



RESEARCH

Civil responsibility in beachwear: creation and branding

A responsabilidade civil na moda praia: criação e marca

La responsabilidad civil en la moda playa: creación y marca

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ABSTRACT

With the popularization of prêt-à-porter, the fashion sector and the Law have experienced an unprecedented level of proximity. The rise of fast fashion stores, whose outstanding features are high-scale production and low prices, and the increasing competition in the sector have accentuated the need to protect the industrial and intellectual property of brands and creations. In Brazil, the exuberance of its shores has resulted in the development of beachwear, a segment that we are a worldwide reference and in which there is a landmark court decision with regard to the applicability of copyright in fashion creations and compensation for damages resulting from these activities. From a casuistic and doctrinal analysis, this academic article aims to contribute to the debates on the fashion world from the point of view of civil responsibility theory, highlighting the legal solutions applicable to the segment and the need to take into account the specific nature of this consumer market.

Keywords: Bikini, Copyright, Intellectual property, Objective liability.

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RESUMO

Com a popularização do *prêt-à-porter*, a moda e o Direito experimentaram uma aproximação nunca antes vista. O surgimento das redes de *fastfashion*, cujas características marcantes são produção em elevada escala e baixos preços, e o aumento da concorrência no setor acentuaram a necessidade de proteção à propriedade industrial e intelectual das marcas e criações. No Brasil, a exuberância de seu litoral fomentou o desenvolvimento da moda praia, segmento no qual somos referência mundial e que foi responsável por decisão judicial icônica acerca da aplicabilidade dos direitos autorais nas criações de moda e na fixação de indenização por danos delas resultantes. A partir de uma análise casuística e doutrinária, este artigo acadêmico visa contribuir para o fomento das discussões jurídicas afeitas ao mundo *fashion*, sob a ótica da teoria de responsabilidade civil, destacando as soluções legais aplicáveis ao segmento e a necessidade de serem levadas em conta as especificidades desse mercado de consumo.

Palavras-chave: Biquíni, Direito autoral, Propriedade intelectual, Responsabilidade objetiva.

RESUMEN

Con la popularización del *prêt-à-porter*, la moda y el Derecho experimentaron una aproximación nunca antes vista. El surgimiento de las redes de *fastfashion*, cuyas características destacadas son producción a gran escala y bajos precios, y el aumento de la competencia en el sector acentuaron la necesidad de protección a la propiedad industrial e intelectual de las marcas y creaciones. En Brasil, la exuberancia de su litoral fomentó el desarrollo de la moda playa, segmento en el que somos referencia mundial y que fue responsable por decisión judicial icónica acerca de la aplicabilidad de los derechos de autor en las creaciones de moda y en la fijación de indemnización por daños resultantes. A partir de un análisis individual y doctrinal, este artículo académico pretende contribuir al fomento de las discusiones jurídicas afectivas al mundo *fashion*, bajo la óptica de la teoría de responsabilidad civil, destacando las soluciones legales aplicables al segmento y la necesidad de ser tenidas en cuenta las especificidades de este mercado de consumo.

Palabras clave: Bikini, Derecho de autor, Propiedad intelectual, Responsabilidad objetiva.

INTRODUCTION

Interested in the historical relevance and social function of *Rio de Janeiro* beach fashion or, what best defines it, in the history and protection of its creations, writers were surprised by the publication of the literary work of journalist Lilian Pacce (2016, p. 19-20). And, from its pleasant and instigating reading, we mean by well punctuate sociological aspects of the trajectory of the so-called *atomic dress*,

(...) what most impressed the Portuguese navigators in the New World was the discovery of nudity. ... Those who traveled to India covered in rags and full of modesty were astonished at the ease with which the natives here exposed their "shame" without shame.

Almost 500 years later, the bikini exploded like an atomic bomb in Europe, giving the start to the sexual

revolution and the liberation of women across the planet. That's because in July 1946, while bomb tests were carried out on the Bikini Atoll on the Marshall Islands in the Pacific, two creators competed for the design of this revolutionary beachwear.

The French stylist Jacques Heim (1899-1967) was the first to present a model, called atome (atom). For the launch, he hired a plane and had it written with smoke in the sky: "Atom: the smallest bathing suit in the world." Shortly after, another Frenchman, the mechanical engineer and stylist Louis Réard (1897-1984), further reduced the size of the piece and hired another plane to stamp in the sky: "Bikini: smaller than the smallest bathing suit in the world." They began, thus, the shots around the bikini that, until today, reinvents itself and provokes.

Given the aforementioned context, this article is the result of a beginning research carried out during the year 2016, led by Professor Ricardo Sichel, on the *Value of intellectual property assets*, of which we also participated

SOCIOLOGICAL ASPECTS OF CARIOCA BEACHWEAR BY BIKINI

Endowed with a lightness and swagger recognized in any part of the world, the carioca may not have invented the sea, but certainly invented the beach. From the costumes to the behavior, this part of the coast displays so much influence on the lifestyle of those who born in *Rio de Janeiro* that it is often possible to forget that one is in one of the largest metropolis of the country.

This fluidity, however, which today seems so intrinsic to the city, only began to take shape in the early twentieth century, in accordance with the spirit of renewal propitiated by the *Belle Époque*. Before that, the Brazilian even went to the beach, but the sea bath had a medicinal character and depended on medical prescription and devices for immersion of the patient. Only from 1903, due to the urban reforms implemented by Pereira Passos in the city of *Rio de Janeiro*, the beach gained prominence and was elevated to a condition of the meeting point. Such was the case with the *Copacabana* waterfront in the emblematic wave design made with Portuguese stones, in a project signed by Roberto Burle Max.

Through the streets, fashion still meant hot and heavy fabrics, despite the intense sun and tropical climate. Nevertheless, the use of the corset began to decline, due to the need for more agile bodies for walking and other physical exercises, such as riding a bicycle. On the beach, baths began to become popular, girls and boys abandoned the paleness cult to throw themselves into the water, even in long nightgowns and caps.

The 1920s and 1930s introduced the beach as a group fun, and the bodies began to be displayed in front of

constructions inspired by the Biarritz and Côté d'Azur buildings, which gave to the city the airs of a luxury bathing resort. Scarves on the head protected the hair, dresses overlapped shorts that went up to the knees (or a span above for more daring girls) and it was common to wear belts, socks, and shoes, even to get into the water. *Looks* were basic, except for one occasional striped print.

At that time, there were still no stores specialized in beachwear in Rio. In France, however, Jean Patou began to revolutionize the segment from a *sportswear* inspiration, producing in 1937 the nylon, a polymer used today in the manufacture of the most diverse types of clothing, especially in the bath.

The real revolution, however, came only after World War II, with the presentation, in 1946, of the bikini by Louis Réard. Aware of the uproar it would cause, the stylist sought inspiration for the name of the two-piece model in the Bikini Atoll, where the United States had made nuclear tests. In Brazil, the costume premiere took place only in 1948, in *Rio de Janeiro*, in the body of the German Miriam Etz. It was a scandal for the time and its use was restricted to the beach of *Arpoador*, in spite of the current "bold" fashion: off-the-shoulder swimsuits from *pin-up* inspiration, emphasizing the guitar-shaped body and leaving the belly to the show. The pieces were made in stretch and helanca, being a reference in the market the brand Catalina, which sponsored the contest Miss Brazil.

Contributing to this breach of standards, Alceu Penna, columnist of magazine *O Cruzeiro*, introduced changes in the behavior of the time, contributing to the emancipation of Brazilian women. "Alceu girls," as the confident, irresistible girls portrayed by the column became known, dictated fashion and customs, directly influencing a generation of men and women. The beach, popular meeting place of the youth of the time, was often illustrated in the scenarios of Alceu, initiating the national spread of the Carioca lifestyle and making the skin tanned and the slender body, the ideal of beauty in force.

The following years were then the *boom* of the beaches, inspiring even the Brazilian music. It was in sands of Rio that Nara Leão and João Gilberto's group met to play guitar and sing, starting *Bossa Nova* in the 1960s. At that time, Ipanema succeeded *Copacabana* as a point debuted his own fashion and bikini, a success in Helô Pinheiro's body - "the girl from Ipanema" by Vinícius de Moraes and Tom Jobim - and Brigitte Bardot - the muse who raised the Búzios bathing resort to international fame and exhibited for the first time a daring model in theaters, frilly checked models.

In *Rio*, however, there was not yet a fashion brand or brand that would produce the two-piece model, and department stores sold only large sizes - not appealing enough to the youth of the time -, leading the girls to make their own pieces at home. In the *surfwear* seg-

ment, on the other hand, the first reference store in *Rio de Janeiro*, the Magno - which resold the desired Hang Ten brand - emerged at the end of that decade, consolidating once and for all the surfboards and paraffined hair to the Rio landscape. This is the time of the launch of Havaianas sandals, which would be so successful in sands all over the world and become an icon, close to the mate of gallon and Globo sprinkle biscuit, from the beaches of Rio.

In 1970, a period of sexual liberation and feminine emancipation, the actress Leila Diniz marked the story with her daring, pregnant, while walking by the beach of Ipanema in a bikini, causing a commotion in the whole of Brazil. In spite of this, the lace-up bikini bottom model - icon of the brand Blue Man -, and the "thong", with a low waist and cavas little pudic, that reached its apex in the years 1980 with the "*roladinho*" model already popularized in the sands. Aware of this fever, several brands launched the hang glider thong model, a symbol of the time, next to the curtain bra and G-string bikini - which still exist today in the sands -, in a manner that there are plenty of candidates claiming the creation of these pieces. Cidinho, the owner of the *Bumbum* store, reported that with the swagger he attributed to the business (PACCE, 2016, p.105-106), the birth of his inventions:

"My store was a real Organização Não Governamental ONG [Non-Governmental Organization]. Half of the production was for my hot friends, and the other was to support the factory, which did not seem to be for profit-making", he laughs. Each summer he invented something different. One of the biggest ideas came in 1988: when he noticed that the women were tying the loop of the bikini in the bra strap, stretching the bottom part, he decided to change the modeling. The name of the new creation came from the sport practiced at Pepino beach, in São Conrado: hang gliding.

Cidinho also called himself the inventor of G-string bikini, which he christened "Ibiza" in 1985, in honor of the trendy eastern island of Spain, where he opened a shop known as the "Brazilian Consulate" (he already had three boutiques in Ipanema and , in 1987, opened one of 300 square feet in California, the largest it ever had). "I made a bikini Bermuda triangle - drawing a line between Rio, Ibiza and California, it's just a triangle, like a pair of panties or a bra." (...)

In addition to the hang glider model and the Brazilian version of G-string, it is also attributed to him the creation of two other models: the sunquíni, in which the front part is bigger, taller and more dug than the back (according to him , the model only stopped being used because of the low waist fashion); and the enro-

ladinho bikini model (or would be of Rose Di Primo?), that made the greater success.

Success at that time was still the brightness of the *laicrae* fluorescent tones, which lasted until the early 1990s when beachwear became cult and occupied an even greater space in the fashion market. At that moment, a real arsenal, between clothes and accessories became part of the bathing suits, such as the sarong, colored bags, flip-flops, glasses, hats, beach wraps, and towels. The models multiplied and the curtain bras and small tops and without structure gained the company of strapless bikini and the top, of firmer models with a bulge and of strategic seams, that never left the scene again. Also, the technological evolution allowed the emergence of increasingly resistant and appropriate fabrics to the sea bath and swimming pool, highlighting the brands exclusively focused on the segment, such as Blue Man, Poko Pano, Lenny Niemeyer, Salinas, Rygy, Bumbum Ipanema and Cia Marítima.

In the present decade, we realize that innovation continues to be what guides the segment. New fabrics and modeling are emerging, such as the ever-lighter laic and the seam that lifts the butt. We also see the search for the strengthening of each brand lifestyle and the offer of products that go beyond the beach in order to accompany customers on several occasions.

A wave erases the border between the beach and the city, day and night, using handmade touches such as lace, *macramê*, tie-dye and noble textiles. The swimsuit is worn as a body and vice versa. More well-known, beachwear becomes a fashionable party (PACCE, 2016, p.325) and, not without reason, it drives the number of beachwear lines in already established *Rio de Janeiro* brands, such as Cantão, Farm, and Osklen, showing that the tide is the intrinsic - and lucrative - part of the soul of the Brazilian.

FASHION LEGAL GUARDIANSHIP: SOME INTRODUCTORY NOTES

Relevant part of the Brazilian Gross Domestic Product (GDP), the fashion market is marked by its protagonism in contemporary society, deriving, according to Lipovetsky, from the “empire of the ephemeral”, based on the valuation of superfluous, individualism and consumerism, in what motivates the consumer is to dress according to the norms of social stratification, but the desire to define

and express their personal identity, in a free and clear way, taking advantage of environmental and climatic gifts.

It is this personal identity that makes the industry so creative, diverse and highly competitive. From that point on, there is the remarkable amount of counterfeits, copies, and imitations of products and brands, causing a monumental loss to the trend precursors of the segment.

In this context, it is essential to have effective protection mechanisms capable of mitigating the damages resulting from constant violations in this market. The Brazilian legislation is no longer in this broader protective aspect, since fashion law is still a recent legal branch and does not enjoy specific protection, and most of the judicial conflicts are solved by the use of analogy.

In fact, an analysis of the precedents allows concluding that there is no consensus on the protection applicable to fashion creations, especially in the clothing segment. This is mainly due to the low index of patented and/or registered products, given the fugacity of the tendencies of the segment allied to a certain lack of knowledge and delay in the conclusion of the applications deposited with the *Instituto Nacional da Propriedade Industrial (INPI)* [National Institute of Industrial Property], that discourage the actors of the market to seek administrative avenues in an attempt to guard against possible violations.

The issue of the application of copyright, governed by Law No. 9,610/1998, to the area in question is still controversial. According to Maia, “despite the artistic connotation of fashion, it is undeniable that it is a basic industrial branch, being a natural object of protection by industrial property” (MAIA, 2009, p.22), given the predominantly utilitarian nature of its production.

Considered merely decorative, the accessories, in general, are more accepted as tutelage objects, although there are also those that also have a functional aspect, such as bags and shoes. The most problematic products, however, are clothing, since they aim to meet a basic human need, to dress (EGUCHI, 2011). In this sense, part of the doctrine understands that the protection granted to artistic works, endowed with singular originality, is not applicable to them.

For some authors, however, the presence of the functional aspect does not exclude the artistic character of the pieces, given that the current fashion, as already ventilated, is endowed with an aspect of identification that goes beyond utility, much more to the aesthetic sensation and perception of what is beautiful. It would be, therefore, an

¹ COPYRIGHT. Hermès Tote Bags. Declaratory action. Counterclaim. Request that the author refrains from producing, importing, exporting, marketing products that violate Hermès copyright on Birkin bags or any other product owned by Hermès. Preliminaries of defense restraint. Extra petita judgement. The absence of appointment to authorship and passive illegitimacy. Away Preliminaries.

COPYRIGHT. Hermès Tote Bags. Declaratory action and counterclaim. Previous counterfeiting - Hermès bags constitute works of art protected by the Copyright Law. Works that did not enter the public domain. Protection guaranteed by the law 9,610/1998. Copyright protection is independent of registration. Author/advertiser who produced handbags very similar to the handbags made by the defendants/scouts. Slavish imitation. Unfair competition configured. Evidenced parasitic exploitation. Compatibility of the competitive infringement with a recognized copyright infringement. The duty of the author /advertiser to refrain from producing, marketing, importing, or storing products that violate Hermès' copyright on the Birkin bag or any other product owned by the defendants/scouts. Indemnification for material and moral damages. Condemnation kept. Appeal devoid.

(Rapporteur: Costa Netto, District: São Paulo, Judging Body: 9th Chamber of Private Law, Judgment Date: 08/16/2016; Registration Date: 08/17/2016)

applied art, “because it combines the aesthetic character with utilitarian connotations and can be used for industrial and commercial purposes” (BARREIRA, 2014, p.30).

This interpretation has been commonly used in judicial precedents, with the case of the recognition of copyright infringement of the Hèrmes handbags by the Village 284, which is reproduced in a collection entitled “I’m not the original”. From the sentence¹, the following excerpt is highlighted:

It is worth remembering that it is possible to double protection, both of the Copyright Law and the Industrial Property Law, in works/creations that have both the aesthetic character and the utilitarian connotation (...). In this way, reference must be made to the so-called “applied works of art” which, by their nature, experience simultaneous protection (...). In the present case, the considerations made by the MM were timely. Judge a quo in observing that “the bags produced by the rés/reconvintes have value by their artistic nature, serving much more as an object of adornment and ostentation, remaining its functional and utilitarian aspect in the background” (pages 1789 - sic). In the words of Gama Cerqueira, “The reproduction of a work of art by industrial processes or its application to the industry does not denature it, they do not take away the artistic character”.

Such an understanding, however, does not detract from the fact that any fashion creation can be an object of author protection, since, according to José de Oliveira Ascensão (1997, p.60):

In utilitarian works, we have above all this function, not a literary or artistic function. There is no reason to automatically allow such works to cross the copyright threshold. They can only do so if, as a result of an appreciation, they conclude that, in addition to their utilitarian

character, they also have a particular merit, which justifies that we consider them also literary or artistic works.

Thus, to the incidence of copyright rules, it is essential to dissociate between the artistic value and the utility value of the work. That is, the “aesthetic attribute must be perceptible even if analyzed separately from the material object that supports it” (BARREIRA, 2014, p.31). Of this attribute, the requirement of originality cannot be overlooked, and the development of a single trait, characteristic of the author in relation to the existing ones, is taxed in the effort to obtain an original product with its own identity.

This is exemplified in the recognition of copyright infringement in the copy marketed by C&A of the bags of designer Gilson Martins. These were pieces in the specific format of mouth and flip-flop sandals that, in the opinion of the Collegiate of the 4th Civil Chamber of the Court of Justice of Rio de Janeiro², provided protection of the aforementioned Law No. 9,610/1998 because it had “proper characteristics and details novelty and originality),” recording the expert’s report presented in the first degree of jurisdiction³, according to which the stock exchanges had different opening and details, and were therefore original.

From this point of view, the tendency, as an expression of the creative direction of a society at a given time, is not subject to protection. Because they are widespread ideas, it is possible that the same trend is used by different designers to create their pieces, which does not necessarily mean that one designer copied the creation of another. It shows the diffuse aspect of the trend.

This is clear even in the judgment of inadmissibility made in the case of IMB Têxtil against C&A, whose purpose was to stop the sale of lingerie and socks with the “animated faces” stamp by the store network, on the grounds that reproduced those designed by the IMB. In the decision, the magistrate understood that the use of

² Indemnity. Allegation of unauthorized marketing of products similar to those created by the First Author, sold by the Second Plaintiff. R. Judgment of Partial Provenance.

I - Joint analysis of the Appeal Appeal of the Defendant and the Adverse Appeal of the Author. Several journalistic articles pointing to the First Supplicant as a famous bag designer and presenting photographs of several models he created, some with authorship claimed on demand. Drawings of the “Boca” and “Chinelo de dedo” bags that were still the object of copyright registration in the School of Fine Arts. II - Expert Report attesting that the exchanges marketed by Defendant characterize reproductions of the creations of the First Author. Models of stock in question that have their own characteristics and details (novelty and originality), whose creation can be attributed to the First Supplicant. III - Violation of the First Plaintiff’s copyrights, setting up moral and material damages, with repercussions on the Author Society created for the sale of these products. Exegese of Articles 7th, 28 and 29 of Law No. 6,610/98. IV - Second Plaintiff who has as its corporate purpose the sale of a purse, belts, and articles of personal adornment, without exclusivity for sale of the creations of the members. The absence of offense to the name, good reputation, the reputation of the legal person, capable of allowing the configuration of moral damage. Legitimacy evidenced. V - Material damages arising from the improper commercialization perpetrated by the Respondent that must be duly repaired, covering the losses suffered by the Authors. VI - The amount fixed for the reparation of the moral damages suffered by the First Respondent in disagreement with the Principles of Reasonability and Proportionality. Lack of any more serious social or economic repercussions arising from the wrongful act practiced by the Supplicated. Reduction of the arbitrated quantum for the indemnification of moral damages suffered by the First Supplicant that is imposed, avoiding even unjust enrichment. VII - Determination of calculation of lost profits by the criterion of analysis of the benefits obtained by the author of the violation of the right (article 210, item II of Law No. 7979/96 - industrial property) that must be maintained. The impossibility of applying the provisions of article 103, caput of Law No. 9,610/98, for lack of numerical identification of counterfeiting. VIII - Partial Provision of Appeal to Defendant, only to reduce the amount of compensation for moral damages suffered by the First Plaintiff for R\$ 15,000.00 (fifteen thousand reais). Denied Provision to the Adverse Appeal of the Author.

(TJRJ Appeal No. 0072174-63.2004.8.19.0001 Rapporteur: Reinaldo Pinto Alberto Filho, Judging Body: 4th Civil Chamber; Judgment Date: 06/01/2010; DJe: 06/08/2010).

³ Process No. 0072174-63.2004.8.19.0001.

said prints consisted of “a market trend, without setting up an unfair competition, but merely a situation of market competition”. This is because several companies of the branch would be marketing products with the same pattern of design, evidencing the lack of originality of the idea⁴.

The protection afforded to prints from human creativity, however, is not confused with the affixing of marking insignia in pieces. Because they relate directly to the brand, they must be protected by trademark law, an industrial property whose applicability in fashion is much less controversial.

In this circumstance, we take as an example Louis Vuitton handbags, whose striking feature is the print with the letters L and V interlaced with cherry blossoms. Although it is the fruit of man’s production and endowed with a certain aesthetic value, such conditions are not sufficiently artistic to permit the protection of copyright. They are much more connected to the brand and visual identification on the market, which makes it possible to protect them through the competent registry at the National Institute of Industrial Property.

In any case, it should be borne in mind that the prints and inspirations in the fashion market have a wide range of incidence, not limited to the scope of authorship or trademark as regards the nature of the violation - that is still verifiable in relation to patents, industrial designs, and creations, which are not yet covered by the national system - as seen in the trade dress.

Thus, regardless of registration or not, it is a fact that these violations cause notorious damages to the label and the creators, resulting in the obligation to indemnify when is identified the phenomenon of confusion to the detriment of the consumer.

Accordingly, compensation will be due in the event that a component of unfair competition is manifested, which may lead to compensation for damages and undue profits.

CIVIL RESPONSIBILITY: A LOOK AT THE BEACHWEAR

From the consumer market’s point of view, the possibility of confusion among the public is a *sine qua non* element for the configuration of unfair competition, instituted by the rules of private law and that is not confused with the abuse of economic power under public law (article 170, item IV, of the *Constituição da República Federativa do Brasil (CRFB)* [Constitution of the Federa-

tive Republic of Brazil]). On the difference between the two, clarifies Newton da Silveira (2014, p.102):

The competition rules of private law directly protect the auction and have subsidiary application in the infractions to the other industrial and author property rights. Those of abuse of economic power protect the freedom of competition within the economic and social order.

Gama Cerqueira defines that the deviation of customers is not unlawful. On the contrary, it is the objective of competition; what can be considered unlawful, for him, are the methods, the processes of competition, but it is unnecessary, however, to prove the subjective criterion of bad faith or fraudulent intent or even the effective loss. In order to be configured disloyalty, it is enough for the competitor to use “ardis and expedient excuses to achieve its intent, that is, to dribble the attention of the consumer causing him to buy its product or service thinking that it is another one of diverse origin” (SILVA, 2013, page 64).

This attempt to inhibit the confusion of the consumer and to preserve the goodwill and intangible value of creation is precisely what is aimed at the registration of brands and industrial designs, as well as the patent of utilitarian models and inventions.

The case involving the fashionable beachwear brand Lenny Niemeyer illustrates well the relevance of the aforementioned protection. Although recognized in the market by its first name only, the brand does not have a trademark registration for that word element. In fact, who owns it is another fashion company, which, due to the similarity of products and the possibility of customer diversion due to confusion, decided to block the registration of the brand of beach for the brand “LENNY and CIA.”, “LENNY NIEMEYER” and “LC”. The application was judged and maintained on appeal⁵, in which the following passage stands out:

(...) As for the expression LENNY, it is possible to affirm that there is no possibility of coexistence of said mark with the marks of the author, since the acronym CIA is insufficient to confer any distinguishing signs, even if mixed, and it is possible to suppose that they are consecrated records, belonging to a single proprietor, creating confusion in the consumer market, as shown in the file. Although the defendant argues that the products it identifies are not confused with those of the author, it is precisely the same market segment, that is, the female

⁵ Civil Appeal No. 0124533-34.1997.8.19.0001, Third Civil Chamber, TJRJ. Rapporteur: High court judge Renata Machado Cotta, Judge on 21/03/2012.

⁴ “Obligation action of not to cumulate with indemnification for moral damages. Use of print with ‘animated faces’ in lingerie. Realization of expertise. Trend of fashion. Configuration. Unfair competition. No characterization. Moral damages - Infringement. Application. Decision held. Unfounded feature. The use of prints with ‘animated faces’ on lingerie sets up a market trend, without configuring unfair competition, but merely a situation of market competition. “(Rapporteur: Jesus Lofrano; District: Barueri; Judge Body: 3rd Chamber of Private Law; Date of judgment: 05/31/2011; Registration date: 06/082011; Other numbers: 4509624100).

public, inducing an inevitable error. There are also in the file several reports that prove the confusion in the market, because the news quotes the name of one of the stores, when, in fact, it is the other.

(...)Therefore, it is impracticable to use the isolated expression "LENNY" by the defendant, showing that the decision pronounced by the sentencing judge is correct. Nevertheless, as far as the second brand "LENNY NIE-MEYER" is concerned, it does not visualize problems of coexistence between the signs in the face of the express indication of the surname of the stylist, a fact that would entirely eliminate any possibility of confusion with the paradigm brands, which only make use of the first name of its stylist.

(emphasis added)

In the same direction understood the 5th Chamber of Private Law of São José do Rio Preto⁶, noting that there would be a possibility of collision and coincidence between markets if the brand of sunglasses "Rosa Chá" coexisted with the renowned brand of bikinis and summer clothes "Rosa Chá", setting the hypothesis of unfair competition.

It urges to emphasize that this practice is one of the purposes of the Industrial Property Law (article 2, paragraph V), generating both criminal (article 195 of the LPI) and civil (Article 209 of the LPI) consequences. This is because the latter device establishes that:

Art. 209. The injured party shall be entitled to damages and losses in compensation for damages caused by acts of violation of industrial property rights and acts of unfair competition not provided for in this Law, which tend to damage the reputation or business of others, to create confusion between commercial, industrial or service providers, or between products and services put on the market.

(emphasis added)

In other words, it is applicable the liability for acts that infringe both industrial property and fair competition; it is understood that, in both cases, in order for the obligation to indemnify remains established damages must be incurred as a result of the possibility of confusion between products.

As for the subject and the extent of the damage, it is important to note that, according to the article of Law itself, the obligation to indemnify arises from material

or moral damages generated to the business of others. This ratifies the understanding already pacified by the Supremo Tribunal de Justiça (STJ) [Supreme Court of Justice] in the statement of summary 227, according to which it is possible that the legal person suffers moral damage. For example:

Civil Appeal. Inhibitory action cumulated with indemnity. Counterfeiting. Abstention from the sale and exhibition of shoes that reproduce the author's models. Passive illegitimacy rejected. Commercialization of counterfeit products that remained uncontroversial in the circumstances of the case. The fact that there is an identification of the manufacturer does not exclude the responsibility of the merchant, who is jointly and liable in relation to consumption by the express legal provision. The sale of counterfeit products implies liability under the law, since the law punishes, indistinctly and in isolation, the manufacture and improper sale of products that incorporate an industrial design of others (Law 9,279/96, articles 187 and 188, I). Trademark ownership is constitutionally protected by the art. 5, XXIX, of the Clube de Regatas Brasil (CRB). The Industrial Property Law, more specifically in its articles 125 and 126, provides special protection to the highly renowned trademarks registered in Brazil, in all branches of activity. Special protection to be applied in this case. The plaintiff has proven to be the legitimate owner of the well-known trademark of GRENDENE women's footwear, whose ownership and, consequently, their exclusive use are guaranteed, as well as the power to prevent third parties from using it. The Industrial Property Law still prohibits in Article 124 the imitation, in whole or in part, of another's trademark. Imitation of the original products that jumps to the eyes with ease by the presented samples for comparison. Misuse of similar products by the defendant that caused material damage to the Authorizing Party, due to the deviation of customers. The industry of product falsification, which in flagrant disrespect to the consumer and the trademarks, often ends up becoming vulgarized and losing market value, what constitutes moral damage. Properly fixed value. Resource devoid."

(Tribunal de Justiça do Estado do Rio de Janeiro (TJRJ) [Court of Justice of the State of Rio de Janeiro] Civil

⁶ Civil Appeal - Punitive action - Groundless judgment - Appeal seeks to obtain for itself the registration of the trademark "Rosa Chá" for a product that, although not included in the list of those whose exclusivity is already granted in favor of the appellant, is intended for the public- common target - Possibility of the general consumer audience accustomed to the brand "Rosa Chá" for bikinis and summer clothes, for example, when finding "sunglasses" with the same brand confuse and think that it comes from the appellant - Uncontroversial likeness since proven the possibility of collision or coincidence of Markets - Unfair competition of the appealed configured against the national and international notoriety of the appellant brand. The burden of reversed succumbency - Provided resource. (Rapporteur: Oldemar Azevedo, District: São José do Rio Preto, Judging Body: 5th Chamber of Private Law; Judgment Date: 01/30/2008; Registration Date: 02/11/2008; Other Issues: 4533444300)

⁷ Article 208. The indemnity will be determined by the benefits that the injured party would have received if the violation had not occurred.

Appeal No. 0027491-93.2013.8.19.0204 Rapporteur: High court judge Carlos Eduardo Moreira da Silva, Judgment date: 01/13/2015, 22nd Civil Chamber)

The obligation to indemnify against the damages suffered is unquestionable, it is worth noting the difficulty in fixing the compensatory amount, which, according to art. 208⁷ of the *Lei da Propriedade Industrial (LPI)* [Industrial Property Law], must be determined by the benefits that the injured party would have received if the violation had not occurred. It is also possible to pay lost profits according to the criteria established by art. 210⁸ of the same law.

Regarding this issue, the most complete judicial decision in the fashion segment, generating a wide discussion of the matter, is presented as a result of a joint action with a claim for compensation for damages proposed by Poko Pano against the giant retailer C&A⁹.

In this case, Poko Pano - a well-known swimwear brand that has exclusive features, distinctive design and limited edition of its pieces - argued that C&A had begun to sell a collection of bikinis with a doll print similar to theirs, presented in a fashion show in *São Paulo* Fashion Week in 2003. The plagiarism would have been perceived by customers and dealers of the author to have seen the parts being sold at a much lower price in the fast fashion network. They showed themselves, then, discontented for having paid dearly for a model that thought to be exclusive and contacted the Poko Pano.

Granted and completed injunction determining the support of the sale of products by the defendant during the course of the investigation, C&A argued that the counterfeit stamp would be merely a market trend and would not be liable to protection. The store also argued that the design would not hold a record in the INPI, without any violation.

In the decision that gave rise to the copyright lawsuit, the magistrate clarified that the tendency to use dolls in print is not protected, because it is an idea; and under the special law, ideas are not protected. However, the dolls stamped by Poko Pano had their own characteristics, so they would experience copyright protection:

Nothing would prevent the defendant, following the prevailing trend in the fashion segment, to stamp dolls

on their products. What is closed is the reproduction of an others' design, which does not belong to the cultural heritage, for the purpose of profit. It was up to him to develop his own model, with distinctive features. Thus, it is imperative to conclude that characterized the counterfeiting, as foreseen in Law 9,610/98, remaining copyright infringement.

Regarding the absence of a filing with the INPI, the judge made mention of an obligation to register¹⁰, noting, however, that the creator, at the time of the counterfeit, had already filed the application for the registration of industrial design. Furthermore, law No. 9,279/1996, which regulates industrial property rights and obligations, "gives the injured party the right to recover damages and losses caused by acts of violation of industrial property rights and acts of unfair competition not foreseen by the Law, tending to damage the reputation or the business of others".

The decision point is thus reached: civil liability (obligation to pay compensation). The judge concluded the argument by stating that C&A, in addition to violating copyright, would harm Poko Pano's business; consequently, the bikinis' brand would have the right to be reimbursed:

In addition to copyright, the author has proven the damage to the reputation of his business and the confusion between the products, due to the reproduction, by C&A, of the image developed previously by the author. Finally, the moral damage of the author company is reflected in his image denigrated, due to the conduct of the defendant.

The fixing of indemnity, therefore, must be given to meet the modalities of patrimonial and moral damages.

Under patrimonial aspect, the magistrate considered that the provisions of article 103 of law No. 9,610/1998 apply, and the defendant must pay the value of three thousand copies of the unduly traded pieces since it is impossible to verify the number of copies actually sold. As each piece of the plagiarized collection obeyed a different price, the average value of the same was calculated for

⁷ Article 208. The indemnity will be determined by the benefits that the injured party would have received if the violation had not occurred.

⁸ Article 210. The lost profits will be determined by the criterion most favorable to the affected, among the following:

I - the benefits that the injured party would have received if the violation had not occurred; or

II - the benefits that were obtained by the author of the violation of the right; or

III - the remuneration that the perpetrator of the violation would have paid to the owner of the right violated by the granting of a license that would allow him to legally exploit the property.

⁹ Process No. 2236/03 - TJ / SP

¹⁰ As well explained by Barreira, "the registration of the work is not a requirement for protection in the case of copyright, it is optional (Law No. 9.610/98, articles 18 and 19). Interesting is the lesson of Silveira (2011, p.13) in the sense that the "foundation of law on such works is explained by the very origin of the work: the individual. The work belongs to it originally by the process of creation itself." Hence there is no need for registration, which in the author's field is merely declaratory and not constitutive of law. The intellectual work is protected by the simple fact of having been created, independent of any formality, but it is worth remembering that registration is often recommended to guarantee the author greater security, and can serve, for example, as proof of priority. (ASCENSION, 1997)."

the determination of the quantum debatur, which totaled the amount of R\$ 53,700.00.

At this point, it is valid to make a counterpoint to the provisions of article 209 of the LPI and clarify why, if unfair competition had been recognized, that rule does not apply. The answer is simple, and in our opinion it is in the quarrels that also deal with copyright, under the aspect of the specialty of law 9,610/1998, making it impose its incidence¹¹.

In the aspect of moral damage, the same had been taken into account, considering the degree of non-acceptability of the illicit practice, admitted *damno in re ipsa*, by the uncontroversial affectation to the creative entrepreneurial society image, as well as the economic capacity of the defendant, R\$ 50,000.00. The magistrate also understood that nothing would justify securing the indemnity twice as much as had been arbitrated for pecuniary damages, as intended by the plaintiff in the initial one.

We understand, however, that the practice of C&A would justify a much larger value, considering that it is a giant commerce that undoubtedly has a large creative team, which in theory would not need to use harmful means to assemble a collection. In view of this fact, it is extremely reprehensible the amount in serious economic embezzlement that generated to Poko Pano, since this creator of good faith has an infinitely smaller structure and had its aggregate value significantly diminished with the copies.

CONCLUSIONS

The recognition of fashion as an expression of individuality and its elevation to the condition of historical and social phenomena has enabled the debate to be expanded on a more effective legal regulation that takes into account important variables in the sector, such as seasonality and trend.

The difficulty for designers and market players in registering their models is chronic. Despite controversies in the doctrine, several decisions have recognized the applicability of copyrights to fashion creations so that the numerous copies and commonly verified counterfeits can be appeased.

The beachwear segment, which has a very strong national appeal and represents internationally our fashion market, does not escape this rule. Unfair competition in the segment is visible, generating property and moral damages that demand legal shelter.

In this section, we record that the damage can be mitigated through the application of the Institute of civil responsibility

in the objective modality¹² to the exsurgent litigation, having as parameter, in particular, that verified in the analysis of the concrete case of the Poko Pano bikini brand, at which time as evidenced by criteria for fixing civil indemnity related to the segment and the legal way used to justify them.

However, we can see that fashion still needs to gain greater prominence and recognition in the judicial sphere, as far as the beachwear segment is concerned, in order to be protected proportionally to the share of GDP that it represents for the country and the time and history that has the lives of Brazilians.

REFERENCES

- BALDISSERA, Bruna. *A concorrência desleal na violação de trade dress e de marca*. Monografia, UFRGS. Porto Alegre, 2015. Available in: <http://www.lume.ufrgs.br/bitstream/handle/10183/121878/000970875.pdf?sequence=1>. Accessed on: October 23, 2016.
- BARREIRA, Ellen Cândido. *O direito autoral e a proteção das criações de moda: um estudo do caso Village 284 vs. Hermès*. Monografia, UNB. Brasília, 2014. Available in: http://bdm.unb.br/bitstream/10483/8999/1/2014_RebecaEllenCandidoBarreira.pdf. Accessed on: October 16, 2016.
- BRASIL. Presidência da República. Constituição (1988). *Constituição da República Federativa do Brasil*. Available in: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: October 20, 2016.
- _____. Decreto nº 75.699, de 6 de maio de 1975. *Promulga a Convenção de Berna para a Proteção das Obras Literárias e Artísticas*, de 9 de setembro de 1886, revista em Paris, a 24 de julho de 1971. Available in: http://www.planalto.gov.br/ccivil_03/decreto/1970-1979/D75699.htm. Accessed on: October 20, 2016.
- _____. Lei nº 9.610, de 19 de fevereiro de 1998. *Altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências*. Available in: http://www.planalto.gov.br/ccivil_03/leis/19610.htm. Accessed on: October 20, 2016.
- _____. Lei 9.279, de 14 de maio de 1996. *Regula direitos e obrigações relativos à propriedade industrial*.

¹¹ Likewise, if there is cumulative protection by means of registration or patent and copyright, the latter would prevail. However, this is an unlikely event, and it is even absurd, since it would be difficult to file an action claiming compensation through law nº 9,610/98, whose incidence requires extensive evidence, which can be cured with the presentation of a simple title.

¹² Therefore, the risk created by the developed business activity, in accordance with the sole paragraph of article 927 of the Brazilian Civil Code, is considered.

Available in: http://www.planalto.gov.br/ccivil_03/leis/L9279.htm. Accessed on: October 20, 2016.

CARVALHO, Angelo Gamba Prata de. *Costurando um modelo de proteção da moda pelo direito de autor*. PIDCC, Aracaju, Ano V, volume 10, nº 1, p. 216 a 233, Fev. 2016. Available in: http://s3.amazonaws.com/academia.edu.documents/43523446/Fashion_Law_publicado.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1477744577&Signature=95b15jQjP67n0%2Bj%2FgHj8n6l%2B5m8%3D&responsecontentdisposition=inline%3B%20filename%3DCOSTURANDO_UM_MODELO_DE_PROTECAO_DA_MODALIDADE.pdf. Accessed on: October 28, 2016.

CCBB, Museu e arquivo histórico. *O museu vai à praia – moda e cultura*. Rio de Janeiro: CCBB, 1995.

DISTIZER, Marcia. *Um mergulho no Rio: 100 anos de moda e comportamento na praia carioca*. 1 ed. Rio de Janeiro: Casa da Palavra, 2012.

EGUCHI, Aya. Curtailing copycat couture: the merits of the innovative design protection and piracy prevention act and a licensing scheme for the fashion industry. *Cornell Law Review*, v. 97, p. 131-158. Available in: <http://cornell.lawreviewnetwork.com/files/2013/02/Eguchi-final.pdf>. Accessed on: November 11, 2016.

GAMA CERQUEIRA, João da. *Tratado da Propriedade Industrial*. Vol. II, Tomo II, Parte III. Rio de Janeiro: Lumen Juris, 2010.

MAIA, Laís Helena Horta. *A contrafação das criações de moda: a possibilidade de proteção das criações de moda em face ao crime de contrafação*. 2009. Monografia, UFS, São Cristóvão, 2009.

PACCE, Lilian. *O Biquíni Made in Brazil*. Rio de Janeiro: Arte Ensaio, 2016.

PEDROZO, Denise Abdalla Freire. Direito Autoral na moda: Visão jurisprudencial. *Revista da ABPI*. Rio de Janeiro. n. 136, p. 17-30. Mai/Jun. 2015.

SILVA, Alberto Luís Camelier da. *Concorrência desleal: atos de confusão*. 1 ed. São Paulo: Saraiva, 2013.

SILVEIRA, Newton. *Propriedade Industrial: propriedade industrial, direito de autor, softwares, cultivares, nome empresarial, abuso de patentes*. 5 ed. São Paulo: Manole, 2014.

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