

Fashionising Intellectual Property

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The fashion world is present in all aspects of everyday life, from the clothes or shoes we choose to go to work, study or attend an important event, according to Bárbara Pardo Navarro, fashion is "one of the artistic activities with the most social movement that exists today, (...) [based on] an aesthetic and expressive beauty, characteristic of which the fine arts deal with". Also, the author cited Enrique Loewe, who mentions that "fashion was always a mirror of society at a particular time. So if someone in two hundred years would like to analyze society at this time, the best method would be to study fashion, much more than through monuments "(Pardo 2008: 10).

Fashion reinvents itself, changes and meets the standards of each society as well as technological changes and if we focus on Peruvian society, the fashion industry grows every day and a proof of this is the success of great designers who have been able to demonstrate their creations not only at a national level but also at an international level, carrying out important fashion events, among which Lima Fashion Week - LifWeek and Peru Moda stand out, in which all kinds of designs are exposed, creating a space for the development of the creativity of national designers as well as for international designers who seek in our country the suitable market to commercialize their trademarks.

It is inevitable to mention big trademarks when we talk about fashion and this is due to the great role played by them being the main identification card at the time of commercializing a product, these great trademarks that previously seemed inaccessible are increasingly closer to the public consumer due to the so-called "fashion democratization" in which the clothing and accessories of high-cost designers or world-famous trademarks are accessible to all public because trademarks or designers create alliances with multi-brand or department stores, these collections receive the name of capsule collections and they are of limited edition generating a high demand. The democratization of fashion has brought benefits for all the parties involved, the first beneficiary is the store due to the large number of people who purchase the product, the second beneficiary is the trademark or the designer who benefits from the marketing or the advertising carried out by the store and also by the customers who attend the stores and finally the consumer who will buy a product from a designer or a high cost trademark at a reasonable price.

It is perhaps the importance of Trademarks to commercialize a product in the world of fashion or the desire to bring the big trademarks to the public consumer added to the lack of creativity or originality which generates clear examples of plagiarism or trademark piracy, among which we can Cite one of

the most important trademarks of sportswear, the swoosh design by Nike Innovate CV  , a well-known trademark, recognized in different Resolutions of INDECOPI, in which a considerable amount of oppositions and nullities have been filed against the trademark pirates of this famous and well-known trademark that have unscrupulously sought to copy the characteristic design through the

¹<https://riunet.upv.es/bitstream/handle/10251/13635/La%20moda.%20Arte%20e%20influencia%20artistica.pdf?sequence=1>

following trademarks:  (File N° 550432-2013),  (File N° 559657-2014),
NYKKER
 (File N° 495090- 2012).

Another case in which there is a clear example of piracy that could be quite common in the Peruvian market is the imitation of the trademark of the polo player that belongs to the company The Polo /

 whose design has sought to be reproduced in the following
 Lauren Company, L.P:  (File N° 538693-2013),
 trademarks:  (File N° 564371-2014),  (File N° 538693-2013),
 (File N° 594519-2014).

Although there is a constant risk of entrepreneurs taking ownership of designs or trademarks of designers, many of them do not protect their designs either because they are unaware of the forms of protection offered by the national legal system or because they can not access because costs or other factors. Thus, after reviewing the key concepts and analyzing the main obstacles in the world of fashion, it is essential for this article to provide a clear scope regarding the forms of protection that designers have regarding their creations.

In Peru, we have a protection regime called “cumulo total” in which copyright and industrial property stands out, as far as copyright is concerned, it is pertinent to refer to Legislative Decree No. 822, the Copyright Law, which points out in subparagraph a) of article 4 that "The copyright is independent and compatible with the industrial property rights that may exist about the work" and in subparagraph f) of article 5 which expressly states that the applied Works of art are protected , defined as "an artistic creation with utilitarian functions or incorporated into a useful article, being a work of craftsmanship or produced on an industrial scale" (subsection 20 of Article 2 of the Copyright Law).

Likewise, the Intellectual Property Chamber of INDECOPI ruled on a case related to models of sweaters, making it clear that fashion designs could obtain protection by copyright. In the Resolution N ° 063-2001 / TPI-INDECOPI, about complaint for infringement to the author's rights the following was indicated:

"Applied works of art include both dimensional forms (such as drawings) and three-dimensional ones (such as models). Considering the characteristics of the applied works of art, it is possible that said works can also be protected as industrial designs, to the extent that they comply with the requirements demanded by the law of the matter. (...) National legislation does not contain a rule that prohibits providing this double protection to applied works of art, so it can be understood that it is possible to invoke it. However, this does not mean that any work of applied art also enjoys protection as an industrial design or vice versa, since it may be the case that an applied work of art has been made accessible to the public, losing therefore the novelty required by the industrial property law to protect an industrial design".

On the other hand, the importance of the protection of fashion designs is such that the Directorate of Copyright of Indecopi has created a "Guide to Copyright in the Fashion Industry" (Indecopi 2013), which aims to provide more information according to the needs of each sector in the industry, but as has been established in the aforementioned guide, the creations or designs of fashion are not only protected in terms of copyright but also ²as industrial design (for example the design of a certain fabric pattern presenting a monogram): To the extent that this type of work is a two-dimensional or three-dimensional creation that can be incorporated into fashion creations and then produced on an industrial scale. For example, the pattern design of the GUCCI trademark will be protected, but not the model or design of the fashion item itself.

Another form of protection and on which we will focus is the protection as a distinctive sign either through a trademark or logo, what is sought here is to protect the trademark or logo registered before the Direction of Distinctive Signs of INDECOPI but the protection is not provided with respect to the garment to which such trademark or logo is applied.

Trademark protection becomes the most recurrent medium for designers According to professors Raustiala and Sprigman, "trademarks help maintain the premium prestige of different trademarks, and can be very valuable for clothing companies and accessories. The fashion industry invests heavily in pursuing the unauthorized uses of its trademarks ". In the same sense, Dr. Susan Scafidi, specialist in the fashion law area states that "the most universally applicable and flexible protection mechanism for fashion designs is that of the law of registered trademarks. Whether on an interior label or on the exterior element of a design, virtually all clothing objects incorporate a trademark in some form. The ease of trademark registration (...) ensures that virtually all designers have access to the protection of their names and logos attached to their products. "

On the other hand, the following is stated in the WIPO Magazine: "instead of protecting designs, most fashion designers prefer to rely on their trademarks, applied directly to their products and which are usually protected by the legislation relating to trademarks. Trademarks make it easy for designers to detect imitations and help consumers identify their favorite items "(WIPO 2008).

Taking into account the importance and preference of designers regarding the protection of their creations as a distinctive sign, it is appropriate to focus on the existing forms of trademark protection among which we find:

- Registration of fashion trademarks: According to Article 134 of Decision 486 of the Andean Community, corresponding to the Common Regime on Industrial Property in Peru and the other countries of the Andean Community, there are several objects that can be registered as trademarks, being that Companies or designers can request the registration of word or figurative trademarks. The applications can be regarding:
 - Designers name or pseudonym
 - Logotypes that are included in labels or images that will be placed on fashion products
 - A fashion line or a collection

² file:///C:/Users/User/Downloads/GDA_IndustriaDeLaModa.pdf

- Registration of fashion design as a trademark: Two-dimensional or three-dimensional trademarks are a clear example of this type of design. It is necessary to mention that to access the registration of a two-dimensional or three-dimensional trademark, it is necessary that the design that is intended to be registered corresponds to a specific business origin, this absence of necessary attributes that give distinctiveness has been grounds for denials regarding some trademarks that were intended to be registered in class 18 and 25, where the following was argued:

"It is not endowed with the necessary attributes to be the means by which the products that intend to distinguish are identified and differentiated from the others that are offered in the market, since such figure will not be perceived by the consumer as a distinctive sign of a certain business origin, while it does not have any peculiar characteristic whose sole presence allows the consumer to determine the business origin of the products that intends to distinguish"³.

Another classic example of this type of records corresponds to the costumes as well as the soles of footwear registered as a trademark in class 25, which present a special design that makes them different from each other.

We can not ignore also one of the most emblematic cases corresponding to the ADIDAS trademark where it was intended to record the characteristic design of the three lines in a shirt and trousers in class 25, a record that was subsequently granted by resolution No. 2054 -2015 / TPI-INDECOPI and N ° 2055-2015 / TPI-INDECOPI since, according to the evidence presented, it was determined that the public consumer could associate the aforementioned design with the applicant company and differentiate the product from others that are commercialized in the market, being the case in addition that the aforementioned product acquired distinctiveness due to its constant use in the market.

Finally, it is important to mention the products in the world of fashion because they are in different classes in a dispersed way, for example, the soaps or perfumery products are found in class 03; articles of jewellery, costume jewellery, precious stones are found in class 14 or imitation leather and leather as well as animal skins; they are included in class 18; in the case of clothing, footwear, headgear, these are classified in class 25, however, it should be noted that as stipulated in article 151 of Decision 486: "(...) classes of the International Classification referred to in the previous paragraph will not determine the similarity or dissimilarity of the products or services expressly indicated."

Taking into account the aforementioned, Indecopi uses linking criteria when issuing a resolution, there have been cases in which the products of class 25 and class 14 have been linked, for example in the

case  against EBEL, L'EBEL and others (Resolution No. 1140-2014 / TPIINDECOPI) or in the

case of the trademark  against BILLABONG and others (Resolution No. 114-2009 / CSD-INDECOPI) where the link was made with respect to the products of class 25 and 18, For this reason, trademark applicants must take into account that the trademark they wish to register for their product line is not registered or has been used for a class other than class 25 and with which a connection or link can be appreciated as described above.

By way of conclusion we can state that the fashion industry has evolved considerably in our country and has positioned itself as one of the most important, fashion is synonymous of creativity, creation and innovation and it is essential that those who are involved recognize the law and more specifically to Intellectual Property law as the ideal means to protect their creations either by registering their trademark or protecting their copyrights, among others, which would bring multiple benefits and prevent further cases of piracy or plagiarism.

³ Resolución N° 16543-2010/DSD-INDECOPI.

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