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# Fashion Industry, Innovation and Intellectual Property

## Indústria da Moda, Inovação e Propriedade Intelectual

## Industria de la Moda, Innovación y Propiedad Intelectual

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## ABSTRACT

Bearing in mind the absence of specific legal norm on "fashion design" and the lack of expertise of our judges, Brazilian courts have recognized some degree of protection for designs granted by the fashion industry. They do not deny protection, as the North Americans who exclude the utilitarian aspects, nor even declare rights as vast as in French law. The trend of the judged in Brazil is in an intermediate position. That is, they aim to encourage innovation, on the one hand, and on the other, limit copying, requiring incremental elements to provide protection.

## RESUMO

Tendo em vista a inexistência de norma jurídica específica sobre "design de moda", e a falta de especialidade dos nossos julgadores, os tribunais brasileiros têm reconhecido algum grau de proteção aos "designs" concebidos pela indústria da moda. Não negam proteção, como fazem os americanos do norte que excluem os aspectos utilitários, nem chegam a declarar direitos tão vastos como no direito francês. A tendência dos julgados no Brasil situa-se em posição intermediária. Isto é, visam incentivar a inovação, de um lado, e de outro coíbem a simples cópia, exigindo para conferir proteção elementos incrementais.

## RESUMEN

Ante la inexistencia de una norma jurídica específica sobre el diseño de la moda y la falta de especialidad de nuestros jueces, los tribunales brasileños han reconocido algún grado de protección a los "designs" concebido por la industria de la moda. No niegan protección, como hacen los estadounidenses que excluyen los aspectos utilitarios, ni llegan a declarar derechos tan vastos como en el derecho francés. La tendencia de los jueces en Brasil se sitúa en posición intermedia. Es decir, tienen como objetivo incentivar la innovación, por un lado, y por otro, impiden la simple copia, exigiendo para conferir protección elementos incrementales.


# INTRODUCTION

### 1.Interface between Intellectual Property (IP) and fashion creations: Questions to be answered by this Essay

- What protection is granted by the existing IP institutes to "design" and other fashion products?

- Is it both necessary and relevant to elaborate a specific legal protection for the "design" of fashion creations?

### 1.1.Brief history

**a)The Period of Privileges**

As early as the 12th century, with the expansion of commerce, the "privileges" were created, voluntarily and arbitrarily, by the monarch or municipal authority to the developers of certain products that excelled in the progress of the arts and sciences. Through these "privileges," the State granted the prerogative of exclusive and temporary use to its owner/creator/developer - which could be revoked at any time by the authority that granted it.

It was not yet a "right" - as a legal norm, but an "advantage" that kept commerce away from copying or usurpation. The State, therefore, guaranteed the "unique advantage of use" to the owner/developer, and conferred the means to prevent third parties from unauthorized use.

At that time, in order to organize the consumption and use of certain materials, including clothing, "privileges" were granted to developers of certain fabrics and combinations of colors, especially those intended for the exclusive use of the nobility, or to identify specific professions such as members of the clergy, teachers and government employees.

It was only with the French Revolution, however, that "privileges" became "rights", while the legal norm for all, and in the list of rights declared by the Revolution were expressly recognized the "authors' and inventors'/developers' rights".

It was in the context of the Industrial Revolution in England and France that laws were issued regulating immaterial/intangible rights, abolishing "privileges" (also clothing) from a class perspective.

**b)The Rise of Modern Society**

**(i)Yesterday**

Capitalist society makes the fashion creations a "consumer good" and an object of desire.

The "fashion industry" is based on the logic of the high turnover of its products and the market is fed by the permanent search for "differentiation of its results".

Notwithstanding the role that "fashion" has played in the progress of the arts and sciences, with the exception of France, where creations receive specific protection, in many countries the real need for legal protection of fashion "design", while "exclusive right", able to prevent third parties from copying and usurpation.

**(ii)Today**

Nowadays, designs of fashion creations, despite their importance as "cultural expression" in an economic sector of growing development in domestic and international markets, remain in the negative space of Intellectual Property (IP). In other words, there are many debates and controversies about the possibility and the actual need for specific legal protection, capable of conferring exclusive rights, for a time to products that originate in the fashion industry.

Nevertheless, even in the absence of specific legal protection, in addition to the questioning of its viability or not, it is necessary to analyze here whether the current legal institutes in the legal system of IP protection are sufficient - although in an indirect and incomplete way - to the "design" and the products from it.

### 2.About the Meaning of Expressions Relating to Fashion Creations

Several expressions are used and related to the creation of fashion and its industry, which must be differentiated with a view to its correct (and possible) legal protection, regarding its type and temporality.

The most frequent terms are:

- Movement;
- Style;
- Trend;
- "Design" itself.

"Movement" implies a change of ideas, opinions, forms of social organization, and patterns of behavior. It is a changeable and unstable concept. Legal protection through IP to "movements" is very difficult and is not desirable.

"Style" implies a set of characteristics, forms, colors, themes, methods, etc., that distinguish one work from another and is tied to aesthetics. It has a stable nature and is permanently linked (and even confused) to a certain company, "maison", "atelier", etc. "Style" can be influenced by "movements" and can be protected by IP rights - as long as it is stable, relatively, and assignable/identifiable to a certain designer/developer/creator. The question that needs to be addressed concerns the definition of its legal nature and correct framing in the various categories of IP.

In principle, the most appropriate "style" protection is that of copyright, regardless of the distinctive signs (trademarks) of their designs, patents (product or process) and utility models that can be involved in the "style" in question.

"Trend" relates to the creation of fashion in a broad sense, as a consumption impulse and behavior of a given historical time. The fashion is related to custom, it comes from the Latin term "modus" or, in the closest language, the French, from the word "mode". Thus, fashion reflects the evolution of behavior. It is non-verbal language that encourages new ways of thinking, acting and positioning oneself in society.

"Trend" is defined by colors, materials, reasons, cultural expressions, etc., implying conscious or unconscious choices, hence its legal protection - as a set of information and aesthetic choices, is very difficult, given its changing nature and unstable. However, its distinctive signs (trademarks), "design", patents of invention, utility models created in the development of a certain "tendency" can be protected in the various own and already existing IP categories.

"Design," an expression that is of most interest here, implies the set that results from the unique, identifiable, stable combination of structures, processes, and procurement of materials and original forms that produce a new (and often functional) visual result. Considering the "design", it is possible to address colors, structures, different forms of fabrics and patterns - while modes and processes of interlacing of materials, prints etc. What we want to safeguard in the "design" is its set, as a form of idealization, creation of a new configuration of "clothes" or "objects" for personal use related to fashion.

There are interior designs, graphic designs, and visual design.

It is interesting here the "fashion design", which can be protected as a set of information, regardless of other rights that may exist linked to the process of obtaining the "design".

## 3.Legal Protection: Reasons for Convenience and Opportunity

Let us return to the central question of this essay: the "fashion", while movement, style, trend and "design" need specific legal protection?

The answer is yes.

Fashion is a factor of cultural expression and implies a market of high economic and developmental value. In the paradigm adopted in the 21st Century, the trend towards customization and recycling of materials with a view to sustainable development, including in Brazil, has grown and consolidated. All people consume fashion and participate in some form of this cultural expression. The fashion retail segment is one of the most sensitive to the economy, which demands more attention from entrepreneurs[1].

According to the *Associação Brasileira da Indústria Têxtil e de Confecção* (Abit) [Brazilian Association of the Textile and Apparel Industry], the revenues of the textile and apparel sector in Brazil are expected to grow by 5.5% to reach R$ 152 billion in 2018. Clothing production is expected to increase from 2.5% to 6.05% of the total, the textile industry could increase 4% in the period, reaching 1.84 million tons. Investments could reach R$ 2.25 billion in 2018 - an increase of 18.4% compared to R$ 1.9 billion in 2017, also surpassing the level of R$ 2.24 billion in 2015[2].

It is estimated that only the textile and apparel industry will be able to open 20 thousand jobs in 2018, and in 2017 the generation was 3.5 thousand jobs. If the projection is confirmed, there will be 1.5 million workers in the sector[3].

Data from 2015 and 2016 reveal that the fashion market in Brazil was around US$ 36.2 billion, with more than 30 thousand companies. What is equivalent to recognizing that Brazil is already the fifth largest textile producer in the world and the fourth producer of ready-made clothing[4].

Faced with such data, the maxim that "nothing is created and everything is copied" has become unaccepta-

[1] According to reports by SEBRAE: http://www.sebraemercados.com.br/publicacoes-analisam-cenarios-e-tendencias-para-2018-em-5-mercados-moda-turismo-construcao-metal-mecanico-e-fruticultura/ (accessed on 03/21/2018)

[2] According to information obtained in the newspaper Valor Econômico, accessed on 12/07/2017: http://www.valor.com.br/empresas/5221045/faturamento-do-setor-textil-deve-subir-55-em-2018-aponta-abit (accessed on 03/21/2018)

[3] http://www.valor.com.br/empresas/5221045/faturamento-do-setor-textil-deve-subir-55-em-2018-aponta-abit (accessed on 03/21/2018)

[4] According to Abit – Associação Brasileira da Indústria Têxtil e de Confecção.

ble. Interest has grown in the legal problems arising and involving the fashion industry. Creative industry, research and development require legal protection. But what protection? What is the material, spatial and temporal extent of protection? This paper is intended to contribute to the answers to these questions.

### 3.1.Legal Perspective of the Most Developed Countries in the Fashion Industry: The United States of America and France

#### a)The United States

In the United States, fashion design is not (yet) protected by intellectual property rights, either from the perspective of copyright or some form of industrial property. The "brands" related to "fashion" are obviously guarded and protected by law. Nonetheless, clothing designs can be copied since they do not enjoy specific protection. That is why companies of greater or lesser importance in the world can copy, in the US, the designs of others. Some only "draw" or "refer" to the existing "design". Others copy ostensibly[5].

Copyright rules in the United States protect "original" copyrighted works, fixed on any tangible medium, not "utilitarian". The "fashion design" can be original, fixed in a tangible medium, nevertheless, has a utilitarian character - thus escaping from the rules of copyright protection in the country.

The exigency of the "non-utilitarian" nature of the object to be protected was introduced into American law in the famous case "*Mazer Vs. Stein*", that was brought to the Supreme Court of the United States, in which the protection of decorative elements in chandeliers and lamps was discussed in 1954. As a result from this case, a guideline adopted to date has been applied in the country: "Unlike a patent, a "copyright" does not give exclusive right to the art disclosed; protection is given only to the expression of the idea - not to the idea itself[6]". Therefore, artistic works are protected by copyright, limited to its form and not to mechanical or utilitarian aspects. In principle, if the artistic or stylized form of a functional object is independent of such function, its form may be protected by "copyright[7]".

In the United States, a garment or accessory (a jewelry or costume jewelry) is protected by copyright, but not its underlying design, since it cannot be separated from its functional (utility) aspect of power be worn and used by its owner.

Nonetheless, the lack of intellectual property protection for fashion creations did not result in a fading innovation in the United States' industry. As it is well known, creative fashion production has never been so successful in that country. This can be explained not only by the peculiarities of this industry, seasonality, volatility, and short life cycle, but mainly because it is precisely the possibility of copying and "per se" that drive innovation. In a highly competitive marketplace, where consumers are extremely demanding, innovation and fast fashions are driving innovation.

For these reasons, there are countless bills in the US Congress to overcome the current limits of design protection and the products of its industry[8].

#### b)France

French law reveals a model that differs from the American seen above. The Code de La *Propriété Intellectuelle* expressly protects fashion designs through copyright. On the basis of the Berne Union Convention, protection is granted automatically, regardless of registration, and the duration extends throughout the life of the author, and more than 70 years after his death. Therefore, designs in France receive the same copyright protection, with the same rights to execution and searches and seizure.

French courts apply existing legal rules and ensure certain and rigid protection of fashion-related designs, which is why the French industry is growing by leaps and bounds, and its market is one of the strongest and most important in the world.

The comparison between the two models is important when it comes to research on which one is most suitable for innovation and the development of the sector. No study to date has been able to demonstrate clearly and assertively whether much, little or no protection is responsible or not for the growth of the sector. This is because the fashion world is complex and subject to many variables and sectors with their own characteristics. On the other hand, the definition of innovation in this sector is unstable and usually linked to classic patterns, pursued and reproduced for decades, subject to mere incremental updates.

#### c)The fashion protection in Brazil

In Brazil, there are no specific legal norms on "fashion". Nevertheless, as seen here, fashion is a dynamic concept, related to custom and reflects the evolution

[5] According to Kal Raustila and Christopher Sprigman. "The knochoffeconomy: Howimitationsparksinnovation". United Kingdom: Oxford University Press.

[6] "Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself".

[7] Mazer v. Stein, 347 U.S. 201 (1954). Handler, S. P. (1971). "Copyright Protection for Mass-Produced, Commercial Products: A Review of the Developments Following Mazer v. Stein". University of Chicago Law Review. 38 (4): 807–825. JSTOR 1598873

[8] The proposals can be studied on site: http://www.thefashionlaw.com/learn/proposed-copyright-legislation-for-fashion-designs.

of behavior. Several are fashionable products. Numerous sectors. For this reason, it would be difficult for a law or protection code that could satisfactorily achieve all its products/results in all its sectors of activity.

However, even without a specific protection regime, fashion products find protection under Brazilian law. This protection ensures the growth of the sector and encourages innovation.

**(i) Industrial Property Perspective**

Products that result from the fashion industry find protection in the following industrial property rights sectors:

- Invention Patents;
- Utility Models;
- Industrial drawings;
- Brands;
- "Trade Dress"
- Unfair competition

The fashion product may be protected by one of the categories above, some of them or all at the same time.

In developing a product, its creator can come up with an invention or utility model and then get its *Instituto Nacional da Propriedade Industrial* (INPI) [National Institute of Industrial Property] registration. They can also develop their distinctive signs in the market, and look for the trademark registration, or even trademarks, being able to make a registration in the *INPI*. The product, according to its complexity, may compose specific "trade dress" and find in this category adequate protection. All these types of protection may fall on the product/good alone or together. One protection does not exclude the other.

In the specific hypothesis of fashion design, Brazilian Industrial Property Law (IPL) (No. 9279/96-IPL) presents a generous prediction that can wrap up claims of protection of that "good" directed to the fashion industry.

According to Art. 94 of the IPL, "the author will be assured the right to obtain registration of industrial design". The Law considers industrial design, in the light of Art. 95, "the ornamental plastic form of an object or the ornamental set of lines and colors that can be applied to a product, providing a new, original (distinctive) visual result in its external configuration and which can serve as an industrial manufacturing type". New (distinctive) is considered the industrial design when not included in the state of the art (Article 96 of IPL). State of the art consists of everything made public before the date of filing of the application in Brazil or abroad, by use or any other means (Article 96, paragraph 1 of the IPL).

Therefore, there is nothing to prevent the registration, on the above conditions, of products intended for fashion.

**(iii) Copyright Perspective**

Bearing in mind the lack of specific legal rules on "fashion design" and the lack of expertise of our judges, Brazilian courts have recognized some degree of protection for designs conceived by the fashion industry. They do not deny protection, as do the North Americans who exclude the utilitarian aspects, nor even declare rights as vast as in French law.

The trend of judges in Brazil is in an intermediate position. That is, they aim to encourage innovation, on the one hand, and on the other limit the simple copy, requiring to provide protection to incremental elements. Our magistrates understand that protection cannot be so extensive as to restrain the reproduction of "ideas" or "trends" and therefore incremental innovations and the development of the fashion industry and at the same time recognize the need for some protection so that the author/developer of the product can feel rewarded and find subsidies to continue developing.

From this point of view, decisions have conferred copyright to the "fashion design" in Brazil.

In the case of Poko Pano and C&A, judged by the Court of Justice of *São Paulo*, the first filed a lawsuit of indemnification and abstention from use by C&A for the unauthorized reproduction of a stylized doll design owned/developed by Poko Pano. C&A was ordered to stop the manufacture and sale of the products and to pay damages for "copyright infringement". The Court of São Paulo, while granting copyright protection, has explicitly maintained permission for "free use of a particular trend". That is, the "idea", the "tendency" to stamp dolls on garments is not, in itself, protected by copyright - this use is free. However, that specific figure is protected and cannot be reproduced without the creator's authorization (Appeal 990.10.460157-6 TJ/SP).

In the case of Hermès and Village 284, the Court of *São Paulo* examined the issue of protecting "fashion design" further. The Village 284 would have reproduced, without Hermès permission, its traditional and classic Birkin bag, but made of inferior fabric, in sweatpants, instead of stylized leather. The bag, created in 1984, is considered an icon of fashion in France to this day. The 284 launched the bag in Brazil reproducing its exact "design", but with the proviso "it is not an original product".

In that case, the Court granted Hermès' design protection, even without prior registration, against the unauthorized copying of 284, even before the mitigating effects of the different material and the proviso that "it is not an original product". The Court of *São Paulo* upheld the decision of the aforementioned Court, based on the understanding that the stock exchange reproduced by 284 implied unlawful conduct, therefore, "unfair competition", in accordance with the provisions of Art. 209 from the IPL, regardless of whether the issue is copyright or industrial property (Civil Appeal 0107079-30.2008.8.26.0011, on August 13rd, 2013/TJ/SP).

As we can see, jurisprudence in Brazil is incipient, but consistent. The few decisions reveal the trend towards

intellectual property rights protection and unfair competition, curbing mere copying but not the reproduction of "ideas" or "trends" and, as a consequence, seeking to encourage incremental innovations that add value to the fashion marke.