem with the establishment of innovation in the market. As innovators make use of their own ideas, isolated from the market, in creating an innovation, protection laws do not have a negative effect in this case.

This kind of development is, however, only suitable for those goods that have the primary function of a practical, physical use, aimed at solving a concrete problem – goods which resemble the products of the imitators in the fashion industry. By contrast, goods which above all satisfy fashion needs – those rather similar to the products of innovators in the fashion industry, are far more attractive to the consumer if they are created in accordance with their fashion requirements in mind. The knowledge used in their development is not just that of the innovator alone, but indirectly involves the sum of knowledge of all market participants, including “trendsetters” and due to the subsequent diffusion this of all other market sectors.

(Hayek, 1971: 33). The development of an innovation created exclusively by innovators will therefore always be subject to the disadvantage it only uses a considerably smaller section of the knowledge available in the market.

This fact is a decisive argument against the utilization of protection laws for innovations that have a predominantly fashion content. A fashion component, dependent on changes within society, is subject to so many unpredictable variables that an anticipated, conscious development of intellectual property, created by an innovator sealed off from the market, is not possible. The development of such innovations requires a corresponding wide-ranging creative knowledge that can only be unconsciously made with the inclusion of the market in its creation.

The use of intellectual property rights in connection with such innovations will force innovators to configure the development of their intellectual property so that a large number of variables determined by consumer desires and unconnected with them must be forecasted. This pattern of development is possible with those innovations characterized by predominately practical functions that are based on for the most part foreseeable physical variables. Innovations that by contrast are based on fashion components are determined by social variables that are correspondingly difficult to predict. A stand-alone, isolated development characterized by a strict organization of a predictable outlay of time and effort, will lead to the innovator being exposed to a very high risk of the non-acceptance by the market.

8. Afterword

Today, purchasing decisions are increasingly made on the basis of product qualities determined by fashion, rather than the yardsticks of price or technological advancement used previously, and it is likely that this trend will continue to grow. Fashionable characteristics will become more important and those of utilitarian characteristics will diminish. This is due primarily to the rapid advances of both science and production techniques that make technological innovations available to a wider public in a very short time. Luxury goods that primarily emanate from their role in social differentiation are no longer only generated through material characteristics like technological advancements, but must increasingly satisfy consumer needs through the immaterial value of fashion requirements.

The conclusions drawn by this paper are not only relevant to the fashion industry, but can also be superimposed on many other industries increasingly determined by fashionable appearance. The importance of protection laws for such industries must be called into question. The basic assumption of a stand-alone creation of intellectual property by an innovator working in isolation is not applicable to such industries. Thus protection laws no longer fit into a current social reality that is saturated with creations based on fashionable innovations, losing their importance for industries that are primarily concerned with satisfying the needs of fashion. As has been shown in the case of the fashion industry, they restrict the economic opportunities of innovators more than they foster them.

Because of increased risk incurred by the development of fashionable innovations in an environment isolated from the market and hampered by the utilization of protection laws, the scale of potential inappropriate allocation of resources for the development of innovations, not to be accepted by the market because of the unpredictable fashion risk, is considerable. The example of the fashion industry can be used to show that the development of such innovations takes place far more effectively without recourse to protection laws, and the risk of non-acceptance by the market, cited above, is correspondingly lessened. This paper aims to stimulate discussion as to whether and to what extent protection laws for fashion innovations make sense, are superfluous or whether they can even lead to significant attrition of welfare. The example of the fashion industry has revealed some valuable insights that may be readily applied to other industries with similar competitive innovation structures.

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