



TIFFANY PERNA

EU DESIGN LAW : HOW TO PROMOTE SUSTAINABILITY IN THE FASHION INDUSTRY?

Dissertation to obtain a Master's Degree
in Law and Management

Supervisor:
Dr. Giulia Priora, Professor of the NOVA School of Law

2023 June

I hereby declare that the work I present is my own work and that all my citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offence.

Abstract

The fashion industry plays a significant role in the global economy, contributing to cultural expression, employment, and economic growth. However, its environmental and social impact cannot be ignored. The current fast-paced and consumer-driven nature of fast fashion copyists has led to alarming levels of waste, resource depletion, and exploitation of labor. Fast fashion brands capitalize on the demand for trendy and affordable clothing by swiftly imitating popular designs showcased by fashion houses and small designers. By utilizing cheap labor and low-quality materials, they produce garments at a fraction of the cost, making fashion accessible to a wider consumer base. However, this approach comes at a substantial cost to both the environment and the original designers.

This paper explores the detrimental effects of fast fashion on the fashion industry within the EU and highlights the importance of intellectual property, particularly design protection, as a critical tool in combating this issue. The EU Design Regulation enables designers enforcing their exclusive design rights against fast fashion copycats and prevent the unauthorized use of their designs. By taking legal action, designers can safeguard their creative works and deter fast fashion companies from engaging in unethical practices. By actively asserting their rights and engaging in legal measures, designers can drive positive change in the industry and promote consumer behavior towards ethical and sustainable fashion. However, despite the availability of extensive and adequate protection, research indicates a limited use of enforcement tools by fashion designers in the EU.

Table of contents

Abstract	iii
Table of contents	iv
List of abbreviations	vi
List of figures	vii
Introduction	1
Chapter 1. The fashion industry and its quest for sustainability	3
1. The concept of fashion and the evolution of the fashion industry	3
1.1. Definition of fashion and related terms.....	3
1.2. Segmentation of the fashion industry	5
1.3. Fashion product life cycle	6
1.4. The rise of fast fashion: a challenge for the fashion industry	8
2. The importance of sustainability in the fashion industry	12
2.1. Sustainability in the fashion industry from a EU policy perspective.....	13
2.2. Movement of slow fashion.....	15
2.3. Role of the designer and the design in the quest for sustainability.....	16
3. Imitation in the fashion industry	19
Chapter 2. Design law protection in the European Union.....	21
1. IPR, sustainability and fashion.....	21
2. International Treaties and Conventions for the protection of designs.....	21
1.1. Paris convention.....	22
1.2. Berne convention	22
1.3. TRIPS Agreement.....	23
3. The EU Design Law Framework	25
1.1 Requirements for acquisition of protection.....	28
2.2. Scope of the protection	36
Chapter 3: Enforcing design rights in the European Union: infringement procedures	40
1. Infringement procedure under the Regulation	40
2. EU case law regarding infringement upon fashion designs	42
3. Enforcement against the current fast fashion practices in the light of the EU case law	58
Chapter 4: Underuse and obstacles of EU Design law in the quest to sustainability in the fashion industry	64

1. Underuse of the EU design protection framework	64
2. Intrinsic shortcomings of the EU legislation on design protection	66
2.1. Time and cost of a Community design	66
2.2. Term of protection	67
2.3. Requirements for protection	70
3. Too big to battle?.....	73
4. The potential irrelevance/denial of design protection as a whole: The so-called piracy paradox	76
Conclusion.....	78
Bibliography.....	81
1. Legislation.....	81
1.1. International	81
1.2. European Union	81
2. Case law	81
2.1. European Union	81
2.2. National.....	82
3. Literature	83

List of abbreviations

AI	Artificial intelligence
Berne Convention	Berne Convention of 19 November 1984 for the Protection of Literary and Artistic Works
CJEU	Court of Justice of the European Union
ESPR	Eco-Design for Sustainable Products Regulation
EUIPO	European Union Intellectual Property Office
General Court	General Court of the European Union
IP	Intellectual property
IPR/IPRs	Intellectual property rights
OHIM	Office for Harmonization in the Internal Market
Paris Convention	Paris Convention of 20 March 1883 for the Protection of Industrial Property
RCD	Registered Community Design
The Directive	Directive of 13 October 1998 on the Legal Protection of Designs
The Regulation	Council Regulation of 12 December 2001 on Community Designs
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCD	Unregistered Community Design
WIPO	World Intellectual Property Organization

List of figures

- Figure 1 – Fashion product life cycle
- Figure 2 – Earlier Peekabo handbag Fendi
- Figure 3 – Deposited model of the earlier Peekabo handbag Fendi
- Figure 4 – Alleged infringing handbag Coach
- Figure 5 – Birkin handbag Hermès in the prior art
- Figure 6 – Kelly handbag Hermès in the prior art
- Figure 7 – L’Arbre de Vie-scarf Hermès
- Figure 8 – Alleged infringing Veritas scarf
- Figure 9 – Tardive dress Nelson
- Figure 10 – Deposited model of the Tardive dress Nelson
- Figure 11 – Alleged infringing Toko dress
- Figure 12 – Skinzee-sp Jeans Diesel
- Figure 13 – Alleged infringing Biker Zippers jeans Zara
- Figure 14 – Pointed Loafer of Rothy’s
- Figure 15 – Alleged infringing Pointy Flat of Geisswein
- Figure 16 – ‘*Allegra K*’ and ‘*Bonnibel*’ suede shoes in prior art
- Figure 17 – Design of small designer Mariama Diallo copied by SHEIN
- Figure 18 – Design of small designer Elexiay copied by SHEIN
- Figure 19 – Birkin bag Hermès
- Figure 20 – Copies of the Hermès Birkin bag found by a simple online research

Introduction

Since the early 1980s, industrialization spread around the world and had a significant impact on how the production of clothes is organized in the fashion industry. Clothing started being produced in standard sizes on a large scale at a low price, mostly in Eastern low-cost countries.¹ The economy was growing, giving consumers more purchasing power. New players entered the market with a new tactic: speed. A new clothing industrial practice called ‘*fast fashion*’ was born. Fast fashion refers to the production and sale of inexpensive clothing that quickly imitates current fashion trends. This business model relies on quickly replicating designs from luxury brands and popular fashion houses, often at a fraction of the original cost.

This reflects a current global trend, where we buy more clothes than ever and use them for shorter periods of time. The industry is bigger, faster and cheaper. The good news is that experts predicted a global economic growth of the sector from €408 billion in 2017 to €712 billion by 2022.² The bad news is that the environment is paying the price for our buying habits. While it offers affordability and accessibility to consumers, it has several negative consequences for the environment and society. The consequences are dramatic, thinking of increasing consumption of water and chemicals, rising CO2 emissions and an ever-growing textile waste mountain.

When environmental thinking first emerged in the sector in the 1970s, it was more focused on finding solutions to the waste issues brought on by the production of fashion items. But a more comprehensive approach was needed. Rethinking the whole process of clothing and fashion items manufacturing during its development plays a crucial role in this journey. Today, sustainable thinking seeks to find sustainable balance in the use of economic, social, and environment.

Intellectual property rights can play a vital role in promoting sustainability in the fashion industry. The imitation and copy business model of fast fashion retailers perpetuates a cycle of constant copying and infringement of intellectual property rights. Fast fashion brands blatantly imitate designs from luxury brands and independent designers without proper authorization or

¹ GODART., F., ‘The power structure of the fashion industry: Fashion capitals, globalization and creativity’, *INFS* 1(1), 2014, pp. 39-55.

² Emerce 100 Magazine, 2020 Edition.

credit. These imitations represent fashion products that closely resemble, but are not always identical to, designs created by others.

In this context, the protection of design as a IPR can serve is a valuable tool for designers in the battle against fast fashion imitations within the EU. Design rights are particularly relevant in the fashion industry where aesthetic appeal and distinct design elements play a central role. With the introduction of the EU Design Directive and Regulation, legal protection is provided to the visual appearance of a fashion garment such as clothing, footwear, handbags and accessories.³

The aim of this thesis is to analyze how the protection of designs under the EU Design Regulation can help designers to navigate the challenges posed by the fast fashion phenomenon within the European Union and how it can contribute to a more sustainable and ethical fashion industry. The current landscape of the protection of designs within the EU will be examined together with its potential to drive transformative and sustainable change within the fashion industry.

For that purpose, the first Chapter presents the fashion market's segmentation, the rise of fast fashion and the impact of the digitalization and the importance of sustainability in the industry. We will briefly discuss the role of the designer and the design in the quest for sustainability while addressing how fast fashion infringes upon their design rights through unsustainable practices.

The second Chapter examines the requirements and formalities that must be met for a fashion design to receive protection under the Regulation. Additionally, it describes the scope of protection granted to designs. When these conditions are satisfied, the designer holds exclusive rights in its design that can be enforced against fast fashion imitators.

The third Chapter introduces the infringement proceedings related to design rights in the fashion industry. The enforcement of design rights by designers is a crucial aspect in the quest to sustainability in the fashion industry. Through an analysis of European and national case law,

³ European IP Helpdesk, 'IP in the Fashion Industry', https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-02/EU_IP_HD_Fact_Sheet_IP-fashion-industry.pdf.

this chapter explores how the principles outlined in the EU Design Regulation are put in practice in terms of enforcement and what is considered as an infringement of fashion designs.

Lastly, the final Chapter will identify whether the EU-based fashion designers adequately utilize the EU Design Law Framework and highlights key areas in which the EU Design Regulation may fall short in supporting fashion designers and promoting sustainable practices in the fashion industry.

Chapter 1. The fashion industry and its quest for sustainability

1. The concept of fashion and the evolution of the fashion industry

1.1. Definition of fashion and related terms

When thinking about fashion, one immediately connects it to clothing. The term is commonly used to refer to popular fashion styles that are highly valued at a particular moment in time.⁴ However, the term encompasses more than just the material aspect and can be conceptualized as an example of a broader phenomenon: the creation and assignment of symbolic values to material culture.⁵ Fashion goes further than just the visual or tangible clothing.⁶ While clothing covers the body, fashion items satisfy individuals' needs, going from physiological needs or safety to self-actualization, esteem, and belonging.⁷ Fashion has always played an important role in the evolution of society. It gives individuals the chance to be creative, express themselves or show their personal identity, talent and culture.

Behind the concept of fashion lies a global industry with a powerful economic, political and cultural impact people's life, regardless of whether they are making, selling, wearing or even just watching fashion.⁸ The term fashion refers to systems that produce new clothing styles and endeavor to make them appealing to the public.⁹ Therefore, '*fashion*' should be distinguished from the '*fashion industry*'. The fashion industry refers to a global supply chain that begins with the production of raw materials, moves on to designing, manufacturing, marketing and

⁴ CRANE, D. and BOVONE, L., 'Approaches to material culture: The sociology of fashion and clothing', *Poetics* 34(6), 2006, p. 320.

⁵ Ibid.

⁶ KAWAMURA, Y., 'Fashion-ology: An Introduction to Fashion Studies', Oxford, *Berg Publishers*, 2005.

⁷ MARCINIA, R., 'Fashion is more than clothing: lifestyle marketing', British School of Fashion, <https://britishschooloffashion.com/fashion-is-more-than-clothing-lifestyle-marketing/>.

⁸ CRAIK, J., '*Fashion: the key concepts*', *Berg Publishers*, United Kingdom, 2009.

⁹ CRANE, D. and BOVONE, L., 'Approaches to material culture: The sociology of fashion and clothing', *Poetics* 34(6), 2006, p. 320.

sales, and ultimately encompasses the consumption of clothing and accessories.¹⁰ In the EU, approximately 5 million people are directly employed in the fashion value chain and over 1 million people are employed in the high-end industries.¹¹ Undoubtedly, the fashion industry makes a significant contribution to the EU economy and is one of the most vibrant and creative sector in the EU.¹²

However, fashion is a concept that is less tied to the industry and more reflective of society. It represents the aesthetic expression of humanity's never-ending search for novel color, shape, or fabric combinations.¹³ Although some products have longevity in fashion, referred to as 'basics', such as a simple white t-shirt or blue jeans, fashion implies constant change. These continual changes are known as 'trends'. A trend refers to a particular style that is considered fashionable and in high demand among consumers for a relatively short period of time, such as the shape or length of trousers or the color of a dress.¹⁴ The development of a trend originates outside the fashion scene and is often a reflection of the prevailing spirit of the times in society. Designers pick up on this collective sentiment and translate their interpretation of into their fashion designs. These designs are the creative output of the designer's idea, with a specific trend as a starting point.

The past decade has seen a sharp increase in the pace of trends in production and innovation.¹⁵ Traditionally, fashion labels designed a summer and a winter collection, occasionally with interim collections. However, this scenario has now changed. A piece of clothing can be trendy one day, and deemed outdated the next. Fashion is no longer limited to the elite and is no longer seen as a luxury good; it is now within the reach of almost everyone, from the middle to lower class.¹⁶ Fashion retailers have capitalized on this consumption culture by delivering the right product at the right time in the market. This culture is characterized by high levels of clothing production, with new collections being offered every two weeks or even more frequently, a

¹⁰ HARKONEN, H., 'Fashion and Copyright: Protection as a Tool to Foster Sustainable Development', University of Lapland, 2021, p. 20.

¹¹ European Commission, Fashion and high-end industries in the EU, https://single-market-economy.ec.europa.eu/sectors/fashion/fashion-and-high-end-industries/fashion-and-high-end-industries-eu_en.

¹² Ibid.

¹³ HOACHEN, S., 'The Distinctiveness of a Fashion Monopoly', *JIPEL* 3(1), 2013,.

¹⁴ HARKONEN, H., 'Fashion and Copyright: Protection as a Tool to Foster Sustainable Development', University of Lapland, 2021, p. 19.

¹⁵ SCHRAMME, A. and SCHRAUWEN, J., 'De mode-industrie in Vlaanderen gesegmenteerd', *Flanders DC*, 2013, <https://www.flandersdc.be/uploads/media/588611aa6a2e1/2016-03-ams-demodeindustrieinvlaanderengesegmenteerd.pdf>.

¹⁶ LIPOVETSKY, G., *The Empire of Fashion: Dressing Modern Democracy*, Princeton University Press, 1994, New Jersey.

faster turnover, faster consumption, and faster disposal of clothing. This practice is known as ‘fast fashion’. The fast fashion industry and its business models facilitate and reinforce this behavior and economic culture, creating ever-increasing pressure not only on the price, quality, and the entire supply chain, but also on the environment.¹⁷

1.2. Segmentation of the fashion industry

Within the fashion industry, a form of segmentation identifies the fashion brands based on their value and position in the market. These schemes have different classifications based on factors such as price, quality, demand, craftsmanship, and creativity. Generally, there are 5 levels of fashion segmentation:

Haute couture¹⁸: this category represents the supreme luxury segment. Designers in this segment have a selective and exclusive market but employ maximum creativity and use the highest quality materials. It is often associated with very extravagant garments, unique pieces of art created by hand with the most refined techniques.

Ready-to-wear: Ready-to-wear or *prêt-à-porter* is the term for clothing designed for production and sale through retail channels such as department stores or online shops. These clothes are not tailor-made for individual customers but are industrialized with standardized sizes. However, they are still made with high-quality materials and come with high price tags. Ready-to-wear collections offers a much greater return-on-investment compared to couture collections.¹⁹

Premium fashion: Designers in this segment have transitioned from the top-tier to the ready-to-wear market range in order to broaden their product offering. This is often referred to as a second young line. Since these collections are frequently outsourced and produced in bulk, they are comparatively more affordable.

¹⁷ BAKKER, B. e.d., ‘Fast fashion onderzoek: vermindering van de negatieve impact’, *KplusV*, 2020.

¹⁸ The Chambre Syndicale de la couture parisienne and French law protect the use of the term ‘haute couture’. Because of this, the word ‘couture’ is often used for collections that are made in the same way as haute couture collections, but are not recognized by the Chambre Syndicale (SCHRAUWEN, J. and SCHRAMME, A., ‘Unraveling the Fashion Industry in Flanders, [Microsoft Word - Chapter 1 Schrauwen & Schramme 16 february 2014.docx \(editorialexpress.com\)](#)).

¹⁹ ARBUCKLE, J. and STERLACCI, F., ‘The A to Z of the Fashion Industry’, *Rowman & Littlefield*, 2009, p. 223.

High street retailers: These mid-range labels have a clear identity and mainly target a well-defined but large group from the (upper) middle class. They focus on offering customers the right amount of fashion creativity while also providing them the best value for their money. Production volumes tend to be higher than for luxury designers, and the technicality of the workmanship is also lower, although still quality-wise. As a result, consumer prices for these fashion brands are also lower than in previous segments.²⁰

Mass market: The mass market is the segment at the base of the pyramid, where clothing is produced on a large scale and is frequently used by consumers to meet their daily clothing needs. The target market for these brands is the average consumer who wants nice clothes at reasonable or cheap prices and is also willing to return often to the shop. No longer the domain of the wealthy few, the industry has grown into a worldwide establishment, driven by advertising, imitation, and mass production.²¹ Mass retailers are capable of translating trends into products in a matter of weeks. It is within this segment that the fast-fashion industry is situated.

1.3. Fashion product life cycle

The fashion product life cycle encompasses the entire process, starting from the design of a product and continuing through its introduction to the market until it eventually leaves the market, replaced by another trend. This life cycle consists of four distinct phases: introduction, growth, maturity and decline.²² While the life cycle for most fashion products is relatively short, some products may remain in a prolonged state of maturity. According to LEVITT, the traditional life cycle of a fashion product follows this pattern²³:

²⁰ SCHRAMME, A. and SCHRAUWEN, J., 'De mode-industrie in Vlaanderen gesegmenteerd', *Flanders DC*, 2013, p. 40, <https://www.flandersdc.be/uploads/media/588611aa6a2e1/2016-03-ams-demodeindustrieinvlaanderengesegmenteerd.pdf>.

²¹ POWELL, S., 'Historical Dictionary of the Fashion Industry', *Reference Reviews* 23(1), 2009, p. 19.

²² See KOTLER, P., 'Principles of Marketing', Pearson, 2008.

²³ LEVITT, T., 'Exploit the Product Life Cycle', November 1965, [Exploit the Product Life Cycle \(hbr.org\)](http://hbr.org).

Sales volume (dollar index)

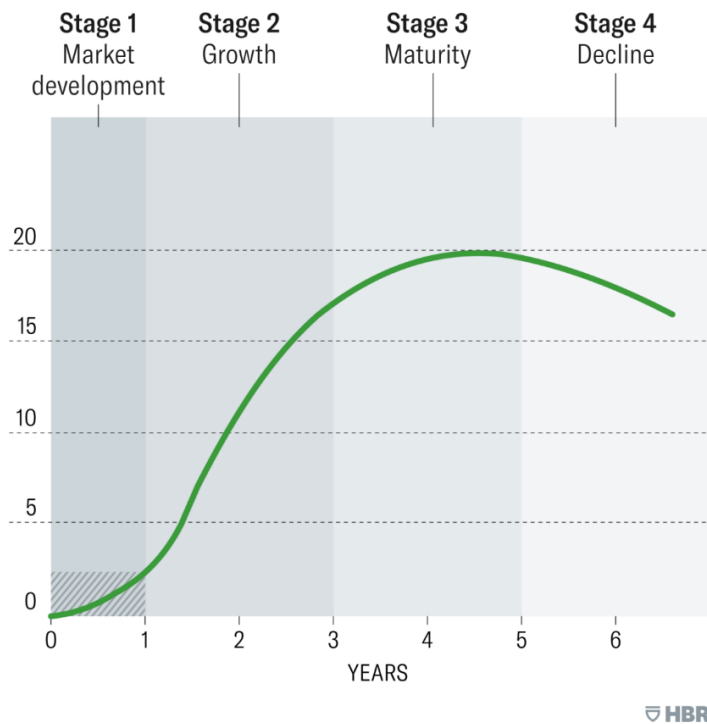


Figure 1 – Fashion product life cycle (Source: Theodore Levitt, ‘*Exploit the Product Life Cycle*’, November 1965)

Before being introduced to the market, a fashion product goes through the manufacturing process, also known as the ‘*development phase*’. A traditional fashion lifecycle is based on seasonality, with collections designed to last 6 months, corresponding to the Spring/Summer or Autumn/Winter seasons.²⁴

When a new product is created and released onto the market without proved demand²⁵, it enters the ‘*introduction phase*’. Sales of the product are relatively low and the competition is limited during this stage. Investments are made to raise brand awareness through advertisements, fashion shows, magazines, and other means to boost product demand and move into the ‘*growth phase*’. Sustaining growth for as long as possible is critical, as the product begins to generate high profits. Once a product has reached its maximum potential, it enters the ‘*maturity phase*’.

²⁴ SEGURA, A., ‘Fast fashion, the art of liquidity’, 2017, <https://fashionretail.blog/2017/06/19/fast-fashion-the-art-of-liquidity/>.

²⁵ Affine, ‘Product life cycle management in apparel industry’, <https://affine.ai/product-life-cycle-management-in-apparel-industry/>.

The number of competitors increases, resulting in a decrease in market share.²⁶ However, the product continues to make substantial sales and generate profits that can create opportunities for new products. Sales may decline as a product remains on the market for an extended period, becoming outdated or facing saturation due to increased competition. This signals the entry into the '*decline phase*'. Despite declining popularity, fashion companies strive to extend the product's life cycle because it can still yield profits. In some cases, innovation or redesigning of the product or its branding can delay or prevent the decline phase.²⁷ Additionally, a product may cycle back into the growth stage after reaching the decline stage due to aggressive promotion, repositioning, or it may remain in the mature stage indefinitely without declining, as is the case for basics.²⁸

1.4. The rise of fast fashion: a challenge for the fashion industry

The textile and clothing industry has always played a significant role in the economic and social fields. However, it is currently facing numerous challenges, with one of the greatest being the transition to a more sustainable fashion industry. The main barrier to achieving sustainable environment is the rise of fast fashion and its dominant position in the market. Fast fashion refers to the rapid production and delivery of clothing by mass market retailers, inspired on the current trends. Fast fashion garments are inexpensive and consumers often see it as disposable without giving it much thought nor value.²⁹

The life-cycle of a fast fashion garment is a '*15-day journey of transporting a garment from the mind of the 'creators' to the stores*'.³⁰ This accelerated process eliminates time-consuming activities and speeds up each phase.³¹ The business model of fast fashion companies involves the rapid production of cheap clothes using toxic dyes and harmful chemicals. They rely on a

²⁶ Affine, 'Product life cycle management in apparel industry', <https://affine.ai/product-life-cycle-management-in-apparel-industry/>.

²⁷ SHIVANGI, 'Style, fashion and fad in marketing', 2020, <https://shivangiarwal.home.blog/2020/10/14/style-fashion-and-fad-in-marketing/>.

²⁸ SHIVANGI, 'Style, fashion and fad in marketing', 2020, <https://shivangiarwal.home.blog/2020/10/14/style-fashion-and-fad-in-marketing/>.

²⁹ PAYNE., A., 'The Life-cycle of the Fashion Garment and the Role of Australian Mass Market Designers', *International Journal of Environmental* 7(3), 2011, p.3.

³⁰ The fashion starter, 'Life cycle of a garment in the fast fashion world', 2021, <https://thefashionstarter.com/2021/11/30/life-cycle-of-a-garment-in-the-fast-fashion-world/>.

³¹ BERG, A., LOBIS, M., ROLKENS, F. and SIMON, P., 'Faster fashion: how to shorten the apparel calendar', 2018, <https://www.mckinsey.com/industries/retail/our-insights/faster-fashion-how-to-shorten-the-apparel-calendar>.

clothing supply chain model that responds in no time to the latest fashion trends, frequently updating their clothing products in stores and online on a weekly or even daily basis.³² The speed of trend cycles results in cheaper prices, faster production and consumption of clothing, made possible through the current globalized model of cheap off-shore manufacturing.³³

In recent years, big data has become increasingly relevant in the fashion industry. Previously, the fashion industry heavily relied on intuition and creativity for designing, buying, and merchandising.³⁴ However, fast fashion retailers are now relying more on big data for trend forecasting, supply chain management, analyzing customer behavior, and garment design.³⁵ Numerous technologies assist the sector in finding new ways to meet the customer's constantly expanding and shifting needs.³⁶ Data-based tracking systems optimize the market by linking different stages of production, design, and marketing, from raw materials to finished products and shops.³⁷ Mass production has evolved into mass customization, which is just customization done with mass production efficiency.³⁸ As way of example, the fast fashion company *Zara* reinvented fashion through real-time trend identification and data analytics³⁹, making it possible for a new product to reach the stores within 2 weeks. A RFID microchip is attached to each piece which is enabled to track real-time information about over 2100 *Zara* store's inventory and the selling process.⁴⁰ The central data processing center receives this information and enables customized weekly or monthly product deliveries to individual stores based on specific inventory data.⁴¹

³² BYUN, S.-E. and STERNQUIST, B., 'Fast fashion and in-store hoarding', *Clothing and textiles research journal* 29(3), 2011.

³³ PAYNE., A., 'The Life-cycle of the Fashion Garment and the Role of Australian Mass Market Designers', *International Journal of Environmental* 7(3), 2011, p.3.

³⁴ SILVA, E., HASSANI. H. and MADSEN, D., 'Big data in fashion: transforming the retail sector', *Journal of Business Strategy*, 2019; for a deeper analysis of the use of big data and AI in fashion I refer to THOMASSEY, S. and ZENG, X., *Artificial Intelligence for Fashion Industry in the Big Data Era*, Springer Series in Fashion Business, 2018.

³⁵ Ibid.

³⁶ JAIN, S., e.d., 'Big data in fashion industry', *IOP Conf. Series* 254, 2017.

³⁷ THOMASSEY, S. and ZENG, X., *Artificial Intelligence for Fashion Industry in the Big Data Era*, Springer Series in Fashion Business, 2018, p. 1.

³⁸ GRIMAL, L., and GUERLAIN, P., 'Mass customization in apparel industry – implication of consumer as co-creator', *Journal of Economics & Management*, 15, 2014; JAIN. S., e.d., 'Big data in fashion industry', *IOP Conf. Series*, 254, 2017.

³⁹ SEGURA, A., 'Fast Fashion, the art of liquidity', 2017, <https://fashionretail.blog/2017/06/19/fast-fashion-the-art-of-liquidity/>.

⁴⁰ M. 'Digitalization of Zara and Fast Fashion', *Harvard TOM*, 2017, <https://d3.harvard.edu/platform-rctom/submission/digitalization-of-zara-and-fast-fashion/>.

⁴¹ Ibid.

Digitalization has paved the way for even faster, known as ‘*ultra-fast fashion*’. This new generation of mass-market retailers has accelerated the process by adopting a direct-to-consumer approach and relying on artificial intelligence (hereafter ‘AI’), social tagging and trend-watching by style scouts to identify trends.⁴² With an ultra-fast fashion cycle, new products can go from development to introduction within 24-48 hours, leading to the normalization of overconsumption. One prominent player in the ultra-fast fashion industry is the clothing app *SHEIN*, which releases hundreds of fashion garments every day, ranging in price from 0,50 cents to 15 euros. The company utilizes social media gather data on fashion designs and labels from unaware customers, and then instructs its factories to produce copies at a lower price than its rivals.⁴³ Through an algorithm on their clothing app and website, SHEIN collects data on the popularity of garments and sends that information directly to manufacturers. AI and big data predict consumer buying patterns, eliminating the need to solely rely on garments sales.⁴⁴ Additionally, SHEIN’s decision to operate solely online and have full control over production allows for significant cost savings.

However, the environmental impact and working conditions associated with the textile production in low-wage countries raise concerns. These companies often produce cheap disposable clothing, overproduced in low-wage countries and made out of profitable synthetic fibers derived from fossil fuels.⁴⁵ Moreover, fast fashion companies heavily rely on synthetic fibres like polyester, nylon and acrylic which take hundreds of years to biodegrade.⁴⁶ The fast fashion industry has significantly increased the use of those fabrics, producing almost twice the amount of clothing today in comparison to 25 years ago.⁴⁷ Such practices result in substantial amounts of textile waste, although considerations of pollution and waste are not their primary concerns.⁴⁸ Fast fashion retailers rather focus on offering low prices and speed delivery, which

⁴² CAMARGO, L. R. and FARIAS PEREIRA, S. C., ‘Fast and ultra-fast fashion supply chain management: an exploratory research’, *IJRDM*, 2020, p. 4.

⁴³ OLIVER, A., ‘China’s fast-fashion spy machine: How shadowy teen brand Shein uses algorithms to harvest data on its users and find out what they want to buy - before its mega-factory spits the clothes out at rock-bottom prices’, *Daily Mail*, 2021, <https://www.dailymail.co.uk/news/article-9936113/How-shadowy-teen-brand-Shein-uses-algorithms-harvest-data-users.html>.

⁴⁴ YIQIN, F., ‘SheIn: A story of Online Segregation and Data as Business Intuition’, 2021, <https://yiqinfu.github.io/posts/shein/>.

⁴⁵ BICK, R., HALSEY, E. and EKENGA, C. ‘The global environmental injustice of fast fashion’, *Environmental Health*, 17(92), 2018, p. 2.

⁴⁶ MAITI, R., ‘Fast Fashion and Its Environmental Impact’, 2023, [Fast Fashion and Its Environmental Impact in 2023 | Earth.Org](https://www.earth.org/2023/03/2023-fast-fashion-and-its-environmental-impact/). According to a [report](#) from 2017 from the International Union for Conservation of Nature, 35% of all microplastics in the ocean come from the laundering of synthetic textiles like polyester.

⁴⁷ NIINIMAKI, K., e.d., ‘The environmental price of fast fashion’, *Nature Reviews Earth & Environment*, 1, 2020, p. 189.

⁴⁸ *Ibid.*

in its turn, further influences consumers to buy more and wear items less frequently. Considering the widespread prevalence of fast fashion and the enormous volume of items produced and wasted, the fast fashion industry poses a significant environmental threat.⁴⁹

Moreover, digital innovation has also transformed consumer spending habits.⁵⁰ Fast fashion is primarily driven by consumer choice, and the industry invests heavily in influencing these buying decisions.⁵¹ Marketing strategies concentrate on consumers' perceptions of success, status, and beauty, playing on the addiction-oriented and '*fear of missing out*' mentalities by associating rarity with value and luxury.⁵² Their target audience does not wait for sales but exhibits accelerated buying behavior, desiring immediate ownership and willingness to pay for the product.⁵³ BYUN and STERNQUIST conducted a study on the influence of perceived limited availability on buying behavior in a fast fashion shop.⁵⁴ The authors found that durability and scarcity influenced both the '*anticipated gains of buying*' and the '*anticipated losses of not buying*'⁵⁵, leading to in-store hoarding and accelerated purchases.⁵⁶ Consequently, an environment is created where customers feel pressured to immediately purchase their preferred products.⁵⁷

The public's taste in clothes is influenced by what they are exposed to.⁵⁸ Fast fashion retailers excel at leveraging human psychology to encourage consumers to buy more and provide them with a sense of euphoria. This pattern of constantly chasing pleasure is called the '*hedonic treadmill*': the feeling of happiness from a new piece of clothing quickly wears off, making people look for this feeling again.⁵⁹ GREGORY stated: '*By playing upon and reinforcing*

⁴⁹ Ibid.

⁵⁰ CAMARGO, L. R. and FARIAS PEREIRA, S. C., 'Fast and ultra-fast fashion supply chain management: an exploratory research', *IJRDM*, 2020, p.5.

⁵¹ SOTO, N., 'Sustainable Fashion: Identifying Fast Fashion Flaws and Extending the Life Cycle of Clothing', *Green Business Bureau*, 2021, <https://greenbusinessbureau.com/industries/fashion/sustainable-fashion-identifying-fast-fashion-flaws-and-extending-the-life-cycle-of-clothing/>.

⁵² Ibid.

⁵³ BYUN, S.-E. and STERNQUIST, B., 'Here Today, Gone Tomorrow: Consumer Reactions to Perceived Limited Availability', *The Journal of Marketing Theory and Practice*, 20(2), 2012.

⁵⁴ BYUN, S.-E. and STERNQUIST, B., 'Fast fashion and in-store hoarding', *Clothing and textiles research journal*, 29(3), 2011.

⁵⁵ I.e. the advantage of buying and disadvantage of not buying.

⁵⁶ BYUN, S.-E. and STERNQUIST, B., 'Here Today, Gone Tomorrow: Consumer Reactions to Perceived Limited Availability', *The Journal of Marketing Theory and Practice*, 20(2), 2012.

⁵⁷ BYUN, S.-E. and STERNQUIST, B., 'Fast fashion and in-store hoarding', *Clothing and textiles research journal*, 29(3), 2011.

⁵⁸ GREGORY, P.M., 'Fashion and Monopolist Competition', *Journal of Political Economy*, 56(1), 1948.

⁵⁹ SELIGMAN, M. E. P., 'Authentic happiness: Using the new positive psychology to realize your potential for lasting fulfillment' *New York, Psychology*, 3(12A), 2002; DULANEY, M., 'How fast fashion uses human psychology to keep you buying more', *ABC RN*, 2022, <https://www.abc.net.au/news/2022-10-16/compulsive-shopping-fast-fashion-threads/101528868>.

*consumer ignorance; by providing the shadow instead of the substance of variety and consumer choice; by taking the buyer's mind off price, materials, workmanship, and durability; by encouraging waste in production; by preventing the independent development of the public taste; by getting the public in the habit of following self-appointed fashion arbiters instead of relying on their own aesthetic values or those of disinterested artists or designers, (...), – fashion intensifies imperfect competition.*⁶⁰ Essentially, fashion exploits the gullibility of buyers and thrives on the allure of promised satisfactions that are often more deceptive than genuine.⁶¹ By creating an illusion of constant novelty and enticing consumers with fleeting pleasures, fast fashion perpetuates a cycle of consumption that is disconnected from sustainable practices and individual aesthetic values.

2. The importance of sustainability in the fashion industry

Over the past two decades, global clothing production has roughly doubled, primarily due to an increased per capita sales in developed economies and a growing middle-class population worldwide.⁶² Unfortunately, the quality of these clothes is deteriorating, making it less likely that people to use them in a sustainable manner. The current approach to making, selling, and using clothes is almost entirely linear: most garments are made from non-renewable resources, worn for a short time, end then end up in landfills or burned.⁶³ It is estimated that more than half of the clothes produced are discarded within a year.⁶⁴ The combination of rapidly shifting fashion trends and short life cycles results in the practical service life of clothes (how long they are worn) being much shorter than their technical service life (how long they could be worn, even if they are no longer trendy).⁶⁵ This incredibly fast and short life cycle is the biggest barrier to sustainability in the mass market.⁶⁶

⁶⁰ GREGORY, P. M., 'Fashion and Monopolistic Competition', *Journal of Political Economy*, 56(1), 1948, pp. 69-75.

⁶¹ *Ibid.*

⁶² Ellen Macarthur Foundation, 'A new textiles economy: redesigning fashion's future', 2017, <https://ellenmacarthurfoundation.org/a-new-textiles-economy>.

⁶³ *Ibid.*

⁶⁴ European Parliament, 'The impact of textile production and waste on the environment', 2020, <https://www.europarl.europa.eu/news/en/headlines/society/20201208STO93327/the-impact-of-textile-production-and-waste-on-the-environment>.

⁶⁵ PETERS, G. M., e.d., 'Life cycle assessment of clothing libraries: can collaborative consumption reduce the environmental impact of fast fashion?', *Journal of Cleaner Production*, 162, 2017, pp. 1368-1375. ^[1]_{SEP}

⁶⁶ PAYNE., A., 'The Life-cycle of the Fashion Garment and the Role of Australian Mass Market Designers', *International Journal of Environmental*, 7(3), 2011, p. 3.

Indeed, sustainability, or rather the lack of it, is one of the biggest challenge in the fashion industry. The term should not be confused with the relatable concept of ‘*sustainable development*’. The most widely used definition of sustainable development, derived from the UN World Commission on Environment and Development, refers to ‘*a process to meet the needs of the present without compromising the ability of future generations to meet their own needs*’.⁶⁷ In the context of fashion, HARKONEN supplements this definition by viewing sustainable development as taking steps *towards* sustainability.⁶⁸ Sustainability is in its turn ‘*the holistic approach that considers ecological, social and economic dimensions, recognizing that all must be considered together to find lasting prosperity*’.⁶⁹

Sustainability in fashion encompasses the entire cycle of each garment, starting from the designer’s table and fiber cultivation to weaving, tailoring, sewing, retail practices and the disposal after use.⁷⁰ Sustainability targets numerous aspects of the business behind fashion business, making it almost impossible for a brand to be recognized as fully sustainable since the term implies that no further development is needed.⁷¹ The term is often misused in the industry, with brands claiming sustainable practices and labeling themselves as sustainable, when in reality, they are just slightly ‘*less unsustainable*’.⁷²

2.1. Sustainability in the fashion industry from a EU policy perspective

As one of the most polluting sectors, the fashion industry has a responsibility to reflect on and reduce its impact on the environment, both for its own sake and for the well-being of all the people in its supply chain. For instance, producing a pair of jeans requires 3,781 liters of water from cotton production to the delivery of the final product to the store.⁷³ Environmental impacts in garment production are associated with the heavy use of chemicals, pesticides, water, energy, and cultivable land. These production techniques, along with the use of non-durable and non-biodegradable materials, contribute to water pollution, soil erosion and CO2 emissions, causing

⁶⁷ Brundtland Report, Our Common Future, 1987, <https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/brundtland-report.html>.

⁶⁸ HARKONEN, H., ‘Fashion and Copyright: Protection as a Tool to Foster Sustainable Development’, University of Lapland, 2021, p. 22.

⁶⁹ Office of Sustainability, ‘What is sustainability?’, University of Alberta, <https://www.mcgill.ca/sustainability/files/sustainability/what-is-sustainability.pdf>.

⁷⁰ HARKONEN, H., ‘Fashion and Copyright: Protection as a Tool to Foster Sustainable Development’, University of Lapland, 2021, p. 21.

⁷¹ Ibid.

⁷² Ibid.

⁷³ UNEP, <https://news.un.org/en/story/2019/03/1035161>.

irreparable harm to the environment and society as a whole.⁷⁴ The true cost of fast fashion is not just financial; it includes 10% of global carbon emissions, 342 million barrels of petroleum for plastic fibers and 20% of worldwide dyeing and treatment wastewater.⁷⁵

Fashion companies are currently facing more pressure than ever to find and promote sustainability. Despite increasing awareness of the need for sustainability in the industry, fashion still attempts to greenwash away its problem and is on track to miss climate targets.⁷⁶ However, it is not only fast fashion brands that are to blame. Well-known and luxury brands are also guilty of unsustainable practices, as they too have relied on a different time management and development processes for their product's life cycle in recent years. The recent fashion show *SS23* was evidence that sustainability in fashion took a step back this season, with sustainability agendas, awareness and education largely left off the runway.⁷⁷ Often, even these big brands have no choice but to produce at a faster pace, compromising on quality and price in order to compete and keep up with the mass-market retailers. Many haute couture and high-fashion retailers are changing their business models to align with the practices of fast fashion companies, but this compromises the integrity and reputation of the company.⁷⁸ It is a matter of adapting or facing decline.⁷⁹

Even at EU policy level, promoting design strategies for a sustainable fashion system is high on the agenda.⁸⁰ In March 2020, the EU Circular Economy Action Plan announced initiatives along the entire life cycle of products.⁸¹ The plan focuses on how products are made, supporting the circular economy, encouraging sustainable consumption, avoiding waste and keeping resources used within the EU economy.⁸² Specifically for the textile industry, the strategy aims

⁷⁴ LEDEZMA, V., 'Globalization and Fashion: Too Fast, Too Furious', *Laurier Undergraduate Journal of the Arts*, 4, 2017.

⁷⁵ The World Bank, 'How Much Do Our Wardrobes Cost to the Environment?', 2019, <https://www.worldbank.org/en/news/feature/2019/09/23/costo-moda-medio-ambiente>.

⁷⁶ WEBB, B., 'Fashion is on track to miss climate target as textile production grows', *Vogue Business*, 2022, <https://www.voguebusiness.com/sustainability/fashion-is-on-track-to-miss-climate-targets-as-textile-production-grows>.

⁷⁷ CERNANSKY, R., 'Why is sustainability still absent from fashion month?', *Vogue Business*, 2022, <https://www.voguebusiness.com/sustainability/why-is-sustainability-still-absent-from-fashion-month>.

⁷⁸ LEDEZMA, V., 'Globalization and Fashion: Too Fast, Too Furious', *Laurier Undergraduate Journal of the Arts*, 4, 2017.

⁷⁹ SEGURA, A., 'Fast fashion, the art of liquidity', 2017, <https://fashionretail.blog/2017/06/19/fast-fashion-the-art-of-liquidity/>.

⁸⁰For more information about textiles and waste in Europe: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729405/EPRS_BRI\(2022\)729405_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729405/EPRS_BRI(2022)729405_EN.pdf).

⁸¹ European Commission, *A new Circular Economy Action Plan*, COM(2020) 98.

⁸² European Commission, *Circular economy action plan*, https://environment.ec.europa.eu/strategy/circular-economy-action-plan_en.

at '(...) *boosting the EU market for sustainable and circular textiles, including the market for textile reuse, addressing fast fashion and driving new business models.*'⁸³ The plan also presents a comprehensive set of measures outlining how these goals will be achieved.

As part of the Circular Economy Package, and to implement the EU Green Deal,⁸⁴ the European Commission presented on 30 March 2022 the EU Strategy for Sustainable and Circular Textiles.⁸⁵ The aim of this strategy is to produce textiles from 2030 in such a way that they last a long time and can be recycled. The textiles must consist largely of recycled fibers and must not contain harmful substances. In addition, social aspects related to the textile industry play a major role in the EU approach and human rights violations must be stopped. The European Commission also wants to put a hold on greenwashing and fast fashion practices. Under its promise to set design requirements for textiles to make them last longer, easier to repair and recycle, the Commission published a proposal for Eco-Design for Sustainable Products Regulation (hereafter: '*ESPR*')⁸⁶, whereas the textile industry is one of the sectors targeted. It creates a framework for eco-design requirements, makes a digital product passport, and makes it illegal to throw away consumer goods that haven't been sold. It lists the aspects of a product that the eco-design standards apply to, such as durability and dependability, reusability, upgradability, repairability, and the ability to be maintained and updated, as well as the presence of substances of concern, energy and resource efficiency, and recycled content.⁸⁷ These new proposals within the EU institutional context give a clear sign that a serious shift and a collective effort in the fashion industry is needed, and recognizes the role of regulation in ensuring sustainable development within the textile industry.

2.2. Movement of slow fashion

Gradually, society is beginning to realize that fair and sustainable fashion is becoming the new fashion formula for success. A study by the international fashion search engine Lyst shows that searches for sustainable fashion have increased by 66% already in 2020.⁸⁸ These searches include terms like '*ethical labels*', '*organic cotton*', '*sustainable jeans*' or '*econyl*'. Searches for

⁸³ European Commission, Circular Economy Action Plan, p. 13, https://ec.europa.eu/environment/pdf/circular-economy/new_circular_economy_action_plan.pdf.

⁸⁴ See more: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

⁸⁵ European Commission, [EU strategy for sustainable and circular textiles](#), COM(2022)141

⁸⁶ Article 1 of the ESPR Proposal.

⁸⁷ Article 1 of the ESPR Proposal.

⁸⁸ Lyst, The 2020 conscious fashion report, <https://www.lyst.com/data/2020-conscious-fashion-report/>.

'vegan leather' were also 119% more frequent. Consumers' interest in and demand for ethical and sustainable fashion products increased. In response to this new demand, many new fashion brands are striving to offer solutions that mitigate or avoid environmental impacts associated with clothing producing and usage. Established brands and retailers are also being inspired to innovate their practices and adopt new sustainable strategies for their collections.⁸⁹

This shift towards sustainable fashion can be seen as part of the slow fashion movement.⁹⁰ FLETCHER argues that it is time for the fashion industry to take a step back and weigh the true cost of prioritizing quantity over quality.⁹¹ These strategies slow down the process of production and consumption. They involve ethical practices, reduced fashion production, and purchasing quality over quantity clothing by opting for sustainable technologies such as upcycling, recycling, and traditional production techniques, and incorporating renewable and organic raw materials.⁹² Indeed, the pursuit of sustainable development in the fashion industry begins at the very start of the value chain – during the garments design phase.⁹³

2.3. Role of the designer and the design in the quest for sustainability

As observed earlier, a traditional life cycle of a product begins with its design table and ends in the closet of customers. However, in the pursuit of sustainable development in the fashion industry, it is now necessary to prolong and optimize this life cycle. The decisions made during the early stages of design have a significant impact on the sustainability of a product.⁹⁴ Design serves as the starting point of the life of a product, where the materials, shape and other aesthetics are made. It is estimated that decisions made at the design stage of a product are responsible for 80% of environmental costs and impacts.⁹⁵ Environmental considerations should be taken into account at each stage of the life cycle from pre-production to disposal.⁹⁶ New standards and practices should be developed with the goal of designing products that can

⁸⁹ MACRI, L., e.d., 'Designing sustainable clothing systems', *Design International Series*, 2022, p. 13.

⁹⁰ HENNINGER, C., 'What is sustainable fashion?', *JFMM*, 20(4), 2015.

⁹¹ FLETCHER, K., 'Sustainable fashion and textiles: design journeys', *Routledge*, 2008.

⁹² HENNINGER, C., 'What is sustainable fashion?', *JFMM*, 20(4), 2015.

⁹³ BSR, 'Sustainable Fashion Design: Oxymoron No More?', 2012, https://www.bsr.org/reports/BSR_Sustainable_Fashion_Design.pdf.

⁹⁴ BERNSTEIN, W., e.d., 'Integrated Sustainable Life Cycle Design: A Review', *Journal of Mechanical Design*, 132(9), 2010.

⁹⁵ CHARTER, M., and TISCHNER, U., 'Sustainable solutions: Developing products and services for the future', *Greenleaf Publishing*, 2001.

⁹⁶ MACRI, L., e.d., 'Designing sustainable clothing systems', *Design International Series*, 2022, p. 27.

span multiple generation.⁹⁷ The use of non-renewable resources should be minimized, other resources should be effectively recycled, waste should be avoided, and if produced, it should be handled in a way that doesn't harm the environment.⁹⁸

Although being the most important feature of a product to consumers and designers, the value of a design goes further than just its aesthetics and appearance. It is exactly due to our aesthetic preferences that our consumption behavior is not sustainable anymore.⁹⁹ Designers, manufacturers, and businesses are responsible for this unsustainable pattern and increase of waste.¹⁰⁰ The role of design in fashion should be reconsidered and reimaged. Introducing design thinking to the fashion industry may alter how clothing is made. Design thinking is '*a holistic approach to product development that is not only based on product lifecycle design but also focused on wider anthropological shifts, promoting new meanings and new styles of thought, not just a new sustainable lifestyle*'.¹⁰¹ The challenge of changing the industry through design entails ending the waste-creation cycle, figuring out new ways to satisfy consumer demand, but also determining whether the product even needs to be made in the first place.¹⁰²

NIINIMÄKI links design thinking as the basis of ethical thinking and future-oriented value creation: sustainable design can change consumption patterns by thinking about how the product will be used, how it will age, how it will be disposed of, and what environmental impact the product will have (during manufacturing, use and after use).¹⁰³ New design innovation is crucial in this process. Standing still is going backward and innovation is the key to more sustainable designs. Nowadays, new approaches and techniques are used to design clothes in different ways to promote sustainable development in the industry. Think about using cut-off waste into the design of the garment, zero waste pattern cutting, using organic and ethical fabrics and up-cycling.¹⁰⁴

⁹⁷ Ibid.

⁹⁸ NIINIMÄKI, K., e.d., 'Sustainable fashion: new approaches', Aalto University publication series, 2013.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ FLETCHER, K., 'Sustainable fashion and textiles: design journeys', *Routledge*, 2008.

¹⁰² MORI, C., 'Design Thinking: Changing approaches to creating fashion', <https://camillemori.com/journal/design-thinking-changing-approaches-to-creating-fashion/>.

¹⁰³ NIINIMÄKI, K., 'Ethical foundations in sustainable fashion', *Textiles and Clothing Sustainability*, 2015.

¹⁰⁴ MOORHOUSE, D. and MOORHOUSE, D., 'Sustainable Design: Circular Economy in Fashion and Textiles', *The Design Journal*, 20(1), 2017.

Stella McCartney, a leader in sustainable luxury fashion, stated ‘*the future fashion is circular*’.¹⁰⁵ The industry is beginning to recognize the need to replace the linear ‘*take, make, use, dispose*’ model with a circular thinking model. Circular fashion creates an endless loop where a product circulates in society as long as possible. Not only should the products themselves be kept in use as long as possible, but materials should also be utilized for extended periods through practices such as reuse, repair, rent, swapping or redesigning, ultimately leading to recycling and regeneration within natural systems. Circular clothing values the raw materials, the production phase and the extension of a product’s life cycle, giving clothes a second life.¹⁰⁶ Circular fashion can be defined as ‘*clothes, shoes or accessories that are designed, sourced, produced, and provided with the intention to be used and circulate responsibly and effectively in society for as long as possible in their most valuable form, and hereafter return safely to the biosphere when no longer of human use*’.¹⁰⁷ One of the principles of circular fashion is design with a purpose, for longevity, resource efficiency, biodegradability and recyclability.¹⁰⁸ Various design principles and techniques are used such as cradle-to-cradle, design for disassembly, eco-design and design for repair or upgrade.

In the light of the above, designers as a professional figure are considered as key agents of change in the transformation to a more sustainable fashion industry.¹⁰⁹ They have the ability to shape and influence the entire lifecycle of a garment, from its conception to its production and eventual disposal. Designers have the power to make conscious decisions regarding materials, production methods, and considering various details and structures that are meant to support product longevity, all of which can significantly impact the environmental and social footprint of fashion.¹¹⁰ Designers who prioritize sustainability can actively seek out eco-friendly materials, promote ethical production practices, and incorporate circular design principles that consider the end-life of a garment.

¹⁰⁵ Website Stella McCartney, <https://www.stellamccartney.com/gb/en/sustainability/circularity-2.html>.

¹⁰⁶ Mode en circulariteit: (hoe) gaat dat samen?, <https://www.shoplikeyougiveadamn.nl/blogs/mode-en-circulariteit-hoe-gaat-dat-samen/bl-358>.

¹⁰⁷ Green Strategy, What is circular fashion?, <https://greenstrategy.se/circular-fashion-definition/>.

¹⁰⁸ Green strategy, Seven forms of sustainable fashion, <https://greenstrategy.se/seven-forms-of-sustainable-fashion/>.

¹⁰⁹ KOZŁOWSKI, A., BARDECKI, M. and SEARCY, C., ‘Tools for sustainable fashion design: An analysis of their fitness for purpose’, *Sustainability*, 11(358), 2019, p. 1.

¹¹⁰ Ibid.; KARELL, E. and K. NIINIMAKI, K., ‘A Mixed-Method Study of Design Practices and Designers’ Roles in Sustainable-Minded Clothing Companies’, *Sustainability*, 12(4680), 2020, p. 20.

3. Imitation in the fashion industry

In the fashion industry, designers often draw inspiration for their designs from the same trend, yet, they strive for their designs to establish and maintain their uniqueness within the market. Fashion is all about self-expression and uniqueness, although, it is at the same time also a form of imitation and social equalization.¹¹¹ According to SIMMEL's observations, the imitation phenomena in the fashion industry started when '*the elite initiates fashion and, when the mass imitates it in an effort to obliterate the external distinctions of class, abandons it for a newer mode - a process that quickens with the increase of wealth*'.¹¹² This theory is more evident today than ever in our modern society, as originality and timelessness of clothes are often overshadowed by consumerism. Fast fashion companies, driven by the pursuit of profits, are moving away from trend forecasting and moving toward utilizing real-time data to comprehend consumer needs and preferences, leading them to resort to copying designs and creating so-called '*knock-offs*'.¹¹³

The copying of fashion designs by fast-fashion retailers has become a significant concern within the industry. These retailers often engage in the practice of replicating popular designs from designers and fashion houses, prioritizing low-quality fabrics and cheap labour forces while charging high profit margins. These low-cost knock-off copies are problematic. Besides copying the newest handbag of a luxury brand, these companies are now also looking in the direction of smaller, more sustainable brands for 'inspiration'.¹¹⁴ While new designers in the slow fashion movement are embracing ethical and sustainable design, fast fashion companies continue instead to pressure the industry to reduce prices and compromise on the quality of clothing. Consequently, sustainable brands, despite their ethical and environmental efforts, struggle to gain recognition and remain overshadowed by fast fashion giants.¹¹⁵ The fashion's copycat phenomena undoubtedly hinder industry-wide sustainability.¹¹⁶

¹¹¹ SIMMEL, G., 'Fashion', *American Journal of Sociology*, 62(6), <https://www.journals.uchicago.edu/doi/epdf/10.1086/222102>.

¹¹² Ibid.

¹¹³ BHARDWAJ, V. and FAIRHURST, A., 'Fast fashion: response to changes in the fashion industry, The International Review of Retail', *Distribution and Consumer Research*, 20(1), 2010, p. 169.

¹¹⁴ MORGAN, C., 'Why fast fashion is accused of copying independent and sustainable brands', *The Vegan Review*, 2023, <https://theveganreview.com/fast-fashion-copying-designers-independent-sustainable-brands/>.

¹¹⁵ Ibid.

¹¹⁶ PHILIPS, S., 'Fashion's copycat dilemma prevents industry-wide sustainability', *Thred*, 2021, <https://thred.com/style/fashions-copycat-dilemma-prevents-industry-wide-sustainability//>

Many small brands and independent designers are using social media as a platform to assert their voice and exposing allegations of fashion design piracy by environmentally unfriendly enterprises. One example is call of the small and independent designer of the brand *Elexiay*, calling out on Shein: ‘*Tonight I feel crushed, @SHEIN_official has stolen my Amelia sweater design. Spent hours designing and brainstorming this design and it takes days to crochet each sweater. It's quite disheartening to see my hard work reduced to a machine made copy*’.¹¹⁷ This designer’s experience is part of a wider trend. As the customer base of the fast fashion industries grows, so does the list of alleged copied designs made under unsustainable circumstances.¹¹⁸

While social media can be a powerful tool for raising awareness, it is crucial to acknowledge the role of intellectual property rights (hereafter ‘*IPRs*’ or ‘*IPR*’) in enforcing the rights a designer owns in its unique designs and in promoting sustainability in the fashion industry. The business model of imitation and copying by the fast fashion industry perpetuates a cycle of infringement on IPRs and highlights the need for effective enforcement mechanisms. IPRs ensures that designers maintain the exclusivity of their fashion garments and prevent others from counterfeiting their designs.¹¹⁹ Pursuing legal remedies can not only help protect the intellectual property (hereafter ‘*IP*’) of these designers but also serve as a deterrent for fast fashion companies engaging in such practices. Among the different tools of intellectual property, the protection of design holds particular relevance for the fashion industry.¹²⁰ The EU design law framework provides legal protection for fashion designs, ensuring that creators are granted exclusive rights over their designs for a specific period of time. This framework helps to deter fast-fashion retailers from copying and replicating designs without proper authorization or credit. By upholding IPRs and enforcing regulations, the fashion industry can take steps towards a more sustainable and ethical future.

¹¹⁷See Twitter post @TheElleey, <https://twitter.com/TheElleey/status/1416111425337053192>.

¹¹⁸ DAS, S., ‘‘They took my world’’: fashion giant Shein accused of art theft’, *The Guardian*, 2022, <https://www.theguardian.com/artanddesign/2022/mar/06/they-took-my-world-fashion-giant-shein-accused-of-art-theft>.

¹¹⁹ SINGH, R., ‘Sustainable Fashion and Intellectual Property Rights’, *Fashion & Law Journal*, 2023, <https://fashionlawjournal.com/sustainable-fashion-and-intellectual-property-rights/>.

¹²⁰ BARRERE, C. and DELABRUYERE, S., ‘Intellectual property rights on creativity and heritage: the case of the fashion industry’, *European Journal of Law and Economics*, 32 (3), 2011, p. 8.

Chapter 2. Design law protection in the European Union

1. IPR, sustainability and fashion

IPR is the legal notion indicating all types of exclusive rights protecting the products of the mind, including creative works and inventions. IP becomes extremely relevant today as an incentive to promote and accelerate sustainable development in several industries, often referred to as ‘*green IP*’ industries, i.e. any intellectual creation which furthers the cause of sustainability and is in coherence with saving the environment from degradation and pollution.¹²¹

IPRs are an enormous asset in the fashion industry. Design protection may not be the first IP that springs to mind when considering a strategy for sustainability, however, it is one of the most apparent and effective ways to protect new and individual fashion designs against the near duplicates or knock-offs produced by fast fashion companies. Design protection protects the intellectual effort and investments made to create new and individual designs and gives the owner the right to prevent others from exploiting their ornamental or aesthetic aspects, such as attractive shapes or aesthetically pleasing textile prints.¹²² It can further push designers to innovate and create new sustainable ways in the design process of products.

2. International Treaties and Conventions for the protection of designs

IPRs, including the protection of design, are subject to a number of international treaties. The right to protect one’s IP is declared in United Nations Universal Declaration of Human Rights: ‘*everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*’.¹²³ The Paris and Berne Agreement, which were signed at the end of the 19th century, were the first steps toward making design protection more uniform around the world.¹²⁴ In addition to these provisions, the TRIPS Agreement includes additional rules where the previous agreements thought to be insufficient.

¹²¹ SINGH., S., ‘Green IP: the key to a sustainable future’, <https://www.ipthink-tank.com/post/green-ip-the-key-to-a-sustainable-future>.

¹²² FILMA., V., ‘IPR in Fashion Industry’, *Manupatra Intellectual Property Reports*, August 2015; NCUBE, A., ‘Intellectual Property for SME’s in the textile industry’, 2017, <https://www.chronicle.co.zw/intellectual-property-for-smes-in-the-textile-industry/>.

¹²³ Article 27(2) UNDHR.

¹²⁴ MELVILLE, L.W., *Forms and Agreements on Intellectual Property and International Licensing*, Sweet & Maxwell, London, 1979.

1.1. Paris convention

The Paris Convention for the Protection of Industrial Property¹²⁵ (hereafter ‘*Paris Convention*’) applies to all industrial property including industrial designs, and is administered by the World Intellectual Property Organization (hereafter ‘*WIPO*’). It was signed in Paris in 1883 and has been revised several times since then. The adoption of this international instrument was the first major step in ensuring that intellectual works could be protected in other countries.¹²⁶

The provisions relating directly to the protection of designs in the Paris Convention are limited. Article 5quinquies sets out the general principle that ‘*industrial designs shall be protected in all the countries of the Union*’.¹²⁷ The Paris Convention does not further define industrial designs and leaves the further framework to each member state through its own national legislation.

According to article 5B of the Paris Convention, member states are prohibited from imposing sanctions that forfeit the protection of an industrial design either by a failure to work or by the importation of articles corresponding to those which are protected.¹²⁸ It is up to the Member states to define what they understand by ‘*failure to work*’.¹²⁹

Article 5(D) of the Paris Convention states that no indication or mention of the deposit of an industrial design can be required upon the goods as a condition of the recognition of the right to protection.¹³⁰ Nevertheless, national laws may stipulate that the items must have a statement indicating they are protected by the deposit of an industrial design, even if this may not constitute a condition of the right to protection under the Paris Convention.¹³¹

1.2. Berne convention

The Berne Convention for the Protection of Literary and Artistic Works (hereafter ‘*Berne Convention*’), initially adopted in 1886 but amended and revised several times, was the

¹²⁵ Paris Convention of 20 March 1883 for the Protection of Industrial Property.

¹²⁶ WIPO, Paris Convention for the Protection of Industrial Property, [Paris Convention for the Protection of Industrial Property \(wipo.int\)](https://www.wipo.int/treaties/en/other/paris/paris.html).

¹²⁷ Article 5quinquies of the Paris Convention.

¹²⁸ Article 5B of the Paris Convention.

¹²⁹ MAUGUÉ, P., ‘The International Protection of Industrial Designs under the International Conventions’, *Baltimore Law Review*, 19(1), 1989, p. 394.

¹³⁰ Article 5D of the Paris Convention.

¹³¹ *Ibid.*

continuation for the Paris Convention and is administered by the WIPO.¹³² The Berne Convention in general covers copyright protection. It was only in the 1948 Brussels Revision Conference that protection of ‘*works of applied art*’ was introduced and added in article 2(1) of the Berne Convention, which stipulates that copyrighted protection must be offered to ‘*every production in the literary, scientific and artistic domain, whatever the mode or form of its expression*’.

The purpose of the Berne Convention regarding industrial designs is to regulate their protection based on copyright.¹³³ This is further governed by article 2(7) of the Berne Convention. Firstly, according to this article, the method and conditions of protection of industrial designs is up to each individual country, leaving them free to protect such creations under copyright laws, under *sui generis* design legislation, or under both.¹³⁴ Secondly, if a work of art applied to industry is protected only by industrial design legislation in its country of origin, it will not be eligible for copyright protection in other contracting countries. However, works protected by copyright in their country of origin can claim copyright protection in other contracting countries, provided they accept the protection.¹³⁵ Consequently, a work that does not enjoy protection under copyright in its country of origin cannot benefit from such protection neither in another contracting country.¹³⁶

1.3. TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights (hereafter ‘*TRIPS Agreement*’) is an international agreement administered by the WTO and provides the minimum standards for the protection of IPRs, including the protection of designs. The TRIPS Agreement came into effect in 1995 and is still today the most comprehensive multilateral agreement on the protection of IP.¹³⁷

The TRIPS Agreement requires member states to comply with the main provisions of WIPO, the Paris Convention and the Berne Convention. It incorporates the substantive provisions of

¹³² Berne Convention of 19 November 1984 for the Protection of Literary and Artistic Works.

¹³³ ELHARIRY, M. F., ‘The requirements for Industrial Designs Protection. The International Overview and National Application’, *Qanonya*, 1, p. 11.

¹³⁴ Article 2(7) of the Berne Convention; MAUGUÉ, P., ‘The International Protection of Industrial Designs under the International Conventions’, *Baltimore Law Review*, 19(1), 1989, p. 401.

¹³⁵ Article 2(7) of the Berne Convention.

¹³⁶ ELHARIRY, M. F., ‘The requirements for Industrial Designs Protection. The International Overview and National Application’, *Qanonya*, 1, p. 12.

¹³⁷ WTO, ‘Overview: the TRIPS Agreement’, [WTO | intellectual property - overview of TRIPS Agreement](#).

these conventions by reference. The TRIPS Agreement is sometimes referred to as a ‘*Berne and Paris-plus Agreement*’, as it builds on the provisions of these earlier conventions.¹³⁸

Under TRIPS Agreement, member states are required to provide protection for industrial designs. Industrial designs protection must be available for independently created designs that are new or original.¹³⁹ An industrial design is considered independently created when a designer creates a similar or identical design without the knowledge about the work of another designer.¹⁴⁰ As a second requirement, member states may choose between novelty and originality. While the concept of ‘*novelty*’ is measured in connection with a specific date, and is a more objective condition, the notion of ‘*originality*’ means that a work must express personal intellectual creation of an author, i.e. a rather subjective condition.¹⁴¹ No novelty or originality can be established when the industrial design does not significantly differ from known designs or combinations of known design features.¹⁴²

Member states may provide that design protection shall not extend to design dictated essentially by technical or functional considerations.¹⁴³ The rationale for this is that if a design is solely dictated by its function, protection for that design prevent others from creating products with the same intended function.¹⁴⁴

Member states are also required to provide a minimum period of exclusive rights in registered designs, which must be at amount to least 10 years from the date of registration.¹⁴⁵ They have the flexibility to provide longer periods of protection if they choose.

In addition to these minimum standards, member states are also required to provide legal remedies against the unauthorized use of protected designs, i.e. the making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected

¹³⁸ Ibid.

¹³⁹ Article 25(1) of the TRIPS Agreement.

¹⁴⁰ ELHARIRY, M. F., ‘The requirements for Industrial Designs Protection. The International Overview and National Application’, *Qanonya*, 1, p. 13.

¹⁴¹ Ibid.

¹⁴² Article 25(1) of the TRIPS Agreement.

¹⁴³ Article 25(1) of the TRIPS Agreement.

¹⁴⁴ ELHARIRY, M. F., ‘The requirements for Industrial Designs Protection. The International Overview and National Application’, *Qanonya*, 1, p. 14.

¹⁴⁵ Article 26(3) of the TRIPS Agreement.

design, when such acts are undertaken for commercial purposes¹⁴⁶, and to establish procedures for the registration and protection of designs.

Special attention is given to textile designs. According to WIPO, textile designs are typically regarded to have a short product cycle, are numerous and are particularly liable to copying.¹⁴⁷ According to article 25(2) of the TRIPS Agreement, requirements for obtaining protection for textile designs, such as the cost, examination or publication, should not unreasonably limit the ability to apply for and get granted such protection.

Overall, the TRIPS Agreement provides a basic framework for the protection of industrial designs in member countries, while also allowing for some flexibility in terms of the specific details of that protection. Member states can decide to impose formalities in their national laws. However, they should comply with the requirements of article 62 of the TRIPS Agreement, according to which any such procedures must permit within a reasonable period of time to avoid an unjustified reduction in the period of protection.

3. The EU Design Law Framework

The European Union offers extensive legal protection to fashion designs. One of the earliest known examples of the protection of textile designs was enhanced by a silk weaving mills regulation of 1744 in Lyon.¹⁴⁸ In the second half of the 19th century, laws on design protection in several countries were founded, however, these national laws protected designs on significantly varying levels.¹⁴⁹ In the Green Paper on Legal Protection of Industrial Designs of 1991, the European Commission pointed out the need to harmonize design law in the EU as national legislation failed short of the needs of industry in two respects: *‘First, its legal effect is limited to the territory of a single Member State (except for the Benelux countries which have introduced a regional protection system); secondly, it protects only insufficiently the salient features of contemporary industrial design, which is the enhanced functionality of a product by way of its design. It is often limited to the protection of the ornamentation of a product.’*¹⁵⁰ The

¹⁴⁶ Article 26(1) and article 26(2) of the TRIPS Agreement.

¹⁴⁷ WTO, ‘Module VI. Industrial designs and layout-designs of integrated circuits’, p. 110, [modules6_e.pdf \(wto.org\)](https://www.wto.org/modules6_e.pdf).

¹⁴⁸ PEREZ, L., ‘Inventing in a World of Guilds: Silk Fabrics in Eighteenth-century Lyon’, *Cambridge University Press*, Cambridge, 2008, p. 238.

¹⁴⁹ European Commission, Legal review on industrial design protection in Europe, 2016, p. 24.

¹⁵⁰ European Commission, Green Paper on Legal Protection of Industrial Designs, 1991, p. 2, http://aei.pitt.edu/1785/1/design_gp_1.pdf.

European Commission recognized further that *'superior design is an important instrument for European Industries in their competition with industries from third countries with lower production costs'* and that *'it is important that appropriate measures are taken to deal with piracy in respect of design products.'*¹⁵¹

Eventually, the first step towards harmonisation of design protection across the member states were taken by the Directive 98/71/EC of 13 October 1998 on the Legal Protection of Designs (hereafter *'the Directive'*).¹⁵² Three years later, on 12 December 2001, the Registered Community Design (hereafter *'RCD'*) and the Unregistered Community Design (hereafter *'UCD'*) were introduced by the Council Regulation 6/2002/EC of 12 December 2001 on Community Designs (hereafter *'the Regulation'*).¹⁵³ The EU design legislation regime is based on treating a design as a *'marketing tool'* and a *'significant component of modern culture'* that aims to meet society's functional, aesthetic, and ergonomic needs.¹⁵⁴

While the Directive harmonizes the national protection regimes of registered designs, the Regulation establishes a Community-wide framework on the protection of registered and unregistered Community designs. The substantive divergence of protection between member states necessitated harmonization through both instruments.¹⁵⁵ Merely aligning the common elements or eliminating the differences under the national laws was insufficient.¹⁵⁶ Therefore, a new European design regime was created to address these issues, allowing for *'greater freedom than any change to be introduced in existing legislation'*.¹⁵⁷

The options available to a EU-based designer consist of a two-tier protection system. Designers can opt for protection of their designs only for the national territory where registration is filed based on the principles under the Directive. The areas of harmonization within the national laws of the member states include protectable subject matter, conditions of protection, scope of protection, and validity.¹⁵⁸ In addition to the national protection regimes, the Regulation offers two pan-EU protection tools within the EU: (i) the Registered Community Design Right, an

¹⁵¹ Ibid.

¹⁵² Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs, 1998 *O.J.* (L 289) 28.

¹⁵³ Council Regulation 6/2002/EC of 12 December 2001 on Community Designs, 2002 *O.J.* (L 3/1), 1.

¹⁵⁴ European Commission, Legal review on industrial design protection in Europe, 2016, p. 24.

¹⁵⁵ European Commission, Legal review on industrial design protection in Europe, 2016, p. 25.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ European Commission, Legal review on industrial design protection in Europe, 2016, p. 26.

exclusive right for up to 25 years; and (ii) the Unregistered Community Design Right, an automatic anti-copying right during 3 years. The application of the Directive within the EU falls outside the scope of this research.

The rationale behind these two rights offered by the Regulation is to provide protection based on the specific needs and characteristics of different sectors of industry. Some sectors require longer term of protection because of the foreseeable market life of their products and value the advantages of registration for the great legal certainty it provides.¹⁵⁹ On the other hand, short-lived sectors, such as the fashion industry, produce large numbers of designs for products frequently having a short market life where protection without the burden of registration formalities and costs is an advantage while the duration of protection is of lesser significance.¹⁶⁰ The decision to adopt such approach was largely influenced by a draft proposal submitted by the Max Planck Institute, which held a symposium amongst stakeholders, including experts from EU Member States, the European Commission and the WIPO.¹⁶¹ According to the Max Planck Institute, short-lived industries, including the fashion industry, require an automatically arising protection which does not need to last for more than 2-3 seasons.¹⁶²

The Regulation define a design as *‘the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.’*¹⁶³ To avoid hampering technological innovation in the European market, any features of appearance that are solely dictated by the technical function of the product are exempt from protection.¹⁶⁴ For example, the sole zipper of a jeans will not be eligible for design protection.¹⁶⁵ In the fashion industry, however, a clothing or garment piece will not often be designed purely by technical requirements.

The definition of products covers *‘parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer*

¹⁵⁹ Recital 16 of the Design Regulation.

¹⁶⁰ Ibid.

¹⁶¹ Max Planck Institute, *Towards a European Design*, Munich, 1991.

¹⁶² Ibid., p. 4 and 5.

¹⁶³ Article 1 of the Design Directive and Article 3 of the Design Regulation; European IP Helpdesk, ‘IP in the fashion industry’, https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-02/EU_IP_HD_Fact_Sheet_IP-fashion-industry.pdf.

¹⁶⁴ Recital 14 and article 87(1) of the Design Regulation.

¹⁶⁵ European IP Helpdesk, *IP in the Fashion Industry*, p. 9, https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-02/EU_IP_HD_Fact_Sheet_IP-fashion-industry.pdf.

program'.¹⁶⁶ The definition is broad enough to include all kinds of three-dimensional products, such as the shape of a shoe or a bag, or two-dimensional products, such as a textile pattern or print, that have certain characteristics that give it a new and individual appearance and distinguishes it from other similar garments.

The protection provided under the EU design law framework relates to the appearance of a product. The wording '*appearance of the whole or a part of a product*' is limited to any material element which can be visually perceived by the human sense, leaving out ideas and concept of the protection.¹⁶⁷ This interpretation of the term 'appearance' has been established by the General Court of the European Union (hereafter '*General Court*') underlining that, according to the wording of article 3(a) of the Regulation and article 1(a) of the Directive, '*a design is merely the appearance of a product or a part thereof and that the infringement criterion is the same 'visual' general impression*'.¹⁶⁸ The Court of Justice of the European Union (hereafter '*CJEU*') confirms this broad interpretation.¹⁶⁹

In the context of fashion, design rights can protect the structure or the look of a broad range of products such as clothing, footwear, handbags and accessories.¹⁷⁰ However, not all fashion designs that meet the requirements of the – overly broad – definition above can be granted protection.¹⁷¹ Two key requirements need to be met for a design to be eligible for Community Design Protection: *novelty* and *individual character*.¹⁷²

1.1 Requirements for acquisition of protection

A. *Novelty*

According to article 5(1) of the Regulation, a design is new '*if no identical design has been made available to the public, (a) in the case of an UCD, before the date on which the design for which protection is claimed has first been made available to the public; (b) in the case of a*

¹⁶⁶ Article 1 of the Design Directive and article 3 of the Design Regulation.

¹⁶⁷ ELHARIRY, M. F., 'The requirements for Industrial Designs Protection. The International Overview and National Application', *Qanonya*, 1, p. 16, VANHEES, H., 'De bescherming van modecreaties via het auteurs- en modellenrecht', *Intersentia*, 2018, p. 121.

¹⁶⁸ General Court, 18 March 2010, *Grupo Promer Mon graphic v. OHIM*, §50.

¹⁶⁹ CJEU, 21 September 2017, *Easy Sanitary Solutions and EUIPO v. Group Nivelles*, §62 and §63.

¹⁷⁰ European IP Helpdesk, IP in the Fashion Industry, p. 8, https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-02/EU_IP_HD_Fact_Sheet_IP-fashion-industry.pdf.

¹⁷¹ MARGONI, T., 'Not for Designers: On the Inadequacies of EU Design Law and How to Fix it', *JIPITEC*, 4(3), 2013, p. 228, [JIPITEC 2013 3.pdf \(ivir.nl\)](#).

¹⁷² Article 3(2) of the Design Regulation.

RCD, before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority.¹⁷³

To assess the novelty of a design, an objective comparison¹⁷⁴ is made between that design and any other individual design made available to the public before the assessment dates listed in article 5 of the Regulation (the so-called ‘*prior art*’).¹⁷⁵ Designs are considered identical if their characteristics differ only in immaterial details that are not immediately noticeable.¹⁷⁶ This is to prevent minor changes to a design from being sufficient for an imitation to be considered new.¹⁷⁷ As a consequence, identical prior designs or prior designs with limited differences destroy novelty. According to EU case law, the examination of the novelty requirement should be conducted in relation to one or more prior designs as a whole rather than a combination of features from a number of prior designs.¹⁷⁸

The novelty requirement, as well as the requirement of individual character that will be examined below, is assessed against designs made available to the public prior to the relevant date, i.e. existing designs in the prior art. In this regard, article 7 of the Regulation states that ‘*When applying articles 5 and 6, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed (...) except where these events could not reasonably have become known in the normal course of business to the circles specialized in the sector concerned, operating within the Community*’. In principle, each of the events listed in article 7 of the Regulation (or in article 11 of the Regulation) constitutes the disclosure to the public of a design.¹⁷⁹

The comparison between two designs does not only take place between designs in the same industry or sector of the product in which the design will be incorporated or to which it will be

¹⁷³ Article 5(1) of the Design Regulation.

¹⁷⁴ According to Vanhees, the novelty requirement is an objective novelty: ‘*a designer who completely independently creates a design that happens to have been previously designed by someone else and made available to the public has no claim to protection*’ (VANHEES, H., ‘De bescherming van modecreaties via het auteurs- en modellenrecht’, *Intersentia*, 2018, p. 123).

¹⁷⁵ CJEU, 21 September 2017, *Easy Sanitary Solutions and EUIPO v. Group Nivelles*, §61. The Court clarifies further that when assessing novelty, the assessment is to be conducted in relation to one or more specific, individualized, defined and identified designs from the prior art.

¹⁷⁶ Article 5(2) of the Design Regulation.

¹⁷⁷ VANHEES, H., ‘De bescherming van modecreaties via het auteurs- en modellenrecht’, *Intersentia*, 2018, p. 122.

¹⁷⁸ CJEU, 21 September 2017, *Easy Sanitary Solutions and EUIPO v. Group Nivelles*, §61; SUTHERSANEN, U., ‘Design Law in Europe, Londen’, Sweet & Maxwell, 2000, p. 37.

¹⁷⁹ CJEU, 21 September 2017, *Easy Sanitary Solutions and EUIPO v. Group Nivelles*, §100.

applied, but all prior designs can be taken into account.¹⁸⁰ The basic rule remains that it is not required that the design should be known in a particular sector.

According to the CJEU, the words ‘*specialized circles in the sector*’ should only be used in relation to the exception and are to be interpreted restrictively.¹⁸¹ The only exception where a design is not deemed to be disclosed is when the alleged events of disclosure could not reasonably have come to the knowledge of EU-market insiders in the normal course of business. The case of *Gautzsch Großhandel v. Joseph Duna* questioned who should be included in the ‘*specialized circles*’.¹⁸² The CJEU ruled that a broad interpretation should be favoured and that persons who are not involved in the creating process of a design should not be excluded.¹⁸³ As a consequence, in the fashion industry, the circles specialized are not limited to the persons behind the scenes of the brand but could also include buyers that attend a fashion show or readers of a fashion magazine in which the designs are featured.

In any case, the CJEU held that the disclosure is a question of fact that should be determined by the circumstances of each case.¹⁸⁴ For example, it has held that disclosure to one single undertaking in a sector may not be enough to become reasonably known to specialized circles, neither does the sole presentation of the design in the showroom outside the EU.¹⁸⁵ However, there is quite a difference between the circumstance where a design is solely disclosed to a large well-known fashion company like Zara and the disclosure to a small local business.

Some authors believe that the EU legislator chooses relative novelty over absolute novelty by introducing the concept of reasonable Community-knowledge: designs made available to the public outside of the EU should only be included in the prior state of art if these designs have reasonably become known to the circles specialized in the sector concerned within the EU.¹⁸⁶ For example, a design that is made available to the public in an international magazine meets

¹⁸⁰ VANHEES, H., ‘Na het douchegoot-arrest van het Hof van Justitie: eindelijk duidelijkheid over de beschermingsvoorwaarden en de beschermingsomvang in het modellenrecht’, *IRDJ*, 3, 2017, p. 176; . r.o. 122 van het arrest van 13 mei 2015.

¹⁸¹ VANHEES, H., ‘Na het douchegoot-arrest van het Hof van Justitie: eindelijk duidelijkheid over de beschermingsvoorwaarden en de beschermingsomvang in het modellenrecht’, *IRDJ*, 3, 2017, p. 176; CJEU, 21 September 2017, *Easy Sanitary Solutions and EUIPO v. Group Nivelles*, §100; European Commission, Legal review on industrial design protection in Europe, 2016, p. 81.

¹⁸² CJEU, 13 February 2014, *Gautzsch Großhandel v. Joseph Duna*.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ CJEU, 13 February 2014, *Gautzsch Großhandel v. Joseph Duna*, §31-36.

¹⁸⁶ ELHARIRY, M. F., ‘The requirements for Industrial Designs Protection. The International Overview and National Application’, *Qanonya*, 1, p. 23; CJEU, 13 February 2014, *Gautzsch Großhandel v. Joseph Duna*.

the criteria and will be included in the prior art. However, this relative novelty is criticized on the ground that in the age of the internet, every part of the world is connected and therefore, this kind of knowledge is questionable.¹⁸⁷ In the invalidity case *Samsung Electronics and Others v Apple Inc.*, the holder of the design claimed that the novelty condition was not lost because of internet disclosure, as the websites on which the prior designs were disclosed cannot be systematically searched and therefore, the designs remain unknown to the Community circles specialized in the sector concerned.¹⁸⁸ The Invalidity Division of the European Union Intellectual Property Office¹⁸⁹ (hereafter ‘EUIPO’) rejected this argument stating that internet disclosures are not unsearchable and that users use search engines such as Google and key words to obtain results on websites that deal with the given subject matter.¹⁹⁰ Nonetheless, the Invalidity Division did have regard to the fact that the internet is a perpetually changing environment, with webpages often being deleted without being archived.¹⁹¹

B. Individuality

In accordance with article 6(1) of the Regulation, a design has an individual character if ‘*the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before (a) in the case of an UCD, before the date on which the design for which protection is claimed has first been made available to the public; (b) in the case of a RCD, before the date of filing the application for registration or, if priority is claimed, the date of priority*’.

Similar to the novelty requirement, the assessment of individual character requires a comparison between the design and the prior art. While the novelty assessment involves a comparison with identical designs to prevent exactly identical designs or designs that differ only in immaterial details to be protected, the individual character assessment involves similar designs, in order to exclude designs with (minor) changes compared to the prior designs from protection.¹⁹² A comparison is made between the overall impressions of the design and the prior designs, paying particular attention to major differences and not to minor deviations or minor

¹⁸⁷ BEZZEGH, T., ‘Main features of the harmonized EU design law’, *European Integration Studies*, 3(1), 2004.

¹⁸⁸ OHIM, 13 May 2013, *Samsung Electronics and Others v Apple Inc.*, §44.

¹⁸⁹ Which was known as the ‘Office for Harmonization in the Internal Market’ (hereafter ‘OHIM’) until 23 March 2016.

¹⁹⁰ *Ibid.*, §45.

¹⁹¹ European Commission, Legal review on industrial design protection in Europe, 2016, p. 81; *ibid.*, §46.

¹⁹² VANHEES, H., ‘De bescherming van modecreaties via het auteurs- en modellenrecht’, *Intersentia*, 2018, p. 124.

disputes. As a consequence, a design that differs on a significant number of details might not be eligible for protection because it produces the same or similar overall impression as the prior design.¹⁹³ According to the CJEU, these are objective differences.¹⁹⁴ Moreover, the assessment only includes a visual comparison, excluding the technicality or other aspects that do not qualify for protection such as features that are not visible or only under circumstances.¹⁹⁵

In the case *Yves Saint Laurent v. H&M*, the CJEU inferred from article 6 the Regulation that the assessment of the individual character of a Community design is, in essence, the result of a four-stage examination.¹⁹⁶ In its judgement, the CJEU declared valid two Community designs representing handbags owned by the designer Yves Saint Laurent, rejecting the actions proposed by the fast fashion brand H&M, which claimed the invalidity of the designs due to lack of an individual character of the design bag. According to the CJEU, the four-step examination consists in ‘*deciding upon, first, the sector to which the products in which the design is intended to be incorporated or to which it is intended to be applied belong; second, the informed user of those products in accordance with their purpose and, with reference to that informed user, the degree of awareness of the prior art and the level of attention in the comparison, direct if possible, of the designs; third, the designer’s degree of freedom in developing his design; and, fourth, the outcome of the comparison of the designs at issue, taking into account the sector in question, the designer’s degree of freedom and the overall impressions produced on the informed user by the contested design and by any earlier design which has been made available to the public*’.¹⁹⁷

i. Sector and prior art

As explained above, and in accordance with article 7 of the Regulation, the prior art consists of designs that have been made available to the public before the date of disclosure of the design, except where these events could not reasonably have become known in the normal course of business within the circles specialized in the sector concerned in the EU.

In addition to the case-law already referred to above, the case *Karen Millen v. Dunnes Store* brings further guidance in deciding upon the relevant sector of the design to conclude the first

¹⁹³ Ibid.

¹⁹⁴ General Court, 6 June 2013, *Erich Kastenholtz v. OHIM*, §39.

¹⁹⁵ General Court, 7 November 2013, *Danuta Budziewska v. OHIM*, §30.

¹⁹⁶ General Court, 10 September 2015, *H&M v. OHIM - Yves saint Laurent*, §32.

¹⁹⁷ Ibid.

step of the examination of the individual character.¹⁹⁸ The designer Karen Millen argued that Dunes infringes its UCD's in a top and shirts. Dunes argued that in order to have individual character, the overall impression produced by the designs of Karen Millen should be different from the overall impression created by a number of elements taken from several different prior designs. Dunes referred to several prior designs that had one or more characteristics in common with the designs of Karen Millen.¹⁹⁹ This approach of *cherry-picking* features from several prior designs was rejected by the court that stated that Article 6 of the Regulation calls for a comparison between the overall impression of the contested design and that created by one or more specific and identifiable earlier designs that have been made available to the public.²⁰⁰ The CJEU later confirmed that the assessment of individual character of a design must be made by reference to '*specific, individualized, defined and identified designs from among all the designs which have been made available to the public previously*'.²⁰¹ The combination of different features from several prior designs does not destroy the individual character of a design. The ruling is undoubtedly in favor of fashion designers relying on unregistered design rights, by allowing for protection of designs based on trends and interpretations rather than only exact copies of prior designs. This decision requires the fast fashion industry to take greater care when producing slavish copying of an individual prior design, given the high threshold for challenging the strong presumption of validity of UCDs.²⁰²

Recital 14 of the Regulation further states that the assessment of the individual character '*should take into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design.*' However, as explained above, the sector concerned within the meaning of article 7(1) of the Regulation is not limited to the sector of the product in which the design will be incorporated or to which it will be applied.²⁰³ The CJEU has clarified that the informed user of the product in which the design is incorporated or to which it is applied does not need to be familiar with the earlier design when the latter is incorporated in, or applied to, a product of an industrial sector other than that to which the

¹⁹⁸ CJEU, 19 June 2014, *Karen Millen Fashions Ltd. V. Dunnes Stores and Dunnes Stores (Limerick) Ltd.*

¹⁹⁹ CASSIDY, L., 'Karen Millen Fashions Ltd. V. Dunnes Stores (Limerick) Ltd.: Clarifying the assessment of individual character in EU designs', *Trademark Reporter*, 105(6), 2015.

²⁰⁰ *Ibid.*

²⁰¹ CJEU, 19 June 2014, *Karen Millen Fashions Ltd. V. Dunnes Stores and Dunnes Stores (Limerick) Ltd.*

²⁰² CASSIDY, L., 'Karen Millen Fashions Ltd. V. Dunnes Stores (Limerick) Ltd.: Clarifying the assessment of individual character in EU designs', *Trademark Reporter*, 105(6), 2015.

²⁰³ CJEU, 21 September 2017, - *Easy Sanitary Solutions and EUIPO v. Group Nivelles*, §126-134.

design belongs.²⁰⁴ The assessment of individual character should only be a comparison of external design, and the product to which or in which this design is applied or incorporated should not influence this comparison. Recital 14 is not contradictory to this view, as the nature of the product and the industrial sector are disregarded in the comparison of both designs, but are of importance in determining the overall impressions to be compared.²⁰⁵ Determining the sector of the products in which or to which the model is applied thus remains an important step, since it is taken into account in determining the overall impression.

ii. *Informed user*

The different overall impression the design should give must be tested in the eyes of an informed user. The standard reference of ‘*informed user*’ has been defined by the CJEU in its case law as ‘*particularly observant and [with] some awareness of the state of the prior art, that is to say the previous designs relating to the product in question*’.²⁰⁶ The term indicates that the reference person is a kind of intermediate category between an average consumer – as applicable in trademark issues, without any specific knowledge and that makes no direct comparison between trademarks in conflict – and the industry expert - with detailed technical expertise.²⁰⁷ It is someone who has a certain knowledge of design either through personal experience or through his extensive knowledge of the industry involved.²⁰⁸ In the case *J. Choo Ltd v. Towerstone Ltd.*, the court defined the informed user as ‘*someone with knowledge of handbag design but not the woman in the street and not a handbag designer. Such a person would know about the design constraints inherent in handbag design, what features were necessary and unnecessary, etc. Evidence was presented and was not disputed by the defendant that the most significant features of a handbag design are those on the front of the bag, the part which is visible in use because it is carried with that side pointing out.*’²⁰⁹

iii. *Designer’s degree of freedom*

²⁰⁴ Ibid.

²⁰⁵ VANHEES, H., ‘Na het douchegoot-arrest van het Hof van Justitie: eindelijk duidelijkheid over de beschermingsvoorwaarden en de beschermingsomvang in het modellenrecht’, *IRDJ*, 3, 2017, p. 177.

²⁰⁶ CJEU, 20 October 2011, *PepsiCo Inc v. Grupo Promer Mon Graphic SA*.

²⁰⁷ As applicable in trademark matters; GOTZEN, F. and JANSSENS, M.-C., *Wegwijs in het intellectueel eigendomsrecht*, 2018, Brugge, Vanden Broele, p. 306.

²⁰⁸ VANHEES, H., ‘De bescherming van modecreaties via het auteurs- en modellenrecht’, *Intersentia*, 2018, p. 126.

²⁰⁹ England and Wales High Court (Chancery), 16 January 2008, *J Choo (Jersey) Ltd v. Towerstone Ltd*.

According to article 6(2) of the Regulation, the assessment of individual character must take into account the degree of freedom of the designer in developing the design. This is different from the assessment of the novelty requirement. The designer's degree of freedom is an interesting notion. The General Court has held that the designer's degree of freedom should be considered in light of standardization of certain features due to the constraints imposed by technical function of the product and by any statutory requirements applicable to the product.²¹⁰ For example, a fashion designer is bound by a certain degree of functionality (the garment must fit the body, must be washable, adaptable to different temperatures, etc.) or by legal restrictions the be qualified under a certain category of clothing.²¹¹ Such restrictions lead to a standardization of certain features and such common features are excluded from protection.²¹² When there is little room for differences, and thus the less freedom the designer has, individuality is more likely to be evident in limited differences.²¹³ The greater the creative freedom, the fewer minor differences will be needed to make a different overall impression on the informed user. In general, when creating fashion creations, the designer has a fairly large freedom, although, this depends on the category of clothing to which the designs belong to.²¹⁴

Article 6(2) of the Regulation does also not affect the CJEU's view that the product to which or in which this design is applied or incorporated plays no role in this comparison. The creative freedom of the designer may, however, reinforce or weaken the general impression created.²¹⁵

iv. *Outcome of the comparison of the overall impressions*

The outcome of the comparison of the design with the prior art is determined taking into account the sector involved, the degree of creative freedom of the designer, and the overall impression that the design in question produces on informed users when compared to any prior design made available to the public. When assessing the individual character, all of these elements must be considered. For example, the designer's freedom of invention should not be used as a

²¹⁰ European Commission, Legal review on industrial design protection in Europe, 2016, p. 66; CJEU, 20 October 2011, *PepsiCo Inc v. GrupoPromer Mon Graphic SA*.

²¹¹ GOTZEN, F. and JANSSENS, M.-C., *Wegwijs in het intellectueel eigendomsrecht*, 2018, Brugge, Vanden Broele, p. 306; CJEU, 20 October 2011, *PepsiCo Inc v. GrupoPromer Mon Graphic SA*, §66-70 and §72-84.

²¹² General Court, 29 October 2015, *Roca Sanitario v. OHIM*, §35; General Court, 5 April 2013, *Bell&Ross v. OHIM*, §112.

²¹³ MUSKER, D., *Community Design Law-principles and Practice*, Sweet & Maxwell, 2002, p. 33.

²¹⁴ General Court, 10 September 2015, *H&M v. OHIM - Yves saint Laurent*.

²¹⁵ VANHEES, H., 'Na het douchegoot-arrest van het Hof van Justitie: eindelijk duidelijkheid over de beschermingsvoorwaarden en de beschermingsomvang in het modellenrecht', *IRDJ*, 3, 2017, p. 177 General Court, 10 September 2015, *H&M v. OHIM - Yves saint Laurent*, §33.

deciding element, but rather as an integrated aspect of the evaluation that might increase or minimize the difference in overall image.²¹⁶

The comparison of the overall impressions of designs avoids granting protection to designs with only minor differences to prior designs and thus, the requirement of individual character is more stringent than that of novelty. While casual observers may not notice minor variations like button arrangement, collar shape, or skirt length, these differences can create a distinct overall impression for informed fashion users. Therefore, a single unique feature, such as an embroidered jeans pocket, an oversized zipper, or a dominant print, can be sufficient to create a distinct overall impression and justify the protection of either that specific feature or the entire item.²¹⁷

2.2. Scope of the protection

A. Term

The protection of the RCD is granted from the date of filing of the application design with the EUIPO in Alicante, the Benelux Office for Intellectual Property or the national competent Office of a member state.²¹⁸ The protection applies in all countries of the European Union and lasts for 5 years, and can be extended without the total duration exceeding 25 years.²¹⁹ The competent Office will not examine the substance of the application, i.e. validity requirements of the design, except for an assessment whether the design is not contrary to public order or morality.²²⁰ Only formal requirements will be assessed, such as a sufficiently clear image of the model.²²¹ The registration of a design is subject to a fee.²²²

On the contrary, the UCD enjoys automatic and free protection throughout the EU once the design is disclosed within the Community.²²³ The UCD is protected for a period of three years from disclosure and cannot be renewed.²²⁴ As mentioned above, this form of protection has

²¹⁶ General Court, 10 September 2015, *H&M v. OHIM - Yves saint Laurent*.

²¹⁷ FISCHER, F., 'Design Law in the European Fashion Sector', WIPO, 2008, https://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html.

²¹⁸ Article 35 of the Design Regulation.

²¹⁹ Article 12 of the Design Regulation.

²²⁰ Article 47(1)(b) of the Design Regulation.

²²¹ Article 36 *juncto* articles 45-47 of the Design Regulation.

²²² Starting from EUR 350, see: <https://euipo.europa.eu/ohimportal/nl/rcd-route-to-registration>.

²²³ Article 11 of the Design Regulation.

²²⁴ *Ibid.*

been created for industries with short-lived models such as the fashion industry, where the duration of protection is of secondary importance.²²⁵ Most fashion pieces are trend-sensitive and therefore do not need a longer duration of protection. For many designers, it is important to get new designs to the market quickly and it can be time-consuming and expensive to register each design individually with an official agency. However, as will be discussed later, this short-term protection is not always in favor of the quest for sustainability in the fashion industry.

A designer has the option to apply for design protection within one year after they first disclose a design, without this disclosure being taken into consideration for registration.²²⁶ In other words, a design can be considered novel for one year following its disclosure.²²⁷ This 12-month ‘*grace period*’ for design novelty allows designers to assess whether it is worth to register their design or not. This is particularly useful for smaller fashion designers that often lack the financial resources for systematic registration of their designs that might not always be successful on the market.²²⁸

The importance of time in meeting the novelty requirement can be demonstrated by the invalidity case of *Handelsmaatschappij J. Van Hilst BV v. Puma*.²²⁹ Puma was the holder of a RCD of sneakers, which was filed on 26 July 2016. In 2019, the Dutch company Handelsmaatschappij J.H. van Hilst filed an application for the declaration of invalidity of the contested RCD, claiming the lack of novelty and individual character, as PUMA had filed the design application over a year after its disclosure, i.e. beyond the 12-month grace period. The invalidity applicant evidenced that the artist Rihanna wore the sneakers in Germany and New York in 2014, which was photographed by paparazzi. In addition, on 16 December 2014, Rihanna posted pictures on her Instagram profile where the shoes were clearly visible. The requirement of novelty could no longer be met because the time period between Rihanna’s Instagram post and Puma’s design application exceeded 12 months.²³⁰ In 2021, the Invalidity Division declared Puma’s design invalid, which was later confirmed by the Board of Appeal.²³¹

²²⁵ Recital 16 of the Design Regulation.

²²⁶ EUIPO, General Questions, [General Questions \(europa.eu\)](https://www.euiipo.eu/en/general-questions).

²²⁷ KLEESPIES, M. and ZAPIRAIN, L. B., ‘Design rights: European Union’, *Word Trademark Review*, 2019, [Design rights: European union - World Trademark Review](https://www.wordtrademarkreview.com/design-rights-european-union-world-trademark-review/)

²²⁸ EUIPO, General Questions, [General Questions \(europa.eu\)](https://www.euiipo.eu/en/general-questions).

²²⁹ EUIPO, 19 March 2021, *Handelsmaatschappij J. Van Hilst BV v. Puma*.

²³⁰ Novagraaf, ‘Design registration: Be careful of accidental publication on social media’, November 2022, [Design registration: Be careful of accidental publication on social media | Novagraaf](https://www.novagraaf.com/en/design-registration-be-careful-of-accidental-publication-on-social-media/).

²³¹ EUIPO Board of Appeal, 11 August 2022, *Puma v. Handelsmaatschappij J. Van Hilst BV*.

B. Exclusive rights

During the protection term, the holder of a RCD owns the exclusive right to use its design and to prevent any third party not having his consent from using it.²³² Article 19 of the Regulation offers a non-exhaustive list of what ‘use’ covers: ‘*the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied*’. In addition, the right holder may oppose the use of a design by a third party, if that design does not create a different overall impression on an informed user than the holder’s design does.²³³ The exclusive right of the holder also allows him or her to prevent or cancel subsequent filings by third parties of an identical design.²³⁴

The scope of protection of an UCD is narrower. Whilst a RCD protects against copying made without knowledge and in good faith²³⁵, an UCD only protects against commercial usage that is the result of deliberate copying, including direct copies or copies that very close-copies and still give the same overall impression.²³⁶ In fact, article 19(2)(3) of the Regulation clarifies that a design resulting from ‘*an independent work of creation by a designer who may be reasonably thought not to be familiar with the design made available to the public by the holder*’ does not fall under the definition of contested use. However, case law has shown that the production of a very similar design will often lead the court to presume that the subsequent design is the result of copying, because it that it can no longer be purely accidental or because the infringer exhibits similar behavior in the past.²³⁷ In the case of *Jimmy Choo v. Towerstone*, the claimant argued that the bag in his UCD in question ‘*when it was launched, was seen as the “it” bag, attracted attention and was given wide publicity, including being photographed as being carried by some celebrities.*’²³⁸ According to the claimant, the alleged infringing bag could therefore not be a result of an independent creation of the infringer. The court agreed and held that ‘*looking at the*

²³² Article 19(1) of the Design Regulation.

²³³ General Court, 6 October 2011, *Industrias Francisco Ivars v. OHIM*.

²³⁴ CJEU, 16 February 2012, *Celaya Emparanza y Galdos Internacional v. Proyectos Integrales de Balizamientos S.L.*

²³⁵ EUIPO, *Designs in the European Union*, Scope - <https://euipo.europa.eu/ohimportal/en/designs-in-the-european-union>

²³⁶ WIPO, ‘Fashion Design and Copyright in the US and EU’, 2015, p. 14, https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf.

²³⁷ PHILIPSEN, G., ‘Het niet-ingeschreven gemeenschapsmodel en de mode: onbekend is onbemind... of is er meer?’, *IRDI*, 4, 2012, 357-358; BARRAGAN, L. and KLEESPIES, M., ‘Design Rights: European Union’, *World Trademark Review*, 2019, [Design rights: European union - World Trademark Review](https://www.wtr.com/articles/design-rights-european-union).

²³⁸ England and Wales High Court (Chancery), 16 January 2008, *J Choo (Jersey) Ltd v. Towerstone Ltd*, §9.

*bags side by side, restricting my consideration to the features which appear in the design document, it seems to me that the inference of copying is overwhelming. The likelihood that these two designs could have been arrived at independently, given the large number of identical features in a design field as free as the present one, seems to me to be truly fanciful.*²³⁹

C. Limitations

The exclusive right of the design holder is not absolute. The main limit to design rights is the impossibility for the right holder to oppose acts carried out on a private basis and for non-commercial purposes, acts carried out for experimental purposes and acts carried out for the purpose of making citations or of teaching.²⁴⁰

Another limitation is that once a design has been lawfully placed on the market within the EU by the design holder or with their consent, the exploitation right of the holder for the design is exhausted.²⁴¹ This is called the ‘*principle of exhaustion*’ and means that the designer cannot prevent further exploitation (for example, resale or distribution) of the design by a third party.²⁴²

In addition, a third party may also have a ‘*right of prior use*’ over a similar design in good faith.²⁴³ This is the case when the third party was using a similar design before the filing or priority date of the protected design. The third party may still use his own design under certain conditions depending on the national laws within the member state.

²³⁹ Ibid., §23.

²⁴⁰ Articles 20 - 23 of the Design Regulation.

²⁴¹ Article 21 of the Design Regulation.

²⁴² GOTZEN, F. and JANSSENS, M.-C., *Wegwijs in het intellectueel eigendomsrecht*, 2018, Brugge, Vanden Broele, 311.

²⁴³ Article 22 of the Design Regulation.

Chapter 3: Enforcing design rights in the European Union: infringement procedures

1. Infringement procedure under the Regulation

The enforcement of a design is as important as its registration.²⁴⁴ A designer has the right to take legal action against anyone who infringes upon their protected fashion designs. An infringement of a Community design consists of any use of the design. The term ‘use’ includes *making, offering, putting on the market, importing, exporting, or using a product to which the design is applied, or stocking it for any of these purposes.*²⁴⁵ In the case of an UCD, this use must be a result of copying.

To prevent unlawful use of designs, a designer can initiate enforcement actions before the national court in the relevant EU jurisdiction. Each member state has designated Community design courts within their national territory that have the exclusive jurisdiction to handle disputes related to infringements and the validity of Community designs.²⁴⁶ In this regard, article 82 of the Regulation stipulates that legal actions can be initiated in the courts of the member state where the defendant is domiciled, has a place of business or, subsidiary, where the claimant is domiciled or has a place of business.²⁴⁷ In addition, action may also be brought in the courts of the member state where the infringement took place or was threatened.²⁴⁸ Each Community design court has jurisdiction over design infringement cases anywhere in the EU and can consequently grant interim injunctions, damages, delivery up and other protective measures in another member state.²⁴⁹ These rules have led to the practice of ‘*forum shopping*’.²⁵⁰ Due to the flexibility that member states have in implementing the Regulation into their national laws, some procedural rules may vary between them. As a result, holders of a Community design benefit from a certain freedom to choose the most advantageous forum, considering factors such as the speed of action, penalties or the possibility of recouping legal

²⁴⁴ EUIPO, Looking after your rights, [Looking after your rights \(europa.eu\)](https://www.euiipo.eu/looking-after-your-rights).

²⁴⁵ Article 19 of the Design Regulation.

²⁴⁶ Article 80 – 92 of the Design Regulation. For example, Belgium has assigned the exclusive jurisdiction to the Courts of Enterprise (Article 633quinquies(1)(3) *juncto* 575 Judicial Code).

²⁴⁷ Article 82 of the Design Regulation.

²⁴⁸ Article 82(5) of the Design Regulation.

²⁴⁹ BRETONNIERE, J. F. and FONTAINE, F., ‘Europe. Using Community Design Rights to Protect Creativity’, *Building and enforcing IP value*, 2010, p. 34.

²⁵⁰ PETRAZ, D. L., VAN DER HEIDE, L. and BARILA, C., ‘Litigation design disputes’, *World Trademark Review*, November 2018.

costs.²⁵¹ In cases involving online infringement on websites that are accessible in multiple EU countries, the CJEU has held that the jurisdiction would be determined by ‘the *place where the process of putting the offer [infringing product] for sale online by that operator on its website was activated*’.²⁵²

As a general rule, article 88(1) of the Regulation states that the Community design courts ‘*shall apply the provisions of this Regulation*’. The Regulation covers the usual main claims, such as an injunction order to stop the infringement acts and an order to seize the infringing products.²⁵³ Although, other supplementary sanctions are not specifically regulated, articles 88(2) and 89(1)(d) of the Regulation provide the Community design courts with the possibility to impose any other appropriate sanction under their national law, including private international law.

If a RCD has not been invalidated, the competent court must consider the design during infringement proceedings as valid.²⁵⁴ This presumption of validity of a RCD is derived from article 85 of the Regulation, which further states that, except for a separate application for a declaration of invalidity of a design before the EUIPO, the validity can only be challenged by the defendant with an invalidity counterclaim.²⁵⁵ In its turn, the plaintiff can request the court to oblige the defendant to file an invalidity application with the EUIPO.²⁵⁶ If the defendant does not file such application within the time limit, the proceedings before the national court will continue and the counterclaim will be deemed withdrawn.²⁵⁷ In addition to a counterclaim, the defendant may also submit a plea claiming that the RCD could be declared invalid due to an earlier national design right held by the defendant, within the meaning of article 25(1)(d) of the Regulation.²⁵⁸

On the other hand, article 85(2) of the Regulation specifies that in infringement cases involving UCDs, the court should only consider the Community design as valid if the holder can prove that all the conditions laid down in Article 11 of the Regulation are met and if the holder

²⁵¹ BRETONNIERE, J. F. and FONTAINE, F., ‘Europe. Using Community Design Rights to Protect Creativity’, *Building and enforcing IP value*, 2010, p. 34.

²⁵² PETRAZ, D. L., VAN DER HEIDE, L. and BARILA, C., ‘Litigation design disputes’, *World Trademark Review*, November 2018; CJEU, 27 September 2017, *Nintendo Co. Ltd v. BigBen Interactive SA*, §108.

²⁵³ Article 89(1) of the Design Regulation.

²⁵⁴ Article 85(1) of the Design Regulation.

²⁵⁵ Article 85(1) of the Design Regulation.

²⁵⁶ Article 86(3) of the Design Regulation.

²⁵⁷ PETRAZ, D. L., VAN DER HEIDE, L. and BARILA, C., ‘Litigation design disputes’, *World Trademark Review*, November 2018.

²⁵⁸ Article 85(1) of the Design Regulation.

indicates what constitutes the individual character of the design. The CJEU clarifies this in the above-mentioned case *Karen Miller v. Dunnes*.²⁵⁹ Dunnes argued that it was the claimant's responsibility to provide evidence of the individual character of her designs. The CJEU rejected this argument, stating that article 85(2) of the Regulation presumes validity and contradicts Dunnes' interpretation.²⁶⁰ If the plaintiff were required to prove the individual character of its designs, there would be no need to identify individual character and the defendant would have no grounds to contest the validity of the design.²⁶¹ The aim of UCDs is to simplify and expedite protection for short-lived products, so imposing a burdensome requirement for right holders like Karen Millen to prove individual character would go against this objective.²⁶² This case clarifies that the holder of an UCD only needs to designate the elements of the individual character of their design, rather than fully prove its existence.

2. EU case law regarding infringement upon fashion designs

During the infringement proceedings under the Regulation, the competent court examines various aspects to determine whether there has been an infringement of design rights. As a general principle, for design infringement to occur, the overall impression produced by the infringing design on an informed user must be the same as the overall impression created by the protected design. This is the so called '*infringement test*' or '*overall impression test*' and is a question for which the eye must be the judge.²⁶³ To illustrate how this test is applied in practice, the case *Fendi v. Coach* serves as a good example.²⁶⁴ In this case, the luxury fashion house Fendi alleged that Coach infringed upon its Peekabo handbag design:

²⁵⁹ CJEU, 19 June 2014, *Karen Millen Fashions Ltd. V. Dunnes Stores and Dunnes Stores (Limerick) Ltd.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² CASSIDY, L., 'Karen Millen Fashions Ltd. V. Dunnes Stores (Limerick) Ltd.: Clarifying the assessment of individual character in EU designs', *Trademark Reporter*, 105(6), 2015.

²⁶³ JAMES&WELLS, 'Design infringement – an overview', <https://www.jamesandwells.com/wp-content/uploads/design-infringement-overview.pdf>.

²⁶⁴ Court of Luxembourg, 24 February 2017, *Fendi v. Coach*.



Figure 2 – Earlier Peekabo handbag Fendi (Source: Court of Luxembourg, 24 February 2017, *Fendi v. Coach*)

Figure 3 – Deposited model of the earlier Peekabo handbag Fendi (Source: Court of Luxembourg, 24 February 2017, *Fendi v. Coach*)



Figure 4 – Alleged infringing handbag Coach (Source: Court of Luxembourg, 24 February 2017, *Fendi v. Coach*)

Coach, as a counterargument, challenged the validity of Fendi's registered Peekabo handbag design by claiming that it lacked individual character. The court considered the perspective of an informed user of handbags, as defined in the above-mentioned judgements *Yves Saint Laurent v. H&M* and *Karen Millen v. Dunnes*. The Peekabo handbag was compared with older models in the prior art, including the 'Birkin' and 'Kelly' handbags from Hermès:



Figure 5 – Birkin handbag Hermès in the prior art (Source: [Hermès 2021 pre-owned Birkin 35 Handbag - Farfetch](#))

Figure 6 – Kelly handbag Hermes in the prior art (Source: [Hermès 1990-2000s pre-owned Mini Kelly 15 Sellier Bag - Farfetch](#))

By assessing factors such as shape, the position of the closure, interior layout, and the presence or absence of a front flap, the court concluded that both handbags created a different overall impression on the informed user. Consequently, the court upheld Fendi's design rights in its Peekabo handbag.

The court then proceeded to examine whether Coach's alleged infringing handbag produces the same overall impression on the informed user as the Peekabo handbag. Based on the deposited model of the Peekabo handbag, the court identified several characteristic elements that give the handbag its individual character such as the trapezoidal shape of the handbag, the metal closure at the top of the bag, the division of the bag into two compartments and the length of the carrying strap that suggests that the handbag must be carried by hand. These elements were also considered by the court when comparing the Peekabo handbag with the prior art. Coach's handbag adopted nearly all these characteristic elements. Considering the significant freedom Coach had in designing its handbag, the small differences between the two designs did not prevent them from producing the same general impression on an informed user. Thus, Coach's handbag was found to infringe the design right that Fendi holds in its Peekabo handbag.

It is important to note that the existence of minor differences between two designs does not diminish a same overall impression on the informed user. The focus of assessment lies rather in the similarities between two designs, particularly whether the infringing design counterfeits

the protected design or creates a *déjà vu* when compared to it.²⁶⁵ Moreover, the notion of freedom of design plays an important role in the comparison of designs.²⁶⁶ In general, the designer has considerable freedom when creating fashion garments, although this freedom depends on the category of clothing of the design.²⁶⁷ The fashion industry is characterized by a high level of creativity and free spirit, they must consider functional aspects like ensuring clothing fits the human body or adhering to a social need to conform to accepted dress codes.²⁶⁸ For example, designing an extravagant Oscar dress offers more freedom in the choice of colour, material or design compared to a conservative suit.²⁶⁹

In the aforementioned case, Coach had significant freedom in creating a new handbag design, yet no effort was made to create a unique piece with special characteristics. The copying was evident. It is well-established in case law that the degree of freedom for a designer of handbags is wide.²⁷⁰ Practically, a bag should have some key elements such as a storage unit, an opening/closure and (in most cases) a strap. While practical considerations impose some limitations, such as the need for storage, an opening/closure, and possibly a strap, there is still considerable design freedom in terms of patterns, colors, overall shape, and size.²⁷¹

Accordingly, in the case *Hermès v. Veritas*, the defendant had a broad degree of freedom during the creation process of the pattern of its alleged infringing design.²⁷² In August 2014, it came to Hermès' attention that the Belgian brand Veritas was selling scarves with very similar resemblances to its *L'Arbre de Vie*-scarves:

²⁶⁵ CJEU, 16 February 2017, *Antrax It v. EUIPO – Vasco Group*, §53.

²⁶⁶ HENSHALL, M. and LIAKATOU, V., 'Comparison, overall impression and inconsistencies in design protection', *World Trademark Review*, 2014, p. 86.

²⁶⁷ General Court, 10 September 2015, *H&M v. OHIM - Yves saint Laurent*.

²⁶⁸ VAN KEYMEULEN, E., 'Copyrighting couture of counterfeit chic? Fashion Design: A Comparative EU – US Perspective', *Journal Of Intellectual Property Law & Practice*, 7(10), October 2012, p. 732.

²⁶⁹ *Ibid.*

²⁷⁰ General Court, 10 September 2015, *H&M v. OHIM - Yves saint Laurent*, §30.

²⁷¹ General Court, 10 September 2015, *H&M v. OHIM - Yves saint Laurent*, §54.

²⁷² Brussels, 13 February 2018, *Veritas v. Hermès, IRDJ*, 2018.



Figure 7 - L'Arbre de Vie-scarf Hermès (Source: Brussels, 13 February 2018, *Veritas v. Hermès*)



Figure 8 - Alleged infringing Veritas scarf (Source: Brussels, 13 February 2018, *Veritas v. Hermès*)

According to Hermès, L'Arbre de Vie is a classic pattern that has been featured in several of its collections. The pattern appears not only on Hermès' scarves but also on its furniture fabrics, plaids, bracelets and ornaments. In April 2011, Hermès registered the pattern of L'Arbre de Vie as an international design with the designation of the EU.²⁷³

According to the court, Veritas had a wide freedom to create the pattern for its scarf, as there are various ways to depict a tree with trunk, branches and leaves, with human and animal figures in between or a tree of life.²⁷⁴ The court concluded that Veritas' alleged infringing scarf did not create a different overall impression on the informed user compared to Hermès' RCD. The minor visually identifiable differences in the depiction of the branches and leaves as well as the difference in the shape of the scarves did not alter the court's findings.²⁷⁵ Therefore, Veritas was found to infringe on Hermès' Community design rights.

The concept of the degree of freedom for a designer is an interesting notion and has been addressed in various case law. Particularly relevant for the fashion industry, it has been established that a general trend or style cannot be regarded as a limitation to the designer's creative freedom.²⁷⁶ This rejection aligns with previous case law, which stated that aesthetics or commercial success should not be considered relevant when assessing the individual character of a design because this does not affect the overall impression on the informed user.²⁷⁷

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ VANHEES, H., 'De bescherming van modecreaties via het auteurs- en modellenrecht', *Intersentia*, 2018, p. 125, *Shenzhen Taiden Industrial Co v OHIM*.

²⁷⁷ Ex. CJEU, 9 September 2011, *Kwang Yang Motor Co Ltd. v. OHIM*; BARAZZA, S., 'The individual character of a design: freedom and the 'saturation of the state of the art'', *Journal of Intellectual Property Law & Practice*,

When two designs fall within the same category of clothing or a general trend, the similarities related to common features of that category or trend hold minor importance in the overall impression on the informed user. However, similarities that relate to elements in respect of which the designer is free to develop in the infringing design attract the informed user's attention.²⁷⁸

In the case of *Nelson v. Mango*²⁷⁹, the court examined whether the fast fashion brand Mango had recreated Nelson's Tardive dress. Nelson was the holder of the following RCD:

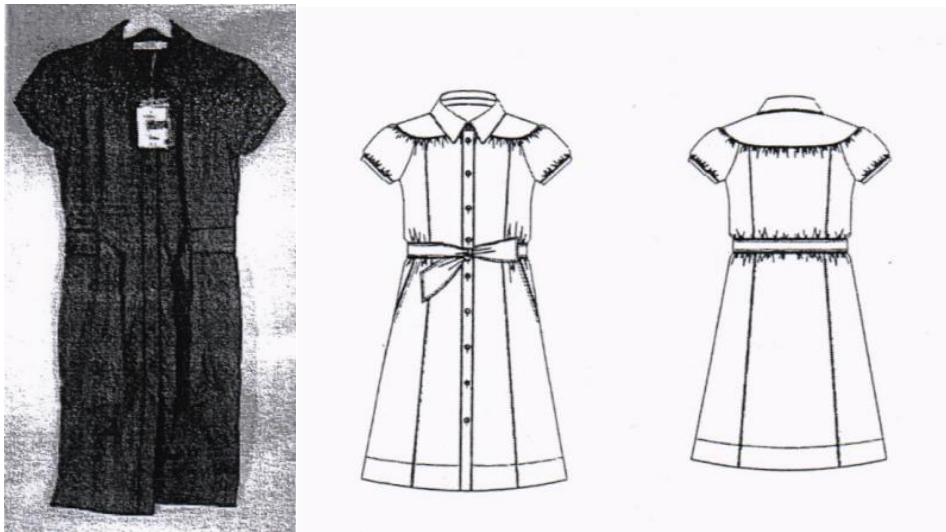


Figure 9 – Tardive dress Nelson (Source: Court of Appeal Brussels, 26 January 2012, *Nelson v. Mango*)

Figure 10 – Deposited model of the Tardive dress Nelson (Source: Court of Appeal Brussels, 26 January 2012, *Nelson v. Mango*)

8(4), 2013; VAN KEYMEULEN, E., 'Copyrighting couture of counterfeit chic? Fashion Design: A Comparative EU – US Perspective', *Journal Of Intellectual Property Law & Practice*, October 2012, 7(10), p. 731.

²⁷⁸ CJEU, 20 October 2011, *PepsiCo Inc v. GrupoPromer Mon Graphic SA*, §29 - 32.

²⁷⁹ Court of Appeal Brussels, 26 January 2012, *Nelson v. Mango*.



Figure 11 - Alleged infringing Toko dress Mango (Source: Court of Appeal Brussels, 26 January 2012, *Nelson v. Mango*)

After comparing the designs with previous dresses in the prior art, the court found that both dresses fit into a broader style of *'shirt dresses'* which is part of the *'common heritage of women's clothing'* and assumes that the *'the characteristic of this type of dress is that it is straight, made up of a single piece with a shirt-like top, buttoned from top to bottom or only at the bust'* (own translation).²⁸⁰ The court was of the opinion that it is not appropriate to focus solely on the overall impression of seeing a shirt dress, but rather on the freedom Nelson had in creating the dress and the elements that transcend this style. According to the court, *'a comb²⁸¹ination of non-original elements can give the whole an original character. But what stands out most about the design of the Tardive dress, even to the untrained eye, is the texture, the clear buttons on the front and the vertical seams that form three parts of the fabric that do not appear in the Toko dress, which is sewn in one piece with a completely hidden button closure. The differences therefore outweigh the similarities and are not insignificant.'* (own translation). The similarities between the two dresses can only be found in the elements that are a basic expression of the style of *'shirt dresses'*. As a result, Mango's Toko dress could not be considered a copy of the Tardive dress.

²⁸⁰ Ibid.

²⁸¹ Ibid.

Similarly, a saturated or crowded field of prior art in the industry does not limit a designer's freedom of creation.²⁸² However, the saturation of the prior art may influence how the informed user perceives a design, making them more sensitive to minor differences between models.²⁸³ In the case of *OTB Group v. Inditex Group*, OTB Group, the parent company of the high-fashion brands Diesel and Marni, accused the fast fashion brand Zara and its parent company Inditex Group of copying the Diesel Skinzee-sp jeans (RCD) and Marni Fussbett sandals (UCD):²⁸⁴



Figure 12 – Skinzee-sp Jeans Diesel (Source: [“Fast Fashion” beware: Zara gets caught up in EU-wide infringement and damages claim - Lexology](#))

Figure 13 – Alleged infringing Biker Zippers jeans Zara (Source: [Zara | Jeans | Nwt Zara Black Coated Wax Biker Moto Jeans | Poshmark](#))

The court acknowledged the highly crowded nature of the fashion industry, particularly in the denim pants sector. It recognized that this oversaturation leads to *‘a significant number of competing designs intended to result in a crowded field of products with similar*

²⁸² CJEU, 15 June 2022, *Tubes Radiatori v. EUIPO*, §83; BARAZZA, S., ‘The individual character of a design: freedom and the ‘saturation of the state of the art’, *Journal of Intellectual Property Law & Practice*, 8(4), 2013, <https://academic.oup.com/jiplp/article/8/4/267/884222>.

²⁸³ Ibid.

²⁸⁴ Court of Milan, 28 June 2016, *OTB Group v. Inditex Group*.

characteristics'(own translation).²⁸⁵ As a consequence, *'the modest differences, which may nonetheless be perceived by the informed user as different from already known shapes, may justify the validity of the right'*(own translation).²⁸⁶ The Skinzee-sp Jeans is a tapered, close-fitting jeans that distinguishes its appearance through *'the combination of the oblique longitudinal seams present on each of the legs and the paired zippers, one substantially horizontal (or slightly oblique to the outer side) to which is added another substantially vertical zipper extending downward on the leg of the pants and accompanying the course of the oblique seam'* (own translation).²⁸⁷ Diesel successfully tackled the challenge of creating a unique piece eligible for design protection within an overly crowded field in the clothing sector.

On the other hand, fast fashion retailer Zara employed its typical strategy of copying a design but making minor alterations to create a different overall impression. By a comparison of the Skinzee-Sp jeans and the Biker Zippers, the court noted that *'the fact that the oblique seams are interrupted by a slanted seam, the different size of the zippers and the absence of the zippers on the bottom of the legs constitute minor elements that do not substantially affect the attribution to the defendant's pattern of independent identity such that its outward appearance is appreciably different to the informed user from that depicted in the RCD'* (own translation).²⁸⁸ The Biker Zipper Jeans of Zara produced a similar overall impression to the RCD *'namely the unusual combination of oblique and longitudinal seams coupled with zippers placed in a wholly original manner, with particular reference to the substantially vertical ones positioned lower along the thigh.'* (own translation).²⁸⁹

The two cases highlight the importance to navigate the constraints of a general trend of an overly crowded clothing sector and creating a distinctive design to be qualified for design protection under the Regulation. This approach fosters innovation within the fashion industry as it incentivises designers to explore new forms and trends, while maintaining to be unique within existing trends.²⁹⁰ When creating a new design, it is necessary for the designer to

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ VANHEES, H., 'De bescherming van modecreaties via het auteurs- en modellenrecht', *Intersentia*, 2018, p. 125, General Court, 12 March 2014, *Tubes Radiatori v. OHIM*, §83; General Court, 4 February 2014, *Sachi Premium v. OHIM*, §23.

ascertain which features can actually be protected by the RCD and may potentially be enforced against imitations.²⁹¹

In the light of the growing emphasis on sustainability in the fashion industry, it is crucial to set high thresholds for innovative designs within seasonal trends. This ensures that designs created by designers that are embracing a new and unique approach are protected and prevents fast fashion companies that are capitalizing on these designs meeting the requirements of novelty and individual character. These companies often take a shortcut path in their design process by adding just a few distinctive elements to copied design.²⁹² Sharing similarities with a prior design does not automatically exclude them from protection as they might still produce a different overall impression on the informed user. However, justifying legal protection for a fast fashion garment that shares similarities with numerous other designs but possesses only a few minor distinctive elements undermines not only the rationale of innovation and creativity behind the EU design law framework but also hampers the progress towards sustainability in the industry. The courts should be aware that a proper application of the concepts of novelty and individual character can help clarify the fine line between following a trend and copying.

When assessing the overall impression between two models, the choice of materials is also taken into account. In the fashion industry, the appearance of a design is of crucial importance as it is the visual stimulus for consumers to buy a fashion piece. The use of different materials can completely alter the appearance of a design. It is not only the type of material, such as wool versus cotton, but the quality of materials that can significantly impact the look of designs. Counterfeiters are often not able to replicate the exact materials used in the copied clothes, regardless of how closely they imitate the design. The reason for this is because the materials themselves contribute to the high production costs and materials like organic cotton, bamboo linen, ECONYL® or deadstock fabrics are high in price. Luxury brands often utilize exclusive materials specifically created for their own products. In contrast, counterfeit clothing is typically of inferior quality.

²⁹¹ HENSHALL, M. and LIAKATOU, V., ‘Comparison, overall impression and inconsistencies in design protection’, *World Trademark Review*, 2014, p. 88.

²⁹² LAPATOURA, I., ‘Copyright originality in fashion: industry-induced bias against small designers in a sector dominated by seasonal trends’, 2022,
<https://copyrightblog.kluweriplaw.com/2022/02/21/copyright-originality-in-fashion-industry-induced-bias-against-small-designers-in-a-sector-dominated-by-seasonal-trends/>.

In this light, an important question arises: can a low-quality knock-off of a high-quality or eco-friendly prior design create a different overall impression on informed users? The answer to this question depends on how the informed user perceives the alleged infringing design. Recital 14 of the Regulation refers to the informed user ‘viewing’ the design, and not touching it.²⁹³ Therefore, what is relevant is how the texture and material of a fashion piece visually appear, rather than how they feel. An informed user is to a fairly high degree attentive and pays attention to details, although they may not necessarily notice all minor differences.²⁹⁴

In this regard, the case *Sadlers v. Nills Fashion* provides further guidance.²⁹⁵ According to *Sadlers*, Nills Fashion is selling a dress and sweater that are identical to Sadler’s protected designs under the UCD. The court compares the overall impression between Sanders' prior designs and Nill's Fashion alleged infringing designs. Firstly, regarding the sweaters, the only very slight difference is the difference in length of both sweaters, which can be considered an insignificant detail. The length of a knitted sweater can differ depending on the corpulence of the person wearing it, so this element does not remove the impression of identity between the sweater of Nill's Fashion and that of Sadlers. Thus, UCD protection extends beyond exact replicas to cover minor differences such as the length of a sweater.

Secondly, the court found that Nills Fashion’s dress is identical to the dress of Sadlers, rejecting Nills Fashion’s argument that they are clearly different due to the use of different fabrics. The court considered that the material of the dress is only an insignificant detail that does not allow to distinguish the contested Nills Fashion’s dress from Sadlers’. This approach suggests that differences in materials alone may not be sufficient to differentiate copied designs from the original ones.²⁹⁶ This is particularly interesting for designers who frequently find their designs being copied by fast fashion retailers using cheap raw materials. Even if a fast fashion item differs from the original design solely by the use of lower-quality materials (e.g. polyester instead of modal²⁹⁷) although such difference may be perceived by the attentive informed user, it still creates a different overall impression.

²⁹³ Joint Paper of ECTA, INTA and MARQUES on the Legal Review on Industrial Design Protection in Europe, July 2018, p. 12.

²⁹⁴ Court of Appeal Den Haag, 3 November 2020, *Wahl Clipper Corporation and Wahl GmbH v. Kappershandel*.

²⁹⁵ Court of Appeal Brussels, 21 June 2016, *Sadlers v. Nills Fashion*.

²⁹⁶ See also Court of the Mid-Netherlands, 29 July 2016, nr. C/16/416357.

²⁹⁷ Modal is a luxury fabric and is a durable, long-lasting option.

Another relevant case is *Stella McCartney v. Imax Srl*. Stella McCartney is a high-end brand that is known for its use of eco-materials. The designer held a RCD in its Falabella bag, which is made out of eco-leather, and sued Imax for design and trademark infringement, as well as for unfair competition. Imax argued that its bags are different from the Falabella bag because they have a different shape, were made of real leather instead of eco-leather and included a shoulder belt.²⁹⁸ Regarding design infringement, the court recognizes that the design of Stella McCartney possesses individual character because of the ‘trapezoidal shape, the odd chain strap following the exterior flap of the bag and the eye-catching stitching’ all of which Imax produces in its designs.²⁹⁹ The argument regarding different materials could not prevent the court from reaching this conclusion. This judgement supports sustainability in the fashion industry as the use of a harmful material does not prevent the design from creating a different impression on the informed user compared to original eco-friendly design. Unfortunately, the court did not consider the eco-leather as an element of the individual character of the Falabella bag, but instead used it as a basis to conclude unfair competition for denigration by Imax. The fact that Imax was selling bags in real leather conveyed a false and anti-environmental message towards consumers, while Stella McCartney never uses materials of animal origin for its products and invested significantly in developing sustainable goods.³⁰⁰

In the case *Rothy's Inc v. Giesswein Walkwaren AG*, Rothys claimed that Giesswein infringed its RCD and UCD by marketing the ‘Pointy Flat’ shoes on its website.³⁰¹

Rothys' Pointed Loafer, launched in November 2017, features a ballet shoe design with a pointed toe and a protruding tongue that gives it the appearance of a loafer. The upper part of the shoe is made out of knitted fabric from recycled plastics:

²⁹⁸ VARESE, E., ‘The Court of Milan stands by the “Falabella” bag of Stella McCartney’, 2017, <https://thefashionablelawyers.com/2017/05/29/the-court-of-milan-stands-by-the-falabella-bag-of-stella-mccartney/>.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ IP Enterprise Court UK, 16 December 2020, *Rothy's Inc. v. Giesswein Walkwaren AG*.



Figure 14 - Pointed Loafer of Rothy's (Source: [Community Designs: Rothy's Inc v Geisswein Walkwaren AG \(nipclaw.blogspot.com\)](https://nipclaw.blogspot.com))

Since April 2019, Geisswein has been offering for sale the Pointy Flat shoe on its websites. These shoes are also made with knitted meshwork fabric from recycled plastics:



Figure 15 - Alleged infringing Pointy Flat of Geisswein (Source: [Community Designs: Rothy's Inc v Geisswein Walkwaren AG \(nipclaw.blogspot.com\)](https://nipclaw.blogspot.com))

Geisswein contested the validity of both Rothy's' RCD and UCD and referred to the following prior designs '*Allegra K*' and '*Bonnibel*' shoes made of suede:



Figure 16 - “Allegra K” and “Bonnibel” suede shoes in prior art (Source: [Community Designs: Rothy's Inc v Giesswein Walkwaren AG \(nipclaw.blogspot.com\)](http://nipclaw.blogspot.com)).

Before evaluating the overall impression of the different designs, the court had to interpret the scope of Rothy’s’ RCD in the Pointed Loafer. The key question was how to interpret the fine black lines on the upper part of the shoe as deposited by Rothy’s’:

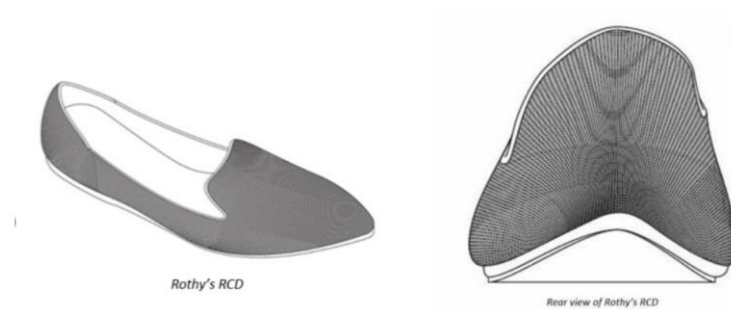


Figure 17 - Deposited model of the Pointed Loafer of Rothy’s (Source: [To the point: Rothy's Inc v Giesswein Walkwaren AG - Mathys & Squire LLP \(mathys-squire.com\)](http://mathys-squire.com))

Giesswein was of the opinion that the black lines only show the 3D shape of the shoe.³⁰² Subsidiary, if the black lines would indicate any surface design feature, they represented a general textured appearance rather than any specific material.³⁰³ However, the court agreed with Rothy's that these lines were not an indication of a general textured appearance, but were intended to indicate the specific knitted fabric used and are inconsistent with alternative textures such as suede.³⁰⁴

When assessing the validity of the RCD, the court noted that the Pointed Loafer differed in the shape and appearance of the heel, the material of the upper part, and the counterline. These differences would be noticeable to the informed user and create a different overall impression.³⁰⁵

Finally, the court concluded that Rothy's RCD and the Giesswein's Pointy Flats created the same overall impression on the informed user. Both designs shared many similarities, including the fact that they are both '*pointed-toe slipper cut ballerina shoes, with a low heel, an obvious counterline, protruding tongue and recognisable gussets*'.³⁰⁶ The most striking similarity to the informed user was that both loafers had uppers knitted from a heavy thread, which was a completely new departure for ballet-style shoe design.³⁰⁷ While the RCD and the Pointy Flat were not identical, they did produce the same overall impression.³⁰⁸

For similar reasons, the UCD of Rothy's was also found valid. Despite slight differences, it was decided that the Pointed Loafer in the UCD produced the same overall impression on the informed user as Giesswein's Pointy Flat shoes. The court considered the limited edition-nature and the short display period of the shoes on the website. Although there were some remaining images on social media, the court did not believe that the Giesswein designers would have revisited those posts. Therefore, the court did not consider the Pointy Flat shoe a copy of the Pointed Loafer and found that Giesswein had sufficiently explained how the Pointy Flat shoes were independently designed. Consequently, no infringement was found on the UCR by Giesswein.

³⁰² IP Enterprise Court UK, 16 December 2020, *Rothy's Inc. v. Giesswein Walkwaren AG*, §58.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*, §59.

³⁰⁵ IBBETSON, S., 'UK: Rothy's v. Giesswein', <https://www.mondaq.com/Article/1034238>.

³⁰⁶ IP Enterprise Court UK, 16 December 2020, *Rothy's Inc. v. Giesswein Walkwaren AG*, §98.

³⁰⁷ THOMA, M. and PARISH, O., 'To the point: Rothy's Inc v Giesswein Walkwaren AG', *Intellectual Property Magazine*, March 2021, [To the point: Rothy's Inc v Giesswein Walkwaren AG - Mathys & Squire LLP \(mathys-squire.com\)](#).

³⁰⁸ IP Enterprise Court UK, 16 December 2020, *Rothy's Inc. v. Giesswein Walkwaren AG*, §98.

The success of Rothy's RCD claim and the resulting design protection for the material and texture of their shoes in this case demonstrates the importance of carefully preparing design drawings.³⁰⁹ This ruling highlights the significance of including high-resolution images demonstrating such features in the RCD application because a Court may 'zoom in' to the drawings to examine subtle, but valuable, details.³¹⁰ For example, if the representation of the upper material had been a simple cross-hatched pattern, the court might not have concluded that the design was made by a knitted material, rendering the design potentially invalid.³¹¹

In addition, this judgement illustrates the difference in scope of protection between an RCD and a UCD. An UCD only provides protection against deliberate copying. Even if both designs produce the same overall impression on the informed user, copying can still be contested if the creation is the result of an independent work of creativity. The existence of this requirement does not inherently hinder the fashion industry from becoming more sustainable; instead, it serves as a source of innovation. However, proving that the alleged infringer had prior knowledge of the original design or intentionally copied it can be a complex task and often involves extensive evidence. It is a case-by-case assessment subject to the judge's interpretation, adding a subjective element to the process. This significant difference between a RCD and UCD explains why the enforcement of a RCD, which does not require the proof of copying having taken place, is often easier than the enforcement of the UCD.³¹² If the threshold for proving independent creation is set too high, it could potentially impede sustainability in the fashion industry. Stringent requirements may discourage designers and businesses from pursuing innovative designs, fearing the risk of unintentional similarities.

Nevertheless, if the contested design is determined to be an independently created design, it does not infringe upon the prior design, yet the latter can still retain its protection under the UCD. This is beneficial for small designers, as their prior design remains safeguarded against other deliberate direct and close copies that create a same overall impression. Additionally, the contested design is not eligible for protection under the Regulation as it lacks novelty or individual character because of the existing prior design.

³⁰⁹ See also UK, 9 March 2016, *Trunki v. Kiddee*; THOMA, M. and PARISH, O., 'To the point: Rothy's Inc v Giesswein Walkwaren AG', *Intellectual Property Magazine*, March 2021, [To the point: Rothy's Inc v Giesswein Walkwaren AG - Mathys & Squire LLP \(mathys-squire.com\)](#).

³¹⁰ *Ibid.*

³¹¹ CARTY-HORNSBY, G., 'Registered Design enforcement: the key lessons from Rothy's v. Geisswein', February 2021, [Key lessons from Rothy's v. Geisswein \(marks-clerk.com\)](#).

³¹² PETRAZ, D. L., VAN DER HEIDE, L. and BARILA, C., 'Litigation design disputes', *World Trademark Review*, November 2018.

However, not every judge sets the threshold for proving intentional copying as high as in the forementioned case. An example of this is the case *OTB Group v. Inditex*, in which the court also had to assess whether Zara Sandals were infringing upon the Marni Fussbet Sandals protected by a UCD. Firstly, the court confirmed the validity of the UCD for the 3-year term. It determined that ‘*the date of public disclosure can be traced back to 15 February 2014, the date on which it was allegedly included in the catalogue also published on websites while in June of the same year it was supplied to the national sales network and other countries in the EU*’ and that ‘*the appearance of Marni's sandal presents enough characteristic elements to produce an overall different impression in the sector, such as the crisscross pattern of the upper part, the back strap with buckle, the material of which it is composed and the one-piece black rubber sole having soft lines that rests on a worn tired tread plate*’ (own translation).³¹³ Regarding the comparison of the overall impression between the UCD and the alleged infringing Zara Sandals, the court found that all the distinctive elements of the Marni Sandals were present in the Zara Sandals. The two products were practically indistinguishable for a consumer who is not placed in a position to make a contextual and direct comparison of the two models. The court determined that ‘*the differences between them appear to be of minimal significance and completely irrelevant for the purpose of actually being able to give the defendants’ model in turn a different overall impression from the plaintiffs’ model*’ (own translation).³¹⁴ Consequently, the court confirmed that the UCD for the Fussbett sandal model had been infringed by the Zara Sandals. It is worth noting that the court solely focused on whether the alleged infringing Zara Sandals produced a different overall impression from the UCD. The question of whether they were made by copying the UCD, i.e. intentionally and not independently designed was not explicitly addressed by the court.

3. Enforcement against the current fast fashion practices in the light of the EU case law

Once a design is eligible for protection, and has been registered in case of a RCD, fashion designers can rely on these tools to enforce their rights against copying practices. The infringement procedure under the Regulation serves an effective mechanism in protecting the design rights of designers and preventing unauthorized copying of designs by fast fashion

³¹³ Court of Milan, 28 June 2016, *OTB Group v. Inditex Group*.

³¹⁴ *Ibid.*

retailers. However, it can be more challenging for fashion designers to achieve a positive outcome in legal actions against the more ‘traditional’ mass market retailers such as ZARA or H&M. These retailers often produce derivative works seeking to reference a hot new trend. They design ‘with reference’ to trends but incorporate distinguishing features to create a different overall impression for each garment, thereby circumventing design infringement. This aligns with the purpose of IPRs: to encourage innovation by rewarding and protecting novel and distinctive designs while allowing for variations and improvements within established trends or styles. This blurs the line between imitation and inspiration and can create frustration and incomprehension amongst fashion designers.

However, the Regulation provides not only protection against exact copies of a prior design, but also against designs that produce a similar overall impression on the informed user as the prior design. This broad scope ensures that even subtle variations can be considered sufficient grounds for an infringement. An exemplary case illustrating this is the *Sandlers v. Nills Fashion* case, where it was established that even in the context of an UCD, an exact replica is not required for infringement, and small differentiating factors can still lead to a finding of infringement.

When assessing an infringement of design rights, the similarities between the two designs are given more weight than the differences. The main focus is on whether the contested design adopts the elements that give the prior design its own character. As long as the visual characteristics of a model have been largely adopted, small differences do not detract from this similar overall impression. If this were not the case, the protection systems could be easily circumvented by adding small changes to the clothes.

An important factor to consider in the assessment of design infringement under the EU design regulation is the perspective of the ‘*informed user*’. This informed user perspective takes into account the overall impression that the design creates on someone knowledgeable in the field. According to case law, ‘*the informed user also knows the different models of umbrella and their usual features and shows a relatively high level of attention in respect of the products concerned - the informed user of a design is already by nature a person who has a particular interest in the design of a given product and who is interested in trends in design, art and fashion which*

might be behind the emergence of such a design'.³¹⁵ In infringement proceedings regarding fashion garments, the informed user is typically well-versed in fashion and design trends.

Unfortunately, it is still a hard truth that today's average consumer of clothing may not yet be aware of the harmful knock-off practices adopted by fast fashion retailers.³¹⁶ However, the informed user is not the average consumer. Their knowledge is greater than the knowledge and perception of the well-informed and reasonably observant and circumspect average consumer relevant in a trademark analysis.³¹⁷ This higher level of perception is advantageous because the informed fashion user possesses a keen eye and a heightened awareness of similarities in fashion designs. While an informed user would likely be alert enough to recognize imitations and similarities between designs, individuals less attuned to fashion trends might not easily discern such infringements. This approach aligns with the intention of the EU design regulation to protect the rights of designers within their specific creative domain and empowers those who possess specialized knowledge to recognize and respond to imitations.

Therefore, the inclusion of the informed user perspective in the assessment of design infringement provides an additional advantage, as it takes into account the informed user's ability to identify similarities and imitations that might be missed by individuals with less knowledge and interest in fashion. It enhances the accuracy and effectiveness of the infringement procedure, allowing for a more nuanced evaluation of design rights and providing further protection for designers in the fast-paced and rapidly evolving fashion industry.

Nevertheless, the outcome of the case assessment is not always predictable and is ultimately up to the judge to make a decision based on their interpretation and the evidence presented. Larger differences between two designs will still let the judge conclude to a different impression on the informed user. Fast fashion brands are aware of this and may add the right amount of modifications to the original design to avoid designers to prove an infringement. This can make it challenging for designers to protect their designs, especially since the assessment of an infringement is a case-on-case assessment, depending on the court's view.

³¹⁵ CJEU, 21 May 2015, *Senz Technologies BV v. OHIM*, para. 51; CJEU, 20 October 2011, *PepsiCo Inc v. Grupo Promer Mon Graphic SA*, §53.

³¹⁶ PEREIRA, L., CARVALHO, R., DIAS, Á., COSTA, R. AND ANTÓNIO, N., 'How Does Sustainability Affect Consumer Choices in the Fashion Industry?', *Resources*, 10(38), 2021, p. 2.

³¹⁷ CLARK, B. and SILVERMAN, I., 'A guide to designs and copyright in Europe and the United Kingdom', *World Trademark Review*, 2014, p. 63.

An advantage of enforcing a RCD is that it is not necessary to prove that there has been intentional copying of a design. An infringer could be ignorant of the design registration, and yet could still be held liable for infringement. What matters is how similar the defendant's design looks to the registered design. When it comes to the enforcement of their rights, it is therefore more interesting for a fashion designer to opt for an RCD. However, fashion designers are more inclined to appeal to UCDs.³¹⁸

Perhaps one of the trickiest parts of the infringement proceeding regarding an UCD, is providing evidence of the date and place of the first disclosure of the design to establish that the design enjoys protection as a UCD. The main requirement for an UCD is that the design should be made available to the public as described in Article 11 of the Regulation. Providing evidence with both a picture and a date can be problematic. For example, the Invalidity Division has dismissed an application for a declaration of invalidity on the ground that the disclosure of the earlier designs had not been demonstrated, because the evidence of the prior disclosure is not dated and is of poor quality.³¹⁹ It is important for designers to provide evidence for each stage of the design process, including store and archive drawings, sketches, mood boards, and more.³²⁰ This evidence is crucial in proving the existence and ownership of the UCD.

In addition, when enforcing an UCD, the claimant will have to prove copying by the infringer. Such evidence can include proof that the defendant purchased one of their products before launching their version, or the defendant's product may look so similar to a design that it must have been a copy.³²¹ Even though proving copying by a fast fashion retailer may not always be an easy job in infringement proceedings, fortunately, some presumptions developed by case-law can help a fashion designer enforcing their UCD. It is presumed that a design in a UCD has been copied if the alleged infringing design is so similar that this similarity can no longer be purely accidental.³²² A similar behaviour in the past by the alleged infringer may also suggest copying.³²³

³¹⁸ BUSSE, J. and CAUDRON, F., 'The Unregistered Community Design to conquer the European fashion industry', *Retail & Consumer Products Law Observer*, 2019, [The Unregistered Community Design to conquer the European fashion industry - Lexology](#).

³¹⁹ General Court, 14 March 2018, *Crocs Inc. v. Gifi Diffusion and EUIPO*.

³²⁰ IP Enterprise Court UK, 21 November 2014, *John Kaldor Fabric Maker UK Ltd. V. Lee Ann Fashions Ltd.*

³²¹ GILBERT, T., 'Why to get your designs registered', 2022, <https://www.lexology.com/library/detail.aspx?g=f422684f-1d12-4461-94be-8c894173c216>.

³²² Court of Appeal 's Gravenhage, 17 October 2007, *BIE* 2008, 317-323; PHILIPSEN, G., 'The unregistered Community design and fashion: unknown is unloved... or is there more?', *IRDI*, 4, 2012, 357-358.

³²³ Brussels, November 2014, ie-forum.be, 1545.

The current fast fashion practices are widely known for intentional copying. For example, SHEIN's fast-fashion business model is routinely criticized for alleged copying of designs.³²⁴ They even use similar names and almost identical images as the original product:



Image 17 – Design of small designer Mariama Diallo (left) copied by SHEIN (right) (Source: Twitter [@MariamaDiallo](#))

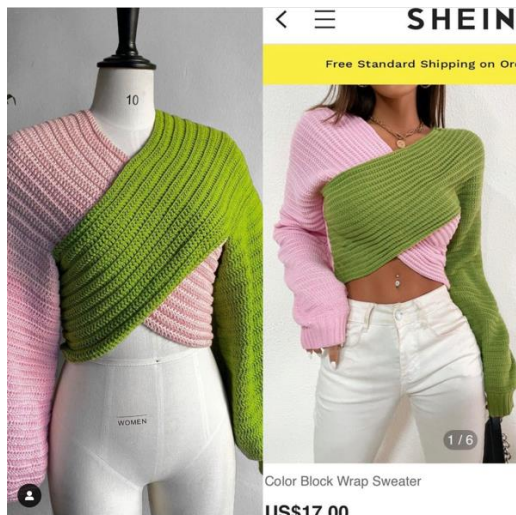


Image 18 – Design of small designer Elexiay (left) copied by SHEIN (right) (Source: Instagram [@Elexiay](#))

These examples, along with hundreds more that can be found through simple internet research, make it undeniable that copying existing designs is an acceptable practice within the company and the formula for their business success.³²⁵ The similarities of the designs are numerous and striking that these cannot be qualified as resulting from an independent work by a designer who

³²⁴ See Chapter 1.

³²⁵ XIE, Y., 'Is SHEIN's Indie Designer Program an Ethical Alternative to Copying?', 2021, <https://pandaily.com/is-sheins-indie-designer-program-an-ethical-alternative-to-copying/>.

can reasonably be assumed not to be familiar with them, especially small designers.³²⁶ The similarities are no longer purely accidental; today, their intentions are clear.

However, even though SHEIN has been under scrutiny numerous times, they persist that *‘they have no intention of infringing on anyone’s valid IPR, not is it our business model to do so. SHEIN suppliers are required to comply with company policy and certify that their products do not infringe on third-party intellectual property rights.’*³²⁷ Furthermore, according to a marketing specialist at SHEIN, the company’s ability to rapidly produce and sell clothes and then remove them from the internet as soon as the owners of the copied design find out makes SHEIN impervious to accusations of copying.³²⁸

However, it seems that the courts are not blind to such practices. In a ruling by the UK High Court³²⁹, the fast fashion brand Oh Polly was found to have *‘flagrantly’* infringed a number of UCDs by House of CB and Mistress Rocks. It was found that Oh Polly took pictures of the claimants’ designs and sent them to their factories to be reproduced. The court referred to these practices as demonstrating an attitude of *‘couldn’t care less’* about the rights of others and that, as a designer, she could have known that such activity was not lawful. Oh Polly was ordered to pay total damages of £ 450.124,56. This case sheds light on the unethical practices of copying and imitating designs without permission, which have been prevalent in the fast fashion industry.

The exposure of fast fashion retailers copying small businesses by more judges can have significant implications for the fashion industry. As more cases come to light and receive attention, it creates opportunities to establish legal precedents and presumptions that can protect the rights of small businesses and designers. By bringing such cases to court, designers and small businesses have a chance to showcase the originality and creativity behind their work, while also raising awareness about the importance of respecting intellectual property.

³²⁶ PHILIPSEN, G., ‘The unregistered Community design and fashion: unknown is unloved... or is there more?’, *IRDI*, 4, 2012, 357-358; Court of Appeal ’s-Gravenhage, 17 October 2007, *G-Star v. Esprit*.

³²⁷ Pandaily, ‘Fast Fashion Giant SHEIN Allegedly Steals Designs’, 2022, <https://pandaily.com/fast-fashion-giant-shein-allegedly-steals-designs/>.

³²⁸ XIE, Y., ‘Is SHEIN’s Indie Designer Program an Ethical Alternative to Copying?’, 2021, <https://pandaily.com/is-sheins-indie-designer-program-an-ethical-alternative-to-copying/>.

³²⁹ England and Wales High Court, 24 February 2021, *Original Beauty Technology Co Ltd and others v G4K Fashion Ltd and others*.

Such judgements do not only protect the rights of designers but also promotes sustainability by encouraging the production of more new and individual designs, rather than relying on copying. Additionally, the exposure of such practices can contribute to a shift in consumer behavior. Increased awareness about the impact of fast fashion copying can lead to more informed purchasing decisions and a growing demand for ethical and sustainable fashion.

While the exposure of fast fashion copying and the establishment of legal precedents are important steps, the ultimate responsibility lies with the designers themselves to take action and protect their design rights. The fashion industry is eagerly waiting for designers to assert their rights and actively engage in addressing the issue of copying. By actively pursuing legal action against infringers, designers can set examples and send a strong message to the fashion industry that copying will not be tolerated. Taking legal recourse not only protects their own interests but also contributes to the overall advancement of intellectual property rights in the fashion industry. Their active participation, along with legal measures, industry collaboration, and consumer awareness, can drive positive change and create a more ethical and supportive environment for the fashion industry as a whole.

Chapter 4: Underuse and obstacles of EU Design law in the quest to sustainability in the fashion industry

1. Underuse of the EU design protection framework

As outlined in Chapter 2, the EU provides a comprehensive legal framework on the protection of fashion designs. While the protection offered by the UCD is considered less extensive compared to the RCD, previous case law from European and national courts, as discussed in Chapter 3, has demonstrated its effectiveness in safeguarding fashion designs against imitations. Both UCD and RCD can serve as a valuable and reliable intellectual property asset for designers to combat the prevalence of fast fashion copycats.

However, despite the availability of such extensive and adequate protection for fashion designs, research indicates that there has been limited use of both RCD and UCD by fashion designers in Europe. As the knock-off industry is only getting bigger, one could think that the use of these

protection tools would increase along. A search on the EUIPO's *DesignView* database³³⁰, reveals that over the past five years, during which the fast fashion copycats have expanded their copying practices, 38.382 EU designs have been registered and fully published within the category of 'Garments'. It is important to note that this category also includes non-fashion clothing such as work and protective clothing, fishermen's jerseys, sport apparel, masquerade costumes, ... Furthermore, these RCDs are owned by a mere 250 designers, with one designer alone holding 5.692 of the registered designs. Notably, there is no mention of any small sustainable fashion brand among these holders. Considering that the EU is home to some of the world's most famous fashion companies that provides an innovative environment for emerging designers, the number of fashion garments registered under the Regulation represents only a fraction of the industry's total output of fashion pieces in the EU during the specified period.

It is not possible to conduct similar research for UDC due to its unregistered nature. A way to measure the use of UDC by fashion designers is to examine litigation proceedings in the EU concerning fashion designs. Although not all cases are publicly accessible, observations indicate that there has been little litigation in the EU concerning UDC for clothing pieces.³³¹

As observed earlier, the low adoption rate of EU design protection is unlikely to be attributed to the ineffectiveness of the protection regime. Many designers who have relied on the system to enforce their rights against design copycats have achieved positive outcomes in their enforcement proceedings. The EU design law framework seems to work and to be fit for purpose.³³² Therefore, other factors must be contributing to the underutilization of the EU design protection system by fashion designers. A Public Consultation conducted by the EC has identified that the low rates of registered designs is mainly due to insufficient awareness of the availability, benefits and methods of protection designs in the EU, particularly affecting young designers and SMEs.³³³ This observation has also been endorsed by the European Design Leadership Board.³³⁴ Interestingly, some respondents have indicated that the fashion and clothing industry, in particular, is susceptible to the detrimental effects of this lack of awareness

³³⁰ This database contains the registered Community designs filed at the EUIPO and national offices, <https://www.tmdn.org/tmdsview-web/welcome>.

³³¹ RAUSTALIA, K. and SPRIGMAN, C., 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review*, 92(8), 2006, p. 1737; MONSEAU, 'European Design Rights: A Model for the Protection of All Designers from Piracy', *American Business Law Journal*, 14, p. 61; MYERS, E., 'Justice in Fashion: Cheap Chic and the IP Equilibrium in the United Kingdom and the United States', *AIPLA Q.J.*, 37(47), 2009, 55–57.

³³² European Commission, Evaluation of EU legislation on design protection, November 2020, p. 58.

³³³ European Commission, Evaluation of EU legislation on design protection, November 2020, p. 17.

³³⁴ European Design Leadership Board, 'Design for Growth & Prosperity Report and Recommendations', 2012.

regarding design protection benefits.³³⁵ In addition, designers are often not aware of the differences between design rights and other IPRs, such as trademarks and copyright. However, design protection, with its unique scope of protection and enforcement mechanisms, can be just as, if not more, crucial in developing a comprehensive IP strategy within the fashion industry.³³⁶

2. Intrinsic shortcomings of the EU legislation on design protection

2.1. Time and cost of a Community design

As a practical consideration, obtaining a RCD can be a time-consuming and expensive process.³³⁷ It involves more than just submitting an application; it requires conducting prior research to ensure that a similar design is not already registered or otherwise protected. Additionally, the application should include a detailed description of the design, along with any relevant drawings or images. The previously mentioned *Rothy's*-case exemplifies the significance of preparing drawings that capture all the essential features of the design to optimise its scope of protection. This can take a considerable amount of time, especially because the fashion industry is characterized by a high level of creativity, which means that designers may need to register multiple designs a year to protect their intellectual property. Furthermore, a RCD is valid for up to 25 years but requires renewal every five years. Failure to renew the registration can result in the loss of protection for the design.

Statistics reveal that the administrative burdens, the complicated nature and the cost of the registered protection process are the most important factors that discourages designers to utilize the RCD regime.³³⁸ The registration fees for a RCD start at EUR 350 but can vary depending on the number of designs being registered.³³⁹ This expense can be significant, particularly for small fashion businesses or independent designers who may not have large budgets for legal and intellectual property protection. Alongside the registration fees, there may be additional costs associated with preparing and filing the application, such as attorney fees because these

³³⁵ European Commission, Evaluation of EU legislation on design protection, November 2020, p. 17.

³³⁶ MULLER, S., 'EU Design Reform Package: More efficient, Affordable, and Future-proof Design Protection Ahead', *The National Law Review*, 13(148), May 2023.

³³⁷ MONSEAU, S., 'European Design Rights: A Model for the Protection of All Designers from Piracy', *American Business Law Journal*, 14, p. 42.

³³⁸ European Commission, Economic Review of Industrial Design in Europe, January 2015, p. 104; European Commission, Evaluation of EU legislation on design protection, November 2020, p. 106.

³³⁹ EUIPO, Fees and payments (May 2023), <https://euipo.europa.eu/ohimportal/en/rcd-fees-and-payments>.

brands may lack the legal expertise and resources to navigate the registration process effectively.

According to the Public Consultation published by the EC, the lack of formalities and registration costs makes the UCD generally more attractive, especially for SMEs and young designers.³⁴⁰ Sustainable brands typically operate with small teams or as independent designers and may often not have the time or resources to dedicate to the registration process. Such constraints could hinder their ability to focus on other crucial aspects of their sustainability efforts, such as sourcing eco-friendly materials or building partnerships with ethical manufacturers, as well as managing other aspects of their business such as the marketing of their designs to build brand recognition.

However, relying solely on the UCD mechanism is not free of cost neither. While owning a Community design provides some level of protection, enforcing and defending those rights can be a costly matter. Legal fees, court expenses, expert witness fees, and other related expenses can quickly accumulate, especially in complex cases. Designers may be concerned about the financial burden associated with pursuing legal action. The success of an infringement claim depends on various factors such as the strength of evidence, the interpretation of design law, and the effectiveness of legal arguments. Designers may be reluctant to invest significant funds in a legal process with an uncertain outcome, especially if the potential damages or compensation they might receive do not outweigh the costs.³⁴¹

2.2. Term of protection

The introduction of UCD was specifically intended to address the unique requirements of the fashion industry and its rapidly evolving products.³⁴² The UCD regime indeed aligns with the current seasonal, not to use ‘*out-of-balanced*’, nature of clothing designs³⁴³ and provides immediate protection for short-lived fashion products against imitation. It allows designs to be showcased before they are available for sale.³⁴⁴ Often, copying of designs starts from its appearance on the runway, with mass market retailers introducing knock-off versions in the

³⁴⁰ European Commission, Evaluation of EU legislation on design protection, November 2020, p. 96.

³⁴¹ BREWER, M. K., ‘Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility’, *The New Frontiers of Fashion Law*, 8(4), 2019, <https://www.mdpi.com/2075-471X/8/4/24>.

³⁴² See above.

³⁴³ IP-wisely, ‘Fashion design protection: US vs. EU’, <https://ipwisely.com/fashion-design-protection-us-vs-eu/>.

³⁴⁴ MARTIN, T., ‘Fashion Law: Updating Protection for Designs’, *Baltimore Law Review*, 48, p. 473.

shops within the next weeks at a fraction of the price.³⁴⁵ Given these circumstances, the three-year term strikes a balance between protecting designers against fast-fashion knockoffs and accommodating the fashion industry's naturally rapid turnover.³⁴⁶

However, in the light of this research, here is exactly where the problem lies. While the UCD regime encourages designers to continually create and innovate by introducing new designs to the market, at the same time, it is contributing to the existing overproduction in the industry. With designs being protected for only a short period, there is a greater incentive for designers to produce large quantities of a particular design in order to maximize profits within the protection period. This results in excess inventory, which often goes to waste.

The limited protection period does not provide sufficient incentives for fashion designers to invest in and create sustainable designs that are intended to last longer than a few seasons, as they can be easily copied and exploited by competitors. Designers may prioritize creating designs that are trendy and will sell quickly rather than designs that are more sustainable. In other words, the underprotection of a design can be a threat to the incentive to engage in creative labour by a designer.³⁴⁷

On the other side, while most fashion trends come and go in the blink of an eye, certain fashion items have a longer life span.³⁴⁸ The RCD regime provides a longer protection term up to 25 years for designers to benefit from their designs, recover investments and generate returns over a more extended period. This encourages the production of quality designs which further drives innovation and sustainable practices in the fashion industry, rather than just chasing short-term trends. It provides designers more incentives to create valuable designs and focus on using more sustainable materials and technology.

³⁴⁵ ROWE, H., 'Retailers are Copying Fashion Show Designs Within Minutes', 2014, <https://www.businessinsider.com/retailers-are-copying-fashion-show-designs-within-minutes-2014-9?international=true&r=US&IR=T>; AGINS, T., 'Copy Shops: Fashion Knockoffs Hit Stores Before Originals as Designers Seethe', *WALL ST. J.*, 1994.

³⁴⁶ VAN KEYMEULEN, E., 'Copyrighting couture of counterfeit chic? Fashion Design: A Comparative EU – US Perspective', *Journal Of Intellectual Property Law & Practice*, 7(10), October 2012, p. 736.

³⁴⁷ SRINIDHI, M., 'Design Challenges in the Realm of Fashion', *CSRIPR*, May 2021, https://csriprnurl.wordpress.com/2021/05/05/design-challenges-in-the-realm-of-fashion/#_edn7

³⁴⁸ VAN KEYMEULEN, E., 'Copyrighting couture of counterfeit chic? Fashion Design: A Comparative EU – US Perspective', *Journal Of Intellectual Property Law & Practice*, October 2012, 7(10), p. 732.

However, while this duration of protection may definitely be suitable to incentivize designers to create durable designs and to act against knock-offs, it falls short in effectively preventing all copying and fostering sustainability in the fashion industry. For example, the iconic Hermès Birkin bag, introduced in 1984, is a timeless design. Each Birkin is handmade from start to finish by a single artisan trained for a minimum of five years, taking up to 40 hours and using traditional tools and techniques dating back to the Middle Ages.³⁴⁹ As one of the most expensive and sought-after bags, it requires an extensive IP protection. As the EU design protection is limited to 25 years, the iconic bag is no longer eligible for such protection. Nevertheless, a simple research on the internet for ‘Hermès Birkin bag’ reveals numerous identical designs being made and sold:



Image 19 - Birkin bag Hermès (Source: [Hermès Birkin 30 Handbag | Buy or Sell your Designer bags - Vestiaire Collective](#))

³⁴⁹ WILKINSON, S., ‘Behind the Birkin’, <https://saclab.com/behind-the-birkin/>.

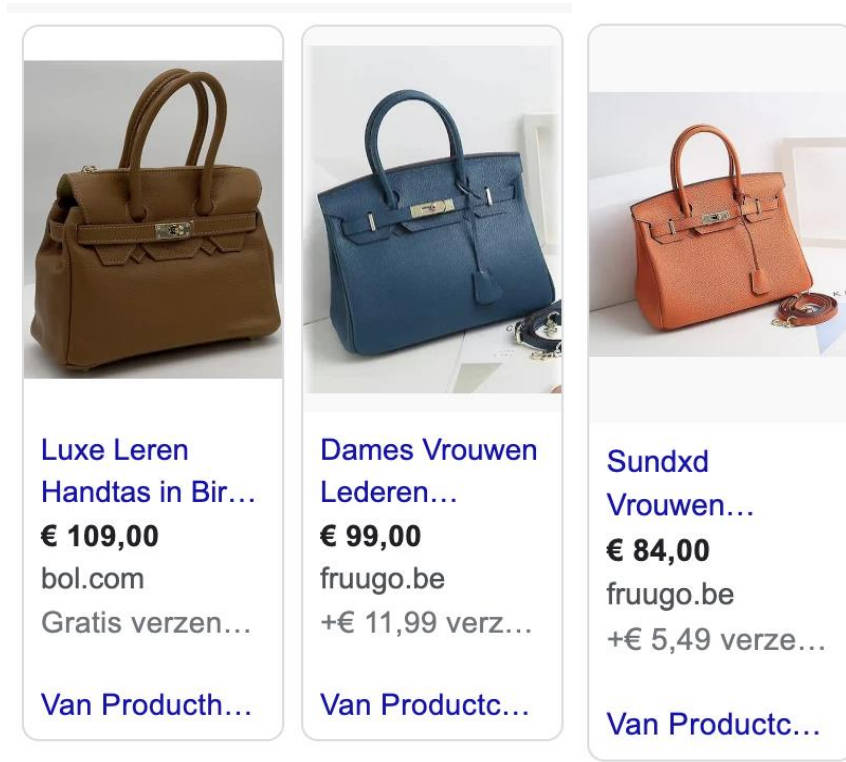


Image 20 – Copies of the Hermès Birkin bag found by a simple online research (Source: Google search for ‘Hermès Birkin bag look-a-like’ – [bag 1](#), [bag 2](#), [bag 3](#))

Such timeless fashion pieces require a longer, if not lifetime, design protection as they stay in style for decades. After the 25-years of Community protection, anyone can reproduce these designs. Moreover, a longer protection period could provide designers with greater confidence in investing their time and resources into creating long-lasting and durable designs that have a more significant impact on sustainability.

2.3. Requirements for protection

In order for designers to protect their designs through design law, it is crucial to determine whether these creations are eligible for protection. Prior to applying for design protection, conducting initial research is essential to determine if the design passes the novelty and individual character tests. The protection conditions are broadly defined, and the registration office does not verify whether the design meets these criteria during the application process. Consequently, a design can be challenged by an application for declaration of invalidity by the owner of a prior design, as seen in the *Puma* invalidity case. Furthermore, the individual character of the claimant’s design in an infringement proceeding may be compromised by prior

designs.³⁵⁰ Thus, whether a design meets the protection conditions is examined for the first time in court. It is therefore crucial to conduct a thorough search of existing fashion creations that may prevent the protection of the creation for which protection is sought. The principle of ‘*first-come, first served*’ applies.³⁵¹

The DesignView Database (EUIPO), the Global Design Database (WIPO) and the The Hague Express Database (WIPO) are essential tools when it comes to design search for prior Registered Community Designs all over the world.³⁵² On the contrary, UCDs cannot be found in design databases. UCDs can be discovered in existing literature, design catalogues, websites, or conducting a search within the circles specializing in the specific fashion sector.³⁵³ This makes it challenging to determine in advance the precise subject of the claimed protection, often leading to a designer understanding the scope of protection only during an infringement proceeding. Additionally, the search should not be limited to a specific territory.³⁵⁴ Any design that has been made available to the public, anywhere in the world, and at any time must be considered.³⁵⁵ Furthermore, rights holders face difficulties in monitoring and detecting unauthorized use of their designs, particularly in cases where the infringing product is not widely distributed or visible in the market.

In the Public Consultation of the EC, respondents highlighted several factors as negatively impacting their confidence in design law, including the lack of substantive examination, complexity in assessing novelty, difficulties in running an exhaustive prior art search before applying for protection, and an insufficient case law on the scope of protection.³⁵⁶ Respondents emphasized the importance of conducting quality searches before registration to gain confidence in scope of protection and validity.³⁵⁷

In the fashion industry, the requirements of novelty and individual character can be challenging, as fashion trends quickly emerge, evolve, and spread. A fashion trend represents a ‘*vivid*

³⁵⁰ For example, Court of Appeal Brussels, 5 September 2017, *Wamo v. WTG*.

³⁵¹ European IP Helpdesk, Design Searching, January 2022, p. 2, https://intellectual-property-helpdesk.ec.europa.eu/system/files/2022-02/EU_IP-H_fact_DesignSearching2022_fin_0.pdf.

³⁵² *Ibid.*, p. 6.

³⁵³ *Ibid.*

³⁵⁴ KAPPELLER-HIRSCH, B., ‘Unregistered Community Designs: a secret weapon in design protection?’, 2021, <https://www.schoenherr.eu/content/unregistered-community-designs-a-secret-weapon-in-design-protection/>.

³⁵⁵ European IP Helpdesk, Design Searching, January 2022, p. 3, https://intellectual-property-helpdesk.ec.europa.eu/system/files/2022-02/EU_IP-H_fact_DesignSearching2022_fin_0.pdf.

³⁵⁶ European Commission, Evaluation of EU legislation on design protection, November 2020, p. 113.

³⁵⁷ *Ibid.*

*manifestation of a general innovation pattern wherein those engaged in innovation continually seek after the new and different while, at the same time, converging with others on similar ideas.*³⁵⁸ One important question in this context is whether a style is protected under EU design law. A fashion style lies between a (non-protectable) idea and a (protectable) embodiment of this idea.³⁵⁹ According to MUSKER, a style of a model can be part of the overall impression of the design and thus enjoy protection under the Regulation.³⁶⁰ However, the mere expression of a fashion style or trend does not qualify for protection.³⁶¹ Case law is clear that the mere development or deployment of a new fashion or style cannot find protection.³⁶² The individual character of a design cannot follow from elements that are an expression of a certain style or fashion, as these elements do not create a different general impression in the informed user.³⁶³ To protect a creation under design law, designers must ensure that there are concrete elements in the design that transcend the style or fashion trend. The overall design must distinguish itself from style features, common forms, trends or fashion phenomena of already existing designs. The *Diesel/Zara* case exemplifies this, where skinny jeans are a style forming part of the overall impression of Diesel's Skinzee sp Jeans, but there were enough distinguishing elements from skinny jeans in the prior art.

However, there is a thin line between ‘*inspiration, adaptation, homage, referencing or remixing*’ and the broad concept of copying.³⁶⁴ Due to shared inspirations or prevailing trends, the fashion industry faces the risk of unintentional similarity, as multiple designers may independently create similar designs. This raises questions about the novelty of a fashion piece and necessitates careful consideration and evidence to establish its distinctiveness. Designers must demonstrate that their fashion piece possesses specific characteristics that set it apart from prior designs in a way that is noticeable to an informed user. This often involves considering details such as silhouette, color, pattern, texture, or innovative design elements to produce a unique overall impression and justify the protection.³⁶⁵

³⁵⁸ HEMPHILL, C. S. and SUK, J., ‘The Law Culture and Economics of Fashion’, *Stanford Law Review*, p. 1147.

³⁵⁹ VANHEES, H., ‘Benelux Convention on Intellectual Property’, *OHRA*, 82, 2018, p. 16; VAN KEYMEULEN, E., ‘Copyrighting couture of counterfeit chic? Fashion Design: A Comparative EU – US Perspective’, *Journal Of Intellectual Property Law & Practice*, October 2012, 7(10), p. 730.

³⁶⁰ MUSKER, D., *Community Design Law-principles and Practice*, Sweet & Maxwell, 2002, p. 33.

³⁶¹ GIELEN, C., *Kort begrip van het intellectuele eigendomsrecht*, Kluwer, 2017, p. 172 - 173, VANHEES, H., ‘Benelux Convention on Intellectual Property’, *OHRA*, 82, 2018, p. 16.

³⁶² Court of Appeal ‘s Gravenhage, 22 May 2008, *Footwear International BV v. Converse Inc.*

³⁶³ Court of Appeal The Hague, 1 October 2008.

³⁶⁴ HEMPHILL, C. S. and SUK, J., ‘The Law Culture and Economics of Fashion’, *Stanford Law Review*, p. 1147.

³⁶⁵ FISCHER, F., ‘Design Law in the European Fashion Sector’, *WIPO Magazine* 12-13, February 2008.

It is important to note that the Regulation primarily focuses on protecting the aesthetic aspects of designs rather than the underlying ideas or functional aspects.³⁶⁶ While this approach ensures the novelty and distinctiveness of designs, it may not adequately address sustainability concerns. The focus of sustainable fashion often lies in the use of sustainable materials, production techniques, and ethical practices, rather than creating designs with unique appearances.³⁶⁷ These designs may share similarities with existing designs, making it challenging to establish the required level of novelty. Additionally, the use of sustainable materials and techniques may not always result in visually distinct or immediately noticeable differences compared to conventional fashion items, further complicating the demonstration of individual character.³⁶⁸ This can make it more difficult for sustainable clothes to meet the requirements of novelty and individual character, which are primarily concerned with aesthetic distinctiveness.

The use of ecological or sustainable fabrics in fashion is not specifically protected under the Regulation. Granting legal protection to the use of ecological fabrics could incentivize designers and brands to invest in sustainable materials and practices. It could encourage innovation and research in developing new eco-friendly fabrics, leading to a broader adoption of sustainable practices throughout the industry. However, this is not the purpose of the Regulation and falls outside its scope. The general yet simple rule of design protection is: what you see is what you get.³⁶⁹ In the context of incentivizing designers to opt for ecological fabrics or sustainable materials, the Eco-Design Regulation or the patent protection is more relevant but beyond the scope of this thesis.

3. Too big to battle?

The rise of fast fashion practices poses a significant challenge to the traditional business model of fashion designers. From a design law perspective, the copying of fashion designs without proper authorization infringes on the exclusive rights granted to designers. Design protection laws aim to reward and protect novel and individual designs, fostering innovation in the fashion industry. However, the fast fashion model, characterized by the rapid production of affordable

³⁶⁶ General Court, 6 June 2013, *Erich Kastenholtz v. OHIM*; Ghent, 30 April 2017, ICIP 2007, 783; Recital 10 and article 8(1) of the Design Regulation.

³⁶⁷ BREWER, M. K., 'Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility' in *The New Frontiers of Fashion Law*, *Laws*, 8(24), 2019, p. 53.

³⁶⁸ *Ibid.*

³⁶⁹ Joint Paper of ECTA, INTA and MARQUES on the Legal Review on Industrial Design Protection in Europe, July 2018, p. 13.

copies, challenges the effectiveness of design protection. Fast fashion supply chains often span multiple countries, involving numerous suppliers and subcontractors.³⁷⁰ This complexity makes it difficult to trace and identify the source of copied designs, hindering effective enforcement of design rights. This creates a challenging market environment for small sustainable designers who often face higher production costs due to ethical and sustainable practices and is just taking resources away from their business.

Moreover, while copying of designs may not have an immediate economic impact on a fashion business, over time, it can gradually erode the company's image and reputation to such an extent that monetary difficulties are likely to arise in the future.³⁷¹ This is especially true for small or upcoming designers who consciously embrace the slow fashion movement in order to effect change in the fashion industry. The attractiveness of a 'look-alike' product at a cheap price is a significant reason for an increase of infringements of design rights.³⁷² If consumers, deceived by the low prices of fast fashion garments, continue to purchase the cheap copies instead of supporting slow fashion pieces, the original designer will experience a decline in sales. Consequently, designers will be deprived of their licensing revenue and the ability to maintain quality control, while fast fashion retailers enjoy financial and reputational gains without the burden of development expenses.³⁷³

In contrast, the sale of low-cost copies of luxury designs from well-established fashion houses like Louis Vuitton or Chanel does not significantly impact the sales of their original items. Exact copies of their designs or counterfeit goods sold at a low price and poor quality have become a commonplace for these brands over the years. While they do have the resources to take action against fast fashion retailers, they are often preoccupied with creating their upcoming FW22 collection to care about who may have copied their last SS22 collection. Consequently, the small designers striving to meet the challenges of sustainability in the fashion industry are suffering the consequences of this negligent behavior.

Retailers producing counterfeit goods do not only infringe on the exclusive rights of designers but also engage in unfair competition practices. The literature refers to counterfeits as '*exact*

³⁷⁰ DOWNER, E., 'Ethical fashion and the complexity of global supply chains', 2022, [Ethical fashion and the complexity of global supply chains - Curobe](#).

³⁷¹ DARCY, J., 'Under-regulated or under-enforced: intellectual property, the fashion industry and fake goods', *European Intellectual Property Review*, 2013, 35(2), pp. 82-92.

³⁷² European Commission, 'Counterfeit, piracy and other IPR violations', https://taxation-customs.ec.europa.eu/customs-4/prohibitions-and-restrictions/counterfeit-piracy-and-other-ipr-violations_en.

³⁷³ MARTIN, T., 'Fashion Law: Updating Protection for Designs', *Baltimore Law Review*, 48, p. 473.

replicas of branded products’ or *‘a 100% direct copy usually having inferior quality’*.³⁷⁴ This unfair competition undermines the ability of original designers to compete on an equal footing and distorts the market by diverting consumers from purchasing the authentic designs. According to the European Commission, counterfeiting and fake goods in the fashion sector account for the largest share of all counterfeit goods.³⁷⁵ They comprised over 50% of products detained by European customs officials in 2013 and it has been estimated that the share of fake products in global trade amounts to 8%.³⁷⁶ These counterfeiting goods risk harming consumers and the environment, as they are less likely than others to be manufactured in compliance with health and safety standards.³⁷⁷

In a bid to tackle counterfeit business, that is spread across numerous countries and organized by cross-border (criminal) networks, there is an ever-growing need for action at both the local and the international level.³⁷⁸ The European Commission has worked on initiatives to strengthen the competitiveness of the fashion and high-end industries, such as measures to protect IPRs, to fight fake goods, and to help fashion SMEs access finance and stimulate creativity and innovation.³⁷⁹ Moreover, competition authorities may intervene to investigate potential anti-competitive behavior by fast fashion retailers, analyzing the impact on market competition and consumer choice.

Designers can leverage competition law to challenge these anti-competitive practices and seek remedies to protect their rights and restore fair competition in the fashion industry. In addition, the customs authorities at the EU borders are in the frontline to enforce IPR and are a crucial tool to stop the spread of counterfeit goods.³⁸⁰ IP rights, included design registrations, can be registered with Customs in order to protect design rights. If Customs inspectors come across a product features may be similar to a design which was registered, the design holder will be notified and can give further instructions. Enforcement via Customs can be an effective tool

³⁷⁴ LE ROUX, A., BOBRIE, F. and THEBAULT, M., ‘A typology of brand counterfeiting and imitation based on a semiotic approach’, *Journal of Business Research*, 69(1), 2016.

³⁷⁵ European Commission, EU support for fashion and high-end industries, https://single-market-economy.ec.europa.eu/sectors/fashion/fashion-and-high-end-industries/eu-support_en.

³⁷⁶ Ibid.

³⁷⁷ European Commission, ‘Counterfeit, piracy and other IPR violations’, https://taxation-customs.ec.europa.eu/customs-4/prohibitions-and-restrictions/counterfeit-piracy-and-other-ipr-violations_en.

³⁷⁸ UNODC, Counterfeit Goods - A bargain or a costly mistake?, https://www.unodc.org/documents/toc/factsheets/TOC12_fs_counterfeit_EN_HIRES.pdf

³⁷⁹ Ibid.

³⁸⁰ European Commission, ‘Counterfeit, piracy and other IPR violations’, https://taxation-customs.ec.europa.eu/customs-4/prohibitions-and-restrictions/counterfeit-piracy-and-other-ipr-violations_en.

against unlawful products as it achieves the most success with the least intervention in design infringements. However, a limitation to this is that unregistered design rights cannot be recorded with customs.³⁸¹

4. The potential irrelevance/denial of design protection as a whole: The so-called piracy paradox

The protection of intellectual property is undoubtedly a core asset in the fashion business and should be a priority for every company. However, some scholars have been conducting empirical studies on how the fashion industry operates and have been arguing that a low-IP equilibrium is far from hurting the fashion industry but rather have been integral to its success.³⁸² Accordingly, imitation culture significantly contributes to the development of the industry, up to hypothesize that it is itself the mutual free copying of designs ‘*the engine that drives the fashion industry*’.³⁸³ These scholars call these observations the ‘*piracy paradox theory*’, the ‘*IP negative spaces theory*’, or the ‘*knock-off economy*’.³⁸⁴ In the fashion industry, there is constant product renewal, making older versions outdated within a short time. This is because nowadays, fashion consumers buy clothes and accessories out of desire, not necessity.³⁸⁵ Fast fashion brands help create trends by fabricating a cheaper knock-off of a design once it appeared on the catwalk, bringing it from the early adopters to the masses and making it no longer exclusive to the elite. This at the same time, ‘destroys’ this trend, and makes a way for new trends. This phenomena is called the ‘*premature obsolescence*’: clothes are not designed to last, but to be discarded after a short period of time.³⁸⁶ Without copycats, the fashion industry would be much smaller and weaker, because every time an innovative design is copied, a fashion brand’s most powerful marketing force kicks in the trend.³⁸⁷ Even Coco Chanel claimed that ‘*being copied is the ransom of success*’.³⁸⁸ According to this theory, copying

³⁸¹ WHYMARK, J., e.d., ‘IP enforcement in the fashion industry’, *World Trademark Review*, 2015.

³⁸² SUROWIECKI, J., ‘The Piracy Paradox’, 2007, <https://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox>.

³⁸³ RAUSTIALA, K. and SPRIGMAN, C., ‘The Knockoff Economy: How imitation sparks innovation’, *Oxford University Press*, 2012.

³⁸⁴ Ibid.

³⁸⁵ Knack, Verpesten (goedkope) kopieën de mode-industrie, of maken ze die net sterker?, 2016, <https://weekend.knack.be/lifestyle/mode/nieuws-trends/verpesten-goedkope-kopieen-de-mode-industrie-of-maken-ze-die-net-sterker/>.

³⁸⁶ PAN, Y., ROEDL, D., THOMAS, J. C., and BLEVIS, E., ‘Fashion thinking: Fashion practices and sustainable interaction design’, *International Journal of Design*, 9(1), 2015.

³⁸⁷ PADHI, P., ‘A Quest towards Fashion Design Protection Model for the Intellectual Property Rights Global Regime’, *International Journal for Research in Applied Sciences and Biotechnology*, 5(5), 2018,

³⁸⁸ RAUSTIALA, K., and SPRIGMAN, C., ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Va. L. Rev.*, 92(8), 2006.

makes trends, and trends sell fashion, leading to more innovation, more competition and therefore, more sales.³⁸⁹ The paradox stems from the basic dilemma that underpins the economics of fashion: in order for the industry to keep growing, customers need to appreciate the designs of the current collection, but they must also become dissatisfied with them, prompting them to purchase the designs of the next collection.³⁹⁰

However, just because design copying is consistent with design innovation and the success of the industry does not automatically undermine the need of intellectual property protection within the industry.³⁹¹ The piracy paradox does not consider the wider normative implications of imitation in the current industry. The traditional fashion product cycle, where designers and their imitators could co-exist, is completely out of balance.³⁹² This ‘*take-make-dispose*’ model contributes to environmental degradation through excessive resource consumption, increased waste generation, and pollution. In light of these environmental concerns, the arguments put forth by the piracy paradox theory need to be considered within the context of achieving sustainable development in the fashion industry while not completely excluding the possibility of a beneficial role played by design protection for the future of our fashion sector. While copying may contribute to trends and sales, it is essential to address the environmental impact and promote responsible practices to mitigate the negative consequences associated with fast fashion. Balancing the need for innovation, protection, and responsible practices is essential for achieving a more sustainable future for the fashion industry.

³⁸⁹ PADHI, P., ‘A Quest towards Fashion Design Protection Model for the Intellectual Property Rights Global Regime’, *International Journal for Research in Applied Sciences and Biotechnology*, 5(5), 2018,

³⁹⁰ SUROWIECKI, J., ‘The Piracy Paradox’, 2007, <https://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox>.

³⁹¹ ELROD, C., ‘The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability’, *Indiana Journal of Global Legal Studies* 24(2), 2017, p. 593; SPRIGAN, J., and RAUSTIALA, K., ‘Faster fashion: *the piracy paradox* and its perils’, *Cardozo Arts & Entertainment*, 39(2).

³⁹² ELROD, C., ‘The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability’, *Indiana Journal of Global Legal Studies*, 24(2), 2017, p. 593.

Conclusion

The fashion industry significantly contributes to the European economy and has experienced explicit growth in recent years. The evolving dynamics of the industry and the demands of consumers have compelled retailers to prioritize low cost, flexibility in design, quality and speed to market. These strategies are crucial for maintaining a profitable position in the increasingly competitive market.³⁹³ In the past, fashion was synonymous with self-expression, quality and uniqueness. However, the rise of fast fashion has shifted the industry's focus towards disposability, velocity, and imitation. Digitalization and globalization have paved the way for fast fashion retailers to easily identify emerging designs and trends within the industry and replicate them at a lower price, poor quality and produced in unsustainable and unethical conditions. Consumers often choose these copies as more affordable alternatives, treating them as disposable items. While most designers experience design piracy as a significant negative consequence of the fast fashion industry, the environmental consequences are equally concerning.³⁹⁴

Both emerging, small designers and leading global brands are recognizing their role in building a sustainable future. However, their efforts are undermined when fast fashion retailers steal their intellectual property and sell similar or identical products.³⁹⁵ Research has shown that design protection under the EU Design Regulation can be a valuable and reliable asset in the fashion industry. It is essential for designers to consider design rights as a means to enforce their rights against (ultra-)fast fashion copycats. Designers have two options for design protection: a 3-year protection without registration or a 25-year protection acquired through a registration procedure. This protection grants exclusive rights to fashion designers, allowing them to utilize their designs and prevent fast fashion companies from unlawful use. Although the Regulation does not specially address the use of sustainable materials in fashion, the infringement procedure plays a crucial tool in promoting sustainability in the fashion industry.

As a consequence, the effectiveness of the Regulation within the fashion industry primarily relies on the enforcement of these rights and how the principles are applied in practice. Design

³⁹³ BHARDWAJ, V. and FAIRHURST, A., 'Fast fashion: Response to changes in the fashion industry', *The International Review of Retail, Distribution and Consumer Research*, 1, 2010.

³⁹⁴ KLUTH, S. N., 'Stealing More than Just Designs: Utilizing Environmental Law as a Remedy to Design Piracy by Fast Fashion Brands', *Ohio State Law Journal*, 83(4), 2022.

³⁹⁵ 7 fashion trends – innovation and counterfeit goods, 2022, [Fashion brands use innovation to fight counterfeit goods \(smartprotection.com\)](https://www.smartprotection.com).

infringement occurs when the overall impression of the infringing design on an informed user is the same as that of the prior design. Fast fashion companies, such as ZARA or Mango, often employ techniques to create derivative works by adding a few different elements to circumvent design infringement. However, designs do not have to be identical for infringement to be found, but there may still be minor differences between the two designs. When assessing an infringement of design rights, greater consideration is given to the similarities between the two creations rather than the differences. This ensures that the strategy of fast fashion retailers who make small changes to copied designs can still be found infringing upon prior designs. In cases of ultra-fast fashion, copies are often identical, utilizing similar names and almost identical images from the original product, making copying evident.

The inclusion of the informed user perspective in design infringement assessments enhances the accuracy and effectiveness of the ‘*overall impression*’-test, as it considers the knowledge and expertise of individuals well-versed in fashion trends. With the growing awareness of the issue of the knock-offs, the informed user may notice similarities and imitations that individuals with less knowledge and interest in fashion might oversee. Over time, this perspective can provide additional protection for designers within their creative domain.

The enforcement of RCDs offers advantages as it does not require proof of intentional copying. However, designers are more inclined to rely on UCDs despite the challenges in providing evidence of disclosure or direct copying. The harmful practices and intentions of fast fashion companies using real-time data to identify popular designs and recreate them leaves little doubt that the design has not been independently created. The outcome of design infringement cases is ultimately determined by judges, who possess a subjective margin of discretion and depends on how the infringement-test is applied in practice. Therefore, establishing legal precedents is crucial. Currently, there is a lack of sufficient case law concerning fast fashion brands being taken to court. It is up to the designers to actively assert their rights and address the issue of copying to drive positive change in terms of sustainability in the fashion industry. This legal exposure brings awareness and can lead to a shift in consumer behaviour towards ethical and sustainable fashion.

Although the infringement procedure is proven to be effective against fast fashion copycats, there is an underuse of the Community designs by fashion designers. According to the European Commission, this underuse is mainly due to unawareness of the design protection tools available. However, intrinsic shortcomings of the Regulation may also deter fashion designers

from relying on its mechanisms. The time and cost associated with obtaining a Community design, particularly a RCD, poses a barrier for fashion designers, especially smaller businesses and independent creators. The complexity and expense of the registration process can discourage designers from seeking RCD protection. While UCDs offer a more accessible option, enforcing and defending these rights can still be costly, limiting their effectiveness as a means of design protection. In addition, the fast-paced nature of the industry and the difficulty in determining novelty and individual character through prior art searches pose further obstacles for fashion designers. As the requirements of a design are not checked beforehand, the scope of protection of a design remains uncertain in advance.

The question remains whether the underuse of design protection is due to unawareness of the mechanisms or the obstacles that designers face when opting for design protection under the Regulation. If more awareness is raised, it should not only focus on the existence of the design protection, but also emphasize the formalities and requirements that designers need to consider to ensure their design enjoy a wide scope of protection when enforcing their rights.

Furthermore, the intrinsic elements of the Regulation are not sufficiently adapted to offer designers the adequate protection for their efforts in creating sustainable fashion products. The requirements for design protection under the Regulation may not fully address the concerns of the fashion industry in terms of sustainability. The focus on aesthetic aspects rather than functional or sustainable elements may not adequately reflect the growing importance of sustainability in the design process. In addition, the duration of protection offered by UCD and RCD may not be ideal to foster sustainability in the fashion industry. UCDs, with their short three-year protection period, encourage continuous creation and innovation in the fashion industry but may contribute to overproduction and waste. On the other hand, RCDs offer longer-term protection of up to 25 years, promoting sustainability and quality design. However, this extended term may fail to effectively prevent copying of iconic fashion pieces beyond the protection period, potentially perpetuating imitation.

In addition to the Regulation, competition law can help combating counterfeiting and design infringement and ensure that designs are adequately protected, prevent fast fashion retailers from shamelessly copying and incentivizing further investment in sustainable fashion.

Bibliography

1. Legislation

1.1. International

Berne Convention of 19 November 1984 for the Protection of Literary and Artistic Works.

Paris Convention of 20 March 1883 for the Protection of Industrial Property.

1.2. European Union

Council Regulation 6/2002/EC of 12 December 2001 on Community Designs.

Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs.

ESPR Proposal.

2. Case law

2.1. European Union

CJEU, 13 February 2014, *Gautzsch Groshandel v. Joseph Duna*.

CJEU, 15 June 2022, *Tubes Radiatori v. EUIPO*.

CJEU, 16 February 2012, *Celaya Emparanza y Galdos Internacional v. Proyectos Integrales de Balizamientos S.L.*

CJEU, 16 February 2017, *Antrax It v. EUIPO – Vasco Group*.

CJEU, 19 June 2014, *Karen Millen Fashions Ltd. V. Dunnes Stores and Dunnes Stores (Limerick) Ltd.*

CJEU, 20 October 2011, *PepsiCo Inc v. GrupoPromer Mon Graphic SA*.

CJEU, 21 May 2015, *Senz Technologies BV v. OHIM*;

CJEU, 21 September 2017, - *Easy Sanitary Solutions and EUIPO v. Group Nivelles*.

CJEU, 27 September 2017, *Nintendo Co. Ltd v. BigBen Interactive SA*.

EUIPO Board of Appeal, 11 August 2022, *Puma v. Handelsmaatschappij J. Van Hilst BV*.

EUIPO, 19 March 2021, *Handelsmaatschappij J. Van Hilst BV v. Puma*.

CJEU, 9 September 2011, *Kwang Yang Motor Co Ltd. v. OHIM*.

General Court, 10 September 2015, *H&M v. OHIM - Yves saint Laurent*.

General Court, 12 March 2014, *Tubes Radiatori v. OHIM*.

General Court, 14 March 2018, *Crocs Inc. v. Gifi Diffusion and EUIPO*.

General Court, 18 March 2010, *Grupo Promer Mon graphic v. OHIM*.

General Court, 29 October 2015, *Roca Sanitario v. OHIM*.

General Court, 4 February 2014, *Sachi Premium v. OHIM*.
General Court, 5 April 2013, *Bell&Ross v. OHIM*.
General Court, 6 June 2013, *Erich Kastenholtz v. OHIM*;
General Court, 6 October 2011, *Industrias Francisco Ivars v. OHIM*.
General Court, 7 November 2013, *Danuta Budziewska v. OHIM*.
OHIM, 13 May 2013, *Samsung Electronics and Others v Apple Inc.*

2.2. National

Brussels, 13 February 2018, *Veritas v. Hermès*, IRDJ, 2018.
Brussels, November 2014, *ie-forum.be*, 1545.
Court of Appeal 's Gravenhage, 22 May 2008, *Footwear International BV v. Converse Inc.*
Court of Appeal 's-Gravenhage, 17 October 2007, *G-Star v. Esprit*.
Court of Appeal Brussels, 21 June 2016, *Sadlers v. Nills Fashion*.
Court of Appeal Brussels, 26 January 2012, *Nelson v. Mango*.
Court of Appeal Den Haag, 3 November 2020, *Wahl Clipper Corporation and Wahl GmbH v. Kappershandel*.
Court of Appeal 's Gravenhage, 17 October 2007, BIE 2008.
Court of Appeal The Hague, 1 October 2008.
Court of Luxembourg, 24 February 2017, *Fendi v. Coach*.
Court of Milan, 28 June 2016, *OTB Group v. Inditex Group*.
Court of the Mid-Netherlands, 29 July 2016, nr. C/16/416357.
England and Wales High Court (Chancery), 16 January 2008, *J Choo (Jersey) Ltd v. Towerstone Ltd*.
England and Wales High Court, 24 February 2021, *Original Beauty Technology Co Ltd and others v G4K Fashion Ltd and others*.
IP Enterprise Court UK, 16 December 2020, *Rothy's Inc. v. Giesswein Walkwaren AG*.
IP Enterprise Court UK, 21 November 2014, *John Kaldor Fabric Maker UK Ltd. V. Lee Ann Fashions Ltd*.
Ghent, 30 April 2017, ICIP 2007, 783.
UK, 9 March 2016, *Trunki v. Kiddee*.

3. Literature

Affine, ‘Product life cycle management in apparel industry’, <https://affine.ai/product-life-cycle-management-in-apparel-industry/>.

AGINS, T., ‘Copy Shops: Fashion Knockoffs Hit Stores Before Originals as Designers Seethe’, *WALL ST. J.*, 1994.

ARBUCKLE, J. and STERLACCI, F., ‘The A to Z of the Fashion Industry’, *Rowman & Littlefield*, 2009.

BAKKER, B. a.o., ‘Fast fashion onderzoek: vermindering van de negatieve impact’, *KplusV*, 2020.

BARAZZA, S., ‘The individual character of a design: freedom and the ‘saturation of the state of the art’, *Journal of Intellectual Property Law & Practice*, 8(4), 2013.

BARRAGAN, L. and KLEESPIES, M., ‘Design Rights: European Union’, *World Trademark Review*, 2019.

BARRERE, C. and DELABRUYERE, S., ‘Intellectual property rights on creativity and heritage: the case of the fashion industry’, *European Journal of Law and Economics*, 32 (3), 2011.

BERG, A., LOBIS, M., ROLKENS, F. and SIMON, P., ‘Faster fashion: how to shorten the apparel calendar’, 2018, <https://www.mckinsey.com/industries/retail/our-insights/faster-fashion-how-to-shorten-the-apparel-calendar>.

BERNSTEIN, W., e.d., ‘Integrated Sustainable Life Cycle Design: A Review’, *Journal of Mechanical Design*, 132(9), 2010.

BEZZEGH, T., ‘Main features of the harmonized EU design law’, *European Integration Studies*, 3(1), 2004.

BHARDWAJ, V. and FAIRHURST, A., ‘Fast fashion: response to changes in the fashion industry’, *The International Review of Retail, Distribution and Consumer Research*, 20(1), 2010.

BICK, R., HALSEY, E. and EKENGA, C. ‘The global environmental injustice of fast fashion’, *Environmental Health*, 17(92), 2018.

BRETONNIERE, J. F. and FONTAINE, F., ‘Europe. Using Community Design Rights to Protect Creativity’, *Building and enforcing IP value*, 2010.

BREWER, M. K., ‘Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility’, *The New Frontiers of Fashion Law*, 8(4), 2019.

Brundtland Report, Our Common Future, 1987, <https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/brundtland-report.html>

BSR, ‘Sustainable Fashion Design: Oxymoron No More?’, 2012, https://www.bsr.org/reports/BSR_Sustainable_Fashion_Design.pdf.

- BUSSE, J. and CAUDRON, F., ‘The Unregistered Community Design to conquer the European fashion industry’, *Retail & Consumer Products Law Observer*, 2019.
- BYUN, S.-E. and STERNQUIST, B., ‘Fast fashion and in-store hoarding’, *Clothing and textiles research journal*, 29(3), 2011.
- BYUN, S.-E. and STERNQUIST, B., ‘Here Today, Gone Tomorrow: Consumer Reactions to Perceived Limited Availability’, *The Journal of Marketing Theory and Practice*, 20(2), 2012.
- CAMARGO, L. R. and FARIAS PEREIRA, S. C., ‘Fast and ultra-fast fashion supply chain management: an exploratory research’, *IJRDM*, 2020.
- CARTY-HORNSBY, G., ‘Registered Design enforcement: the key lessons from Rothy’s v. Geisswein’, February 2021, marks-clerk.com.
- CASSIDY, L., ‘Karen Millen Fashions Ltd. V. Dunnes Stores (Limerick) Ltd.: Clarifying the assessment of individual character in EU designs’, *Trademark Reporter*, 105(6), 2015.
- CERNANSKY, R., ‘Why is sustainability still absent from fashion month?’, *Vogue Business*, 2022, <https://www.voguebusiness.com/sustainability/why-is-sustainability-still-absent-from-fashion-month>.
- CHARTER, M., and TISCHNER, U., ‘Sustainable solutions: Developing products and services for the future’, *Greenleaf Publishing*, 2001.
- CLARK, B. and SILVERMAN, I., ‘A guide to designs and copyright in Europe and the United Kingdom’, *World Trademark Review*, 2014.
- CRAIK, J., ‘Fashion: the key concepts’, *Berg Publishers*, United Kingdom, 2009.
- CRANE, D. and BOVONE, L., ‘Approaches to material culture: The sociology of fashion and clothing’, *Poetics* 34(6), 2006.
- DARCY, J., ‘Under-regulated or under-enforced: intellectual property, the fashion industry and fake goods’, *European Intellectual Property Review*, 2013, 35(2).
- DAS, S., ‘“They took my world”: fashion giant Shein accused of art theft’, *The Guardian*, 2022, <https://www.theguardian.com/artanddesign/2022/mar/06/they-took-my-world-fashion-giant-shein-accused-of-art-theft>.
- DULANEY, M., ‘How fast fashion uses human psychology to keep you buying more’, *ABC RN*, 2022, <https://www.abc.net.au/news/2022-10-16/compulsive-shopping-fast-fashion-threads/101528868>.
- ELHARIRY, M. F., ‘The requirements for Industrial Designs Protection. The International Overview and National Application’, *Qanonya*, 1.
- Ellen Macarthur Foundation, ‘A new textiles economy: redesigning fashion’s future’, 2017, <https://ellenmacarthurfoundation.org/a-new-textiles-economy>.
- ELROD, C., ‘The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability’, *Indiana Journal of Global Legal Studies*, 24(2), 2017.
- Emerce 100 Magazine, 2020 Edition.

- EUIPO, Designs in the European Union, Scope - <https://euipo.europa.eu/ohimportal/en/designs-in-the-european-union>.
- EUIPO, Fees and payments (May 2023), <https://euipo.europa.eu/ohimportal/en/rcd-fees-and-payments>.
- EUIPO, General Questions, General Questions (europa.eu).
- EUIPO, Looking after your rights, Looking after your rights (europa.eu).
- European Commission, A new Circular Economy Action Plan, COM(2020) 98.
- European Commission, Circular Economy Action Plan, https://ec.europa.eu/environment/pdf/circular-economy/new_circular_economy_action_plan.pdf.
- European Commission, Economic Review of Industrial Design in Europe, January 2015.
- European Commission, EU strategy for sustainable and circular textiles, COM(2022)141
- European Commission, Evaluation of EU legislation on design protection, November 2020.
- European Commission, Fashion and high-end industries in the EU.
- European Commission, Green Paper on Legal Protection of Industrial Designs, 1991.
- European Commission, Legal review on industrial design protection in Europe, 2016.
- European Design Leadership Board, ‘Design for Growth & Prosperity Report and Recommendations’, 2012.
- European IP Helpdesk, ‘IP in the fashion industry’, https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-02/EU_IP_HD_Fact_Sheet_IP-fashion-industry.pdf.
- European IP Helpdesk, Design Searching, January 2022, p. 3, https://intellectual-property-helpdesk.ec.europa.eu/system/files/2022-02/EU_IP-H_fact_DesignSearching2022_fin_0.pdf.
- European Parliament, ‘The impact of textile production and waste on the environment’, 2020, <https://www.europarl.europa.eu/news/en/headlines/society/20201208STO93327/the-impact-of-textile-production-and-waste-on-the-environment>.
- FILMA., V., ‘IPR in Fashion Industry’, *Manupatra Intellectual Property Reports*, August 2015.
- FISCHER, F. ‘Design Law in the European Fashion Sector’, *WIPO Magazine* 12-13, February 2008.
- FLETCHER, K., ‘Sustainable fashion and textiles: design journeys’, *Routledge*, 2008.
- GIELEN, C., Kort begrip van het intellectuele eigendomsrecht, *Kluwer*, 2017.
- GILBERT, T., ‘Why to get your designs registered’, 2022, <https://www.lexology.com/library/detail.aspx?g=f422684f-1d12-4461-94be-8c894173c216>.

- GODART, F., ‘The power structure of the fashion industry: Fashion capitals, globalization and creativity’, *INFS* 1(1), 2014.
- GOTZEN, F. and JANSSENS, M.-C., *Wegwijs in het intellectueel eigendomsrecht*, 2018, Brugge, *Vanden Broele*.
- Green strategy, Seven forms of sustainable fashion, <https://greenstrategy.se/seven-forms-of-sustainable-fashion/>.
- Green Strategy, What is circular fashion?, <https://greenstrategy.se/circular-fashion-definition/>.
- GREGORY, P. M., ‘Fashion and Monopolistic Competition’, *Journal of Political Economy*, 56(1), 1948.
- GRIMAL, L., and GUERLAIN, P., ‘Mass customization in apparel industry – implication of consumer as co-creator’, *Journal of Economics & Management*, 15, 2014;
- HARKONEN, H., ‘Fashion and Copyright: Protection as a Tool to Foster Sustainable Development’, *University of Lapland*, 2021.
- HEMPHILL, C. S. and SUK, J., ‘The Law Culture and Economics of Fashion’, *Stanford Law Review*.
- HENNINGER, C., ‘What is sustainable fashion?’, *JFMM*, 20(4), 2015.
- HENSHALL, M. and LIAKATOU, V., ‘Comparison, overall impression and inconsistencies in design protection’, *World Trademark Review*, 2014.
- HOACHEN, S., ‘The Distinctiveness of a Fashion Monopoly’, *JIPEL* 3(1), 2013.
- IP-wisely, ‘Fashion design protection: US vs. EU’, <https://ipwisely.com/fashion-design-protection-us-vs-eu/>.
- JAIN, S., e.d., ‘Big data in fashion industry’, *IOP Conf. Series*, 254, 2017.
- JAMES&WELLS, ‘Design infringement – an overview’, <https://www.jamesandwells.com/wp-content/uploads/design-infringement-overview.pdf>.
- Joint Paper of ECTA, INTA and MARQUES on the Legal Review on Industrial Design Protection in Europe, July 2018.
- KAPPELLER-HIRSCH, B., ‘Unregistered Community Designs: a secret weapon in design protection?’, 2021, <https://www.schoenherr.eu/content/unregistered-community-designs-a-secret-weapon-in-design-protection/>.
- KARELL, E. and K. NIINIMAKI, K., ‘A Mixed-Method Study of Design Practices and Designers’ Roles in Sustainable-Minded Clothing Companies’, *Sustainability*, 12(4680), 2020.
- KAWAMURA, Y., ‘Fashion-ology: An Introduction to Fashion Studies’, Oxford, *Berg Publishers*, 2005.
- KLEESPIES, M. and ZAPIRAIN, L. B., ‘Design rights: European Union’, *World Trademark Review*.

Knack, Verpesten (goedkope) kopieën de mode-industrie, of maken ze die net sterker?, 2016, <https://weekend.knack.be/lifestyle/mode/nieuws-trends/verpesten-goedkope-kopieen-de-mode-industrie-of-maken-ze-die-net-sterker/>.

KOTLER, P., 'Principles of Marketing', *Pearson*, 2008.

KOZLOWSKI, A., BARDECKI, M. and SEARCY, C., 'Tools for sustainable fashion design: An analysis of their fitness for purpose', *Sustainability*, 11(358), 2019.

LAPATOURA, I., 'Copyright originality in fashion: industry-induced bias against small designers in a sector dominated by seasonal trends', 2022, <https://copyrightblog.kluweriplaw.com/2022/02/21/copyright-originality-in-fashion-industry-induced-bias-against-small-designers-in-a-sector-dominated-by-seasonal-trends/>.

LEDEZMA, V., 'Globalization and Fashion: Too Fast, Too Furious', *Laurier Undergraduate Journal of the Arts*, 4, 2017.

LEVITT, T., 'Exploit the Product Life Cycle', November 1965, Exploit the Product Life Cycle (hbr.org).

LIPOVETSKY, G., *The Empire of Fashion: Dressing Modern Democracy*, Princeton University Press, 1994, New Jersey.

Lyst, The 2020 conscious fashion report, <https://www.lyst.com/data/2020-conscious-fashion-report/>.

M. 'Digitalization of Zara and Fast Fashion', *Harvard TOM*, 2017, <https://d3.harvard.edu/platform-rctom/submission/digitalization-of-zara-and-fast-fashion/>.

MACRI, L., e.d., 'Designing sustainable clothing systems', *Design International Series*, 2022.

MAITI, R., 'Fast Fashion and Its Environmental Impact', 2023, Fast Fashion and Its Environmental Impact in 2023 |.Earth.Org.

MARCINIA, R., Fashion is more than clothing: lifestyle marketing', British School of Fashion, <https://britishschooloffashion.com/fashion-is-more-than-clothing-lifestyle-marketing/>.

MARGONI, T., 'Not for Designers: On the Inadequacies of EU Design Law and How to Fix it', *JIPITEC*, 4(3), 2013.

MARTIN, T., 'Fashion Law: Updating Protection for Designs', *Baltimore Law Review*, 48, p. 473.

MAUGUÉ, P., 'The International Protection of Industrial Designs under the International Conventions', *Baltimore Law Review*, 1989, 19(1).

Max Planck Institute, *Towards a European Design*, Munich, 1991.

MELVILLE, L.W., *Forms and Agreements on Intellectual Property and International Licensing*, Sweet & Maxwell, London, 1979.

Mode en circulariteit: (hoe) gaat dat samen?, <https://www.shoplikeyougiveadamn.nl/blogs/mode-en-circulariteit-hoe-gaat-dat-samen-/bl-358>.

- MONSEAU, S., ‘European Design Rights: A Model for the Protection of All Designers from Piracy’, *American Business Law Journal*, 14.
- MOORHOUSE, D. and MOORHOUSE, D., ‘Sustainable Design: Circular Economy in Fashion and Textiles’, *The Design Journal*, 20(1), 2017.
- MORGAN, C., ‘Why fast fashion is accused of copying independent and sustainable brands’, *The Vegan Review*, 2023, <https://theveganreview.com/fast-fashion-copying-designers-independent-sustainable-brands/>.
- MORI, C., ‘Design Thinking: Changing approaches to creating fashion’, <https://camillemori.com/journal/design-thinking-changing-approaches-to-creating-fashion/>.
- MULLER, S., ‘EU Design Reform Package: More efficient, Affordable, and Future-proof Design Protection Ahead’, *The National Law Review*, 13(148), May 2023.
- MUSKER, D., *Community Design Law-principles and Practice*, Sweet & Maxwell, 2002.
- MYERS, E., ‘Justice in Fashion: Cheap Chic and the IP Equilibrium in the United Kingdom and the United States’, *AIPLA Q.J.*, 37(47), 2009.
- NIINIMAKI, K., ‘Ethical foundations in sustainable fashion’, *Textiles and Clothing Sustainability*, 2015.
- NIINIMAKI, K., e.d., ‘Sustainable fashion: new approaches’, *Aalto University publication series*, 2013.
- NIINIMAKI, K., e.d., ‘The environmental price of fast fashion’, *Nature Reviews Earth & Environment*, 1, 2020.
- Novagraaf, ‘Design registration: Be careful of accidental publication on social media’, November 2022.
- Office of Sustainability, ‘What is sustainability?’, University of Alberta, <https://www.mcgill.ca/sustainability/files/sustainability/what-is-sustainability.pdf>.
- OLIVER, A., ‘China's fast-fashion spy machine: How shadowy teen brand Shein uses algorithms to harvest data on its users and find out what they want to buy - before its mega-factory spits the clothes out at rock-bottom prices’, *Daily Mail*, 2021, <https://www.dailymail.co.uk/news/article-9936113/How-shadowy-teen-brand-Shein-uses-algorithms-harvest-data-users.html>.
- PADHI, P., ‘A Quest towards Fashion Design Protection Model for the Intellectual Property Rights Global Regime’, *International Journal for Research in Applied Sciences and Biotechnology*, 5(5), 2018,
- PAN, Y., ROEDL, D., THOMAS, J. C., and BLEVIS, E., ‘Fashion thinking: Fashion practices and sustainable interaction design’, *International Journal of Design*, 9(1), 2015.
- Pandaily, ‘Fast Fashion Giant SHEIN Allegedly Steals Designs’, 2022, <https://pandaily.com/fast-fashion-giant-shein-allegedly-steals-designs/>.
- PAYNE., A., ‘The Life-cycle of the Fashion Garment and the Role of Australian Mass Market Designers’, *International Journal of Environmental*, 7(3), 2011.

- PEREIRA, L., CARVALHO, R., DIAS, Á., COSTA, R. AND ANTÓNIO, N., ‘How Does Sustainability Affect Consumer Choices in the Fashion Industry?’, *Resources*, 10(38), 2021.
- PEREZ, L., ‘Inventing in a World of Guilds: Silk Fabrics in Eighteenth-century Lyon’, *Cambridge University Press*, Cambridge, 2008.
- PETERS, G. M., e.d., ‘Life cycle assessment of clothing libraries: can collaborative consumption reduce the environmental impact of fast fashion?’, *Journal of Cleaner Production*, 162, 2017.
- PETRAZ, D. L., VAN DER HEIDE, L. and BARILA, C., ‘Litigation design disputes’, *World Trademark Review*, November 2018.
- PHILIPS, S., ‘Fashion’s copycat dilemma prevents industry-wide sustainability’, *Thred*, 2021, <https://thred.com/style/fashions-copycat-dilemma-prevents-industry-wide-sustainability//>
- PHILIPSEN, G., ‘The unregistered Community design and fashion: unknown is unloved... or is there more?’, *IRDI*, 4, 2012.
- POWELL, S., ‘Historical Dictionary of the Fashion Industry’, *Reference Reviews* 23(1), 2009.
- RAUSTIALA, K. and SPRIGMAN, C., ‘The Knockoff Economy: How imitation sparks innovation’, *Oxford University Press*, 2012.
- RAUSTIALA, K., and SPRIGMAN, C., ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’, *Va. L. Rev.*, 92(8), 2006.
- ROWE, H., ‘Retailers are Copying Fashion Show Designs Within Minutes’, 2014, <https://www.businessinsider.com/retailers-are-copying-fashion-show-designs-within-minutes-2014-9?international=true&r=US&IR=T;>
- SCHRAMME, A. and SCHRAUWEN, J., ‘De mode-industrie in Vlaanderen gesegmenteerd’, *Flanders DC*, 2013, p. 40, <https://www.flandersdc.be/uploads/media/588611aa6a2e1/2016-03-ams-demodeindustrieinvlaanderengesegmenteerd.pdf>.
- SEGURA, A., ‘Fast fashion, the art of liquidity’, 2017, <https://fashionretail.blog/2017/06/19/fast-fashion-the-art-of-liquidity/>.
- SELIGMAN, M. E. P., ‘Authentic happiness: Using the new positive psychology to realize your potential for lasting fulfillment’ New York, *Psychology*, 3(12A), 2002;
- SHIVANGI, ‘Style, fashion and fad in marketing’, 2020, <https://shivangiagarwal.home.blog/2020/10/14/style-fashion-and-fad-in-marketing/>.
- SILVA, E., HASSANI, H. and MADSEN, D., ‘Big data in fashion: transforming the retail sector’, *Journal of Business Strategy*, 2019.
- SIMMEL, G., ‘Fashion’, *American Journal of Sociology*, 62(6), <https://www.journals.uchicago.edu/doi/epdf/10.1086/222102>.
- SINGH, R., ‘Sustainable Fashion and Intellectual Property Rights’, *Fashion & Law Journal*, 2023, <https://fashionlawjournal.com/sustainable-fashion-and-intellectual-property-rights/>.

SINGH, S., ‘Green IP: the key to a sustainable future’, <https://www.ipthink-tank.com/post/green-ip-the-key-to-a-sustainable-future>.

SOTO, N., ‘Sustainable Fashion: Identifying Fast Fashion Flaws and Extending the Life Cycle of Clothing’, *Green Business Bureau*, 2021, <https://greenbusinessbureau.com/industries/fashion/sustainable-fashion-identifying-fast-fashion-flaws-and-extending-the-life-cycle-of-clothing/>.

SPRIGAN, J., and RAUSTIALA, K., ‘Faster fashion: the piracy paradox and its perils’, *Cardozo Arts & Entertainment*, 39(2).

SRINIDHI, M., ‘Design Challenges in the Realm of Fashion’, *CSRIPR*, May 2021, https://csripnusrl.wordpress.com/2021/05/05/design-challenges-in-the-realm-of-fashion/#_edn7

SUTHERSANEN, U., ‘Design Law in Europe, Londen’, *Sweet & Maxwell*, 2000.

The fashion starter, ‘Life cycle of a garment in the fast fashion world’, 2021, <https://thefashionstarter.com/2021/11/30/life-cycle-of-a-garment-in-the-fast-fashion-world/>.

The World Bank, ‘How Much Do Our Wardrobes Cost to the Environment?’, 2019, <https://www.worldbank.org/en/news/feature/2019/09/23/costo-moda-medio-ambiente>.

THOMA, M. and PARISH, O., ‘To the point: Rothy’s Inc v Giesswein Walkwaren AG’, *Intellectual Property Magazine*, March 2021, (mathys-squire.com).

THOMASSEY, S. and ZENG, X., *Artificial Intelligence for Fashion Industry in the Big Data Era*, *Springer Series in Fashion Business*, 2018.

Twitter post @TheElleey, <https://twitter.com/TheElleey/status/1416111425337053192>.

UNEP, <https://news.un.org/en/story/2019/03/1035161>.

VAN KEYMEULEN, E., ‘Copyrighting couture of counterfeit chic? Fashion Design: A Comparative EU – US Perspective’, *Journal Of Intellectual Property Law & Practice*, October 2012, 7(10).

VANHEES, H., ‘De bescherming van modecreaties via het auteurs- en modellenrecht’, *Intersentia*, 2018, p. 125.

VANHEES, H., ‘Na het douchegoot-arrest van het Hof van Justitie: eindelijk duidelijkheid over de beschermingsvoorwaarden en de beschermingsomvang in het modellenrecht’, *IRDJ*, 3, 2017.

VANHEES, H., ‘Benelux Convention on Intellectual Property’, *OHRA*, 82, 2018.

VARESE, E., ‘The Court of Milan stands by the “Falabella” bag of Stella McCartney’, 2017, <https://thefashionablelawyers.com/2017/05/29/the-court-of-milan-stands-by-the-falabella-bag-of-stella-mccartney/>.

WEBB, B., ‘Fashion is on track to miss climate target as textile production grows’, *Vogue Business*, 2022, <https://www.voguebusiness.com/sustainability/fashion-is-on-track-to-miss-climate-targets-as-textile-production-grows>.

Website Stella McCartney, <https://www.stellamccartney.com/gb/en/sustainability/circularity-2.html>.

WILKINSON, S., ‘Behind the Birkin’, <https://saclab.com/behind-the-birkin/>.

WIPO, ‘Fashion Design and Copyright in the US and EU’, 2015, https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf.

WIPO, Paris Convention for the Protection of Industrial Property, Paris Convention for the Protection of Industrial Property (wipo.int).

WTO, ‘Module VI. Industrials designs and layout-designs of integrated circuits’, (wto.org).

WTO, ‘Overview: the TRIPS Agreement’, WTO | intellectual property - overview of TRIPS Agreement.

XIE, Y., ‘Is SHEIN’s Indie Designer Program an Ethical Alternative to Copying?’, 2021, <https://pandaily.com/is-sheins-indie-designer-program-an-ethical-alternative-to-copying/>.

YIQIN, F., ‘SheIn: A story of Online Segregation and Data as Business Intuition’, 2021, <https://yiqinfu.github.io/posts/shein/>.