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**Fashion from shoes to bags: How Intellectual Property Law changes the game in the ruthless world of fashion – Intellectual property in the EU Fashion law with hints of Italian fashion and economy**

**1. Fashion industry and the importance of intellectual property**

The fashion industry falls into a unique category that encompasses both elements of core cultural industries and consumer goods industries. While it shares similarities with consumer goods industries in terms of manufacturing and functional characteristics of the product, fashion also has a significant cultural component that sets it apart. Fashion products transcend their physical form and carry symbolic and communicative meanings that consumers attribute to them; they are not just about clothing and apparel, they serve as vehicles for expressing one's identity and keeping up with societal trends. Consumers purchase fashion products to communicate a certain "way of life" or lifestyle, which goes beyond the mere functional purpose of the product. Therefore, fashion products can be seen as mediums through which individuals manifest and align their identities with contemporary culture<sup>1</sup>.

In recent years, the fashion industry has evolved to incorporate design and creativity as integral parts of the manufacturing process. This shift emphasizes the cultural content of fashion products, as they become more than just utilitarian objects. By combining material-functional characteristics with intangible elements, such as historical, social, aesthetic, and cultural values, fashion products acquire a more profound significance.<sup>2</sup>

This creative aspect is what sets the fashion industry apart from other manufacturing sectors. The intellectual capital invested in fashion is a key driver of its success.<sup>3</sup>

Fashion designers and creatives constantly innovate to create unique and aesthetically pleasing designs. Their ability to push boundaries and challenge societal norms gives fashion its distinctive character. The intellectual capital invested in fashion includes the knowledge and expertise of designers, the ability to anticipate and adapt to changing trends, and the ability to communicate a brand's identity through visual storytelling.

As for trademarks, fashion companies can register their brand names, logos, and other distinctive signs with national or international Intellectual Property Offices. Once registered, trademarks offer broad protection against unauthorized use by third parties, allowing owners to maintain their identity and brand image.

Strategic use of intellectual property rights in the fashion industry can also provide other revenue opportunities, such as licensing rights to third parties or selling the rights themselves. These transactions can increase revenues and enhance the company's reputation. Intellectual property protection is a key feature of growth and victory in the fashion industry intellectual property rights allow owners to exploit their creativity and intellectual capital, generating additional revenue and reducing the risk of infringement by third parties.

By utilizing IP protection, fashion designers and companies can prevent others from copying or imitating their designs or using their brand names without permission. This helps maintain the exclusivity and uniqueness of their products, giving them a competitive advantage in the market.

Therefore, it is easy to understand that if a trademark is easily visible and recognizable, the greater the intellectual protection and consequently the demonstrability of infringement in

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<sup>1</sup>JESSICA NEWMAN, *Fashioning the self: performance, identity and difference*, University of Denver, Denver, 1-1-201, pp. 29-51.

<sup>2</sup>DAVID HESMONDHALGH, *Le industrie culturali*, EGEA, 2015, pp. 171-189.

<sup>3</sup>European IPR Helpdesk, IP and Fashion, p. 2. [https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-02/EU\\_IP\\_HD\\_Fact\\_Sheet\\_IP-fashion-industry.pdf](https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-02/EU_IP_HD_Fact_Sheet_IP-fashion-industry.pdf)

lawsuits. For obvious reasons then, designers try to apply their logos or elements covered by intellectual rights protection in their items. This is what most designers do to obtain legal protection<sup>4</sup>.

However, there are cases where the way items are produced distinguishes them through much more subtle recognitions. A glaring example is Bottega Veneta's "*intrecciato*", a boutique boast that advertised it as "When your own initials are enough"<sup>5</sup>.

In addition to legal protection, intellectual property rights can also contribute to the overall reputation and image of a fashion brand. Consumers often associate originality and creativity with high-quality products, and having strong intellectual property rights can enhance the perceived value of a brand. This, in turn, can attract more customers and investors, leading to increased sales and profitability.

Furthermore, intellectual property rights can provide opportunities for collaboration and licensing agreements. Fashion designers can license their designs or trademarks to other companies, allowing them to expand their reach and generate additional revenue streams. This can be especially beneficial for smaller designers who may not have the resources to produce and distribute their designs on a large scale.

Intellectual property rights play a crucial role in the fashion industry by protecting creativity, promoting innovation, and providing opportunities for growth and profitability. Fashion companies that understand the importance of these rights and effectively manage and protect their intellectual assets are more likely to succeed in this competitive industry<sup>6</sup>

This means that designers have the option to rely on unregistered design rights, which provide short-term protection for their designs without the need for formal registration. This can be advantageous for designers who want to quickly bring their designs to market and test their popularity before investing in formal registration. It also provides a more affordable option for designers or companies with limited budgets, as registration can be costly.

When speaking of intellectual property, therefore, it becomes crucial to emphasize the fashion industry is known for its fast-paced nature, with trends constantly changing and new designs being produced each season. This dynamic cycle makes it challenging for designers to keep up with the demands of registration and enforcement of intellectual property rights. Instead, some of them may prefer to focus on creating new designs and maintaining a competitive edge in the market

However, for this kind of ephemeral industry unregistered designs can be a compromise for both designers and fashion firms who have limited budgets and for those who want to test their products before deciding to register or not, after this period the design becomes free to use. This lack of long-term protection can be a disadvantage, especially if the design proves to be successful and profitable.

Ultimately, the decision will depend on various factors, including the nature of the design, the company's resources, and its long-term goals.

The European Community design registration system provides fashion companies with a valuable tool to protect their iconic items such as bags, jewelry, and sunglasses. This system allows companies to apply for a Community Design Registration (CDR) to prevent the misuse of their designs by third parties.

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<sup>4</sup>SUSAN SCAFIDI: *Intellectual Property and Fashion Design*. In Peter K. Yu (ed.), *1 Intellectual Property and Information Wealth*, 2006, p. 115.

<sup>5</sup>KATE BETTS: *The Height of Luxury*, Time, May 1, 2006, p.67. In the case of Bottega Veneta, the *intrecciato* style also arguably serves as a trademark surrogate or a form of trade dress.

<sup>6</sup> CIA Diffusione, "*L'industria del tessile abbigliamento*", Gennaio 2009, pp.5-6.  
<https://www.ciadiffusione.it/gesFiles/Filez/1537430803K100643.pdf>

One example of a fashion item that has become a classic and is protected through the CDR system is the Birkin Bag by Hermès<sup>7</sup>. This iconic handbag, known for its timeless design and high-quality materials, is highly sought after by fashion enthusiasts. By registering the design of the Kelly Bag<sup>8</sup> through the CDR system, Hermès can ensure that no one else can copy or imitate their distinctive design without their permission.

Another example of a fashion item protected through the CDR system is the Fendi Baguette, known for its extroverted patterns and materials used and the classic 'baguette' shape to be carried on the shoulder.

One advantage of the CDR system is that it allows for the deferral of publication of the design application for up to 30 months. This means that companies can keep their designs confidential for a certain period, giving them time to market and commercialize their products before they are publicly disclosed. This deferral of publication can be requested at the time of filing the CDR application, providing companies with flexibility in their design protection strategy. In conclusion, the European Community design registration system is a valuable tool for fashion companies to protect their iconic items. By filing for a CDR, companies can safeguard their designs from misuse by third parties and ensure the longevity of their fashion classics.<sup>9</sup>

Moreover, brands assure authenticity and originality. As mentioned earlier, the proliferation of counterfeit products makes it essential for brands to have visible trademarks, ensuring that consumers can differentiate between genuine and fake products. This not only protects the brand's reputation but also safeguards consumers from purchasing counterfeit items.

Companies are more likely to invest in creating innovative designs and technologies if they know that their intellectual property will be protected and rewarded. This leads to a continuous cycle of innovation and creativity, benefiting not only the fashion companies but also the industry as a whole.

In addition, intellectual property protection can also open up new revenue streams for fashion companies. They can license their designs, trademarks, or patents to other companies, allowing them to generate additional income without the need for significant investments or production costs.

By protecting their intangible capital, fashion companies can thrive in a competitive market and secure their long-term growth and success. Moreover, intellectual property protection allows fashion companies to differentiate themselves from their competitors and create a unique brand identity.

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In conclusion, the means of intellectual property protection are invaluable to the fashion industry. They not only safeguard a company's innovations and creations but also help to establish a strong market position, increase profit margins, and foster continuous innovation.

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<sup>7</sup>Hermès International v. Emperia Inc., U.S. District Court of California, 31.07.2014

Hermès v. Laurence S.r.l., Trib. Torino 11.06.2010

Hermès v. Tia Maria, Japan IP Court n. Heisei 31, 17.12.2020

<sup>8</sup>Trademark Italian registration n.1003725

<sup>9</sup> Council Regulation (EC) N. 6/2002, Community designs, 12.12.2001

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### **A. Creativity and its importance in the Fashion system**

There is a big difference between haute couture, ready-to-wear, and fast fashion; the key lies in creativity.

Haute couture designs and patterns are the result of a unique project that can create distinctive products based on the talent of the designer and the team working with him. In contrast, the fast-fashion industry is based on cutting costs and imitating what is deemed trendy in that specific season.

At the same time, it can be said that creativity, in the fashion industry, is represented by the designs and patterns in the archives but also by the style followed by maisons such as Dior or Chanel. Many brands over the years "revisit" previous collections and their cult items such as Dior's "Saddle" bag first presented by John Galliano in 1999 and re-presented in 2018 by Maria Grazia Chiuri.<sup>10</sup>

Fashion therefore is affected by the traditions of a given state, examples are certainly Vivienne Westwood or John Galliano who have made the tradition of English tailors their style<sup>11</sup>. Such influences thus provide a competitive advantage over others.

So the designers rely on their own creativity and personal experiences, the culture of that given historical moment, and other outputs, so creativity lies precisely in his unique interpretation of external outputs; it is, therefore, apparent how creativity should be protected from counterfeiting of all kinds precisely to protect the choice of materials, quality, and labor both in the research stages and in the production of garments themselves.

### **B. The relationship between Fashion Law and Society**

A key factor in understanding the world of IP and fashion is its sociological relationship with the population.

Fashion is a social form that is increasingly intertwined with politics, culture, entertainment, and information.<sup>12</sup>

Throughout the decades this relationship has changed, we no longer speak of imitation of a hierarchical system, Blumer argues that the elite class is seen as a symbol and representation in itself of the phenomenon; this is precisely why other people follow fashion as such and not to approach other social statuses. Thus, "The fashion mechanism" derives from the desire to be fashionable, to live up to that which enjoys prestige, to express new emerging tastes in an ever-changing world".<sup>13</sup>

Precisely from this concept, it follows that for today's society, the concept of fashion represents an encouragement of appropriateness and adherence to the society to which one belongs.

With the advent of fast fashion, Prêt-à-porter and social media there has been a democratization of fashion; designs and trends have reached many buyers<sup>14</sup> accordingly the distinction between high fashion and affordable fashion has been thinned.

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<sup>10</sup> ANNA VILLANI, "Back in the "Dior" Saddle", in Alberte Gram (ed.) 2021.

<https://thevintagebar.com/the-archive/back-in-the-dior-saddle>

<sup>11</sup> CHRISTIAN BARRÈRE- SOPHIE DELABRUYÈRE, "Intellectual property rights on creativity and heritage: the case of the fashion industry", European Journal of Law and Economics, 2011, p.320.

<sup>12</sup> GILLES LIPOVETSKY, "The Empire of Fashion: Dressing Modern Democracy", Princeton University Press, 1996, pp 174-187.

<sup>13</sup> HEBERT BLUMER, "Fashion: from class differentiation to collective selection", 1969, p. 275-279

<sup>14</sup> MARGARET CHON, "Slow Logo: Brand in Global Value Networks". In U.C. DAVIS L. REV. 935, 957. 2014, pp. 950-953.

## 2. EU Legislation

As demonstrated above, it is fundamental European intervention for intellectual protection in fashion. In this article, trademark, design and copyright are going to be analyzed, even if there are other forms of intellectual protection such as patents and trade secrets that are not typically used in Fashion Law.

Trade secrets are confidential information that is not generally known; they can be patterns, strategies, techniques, and others, patents on the other hand, cover inventions, processes, or products that offer a technical solution to problems and have industrial application. There is, however, a list of inventions that cannot be patented.

### A. Copyright

Copyright typically protects works such as photographs, novels, and songs, granting the author exclusive rights over the use of his or her creations up to 70 years after the creator's death, without a necessary registration. The author from the moment of disclosure with the public of his work automatically becomes the owner of the exclusive rights, both economic and moral essential to be recognized as a designer and a brand.

The European Union has legislated regarding copyright in a series of 13 directives and 2 regulations with the aim to armonize rights, ensure a minimum level of protection and to promote creativity and diversity.<sup>15</sup>

In the field of fashion, copyright concerns the concrete realization of an idea, from the graphic instructions of a sewing pattern as long as it is not the actual design.

The requirement is that, the creative work be an expression of the author's personality and his creations, regardless of the public's consideration of it.

As the boundary turns out to be interpretable, with the advent of digital fashion shows, such as the one at GCDS<sup>16</sup>, and digital presentations during fashion week, copyright plays a key role in protecting drawings and images about the show, especially considering the distribution on social media as well.

Very important is also the role that copyright possesses in the case of logos, despite the fact that they are, in most cases discovered by trademark, in the creation of websites, on social media, in commercials or even on garments, they can be copyrighted in case they have sufficient creativity and originality, in fact they cannot be simple letters, geometric shapes or representative colors.

### B. Trademark

A garment or accessory becomes recognizable to all through obvious features, the famous Ralph Lauren logo, a weave such as the famous "Gucci" monogram, or through an iconic label such as the red label of the jeans brand "Levi's," and also used by consumers to recognize brands, creating a real identity and leading to a resulting reputation.

To prohibit their use by others requires registration of the trademark, which entails legal protection in the legal area where it is recognized for 10 years and potentially renewable indefinitely, this is because the European regulatory framework coexists with national systems

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<sup>15</sup>EUROPEAN COMMISSION, “*The EU copyright legislation*”, Brussels, 2023. <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation>

<sup>16</sup> GIADA CORNELI, “*GCDS Out of this World*”, 12 October 2020. <https://www.klamour.it/gcdfs-out-of-this-world-una-sfilata-come-non-labbiamo-mai-vista/>

harmonized in the EU Directive 2015/2436, but registration can also take place at the European, Benelux, as well as international level.

At the European level, trademarks are codified in EU Regulation 2017/1001, which clarifies and amends previous regulations, which also clarifies the grouping into different categories that include: word marks, figurative marks, shape marks, position marks, color marks...

Some trademarks can also become a kind of quality assurance, meeting quality standards, as is the case, for example, with Manteco wool or Woolmark.

### **C. Designs**

Designs, such as industrial products or handcraft, were introduced with the purpose of protecting the appearance of a product, its outward appearance, and not its functionality. There are other indispensable characteristics to be respected such as novelty and an individual character even vis-à-vis designs already presented in the past. Thus, it emphasizes how designs protect the visual appearance of a product, either in its entirety or only in part, and how they are essential precisely because of the influence consumers can have from the outward appearance.

However, there are also exclusions because of technical functions that could fall under patent protection; as well as features that fall under the characteristics of another product and features that are contrary to public policy or accepted principles of morality.

As already stated, designs can also be registered at the national, regional, or international level. Crucial at the European level has been the harmonization of national laws with Directive 98/71/EC, Regulation (EC) No 6/2002 of 12 December 2001 on Community and Council Regulation No 1891/2006.

In order to protect designs, registration with the relevant offices is required despite this it is possible to take advantage of a "grace period," consisting of 6 months to a year depending on the national system. This period is crucial for brands in order to test a product on the market but on the other side of the coin, during this period the designer has no exclusive rights to the product.

At the European level, registration is valid for 5 years, renewable for 4 5-year periods up to a maximum of 25 years from which exclusive rights of use and prohibition of use to third parties follow.

In order to understand the importance of designs we can mention the case of the famous after-boots "Moon Boots" which for the Business Court of Milan are a clear example of how industrial design can bring creativity and innovation in the guise of art to the everyday world. The dispute was brought to the court's attention by Tecnica Group S.p.a., as well as the owner of the design of the well-known boot, believing that the Anouk design presented in the "east-west" collection led to copyright infringement and consequent unfair competition of the brand. The court supported this idea as an icon of Italian design and common taste of an entire historical era, also reporting the presentation at the Louvre Museum as one of 100 symbols representing 20th-century design.

The court's choice underscored how in an ever-changing world such as fashion it is necessary to protect the icons of a particular historical and cultural period and to be considered art in their own right.<sup>17</sup>

### **3. Violations of intellectual Property**

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<sup>17</sup> Tribunale delle Imprese di Milano n. 8628 del 12 luglio 2016.

Infringement of intellectual property concerns unauthorized use of it and it can be criminal or civil depending on the jurisdiction, type of protection, and depending on the action itself<sup>18</sup>, hence it follows that there are different categories of infringement.

Piracy and counterfeiting are illegal practices related to the violation of intellectual property rights. Specifically, the term "counterfeiting" is used to describe those tangible goods that infringe trademarks, designs, and patents, while the term "pirated" is used to describe tangible goods that infringe copyright.<sup>19</sup>

### a. Piracy paradox

Piracy refers to the infringement of intellectual property of tangible goods that violate copyright, by now copies of big brands can be found everywhere, Instagram pages, online, and in fast-fashion stores such as Zara and H&M that base their collections on cheap copies of ready-to-wear brands.

Equally common is the same practice among designers, as is pointed out by the column "Splurge or Steal," in the well-known fashion magazine Marie Claire US where it is intended to point out to the reader that it is almost always possible to find a cheaper alternative to a garment seen on the runway, although it is always difficult then to tell which designer copied the other.

Usually, imitations are released on the market in the same season or shortly after precisely to "ride the wave" of fashions, but sometimes, precisely because of the cyclical nature of fashion they are repurposed years later.

An example can certainly be the case of Tod's rubber-cleated moccasins, called precisely for this reason "*Gommino*" released in 1978. They enjoyed great success from the very first moment among moccasin lovers and others. In the 2000s several brands including Ralph Lauren and E. T. Wright<sup>20</sup> presented very similar models most likely inspired by Tod's classic model.

By now, long-lasting trends, such as Tod's loafers, are difficult precisely because fashion keeps coming up with new trends and some pieces do not survive until the next season leading to infighting between designers and brands especially when garments are produced and marketed within a very short period.

This is what also happened to designer Giuliano Calza, founder and creative director of GCDS, whose whimsical shoes, representing a bite, appeared within a short time on the website of Chinese giant SHEIN causing Calza's anger on his social networks.

In "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design," Raustiala and Sprigman argue that the industry, under scrutiny, is based on free appropriation where copying can promote creativity and innovation, and this is precisely why they speak of the "piracy paradox".<sup>21</sup>

Essentially, the authors try to communicate that piracy could benefit designers by speeding up the processes of creating and marketing goods.

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<sup>18</sup> RICHARD T. DE GEORGE, "*Intellectual Property rights*", in *The Oxford Handbook of Business Ethics*, Oxford, Oxford University Press, 2005, p. 54.

<sup>19</sup> OECD, EUIPO, *Trade in Counterfeit and Pirated Goods, Mapping the Economic Impact*, p.16.

[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/Mapping\\_the\\_Economic\\_Impact\\_study/Mapping\\_the\\_Economic\\_Impact\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Mapping_the_Economic_Impact_study/Mapping_the_Economic_Impact_en.pdf)

<sup>20</sup> KAL RAUSTALIA- CHRISTOPHER SPRINGMAN, "*The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*", 2006, p.1712.

<sup>21</sup> RAUSTALIA- SPRINGMAN p. 1691.

Moreover, in the case of no intellectual protection of creations, trends are stabilized by anchoring that helps consumers understand when the trend is over, what outlines the new trend, and what to buy to be fashionable.<sup>22</sup>

Thus, low intellectual protection in this area has allowed the industry to remain victorious and creative despite the free appropriation of others; the authors in each case do not seek that such a regime is optimal for those who create and those who buy and that such an industry could thrive even under a high intellectual protection regime.

## **b. Counterfeiting**

Counterfeiting is the infringement of trademarks, designs, models, and patents<sup>23</sup> and is definitely one of the biggest issues in the fashion sphere and is fueled by criminal organizations in all European states and even outside.

One of the most well-known cases in the sphere of Fashion Law and alleged counterfeiting is definitely *Louboutin v. YSL*; all fashion lovers would be able to recognize Louboutin shoes with the classic red sole. This is precisely where the case in question stems from; designer Christian Louboutin, in the early 1990s, began painting the soles of his shoes red, with the intention of conveying a sexy, seductive, and energetic perception to the wearer of such a shoe. In 2011, Louboutin sent a cease and desist notice to the French brand YSL, relying on the exclusive rights of the red color on the sole, requesting the withdrawal from the market of some models of YSL's Cruise collection, due to the color of the sole, further requesting, through emergency injunction on the basis of trademark infringement, trademark dilution, and unfair competition. It is necessary, however, to point out that in YSL's models, the shoes were entirely red, which is precisely why YSL requested the cancellation of the U.S. trademark "red colored sole" for lack of distinctiveness and precisely because it was an ornamental and technical aspect of a product.

The judge of the first instance in New York emphasized that the red sole mark was merely a distinguishing functional and quality trait of the boutique; in fact, in fashion, it is typical to use a specific color for aesthetic and purely ornamental reasons, and in the case of trademark registration many times other colors are included to make them recognizable, as in the case of the shades of brown used by Louis Vuitton or in Burberry's graphics. In fact, the designer himself had pointed out that the choice of red had been made to give them a strong and sensual character, thus not brand characteristics. It had also been verified that the collection presented by YSL evoked China where the color red is traditional since it represents good luck, happiness, and wealth; again, the color was therefore used to decorate and not to distinguish.

The judge then rejected Louboutin's emergency petition, arguing that if trademark protection and thus monopoly were recognized it would distort free market competition, especially in a seasonal market such as fashion.

The appeal of that decision, however, led to a more favorable position for Louboutin, recognizing the brand's exclusive right to trademark "red sole" provided that the rest of the shoe was another color, thus recognizing a "secondary meaning" of the sole.<sup>24</sup>

In Europe, more specifically in France, Christian Louboutin first registered the trademark in 2000 and in 2001 at WIPO for international protection.

At the European level, however, there was no shortage of obstacles after the first application was rejected on Sept. 20, 2010, by the EUIPO for lack of distinctiveness, the Board of Appeal

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<sup>22</sup> RAUSTALIA- SPRINGMAN p. 1729

<sup>23</sup> EUROPEAN COMMISSION, Brussels, 2010

[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_10\\_272](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_10_272)

<sup>24</sup> *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.* United States Court of Appeals for the Second Circuit September 5, 2012



recognized the distinctiveness of the color used due to the Pantone code (18 1663TP) in the application and the public perception of that color.

The European Court of Justice also ruled in favor of the brand, stating that the color can be a trademark, not by focusing on the shape of the shoe sole but by highlighting the location of the red color referred to in the registration <sup>25</sup>.

### **c. Parasitic competition**

"Parasitic competition" refers to unlawful conduct consisting of following the same path as the most successful competitor by exploiting business strategy, creativity, and innovation thus appropriating all the vital elements of fashion.

The remedies used by such misconduct are many, all characterized by urgency, injunctive action, seizure, publication in newspapers or online of the proceedings in such a way as to publicize the unfair behavior of a particular brand.

In Italy, "parasitic competition" has as its essential characteristics continuity, heterogeneity, and repetitiveness since it exploits the creativity of others<sup>26</sup>; in this case, consumer confusion is not expected, in fact he is induced to make a psychological connection thus stealing a market space from the copied competitor.

Precisely with regard to this almost vexatious behavior the Supreme Italia affair comes to mind; with the return of street-fashion, the madness of the sneaker worn by U.S. rappers and sportswear also flared up in Italy, especially for the classic Supreme logo box t-shirts. In stores and online, this kind of clothing began to appear, and streetwear novices got "grabbed" by Supreme Italia thinking of buying the now 30-year-old Supreme New York brand.

All this was caused by the lack of registration of the original brand, and taking advantage of the lack of registration, Supreme Italia copied the distinctive elements in every way, from the business choice to the beloved logo.

However, on April 20, 2017, the Court of Milan ascertained Supreme Italia's conduct as "parasitic competition," to the detriment of Supreme New York; the parasitic competition was obvious, according to the judges, as the brand even presented itself in catalogs as an "authorized licensee."

The interlocutory proceedings ended in favor of Supreme New York, but the same court pointed out the lack of a protection strategy in Italy since the trademark had been filed after the Italian one and in any case 15 years after the creation of the brand itself despite its presence on the Italian market since around 2000<sup>27</sup>.

### **d. Made in Italy**

Certainly the origin of "Made in Italy" is recognized in almost the whole world, and there are those who support their sales by making people believe that it is their Italian production, following the system of parasitic competition. These cases based on product origin are called "Italian Sounding" and involve many areas of the Italian economy, from fashion to food to design.

This happens not only towards international markets but also internally, towards the domestic consumer to be able to extort higher prices; the Parliament has also intervened in this area with

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<sup>25</sup> C-163/16 Louboutin and Christian Louboutin, 12 June 2018

<sup>26</sup> REMO FRANCESCHELLI "Concorrenza parassitaria" on the base of art. 2598, n.3 cc. 1956, p. 265 and followings.

UNIVERSITÀ DI MESSINA, "Nota sulla concorrenza parassitaria" Annali della Facoltà di Economia e Commercio. 1967, p. 3 and followings.

<sup>27</sup> Tribunale di Milano, ord., 31 gennaio 2017 e Tribunale di Milano, ord., 20 aprile 2017

l. 166, 20.11.2009<sup>28</sup>, and through the help of the Chambers of Commerce to ensure the consumer's right to transparency.

Consequently, even the trademark holder itself can be guilty of counterfeiting if it is misled into thinking that the product was made on the peninsula. Said in this way it might seem like a fully functioning system, but there are limits to such legislation. A significant example is that producers from other member states are not obliged to follow such legislation thus leading to an imbalance between Italian and European companies, consequently, goods bearing the indication "Made in Italy" can be imported from abroad, also due to customs controls, in fact Italian operators who make goods outside the territory in question, enter their goods through EU customs.

So the consumer, theoretically protected, may suffer actual harm.

In the case of the fashion industry to suffer most are textile companies, intermediaries between different companies in the case of creating a product, which thus suffer great contraction compared to companies that rely on cheaper Italian production and imports. There is therefore a need for greater transparency to both consumers and 100% Italian companies.

#### **e. Consequences in the “Made in Italy industry”**

In addition to defending the originality and creativity of designers, intellectual property is crucial to protecting the economic interests of a brand but at the same time also the European economy, and in this chapter I will consider the consequences in the fashion industry of “Made in Italy”.

After the advent of Covid-19, the habits of Italians have changed significantly, bringing them closer to the online marketplace and resulting in a digital evolution of purchasing; this new trend has been matched by an increase in companies relying on marketplace and e-commerce, however, the same has happened to bad actors that undermine intellectual property and consumer safety. Counterfeiting has left the typical known places of sale such as streets, beaches, and dodgy stores for a new virtual "marketplace". Over the years, many marketplaces have allowed their social commerce users to sell and buy by also giving visibility through social networks.

Another scourge of the marketing of fakes is clone sites, which through a similar domain, articles and graphics look authentic, consumers are left to understand that the products are legitimate. Obscuring such sites seems impossible since the sites are located in foreign countries or based on a dense network of addresses or through redirection to other sites.

Last but not least is the use of messaging apps such as Whatsapp, We Chat or Line; dropshipping is based on these apps, which precisely in the accessories and fashion sector has led to the proliferation of pages on social media that follow this mechanism.

Studies by CENSIS for Mise-UIBM in 2021, estimated that about 8 300 000 of Italians had purchased fake products online and of these only 1 800 000 claimed it was a conscious purchase<sup>29</sup>.

Speaking of numbers, according to data released by the OECD and shared by Confindustria Moda, counterfeiting on the fashion industry results in 1.3 billion for lost sales and 1.44 billion for those who spend money "in vain."

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<sup>28</sup> Legge di conversione del D.L. 25 settembre 2009, n. 135 and Art. 4, 49, della legge finanziaria. <https://def.finanze.it/DocTribFrontend/getAttoNormativoDetail.do?ACTION=getArticolo&id=%7BE0559BBB-5AF5-4BEE-A4AE-8EC93C38850E%7D&codiceOrdinamento=200000200000000&articolo=Articolo%202>

<sup>29</sup>MINISTERO DELLO SVILUPPO ECONOMICO, Direzione Generale per la Tutela della Proprietà Industriale Ufficio Italiano Brevetti e Marchi, "Rapporto sulle politiche anticontraffazione 2020-2021", 2022. [https://uibm.mise.gov.it/images/Rapporto\\_Politiche\\_Anticontraffazione\\_20\\_21.pdf](https://uibm.mise.gov.it/images/Rapporto_Politiche_Anticontraffazione_20_21.pdf)

#### **4. Conclusions**

Fashion is constantly changing, changing styles and trends from season to season so what may not have had identifying value yesterday, may become relevant to the law today through distinctiveness.

It is the prerequisite for any type of protection, regarded as the obvious ability of the sign to stand out from others in the marketplace and be perceived as an indicator of quality and provenance.

However, it is also possible to become so through use, thus gaining secondary meaning, allowing a symbol, shape, or motif the ability to become recognized just as with Louboutin's red sole considered a position mark in Europe.

It was therefore accurate that infringement of intellectual property rights, in the fashion industry, poses a serious threat at the European level, where some of the largest and most recognized brands in the world reside as well as posing a serious threat to the creativity and ingenuity of designers.

At the same time, creativity and cultural heritage will remain one of the cornerstones in the creative process, in fact, the standard model for protecting intellectual property, based on production and consumption, turns out to be only partially relevant in this industry.

In recent years it seems clear that the problem lies in the depopulation of fast-fashion, ultra-fast-fashion, and the use of the Internet, where not only counterfeits proliferate but also knock-offs of large chains, which, through ploys manage to prevent IP holders from enforcing their rights.