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Rigorosum Thesis

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Declaration

I hereby proclaim that the submitted thesis is the result of my own efforts and that the thesis has not been used to obtain any other academic degree and that the minimum number of characters required for rigorosum thesis has been met.

In Prague 31 July 2017 .....

Mgr. Anna Krčmárová

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Content

Introduction

"Fashion goes only one direction – forward – and I am a firm believer in thinking that way too."[1]

For as long as I can remember, I have always had a profound admiration for beauty in all possible forms. One of them for me is law with its history, social importance and particularly core values which it represents. I can also see this immense complexity in fashion which is full of contradictions worth observing and analysing.

The purpose of this thesis is to present a new field of law and its specifics with an unpretentious historical and sociological overlap, and with the ambition to commence a social discussion about fashion, as we perceive it and as we should perceive it.

This thesis is also dedicated to those who consider fashion industry frivolous, to provide them with the essential insight into the very complex and intricate field, and in fact a market valued at 1.7 trillion dollar.[2] Even though it is rather widely known that the fashion market is divided into many levels of brands; from the luxurious ones through premiums to the fast fashion ones, I am convinced that relations among them have never been under public scrutiny or thorough academic research. The objective of this thesis is to answer whether there is demand for the establishment of the new field of law, and whether the present legal norms are sufficient for protection of the fashion companies' intellectual property, particularly fashion designs.

The first chapter is dedicated to proper introduction into the fashion law, its establishment on website blog grounds and its wide popularization and academic acceptance.

The second chapter provides the fashion law's three part conceptual classification into sub fields – fashion business law, fashion public law and fashion intellectual property law. Fashion business law is outlined to the extent essential for the purposes of this thesis, whereas the topic of intellectual property licensing in fashion is highlighted due

[1] Anna Wintour.
[2] Guillermo C. Jimenez and Barbara Kolsun, *Fashion Law: Cases And Materials* (Carolina Academic Press 2016) 3.

to its substantial influence on the reputation of the fashion companies which is crucial in such a competitive market.

Within the fashion public law part, a considerable attention is given to the matter of the fashion industry's impact on the environment and the consumers' conduct in terms of description of the rise of fast fashion and its true cost. I believe that the inclusion of these topics is crucial for understanding the current state of the entire fashion industry which may provide the necessary alternative look at the importance of protection of the fashion companies' intellectual property.

The entire third chapter deals with the fashion intellectual property according to the type of protection – patents, copyright, designs and trade marks. Each type is introduced in the international context to provide an overview to what extent would a concrete fashion design be protected, and to present the statutory requirements of the respective protection. Special view is given to the legislation of the Czech Republic as well as the European Union.

A relevant part of the third chapter is represented by the fashion intellectual property law in practise, particularly the case law. Though few and far between and with international origin, the most relevant and remarkable cases are described.

1 Fashion Law as a New Phenomenon

1.1 Evolution of Fashion Law

1.1.1 Fashion

The word "*fashion*" itself has several meanings. From a style that is popular at particular time, especially in clothes, hair or make-up,[3] through a manner of doing something[4] to the most important one; fashion is the area of activity that involves styles of clothing and appearance. For the purposes of this thesis only the first and the third definition will be worked with.

Fashion has had been present from the very first beginnings of mankind and has been in a constant process of evolution since then. First of all, the argument that fashion is girly, and what is more, frivolous, must be declined. Apart from the significance of fashion as an industry with an undeniable global growth and billions annual sales, fashion generates and influences cultural perception and is one of the factors in social and interpersonal relations.[5]

Dynamics and specifics of fashion were subject to a number of theorists' analysis. One of the first notable ones was the theory of "conspicuous consumption" by a Norwegian-American economist and sociologist Thorstein Veblen published in his book The Theory of the Leisure Class: An Economic Study in the Evolution of Institutions. Veblen explains fashion as a display of wealth through which a conspicuous consumer attains or maintains a given social status.[6] The connection between fashion and social status was elaborated on by a German sociologist Georg Simmel. *"According to this view, fashion is adopted by social elites for the purpose of demarcating themselves as a group from the lower classes. The lower classes inevitably admire and emulate the*

[3] Often connected with "fashion dictate".
[4] See https://en.oxforddictionaries.com/definition/fashion.
[5] Georg Simmel, "Fashion", International Quarterly, 10(1), October 1904, pp. 130-155, reprinted in American Journal of Sociology, 62(6), May 1957, pp. 541-558. Quotations used here are taken from the October 1904 translation and labelled F. p 133.
[6] Fashion as display of wealth and as the field for high society only confirms first issue of Vogue in 1892 "dignified authentic journal of society, fashion and the ceremonial side of life". Classic Chic: Music, Fashion, and Modernism (Calif: University of Carolina Press, Berkeley 2008) p 203.

upper classes. Thereupon, the upper classes flee in favour of a new fashion in a new attempt to set themselves apart collectively. This trickle-down process, moving from the highest to the lowest class, is characterised by the desire for group distinction on the part of the higher classes and the attempt to efface external class markers though imitation on the part of the lower classes."[7] Simmel also highlights the role of envy in the fashion dynamic as a social link. There is no envy without admiration, because envy marks the distance between ourselves and our ideal of being or having, when we see this ideal realised in our neighbour.[8] For these reasons some consider fashion an instrument for dilution of envy among individuals, and for social inclusiveness.

This functionalist view of fashion was criticized for the fact that the main driver of fashion may not necessarily be the imitation of high status people. One of the challengers of the trickle-down theory was an American sociologist Herbert Blumer who regarded fashion as a "collective selection" process. Blumer insists that individual choices are made on basis of desire for modernity, novelty, innovation and state of the art rather than class distinction. Notable fact is being brought to attention; people want to join certain group not necessarily out of desire to emulate that group, but because the so called "being in fashion" is attractive.

Modern theories highlight that fashion, better said what people wear is becoming an essential part of communication because it provides visual cues and identifiers of one's personality. *"Fashion is then driven forward as a combination of individual differentiation and collective identification, and the personal and the social impulses."*[9]

1.1.2 Professor Susan Scafidi

Although some aspects of fashion were recognised by lawyers and scholars even before the fashion law became a field of law, the history of the fashion law is tightly connected with Professor Susan Scafidi and other scholars from universities in the United States of America (hereinafter referred to as "U.S.").

[7] C. Scott Hemphill, Jeannie Suk, The Law, Culture, and Economics of Fashion in Stanford Law Review (61 Stan.L. Rev. 1147, March 2009).
[8] Sergio Benvenuto, Fashion: Geor Simmel, in Journal of Artificial Societies and Social Simulation vol. 3, no. 2 (2000).
[9] C. Scott Hemphill, Jeannie Suk, The Law, Culture, and Economics of Fashion in Stanford Law Review (61 Stan.L. Rev. 1147, March 2009).

Professor Scafidi is considered a pioneer of fashion law as a distinct legal field. Professor herself does not claim to be the only founder of the field; moreover, she states that several publications on fashion law were her inspiration for the foundation of the fashion law. Published in 2000, "Droit International de la Mode" (translated as The International Law of Fashion) written by Jeanne Belhumer was one of the first attempts to describe the interaction between fashion and law. So was "Droit du luxe" (translated as Law of luxury goods) written by Annabelle Gauberti as a supplement of the French legal magazine Revue Lamy Droit des Affaires published in May 2004. Nevertheless, these publications cover only specific aspects of the fashion law, which was the initial impulse for Professor Scafidi to commence her journey of establishing the fashion law with the ambition to acquire scholars' acknowledgement.[10]

This journey of Professor Scafidi was foreshadowed in her previous academic work which resulted in the publication "Who Owns Culture? Appropriation and Authenticity in American Law". After the positive reception of her book, she started writing a blog dedicated to the fashion law named "Counterfeit Chic" which gained an amount of necessary attention and raised awareness about the legal aspects of fashion, and also inspired other lawyers to contribute to the foundation of the fashion law.[11]

Even though the popularity of the "Counterfeit Chic" blog was growing, opening a university course was a bit of a challenge even for the experienced Yale Law School graduate. After an amount of convincing the University leaders she managed to open the first course of fashion law at Fordham University. Maybe, the last argument to undergo the possible risk of students' lack of interest in such course and the possible negative attention was Professor Scafidi's persuasion that fashion industry is unjustifiably neglected by the legal academy for the reason she calls *"pink and lavender discipline, one primarily associated with women and gay men, as well as men of colour (and those who are willing to wear it)"* and has nothing to do with the importance of

[10] Susan Scafidi, 'Fiat Fashion Law! The Launch of a Label – and a New Branch of Law' in *Navigating Fashion Law: Leading Lawyers on Exploring the Trends, Cases, and Strategies of Fashion Law* (Inside the Minds, Mass.: Aspatore, Boston 2012) 10.

[11] The Counterfeit Chic blog was recognised as one of the American Bar Association's top 100 blogs in 2009. Sarah Randag and Molly McDonough, 'Third Annual ABA Journal Blawg 100' (*ABA Journal*, 2009) <http://www.abajournal.com/magazine/article/third_annual_aba_journal_blawg_100> accessed 15 September 2016.

fashion, which is in fact immense.[12] Not only she built up the grounds for creation of the new legal field she also articulated the unspoken truth – that fashion and its protection by law is neglected and overlooked for deplorable reasons vesting in gender.[13]

1.1.3 Fashion Law at Universities

The Fordham University School of Law was the very first university to offer a course in Fashion Law ever. The course was opened in 2006 and led by the Professor Scafidi.[14] From 2015 lawyers can even obtain Master of Laws degree in Fashion Law (L.L.M.) at the Fordham University School of Law.[15]

In another part of New York, Professor Guillermo Jimenez and Professor Barbara Kolsun began their project with the formation of Committee on Fashion Law at the Fashion Institute of Technology (F.I.T.), State University of New York.[16] The committee was met with an amount of support from its participants and thus elaborated on how to elevate its activity. It was clear that time to create new a legal discipline – the fashion law – had come. After surveys among attorneys practising in fashion and numerous discussions the most important legal topics were determined and the creation of the first handbook on the fashion law commenced. In October 2009 the Fairchild Books published the very first handbook on the fashion law "Fashion Law: A guide for Designers, Fashion Executives and Attorneys" written by Professor Guillermo Jimenez and Professor Barbara Kolsun.

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[12] Susan Scafidi 'Fiat Fashion Law! The Launch of a Label – and a New Branch of Law' in *Navigating Fashion Law: Leading Lawyers on Exploring the Trends, Cases, and Strategies of Fashion Law* (Inside the Minds, Mass.: Aspatore, Boston 2012) 10.

[13] This is much more visible and striking if we compare it to the Sports Law, which is widely accepted by legal society without any contempt or pursuit of detraction. Not to mention that sport is historically connected with men (e.g. women are allowed to compete in the Olympic games since 1900 http://www.oc-tv.org/2014/02/25/did-you-know-olympics-edition/).

[14] Susan Scafidi 'Fiat Fashion Law! The Launch of a Label – and a New Branch of Law' in *Navigating Fashion Law: Leading Lawyers on Exploring the Trends, Cases, and Strategies of Fashion Law* (Inside the Minds, Mass.: Aspatore, Boston 2012)18.

[15] Vanessa Friedman, 'Fashion's Latest Accessory: The Law' *The New York Times* (2015) <https://www.nytimes.com/2015/06/23/fashion/fashions-latest-accessory-the-law.html> accessed 14 September 2016.

[16] Guilermo Jimenez is Associate Professor at Department of International Trade and Marketing of Fashion Institute of Technology and also Adjunct Professor at Brooklyn Law School and NYU Stern School of Business.

By the year 2010, the fashion law started to be recognised as a distinct area of law. Permanent courses on fashion law were offered by universities across the United States of America – NYU Law School, Brooklyn Law School, New York Law School, University of Pennsylvania Law School and many other institutions.[17] The Cardozo Law School joined forces with General Counsel of Michael Kors Lee Sporn and Professor Kolsun who expanded the university's Fashion, Arts, Media and Entertainment Law Centre with the Fashion law. Professor Kolsun also served as general counsel for such names as Kate Spade, Stuart Weitzman, had been Assistant General Counsel of Westpoint and Calvin Klein Jeans and worked with Ralph Lauren and Tommy Hilfiger.[18] This concept of experts in fashion law giving courses has been acquired by other universities around the world since then. Programs in the area of the fashion law are offered in University of Milan,[19] the University of Insubria,[20] the Instituto Brasileiro de Negócios e Direito da Moda,[21] University at Buffalo Law School,[22] the Fashion Law Project at Loyola Law School,[23] the Moda Hukuku Enstitusu in Turkey,[24] the annual Fashion Law Week at Howard University,[25] and McGill University Faculty of Law.[26]

1.1.4 Fashion Law at Associations

It is common knowledge that New York City is a fashion mecca and that the fashion business growth is one of its priorities. This may be the reason why the fashion law

[17] Jimenez Fashion law, p acknowledgements.
[18] Cardozo School of Law, 'New Classes, Industry Leaders Join Board, Expanded Connections To New York Businesses' (2015) <https://cardozo.yu.edu/news/cardozo-law-expands-fame-center-fashion-art-media-entertainment-law> accessed 14 September 2016.
[19] 'Corso Di Perfezionamento In FASHION LAW - Le Problematiche Giuridiche Della Filiera Della Moda' (*Fashionlaw.unimi.it*, 2015) <http://www.fashionlaw.unimi.it/> accessed 14 September 2016.
[20] Paola Aurucci, 'Corso Di Perfezionamento In Fashion Law' [2014] *The Vogue*<http://www.vogue.it/talents/neodiplomati/2014/01/corso-di-perfezionamento-in-fashion-law> accessed 15 September 2016.
[21] 'Fashion Business Law Institute' (2015) <http://www.fbli.com.br/fbli> accessed 14 September 2016.
[22] *Buffalo Law School Spring 2014 Course Descriptions* (2nd edn, SUNY Buffalo Law School 2014) <http://www.law.buffalo.edu/content/dam/law/restricted-assets/pdf/registrar/c14/sprCourses14.pdf> accessed 15 September 2016.
[23] 'Loyola Law School | Registrar | Courses' (*Webdb.lls.edu*, 2016) <https://webdb.lls.edu/courses/> accessed 15 September 2016.
[24] 'Moda Hukuku Eğitimleri' (*Moda Hukuku Enstitüsü*, 2016) <http://modahukukuenstitusu.org/> accessed 15 September 2016.
[25] 'Fashion Law Week' (*Fashion Law Week*, 2016) <http://www.fashionlawweekdc.org/> accessed 15 September 2016.
[26] *Course Offerings 2015-2016* (McGill University – Faculty of Law 2014) <https://www.mcgill.ca/law-studies/files/law-studies/sao_courseofferings20152016_20151203.pdf> accessed 15 September 2016.

creation was started by New York City's professors. In 2010 New York City's Mayor announced initiatives to grow New York City's Fashion Industry over the next decade from a fashion draft through a fund to a fashion campus.[27] These initiatives were followed by the American associations and resulted in establishing specialised committees on the fashion law.

In January 2011the New York City Bar Association created the Fashion Law Committee, with the objective to study and comment on a wide range of legal issues associated with the fashion industry. The New York State Bar Association followed the trend and established their Fashion Law Committee in the same year. The Federal Bar Association did not establish any fashion law committee, but it recognises fashion law as a practise area and for several years, seminars and conferences have been held annually.

1.1.5 Fashion Law in Practice

Fashion Law deals inter alia with the outcomes of the work of designers, in better words: artists, who in most cases do not see the importance of legal instruments for the protection of their work, or who are convinced that time to invest in legal services will come after their break through or first success, which is false.[28]

1.1.5.1 Fashion Law Institute

For the reasons mentioned above it is clear that the education of lawyers in fashion is highly needed, however, it is also necessary to provide the designers with the so called legal minimum to protect their business. Bearing in mind the designer's approach and risks linked to it, professor Scafidi, with the support of Diane von Furstenberg and the Council of Fashion Designers of America, established the first academic centre

[27] The Official Website of the City of New York, 'Mayor Bloomberg Announces Six New Initiatives To Grow New York City's Fashion Industry Over The Next Decade' (2010) <http://www1.nyc.gov/office-of-the-mayor/news/452-10/mayor-bloomberg-six-new-initiatives-grow-new-york-city-s-fashion-industry-the> accessed 3 October 2016.

[28] Designers are prone to make mistakes from the outset, e.g. registering their name as a trademark used for their designs. Thought it may sound honourable to link their products with their name, it is very likely to result in losing their rights to trade under their own name. See England and Wales High Court of Justice Chancery Division decision in Karen Denise Millen v Karen Millen Fashions Limited and Mosaic Fashion U.S. Limited [2016] EWHC 2104 (Ch) available at: 'Millen v. Karen Millen Fashions Ltd & Anor [2016] EWHC 2104 (Ch) (16 August 2016)' (*Bailii.org*, 2016) <http://www.bailii.org/ew/cases/EWHC/Ch/2016/2104.html> accessed 2 October 2016.

dedicated to the law and the business of fashion - the Fashion Law Institute, which also serves designers.[29] The Fashion Law Institute provides courses for lawyers and business professionals, as well as legal services for design students and professionals, particularly in the form of "Fashion Law Pop-Up Cliniques".[30]

1.1.5.2 Ústav Práva Módního Průmyslu

As a response to the formation of the Fashion Law Institute and the completion of one of the provided courses, Mgr. Zuzana Šimonovská, LL.M. decided to employ her intellectual property expertise in a similar national project – Ústav práva módního průmyslu (hereinafter referred to as "Ústav"). Ústav is a non profit organization aiming to navigate local designers between the legal and business intricacies of the fashion business. Many designers and fashion law students have been awakened since the establishment of Ústav in 2015. The first Fashion Law conference by the Ústav was held in 2016 and more courses are supposed to follow to satisfy the demand, as well as gain acclaim.[31]

1.1.6 Fashion Law in Media

Even though the media paying attention to the topic of the Fashion Law are listed in the last paragraph of this chapter, the media were in fact the initial platform for formation of the Fashion Law. Undoubtedly, professor Scafidi's blog "Counterfeit Chic" is a pioneer in the field of the fashion law, yet worth mentioning are also blogs primarily written on intellectual property matters, which frequently discuss disputes from the field of fashion. One of them is a blog established in 2003 – "IPKat: intellectual property news and fun for everyone". Within the period of its existence the IPKat has acquired numerous recognitions and has been even recommended by the European Patent Office as a reading material for the candidates of the European Qualifying Examinations.[32] This is comes as no surprise when we consider that the IPKat team consists of

[29] 'About - Fashion Law Institute' (*Fashion Law Institute*, 2016) <http://fashionlawinstitute.com/about> accessed 21 September 2016.
[30] Designer seeking legal advice is matched with pro bono attorney at "Fashion Law Pop-Up Cliniques". See 'Fashion Law Pop-Up Clinic - Fashion Law Institute' (*Fashion Law Institute*, 2017) <http://fashionlawinstitute.com/fashion-law-pop-up-clinic> accessed 15 September 2016.
[31] 'UPMP' (*ÚSTAV PRÁVA MÓDNÍHO PRŮMYSLU*, 2016) <http://www.upmp.cz/> accessed 21 September 2016.
[32] 'A Bit More About The Ipkat' <http://ipkitten.blogspot.cz/p/bit-more-about-ipkat.html> accessed 21 September 2016.

intellectual property enthusiasts which are in fact, every single one of them, successful attorneys-at-law and academics.[33] The scope, frequency, efficient research and a particularly unique point of view with critical observation are all present. The IPKat is worth mentioning as an irreplaceable source for the European readers as it is written by European practitioners on European cases decided by the European courts unlike the vast majority of the fashion blogs which are primarily American focused. Although the IPKat has not been labelled as a fashion law blog, it is one virtually. This could also be said about a number of other intellectual property blogs.

However, speaking of the establishment of the independent legal field blogs' authors who insisted on this perception of the fashion law can be considered as uppermost. The most discussed fashion law blog in last several years is undeniably "The Fashion Law" written by an American then law student Julie Zerbo. The blog consists of posts regarding the legal and business aspects of fashion, and is known for its in depth commentaries with an admirable frequency with regard to the fact that Julie Zerbo is the author of the vast majority of the posts. Not only Julie Zerbo has been cited by the Vogue, the New York Times and the Economist, she also participated in the creation of the first fashion law handbook "Fashion Law: A guide for Designers, Fashion Executives and Attorneys" by authoring a chapter. The Fashion Law blog remains one of the most important sources for entrepreneurs and lawyers to keep pace with all of the court decisions and the disputes of the fashion business companies and last but not least, their controversies.[34]

1.2 Fashion Law as a Field of Law

The previous chapter of this thesis was dedicated to the evolution of the fashion law, however, it is yet to be analysed if the fashion law would meet the mandatory requisites

[33] Alberto Bellan, adjunct professor at University of Trieste, David Brophy, patent attorney at FRKelly, Eleonora Rosati, associate professor at the University of Southampton, Nicola Searle, Lecturer at the Institute for Cultural and Creative Entrepreneurship at Goldsmiths, University of London, Daren Smyth, patent attorney and partner in the IP practise of EIP, Annsley Merelle Ward, IP litigator at Bristows LLP, Neil J. Wilkof, of counsel to Herzog Fox Neeman, Rosie Burbidge, IP lawyer at Fox Williams LLP, Eibhlin Vardy, senior associate at Stephenson Harwood in London, Mark Schweizer, associate in the Swiss firm of Meyerlustenberger Lachena and other.

[34] Julie Zerbo, 'About' (*The Fashion Law*, 2016) <http://www.thefashionlaw.com/about/> accessed 27 September 2016.

to be considered a field of law – an autonomous part of the orderly system of sources of law.[35]

Civil law, commercial law, criminal law and administrative law are undoubtedly considered traditional fields of law whose origin is dated centuries ago.[36] Over time we have been witnesses to the insufficiency of the above mentioned fields of law for constantly developing legal relations and growing needs of a special legislation, for instance in the case of financial law or environmental and natural resources law which separated from the administrative law, or labour law from the private law.[37]

The fashion law consists of legal norms which have separated from the intellectual property law, consumer protection law, business law as well as other fields of law.[38] The fashion law will not become a vertical field of law because it does not consist of its own comprehensive subject matter, its own terminology and limitation by respective code. On the other hand, fashion law meets the criteria of a horizontal field of law. Horizontal field of law is characterised by the fact that its subject matter is spread across other legal fields and its terminology is based on the terminology of these legal fields. The horizontal field of law originate through assignment of legal acts and its provisions relating to determined matters of such horizontal field of law.[39]

Legal theory states that legal norms create a field of law when they meet field-specific criteria.[40] The field-specific criteria are: existence of common institutes, internal systemic coherence and acceptability by the academic public. The wide academic acceptability was outlined in the first chapter, whereas the common institutes will be closely analysed in the following chapters on the background of systemic coherence. Moreover, the acceptability of fashion law as field of law should arise from the wider public, not only the academic one. Fashion law deals with a very specific dynamic industry which employs a great number of persons who should be aware of the manner in which the fashion industry is regulated and more importantly, which rights and

[35] Jaromír Harvánek, *Teorie Práva* (Vydavatelství a nakladatelství Aleš Čeněk 2008) 24.
[36] Viktor Knapp, *Teorie Práva* (CH Beck 1995) 69.
[37] Libuše Neščáková, *Zákoník Práce 2014 V Praxi* (4th edn, Grada Publishing 2014) 13.
[38] Zuzana Šimonovská, 'Fashion Law' <http://www.pravniprostor.cz/clanky/ostatni-pravo/fashion-law> accessed 2 October 2016.
[39] Karel Eliáš, Josef Bejček et al, *Kurs Obchodního Práva. Obecná Část - Soutěžní Právo* (5th edn, CH Beck 2007) 9.
[40] In Czech: odvětvotvorná kritéria.

obligations they have. The public has an inherent interest in the environment and the real impact of the fashion industry in its entirety, and how it is regulated, or if it is in fact regulated.

2 Fashion Law: Key Legal Areas and Issues

Fashion Law is as diverse as fashion itself and for this reason it consists of different sub-fields. For the purposes of this thesis professor Jimenez's three part conceptual classification of these sub fields is employed.[41] Professor Jimenez divides the fashion law into three main areas:

- Fashion Intellectual Property – Design and Brand Protection
- Fashion Business Law and
- Fashion Public Law.

The most crucial area is undeniably the Fashion Intellectual Property. For this reason it will be described thoroughly in a separate chapter of this thesis due to its crucial importance, as opposed to the other two areas which will be outlined to an extent for a suitable introduction to the fashion law from the intellectual property point of view.

2.1 Fashion Business Law

2.1.1 Commercial Sales

Regarding the fact that fashion is very broad, tangible objects which are the subject of commercial sales in the fashion field may vary substantially. What is on the other hand rather similar in commercial sales in the fashion field is the occurrence of certain patterns and instruments which will be described below on the grounds of the most important commercial sales, which are considered to be:

- the sale of apparel from the factory to the fashion company
- the sale of apparel from the fashion company to the retailer.[42]

[41] Jimenez, Kolsun (no 2) 4.
[42] Jimenez, Kolsun (no 2) 538.

2.1.1.1 Applicable Law

Applicable law for transactions within one nation will be presented by a national statue, in the Czech Republic it is Act No 89/2012 Coll., Civil Code, as amended (hereinafter referred to as "Czech Civil Code").[43]

Contractual parties whose places of business are in different states may conclude that law of one of these states will apply to their contractual relationship. If the choice of law is not performed, directly applicable substantive law provisions of international conventions will apply.

For the sales within the European Union member states Convention on the law applicable to contractual obligations, also known as "Rome Convention" is applicable.[44]

The essential applicable law for international transactions is represented by the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "CISG").[45] The CISG will apply to contracts of the sale of goods between parties whose places of business are in different states, when the states are contracting states[46] or when the rules of the private international law lead to the application of the law of a contracting state.[47]

2.1.1.2 Form of Contract between Fashion Company and Retailer

"Commercial sales are typically based on an exchange of form documents, of which the purchase order ("PO") is the most important. The PO is, legally-speaking, an offer to buy goods. In many cases, the seller or vendor will transmit an acceptance via a confirmation or "pro forma invoice" It is common for the PO to be made subject to additional legal terms which may be contained in a separate document."[48]

Sales contract composed of a single document signed by both parties is rather rare. This is valid for both the domestic commercial transactions and the international commercial

[43] In Czech: zákon č. 89/2012 Sb., občanský zákoník, ve znění pozdějších předpisů. National statue for transactions within United States of America is Uniform Commercial Code.
[44] Convention 80/934/ECC on the law applicable to contractual obligations was open for signature in Rome on 19 June 1980 and entered into force on 1 April 1991.
[45] CISG is also known as "Vienna Convention" which came into force on 1 January 1988 and has 85 contracting states to this day.
[46] Article 1 par 1 subpar a of the CISG.
[47] Article 1 par 1 subpar b of the CISG.
[48] Jimenez, Kolsun (no 2) 538.

transactions. The main source vests in a purchase order as an offer intended to be accepted by the fashion company.[49]

With regard to the fact that major retailers have significant advantage in negotiation when dealing with most fashion companies, we can speak about the fashion market as "buyers' market". This results in the occurrence of provisions unfavourable for the fashion companies, which must compete with others to retain its business vital.[50]

2.1.1.3 "Vendor Compliance Manual"

The Vendor Compliance Manuals or any others differently called manuals include the terms and conditions of purchase and set forth requirements which the fashion companies (vendors) must conform to. These manuals are profusely employed by majority of the important retailers to whom they serve as a platform for almost "dictate" in form of provisions that are grossly unfair to the fashion companies (vendors). Most commonly these Vendors' compliance manuals are accessible to the fashion companies (vendors) on the retailers' websites only through references to them in the retailers' purchase orders. If a fashion company signs the manual, signs the purchase order or any other document that specifically incorporates the terms of the manual, provisions thereof supersede or nullify the requirements specified by the applicable law provisions and become binding.[51]

Above mentioned references to terms and conditions in purchase order may be considered as common, generally. In sales of apparel they predominantly consist of onerous conditions for the fashion companies (vendors) reasoned by the negotiating strength of the major retailers. These provisions are present in almost every apparel sale and balanced commercial sales relationships are becoming an exception to the rule.[52] As

[49] International commercial transactions in the fashion and their specifics will be described further.
[50] Donald L. Kreindler, 'Selling And Buying: Commercial Agreements In Fashion', *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys* (2nd edn, Fairchild Books 2014) 200.
[51] Kreindler (no 52) 200.
[52] This concerns even major vendors such as Onwar Kashiyama which used to supply Michael Kors products to the Saks Fifth Avenue. Onwar Kashiyama sued Saks Fifth Avenue for substantial deductions and credits which were not allowed under the term of the agreement. *"It got to the point where we were delivering millions of dollars' worth merchandise, and they'd send us a bill of what we owed them."* Onward Kashiyama's comment on the lawsuit speaks for itself. See WWD Staff, 'Chargebacks Crisis: Saks Inc. To Repay $21.5M To Vendors' (*WWD*, 2005) <http://wwd.com/business-news/financial/chargebacks-crisis-saks-inc-to-repay-21-5m-to-vendors-581255/> accessed 28 October 2016.

an example of an unconscionable provision may be deemed a provision allowing the retailer to cancel the purchase order at any time, prior to shipment, after the goods have been manufactured.[53]

2.1.1.4 Chargebacks

Chargeback represents a common legal provision in "vendor compliance manuals". The chargeback is a form of previously agreed liquidated damages for non-compliance with the retailer's (buyer's) contractual conditions.[54] As such, chargeback for non-compliance is a legitimate buyer's request and it is agreed by both contractual parties ex ante as well. The chargebacks vary and particularly their size is changing through time, especially during periods of economic crises chargebacks grow to provide retailers the sought after funds.

The chargebacks can be divided into two sections listed below with examples:

Freight Chargebacks:

1. Failure to comply with purchase order freight terms
2. Un-authorized air freight
3. Failure to ship the order via the Retailer's store preferred carrier list
4. Failure to comply with the carrier's requirements
5. Failure to ship samples freight pre-paid
6. Accessorial charges to Retailer's store from non-preferred carriers
7. Failure to consolidate same day shipments[55]

Warehouse chargebacks:

1. Failure to comply with distribution centre shipment policy
2. Failure to provide a detailed packing slip with the shipment
3. Failure to pack styles per purchase order instructions in a shipping quality carton
4. Failure to side-mark cartons per packing instructions

[53] See, e.g. Decision of Appellate Division of the Supreme Court of the State of New York in Jonathan Cass, Ltd. v. Wal-Mart Stores, Inc. [1995] 216 A.D. 2d 31.
[54] Jimenez, Kolsun (no 2) 538.
[55] Kathleen Fasanella, 'Freight And Warehouse Chargebacks' <http://fashion-incubator.com/freight_and_warehouse_chargebacks/> accessed 15 October 2016.

5. Failure to attach price tags to merchandise correctly per purchase order instructions
6. Unauthorized style, colour or size over-shipment
7. Unauthorized shipment of merchandise, which is past the purchase order completion date
8. Un-scheduled delivery to the Retailer's store via the vendor's house truck.[56]

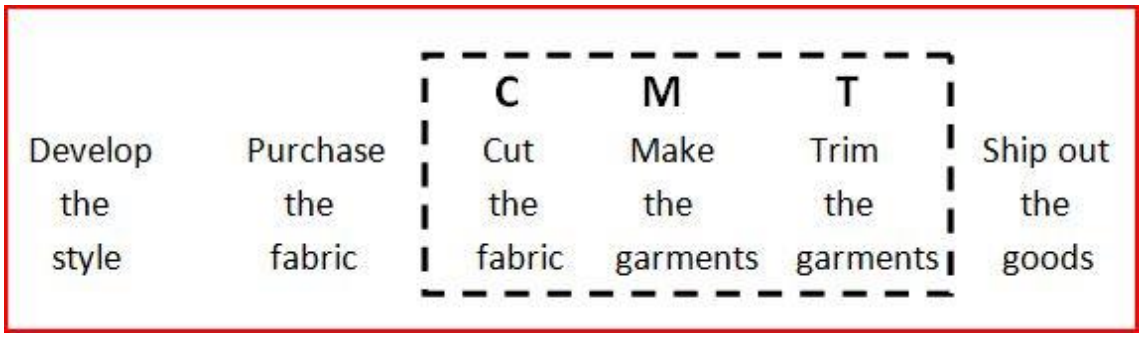
Enumeration of the chargebacks is not exhaustive and with regard to the negotiating leverage of the major retailers, chargebacks may be more numerous and more detailed in practise. The legitimate nature of these chargebacks is retained if they are reasonable. Practise adopted by the Saks Fifth Avenue around 2000 that would impose a charge of up to 50 per cent of the sales price for receipts not ordered (overage, substitution, …) was investigated by the U.S. Securities and Exchange Commission and U.S. Attorney's Office and resulted in return of the chargebacks to vendors from the period between 1999 and 2003 in amount over USD 20,000,000, as a prevention of possible lawsuits by vendors.[57] In any case, a chargeback must bear relationship to the damage to the actual or participated loss that results from the violation in order to be considered reasonable.[58]

2.1.2 Sourcing and Customs

Apparel manufacturing is a complex international process with many legal entities, whose places of business are in various different states and create genuine supply chains. Global sourcing comprises of trade law, logistics, shipping, environmental and human rights compliance and customs. [59] In order to keep pace with the others in the fashion field and stay relevant, many fashion companies purchase from full service companies, however, most fashion companies have different sourcing models.

[56] Kathleen Fasanella, 'Freight And Warehouse Chargebacks' <http://fashion-incubator.com/freight_and_warehouse_chargebacks/> accessed 15 October 2016.
[57] Marianne M. Jennings, *The Seven Signs Of Ethical Collapse* (St Martin's Press 2006) 252-254 .
[58] Kreindler (no 52) 200.
[59] Kreindler (no 52) 200.

2.1.2.1 Sourcing Concepts



Brief overview of the steps of garment production[60]

CMT sourcing stands for cut-make-trim factories. CMT factories were associated with late deliveries, low quality and sweatshop issues and are no longer in demand of the fashion companies.

Full package sourcing on top of CMT manages sourcing of fabric, export logistics and import duties and even participates in product or style development. Full package sourcing eliminates delays caused, e.g. by late delivery of the fabrics from the fashion company to the factory. "*Since full package factories compete on the quality of their services rather than merely on cost, China has been able to retain its position as the world's leading source of apparel manufacturing, though Chinese labour costs have now risen high above those of other countries.*"[61]

Private brand importer can be considered a traditional manner of apparel purchase from branded manufacturers. Simply put, retailers purchase ready-made product to which they apply their own private brand (logo).

2.1.2.2 International Commercial Documents

"*Export and import commercial transactions commonly require usage of standard documents and forms, in particular the pro forma invoice, purchase order, commercial*

[60] Renaud Anjoran, 'What Does CMT (Cut, Make & Trim) Mean In Textile Industries?' (*QualityInspection.org*, 2010) <https://qualityinspection.org/cmt-cut-make-trim/> accessed 12 October 2017.
[61] Guillermo C. Jimenez, 'Global Sourcing And International Trade', *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys* (2nd edn, Fairchild Books 2014) 292.

invoice, documentary credit, bill of lading, certificate of origin, certificate of inspection, consular invoice, packing list, and insurance certificate."[62]

The formation of a legally binding contract is based on an offer and its consecutive acceptance. In commercial transactions the exchange of a number of forms between the contractual parties is more typical rather than just one single document. As key forms are considered the seller's pro forma invoice and the buyer's purchase order. Depending on the commercial context, legal importance and its content of these main types of documents vary. Whereas commonly pro forma invoice comprises of crucial elements, such as description of the goods, delivery date, payment method and currency, price maturity and etc., in the apparel sourcing context, the purchase order serve as an offer. In such case the sending the pro forma invoice to the buyer constitute contract.[63]

2.1.2.3 Employment of Incoterms

Equally as important as the price for the purchase of apparel is its delivery term. International delivery terms are standardised by the International Chamber of Commerce (hereinafter referred to as "ICC").[64] The Incoterms also determine the point of transfer of risk from the seller to the buyer. In commercial sales of apparel most common are:

EXW ("Ex Works") means that the seller makes goods available at their premises. If this term is employed by the contractual parties, the transfer point is at the seller's factory.[65]

FOB ("Free on Board") means that the seller bears all costs and risks until the goods are loaded on board a vessel in a local seaport and the costs of international shipment and import duties are borne by the buyer. If this term is employed by contractual parties, transfer point is the moment of goods loading on board the vessel.[66]

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[62] Jimenez (no 63) 296.
[63] Jimenez (no 63) 297.
[64] Also known as international commercial terms.
[65] 'Incoterms® Rules 2010 - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2017) <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> accessed 16 October 2016.
[66] 'Incoterms® Rules 2010 - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2017) <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> accessed 16 October 2016.

FCA ("Free Carries") means that the seller delivers the goods, cleared for export, at a named place. FCA is a variant of FOB made by truck or air.[67]

CIF ("Cost Insurance and Freight") means that the seller loads the goods on board a vessel and pays the freight and insurance of the delivery to a port in the named country except the import duties which are borne by the buyer. If this term is employed by the contractual parties, the transfer point is the moment of goods loading on board the vessel.[68]

DDP ("Delivered Duty Paid") means that the seller pays for the shipment to named country, clears the goods through customs and pays the import duties. The DDP has the same meaning as LDP ("Landed Duty Paid"), which is not an official Incoterm. Nevertheless, LDP is regularly used in the apparel sector instead of DDP. If this term is employed by the contractual parties, the transfer point is the moment of the goods' delivery to the buyer's premises.[69]

2.1.2.4 International Payment Methods

The most traditional and commonly used payment method is represented by the "letter of credit". If the buyer is obliged to pay through a letter of credit, the bank will have the main role in the payment process. The letter of credit is a guarantee of payment to the seller. The bank upon buyer's request takes it upon itself to pay to the seller against submission of specified documents. These documents prove that the seller has duly performed. Ordinarily, the buyers request a bill of landing, an inspection certificate, a commercial invoice, a packaging list, an insurance certificate and a certificate of origin can be demanded as well.[70] Although the letter of credit is considered a secure payment method, the seller may risk that the bank will refuse to pay him due to even a marginal problem with the requested documents. In such cases the seller is reliant on the buyer's willingness to amend the letter of credit or waive the letter of credit conditions.

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[67] 'Incoterms® Rules 2010 - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2017) <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> accessed 16 October 2016.

[68] 'Incoterms® Rules 2010 - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2017) <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> accessed 16 October 2016.

[69] Jimenez (no 63) 297.

[70] Letter of credit is regulated on national level by Section 2682 and seq. of the Czech Civil Code and Documentary credits are regulated by Section 2690 and seq. of the Czech Civil Code.

A simpler payment method vests in wire transfer, sometimes called "SWIFT payment", whereas SWIFT is a global bank network which realizes wire transfers. Although wire transfers are simpler, they are also connected with payment risk on buyer or seller, depending on the nature of the payment – advance payment or open account.[71]

2.1.2.5 Arbitration

In international transaction regarding apparel, the party having more negotiation leverage ordinarily compel the jurisdiction of the state where it has a place of business. In other cases, the Court of Arbitration of the International Chamber of Commerce is highly sought after and recommended as a neutral arbitrator in a neutral location.

2.1.2.6 Customs

Every importer of apparel must have profound knowledge of applicable customs law. The knowledge is able to prevent the importer from the rise of liability for administrative offences[72] according to national law and liability for criminal offences[73] as well. Moreover, the precise knowledge of classification of apparel for customs purposes may result in substantial savings, particularly when taking into account the basic rule for customs officers "when in doubt, classify as the goods with higher custom fees". [74]

For the member states of the European Union the essential applicable law is represented by Regulation No 952/2013, also known as "The Union Customs Code (UCC)".[75] Importer of the apparel may benefit from free trade agreement concluded by their state which would in most cases simplify the import process at borders without the need to pay import duties. The exemption from custom duties based on free trade agreement is implausible in number of cases due to the manufacturers' places of business being

[71] Jimenez (no 63) 299.
[72] Administrative offences in the field of customs are governed by the Section 47 and seq. of the Act No 242/2016 Coll., on Customs, as amended (In Czech: zákon č. 242/2016 Sb., celní zákon, ve znění pozdějších předpisů).
[73] Criminal offences are governed by the Act No 40/2009 Coll., Criminal Act, as amended (In Czech: zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů).
[74] See for instance Pollak Import Export, Corp. v The United States, 16 CIT 58, 1992 WL 33828 (1992), in which importer successfully challenged classification of the United States Customs.
[75] In United States of America, the applicable is represented by the Tariff Act of 1930, also known as Smoot-Hawley Tariff.

situated in states which are not ordinarily contractual states of such agreements.[76] Certainly there are more beneficial provisions for apparel importers. For instance, Article 86 of the Council Regulation No 1186/2009 setting up a Community system of reliefs from customs duty provides that samples of goods of negligible value used only to solicit orders for goods of the type they represent shall be admitted free of import duties.

The customs' role in commercial sale of apparel is irreplaceable. The customs authorities of the European Union member states enforce intellectual property rights according to Regulation No 608/2013 concerning Customs Enforcement of Intellectual Property rights. Inter Alia, customs authorities inspect whether the goods are genuine or if an intellectual property infringement suspicion is present. Primarily, the customs inspect trade marks, which are the most visible intellectual property to be determined genuine - used by its owner or with his consent, e.g. by licensor. Intellectual property owners have the right to request customs to take measures to protect their intellectual property.[77]

Customs' success against counterfeits can be influenced by a proactive approach of the intellectual property owner who is supposed to register his intellectual property in a respective office's register, e.g. a European Union trade mark at the European Union Intellectual Property Office. Moreover, intellectual property owners are challenged to give a hand to the customs and the police by submitting data of their products, trade marks as well as business names and other intellectual property rights into Enforcement Database (hereinafter referred to as "EDB"). The EDB is an integrated enforcement system built upon the existing intellectual property right databases for the purposes of the European Union customs, the police and also for the World Customs Organisation. The EDB also provides alert notifications on possible counterfeit consignment, and the entire system is provided at no costs to owners.[78] "*Further, one of the added advantages*

[76] List of Free Trade Agreements of member countries of Asian Development Bank available at 'Free Trade Agreements' (*Asia Regional Integration Centre*, 2015) <https://aric.adb.org/fta-country> accessed 28 October 2016.

[77] Official standardized form available at: *Official Application Form* (Celní Správa 2013) <https://www.celnisprava.cz/cz/dalsi-kompetence/ochrana-dusevniho-vlastnictvi/Documents/application_cs.pdf> accessed 17 October 2016.

[78] European Trade Mark and Design Network, 'Enforcement Database' (*Tmdn.org*, 2017) <https://www.tmdn.org/enforcementdb-ui-webapp/> accessed 19 October 2016.

is that companies can feel safe because all the information uploaded on the database is very confidential - the information can be updated and the users decide which custom can see it. OHIM[79] has only access to statistics - how many companies, how many actions but no names, no precise information will be made public (to avoid helping counterfeiters "improve" their methods of counterfeit).”[80]

2.1.3 Employment Law

This part is not aiming to present an overview of the entire employment issue in the fashion industry, it does, however, aspire to describe selected concerns in the industry which are the subject of present discussions.

2.1.3.1 Models

Fashion industry has been inherently connected with models ever since its origin. Underweight models are often considered to be one of the global issues. Fashion companies learned not hire visibly unhealthy models in order to avoid the negative attention tied to them. Social awareness about eating disorders has undergone a great development in recent years and resulted in a number of initiatives and most recently in adopting a law.

In 2006 the worlds’ first ban on overly thin models who fail to comply with at least 18.5 Body Mass Index (BMI) was adopted during the Madrid Fashion Week in the name of fashion industry’s responsibility to portray a healthy body image. The Madrid Fashion Week was followed by similar actions regarding BMI and sufficient age of the models.[81]

The State of Israel passed an act according to which models are required to submit medical documentation and comply with at least 18.5 BMI, otherwise they would be disqualified from jobs. The BMI rule was replaced by the physician discretion in France with submission of a certificate of compatibility with the practise of the profession.

[79] OHIM was renamed as European Union Intellectual Property Office in 2016.

[80] Laetitia Lagarde, 'OHIM Enforcement Database To Help Fight Counterfeit Goods' <http://ipkitten.blogspot.cz/2013/12/ohim-enforcement-database-to-help-fight.html> accessed 21 October 2016.

[81] CNN.com 'Skinny Models Banned From Catwalk' <http://edition.cnn.com/2006/WORLD/europe/09/13/spain.models/> accessed 24 October 2016.

Employers violating the act protecting youth against "promotion of eating disorders" on catwalks an in magazines may be subject to a fine amounting to EUR 75,000.[82]

2.1.3.2 Designers' Contracts

Fashion designers are hired by the fashion companies on the basis of employment agreement or contractor agreement.[83] For the both types of the contracts inclusion of certain clauses is typical – nonsolicitation, non-interference, nondisparagement and nondisclosure.

The most frequent and the most important is the noncompete clause. The noncompete clause requires a designer not to compete with the former employer or contractor for a definite period of time within a specified geographic area. The type of contract between a designer and a fashion company determines other requisites. According to the Section 310 of the Act No 262/2006 Coll., Labour Code, as amended,[84] a fashion company is limited in designing terms and conditions of the noncompete clause in the employment contract in the name of the employees' protection in contrast with the noncompete clause in contractor agreement govern by the Section 2975 of the Czech Civil Code.[85] *"..courts in New York have repeatedly held time restrictions of six month to a year are reasonable. In France, the maximum duration is 24 months. In the UK, where the law is the most restrictive in this respect, non-compete covenants that the maximum duration for non-compete is three years for employees and five years for executives.*"[86]

The application of the noncompete clause is widespread within the entire fashion industry, particularly the noncompete clauses of fashion companies' creative designers are deemed to have the greatest significance. The length of the noncompete period within legal and partly judicial limits depends on the creative designer's access to

[82] 'France Passes Bill Banning 'Excessively Thin' Models' [2015] *BBC*<http://www.bbc.com/news/world-europe-35130792> accessed 24 October 2016.
[83] Nature of the designers'contract is at issue in many cases and frequently designers'claims of wrongful termination are dismissed. See for instance John Galliano v. Dior and Galliano S.A. Lauren Milligan, 'Galliano To Appeal Court Ruling' [2015] *Vogue*<http://www.vogue.co.uk/article/john-galliano-lawsuit-appeals-labour-court-ruling> accessed 29 March 2017.
[84] In Czech: zákon č. 262/2006 Sb., zákoník práce, ve znění pozdějších předpisů.
[85] Designer as an employee can be subject to noncompete clause in maximum duration of one year. Designer as an subcontractor can be subject to noncompete clause in maximum duration of 5 years.
[86] Julia Zerbo, 'How Fashion's Musical Chairs Fare In Light Of The Non-Compete Agreement' (*The Fashion Law*, 2017) <http://www.thefashionlaw.com/home/fashions-musical-chairs-and-the-role-of-the-non-compete?rq=labor> accessed 31 May 2017.

confidential information, and the noncompete policy of the particular fashion company or a fashion group.

In 2011 the fashion company Dior suffered considerable harm on its reputation after John Galliano, Dior's creative director at the time, was arrested for his outburst in a Paris Café plentiful of anti-Semitic, deeply offensive statements and later convinced of public insult towards persons on the basis of their religion or origin by the French court. This incident brought a lot of negative attention to the Dior brand and this situation was even worsened by John Galliano himself when he filed a suit against Dior and Galliano S.A. for wrongful termination, in which he claimed that at the time of the incident he was suffering from work related stress and his employers let him maintain a substance addiction.[87] Thereafter, Dior fully committed to restore its reputation by appointing the Belgian designer Raf Simons as creative director and most importantly "arranged" that film about Simon's first collection for Haute Couture Fall-Winter 2012 at Dior named "Dior and I" was made into a success. Unsurprisingly, when Simons resigned from his post as the creative director of Dior three years later, he was subject to a nine months long noncompete clause.[88]

Another company operating in fashion industry using rather long noncompete clauses is Nike. In 2015 Nike filed a suit against its three former designers who left the company with sensitive documents and headed straight to Nike's biggest competitor – Adidas. It was revealed that Nike's noncompete clause is one-year long.[89]

Apart from the above mentioned, noncompete clauses of creative directors in the fashion field known to the public are in most cases six months long.[90] Laura Kim had

[87] Joelle Diderich, 'Galliano Case To Head Back To Labor Court' (*WWD*, 2013) <http://wwd.com/business-news/legal/galliano-case-to-head-back-to-labor-court-7294654/> accessed 24 October 2017. Not to mention that one of the faces of Dior is an American Actress Natalia Portman whose belief is Jewish was ultimately insulted and the contract between her and Dior was at risk of termination.

[88] Lauren Milligan, 'Riccardo To Versace: The Sticking Point?' [2017] *Vogue*<http://www.vogue.co.uk/article/riccardo-tisci-versace-rumours-non-compete-clause> accessed 19 February 2017.

[89] Hayley Peterson, 'Nike Settles Lawsuit Against Ex-Employees Accused Of Stealing Secrets For Adidas' <http://uk.businessinsider.com/nike-settles-lawsuit-against-designers-2015-6> accessed 27 October 2016.

[90] For instance. Marco Gobbetti and Céline contract included a six months long noncompete clause. Mark Vandevelde, 'New Burberry CEO Faces 6-Month Wait to Take His Coat Off' [2017] *Financial Times*<https://www.ft.com/content/2181c1aa-dc13-11e6-9d7c-be108f1c1dce> accessed 23 January 2017.

the same duration clause in her contract for senior designer with Carolina Herrera, who filed a suit against her for a breach of the noncompete clause. Laura Kim's suit is an example of rivalry between the biggest fashion companies as well, because Carolina Herrera filed a suit against Laura Kim's new employer, Oscar de la Renta, for interference with business relations between Carolina Herrera and Laura Kim. It is believed that Oscar de la Renta offered to bear the cost for noncompete clause breach in order to "win" Laura Kim, who had worked for Oscar de la Renta for twelve years in the past.[91]

According to the lengthy rivalry between former friends Carolina Herrera and Oscar de la Renta, the so called "buy out" of the designer by the fashion company would not be possible, nevertheless the option to buy out of the noncompete clauses seems to be present even in designers' contracts. The recent speculation of buy out of the designer were connected with the creative director of Chloé, Clare Waight Keller who resigned from her position three months before she started at an artistic director position at Givenchy which is considered short in terms of creative directors' noncompete clauses in the fashion industry.[92]

The noncompete clauses serve fashion companies as a protection of their trade secret and its possible misappropriating by a competing fashion company, which they are willing to invest in. If the risk of trade secret misappropriation is low, the fashion industry is no exception to the rule that a fashion company would try to save money by lifting the noncompete clause right before termination of the contract with the designer. Hedi Slimane, creative director of Yves Saint Laurent, was known as a natural talent in designing and photography. When Yves Saint Laurent realised the possibility that there is a chance of Hedi Slimane not heading to a competitor after the termination of his contract with Yves Saint Laurent, the fashion company lifted the noncompete clause

[91] WWD Staff, 'Carolina Herrera Sues Oscar De La Renta' [2016] *Women's Wear Daily*<http://wwd.com/business-news/legal/carolina-herrera-sues-de-la-renta-10732706/> accessed 7 January 2017.

[92] Nicole Phelps, 'Clare Waight Keller Is Givenchy'S New Artistic Director' [2017] *The Vogue*<http://www.vogue.com/article/givenchy-designer-clare-waight-keller-artistic-director-announcement> accessed 10 June 2017.

which resulted in no compensation for the designer. The French court ruled in favour of Hedi Slimane and awarded him 13 million dollars in compensation.[93]

2.1.4 Leasing

Apart from the common leasing intricacies, lease of business premises by a fashion company or a designer may prevent them from expanding their business. Bearing in mind that fashion is a highly competitive industry, the occurrence of certain limitations is high.

2.1.4.1 Use Clause

According to Section 2304 of the Czech Civil Code, tenant of business premises is not permitted to use the premises for business activities other than those specified in the lease agreement if they have a negative influence on the estate or excessively violate the rights of the land lord or other tenants of the estate. This limitation of permissible uses of leased premises is called "use clauses". Land lords of the business premises located in the most desirable shopping places learned to benefit from injudicious tenant consent to a very narrow specification of the business use. Typically, use clause reflects the retailer's current practises, e.g. women's apparel, which implies future obstacles for intention to sell men's apparel, home goods or gift items and many more. Another landlords' limitation practise vests in the use of the business premises typically for "sale and display of merchandise bearing the tenant's trade name". To prevent the occurrence of situation when the retailer's door to licensing and partnership will be closed, limitation of such "name use clause" by percentage could be the solution.[94]

2.1.4.2 Radius Clause

A common provision present in business premises leases is an additional percentage rent on of the base rent. In order to maintain or increase the revenue from such a rent, the landlords employ the radius clause which prohibits the retailer from operating a competing store within a specified distance from the leased business premises.

[93] Matt Sebra, 'Hedi Slimane Is About To Make $13 Million For Doing Nothing' [2016] *Gentleman's Quarterly* <http://www.gq.com/story/hedi-slimane-non-compete-kering-13-million> accessed 27 October 2016.

[94] Matthew E. Epstein and Lee Sporn, 'Retail Leasing For Fashion', in *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys* (2nd edn, Fairchild Books 2014) 277.

Commonly, the landlord will be represented by a shopping centre, a mall or an outlet, which are in vital need of maintaining their brand portfolios and in many cases they benefit from the fact that the retailer's store is the only one in the city, region or even in the entire country.[95] Violation of the radius clause can constitute a default resulting in termination of the lease agreement.

2.1.4.3 Termination Rights

The right for termination of the lease agreement as well as the right for remedies may arise from various reasons. In the fashion industry unsatisfactory sales volume may serve to both parties. In contrast with the above mentioned clauses the retailers may benefit from co-tenancy rights. Generally, these rights protect the retailers from low sales volume caused by insufficient foot traffic in a shopping centre, a mall or an outlet.[96]

2.1.5 Licensing

Pursuant to the Section 2358 of the Czech Civil Code through licence agreement, one party grants to another the right to exercise a certain intellectual property in an agreed extent for remuneration unless stated otherwise. The parties are called licensor – the owner of the intellectual property, and licensee – the party authorised to exploit the trade mark of the licensor, in most cases, in the fashion field. "*Licensing allows a brand owner to engage in controlled expansion without having to invest in costly infrastructure. Frequently, licensing facilitates expansion into new product categories, increases market penetration, expands distribution channels, and enhances brand awareness*."[97] Frequently clothing designers, in order to enhance their brand awareness, expand into fragrances, cosmetics or generally lower priced apparel or accessories. Licence agreements in the fashion industry are often licences of intellectual property and also service agreements, because the owner of the respective intellectual property (designer), in order to maintain his control over the quality of the products made by the

[95] Johanna Collins-Wood, 'Luxury Brands Are Wrong To Ignore Africa' [2014] *The Business of Fashion* <https://www.businessoffashion.com/articles/opinion/op-ed-luxury-brands-wrong-ignore-africa> accessed 8 November 2016.
[96] Epstein and Sporn (no 96) 287.
[97] Karen Artz Ash and Barbara Kolsun, 'Fashion Licensing', in *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys* (2nd edn, Fairchild Books 2014) 116.

licensee with the licensor's trade mark, will participate in the design process. This provision favourable to the licensor will be connected with licensor's obligation to publicly promote products with a licensed trade mark in most cases, for instance in commercials.

With regard to the above mentioned, licensing is beneficial for both parties to the agreement. The licensor may benefit from the increased awareness of his brand in the relevant public, not to mention his remuneration which is called royalties.[98] On the other hand, the licensee may exploit the goodwill of the trade mark (or other intellectual property). Certainly, using the well-known trademark may even provide the licensee with an access to other retailers and their trade marks, particularly in terms of retailers of different products with no risk of competition.

Licence agreements may be mutually very profitable if concluded in an unambiguous wording after a profound analysis of a particular market and importance of the trade mark (or other intellectual property). For instance, according to the License Global magazine in the 2016 Phillips-Van Heusen Corporation (hereinafter referred to as "PVH Corp")[99] placed third in the magazine study of the top 150 global licensors with its 18 billion American Dollars acquired from sales of licensed merchandise.[100]

However, the most significant years for licensing were 1980s and 1990s when many of fashion designers founded public companies and searched for easy sources of profit, which they actually acquired. One of the problematic aspects of licensing is control deficiency. If this control deficiency is paired with a high quantity of granted licences, which was common in the above mentioned years, it was only a matter of time until such a fashion brand will have had its trade mark reputation damaged. Unexcitedly, licensing has gone too far, for instance the Gucci trade mark was granted to over 20,000 products (including disposable lighters and similar objects). By the year 2000 fashion

[98] Royalties in the fashion industry ranges from 3 to 15 per cent of net sales. David H. Bernstein, 'Litigation Strategies In Fashion Law', *Fashion Law: A guide for Designers, Fashion Executives and Attorneys* (2nd edn, Fairchild Books 2014) 91.

[99] PVH Crop is an American clothing company which owns brands particularly Tommy Hilfiger, Calvin Klein, IZOD, Arrow and licenses brands particularly BCBG Max Azria, Chaps, Kenneth Cole New York and Michael Kors.

[100] 'The Top 150 Global Licensors' [2017] *License Global*<http://www.licensemag.com/license-global/top-150-global-licensors-3> accessed 8 June 2017.

brands changed their licensing policy to regain control over their trade marks and their reputation, in other words over their most valuable assets.[101]

Above mentioned is certainly not evidence against licensing, because it is without a doubt highly profitable, nevertheless generally speaking the risk of cheapening the brand – the risk of damage to the trade mark reputation – is immanent when not licensed professionally. This was apparent in case of Pierre Cardin, the licensing pioneer who extended his brand in 1960s through licences into perfumes and cosmetics with an immense success which led to granting more than 800 licences until 2000.[102] The Pierre Cardin profit was stable until the expansion of the trade mark to nonadjacent products such as cigarettes and similar products which cost Pierre Cardin an inclusion in the group of the luxury brands.

"*Luxury brands are regarded as images in the minds of consumers that comprise associations about a high level of price, quality, aesthetics, rarity, extraordinariness and a high degree of non-functional associations.*"[103] According to marketing experts, successful leaping among categories hand in hand with preservation of the trade mark goodwill and brand status can be realized only in the case that the brand's value is primarily symbolic in the eyes of consumers. Without consistent promotion of the brand's core, symbolic values and stress on the technical aspects of nonadjacent products bearing the trade mark, on the other hand, it is likely that the brand will lose its value (which needs to be considered even in terms of the affiliation to the brand category like it was in the case of the Pierre Cardin falling from the luxury brands category to the premium brands category at best) and the trade mark is bound to lose its reputation.[104]

Regardless of the downsides of fashion licensing, highly expertized manufacturers of apparel earned their position and became an immanent part of the fashion industry. In

[101] Jimenez, Kolsun (no 2) 495.
[102] Mergen Reddy and Nic Terblanche, 'How Not To Extend Your Luxury Brand' [2005] *Harward Business Review* <https://hbr.org/2005/12/how-not-to-extend-your-luxury-brand> accessed 12 November 2016.
[103] Klaus Heine, *The Concept Of Luxury Brands* (2nd edn, 2012) <http://www.conceptofluxurybrands.com/content/20121107_Heine_The-Concept-of-Luxury-Brands.pdf> accessed 13 November 2016.
[104] Mergen Reddy and Nic Terblanche, 'How Not To Extend Your Luxury Brand' [2005] *Harward Business Review* <https://hbr.org/2005/12/how-not-to-extend-your-luxury-brand> accessed 12 November 2016.

the field of cosmetics one of the most prominent is Esteé Lauder, in the field of eyewear it is an Italian company Luxottica Group S.p.A, which manufactures sunglasses and prescription frames under the most desirable trade marks such as Chanel, Prada, DKNY, Burberry, Versace, Dolce and Gabbana, Miu Miu and Ray-Ban. It is widely believed that Luxottica has the position of dominance in the eyewear market and some sources even claim that it controls over 80 per cent of eyewear brands, however, these claims are rather unverifiable.[105] These manufacturers may also be viewed as appropriate means of preventing loss of rights from registered trade mark by non usage generally or no usage for certain products.[106]

2.1.5.1 Disputes over Quality and Distribution

In order to preserve the brand's image, it is essential to maintain control over the quality of its own products and products with granted licence and implement respective provisions in the licence agreement. Conclusively, provisions regarding rights to inspect manufacturing, materials used and sample products, as well as obligation to abide by the respective law adopted for protection of consumers' health and etc.[107] Although the quality control performed by the licensor may be sufficient, the brand's image may be in permanent risk of exclusive image loss if it is not distributed properly.

In Calvin Klein Trademark Trust and Calvin Klein, Inc. v. Linda Wachner, Warnaco Group, Inc. et al. case the Calvin Klein stated that the improper distribution of the Calvin Klein apparel harmed the Calvin Klein company itself, its trade marks, its licensees and also harmed the public that places its trust and confidence in products that bear Calvin Klein trade marks, expecting that products embody the design standards and quality associated with the trade marks. Improper distribution vested in selling other brands controlled by the Warnaco in Calvin Klein outlet stores, trying to pass off other designer's products as Calvin Klein products samples, and more importantly claiming that shipments to unapproved and inappropriate distributors comprised only excess inventory, mark-downs and irregulars. "*In order to maintain the reputation, the image*

[105] 'Eyewear Brands: Our Glasses' (*Luxottica*, 2017) <http://www.luxottica.com/en/eyewear-brands> accessed 20 November 2016.

[106] Non usage of trade mark for period of 5 years may result in loss of the right to object invalidity of posterior trade mark or even in revocation of the trade mark pursuant to the Article 51 of the Regulation No 207/2009 on the Community Trade Mark.

[107] For instance Regulation No 1907/2006 concerning Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

and prestige of the Licensed Marks, Licensee's distribution patterns (a) shall consist of those retail outlets whose location, merchandising and overall operations are consistent with the quality of Articles and the reputation, image and prestige of the Licensed Marks, and/or (b) shall be consistent with Licensor's past practice, and (c) may include those authorized distribution channels in which apparel products manufactured by Licensor and its licensees and sublicensees bearing the mark CALVIN KLEIN have been or are being sold and such other distribution channels as Licensor shall approve."[108] Contrary to the above mentioned provision of the licence agreement with Calvin Klein, Warnaco accepted orders for first quality Calvin Klein goods to warehouses offering goods at reduced prices based on high volume sales and a fast inventory turnover – BJ's, Costco and Sam's Club. This distribution practise resulted in direct reaction of premium and luxury brands selling departments such as Dillard's Department Stores, Inc., Nordstrom, Inc., Neiman Marcus, Inc. or Federated Department stores, Inc. (now Macy's, Inc.) cancelled certain Calvin Klein product lines. Warnaco distribution practise is an exemplary case of dilution of the brand's reputation and worth by its own contractual partner. Parties settled the dispute out of court before the trial for an undisclosed amount. The situation of separation of Calvin Klein underwear and jeans licensed to Warnaco ended later by the PVH Corp (owning Calvin Klein) buying the Warnaco.[109]

The issue of "better zone" retailers is one of the most crucial matters in the fashion licensing today. Undoubtedly, fashion companies are sophisticated business parties so if they enter into an agreement with a provision stating that the trade mark can be licensed to any other person, their request for the court to alter the licence agreement to prevent dilution of the trade mark reputation by licensee's improper distribution to retailers below better zone will be rejected. This was concluded by the Supreme Court of New York County in 2010 in The Levy Group, Inc. v. L.C. Licensing, Inc. and Liz Claiborne, Inc. In 1997 Levy was granted the right to sell and distribute men's and

[108] Section 4.3 of the Jeanswear License Agreement. Available at 'Calvin Klein Trademark Trust V. Wachner, 129 F. Supp. 2D 254 (S.D.N.Y. 2001)' (*Justia Law*, 2001) <http://law.justia.com/cases/federal/district-courts/FSupp2/129/254/2471414/> accessed 22 November 2016.

[109] Nadine Schimroszik, 'Calvin Klein Underwear And Fashion Reunited As PVH Agrees To Buy Warnaco' *The Guardian* (2012) <https://www.theguardian.com/business/2012/oct/31/calvin-klein-fashion-pvh-warnaco> accessed 26 November 2016.

women's outerwear and rainwear under the Liz Claiborne trade marks. Liz Claiborne granted J.C. Penney Corporation, Inc. rights to use the trade marks in question for certain goods not including the merchandise concluded in the licence agreement with Levy. Due to the fact that J. C. Penney Corporation, Inc. was not considered a better zone retailer, the Levy filed a suit and claimed that better zone retailers will no longer purchase its merchandise which may result in a decline in net sales of tens of millions of dollars annually.[110]

2.1.5.2 Disputes over Term and Termination

Generally, the licensor grants his right to use the trade mark to the licensee with a clear intention to profit from the licensee's capital and know-how in order to launch new product lines. The licensing also allows the licensor's trade mark to remain publicly visible and establish a consumer base from the outset, typically, in times of departures of designers from fashion houses before launching their one-day considerable business.

Tom Ford served as a creative director for Gucci from 1994 and brought the brand back into the limelight by his visionary changes which resulted in the rise of Gucci value over USD 4 billion in 1999 just after disastrous years caused particularly by over licensing; when the Gucci brand was slowly losing its reputation and status. Soon after Tom Ford built up the Gucci Group empire[111] he disagreed with the new owner Pinault Printemps Redoute (PPR) and decided to terminate his agreement. Instead of receiving the expected and deserved acclaim Tom Ford found himself depressed without a job and no perspective to continue his fashion designer career. Even though he focused on other activities and proved that he is a gifted film director with Single Man, he preserved his business genius and kept his name visible in the fashion industry by granting licences. The Tom Ford licences were given upon rigorous selection only to two subjects. The

[110] *Levy Group, Inc. v. L.C. Licensing, Inc.* (Justia Law, 2010) <http://law.justia.com/cases/new-york/other-courts/2010/2010-ny-slip-op-33800-u.html> accessed 29 November 2017.

[111] The Gucci acquired Yves Saint Laurent, Boucheron, Sergio Rossi, Balenciaga, Bottega Veneta, Alexander McQueen and Stella McCartney. Today the Gucci Group is know as subsidiary of Kering which is new name of the PPR.

global cosmetics licence was given to Estée Lauder and the global eyewear licence was given to Marcolin.[112]

These two licence agreements are not likely to be terminated in the near future because Tom Ford's aspirations in terms of the size of his business have not yet been met. In that case there is no reason for termination of the mutually beneficial agreements.

In Macy's, Inc. v. J.C. Penney Corporation, Inc.; Macy's Inc. v. Martha Stewart Living Omnimedia, Inc. case decided by the Supreme Court of New York County, Marta Stewart, the licensor, tried to circumvent the licence agreement provisions on granting exclusive rights to Macy's as well as an unilateral right to renew the agreement by conclusion of the agreement with J.C. Penney on "Martha Stewart stores in J. C. Penney stores". The agreement provided that J. C. Penney will sell products with Martha Stewart Marks in J. C. Penney department stores and website, moreover, that J. C. Penney will pay for the design and construction of the Martha Stewart stores and even pay the employees. Macy's invested largely to promote the Martha Stewart products and to renew the goodwill affiliated with its trade marks after years when the marks were seen in public, however, been also connected with Martha Stewart's conviction for obstruction of justice, securities fraud and bellow better zone retailer Kmart. For this reason, Macy's settled the case out of court with Martha Stewart which is up to this date Macy's contractual partner. Moreover, Macy's prevented J. C. Penney from selling products with the Martha Stewart trade marks and also prevented the risk of creation of a link between trade marks at issue with the J. C. Penney, a below better zone retailer, particularly by means of disclosing its practises of J. C. Penney close to unfair competition which were found "*over the top and exceeding the minimum level of ethical behaviour in the marketplace*" by the court.[113]

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[112] Imran Amed, 'The Business of Being Tom Ford, Part I' [2013] *The Business of Fashion* <https://www.businessoffashion.com/articles/people/the-business-of-being-tom-ford-part-i> accessed 28 November 2016.

[113] 'Macy's Inc. V Martha Stewart Living Omnimedia, Inc. Op 01728' (*Justia Law*, 2015) <http://law.justia.com/cases/new-york/appellate-division-first-department/2015/652861-12-650197-12-13961.html> accessed 29 November 2016.

2.1.5.3 Diffusion Lines

Diffusion line is a range of clothes made by a top fashion designer (a fashion company) for a high-street retailer.[114] From the legal point of view, diffusion line is a special type of licence through which the luxury brand grants rights to manufacture and produce a certain unique collection of apparel and accessories or the entire scale of products, frequently called collaborations.[115]

Diffusion line may also denote a secondary line of merchandise created by a fashion designer (or a fashion company) sold for low prices, more precisely prices lower than the prices of the main line of the fashion company, frequently called bridge lines.[116]

Collaborations and bridge lines are outlined in this section because they are both tied to the reputation of the brand. Possible outcomes of both types of diffusion lines for the brands and their goodwill will be outlined through the definition of both and examples from practise.

Very simply put the collaborations may be denoted as "Designer's collection at your retail store". As one of the first explorers of the significance of the famous designers' names for retail stores can be considered the Swedish fashion company H&M. The H&M through years of its existence incorporated cooperation with celebrities, but only the diffusion lines became a phenomenon.

List of collaborating fashion designers with H&M[117]

Year of the collaboration	**Designer**
2004	Karl Lagerfeld
2006	Viktor & Rolf
2007	Roberto Cavalli

[114] Geared to meet the requirements of, and readily available for purchase by, the general public. Examples of the high-street retailers are H&M, Forever21 or Zara.

[115] Fabrizio Acobacci and Lauren R Keller, 'Bucking The Trend: When Luxury Brands Target Mass Appeal' [2014] *World Trademark Review*<http://www.worldtrademarkreview.com/Magazine/Issue/47/Features/Bucking-the-trend-when-luxury-brands-target-mass-appeal> accessed 18 November 2016.

[116] Valerie Cumming, C. Willet Cunnington and Philiphs Cunningtony, *The Dictionary Of Fashion History* (Berg 2010) 66.

[117] Steff Yotka, 'Every H&M Fashion Collaboration, Ranked' [2016] *The Vogue*<http://www.vogue.com/article/hm-designer-collaborations-ranked> accessed 10 November 2016.

2008	Comme des Garçons
2009	Jimmy Choo
	Matthew Williamson
	Sonya Rykiel
2010	Lanvin
2011	Versace
2012	Marni
2013	Isabel Marant
2014	Alexander Wang
2015	Balmain
2016	Kenzo

In the US, it was the retail store Target which commenced the cooperation with architects and also fashion designers, for instance Proenza Schouler in 2007, Zac Posen and Jean Paul Gaultier in 2010, Missoni in 2011, Philip Lim in 2013 and Victoria Beckham in 2017.[118]

A fact worth mentioning is that the more luxurious the fashion designer brand seemed, the higher the success of such collaboration was. It is no surprise when we consider that the luxury products are characterised by the:

- ***Highest prices*** in the category
- ***Quality*** which lasts and its value grows through time
- ***Aesthetics*** in terms of embodiment of beauty and elegance
- ***Rarity*** in terms of personal and local accessibility
- ***Extraordinariness*** linked to specific style and "wow" effect
- ***Symbolism*** in terms of charisma.[119]

[118] Maggie Fazeli Fard, 'Missoni For Target Collection Cleans Out D.C. And New York Stores, Crashes Web Site' [2011] *The Washington Post* <https://www.washingtonpost.com/local/missoni-for-target-collection-cleans-out-dc-and-new-york-stores-crashes-web-site/2011/09/14/gIQAfmyLSK_story.html> accessed 16 November 2016.

[119] Klaus Heine, *The Concept Of Luxury Brands* (2nd edn, 2012) <http://www.conceptofluxurybrands.com/content/20121107_Heine_The-Concept-of-Luxury-Brands.pdf> accessed 13 November 2016.

As mentioned above the licensing is on one hand highly profitable, on the other hand it bears several pitfalls for the licensors, particularly for the luxury brands. The luxury fashion brands must preserve their high quality standards of manufacturing, used materials, promotion and image in order to retain their status. Although the luxury fashion brands are by their very nature inaccessible, they are in search for young consumers to retrieve the clientele base. Typically, younger consumers are less affluent than the luxury brand clients so the key factor is the price of the merchandise. The luxury fashion brands have tried to attract these younger consumers by their bridge lines, however, in the longer time frame the bridge lines failed to fulfil the expectations.[120]

Collaborations between the fashion designer and the retail store are nonrecurring; moreover, sale of the collaboration merchandise lasts hours or a few days at maximum under normal circumstances. These collaborations are also characterised by limitation to evoke the "luxury feel". In order to have a chance to purchase some of the merchandise, the consumers must wait in a queue for hours before the retail store's opening; sometimes they are given bracelets depending on the time of their arrival in the queue and are allowed to enter the store accordingly. Limitation is also visible in terms of quantity and range of the products as well as availability only in the metropolitan cities. Other aspects of such collaborations strive to be extraordinary to induce the feeling of exclusivity typical for the luxury brands. For instance, the usage of dust covers for dresses and men's apparel (Lanvin for H&M), dust bags for handbags (Versace for H&M) or even padded jewellery boxes (Marni for H&M).

Merchandise from the collaboration is frequently priced a triple of the retail store merchandise's usual price. This fact is the crucial determinant in the consumers' perception because they do not expect the collaboration merchandise to have quality comparable to the fashion designer's own merchandise.

The above mentioned implies numerous advantages for the fashion designer as well as the licensor; instant popularization amongst the younger, less affluent consumers due to massive promotion by the retailer store. Another benefit is a very low risk of harm to the brand's (its trade mark) reputation in terms of lessening or eliminating its luxury

[120] Reasons of that failure will be described hereafter.

status. Despite the fact that immediately before it launches in the stores, "the collaboration is everywhere", after it is sold, the specific merchandise just as the fashion designer brand is not visible at all. For these reasons this type of diffusion line has its place in the fashion industry in the foreseeable future.

On the other hand, the fashion designers' bridge lines era might be over in the near future. The bridge line is typically separated by a different name and is considerably more affordable than the main line of the fashion brand. In contrast with the inherent restrictions for the sale of the main line, the bridge lines can also be placed for sale in outlet stores.

Examples of fashion designers' bridge lines[121]

Agent Provocateur	L'agent
Armani	Armani Exchange
	Emporio Armani
	Armani Jeans
Dolce & Gabbana	D&G
Donna Karan	DKNY
Chloé	See by Chloé
Marc Jacobs	Marc by Marc Jacobs
Marchesa	Notte
Michael Kors	MICHAEL by Michael Kors
Prada	Miu Miu
Victoria Beckham	Victoria by Victoria Beckham
Zac Posen	Zac Zac Posen
	Z Spoke[122]

The prime of bridge lines is linked with the 1990s and the early 2000s, though the fashion industry has gone through a fast development. The luxury fashion brands had to

[121] Monica Barnett, 'Designer Vs Diffusion Lines' <http://www.blueprintforstyle.com/designer-vs-diffusion-lines/> accessed 29 November 2016.

[122] Fashion designer Zac Posen diffusion lines are strictly divided by the price bracket. Zac Posen at first launched diffusion line Z Spoke with retail prices under USD 200 and few years later launched his second diffusion line Zac Zac Posen with retail prices ranging from USD 500 to USD 1,600.

transform their inaccessibility vesting in the absence of online shops and general digital nativity, and the process was even more complicated by the fact that the focus must have been dedicated to more individual brands – the main line and the bridge line. Another reason of bridge lines' retreat is represented by the rise of fashion retail conglomerates such as H&M and Zara, generally speaking the entire Inditex group, which is considered the biggest fashion group in the world. Bearing in mind that Zara is able to offer a new garment in fifteen days from design and production to the stores across the world, the bridge lines in comparison are unable to react to new trends in such a fast manner.[123] Not to mention that these giants learnt how to appeal to the younger consumers in terms of cooperating with fashion bloggers at first, then with the so called "instamodels" and finally in online shopping. The luxury fashion brands adapted as well, unfortunately for them having more line than the main line became very expensive due to separate teams, shows, campaigns and stores, and also very time consuming when they have to keep pace with the successful "newcomers".[124]

The bridge line D&G was discontinued in 2011 and Marc by Marc Jacobs in 2015. There are still successful diffusion lines like Miu Miu, which was repositioned in Prada's sister brand, or See by Chloé. The success consists of many aspects but certainly it is separation by the name of the brand and most importantly separation by the manner of distribution. See by Chloé is distributed exclusively through wholesale channels. Miu Miu almost became an individual brand which is able to stand apart from Prada and does not need to derive its designs and pricing strategies from the Prada main line.

Another example of successful and lasting diffusion line is MICHAEL by Michael Kors. Michael Kors took advantage of the gap on the market and launched his diffusion line as the one bringing "affordable luxury", particularly to the handbag market. Michael Kors is a perfect case study for other luxury brands in the fashion industry. Whereas the main line undoubtedly has the status of a luxury brand, the affordable

[123] Lauren Frayer, 'The Reclusive Spanish Billionaire Behind Zara's Fast Fashion Empire' [2013] *National Public Radio* <http://www.npr.org/2013/03/12/173461375/the-recluse-spanish-billionaire-behind-zaras-fast-fashion-empire> accessed 30 November 2016.

[124] Hilary Milnes, 'As Luxury Goes Digital, 'Diffusion' Brands Become Obsolete - Digiday' (*Digiday*, 2015) <https://digiday.com/marketing/luxury-goes-digital-diffusion-brands-become-obsolete/> accessed 19 November 2016.

luxury represented by MICHAEL by Michael Kors caused a loss of exclusivity of the Michael Kors brand by being always present. *"In other words, it appears Kors is becoming a victim of its own success: Its extraordinarily speedy growth made its products accessible to a vastly larger audience, and as a result, the brand began to lose the veneer of exclusivity that is so essential for a luxury brand."*[125] The speedy growth is connected with the diffusion line whose products, better said, the trade mark used on them, is problematic. In fact, the merchandise from the diffusion line is labelled "Michael Kors" which makes the diffusion line merchandise indistinguishable from the main line. This fact may be one of the grounds of such success. At the time when the less affluent consumers learnt that they can buy merchandise from the diffusion line for a favourable price with the same trade mark the main line has, the demand grew enormous. Naturally, what works for a certain group of consumers, does not work for another.

The target group of the Michael Kors main line would no longer consider the brand as exclusive, therefore not luxurious. In other words, the brand, the trade mark, loses its value – the reason for the purchase of its respective merchandise. These tendencies are more visible in the US, in which there is a strong culture of shopping centres with frequent discounts and etc. Michael Kors is not the first brand experiencing the results of oversaturation of the market by its own merchandise.

Another prominent American brand – Coach – has gone through an almost identical scenario. Coach, similarly to Michael Kors, took an advantage of the gap in the market but their means were slightly different. In 2000 the Coach handbags were widespread due to Coach outlet stores. *"When wealthy shoppers began to see those little bags bedecked in the letter "C" draped over seemingly every other woman's shoulder, they started to snub the brand in favour of something that felt more uncommon. For a while, they found that with Kors. But analysts now say Kors is suffering from the very same problem, particularly in here in North America."*[126] Reaction of the brands vested in

[125] Sarah Halzack, 'Michael Kors Handbags Are Everywhere — And That's a Problem for the Brand' *The Washington Post* (2015) <https://www.washingtonpost.com/news/business/wp/2015/02/05/michael-kors-handbags-are-everywhere-and-thats-a-problem/> accessed 30 November 2016.

[126] Sarah Halzack, 'Michael Kors Handbags Are Everywhere — And That'S A Problem For The Brand' *The Washington Post* (2015)

reducing the presence by 25 per cent in the United States of America in case of the Coach or by reduction of the inventory provided to the department stores and also by demand to be excluded from storewide promotions and etc. Handbags from the diffusion line being constantly on sale further worsened the brand's trade mark.[127]

As stated above, it is not only competitors who try to benefit from the reputation and goodwill of the fashion luxury brands, often the brands themselves contribute to harm caused to their own names – trade marks and their reputation. With regard to the description of the diffusion lines, it is clear that fashion brands put their trade marks at risk purposefully – to easily acquire funds, public visibility and to retrieve a clientele base. In short term, bridge lines proved to be beneficial for the fashion brands because they have the potential to bring those. On the other hand, when excessive focus is dedicated to the bridge line by the brand at the expense of the main line, it can bear devastating consequences to the fashion brand's reputation, and of course to the reputation of its trade marks.[128]

In my opinion this is the answer to the question about the future of diffusion lines. The bridge lines, if not already considered as stand-alone brands apart from the main lines, in the eyes of consumers seem rather obsolete. Collaborations serve as an easy instrument for obtaining numerous benefits for the fashion brands, and still have its place in the fashion industry, however, not many luxury fashion brands to collaborate with remain for retail stores, and more importantly some of them deprecate such collaboration with mass retailer stores. Simply because a luxury fashion brand does not need such a promotion.

<https://www.washingtonpost.com/news/business/wp/2015/02/05/michael-kors-handbags-are-everywhere-and-thats-a-problem/> accessed 30 November 2016.

[127] Sarah Halzack, 'It'S About To Get A Lot Harder To Get A Discounted Coach Or Michael Kors Handbag' *The Washington Post* (2016) <https://www.washingtonpost.com/news/business/wp/2016/08/10/its-about-to-get-a-lot-harder-to-get-a-discounted-coach-or-michael-kors-handbag/?utm_term=.4b75d7a21648> accessed 30 November 2016.

[128] Worth mentioning is suit brought by Gemmon LLC against Vera Wang BEcker et al., where famous bridal fashion designer Vera Wang was sued for devaluating her brand by entering into an agreement with Kohl's department store (and later with Costco and David's Bridal) to exclusively sell her bridge line Simply Very which according to plaintiff resulted in impossibility of operating boutique selling exclusively Vera Wang main line. In 23 March the Supreme Court, New York County dismissed the complaint because plaintiff failed to present evidence sufficient to raise a triable issue of fact. *Vera Wang Vs. Gemmon LLC* (New York State Unified Court System 2017) <http://www.courts.state.ny.us/courts/ad1/calendar/appsmots/2017/March/2017_03_23_dec.pdf> accessed 27 March 2017.

2.1.6 Advertising

According to Article 2 par 1 of the Directive 2006/114/EC concerning Misleading and Comparative Advertising, advertising means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.[129] Advertising is generally controlled in the name of the consumer's protection by respective offices which are authorised to impose fines if certain conditions are met, particularly concerning advertising which is also an unfair commercial practise according to Article 5 of the Directive 2005/29/EC on Unfair Commercial Practices. Additionally, misleading advertising may give a rise to private lawsuits by other competitors in the name of their rights' protection.

The key question to be addressed by the fashion company is whether to purchase the content which is to be used in advertising from a third party creator or licence that content and likely be restricted in its use in the future. This concerns music and photographs in particular. Purchased or created content guarantees more control over it, particularly over legal intricacies, which is appreciated not only in connection with model release.[130]

Advertising in fashion has its own specifics stemming from high profile models, sport personas and socialites' involvement, as well as the famous artists producing it. The above mentioned require a considerable level of attention dedicated to exclusivity provisions, confidentiality, and with respect to the cult of youth but also to legal boundaries of hiring minors.

[129] National law represented by the Section 1 subsect 2 of the Act No 40/1995 Coll., on Regulation of advertisement, as amended (In Czech: zákon č. 40/1995 Sb., o regulaci reklamy, ve znění pozdějších předpisů), provides that advertising means making of notice, demonstration or any other representation spread via communications media aiming to promote business activity, particularly promotion of goods sale or consumption, real estate development or lease, sale or use of right or obligations, provision of services, and promotion of trade mark.

[130] Model release is type of agreement between photographer and subject of a photograph granting permission to publish the photograph. According to the Section 84 of the Czech Civil Code person's appearance can be captured only upon agreement, which applies that models can limit, e.g. the form of the photographs and etc. See https://en.oxforddictionaries.com/definition/model_release

2.1.6.1 Moral Clauses and Changes in Appearance

Fashion companies are willing to hire high profile persons and provide them with considerable remunerations. Frequently these people are made into spokespersons of the brands (fashion companies) and their reputation becomes almost that of the brand. This fact is beneficial for both parties when the reputation of both is good. The moral clauses allow fashion companies to terminate the agreement if the person behaves in a manner which is likely to influence the brand's reputation negatively.[131] Reputation of the brand, its products and services and more importantly its trade marks can be harmed which justifies immediate termination with possibility of "claw back" refund of fees already paid to that person. A complex moral clause will encompass public accusation, engagement in any activity that is illegal, degrading, disreputable, indecent, contemptuous, likely to shock or offend.[132]

The information listed above is applicable to changes in appearance. If a model is hired to promote purely natural cosmetic products, the cosmetic company should have the right to terminate their contract when the model, e.g. undergoes a visible plastic surgery against that company's politics.

2.1.6.2 "Theatrical Property" also Known as "Prop"

The so called "prop" is an object used on screen (on stage) by actors during a production (performance). The props bring a risk of infringement of someone else's trade mark or copyright. The fashion company would rather be aware of intellectual property of other competitors than intermediary creating advertisements. Nonetheless, thorough attention must be paid to the props used in advertising. Props regardless of incidental nature of its appearance, e.g. a sculpture, a painting, a book, a magazine cover, television broadcast, may give a rise to intellectual property holders' claims. The

[131] Bad behaviour of high profile persons attracts even more attention and increases the potential harm to the brand. In 2005 Chanel, Burberry and H&M terminated contracts with the British model Kate Moss after British tabloid issued pictures of her consuming lines of the class A drug. See for instance Vikram Dodd, 'Chanel and Burberry Drop Moss as Police Start Inquiry' *The Guardian* (2005) <https://www.theguardian.com/uk/2005/sep/22/drugsandalcohol.vikramdodd> accessed 1 December 2016.

[132] Ashima Dayal, Antonio Borrelli and Brooke Erdos Singer, 'Marketing, Advertising, And Promotion', *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys* (2nd edn, Fairchild Books 2014) 253.

one-second-long commercial shot of a basketball printed with a pattern resembling the Louis Vuitton's Toile Monogram within a thirty seconds long commercial for Hyundai Sonata aired in 2010 during the Super Bowl brought Hyundai a lengthy lawsuit with a final loss. This use of a prop vesting in the "Louis Vuitton brown" basketball with a monogram pattern "LZ" was fully astute. Hyundai intended to create an association with Louis Vuitton for the purpose of creation of the consumers' idea that Hyundai's promoted Sonata vehicle is luxurious (as Louis Vuitton products).[133] Not exactly exaggeratedly, reputation of the Louis Vuitton is very good and strong and it has been the subject of infringements within the entire history of the fashion company. It is no surprise that Louis Vuitton is very vigilant of any possible infringement of its trade marks and vigorously defends its rights.[134]

2.2 Fashion Public Law

"Fashion law was developed with the pragmatic objective of providing legal support for fashion designers and fashion companies. However, there are other stakeholders in society with an interest in the fashion sector: consumers, employees, unions, environmental groups, and the government. Although laws relating to the use of consumption of fashion may not always have a direct impact on fashion companies, they are part of the legal landscape covering fashion sector, so in our view it makes sense to bring these issues under the umbrella of fashion law."[135]

2.2.1 Freedom of Expression

Fashion is commonly considered an instrument for the expression of one's standpoint. Historically, people expressed themselves through their attire, nowadays there seems to

[133] See decision of the United States District Court Southern District of New York in Louis Vuitton Malletier, S.A. v. Hyundai Motor America, 2012 WL 1022247. *LOUIS VUITTON MALLETIER, S.A v.. HYUNDAI MOTOR AMERICA* (Leagle 2012) <http://www.dmlp.org/sites/citmedialaw.org/files/2012-03-12-LV%20Hyundai.pdf> accessed 21 October 2016.

[134] Louis Vuitton filed a suit concerning use of prop in Britney Spears video for single "Do Somethin'" where Louis Vuitton's "Cherry Blossom" pattern with "LV" monogram created with Takashi Murakami was used on vehicle's dashboard and won in 2007 before Paris court. On the other hand, in Louis Vuitton's detriment was decided case before Southern District Court of New York about prop in movie Hangover II. Use of Counterfeit Louis Vuitton bag with quote "Careful, that is a Lewis Vuitton" was found harmless. See Haochen S., Barton, B., Madhavi S., The Luxury Economy and Intellectual Property: Critical Reflections. p 368.

[135] Jimenez, Kolsun (no 2) 9.

be no grave topic to encourage people to communicate their values, fashion became more of a statement and a declaration of social status through brands, than one's strong conviction. In the late sixties groups of students wore black arm-bands as a communication of their protest of the Vietnam War by which they violated the school policy. The Supreme Court of the United States of America ruled in favour of the complaining expelled students with the justification that censoring a relatively silent speech through attire must be based on more than "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[136]

2.2.2 Religious Freedom and Attire

Nowadays, the matter of wearing an Islamic veil hijab in public is subject to numerous discussions, laws and court decisions. In 2011 France, as the first European country, banned veils covering the face in public places, this was reasoned by the oppressive nature towards women which is not acceptable in France, and thus followed the previous act of banning ostentatious wear of religious symbols (crosses, Yarmulkes, veils and etc.) in public schools from 2004. Restriction of hiding a face by a veil reasoned by the public security was adopted in Belgium, Netherlands, Bulgaria, Switzerland and Italy.[137]

On 14 April 2017 the Court of Justice of the European Union ruled that an internal rule of an undertaking which prohibits the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination.[138] *"However, in the absence of such a rule, the willingness of an employer to take account of the wishes of a customer no longer to have the employer's services provided by a worker wearing an Islamic headscarf cannot be considered an occupational requirement that could rule out discrimination."*[139]

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[136] Judgment of the U.S. Supreme Court in case Tinker v. Des Moines School District 393 U.S. 503 from 24 February 1969.

[137] 'Evropský Soudní Dvůr: Zaměstnavatelé Mohou Zakazovat Islámské Šátky' (*Česká justice*, 2017) <http://www.ceska-justice.cz/2017/03/evropsky-soudni-dvur-zamestnavatele-mohou-zakazovat-islamske-satky/> accessed 15 March 2017.

[138] Judgment of the Court of Justice of the European Union in case Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions C-157/15.

[139] Judgment of the Court of Justice of the European Union in case C-188/15 Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole Univers.

The above mentioned practises of the European legislations and courts is in opposition to the U.S. practise where for instance, the American Army allowed women to wear hijabs and men turbans (and beards) made from non-flammable materials and in colour closely resembling the assigned uniform.[140]

2.2.3 Criminal Law: Strip Searches, Decency Laws

According to the Section 82 of the Act No 141/1961 Coll., on Criminal Procedure, as amended, in appropriate circumstances the police is empowered to force a person to remove clothing and to observe the body in search of things important for a criminal trial.[141]

Outraging public decency is regarded by the Section 358 of the Act No 40/2009 Coll., Criminal Code, as amended[142] as gross indecency committed in public with penalty up to two years of imprisonment. And also by the Section 47 subsect 1 letter d) of the Act No 200/1990 Coll., on Administrative Offences, as amended,[143] with a fine amounting up to CZK 10,000. In England and Wales, it is known as a common law offence. It is not unlikely that some artist or designer may commit outraging public decency. For instance, in 1989 artist Rick Gibson pleaded guilty of outraging public decency by the exhibition of earrings from freeze-dried human foetuses at the Young Unknown Gallery in London.[144]

2.2.4 Impact Areas of Fashion

Fashion itself has long since become a phenomenon affecting more than what we see in the streets, on the catwalk or in the magazines. The fashion industry has an immense impact on society as a whole whether it is its employees, the animals used for

[140] Jon Sharman, 'Turbans And Hijabs Now Officially Part Of U.S. Army Uniform' (*The Independent*, 2017) <http://www.independent.co.uk/news/world/americas/hijab-turbans-us-army-uniform-beards-muslim-soldiers-sikhs-female-allowed-head-coverin-combat-a7518886.html> accessed 12 January 2017.
[141] In Czech: zákon č. 141/1961 Sb., trestní řád, ve znění pozdějších předpisů.
[142] In Czech: zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů.
[143] In Czech: zákon č. 200/1990 Sb., o přestupcích, ve znění pozdějších předpisů.
[144] Judgment of the Court of Appeal of England and Wales in case R v. Gibson and Another [1991] 1 All ER 439, [1990] 2 QB 619, [1990] 3 WLR 595, [1990] Crim LR 738, 91 Cr App Rep 341, 155 JP 126 from 11 April 1988.

manufacturing, the environment or the consumers. According to the available fashion law textbooks, animal treatment or environmental issues are not considered a part of the fashion law. However, with regard to the fact that particularly shoes, handbags and other accessories not to mention apparel are made from leather, animal treatment should be included as one of the topics of the fashion law because it is certainly one of the areas of its impact. Environmental issues should be mentioned as well because the manufacturing of apparel is undeniably taking its toll on the environment.

2.2.4.1 Sweatshops

Sweatshop is a pejorative term denoting a factory, a workplace with unacceptable working conditions.[145] This term may denote factories with horrendous working conditions not only in the fashion field, but more typically in the manufacturing industry. Historically the term sweatshop is tied to garment making and originated in the United Kingdom during the nineteenth century.[146] Nowadays the sweatshop concept, a system of subcontracting in the tailoring, is discussed in connection with the third world countries, in which most of the apparel is manufactured.

Hallmarks of sweatshops are identical to:

- manually difficult labour with need of standing still during the entire work day
- low pay under minimum wage without paid overtime
- unreasonable work hours amounting to one hundred per week
- labour with dangerous chemicals and machines without protective equipment
- labour in enormously large but crowded factories without air-condition or heating
- labour in factories built without respective authorities' approvals
- labour in factories with locked exit doors and nets in windows
- forced labour
- child labour
- high degree pregnant women labour, forced abortion or dismissal
- verbal violence, humiliation or abuse

[145] According to the Cambridge dictionary "sweatshop" is a small factory where workers are paid very little and work many hours in very bad conditions.
[146] Charles Kingsley, *Cheap Clothes And Nasty* (1850).

– physical violence by supervisors.[147]

Undoubtedly, the above mentioned conditions would be unacceptable in developed countries where the minimum wage, the anti-discrimination, and work safety acts were adopted and are enforced. Discussion about sweatshops are often lively after factory disasters which can hardly be disregarded simply because of the immense number of the dead and often even their appalling death under the factory debris.

Fashion industry renewed its focus on anti-sweatshops compliance after the Rana Plaza factory collapse also known as Savar building collapse close to Dhaka, Bangladesh in 2013. On 24 April 2013 an eight story business building collapsed which resulted in the death of over 1,100 people and another 2,500 injured and over 2,000 people found in the debris. Rana plaza was a demonstration of common practises adopted by factories manufacturing apparel in the third world countries. Despite the occurrence of multiple cracks in the building, the factory workers were forced to return to the factory and continue working. Under the heaviness of the returned workers the building collapsed. Later it was discovered that just as many of these factories, Rana Plaza was built illegally in terms of an illegal additional upper floor construction, and housed 5 garment factories instead of the approved shopping centre.[148]

The Rana Plaza collapse is considered the deadliest accidental structural failure in the modern history. The shocking number of dead workers alarmed customers of "fast fashion"[149] worldwide and raised the awareness about sweatshops in Bangladesh generally. This resulted in responses of International Labour Organization, IndustriAll Global Union, Workers Right Consortium and more in form of legally binding agreement "Accord on Fire and Building Safety in Bangladesh" from 2013.[150] This

[147] Fair Labor Association Annual Public Report from 2015 available at: *2015 Annual Report* (Fair Labor Association 2015) <http://www.fairlabor.org/sites/default/files/documents/reports/2015_fla_apr_0.pdf> accessed 9 January 2017.
[148] Dean Nelson, 'Bangladesh Building Collapse Kills At Least 82 In Dhaka' (*The Telegraph*, 2013) <http://www.telegraph.co.uk/news/worldnews/asia/bangladesh/10014778/Bangladesh-building-collapse-kills-at-least-82-in-Dhaka.html> accessed 6 January 2017.
[149] Fast fashion will be described in next chapter. Factories in Rana Plaza manufactured apparel for e.g. Benetton, Mango, Primark and Walmart. Clean Clothes Campaign, 'Global Actions Targeting Benetton And Mango In Rana Plaza Aftermath' (2015) <https://cleanclothes.org/news/2015/04/17/global-actions-targeting-benetton-and-mango-in-rana-plaza-aftermath> accessed 6 January 2017.
[150] Moreover, 38 people were charged with murder. Reuters, 'Rana Plaza Collapse: 38 Charged With Murder Over Garment Factory Disaster' (*the Guardian*, 2016)

agreement aims to support Bangladeshi factories to build a safe ready-made garment industry. Over 200 apparel brands across the world have already signed this agreement.[151]

Fashion companies cooperating with the so called sweatshops have an unique opportunity to support the factory workers in their quest for improvement of working conditions and to contribute to the establishment of culture of respecting rights of others, particularly the weakest – the women and the children. Certainly there is a number of organizations focusing on labour issues for fashion companies to join forces for such an honourable goal.[152] The sweatshop discussion is very current in connection with the exploitation of the Syrian war refugees in Turkey, which is the world's third largest supplier of clothing after China and Bangladesh, and gets another moral dimension.[153] Sweatshops are discussed in connection with multinational fashion groups like Inditex owning Zara, Pull and Bear and etc. and H&M avoiding tax. Naturally, the fashion companies as well as any other multinational companies endeavour to optimize tax in the tax heavens or they prefer to pay taxes in their country of origin thanks to the corporate structure.[154] Despite the strategies and actions, e.g. Base Erosion and Profit Shifting by Organisation for Economic Co-operation and development adopted in 2015, fighting tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no tax locations, fashion giants mostly do not cross the line of illegality. However, these strategies are certainly immoral, particularly when it comes to the third world countries in which people's workforce is exploited and no taxes are paid there.

<https://www.theguardian.com/world/2016/jul/18/rana-plaza-collapse-murder-charges-garment-factory> accessed 6 January 2017.

[151] List of signatories available at: 'Official Signatories | The Bangladesh Accord' (*The Bangladesh Accord*, 2017) <http://bangladeshaccord.org/signatories/> accessed 6 January 2017.

[152] For e.g. Interlanitonal Labour Organization, Worker Rights Consortium, Clean Clothes Campaign, SweatFree Communities, Global Exchange, Asia Monitor Resource Center.

[153] Labour behind the Label, 'Fashion Brands Need To Do More To Tackle Abuse Of Syrian Refugees In Turkish Garment Factories' (2017) <http://labourbehindthelabel.org/fashion-brands-need-to-do-more-to-tackle-abuse-of-syrian-refugees-in-turkish-garment-factories/> accessed 20 January 2017.

[154] For instance in 2008 H&M paid EUR 60 of corporate taxes in Bangladesh and diverted profits to tax heavens to avoid paying tax in Tanzania according to non-governmental organization Action Aid. Available at: ActionAid, 'Actionaid Tax Campaign: Highlights So Far' (2013) <http://www.actionaid.org/tax-power/actionaid-tax-campaign-highlights-so-far> accessed 8 January 2017.

2.2.4.2 Animal Treatment

More than billion animals are slaughtered every year for their meat, and the skin of these animals is considered to be one of the most important by-products of the meatpacking industry.[155] The fact that every part of the animal is used is widely accepted and many people purchasing leather products are convinced that the animals would be slaughtered in any case because of their meat. This belief has solid ground and is so widespread across the nations that it is very unlikely to be changed drastically in the future. What is subject of numerous discussions, initiatives and has the potential for change is the animal treatment during their life. The animal treatment issue is related to ethics as well as the sweatshop issue. The main difference may vest in the nature of the "victim" of unethical treatment. In the case of sweatshops, the victims are humans with granted human rights and more importantly, with will and resources to defend themselves. On the other hand, there are animals in countries with no legislation protecting animals adopted that are considered things, a source of profit, rather than living creatures.

a) Leather

Due to globalisation and the substantial progress achieved by animal protectors, or naturally by improvement of animal rights in the western world, the focus is being dedicated to the eastern countries, partially Asia. The consumption of leather is constantly rising in accordance with growing population and its needs so it comes as no surprise that the manufacturers of apparel find themselves in need of more resources; more animals. The pressure on price, speedy delivery and the number of living resources is immense. This fact results in factory workers treating animals as objects without the ability to percept and to have feelings, especially to feel pain.

One of the most discussed cases of inhuman animal treatment connected with fashion is presented by the crocodiles' treatment in the US, Zimbabwe, Vietnam and many more countries, by People for the Ethical Treatment of Animals (hereinafter referred to as "PETA"). PETA regularly investigate animal treatment on various farms across the world and expose appalling footages from their undercover investigations.

[155] Deng-Cheng Liu, "Better Utilization of By-Products from the Meat Industry," Food & Fertilizer Technology Center for the Asian and Pacific Region, 10 Jan. 2001.

In 2015 PETA released footage of crocodiles' treatment on farms in Zimbabwe and Texas. These farms were the exclusive suppliers of crocodile belly skins to the French fashion company Hermès.[156] Undoubtedly, the treatment of crocodiles at the farms in question was inhuman. The crocodiles were "planted" in inconveniently small and unclean pits until they reached the size appropriate for the particular product they were planted for.[157] It was documented that farm workers hacked into the necks of the crocodiles and attempted to impair their brains with metal rods.

The farm workers are focused on the outcome of their work which is flawless skin in the case of luxury products, or speed of "leather manufacture" in the case of the cheapest products. In many cases reported by PETA achieving this outcome results in farm workers paying no attention to the fact whether the animal is dead before they start skinning them or not. Moreover, the manner of killing is unsatisfactory – a metal rod hit in most of the cases. This fact implies that there is very high possibility of survival after such hit with the addition of tremendous pain afterwards. From the PETA footages it is clear that the farm workers are fully content with stabbing the animals into their spinal cord to paralyse them and leave them dying for hours on a pile with other animals' bodies with no regard to the fact that they are still alive, fully conscious, feeling pain and agony and in some cases still moving.

PETA repeatedly reported practises adopted at farms particularly in Asia and Africa, but not only, as follows:

- miserable life in insufficient and unnatural conditions filled with apathy
- unsuccessful attempts to kill
- inhuman manner of killing by metal rods or baseball sticks
- skinning alive.[158]

[156] 'Exposed: Crocodiles And Alligators Factory-Farmed For Hermès 'Luxury' Goods' (*PETA Investigations*, 2017) <https://investigations.peta.org/crocodile-alligator-slaughter-hermes/> accessed 11 January 2017.
[157] Called "watch wristband alligator"and "handbag alligators".
[158] Western world was horrified by the dogs and cats skinned alive for leather in China especially with regard to the fact that this leather is being labelled as "other" or "faux" and even animal protectionists may wear dog and or cat leather and fur because despite the adopted law it is very hard to control the China's export to the European Union or United States. 'Dogs Bludgeoned And Killed In Leather Industry' (*PETA Investigations*, 2017) <https://investigations.peta.org/china-dog-leather/> accessed 13 January 2017.

With hyperbole, the crocodiles were lucky because the PETA footage brought considerable attention to the topic of animal treatment connected with fashion, and bearing in mind the price of a "croco" Birkin bag starting at EUR 20,000, even to the outrageous disproportion between Hermès profit and the crocodiles' suffering. The Birkin bag is, beside the Kelly bag, Hermès's hallmark and most desirable product. As a consequence of the handbag style name being explicitly stated in the PETA footage, the French actress Jane Birkin was alarmed by the cruel methods used by Hermès's suppliers. Birkin instantly demanded Hermès to remove her name from its crocodile-skin handbags until better practices in line with international norms can be put in place.[159] This fashion world embarrassment enlarged by the brand's own long-term ambassador forced Hermès to audit the farms and their procedures, and accept the policy of no irregularity to recommended procedures.[160]

Similar despicable treatment of crocodiles was identified in Vietnam by PETA in late 2016 on Heng Long farm which sourced skins to the French concern Moët Hennessy Louis Vuitton SA (hereinafter referred to as "LVMH") according to the farm workers in the PETA's footage.

The above mentioned cases are examples of how fashion influencers may bring attention to issues of law enforcement and insist on ethical approach on every level of manufacturing apparel and accessories. Nevertheless, many topics are not covered in their entirety despite the fact that they have a strong link to the fashion industry.

b) Wool

Wool can only be obtained by shearing a sheep. In order to produce more wool to satisfy the fashion industry demand, the sheep are genetically manipulated and their wool is no longer protecting them from temperature extremes, it becomes one instead. Sheep are subject to abuse of shearers, who are under pressure to achieve huge volumes, in terms of beating; tails, ears, teats or strips of skin are frequently cut or ripped during the shearing.

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[159] 'Jane Birkin Asks Hermès To Remove Her Name From Handbag After Peta Exposé' [2015] *The Guardian* <https://www.theguardian.com/fashion/2015/jul/28/hermes-jane-birkin-handbag-peta-crocodiles> accessed 18 January 2017.

[160] Angelique Chrisafis, 'Hermès And Jane Birkin Resolve Spat Over Crocodile Handbags' [2015] *The Guardian* <https://www.theguardian.com/fashion/2015/sep/11/hermes-jane-birkin-crocodile-handbag-peta-luxury> accessed 18 January 2017.

The biggest producer of wool is considered to be the Merino breed which was domesticated in New Zealand and Australia. The Merino sheep boast of wrinkly skin which allows to grow more wool which is desirable, however, for the price that the wrinkles around the tail and breech area are prone to become moist with urine and faeces. This is a target area for blowflies to lay their eggs which results in flystrike meaning that larvae feed off flesh of the sheep up to three days and then the untreated sheep die. In 1927 in Australia adopted a protective measure called "mulesing". The mulesing procedure consists of carving huge chunks of skin away from the sheep's backsides without any painkillers for pain lasting up to forty-eight hours.[161]

As a response to PETA's anti-mulesing campaign started in 2004, fashion companies terminated purchases of Australian Merino Wool products.[162] The campaign and subsequent rejection of mulesed sheep wool products opened discussion about making mulesing a criminal offence if not performed by a veterinarian in the New Zealand.[163] Despite the fact that both the wool industry and non-profit organisations such as the Australian Wool Innovation Limited intent to phase out mulesing, no law has been adopted yet because of the conviction of the absence of a better, sufficient prevention of flystrike yet persists.[164]

On the other hand, in late 2016 PETA claimed that for the first time in the history, an Australian shearer pleaded guilty of cruelty to animals and was banned from shearing or being in charge of farmed animals for two years and ordered to donate USD 500 to the Royal Society for the Prevention of Cruelty to Animals. Another five shearers pleaded

[161] 'What Is Mulesing And What Are The Alternatives? - RSPCA Australia Knowledgebase' (*Royal Society for the Prevention of Cruelty to Animals Australia*, 2016) <http://kb.rspca.org.au/What-is-mulesing-and-what-are-the-alternatives_113.html> accessed 23 January 2017.

[162] Hugo Boss, Timberland, Victoria's Secret, Abercrombie & Fitch, H&M, Perry Ellis, Adidas and more brands. 'Adidas Joins Ban On Mulesed Wool' (*The Age*, 2008) <http://www.theage.com.au/business/adidas-joins-ban-on-mulesed-wool-20080604-2m2g> accessed 24 January 2017.

[163] Terry Sim, 'NZ Plans To Ban Sheep Mulesing, While Woolproducers Australia Wants A Consumer Awareness Campaign + VIDEO' [2016] *Sheep Central* <https://www.sheepcentral.com/nz-plans-to-ban-mulesing-while-woolproducers-australia-wants-an-awareness-campaign/> accessed 29 January 2017.

[164] Australian Wool Innovation Limited, 'AWI BOARD UNANIMOUSLY CONFIRMS SUPPORT FOR INDUSTRY DECISION TO PHASE OUT MULESING' (2008) <https://www.wool.com/about-awi/media-releases/awi-board-unanimously-confirms-support-for-industry-decision-to-phase-out-mulesing/?category=0&year=2008&month=0&page=22> accessed 9 January 2017.

guilty of cruelty to animals, were banned from owning or being in charge of sheep up to two years and were fined up to USD 3,500.[165]

c) Angora Wool

The Angora wool is produced by the Angora rabbit. The source of ninety per cent of the world's Angora wool is China. Common practise in China is keeping the Angora rabbits in small wire-mesh cages in which the Angora rabbits, naturally sociable animals used to living in the wild (in underground warrens), suffer from anxiety, inflamed feet, irritated and infected eyes caused by their waste unremoved from the cages. Apart from the miserable life conditions, when it comes to shearing, the Angora rabbits' feet are tightly tethered and their bodies stretched in the air and the farm workers rip the fur out of skin of the Angora rabbits while they scream in pain. The Angora rabbits are then left alone in their dirty wire cages; bald and unprotected from the elements and in many cases they are not able to move from the pain and shock they had suffered. This procedure repeats every three months until the Angora rabbits are unable to produce wool. The Angora rabbits can live up to twelve years, however, the Angora rabbits planted in China farms usually die after two years.[166]

In 2013 PETA released footage of such practises on Chinese Angora rabbit farms which gave a rise to numerous customers' demands and inquiries to terminate the manufacture and offer of Angora wool products addressed to fashion companies. Up to this day more than two hundreds of fashion companies banned the Angora wool.[167]

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[165] 'VICTORY! Australian First: Wool Workers Charged For Abusing Sheep' (*PETA Australia*, 2016) <http://www.peta.org.au/news/victory-wool-worker-charged-abusing-sheep/> accessed 28 January 2017.

[166] 'The Angora Industry' (*PETA*) <https://www.peta.org/issues/animals-used-for-clothing/angora-industry/> accessed 30 January 2017.

[167] For e. g. H&M, Zara, Zara, Asos, Adidas, Lacoste, Mango, Polo by Ralph Lauren. http://www.peta.org/living/fashion/more-companies-ban-angora/ Moreover, the Inditex donated its remaining stock from angora wool to Syrian refugees through the Charity Life for Relief and Development. Vivian Hendriksz, 'Inditex Donates 575,000 Pounds Worth Of Angora Garments To Syrian Refugees' [2015] *Fashion United* <https://fashionunited.com/news/fashion/inditex-donates-575-000-pounds-worth-of-angora-garments-to-syrian-refugees-via-peta-program/201503056256> accessed 31 January 2017.

PETA investigation and subsequent acts of fashion companies and fashion consumers have potential to change the perception of animals in China, where no animal protecting law has been adopted and animal treatment is significantly cruel in general.[168]

d) Fur

Obtaining of fur is connected particularly with the topic of wild animals' captivity. Minks, foxes, chinchillas, ferrets, nutrias, raccoons, polecats and raccoon dogs are planted particularly for fur. What was mentioned above about inhumane and despicable treatment of animals is applicable in this chapter as well; cruel methods of killing and skinning living animals are common in China.[169]

With regard to the proved ethologic needs of these wild animals and wide spread information about their miserable lives in wired cages without any possibility of free movement, cannibalism and self-destructive behaviour, some countries banned the fur farming, e.g. The United Kingdom as the first in Europe, Netherlands, Austria and some countries like Germany and Switzerland adopted an indirect ban.[170]

On 16 March 2016 a group of deputies submitted an amendment of Act. No. 246/1992 Coll., on Protection of Animals against Maltreatment, as amended,[171] which suggests a general ban of fur farms in the Czech Republic. The amendment was passed on 7 June 2017 by the Chamber of Deputies followed by the Senate on 20 July 2017 and is now subject to the president of the Czech Republic approval.

e) PETA Shares in Fashion Companies

PETA often purchase a minimal amount of stock in companies supporting animal maltreatment, which enables PETA as a shareholder of a publicly traded company to

[168] In 1988 China adopted Regulations for the Administration of Laboratorial Animals and later Guidance on Kind Treatment of Laboratory Animals by Ministry of Science and Technology of the People's republic of China. In 2017 Chinese Food and Drug Administration waived its requirement for certain cosmetics to be registered with the agency which means that non-special use cosmetics will no longer need animal testing for their products to be marketed in China. Sophia Yan, 'Major Global Cosmetics Firms Are Selling Products Tested On Animals In China' (*CNBC*, 2017) <https://www.cnbc.com/2017/04/19/in-china-big-cosmetics-firms-are-selling-products-tested-on-animals.html> accessed 13 June 2017.

[169] 'The Fur Industry: Animals Used For Their Skins' (*PETA*) <https://www.peta.org/issues/animals-used-for-clothing/fur/> accessed 29 January 2017.

[170] *Overview Of National Legislation On Fur Farming In Europe* (Furfree Alliance 2016) <http://www.furfreealliance.com/wp-content/uploads/2016/11/Overview-of-national-legislation-on-fur-farming-in-Europe-1.pdf> accessed 31 January 2017.

[171] In Czech: zákon č. 246/1992 Sb., na ochranu zvířat proti týrání, ve znění pozdějších předpisů.

submit proposals, discuss matters and vote at a company's general meeting. In 2015 PETA purchased one share in Hermès, in 2017 one share in LVMH[172] and in 2016 in Prada to enforce the ban on use of exotic ostrich skin used for the Prada handbags.[173]

2.2.4.3 Environmental Issues

a) Fast Fashion

"One aspect of fashion law that differs from many other types of law is the emphasis on the seasonal nature of many of the fashion clients' needs."[174]

Although there are still only two main seasons - Spring/Summer and Fall/Winter (accompanied by Resort and Pre-Fall seasons), the fashion industry has changed drastically in the last decades and now is believed to have up to fifty micro seasons. The main player who is transforming the whole industry with its societal impact is Zara, whose owner Amancio Ortega has been named in the list of the top 10 in the World's Billionaires published by the American business magazine Forbes since 2009 and in 2016 he was even named the second richest man in the world.[175]

These changes are connected with the term "fast fashion." According to the Oxford dictionary, fast fashion denotes inexpensive clothing produced rapidly by mass-market retailers in response to the latest trends moving into stores in the fastest possible way.[176] Fast fashion is a product of the fashion market, particularly of consumers' demand to obtain high fashion looking apparel for the lowest price at a time when that particular fashion trend is still relevant. Zara (Inditex group) and other fast fashion retailers like H&M, Forever 21, Topshop and etc. acquired a model consisting of making designs according to luxury brands' seasonal fashion shows, immensely fast manufacturing due

[172] Parent company of LOEWE, Louis Vuitton, Berlutti, Loro Piana, Fendi, Céline, Christian Dior, Emilio Pucci, Givenchy, Kenzo, Marc Jacobs and more.
[173] Luisa Zargani, 'PETA Invests In Prada To Protest Ostrich-Skin Products' (*WWD*, 2016) <http://wwd.com/fashion-news/fashion-scoops/prada-peta-shareholder-protect-ostrich-skin-10421026/> accessed 13 January 2017.
[174] Monica B. Richman, 'A Fashionable Career' in *Navigating Fashion Law: Leading Lawyers on Exploring the Trends, Cases, and Strategies of Fashion Law* (Aspatore 2012).
[175] Luisa Kroll, 'Forbes 2016 World's Billionaires: Meet The Richest People On The Planet' [2016] *Forbes*<https://www.forbes.com/sites/luisakroll/2016/03/01/forbes-2016-worlds-billionaires-meet-the-richest-people-on-the-planet/#6f63414177dc> accessed 3 February 2017.
[176] See https://en.oxforddictionaries.com/definition/fast_fashion.

to inexpensive labour in the third world countries and fast delivery to its stores on a weekly basis.[177]

The cause of Zara's primacy vests in limitation of the merchandise remaining in the stores and heading for discount. Zara renews its stores' stock on a two weeks' basis which implies that the consumers aware of this fact will likely purchase the merchandise due to fear that it will not be available the next week. Moreover, the sales of concrete products are thoroughly monitored in every Zara store and processed to discontinue products with unsatisfactory selling performance and to order products which are sought after by the consumers. This modus operandi guarantees sale of 90 per cent of Zara's stock and an advantage over other competitors who are only able to sell up to 83 per cent of their stock.[178]

Fast fashion is one of the main parts of democratization of fashion which is an ongoing process of making fashion available to masses in contrast with the history when fashion used to be the domain of queens and socialites.[179] Democratization is highly appreciated by the less affluent consumers, on the other hand constant availability of fashion means higher chances for competitors to copy luxury fashion brands, and as a final consequence it harms the luxury fashion brands, the innovators and trend setters, in the behalf of anonymous mass of consumers in the name of their "right for fashion".

The rather inexpensive products of fast fashion implicate overconsumption of clothes and their obsolescence in a very short time period. Hand in hand with the cheapest materials and environmentally unfriendly manufacture, the fashion industry is believed to be the second biggest polluter in the world.[180]

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[177] Grace Gordon, 'Why Are There So Many New Seasons In Fashion?' [2015] *Savoir Flair*<https://www.savoirflair.com/fashion/106670/fashion-decoded-seasons-explained> accessed 2 February 2017.

[178] Kasra Ferdows, Michael A. Lewis and Jose A. Machuca, 'Zara's Secret For Fast Fashion' [2005] *Harvard Business School Working Knowledge* <http://hbswk.hbs.edu/archive/4652.html> accessed 3 February 2017.

[179] Democratization of fashion consists of fast fashion, luxury brands with mass retailers collaborations, fashion bloggers, insta models, influencers and for instance broadcasting of fashion shows, generally acts making fashion more approacheable.

[180] According to Danish Fashion Institute, fashion industry is second after oil industry. 25 % of chemicals produced worldwide are used for textiles. Moreover, fashion industry is also noted as the second biggest polluter of clean water, after agriculture *The Future Of Fashion - In Facts & Figures* (Ethical Fashion Forum 2014) <http://source.ethicalfashionforum.com/assets-

Toxic chemicals

Toxic chemicals are commonly used in cotton agriculture and during some stages of manufacturing such as pre-treatment, dyeing, printing and etc. Consumers may be directly affected by the toxic chemicals residues in garments they wear typically resulting in various health problems. Much worse influence of the toxic chemicals vests in their washing into waterways and entering the local ecosystems. This is considered one of the major sources of pollution which is on its rise particularly thanks to fast fashion. Despite the fact that cotton plants represent only 2.4 per cent of the world's cropland, cotton is responsible for 24 per cent of the world's insecticide use and 11 per cent of pesticides.[181]

"Altogether, more than a half trillion gallons of fresh water are used in the dyeing of textiles each year. The dye wastewater is discharged, often untreated, into nearby rivers, where it reaches the sea, eventually spreading around the globe. China, according to Yale Environment 360, discharges roughly 40 percent of these chemicals."[182]

Water

Cotton cultivation is highly demanding of fresh water. The disastrous consequences of cotton crop may be fittingly illustrated by the disappearance of the Aral Sea in central Asia. In the 1970s the Aral Sea was the fourth largest lake in the world and an important source for neighbouring states – Kazakhstan, Uzbekistan and Turkmenistan. In 1950s the river Amu Darya and the Syr Darya were diverted from the Aral Sea to provide irrigation for plants with cotton in Turkmenistan and Uzbekistan; the world's sixth leading producer of cotton. Today, the Aral Sea is only a tenth of its former size (compared to the year 1950). The former source of life and water unsurprisingly transformed into a dead sea with over-salinated areas heavily affected by pesticides

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uploaded/documents/The_Future_of_Fashion_-_In_Facts_Figures___The_Ethical_Fashion_Source_(20150109).pdf> accessed 4 February 2017.

[181] Tansy Hoskins, 'Cotton Production Linked To Images Of The Dried Up Aral Sea Basin' [2014] *The Guardian* <https://www.theguardian.com/sustainable-business/sustainable-fashion-blog/2014/oct/01/cotton-production-linked-to-images-of-the-dried-up-aral-sea-basin> accessed 11 February 2017.

[182] Glynis Sweeney, 'Fast Fashion Is The Second Dirtiest Industry In The World, Next To Big Oil' (*EcoWatch*, 2015) <https://www.ecowatch.com/fast-fashion-is-the-second-dirtiest-industry-in-the-world-next-to-big--1882083445.html> accessed 13 February 2017.

from the plants. This fact caused the air in the area to become carcinogenic and once a fruitful area for a couple of states became dangerous and negatively influential for the whole region and its inhabitants.[183]

As stated above, it is not only cotton cultivation, but also the process of dyeing and etc. is water intensive as well. That is why waterless dye technologies have been developed, but not widely employed due to their expensiveness.

Air

Although the prices of clothing fell low in the last decades due to inexpensive labour in developing countries which are the manufacturers of more than 60 per cent of world's clothing, the price is paid by an increase in greenhouse gas emissions produced by container ships which are noted as the transportation of 90 per cent of the garments. Such pollution is hardly justifiable because of following facts:

- Countries with the cheapest labour such as Bangladesh, Vietnam, Pakistan and the Philippines might not have the raw materials needed, so the materials need to be delivered to these countries from the USA, China or India.
- Container ship transportation is incomparably more frequent than it used to be due to the fact that fast fashion retailers need to stay relevant and bring the newest trends immediately and to renew its stock on weekly basis.[184]

Waste

In 2013, 15.1 million tons of textile (clothes and household textiles) were generated in the US, of which 12.8 million tons were discarded, according to the Environmental Protection Agency.[185] Generally, the consumption of clothes increased in the last couple

[183] Tansy Hoskins, 'Cotton Production Linked To Images Of The Dried Up Aral Sea Basin' [2014] *The Guardian* <https://www.theguardian.com/sustainable-business/sustainable-fashion-blog/2014/oct/01/cotton-production-linked-to-images-of-the-dried-up-aral-sea-basin> accessed 11 February 2017.

[184] Glynis Sweeney, 'Fast Fashion Is The Second Dirtiest Industry In The World, Next To Big Oil' (*EcoWatch*, 2015) <https://www.ecowatch.com/fast-fashion-is-the-second-dirtiest-industry-in-the-world-next-to-big--1882083445.html> accessed 13 February 2017.

[185] *Advancing Sustainable Materials Management: Facts And Figures 2013* (EPA 2015) <https://www.epa.gov/sites/production/files/2015-09/documents/2013_advncng_smm_rpt.pdf> accessed 15 February 2017.

of decades by 400 per cent due to the transformation of the fashion industry.[186] Consumers prefer to donate their no longer needed clothes to charity, to be distributed to people in need. Circa half of the donated clothes end in charitable second hand shops, and only 40 per cent of that is sold. The rest of the clothes ends on landfills or is delivered to the third world countries, where the demand over second hand clothes is smaller than the actual volume of the clothes supplied by the western world.[187] Fast fashion is and will be the originator of immense amounts of textile waste. This process is utterly intentional because the business of the fast fashion retailers is based on the immediate obsolescence of the clothes. If this is topped with the fact that fast fashion produces mostly not recyclable textiles, hand in hand with the constant rise of consumption, the fashion industry may become a serious threat.

Materials

The most problematic materials widely used are polyester and nylon. The reason for that is simple; nylon emits a greenhouse gas - nitrous oxide - during manufacturing. One pound of nitrous oxide's impact on warming the atmosphere is almost 300 times that one pound of carbon dioxide.[188] Both polyester and nylon are not biodegradable and what more, latest research revealed that around 1,900 individual fibres may be washed off of a single garment in the washing machine, end up in the oceans and thus affect the shores at first, and in time become a larger problem.[189]

Initiatives

The topics of ethical aspects in the fashion industry have already been described; however, the fashion industry and the latest social and environmental trends deserve a thorough overview and evaluation of their impact which is almost invisible in the public debate. Writers such as Elizabeth L. Cline who wrote Overdressed: The Shockingly

[186] 'Environmental Impact' (*The True Cost*, 2017) <https://truecostmovie.com/learn-more/environmental-impact/> accessed 14 February 2017.
[187] Alden Wicker, 'Fast Fashion Is Creating An Environmental Crisis' (*Newsweek*, 2016) <http://www.newsweek.com/2016/09/09/old-clothes-fashion-waste-crisis-494824.html> accessed 14 February 2017.
[188] 'Overview Of Greenhouse Gases | U.S. EPA' (*US EPA*, 2016) <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> accessed 15 February 2017.
[189] Mary C. O'Connor, 'Inside The Lonely Fight Against The Biggest Environmental Problem You've Never Heard Of' [2014] *The Guardian* <https://www.theguardian.com/sustainable-business/2014/oct/27/toxic-plastic-synthetic-microscopic-oceans-microbeads-microfibers-food-chain> accessed 18 February 2017.

High Cost of Cheap Fashion or documentarists such as Andrew Morgan who filmed The True Cost bring the much needed attention to this greatly complex problematic.

In 2013 as a response to the Rana Plaza disaster in Bangladesh, Carry Somers and Orsola de Castro established a not for profit global movement named Fashion Revolution engaging teams in 92 countries aiming to bring more transparency to the fashion industry, particularly focusing on supply chains. Fashion Revolution aims to familiarize the public with true meaning of purchasing a garment or an accessory, which is in fact purchasing the whole chain of values, which needs to be noted.

On 2 December 2015 Fashion Revolution launched its first white paper for the European Year for Development "It's time for a Fashion Revolution" with the following agenda to be met by 2020:

- Transform the #whomademyclothes campaign launched in 2015 into an always present tool for customers to get real answers from fashion companies
- make workers and producers and their story more visible
- support consumers demanding fashion made in a sustainable and ethical way.[190]

As a response or an alternative to fast fashion the "sustainable fashion" or "eco fashion" emerged aiming to promote more environmentally friendly options in terms of used materials and low impact dyes and other manufacturing techniques employed. Fast fashion gave a rise to "slow fashion" movement which is based on lengthening the life of garments. The tool to persuade the consumers to slow down their consumption of clothes is seen in the creation of a cultural and emotional connection and emphasizing that quality is a better choice than quantity, particularly when consumers can buy quality garments manufactured in their location. Generally, the slow fashion brings a new perspective to fashion, which has been linked solely with pleasure until recently, in

[190] The year 2015 was designated the European Year for Development by the No 472/2014/EU with the motto "Our world, our dignity, our future". 'Fashion Revolution | European Year For Development' (*Europa.eu*, 2015) <https://europa.eu/eyd2015/en/fashion-revolution> accessed 19 February 2017.

highlighting responsibility and awareness of the consumers supporting the fast fashion way of life.[191]

b) Green Washing

Fashion companies are always on trend even in terms of beginning discussions about their substantial impact on the environment. In that context the concept of green washing employed by the fast fashion companies needs to be outlined.

Green washing denotes *"the promotion of the green-based environmental initiatives or images without the implementation of business practises that actually minimize environmental impact (or any of the other negative effects of fast fashion). This often includes misleading customers about the actual benefits of a product or practise through misleading advertising and/or unsubstantiated claims."*[192]

Examples of green washing may be seen in recycling, waste or chemicals reducing initiatives, sustainable collections, and launches of organic and natural lines of the fast fashion companies.

Undoubtedly, the fast fashion companies try to position themselves more favorably in the eyes of consumers. On one hand, these efforts may have some positive impact on the environment, for instance the ban of angora wool is very visible amongst the consumers of the fast fashion companies and has the externality in improvement of the angora rabbits' life. On the other hand, affirmation of ethical and green conduct may prevent consumers from critical analysis of their fast fashion company conduct, therefore prevent the desirable improvement of the entire situation.

In contrast, the luxury fashion companies actually try to improve their conduct and contribute to positive social and environmental changes. For instance, Kering the parent company to Gucci, Bottega Venetta, Saint Laurent, Balenciaga and etc, adopted the "2025 Strategy" to pair luxury and sustainability with the aim to place sustainability as

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[191] Kate Fletcher, 'Slow Fashion' (*The Ecologist*, 2007) <http://www.theecologist.org/green_green_living/clothing/269245/slow_fashion.html> accessed 17 February 2017.

[192] Julia Zerbo, 'Fast Fashion's Do-Good Initiatives? Don't Believe The Hype' (*The Fashion Law*, 2016) <http://www.thefashionlaw.com/home/fast-fashions-green-initiatives-dont-believe-the-hype?rq=environment> accessed 19 February 2017.

one of the core values of the fashion group.[193] Kering, as opposed to the fast fashion companies, employs sustainability as a business strategy rather than a marketing one, and sees it as a risk management approach. *"By integrating natural capital into our business we deliver financial, social and environmental value."*[194] The group aims to make the invisible impacts of business visible, quantifiable and comparable and confirms that resources can no longer be seen as infinite and externalities have to be dealt with, not ignored.

Kering also sets an example of honest reporting when its 2016 report admits, for instance that the goal of sourcing leather from responsible and verified sources that do not result in converting sensitive ecosystems into agricultural land was accomplished only by 64 per cent.[195] And generally, contributes to more transparency of the fashion industry for instance by adoption of its Environmental Profit & Loss (EP&L) tool and comprehensive strategy.[196]

[193] '2025 Strategy | Kering' (*Kering.com*, 2017) <http://www.kering.com/en/sustainability/2025-strategy> accessed 22 February 2017.
[194] 'WHY DEVELOP AN EP&L? | Kering' (*Kering.com*, 2017) <http://www.kering.com/en/sustainability/motivation> accessed 17 February 2017.
[195] Kate Abnett, 'Kering Goes Public With Sustainability Report, Revealing Progress And Pain Points' (*The Business of Fashion*, 2016) <https://www.businessoffashion.com/articles/bof-exclusive/bof-exclusive-kering-goes-public-with-sustainability-report-revealing-progress-and-pain-points> accessed 27 February 2017.
[196] 'Environmental P&L | Kering' (*Kering.com*, 2017) <http://www.kering.com/en/sustainability/epl> accessed 28 February 2017.

3 Fashion Intellectual Property – Design and Brand Protection

The fashion industry has been strongly linked with the intellectual property law since its outset. In fact, the vast majority of academic public believes that the intellectual property law is the core of the fashion law and other sub-fields are solely secondary. Although such assertion is true, the degree of importance given to intellectual property varies depending on the type of the fashion company. Whereas smaller fashion companies competing on price will have no substantial interest in protecting their intellectual property (if they have any), the luxury fashion companies will be in many cases existentially dependent on it.[197]

Bearing in mind that the fashion industry and its processes are miscellaneous, fashion industry products are characterised by immense diversity as well. From the initial sketches with the design of a garment through the technical drawing with specifications, to the final design with the labelled name on it. These subjects may be considered intellectual property worth protecting while certain criteria set forth by the law are met.

For the purposes of enlistment of the intellectual property forms of protection the basic fashion stratification needs to be provided.

Haute Couture	denotes exclusive clothing tailored to concrete person made from high quality, expensive fabrics and sewn by the most professional seamstresses with extreme attention to every aspect.[198] For instance Elie Saab.
Prêt-à-porter/ Ready-to-wear	denotes factory-made clothing sold as seen in standardized sizes made with faster construction techniques which returns a greater profit because of the higher availability and volume made. For instance Ralph Lauren.
High Street	denotes affordable for general public factory-made clothing from low quality materials and techniques by the least experienced factory

[197] Jimenez, Kolsun (no 2) 4.
[198] Although the term haute couture is highly over used, it is designation granted by the Ministry for Industry of the French Republic if the statutory requirements are met.

workers; mass produced.
For instance Topshop.

In this chapter, individual forms of protection granted by the law of the Czech Republic and the European Union will be outlined with a certain overlap to the law of the U.S. and the countries historically linked to fashion, while acknowledging their importance through presented selected cases which will be analysed to provide examples of fashion design protection in practise accordingly.

Forms of protection provided by intellectual property law are:

- Copyright
- Designs
- Trade Marks.

Notwithstanding the three main forms of protection of fashion design, there are more subjects to be protected by the intellectual property law in the fashion field, such as discoveries protected by patents and functional aspects of designers' inventions protected by utility models.

3.1 Patents

Patents represent a form of formal protection of inventions and grants an inventor exclusive right to use the invention.

3.1.1 Patents in the International Agreements

Inventions as inherent initiators of advances in technology are present from time immemorial and as such they have been the subject of numerous international agreements. The Paris Convention for the Protection of Industrial Property from 1883 (hereinafter referred to as "Paris Convention"), the Patent Cooperation Treaty from 1970 (hereinafter reffered to as "PCT") followed by the Strasbourg Agreement Concerning the International Patent Classification from 1979, the European Patent Convention from 1973 (hereinafter referred to as "EPC") and the Agreement on Trade-Related Aspects of Intellectual Property Rights from 1994 (hereinafter referred to as "TRIPS") are considered the primary sources of the contemporary patent law.

While the Paris Convention establishes an Union for the protection of industrial property where national treatment, priority right and mutual independence of patents in union states is granted, it is the TRIPS that provides that patentable subject matter may be any inventions, whether products or processes, in all fields of technology provided that they are new, involve an inventive step and are capable of industrial application. Moreover, Article 33 of the TRIPS provides that the term of protection shall not end before the expiration of the period of 20 years from the filing date. Considering that the TRIPS agreement is binding for every World Trade Organisation member state and parties bound by the TRIPS, the patentable subject matter and term is unified across the world.

Generally, international agreements focus on simplification and internationalization of patent proceedings. The PCT enables inventors to obtain patents in over 150 member states on grounds of one application submitted to the national office, where the invention will be examined in accordance with law of each particular state. Even despite the adoption of the EPC with the same objective, the unitary effect has been provided

later by the Regulation No 1257/2012 on Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection (hereinafter referred to as "UPP").

The European Union adopted three long awaited documents: UPP, Regulation No 1260/2012 on Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection with Regard to the Applicable Translation Arrangements and the Agreement on a Unified Patent Court, which has not yet come into effect.

3.1.2 Patents in the Czech Republic

The national law is represented by the Act No 527/1990 Coll., on Inventions and Improvement Proposals, as amended (hereinafter referred to as "Act on Inventions").[199] Section 3 Subsec 1 of the Act on Inventions provides that patent may be granted to an invention that is novel, is the result of an inventive step and is capable of industrial application. Also, it is provided that besides others, aesthetic creations are not inventions.

The application of an invention will be subject to a formal examination as well as a substantive examination by the national authority Úřad průmyslového vlastnictví (hereinafter referred to as "ÚPV"). The ÚPV will register only those inventions that meet the statutory criteria. Therefore, it is crucial whether the invention is novel – different from everything known to the day of priority right[200] and whether it is the result of an inventive step – which must be examined by a person "skilled in the art" (educated in the particular field of technology).[201]

3.1.3 Rights and Term

Pursuant to the Section 11 of the Act on Inventions, holder of the patent has the exclusive:

- right to use the invention
- right to grant consent to use by another person
- right to transfer the patent

[199] In Czech: Zákon č. 527/1990 Sb., o vynálezech a zlepšovacích návrzích, ve znění pozdějších předpisů.
[200] Vojtěch Chaloupek, Kateřina Hartvichová et al, *Patentový Zákon* (1st edn, C H Beck 2016) 24.
[201] Chaloupek (no 200) 40.

- right to conclude licensing contract.

The exclusive right enables the patent holder to prevent others not having his consent from:

- making, using, offering for sale, selling, storing or other disposal, or importing product patented for these purposes
- using, offering for sale, selling, storing, or importing for these purposes at least the product obtained directly by the patented process
- supplying or offering to supply any person other than the person entitled to exploit the patented invention with means relating to an essential element of that invention if it is obvious that those means are suitable and intended for putting said invention into effect exluding staple products.

The exclusive right is granted for the period of 20 years according to the Section 21of the Act on Inventions, without the possibility of renewal.

3.1.4 Utility Models

The Article 1 Subart 2 of the Paris Convention lists utility models as one of the objects of protection of industrial property alongside patents, industrial designs, trade marks, service marks, trade names, indications of source or appellations of origin. A chapter concerning utility models is included in the Patents chapter of this thesis by design.

Utility models are very similar to patents as they represent the right granted to an invention, which allows its holder to prevent others from commercially using the protected invention without their consent for a limited period of time, usually between 7 and 10 years without the possibility of renewal.

"In practice, protection for utility models is often sought for innovations of a rather incremental character which may not meet the patentability criteria."[202] This fact is also connected with the absence of the substantive examination by the national intellectual property offices; resulting in faster and cheaper registration process. On the

[202] 'Protecting Innovations By Utility Models' (*Wipo.int*, 2017) <http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm> accessed 1 March 2017.

other hand it also results in the possibility of easy cancellation of the registered utility model.

The Czech Republic is one of the rather few countries which recognise utility models. The Act No 478/1992 Coll., on Utility Models, as amended, provides that utility models protect technical solutions which are novel, capable of industrial application and are beyond a certain skill level, for the period of 4 years with the possibility of extension up to 10 years in total.[203]

3.1.5 Suitability for the Fashion Industry

Some say that fashion recycles itself; therefore it brings nothing new and just reapplies old ideas. However, many a fashion company is able to discover truly new products and exceptional processes which may be patentable. This is valid particularly in the field of new materials and fabrics. For instance, the company Suberis which patented innovative fabric made of cork.[204] Manufacturing processes need to be mentioned as well, for instance special dyeing by Novozymes, whose patent for "worn look" has spread across the fashion world through licences.[205]

Another product category in which improvements may reach the degree of "patentability" is the shoe subfield. Patents have been granted particularly to companies specialising in sportswear, for instance to special lacing systems or high performance fabrics.[206] Typically, the shoe category is challenging for designers, because one may create either a beautiful piece or a comfortable and functional one. Yet, there are companies trying to offer shoes which boast of both beauty and comfort at the same time. For instance, the Italian shoe maker Geox S.P.A. has acquired a patent for soles consisting of three breathable and waterproof components.[207] Speaking of comfort, the

[203] In Czech: Zákon č. 478/1992 Sb., o užitných vzorech, ve znění pozdějších předpisů.
[204] 'From Seamstress To International Sartorial Status' (*Wipo.int*, 2017) <http://www.wipo.int/ipadvantage/en/details.jsp?id=2667> accessed 1 March 2017.
[205] V. Vinod Sople, *Managing Intellectual Property* (3rd edn, PHI Learning Private Limited 2012) 305.
[206] Nike's lacing system registered under US8769844 B2 at the USPTO.
[207] 'Breathable Shoes: Branding Success Through Patenting' (*Wipo.int*, 2017) <http://www.wipo.int/ipadvantage/en/details.jsp?id=893> accessed 2 March 2017.

shapewear underwear Spanx Inc. has not only become a phenomenon of the last years but has also been granted a patent by the U.S. Patent and Trademark Office.[208]

Possibly the most famous utility patent of a fashion company was registered by the U.S. Patent and Trademark Office in 1873 as "improvement in fastening pocket-openings" and gained substantial popularity for its holders – Levi Strauss and Jacob Davis.[209] In recent times, the American designer Alexander Wang successfully registered his studs adorning the bottom of his popular handbag model Rocco by emphasising the specific grooves and circular channels on them, and was thus granted protection for 20 years.[210]

The above mentioned declares that there are still opportunities for repetitive fashion companies to invent something novel; however, the protection of fashion through patents will likely remain subsidiary.

3.2 Copyright

Copyright is one of the informal protection tools of works of authorship which grants the author of the work certain moral and proprietary rights. Copyright is granted automatically at the moment of work of authorship expression in any perceptible form without acknowledgement of any authority.

3.2.1 Copyright in the International Agreements

The copyright protection has been subject to a number of important international agreements such as the Berne Convention for the Protection of Literary and Artistic Works from 1886, as amended (hereinafter referred to as "Berne Convention") which set a guarantee of recognition of copyrights held by the citizens of Berne Convention signatory states and other minimum standards. As modern copyright laws are primarily

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[208] Boer Deng, 'Patent Style' (*Slate Magazine*, 2014) <http://www.slate.com/articles/technology/history_of_innovation/2014/05/the_thong_the_backless_bra_and_other_life_changing_fashion_patents.html> accessed 2 February 2017.

[209] José Blanco F. and others, *Clothing And Fashion* (ABC-CLIO 2015) 244.

[210] Véronique Dahan, 'How Design Patents Complement Trademarks In The Fashion Brands Armoury' [2014] *World Trademark Review* <http://www.worldtrademarkreview.com/Magazine/Issue/49/Features/How-design-patents-complement-trademarks-in-the-fashion-brands-armoury> accessed 3 February 2017.

considered treaties administered by the World Intellectual Property Organization (hereinafter referred to as "WIPO")[211] and the TRIPS administered by the World Trade Organization.[212] Thanks to the above mentioned international agreements, the copyright protection is guaranteed across the world with differences in concrete states which will be presented in selected cases from the fashion field.

Notwithstanding the international agreements, significant differences between the angloamerican "copyright" and the continental "droit d'auteur" conceptions are present. Whereas the continental law acknowledges author of the work by granting them moral rights and recognition that only an individual may be an author, the angloamerican law emphasizes the material value of the work which may be created even by a legal person and rights to it may be entirely alienated due to no moral rights granted to the author. This difference is also visible in the requirement of uniqueness of works in the continental law on one hand, and the requirement of mere effort without copying which is sufficient in the angloamerican law protecting "skill and labour" of the author, not necessarily his creativity on the other.[213]

Although the copyright is subject of the European Union law as well, the respective harmonising directives will not be mentioned due to their partial nature and the fact that the most important matter for the fashion field – the attributes of the work of authorship – is not covered by them.

3.2.2 Copyright in the Czech Republic

According to Section 2 Subsect 1 of the Act No 121/2000 Coll., on Copyright, as amended (hereinafter referred to as "Act on Copyright"),[214] the copyright is granted to the artistic or scientific work which is an unique result of an author's creative activity and is expressed in any perceptible form, inclusive of electronic form, permanently or temporarily regardless of its extent, purpose or importance. Among the examples of

[211] Particularly, the WIPO Copyright Treaty from 1996 and others with copyright subject matter from the total amount of 26 treaties on intellectual property.
[212] Tomáš Dobřichovský, *Moderní Trendy Práv K Duševnímu Vlastnictví* (Linde Praha 2004) 45.
[213] Pavel Koukal, *Souběh Ochrany Průmyslových Vzorů S Ochranou Autorskoprávní A Známkoprávní* (PRÁVNICKÁ FAKULTA MASARYKOVY UNIVERZITY 2007) <https://is.muni.cz/th/13672/pravf_d/Pavel_Koukal_disertace_soubeh_ochrany__prumyslovych_vzoru_s_ochranou_autorskopravni_a_znamkopravni.pdf> accessed 24 February 2017.
[214] In Czech: Zákon č. 121/2002 Sb., autorský zákon, ve znění pozdějších předpisů.

works of authorship in the statutory provision the works of applied arts are listed which represents the most frequent form of protection of design by copyright. Works of applied arts are generally works of fine arts which please the eye and satisfy daily needs at the same time. Artistic jewellery and textiles are denoted as works of applied arts.[215]

3.2.3 Rights and Term

Copyright protection arises in the moment of work of authorship expression in any perceptible form, therefore without any formal registration or acknowledgement of any authority. According to Section 10 of the Act on Copyright the author is granted exclusive moral rights and proprietary rights which have *erga omnes* effect.

In contrast with the US, which do not recognise the moral rights,[216] the continental law emphasizes the rights of the author for his "authorship" vesting in the listed rights during his life:

- right to decide about publication of the work of authorship
- right to appropriate authorship of the work (attribution right) and determine the manner in which it will be stated at the moment of publication and another use of the work
- right for inviolability of the work of authorship, particularly to grant permission to any alteration of the work of authorship
- right for work of authorship use in a manner un-diminishing the value of the work of authorship (integrity right) and right for control over such use.[217]

The proprietary rights are granted during the author's life and 70 years after their death and are divided into two categories. The first one is represented by the exclusive right to use the work of authorship and the second one is the other proprietary rights' category. The exclusive right to use the work comprises of:

- right of licensing the use
- right of derivative works creations

[215] Pavel Koukal, *Právní Ochrana Designu - Průmyslové Vzory, Autorská Díla* (Wolter Kluwer 2012) 97.
[216] Dobřichovský (no 209) 46.
[217] Section 11 of the Act on Copyright.

- right of reproduction
- right of distribution
- right of public performance
- right of display
- right of lease or lending and the right of communication to the public.

In case of infringement of the author's copyright, the Section 40 of the Act on Copyright grants particularly the right to prohibit the infringer from interference or jeopardizing, right to enforce elimination of consequences of such interference and right for reasonable satisfaction as well as right for damages or unjust enrichment.

3.2.4 Cases

Considering the fact that the Czech courts have not had the opportunity to determine whether the copyright is suitable for protecting products of the fashion field yet, the case law of countries historically linked to fashion will be outlined.

3.2.4.1 Yves Saint Laurent v. Louis Dreyfus[218]

This case represents victory of a fashion designer who carried the burden of making claims and held another fashion designer liable for copyright infringement.

Yves Saint Laurent

Ralph Lauren[219]

[218] Judgment of the Tribunal de Commerce de Paris in case Société Yves Saint Laurent Couture S.A. et al v. Société Louis Dreyfus Retail Management S.A. et al. E.C.C. 512 from 18 May 1994.

Ralph Lauren was selling long black tuxedo dresses made of wool for price equal to USD 1,000 each at his Paris boutique. When it came to the tuxedo dresses sale, Ralph Lauren as a well-known fashion designer acquired attention not only from his customers, but even from another fashion designer Yves Saint Laurent, the creator of "Le Smoking".

In 1966 Yves Saint Laurent created the very first tuxedo for women and named it Le Smoking. Although the 60s were the period of second wave feminism with broader issues for public debate such as sexuality, work conditions or reproductive rights after the goals of the first wave feminism like voting rights and property rights were achieved,[220] it was still controversial for a woman to wear trousers in public.[221] Despite the fact that first acceptance of the Yves Saint Laurent collection "Pop Art" where Le Smoking was introduced was rather half-hearted, many celebrities such as Catherine Deneuve or Liza Minnelli proved that Le Smoking was more than spot on.[222]

Le Smoking was created as an alternative to the classic little black dress not as a product of fashion but as a product of style of its wearer. More acclaim and popularity was gained in 1975 when the famous photographer Helmut Newton shot a model wearing Le Smoking paired with a white blouse and black stilettos on a Parisian street. Some believe that the photography made Le Smoking iconic, however, the iconic nature rather vests in the powerful message of the tuxedo – "if a man can wear this, so can I", which is still relevant up to this day because of its empowerment of women who are more than objects to be looked at in feminine dresses.[223]

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[219] Michele Woods and Miyuki Monroig, *Fashion Design And Copyright In The U.S. And EU* (WIPO 2015) <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf> accessed 6 March 2017.

[220] Elinor Burkett, 'Women's Movement | Political And Social Movement' (*Encyclopedia Britannica*, 2016) <https://www.britannica.com/topic/womens-movement> accessed 11 March 2017.

[221] Woman wearing trouser in public was controversial despite the fact that wide trousers were worn before, by woman during Second World War when working in traditionally male jobs. Eleanor Dunne, 'SEVEN WONDERS: HOW COCO CHANEL CHANGED THE COURSE OF WOMEN'S FASHION – Wonderland' (*Wonderland*, 2013) <https://www.wonderlandmagazine.com/2013/09/04/seven-wonders-how-coco-chanel-changed-the-course-of-womens-fashion/> accessed 14 March 2017.

[222] Nicole Kliest, '5 Facts You Never Knew About YSL's Le Smoking Suit' (*WhoWhatWear*, 2015) <http://www.whowhatwear.co.uk/yves-saint-laurent-le-smoking-suit/slide10> accessed 7 March 2017.

[223] Tamsin Blanchard, 'Le Smoking' (*The Independent*, 1996) <http://www.independent.co.uk/arts-entertainment/le-smoking-1330731.html> accessed 22 March 2017.

"Le Smoking became such an icon that the brand ensured that some manifestation of it was included in every subsequent fashion collection, continuing up to present day with the YSL's current head designer, Stefano Pilati. Over the years, the tuxedo suit has reappeared in a huge variety of guises and fabrics: reworked as a dress or trench coat, given a bolero in place of a jacket and shorts instead of trousers, incarnated in velvet, silk or leather."[224]

With regard to the above mentioned, it is no surprise that the Yves Saint Laurent put an immense effort into the protection of the tuxedo and its variations as well, especially when we consider that Le Smoking was a part of the haute couture collection costing USD 15,000. When Yves Saint Laurent discovered that a less expensive copy is sold in a nearby Ralph Lauren boutique, it is clear that a suit must be filed to protect the integral and iconic part of the Yves Saint Laurent brand, because every time a work is copied, its value diminishes; not to mention that clientele sees such apparel everywhere which results in the loss of its interest.

"Because of the infringement, the haute couture model is said to have been cheapened by reproduction as a ready-to-wear garment, albeit in the luxury range. This very original model is a "beacon" model whose haute couture customers are up-to date with the very latest fashions and must have been aware of the popularization of the model because of its publications in the international and national press by the PRL Group. The infringement of YSL's property right is all the more serious in that haute couture houses only make "original" models which are not marketed en masse. The infringement of the mark is significant. Customers for luxury ready-to-wear clothes do not patronize haute couture, whereas haute couture customers are quite prepared to buy luxury ready-to-wear items."[225]

In May 1996 French Tribunal de Commerce adjudicated that Ralph Lauren proceeded contrary to honest practises and infringed the Yves Saint Laurent copyrighted tuxedo dress introduced in 1970 as Le Smoking variation, and ordered Ralph Lauren to pay

[224] Estella Shardlow, 'How Yves Saint Laurent Revolutionized Women's Fashion By Popularizing The "Le Smoking" Suit' (*Business Insider*, 2011) <http://www.businessinsider.com/ysls-greatest-fashion-hits-2011-8> accessed 23 March 2017.
[225] Jimenez, Kolsun (no 2) 367.

USD 395,090.[226] In other words, the court stated that the apparel design meets the criteria of the work of authorship according to Art. L112-1 of the Act No. 92-597 Code de la Propriété Intellectuelle (hereinafter referred to as "French Act on Copyright"). Thus the fashion design of the tuxedo dress was denoted as original and distinctive according to Art. L112-2 of the French Act on Copyright.

It is often said that France has been the centre of fashion since the 17th century thanks to King Louis XIV, who brought numerous artistic industries under the control of the royal court, which became unexaggeratedly a fashion arbiter. There is no surprise that France adopted a broad system of copyright which applied even to fashion apparel and accessories very early - in the 18th century.[227] France, as a member state of the European Union also took advantage of the Article 17 of the Directive 98/71/EC on the Legal Protection of Designs (hereinafter referred to as "Directive on Designs") and preserved its double protection of designs by both the copyright and the design right.

Just as fashion in France has a strong presence in the history, fashion design has an explicit presence in the French Act on Copyright as well:

Article L112-2 Subart. 14 of the French Act on Copyright states that one of the examples of protected "work of mind" (work of authorship) are creations of the seasonal industries: Creations of the seasonal industries of dress and articles of fashion. Industries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of articles of fashion

[226] The victory was depreciated by judgment of the same court in case of chairman of Yves Saint Laurent against Ralph Lauren who sued him for defamation for quote "*It's one thing to draw inspiration from another designer, it's quite another to rip off a design, line for line cut for cut, which Ralph Lauren did."* which cost USD 87,720. Amy M. Spindler, 'COMPANY NEWS; A Ruling By French Court Finds Copyright In A Design' [1994] *The New York Times* <http://www.nytimes.com/1994/05/19/business/company-news-a-ruling-by-french-court-finds-copyright-in-a-design.html> accessed 20 March 2017.

[227] In 1793 adopted Chénier Loi sur Droit de l'auter. 'Fashion Law Wiki / Copyright Protection Of Design In The U.S. v Europe' (*Fashionlawwiki.pbworks.com*, 2009) <http://fashionlawwiki.pbworks.com/w/page/11611162/Copyright%20Protection%20of%20Design%20in%20the%20US%20v%20Europe#footnote-18> accessed 24 March 2017.

and of footwear and the manufacture of fabrics for upholstery shall be deemed to be seasonal industries.[228]

3.2.4.2 Isabel Marant v. Mango France[229]

Isabel Marant "Scarlet" Boots

Mango boots[230]

As a part of the Fall 2013 collection of the French fashion designer Isabel Marant, the "Scarlet" boots became the "it" boots at the time they were presented on the catwalk by models and even by the designer herself. Moreover, the Scarlet boots' design was registered on 20 March 2013 as a community design n. 001365134-008 at the Office for Harmonization in the Internal Market Office (today named European Union Intellectual Property Office (hereinafter referred to as "EUIPO") for footwear. In response to their growing popularity, the fast fashion giant Mango launched their wedge boots very similar to the Scarlet boots to benefit from their popularity. Isabel Marant as a vocal

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228 *„Les créations des industries saisonnières de l'habillement et de la parure. Sont réputées industries saisonnières de l'habillement et de la parure les industries qui, en raison des exigences de la mode, renouvellent fréquemment la forme de leurs produits, et notamment la couture, la fourrure, la lingerie, la broderie, la mode, la chaussure, la ganterie, la maroquinerie, la fabrique de tissus de haute nouveauté ou spéciaux à la haute couture, les productions des paruriers et des bottiers et les fabriques de tissus d'ameublement."*

229 Judgment of the Tribunal de Grande Instance de Paris in case Isabel Marant, IM Production et Isabel Marant v. Mango France, Punto FA et Mango-On line n. 2013/16593 from 25 March 2016.

230 'Isabel Marant Victorious In Mango Copying Case, Sheds Light On U.S. Copyright Deficiencies' (*The Fashion Law*, 2016) <http://www.thefashionlaw.com/home/isabel-marant-victorious-in-mango-copying-case-sheds-light-on-us-copyright-deficiencies> accessed 25 March 2016.

opponent of widely spread trends and counterfeits filed a suit claiming copyright infringement by Mango.

Tribunal de grande instance de Paris stated that there is a point in the Mango claim that the Scarlet boots lack originality in terms of the wedge shape being common and usage of two different materials as well. On the other hand, the Tribunal concluded that there has not been any type of shoe with combination of all these elements before the launch of the Scarlet boots and highlighted that the conjunction of these pre-existing elements was a result of Isabel Marant's choice, thus the designer created a novel shoe design worth protecting.[231]

As the Mango boots were found having an overall visual impression of the Scarlet boots, the Tribunal awarded Isabel Marant EUR 37,800 in damages suffered by sale in France from the total of EUR 350,000 claimed by the designer.

However, it may seem that the French Act on Copyright may serve the needs of fashion designers well and French courts are aware of their artistic and economic importance, the protection is always provided only to original works of art. If the design is considered commonplace, it would not be protected by the copyright even in France.[232]

[231] 'Isabel Marant, IM Production Et Isabel Marant Diffusion v. Mango France, Punto FA Et Mango-On Line, Jugement Du 25 Mars 2016' (*Legalis.net*, 2017) <https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-3eme-ch-3eme-sec-jugement-du-25-mars-2016/> accessed 19 March 2017.
[232] Judgment of the Cour d'appel de Paris in case Céline v. Zara France 2012/04542 from 27 February 2013. Judgment of the Cour d'appeal de Paris in case Vanessa Bruno 2011/09133 v. Zara France from 17 October 2012.

3.2.4.3 Tecnica v. Anniel Anouk[233]

On 12 July 2016 the specialized intellectual property section of the Tribunal of Milan ruled that industrial design may enjoy copyright protection if it has an artistic value.

Tecnica "Moon Boots"[234]

Anniel Anouk snow boots[235]

The Italian business company Tecnica Group SPA created distinctive snow boots (so called après-ski boots) inspired by the U.S. astronauts' boots and named the model "Moon Boots" more than 40 years ago. Moon Boots at the time of their market launch brought novelty into the concept of snow boots and thanks to their inherent aesthetic appeal they have become iconic not only in Italy but also worldwide.

As soon as the Tecnica Group SPA discovered that similar boots are sold as snow boots by Anniel Anouk, the Tecnica Group SPA filed a suit against the producer and the distributor of the mentioned "Anouk Boots" for alleged copyright infringement, infringement of the registered community design and unfair competition as well.

In accordance with Article 17 of the Directive on Designs, Italy (so as France and the Czech Republic) remains double protection of designs by design patents on one hand

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233 Judgment of the Tribunale di Milano in case TECNICA GROUP S.p.A v. GRUPPO ANNIEL SNC DI SIMEONI ANNA & C., ANNIEL SRL and GRUPPO COIN S.p.A N. 70313/2013 R.G. from 12 July 2016.

234 'MOON BOOTS Delux Glitter Moon Boot' (*Polyvore*, 2017) <https://www.polyvore.com/moon_boots_delux_glitter_moon/thing?id=45185102> accessed 28 February 2017.

235 'Anniel Anouk Snow Boots Suede' (*Shoe on the Cake*, 2017) <http://www.shoeonthecake.com/anniel-anouk-snowboots-suede-xml-350_373-1316.html> accessed 27 March 2017.

and copyright on the other, which is declared in Article 2 Subart 10 of the Act. No. 633 of 22 April Copyright Act, as amended. Therefore, the Milan Tribunal had to determine whether the Moon Boots meet the legal criteria to be a work of authorship:

- a particular degree of creativity
- novelty
- the work's externalization
- affiliation to art or culture.[236]

The Milan Tribunal stated that the importance of the artistic value may be ascertained if the products receive national or worldwide awards or accolades, publications in monographies on contemporary design, popularity or generally broad acceptance by the public over the years of their existence. The main argument taken into account vested in the fact that in 2000 Moon Boots were selected and exhibited at the Louvre Museum of Paris as one of the 100 most significant design icons of the 20th century.[237] The Milan Tribunal then declared that the Moon Boots meet the criteria of creativity and artistic value and found the snow boots by Anniel Anouk counterfeits, as they present all the creative features of the Moon Boots apart from the reduced height and two eyelets instead of three. The Milan Tribunal stressed the claim that the shape of the Moon Boots is the public domain is false because at the time of the Moon Boots' launch, their shape and general design were pure novelty and since then their owner has been taking appropriate actions against any counterfeits.

Without determining of infringement of Tecnica Group SPA's community design or unfair competition by the defendants, the Milan Tribunal ordered the defendants not to further market the snow boots in question and set a fine equal to EUR 250 for each pair for the copyright infringement with further proceedings regarding assessment of the damages.

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[236] Salvatore Sica and Virgilio D'Antonio, *THE BALANCE OF COPYRIGHT IN ITALIAN NATIONAL LAW* (2017) <http://www.comparazionedirittocivile.it/prova/files/sica_balance.pdf> accessed 26 March 2017.

[237] As it was the most highligted argument, it received critique based on the fact that exhibitions are frequently sponsored or the final selection of the items is result of lobbying, thus a criterion of auctioning at art sales is more preferable. 'Industrial Design Works: Exhibition In Museums As Proof Of Special Artistic Merit?' (*Iplens.org*, 2016) <https://iplens.org/2016/09/21/industrial-design-works-exhibition-in-museums-as-proof-of-special-artistic-merit/> accessed 30 March 2017./

3.2.4.4 Varsity Brands v. Star Athletica[238]

Star Athletica, L.L.C. v. Varsity Brands, INC. decided on 22 March 2017 by the Supreme Court of the United States has a revolutionary potential in the U.S. context of the copyright protection of fashion designs in general.

Varsity Brands designs

Star Athletica design[239]

The U.S. copyright law is codified in the Act for the General Revision of the Copyright Law, as amended (hereinafter referred to as "US Act on Copyright") and provides that the copyright protects original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived,

[238] Judgment of the Supreme Court of the United States in case Star Athletica, L.L.C. v. Varsity Brands, INC. et al No 15-866 from 22 March 2017.

[239] Shrutih Tewarie, 'Can I Get A C-O-P-Y-R-I-G-H-T? Sixth Circuit Holds Cheerleading Uniform Designs Copyrightable | Trademark And Copyright Law' (*Trademarkandcopyrightlawblog.com*, 2015) <http://www.trademarkandcopyrightlawblog.com/2015/10/can-i-get-a-c-o-p-y-r-i-g-h-t-sixth-circuit-holds-cheerleading-uniform-designs-copyrightable/> accessed 31 March 2017.

reproduced, or otherwise communicated directly or with the aid of a machine or a device. One of the categories of works of authorship according to Section 103 Subsect a) par 5 of the U.S. Act on Copyright is represented by pictorial, graphic, and sculptural works (also referred to as "PGS category"). The PGS category is the one that may serve as protection for fashion designs. As the Congress of the U.S. provided further definition of the PGS category in the Section 101 of the Act on Copyright, below mentioned, the fashion designs are protectable by copyright only if they can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article. This is referred to as the "doctrine of separability".

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[240]

From the outset, fashion items were classified as useful and therefore not eligible for copyright protection. However, changes have been initiated by the decision of the Supreme Court of the U.S. in Mazer v. Stein 74 S. Ct 460 (1954), which extended copyright protection to commercial products. In the course of time, the copyright has been extended by judge made law to jewellery and fabric designs by the U.S. Court of Appeals in Peter Pan Fabrics, Inc. v. Martin Weiner Corp. 274 F.2d 487 (1960) including lace in Eve of Milady v. Impression Bridal decided by the U.S. District Court for the Southern District of New York 957 F. Supp. 484 (1997). In Kieselstein-Cord v. Accessories by Pearl, Inc. U.S. Court of Appeals for the Second Circuit 632 F.2d 989 (1980) the court stated that the primary ornamental aspect of belt buckles is conceptually separable from their subsidiary utilitarian function if they rose to the level

[240] U.S. Office, 'Chapter 1: Subject Matter And Scope Of Copyright - Circular 92 | U.S. Copyright Office' (*Copyright.gov*) <https://www.copyright.gov/title17/92chap1.html> accessed 31 March 2017.

of "creative act", as in this case in which two extraordinary belt buckles were considered jewellery, which is subject to copyright.[241]

The Varsity Brand Inc. v. Star Athletica L.L.C. decision is crucial in terms of that the court determined the circumstances in which it is possible to separate the artistic work from the functional product, in this case cheerleading uniforms. Varsity Brands Inc., the dominant U.S. maker of cheerleader uniforms, filed a suit against its smaller competitor Star Athletica L.L.C. for infringement of their 5 designs (from the total amount exceeding 200 registered and copyrighted designs).[242] The Varsity Brand Inc. had to challenge the following strong arguments of the Star Athletica L.L.C.:

- that the chevron, stripes and other visual elements are utilitarian in the case of cheerleading uniforms because the result of their separation would be a plain outfit with no signalisation of a cheerleader (or her team)
- that the disputed chevron, stripes and other visual elements would create a picture of a cheerleading uniform on paper or canvas, not a work of authorship, if separated.

The Supreme Court of the United States ruled that surface decoration such as chevron, stripes and other visual elements are under the PGS category and are separable from the uniform and applicable to other medium such as canvas, paper etc. which would not replicate the uniform itself, however, would result in a stand-alone work of authorship; therefore, copyrightable.

Despite contradictory reactions, including dissenting judges, the decision of the Supreme Court of the United States is based on rigorous application of conclusions set in Mazer v. Stein that the design is eligible for copyright if it is copyrightable as a (rather conceptually) stand-alone pictorial, graphic or sculptural work, even if created first as a part of an useful article.

[241] Jimenez, Kolsun (no 2) 68.
[242] Although the copyright is of informal basis, Section 412 of the U.S. Act on Copyright provides that if the work of authorship is not registered in the U.S. Copyright Office, statutory damages and attorney's fees will not be awarded in case of infringement suit.

3.2.5 Suitability for the Fashion Industry

A work of authorship must meet the criterion of artistic value which is derived from Section 11 Subsect 3 of the Act on Copyright. From the fashion point of view, it is rather problematic for fashion designs that the Act on Copyright is based on statistic uniqueness which implies that two identical works of authorship created independently on each other cannot exist because if they did, one of them would be the original and the other one would be a copy.[243] Although the copyright may represent useful tool providing protection to fashion designs within a generously long period, its primary purpose is to encourage the production of creative works of authorship that will enrich society and stimulate the perception of beauty around, and the protection of property interests of the authors is just secondary.[244] The copyright may serve suitably only to works of authorship characterised by their uniqueness and a high level of creativity, in other words, works deserving protection for their artistic value. On the other hand, authors of routine works absenting such value are undeserving of informal and free of charge protection by copyright (because there is no aesthetic or scientific value to protect in the name of public) but solely the interest of the owner. In such case, the owner should invest in protection through designs which only need to meet the criterion of distinctiveness, not the artistic value.[245] The criterion of artistic value will be certainly met in the case of haute couture works, which are widely considered art. As the recent cases prove the criterion of novelty and uniqueness would be the main determinant for granting the copyright protection; therefore, it is also applicable to products from the ready-to-wear category.

3.3 Designs

Industrial designs are said to represent a link between the world of arts and the world of technology, and combine elements of the works of authorship and patents which provide their holder formal protection through registration of their design at state authority.

[243] Helena Chaloupková and Petr Holý, *Autorský Zákon* (4th edn, CH Beck 2012) 3.
[244] Jimenez, Kolsun (no 2) 51.
[245] Koukal (no 211) 100.

3.3.1 Industrial Designs in the International Agreements

The Article 1 Subart 2 of the Paris Convention lists industrial designs as one of the objects of protection of industrial property alongside patents, utility models, trade marks, service marks, trade names, indications of source or appellations of origin. The industrial designs' nature and international agreements mostly disregarding them resulted in different definitions in the states' legislation and varying protection.

Although the Article 5quinquies of the Paris Convention provides that the industrial designs shall be protected in every signatory state of the Paris Convention union, the form of protection is subject to the concrete state decision whether adopt industrial design protection *sui generis* or protect designs by other industrial property law or copyright. The states' obligation for protection of the industrial designs is expanded in the Article 2 Subart 7 of the Berne Convention which states that works protected in the country of origin solely as designs and models shall be entitled in another country of the Berne Convention union only to such special protection as is granted in that country to designs and models, however, if no such special protection is granted in that country such works shall be protected as artistic works. According to this provision the situation when one concrete design may be protected as registered industrial design in one state, as work of applied arts in the second state and as work of authorship protected by copyright may occur.[246]

The requirements for protection of industrial designs have been set afterwards by the TRIPS. Article 25 Subpar 1 of the TRIPS states that the WTO member states shall provide for the protection of independently created industrial designs that are new or original. Whereas the design might be required to significantly differ from known designs or combinations of known design features, as well as not be dictated essentially by technical or functional considerations. Also, the Article 25 Subart of the TRIPS provides that each member state shall ensure that the requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such

[246] Koukal (no 211) 30.

protection which may be met through provision of protection through industrial design law or copyright law.

For the purposes of simplification of the industrial design registration through a single application, the Hague Agreement Concerning the International Deposit of Industrial Designs was signed in 1925. The so called Hague system, despite its ideas proved to be problematic due to various reasons for many states. The Geneva Act amendment among other things allowed international organisations to become member states which resulted in signature by the European Union in 2008. Moreover, it is believed that the European Union membership is the reason for regained popularity of the Hague system whose future was uncertain due to the adoption of the community design by the European Union in 2002.[247]

In connection with industrial designs the Locarno Agreement Establishing an International Classification for Industrial Designs concluded in 1968 (hereinafter referred to as "Locarno Agreement") ought to be mentioned. The Locarno Agreement established a system of classifying goods for the purpose of registration of industrial designs through thirty-two classes of goods. The Locarno classification is applied in 54 member states and by other office such as EUIPO of the Benelux Office for Intellectual Property.[248]

3.3.2 Industrial Designs in the European Union

Apart from the above mentioned international agreements which only determined the basics of the industrial designs' protection, the harmonization of the industrial design law has been initiated in the European Union by the adoption of the Directive on Designs. The Directive on Designs denotes industrial designs as "designs" and harmonises their definition as the appearance of the whole or a part of a product resulting from the features of, in particular, lines, contours, colours, shapes, texture and/or materials of the product itself and/or its ornamentation whereas the features of appearance which are solely dictated by its technical function are not protected by the design right. Member states of the European Union must protect designs to the extent

[247] Koukal (no 211) 34.
[248] 'WIPO – Locarno Classification' (*Wipo.int*, 2017) <http://www.wipo.int/classifications/locarno/en/faq.html> accessed 8 April 2017.

that it is new and has individual character, therefore the design is not identical (differs in substantial details) and 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 the date of filing of the application for registration.

As almost revolutionary in the field of industrial design law is considered the Regulation No 6/2002 on Community Designs from 2001 (hereinafter referred to as "Regulation on Community Designs") which implements an unified system for obtaining a community design to which uniform protection is given with uniform effect throughout the European Union territory. The Regulation on Community Designs defines a design and lays down protection for the period of 5 years with 5 years' renewal period up to the total of 25 years of protection from the date of filing of an application for registration at EUIPO in line with the Directive on Designs.

In general, fashion articles may be protected as community designs if they meet the novelty and individual character requirements. Considering the short-lived nature of most of the fashion products, for which the registration process may last longer than their desirability and sale, the unregistered community design protection may serve the fashion designs better. The fashion design may be protected as an unregistered community design (hereinafter referred to as "UCD") if there is no identical design (different in substantial details) and the overall impression it produces on the informed user differs from the overall impression produced on such user by any design which has been made available to the public before the date on which the design for which protection is claimed has first been made available to the public.

The Regulation on Community Designs implements protection of UCD for the period of 3 years, however, solely against the so called "dead copies". The holder of the registered community design is granted the exclusive right to use the design and prevent any third party not having his consent from using it, the holder of the UCD on the other hand is granted the right to prevent such use only if it is a result of copying the protected design. Moreover, the holder of the UCD must successfully prove that the designer of the dead copy must have been familiar with the UCD made available to the public by the holder, and that the copy is not a result of an independent work of

creation, otherwise it would not be considered copying, therefore not in breach of the UCD holder right.

3.3.3 Industrial Designs in the Czech Republic

The Czech Republic protects designs through industrial designs sui generis law represented by the Act No 207/2000 Coll., on Protection of Industrial Designs, as amended (hereinafter referred to as "Act on Protection of Industrial Designs"),[249] which implements provisions of the Directive on Designs. The Czech industrial design law is based on the registration principle with formal as well as substantive examination of the industrial design application which means that the national authority ÚPV would not register a design if it did not meet the statutory requirements.[250] Protection granted by the Act on Protection of Industrial designs does not interfere with the protection granted to the design in question through another intellectual property law. Since the Act on Protection does not grant protection to the unregistered industrial designs, holder of such design may seek protection typically through copyright.

3.3.4 Rights and Term

Pursuant to the Section 19 Subsec 1 of the Act on Protection of Industrial Designs holder of registered industrial design has the monopoly right over it from the date of filing the application for registration at the ÚPV, therefore also the following rights:

- to use the registered industrial design
- to prevent any third party not having his consent from using the registered industrial design
- to confer a consent to third party to use the registered industrial design
- to transfer the right to the registered industrial design.[251]

In case of unlawful interference with rights to the industrial design holder or the licensee or professional organizations may proceed according to the Act No 74/2006 Coll., on Enforcement of the Industrial Property, as amended (hereinafter referred to as

[249] In Czech: Zákon č. 207/2000 Sb., o ochraně průmyslových vzorů, ve znění pozdějších předpisů.
[250] Dobřichovský (no 209) 169.
[251] The Explanatory report to the Act on Protection of Industrial Designs.

"Act on Enforcement of Industrial Property Rights").[252] Alongside the rights for damages, appropriate satisfaction and unjust enrichment the Act on Enforcement of the Industrial Property Rights provides the following corrective measures:

- recall of the products whose manufacture or placement on the market or storage jeopardized or infringed the industrial property rights from the channels of commerce
- definitive removal or destruction of the products whose manufacture or placement on the market or storage jeopardized or infringed the industrial property rights from the channels of commerce
- recall or definitive removal or destruction of materials, tools and machines designed or used within process of jeopardizing or infringement of the industrial property rights.[253]

In line with the Directive on Designs the protection is given for the period of 5 years with 5 years' renewal period up to total 25 years of protection from the date of filing of an application for registration of the industrial design at the ÚPV.

3.3.5 Cases

The fashion industry is one of those sectors producing large numbers of possibly short-lived designs over short periods of time which find advantage in the unregistered designs. Although there had been countries protecting unregistered designs before, for instance the United Kingdom which protects unregistered designs for the period of fifteen years according to the provisions of the Copyright, Designs and Patents Act c 48 from 1988, as amended, the Regulation on Community Designs brought highly desirable protection through UCD into every European Union member state. Protection of the unregistered designs was entirely novel for instance in the Czech Republic and the Republic of Ireland.

[252] In Czech: Zákon č. 74/2006 Sb., o vymáhání práv z průmyslového vlastnictví, ve znění pozdějších předpisů.
[253] Section 4 and 5 of the Act on Protection of Industrial Property Rights which implements Directive 2004/48/EC on the Enforcement of the Intellectual Property Rights.

3.3.5.1 Karen Millen v. Dunnes[254]

In 2007 the British high street retailer Karen Millen filed a suit against the Irish retail chain Dunnes, which became the first case to be taken in the Republic of Ireland under the UCD.[255]

Karen Millen

Dunnes[256]

[254] Judgment of the Supreme Court of Ireland in case Karen Millen Fashions Ltd v. Dunnes Stores and Dunnes Stores (Limeric) Ltd. No. 55/08 from 2 April 2014.

[255] 'Dunnes Stores Found To Have Copied Designs' (*RTE.ie*, 2007) <https://www.rte.ie/news/2007/1221/97523-dunnes/> accessed 31 March 2017.

[256] Michele Woods and Miyuki Monroig, Fashion Design And Copyright In The U.S. And EU (WIPO 2015) <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf> accessed 6 March 2017.

In 2006 Dunnes wilfully copied three designs of Karen Millen introduced in late 2005 and sold in the Republic of Ireland – a black knit top and two colour versions of a striped shirt with one pocket (in blue and stone brown). Identical designs were sold by Dunnes under its sub-brand SAVIDA across the country. Sale of the designs in question came to the attention of Karen Millen who sought damages and injunction at the High Court in 2007 reasoned by the Dunnes's infringement of the Karen Millen UCD of the designs in question. The Supreme Court following Dunnes's appeal against the High Court judgment siding with Karen Millen referred questions to the Court of Justice of the European Union (hereinafter referred to as "CJEU") for a preliminary ruling:

1. In consideration of the individual character of a design which is claimed to be protected as UCD, is the overall impression it produces on the informed user, within the meaning of Article 6 of the Regulation on Community Designs, to be considered by reference to whether it differs from the overall impression produced on such user by:
    a. any individual design which has previously been made available to the public, or
    b. any combination of known design features from more than one such earlier design?
2. Is community design court obliged to treat UCD as valid for the purposes of Article 85 Subart 2 of the Regulation on Community Designs where the right holder merely indicates what constitutes the individual character of the design or is the right holder obliged to prove that the design has individual character in accordance with Article 6 of that regulation?[257]

The CJEU provided for the first question:

"In those circumstances, the answer to the first question is that Article 6 of Regulation No 6/2002 must be interpreted as meaning that, in order for a design to be considered to have individual character, the overall impression which that design produces on the informed user must be different from that produced on such a user not by a combination

[257] Judgment of the CJEU (Second Chamber) C-345/13 from 19 June 2014.

of features taken in isolation and drawn from a number of earlier designs, but by one or more earlier designs, taken individually."[258]

and stressed that provision of the Article 25 of the TRIPS *"Member states may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features"* is worded in optional terms and was not employed therefore the novel character or originality of a design is not subject to assessment in comparison with such combinations.

Moreover, it was ruled that the right holder does not need to prove the individual character of his UCD, however, he is obliged to indicate what constitutes the individual character of that design, what in his view, are the elements of the design concerned which give it its individual character. Therefore, the CJEU reduced the evidential burden of the right holders and supported presumption of the UCD validity.[259]

Subsequently, the Supreme Court rejected Dunnes's appeal who then admitted to copying the Karen Millen designs from the outset and stated only that the designs cannot be considered as UCD because they lack individual character, and uphold the decision of the High Court.

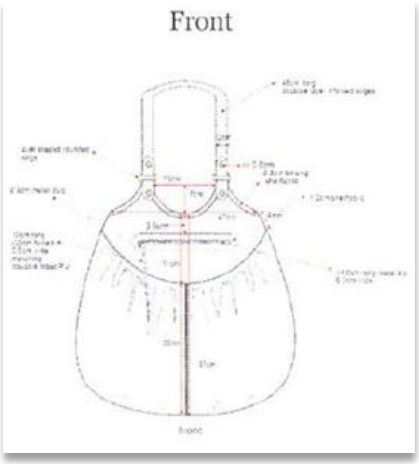
[258] Judgment of the CJEU (Second Chamber) C-345/13 from 19 June 2014.

[259] Leighton Cassidy and Richard Hing, 'Karen Millen Fashions Ltd V. Dunnes Stores, Dunnes Stores (Limerick) Ltd: Clarifying The Assessment Of Individual Character In EU Designs - Snippets Fieldfisher' (*Intellectualpropertyblog.fieldfisher.com*, 2016) <http://intellectualpropertyblog.fieldfisher.com/2016/karen-millen-fashions-ltd-v-dunnes-stores-dunnes-stores-limerick-ltd-clarifying-the-assessment-of-individual-character-in-eu-designs/> accessed 14 May 2017.

3.3.5.2 H&M v. Yves Saint Laurent[260]

Although the CJEU conclusions in Karen Millen v. Dunnes are fully applicable to the registered community designs as well, there have been efforts to challenge the conception of the required individual character of registered designs in the following years.

Yves Saint Laurent



Earlier design[261]

In 2009 H&M filed application for declaration of invalidity of the Yves Saint Laurent handbag design registered under the number 613294-0002 at EUIPO in 30 October 2006 reasoned by the lack of individual character required by the Article 6 of the Directive on Designs.

CJEU provided that assessment of the individual character is subject to a four-stage examination which consists of deciding:

1. sector to which products in which the design is intended to be incorporated, or to which it is intended to be applied, belong
2. 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

[260] Judgment of the General Court of the European Union in case H&M Hennes & Mauritz v. European Union Intellectual Property Office T-526/13 from 10 September 2015.

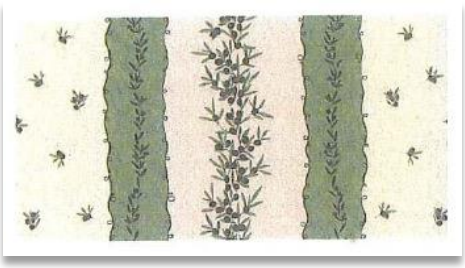
[261] 'H&M Hennes & Mauritz BV & Co. KG v. Office For Harmonisation In The Internal Market (Trade Marks And Designs) (OHIM)' (*Curia.europa.eu*, 2015) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=167263&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=998657> accessed 20 April 2017.

3. designer's degree of freedom in developing his design
4. outcome of the comparison of the designs at issues, taking into account the sector in question, the designer's degree of freedom and the overall impression produced on the informed user by the contested design and by any earlier design which has been made available to the public.

"In the case of the contested design, the Board of Appeal found that the impression produced would be that of a design characterised by classic lines and formal simplicity whereas, in the case of the earlier design, the impression would be that of a more "worked" bag, characterised by curves, the surface of which is adorned with ornamental motifs." Moreover, the CJEU pointed out that Yves Saint Laurent handbag is to be carried solely by hand and the earlier design is to be carried on the shoulder and concluded that the differences between the designs at issue are significant in contrast with similarities which are insignificant in the overall impression. Therefore, the Yves Saint Laurent handbag produced an overall impression different from that produced by the earlier design on the informed user which in this case is woman who is interested, as a possible user, in handbags. For this reason the H&M failed to contest the Yves Saint Laurent registered community design.

3.3.5.3 Prodeco Sarl v. AS[262]

Prodeco Sarl v. AS GmbH is an example of invalidation of a registered Community design for fabrics on the basis of pre-existing copyright granted in a European Union member state.



Prodeco Sarl fashion design

AS GmbH fashion design[263]

[262] Decision of the European Union Intellectual Property Office's Invalidity Division in case Prodeco Sarl v. AS GmbH from 2010.

On 29 July 2009 German company AS GmbH registered its Community design for fabrics at EUIPO. Another company Prodeco Sarl challenged the validity of this Community design claiming that owner of the fabric design in question is Prodeco Sarl, not its registrar AS GmbH. Moreover, according to Prodeco Sarl claim, the AS GmbH registered the fabric design in bad faith following seizure of its counterfeit fabrics imported from China. EUIPO based on submitted evidence consisting of:

- invoice from business company TEMPO regarding sale of the rights in the design of the following fabric to Prodeco
- contract concluded between designer and TEMPO on grant of the rights to use and reproduce the fabric design
- statement of the designer who created the fabric design
- decision of the Belgian Court of Appeal rejecting claims made by AS against the seizure of the counterfeit fabrics on basis of protection of the design in question by the Belgian copyright law

EUIPO declared the Community design invalid for constituting an unauthorized use of work protected under the copyright law of a European Union member state in accordance with Article 25 Subart 1 letter f) of the Regulation on Community Designs. EUIPO stated that pursuant to the French and Belgian copyright law the fabric design in question represent the applied arts which enjoys the same protection as work of authorship. Insomuch as the AS GmbH Community design had the same number, width and direction of the stripes, olive leaves patterns and their design, the EUIPO concluded that AS GmbH used the main features which constitute the originality of the work of Prodeco Sarl, thus infringed its author rights, and invalidated the Community design in question.[264]

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[263] *Intellectual Property Quarterly Newsletter January 2011* (Hogan Lovells 2011) <https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/ipnewsletterjanuary2011_pdf.pdf> accessed 23 May 2017.

[264] *Intellectual Property Quarterly Newsletter January 2011* (Hogan Lovells 2011) <https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/ipnewsletterjanuary2011_pdf.pdf> accessed 23 May 2017.

Prodeco Sarl fashion design

AS GmbH fashion design[265]

AS GmbH experienced the same defeat as in the above mentioned EUIPO proceedings with its other registered Community design n. 001595737-0013 which was invalidated on 15 July 2011.

3.3.6 Suitability for the Fashion Industry

Generally, registered designs are irreplaceable for fashion designs with a long term lifetime and utterly vital for iconic fashion items which went down the fashion history. In contrast to UCD, registered community designs provide its holder protection within period up to 25 years with a broader protection not only against dead copies. Unsurprisingly, the most famous designs are registered to preserve that level of protection. The EUIPO have registered iconic handbag designs such as the Lady Dior model introduced by Dior in 1995 and popularized by Lady Diana,[266] the Antigona model introduced by Givenchy in 2010 and still continuing to gain popularity[267] or iconic dress designs such as the Octavia model with the optical illusion produced by tricolour parts from Stella McCartney, one of the most copied dresses since its introduction by the actress Kate Winslet in 2011 during the Venice Film Festival.[268]

Presented Prodeco Sarl v. AS GmbH case perfectly presents the drawback of the registered community design which vests in the absence of a substantive examination. Successful registration of design confirms that the applicant met formal requirements, however, does not say any more about the registered community design itself. The registered community design may represent unfair competition move as in the

[265] Michele Woods and Miyuki Monroig, *Fashion Design And Copyright In The U.S. And EU* (WIPO 2015) <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf> accessed 6 March 2017.
[266] Community design No. 000058300-0002 registered at EUIPO on 30 July 2003.
[267] Community design No. 001685645-0001 registered at EUIPO on 23 March 2010.
[268] Community design No. 001946211-0001 registered at EUIPO on 11 November 2011.

mentioned case or may embody the risk of being contested by the EUIPO even after years of use (with possible rights enforcement) in proceeding initiated by competitor of the registered community design holder which may have an immense influence on the legal certainty of the design rights holder.[269]

Although there is not much reliable case law to be found, it seems that the Regulation on Community Designs serves the fashion companies for designs' protection appropriately. Generally, the UCD category is believed to be the main instrument for protection of fashion items without a lengthy and costly registration process. Short lived fashion items will likely be completely copied (to benefit from the current trend which needs to be preserved from blurring), which would fall within the UCD category. The long lived fashion items on the other hand will likely be altered in some way in pursuit of obtaining differences advocating its different overall impression. Undoubtedly, fashion companies should choose the protection through registered community design if the narrow protection lasting only 3 years as from the date on which the design was first made available to the public within the European Union is not sufficient.

Even if there is a relevant chance that a design would qualify for copyright protection, which was preferred in recent judgments over granting rights from registered designs, the registration of design will serve as a strong evidence of vigilant approach to protection of the brand's intellectual property and for this reason should not be disregarded.

Moreover, the European Union protection of fashion designs is frequently glorified by the advocates of protection of fashion designs in the U.S. who is being in contravention of its obligations arising out of the Berne Convention for absence of protection of fashion designs.[270] Although there is no protection of unregistered designs, fashion designers in the U.S. may protect their designs through design patents. Obtaining a design patent is a lengthy process because the Patent Office performs a substantive examination of the design and it may take up to 20 months to obtain the design patent. This implies that design patents will be sought after only by bigger fashion companies with resources and only for their key items sold at least for two seasons. It is clear that

[269] Dobřichovský (no 209) 169.
[270] Jimenez, Kolsun (no 2) 337.

the vast majority of fashion designs with no prospection of sale in the next season will not be protected due to this reason. Also, as problematic is considered that the respective design must be ornamental rather than useful because the functionality is bar for protectability.[271]

Pursuant to the Section 171 of the U.S. Patent Act – 35 USCS design patents protect only designs which are:

1. novel
2. ornamental
3. non-functional
4. non-obvious.

Although the design seeking protection must meet the statutory requirements, the design patents are spreading among the luxury fashion companies and their increase is expected to continue in the future.[272] Uncertain is the adoption of protection of short lived fashion designs in the US, however, it is likely that such designs would be rather covered by the copyright protection according to numerous previous attempts represented by bills,[273] for instance by Innovative Design Protection and Piracy Prevention Act from 2010 or Innovative Design Protection Act from 2012, than protection similar to the UCD.[274]

3.4 Trade Marks

Trade marks represent one of the formal protections of various types of signs through registration at state authority for a limited period of time.

[271] Jimenez, Kolsun (no 2) 312.
[272] Julia Zerbo, 'Currently Trending In Fashion: Design Patents' (*The Fashion Law*, 2016) <http://www.thefashionlaw.com/home/currently-trending-in-fashion-design-patents?rq=design%20patents> accessed 29 March 2017.
[273] Vicki Dallas 'The Opportunities of Fashion Law' in *Navigating Fashion Law: Leading Lawyers on Exploring the Trends, Cases, and Strategies of Fashion Law* (Inside the Minds, Mass.: Aspatore, Boston 2012) 85.
[274] Julia Zerbo, 'Copyright Legislation For Fashion Designs (Proposed)' (*The Fashion Law*, 2016) <http://www.thefashionlaw.com/learn/proposed-copyright-legislation-for-fashion-designs> accessed 30 March 2017.

3.4.1 Trade Marks in the International Agreements

Trade marks are one of the objects of protection of industrial property according to Article 1 Subart 2 of the Paris Convention from 1883. Although the definition of trade mark in international agreement was given in the years following it, the Paris Convention set out reasons for denial of registration or invalidation of trade marks from the outset of the international legislation, as follows:

- when they are of such nature as to infringe rights acquired by thirds parties in the country where protection is claimed,
- when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed,
- when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public.

In response to demand for territorial extension of trade marks protection the Madrid Agreement Concerning the International Registration of Marks was concluded in 1891 (hereinafter referred to as "Madrid Agreement"). Madrid Agreement along with Madrid Protocol concluded in 1989 create the so called Madrid system which allows the protection of a mark in member states selected by the applicant through one international registration with the possibility of transformation into national registrations in case of denial of protection in one of the selected states.[275]

In connection with trade marks the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks concluded in 1957 (hereinafter referred to as "Nice Agreement") needs to be mentioned. Nice Agreement has established a system of classifying goods and services for the

[275] Ladislav Jakl, *Národní, Mezinárodní A Regionální Systémy Ochrany Průmyslového Vlastnictví* (2nd edn, Metropolitan University Prague Press 2014) 300.

purpose of registration of trade marks through 45 classes of goods and services. The Nice classification is applied by around 150 offices in the world.[276]

As stated above, the protection of signs through trade marks had been the subject of numerous international agreements and through years the conception and classification of trade marks have become almost unified across the world. This state is the result of mainly the comprehensive provisions of the TRIPS from 1994 which is binding for almost every country in the world. The TRIPS is also the first international agreement including a definition of trade marks. The Article 15 Subart 1 of the TRIPS defines trade mark as any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings. Moreover, the TRIPS sets the possibility for its member states to make registrability of signs not inherently capable of distinguishing the relevant goods or services dependent on distinctiveness acquired through use, as well as the possibility to require the sign to be visually perceptible.

3.4.2 Trade Marks in the European Union

The European Union with regard to proclaimed persisting disparities contained in the trade mark law of the member states which may have impeded the free movement of goods and freedom to provide services and may distorted competition within the European market adopted harmonizing Directive 2008/95/EC to Approximate the Laws of the Member States Relating to the Trade Marks (hereinafter referred to as "Directive on Trade Marks"). The Article 2 of the Directive on Trade Marks provided the long awaited enumeration of signs of which a trade mark may consist of – any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging – provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings. With regard to the TRIPS, the Directive on Trade Marks states that

- a trade mark which is devoid of any distinctive character

[276] 'WIPO – Nice Classification' (*Wipo.int*, 2017) <http://www.wipo.int/classifications/nice/en/faq.html> accessed 5 June 2017.

- a trade mark which consists exclusively of signs or indications which serve to designate the kind, quality, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services
- a trade mark which consists exclusively of signs or indications which have become customary in the current language or in the bona fide established practises of the trade

shall not be refused registration or be declared invalid if it has acquired a distinctive character through use before the date of application for registration.

Directive on Trade Marks allows member states to provide broader protection to trade marks with reputation in terms of preventing all third parties from using it in the course of trade not only in relation to goods or services which are identical with those for which the trade mark is registered.

In order to implement a unified system for obtaining a community trade mark to which uniform protection for a period of 10 years with possible renewal of periods of 10 years is given with uniform effect through the European Union territory the Regulation No 207/2009 on the Community Trade Mark (hereinafter referred to as Regulation on Trade Marks“) was adopted.

Despite the enormous popularity of the community trade marks, some requirements became obsolete. *“This requirement of ‘graphic representability’ is out of date. It creates a great deal of legal uncertainty around the representation of certain non-traditional marks, such as mere sounds. In the latter case, representation by other than graphical means (e.g. by a sound file) may even be preferable to graphic representation, if it permits a more precise identification of the mark and thereby serves the aim of enhanced legal certainty. The proposed new definition does not restrict the permissible means of representation to graphic or visual representation but leaves the*

door open to register matter that can be represented by technological means offering satisfactory guarantees."[277]

The main problem for registration in terms of the definition of trade marks was embodied in the requirement of graphical representation.[278] In order to provide more flexibility and ensure greater legal certainty, the graphic representability is non present in the newly adopted European Union legislation – Directive 2015/2436 to Approximate the Laws of the Member States Relating to Trade Marks which came into effect on 12 January 2016 with transposition set on 14 January 2019 and Regulation No 2015/2424 amending Regulation on Trade Marks which comes into effect on 1 October 2017.[279] These changes may be revolutionary for fashion companies particularly for the protection of their perfumes through trade marks which has already been a subject of discussion in some national proceedings; which was impossible because of conclusions of the CJEU stated in Ralf Sieckmann v. Deutsches Patent und Markenamt case C-273/00 from 12 December 2002.[280]

3.4.3 Trade Marks in the Czech Republic

Trade mark law in the Czech Republic is represented by the Act No 441/2003 Coll., on Trade Marks, as amended (hereinafter referred to as "Act on Trade Marks").[281] The Act on Trade Marks fully implements the Directive on Trade Marks, therefore provides the same definition of trade mark (with additional expressly stated type - colour) and term.

[277] *Proposal For A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL To Approximate The Laws Of The Member States Relating To Trade Marks* (European Commission 2013) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0162&from=EN> accessed 29 April 2017.
[278] Catherine Seville, *EU Intellectual Property Law And Policy* (Edward Elgar 2010) 331.
[279] The new legislation includes the conclusions from the CJEU judgments in Libertel Groep BV v. Benelux-Merkenbureau C-104/01 from 6 May 2003 where declared that single colour may constitute a trade mark and Heidelberger Bauchemie C-49/02 from 24 June 2004 where declared the same for the combination of colours, and enlists the "colour" as one of the examples of trade marks.
[280] Judgment of the Supreme Court of Netherland in case Lancôme v. Kecofa C04/327HR from 16 June 2006.
[281] In Czech: zákon č. 441/2003 Sb., o ochranných známkách, ve znění pozdějších předpisů.

3.4.4 Rights and Term

According to the Article 8 of the Act on Trade Marks the holder of the trade mark registered at the ÚPV is entitled to use his trade mark with ®, mainly to prevent all third parties not having his consent from using:

- any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered
- any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark
- any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Czech Republic and in which use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trade mark.

Protection is given for the period of 10 years with possible renewal of periods of 10 years.

In case of unlawful interference with rights to the trade mark holder or the licensee or the professional organizations may proceed according to the Act on Enforcement of Industrial Property Rights which states that the holder of the infringed trade mark is entitled to damages, appropriate satisfaction, and that the holder may seek corrective measures such as recall of the product from market, definite removal or destruction of the products at court.[282]

Moreover, holder of the earlier trade mark which acquired a reputation in the Czech Republic or the European Union may oppose that trade mark which is identical with or similar to the earlier mark applied for shall not be registered even for goods or services which are not similar to those for which the earlier trade mark is registered, where use

[282] More in Chapter 3.2.3 Rights and Term hereof.

- would take unfair advantage of the distinctive character of the trade mark with reputation or
- would be detrimental to the distinctive character or the reputation of the earlier trade mark.

3.4.5 Cases

Trade marks, as opposed to fashion designs "do not come and go"; they are constantly present and connected with the fashion company itself, because they protect the brand names. This fact implies that trade marks are rather prone to be infringed by the competitors and for this reason the frequency of suits and intellectual offices proceedings is higher than in case of the earlier mentioned industrial property.

Successful registration of listed signs capable to form a trade mark does not seem complicated for fashion companies. For instance Louis Vuitton and Tiffany protect even their packaging through trade marks.[283] On the other hand, the real challenge for the fashion companies vests in proving the inherent distinctiveness or acquired one through use and proving the reputation.

The most relevant fashion companies, better yet, their trade marks, in most cases acquired reputation in the state of their provenance or in the European Union, even worldwide. With respect of the abovementioned legislation, trade marks of fashion companies would be entitled to broader protection of their marks in terms of protection of their marks even for goods or services which were not registered for, in order to prevent their mark from damage. Such protection of mere reputation may sound as a strong tool in the hands of fashion companies. However, from the available case law, on national level for instance Decision of the President of the ÚPV O-500184 from 18 March 2015 in PUMA SE case, it is clear that even a widely known fashion company cannot rely on its acquaintance with public and must provide sufficient evidence of its reputation closely antecedent of the respective proceeding about its opposition.

[283] Louis Vuitton orange box for accesorries registered on 24 April 2017 by EUIPO under No. 016174815, Tiffany egg blue box registered on 10 October 2005 by EUIPO under No. 000151985.

3.4.5.1 Christian Lacroix v. M. Christian Lacroix[284]

Christian Lacroix experienced just how difficult it is to prove the reputation of his registered trade mark in a recently decided suit against business company selling furniture under the sign "designed by Mr. Christian Lacroix" since 2011 when the suit was filed.[285]

Christian Lacroix experienced his heyday in 80s and 90s with his haute couture, however, sooner than later the haute couture line was terminated. Since then the Christian Lacroix trade mark was exploited through licensing outside of the state of its provenance, France, for lingerie, accessories of perfumes produced by the cosmetic company Avon.

The French Supreme Court held that Christian Lacroix no longer retains a strong reputation and cannot rely on its past reputation connected with his previous haute couture lines. The court concluded that because Christian Lacroix did not constantly nurture the reputation of his trade mark, therefore he is not entitled to oppose later trade mark used for different goods class.[286]

3.4.5.2 Nanu-nana v. Louis Vuitton[287]

Louis Vuitton is one of the fashion companies that vigilantly and rigorously protect their intellectual property through registrations at the intellectual property offices as well as through enforcement of their rights. Unsurprisingly, Louis Vuitton has registered its most popular designs as community trade marks at EUIPO, for instance:

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[284] Judgment of the Cour de Cassation in case Christian Lacroix, Société v. M. Christian Lacroix 14-28.232 from 8 February 2017.

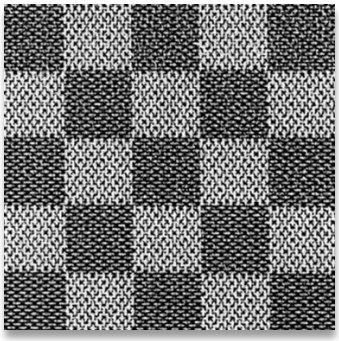
[285] Karine Disdier-Mikus and Nancy Larrieu, 'Demonstrating Reputation - A Long Winding Road For Trademark Owners | Insights | DLA Piper Global Law Firm' (*DLA Piper*, 2017) <https://www.dlapiper.com/en/dubai/insights/publications/2017/05/law-a-la-mode-inta-2017/demonstrating-reputation-trademark-owners/> accessed 24 May 2017.

[286] 'Société Christian Lacroix Vs. M. Christian X' (2017) <https://www.courdecassation.fr/jurisprudence_2/chambre_commerciale_574/205_8_36095.html> accessed 9 March 2017.

[287] Judgment of the General Court of the European Union in case Louis Vuitton Malletier SA. v. European Union Intellectual Property Office T-359 from 21 April 2015. Judgment of the General Court of the European Union in case Louis Vuitton Malletier SA. v. European Union Intellectual Property Office T-360 from 21 April 2015.

Louis Vuitton Monogram Canvas[288]

Louis Vuitton Epi Leather[289]



Louis Vuitton Damier[290]

In 2009 the German company Nanu-Nana filed an application for declaration of invalidity of two Louis Vuitton trade marks for the Damier design reasoned by the descriptive nature of the contested marks and the absence of any distinctive character, therefore based on the absolute grounds for refusal according to the Article 7 of the Regulation on Trade Marks.

In context of the respective judgments, the history of contested designs must be provided. The Damier design was created by Louis Vuitton himself in 1888 and was presented as "Damier Canvas" with logo "L.Vuitton registered trademark" as a response to the immense imitation of his previous Trianon Canvas design used on trunks, at the time revolutionary, made from canvas by Louis Vuitton.[291] Damier canvas design represented by a checkerboard pattern consisting of a combination of dark brown and beige checks accompanied the brand since its establishment until recently. Moreover, in 2006 its blue and light beige variation Damier Azur was introduced for women's apparel followed by Damier Graphite of black and grey squares for men's apparel in 2008. For this reason it was only a question of time when the design would be registered even on the European Union level. EUIPO registered Damier Ebene in 1998 and Damier design in black and white to cover all colour variations in 2008.

[288] Figurative trade mark registered at EUIPO on 1 April 1996 under No. 000015602 for class 16, 18, 25.
[289] Figurative trade mark registered at EUIPO on 1 April 1996 under No. 000015644 for class 16, 18.
[290] Figurative trade mark registered at EUIPO on 21 November 2008 under No. 006587851 for class 18.
[291] Richard Martin, *Contemporary Fashion* (St James Press 1995) 500.

General Court of the European Union (hereinafter referred as "General Court") provided that the design of checkerboard is one of the most basic patterns
used as a decorative element, and as such the relevant public would see it merely as a decorative feature and not as a sign indicating the origin of the goods in question, and that, in any event, the contested trade mark did not depart significantly from the norms or customs of the sector which uses to decorate various products, therefore also goods from the class 18.[292] Louis Vuitton claim that the weft and warp structure is a design in another design of regular succession of squares creating the checkerboard was rejected by the General Court stating that this element is incapable of individualizing in such way that it would not appear as a common and basic checkerboard pattern.

Alongside the confirmation of the Damier design being devoid of any distinctive character ab initio, the General Court ruled that it did not even acquire a distinctive character through use which could have been the second option for Louis Vuitton to retain the validity of the Damier trade marks. Louis Vuitton's strategy vested in claiming inherent distinctiveness of the Damier design ab initio without claiming its acquisition through use. The submitted evidence was found to be inadequate to prove the acquisition of distinctiveness through use in the European Union. The evidence was mostly uncertified by competent authorities (in the case of financial documents) or not providing any indication of the perception of the contested marks by the public concerned (in the case of shops in the member states).

With regard to the abovementioned, the General Court dismissed the Louis Vuitton action and declared his contested Damier trade marks invalid. Louis Vuitton immediately appealed that judgment to avert the negative consequences which would certainly worsen its position in the legal battle with its trade mark infringers. In the meantime, Louis Vuitton and Nanu-Nana reached an amicable settlement on the basis of which Nanu-Nana was to withdraw its actions for declaration of invalidity in respect of

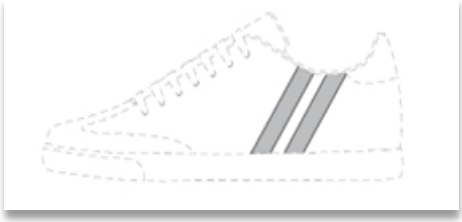
[292] Class 18 - Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas and parasols; walking sticks; whips, harness and saddlery. 'NICE Classification Class 18' (*Web2.wipo.int*, 2015) <http://web2.wipo.int/classifications/nice/nicepub/en/fr/edition-20150101/taxonomy/class-18/> accessed 7 June 2017.

the contested Damier trade marks.[293] Up to date of 31 July 2017 the contested Louis Vuitton trade marks protecting the Damier design are registered and valid.[294]

3.4.5.3 Adidas v. Shoe Branding Europe[295]

Adidas holds one of the most valuable trade marks in the fashion industry; its "three stripes" are protected as a figurative trade mark registered for class 25 at EUIPO under No. 3517646 from 26 January 2006.

Adidas



BVB Shoe Branding Europe[296]

In 2009 Shoe Branding Europe filed an application for the registration of a positional community trade mark for class 25, consisting of two parallel stripes positioned on the side of the shoe that run from the edge of the sole and slope backwards to the middle of the instep of the shoe. Immediately after the Shoe Branding Europe's mark was published in Community Trade Marks Bulletin in 2010, Adidas filed a notice of opposition based on an earlier community trade mark as well as national trade marks registered in Federal Republic of Germany.

The EUIPO concluded that differences in the number of stripes and their respective positions on the shoe were sufficient to find that the compared marks were dissimilar. Moreover, the EUIPO perceived those differences to be fully sufficient to preclude any likelihood of confusion in the mind of the reasonably well-informed, reasonably

[293] Order of the Court (First Chamber) from 21 July 2016.
[294] See: https://euipo.europa.eu/eSearch/#details/trademarks/006587851, https://euipo.europa.eu/eSearch/#details/trademarks/000370445.
[295] Judgment of the General Court of the European Union in case Adidas AG v. European Union Intellectual Property Office T-145/14 from 21 May 2015.
[296] 'Adidas AG v. Office For Harmonisation In The Internal Market' (2015) <http://curia.europa.eu/juris/document/document.jsf?docid=164343&doclang=EN> accessed 22 May 2017.

observant and circumspect public even for fashion in goods, despite the reputation of Adidas earlier trade marks.

The CJEU sided with Adidas and annulled the decision of the EUIPO, ruling that the EUIPO was wrong to conclude that the marks at issue were visually dissimilar.

Despite the fact that sport shoes are everyday consumer goods, the relevant public consists of the average consumer, who is reasonably well informed, observant and circumspect, whose degree of attention must be regarded as average, thus, who receives the mark as a whole and does not analyze its various details.

"It must be observed that the presence of stripes on the outside of the shoe will be easily and immediately noticed by the average consumer as an element of similarity between the signs at issue. However, the differences in positioning and inclination are noticeable only if the consumer undertakes a closer inspection."[297]

The overall impression produced by the marks at issue was found similar. CJEU recalled that the more distinctive the earlier mark is the greater will be the likelihood of confusion. Therefore, thanks to its recognition on the market, Adidas's three stripe mark enjoys broader protection than marks of less distinctive character. *"The distinctive character of the earlier trade mark and, in particular, its reputation must therefore be taken into account when assessing whether there exists a likelihood of confusion."*[298]

3.4.5.4 Christian Louboutin v. Yves Saint Laurent[299]

The introduction of the Christian Louboutin red lacquered outsole contrasting with the remainder of the high heel shoes came in 1992, following the establishment of the eponymous fashion company. Application for trade mark registration was filled years later and only for the specific position of concrete shade of red marked "China Red"

[297] 'Adidas AG v. Office For Harmonisation In The Internal Market (Trade Marks And Designs) (OHIM)' (*Curia.europa.eu*, 2015) <http://curia.europa.eu/juris/document/document.jsf?docid=164343&doclang=EN> accessed 8 May 2017.

[298] 'Adidas AG v. Office For Harmonisation In The Internal Market (Trade Marks And Designs) (OHIM)' (*Curia.europa.eu*, 2015) <http://curia.europa.eu/juris/document/document.jsf?docid=164343&doclang=EN> accessed 8 May 2017.

[299] Judgement of the United States Court of Appeal in case CHRISTIAN LOUBOUTIN S.A., Christian Louboutin, L.L.C., Christian Louboutin v. YVES SAINT LAURENT AMERICA HOLDING, INC., Yves Saint Laurent S.A.S., Yves Saint Laurent America, No. 11-3303-cv from 5 September 2012.

(Pantone No. 18.1663TP). Christian Louboutin applied for the registration in the U.S. in 2007 at that time as for a mark with an acquired limited secondary meaning as a distinctive symbol that identifies the Christian Louboutin brand, not the product itself.[300] This was followed by the filling of the community trade mark in 2010 at the EUIPO.[301]

Christian Louboutin

Yves Saint Laurent[302]

In 2011 Yves Saint Laurent sold a line of "monochrome" shoes in purple, green, yellow and red which were later requested to be removed from the market on the ground of trade mark infringement by Christian Louboutin.

Although the court declared that a single colour can serve as trade mark and acquisition of the secondary meaning by the Christian Louboutin positional red trade mark, it ruled that Yves Saint Laurent did not infringe the Christian Louboutin trade mark. The court stressed that the Christian Louboutin trade mark acquired secondary meaning, thus distinctiveness to merit protection, from the contracting nature of the red lacquered outsole with the remainder of the high heel shoes. Because of the absence of such

[300] Kateřina Dvořáková, 'Zápisná Způsobilost Některých Druhů Ochranných Známek, Zejména Netradičních' [2005] Průmyslové Vlastnictví.
[301] Community trade mark registered on10 May 2016 under No. 008845539.
[302] Toyin Owoseje, 'Christian Louboutin Wins Trademark Battle For Signature Red Bottom Shoes' (*International Business Times UK*, 2012) <http://www.ibtimes.co.uk/olympic-star-louis-smith-join-strictly-come-381343> accessed 9 May 2017.

colour contrast in case of Yves Saint Laurent monochromatic red heels, no trade mark infringement was assumed.[303]

3.4.6 Suitability for the Fashion Industry

"Fashion should slip out of your hands. The very idea of protecting the seasonal arts is childish. One should not bother to protect that which dies the minute it is born."[304]

The legendary French fashion designer Coco Chanel articulated the truth about the nature of seasonal apparel, there is no need to protect something which is not designated to last. However, not every fashion item is connected with short life span, the collarless Chanel jacket designed in 1954 of boxy shape to allow women move naturally, stitched out of boucle with colour contrasting lapels and pockets is one of the iconic exceptions to the rule.[305] As most of the items sold by the fashion companies do not become iconic, the most important thing to protect is the name of the fashion company through its registered trade marks.

Trade marks boasting of reputation may protect its reputation even in the categories of goods they have not been registered for. This higher protection has a high price in terms of proving the strong reputation in the relevant territory within a period closely preceding the respective proceedings. As recent case law shows, reputation is the most valuable asset of the fashion companies and it is rather inconstant as well. Fashion companies should bear that in mind and be prepared to provide sufficient evidence in the intellectual property offices or courts proceedings, because merely relying on the (frequently former) acquaintance of their brand proved to be disastrous.

Trade marks are not useful solely for fashion companies' names. More flexibility provided by the simplification of statutory requirements is trending in the trade mark law. The fashion companies may protect a large scale of signs ranging from names to shapes of their products for instance shoes and handbags, or their packaging for instance

[303] 'CHRISTIAN LOUBOUTIN S.A., Christian Louboutin, L.L.C., Christian Louboutin v. YVES SAINT LAURENT AMERICA HOLDING, INC., Yves Saint Laurent S.A.S ., Yves Saint Laurent America, Inc.' (*Findlaw*, 2017) <http://caselaw.findlaw.com/us-2nd-circuit/1611250.html> accessed 30 June 2017. >
[304] Gabrielle Chanel.
[305] Bibby Sowray, 'A Brief History Of Chanel's Boucle Jacket' (*The Telegraph*, 2013) <http://fashion.telegraph.co.uk/videos/TMG9922250/A-brief-history-of-Chanels-boucle-jacket.html> accessed 2 July 2017.

accessories boxes and bags, through trade marks. The future will answer whether the fashion companies will be able to successfully protect its perfumes through trade marks or if the possibilities brought by the new legislation of the European Union will serve only to protect products such as scented shoes.[306]

[306] Robin, 'Vivienne Westwood + Melissa Bubblegum Scented Shoes' (*Now Smell This*, 2010) <http://www.nstperfume.com/2010/05/21/vivienne-westwood-melissa-bubblegum-scented-shoes/> accessed 18 June 2017.

Conclusion

The theme of my rigorosum thesis has been determined from the outset by my ambition to analyse the present situation in the fashion industry, particularly the visible phenomenon of copying. Whereas the wider public has been familiar with counterfeit goods being sold at market places and the educational endeavour seems to be successful in this matter, there has not been a wider discussion about the rise of fast fashion retailers in the last decade and its implications for the fashion industry and the society as a whole.

The recent changes in the fashion industry have drawn my attention from the intellectual property point of view at first. Only a few have realized that the current trends are instantly available at the mass retailers' stores, frequently sooner that the designer collection itself. Moreover, that the natural following the "catwalk" trends is approaching almost to pure copying of the goods itself, styling of the models and even the entire shows or website designs, followed by websites dedicated to comparison of the luxurious fashion companies products with their mass retailers' cheaper copies. This fact has awakened my curiosity about all possible intellectual property tools possibly suitable for protection of fashion designers' brands, designs and reputation.

Time goes by and society is in a constant development with growing needs; the traditional fields of law quickly proved to be insufficient. Although the academics recognised that fashion designers are one of the most relevant entities creating intellectual property and protecting it through intellectual property rights, willingness to acknowledge that there are other stakeholders in the fashion industry such as consumers, employees, environmental groups and others had been absent.

For the establishment of the fashion law as a distinctive field of law, the field-specific criteria must be met. I am convinced that the criterion of common institutes and internal systemic coherence is met in case of fashion law and was proved on background of three part conceptual classifications - fashion business law, fashion public law and

fashion intellectual property law. Even though the academic public may have been persuaded that society needs the establishment of the fashion law as a distinct field of law, the general public might not be so easily convinced. The fulfilment of the wide acceptability criterion might prove troublesome for the fashion law in countries where the fashion industry, especially fashion designing, does not have a strong tradition, for instance the Czech Republic. I believe this stems from the absence of knowledge of the fashion industry's importance as a sector which is in fact the originator of 2 per cent of the world's Gross Domestic Product with an immense impact on global environment and values of the entire society.

This rigorosum thesis has been deliberately structured as a broader treatise on the fashion law rather than selected forms of intellectual property protection of fashion articles. The mere description of such forms would present a solely comparative study of these forms of protection without, from my point of view, the most important argument for this protection – the core values.

The intellectual property rights are granted to authors of artistic works, registrars of novel and individual designs or distinctive marks. The main reason for protection is inherently present in these subjects – their intellectual creation is worth protecting. Other reasons which should not go unnoticed vest in sustainable and ethical business models. I doubt that the argument for protecting especially intellectual property of the luxury fashion brands only for reason to award its creators is relevant in the eyes of regular consumers. The vast majority of consumers prefers the satisfaction of their own need for fashion rather than the acknowledgement of the intellectual property value of some distant third entity. Undoubtedly, everyone is able to understand such perception of fashion intellectual property because it is in the human nature to put our needs and happiness ahead of others'. Although I tend to perceive the so called democratisation of fashion as beneficial thanks to its social inclusiveness, its fast fashion part may represent our disastrous future filled with apparel obsolete minutes after its purchase, causing us to get used to wearing apparel infringing intellectual property of the luxury brands; moreover at the expense of the environment, human rights and our own health.

In my opinion the argument for protection of the intellectual property of luxury brands vesting in their trend setting artistic value should be accompanied by highlighted corporate responsibility. I am convinced that the fashion law as a distinct legal field law is highly needed in order to bring the desirable attention and transparency to fashion matters influencing the environment and our conduct towards the people in manufacturing. Otherwise the emergence of insensitivity or even ignorance to the violation of our social core values is inevitable.

Designer/luxury fashion brands and fast fashion retailers have been chosen for comparison on purpose. Luxury fashion brands are the trend setters and their intellectual property is being constantly infringed by the trend followers, or rather so called "copycats" – the fast fashion retailers. In the age of the Internet and social media it is no exception that fast fashion retailers are able to spot and copy the original design immediately after its catwalk presentation and deliver the copied design in their stores even before the original is being sold. The comparison should also point out that the luxury fashion brands are under public scrutiny at any given time, and in the case of the occurrence of any misconduct, they are immediately criticized, under public pressure and risk of reputation loss, which is vital for the luxury fashion brand. In other words, the luxury fashion brands set trends even in the field of conduct and they understand that sustainability is much more than the new black. On the other hand, there are fast fashion retailers who are not transparent at all. The fast fashion retailers are not even dependent on true reputation rather than the image based on marketing not genuine action and always have the possibility to alter the prices to accost consumers as every time effective tool.

Luxury fashion brands fight the fast fashion copies especially with the quality of their products, their high aesthetic value, extraordinariness, rarity and symbolism. It is undisputable that both groups have a different customer base. However, even the loyal customers of luxury brands are not willing to invest in the original if a similar design is also available for a fraction of the price at the fast fashion retailer's because of the absence of the highly desired and expected rarity. Undoubtedly, the luxury fashion

brands' greatest asset is their extraordinariness and symbolism which they cannot risk to lose; therefore they must vigilantly protect their intellectual property.

The entire third chapter of this thesis is dedicated to introduction of the possible forms of protection of fashion apparel and brand names. The practice shows that patents and utility designs may serve the fashion companies well-enough; however, copyright, designs and trade marks are considered the essential forms of protection.

The fashion companies should be aware of the different levels of protection and the statutory requirements of the protected article dependent on the legislation of the particular state, frequently substantially modified by case law. While it is common to provide copyright protection to designs boasting of artistic qualities in states recognising fashion as one of the most important industries such as France or Italy, it may be onerous to entitle to such protection in the US. However, recent cases prove that courts are willing to grant such protection if the fashion companies provide sufficient evidence that their articles are classifiable as artistic works rather than mere functional articles. In general, the copyright may serve perfectly to iconic fashion articles which are worthy of informal protection lasting throughout the life of their author and up to 70 years after his or her death.

Industrial designs are regarded as the most useful form of protection of fashion articles due to protecting the appearance of the whole or a part of the product resulting from the features of the product itself and/or its ornamentation. The protection given upon registration lasting up to 25 years should be satisfactory for most of the fashion articles. The European Union also provides informal 3 years long protection to unregistered designs. The UCD is considered an irreplaceable tool for fashion companies – particularly for their short-lived articles – thanks to its automatic protection without an expensive formal registration process which is on the other hand balanced by the protection against nothing but the dead copies. The UCD is often discussed with regard to the absence of such protection of the fashion designs in the US.

In my opinion, trade marks are crucial for the fashion companies. Not only do trade marks protect, in majority of cases, the most valued asset which is the brand name, they are also suitable for protection of every sign capable of distinguishing the goods of one fashion company from those of other undertakings. Trade marks may protect fashion designs itself, such as colour insole contrasting with the heels, colours or packaging. Protection is granted for the period of 10 years with the possibility of renewal. The rather problematic aspect of trade mark protection is the requirement of distinctiveness. Luxury fashion companies often aim to create timeless pieces which would naturally encompass simple features without distinctiveness. On the other hand, the luxury fashion brands have the possibility to prove the acquired distinctiveness through use. Recent cases prove that fashion companies unreasonably rely on their renown and are unable to present solid evidence in the court proceedings. Trade mark law also provides strong protection for marks with reputation which is irreplaceable. Moreover, I believe that the amendment of the European Union legislation which no longer insists on graphical representation may be ground-changing especially for the fashion companies, for instance for effective and easy protection of their perfumes, better said their scents.

All in all, I believe that fashion companies have several options for protection of their designs and their brand names. Undoubtedly, it seems that the European Union provides efficient protection for fashion designs and it is given as an example appropriate to follow to the U.S. legislators.

What is on the other hand rather unsatisfactory in my opinion, is the decision making practice of intellectual property offices and courts on the European Union level as well as the national one, which ostentatiously ignores the competition reality in the fashion industry. Finally, I would like to express my belief that the true motives of the challengers of fashion designers' intellectual property will be critically observed by the authorities, hand in hand with the recognition of the immense benefits of designers' protection. The rigorous protection of the trend setters is crucial and irreplaceable just as the message that their value will be protected – not belittled, but exalted.

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28. Judgment of the Tribunal de Commerce de Paris in case Société Yves Saint Laurent Couture S.A. et al. v. Société Louis Dreyfus Retail Management S.A. et al. E.C.C. 512 from 18 May 1994.
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Statutes and International Treaties

1. Act No 121/2002 Coll., on Copyright, as amended.
2. Act No 141/1961 Coll., on Criminal Procedure, as amended.
3. Act No 207/2000 Coll., on Protection of Industrial Designs, as amended.
4. Act No 242/2016 Coll., on Customs, as amended.
5. Act No 262/2006 Coll., Labour Code, as amended.
6. Act No 40/1995 Coll., on Regulation of advertisement, as amended.
7. Act No 40/2009 Coll., Criminal Act, as amended.
8. Act No 40/2009 Coll., Criminal Code, as amended.
9. Act No 40/2009 Coll., Criminal Code, as amended.
10. Act No 441/2003 Coll., on Trade Marks, as amended.
11. Act No 478/1992 Coll., on Utility Models, as amended
12. Act No 527/1990 Coll., on Inventions and Improvement Proposals, as amended.
13. Act No 74/2006 Coll., on Enforcement of the Industrial Property, as amended.
14. Act No 89/2012 Coll., Civil Code, as amended.
15. Act. No 246/1992 Coll., on Protection of Animals against Maltreatment, as amended.
16. Act. No 478/1992 Coll., on Utility Designs, as amended.
17. Agreement on a Unified Patent Court from 2013.
18. Berne Convention for the Protection of Literary and Artistic Works from 1886.
19. Convention 80/934/ECC on the Law Applicable to Contractual Obligations (Rome Convention) from 1 April 1991.
20. Directive 2004/48/EC on the Enforcement of the Intellectual Property Rights.
21. Directive 2005/29/EC on Unfair Commercial Practices.
22. Directive 2006/114/EC concerning Misleading and Comparative Advertising.
23. Directive 2008/95/EC to Approximate the Laws of the Member States Relating to the Trade Marks.
24. Directive 2015/2436 to Approximate the Laws of the Member States Relating to Trade Marks.
25. Directive 98/71/EC on the Legal Protection of Designs.
26. European Patent Convention (EPC) from 5 October 1973.

27. Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks from 15 June 1957.
28. Paris Convention for the Protection of Industrial Property from 1883.
29. Patent Cooperation Treaty (PCT) from 19 June 1970.
30. Regulation 1257/2012 on Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection.
31. Regulation 1260/2012 on Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection with Regard to the Applicable Translation Arrangements.
32. Regulation No 1186/2009 setting up a Community system of reliefs from customs duty.
33. Regulation No 1907/2006 concerning Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).
34. Regulation No 2015/2424 amending Regulation on Trade Mark.
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36. Regulation No 6/2002 on Community Designs.
37. Regulation No 608/2013 concerning Customs Enforcement of Intellectual Property rights.
38. Regulation No 952/2013 Union Customs Code.
39. Strasbourg Agreement Concerning the International Patent Classification from 1979.
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41. United Nations Convention on Contracts for the International Sale of Goods from 11 April 1988.

Abstract in Czech

Právo módního průmyslu

Tato rigorózní práce nese název nově vzniklého odvětví práva. Právo módního průmyslu musí status právního odvětví teprve obhájit splněním konceptu teorie práva a tedy odvětvotvorných kritérií. Z tohoto důvodu je právo módního průmyslu představeno prostřednictvím tří koncepčních částí – obchodní právo módního průmyslu, veřejné právo módního průmyslu a duševní vlastnictví módního průmyslu. První kapitoly této rigorózní práce jsou věnovány vzniku práva módního průmyslu s ohledem na široké přijetí odbornou veřejností. Druhá kapitola nastiňuje obchodní právo módního průmyslu se zaměřením na licencování duševního vlastnictví módních značek pro svůj nebývalý vliv na dobré jméno módních značek, které je v tomto nesmírně kompetitivním odvětví naprosto stěžejní. Druhá kapitola rovněž pojednává i o veřejném právu módního průmyslu, které může poskytovat přínosný alternativní pohled na problematiku ochrany duševního vlastnictví módních značek. Celá třetí kapitola se poté věnuje duševnímu vlastnictví módních značek: patenty, autorská práva, průmyslové vzory a ochranné známky jakožto vhodné prostředky ochrany módního designu a módních značek. Jednotlivé formy ochrany jsou prezentovány v mezinárodním kontextu s konkrétními zákonnými požadavky pro poskytnutí příslušné ochrany. Značná část poslední kapitoly je zaměřena na judikaturu zemí historicky spojených s módou, jako je Francie, Itálie a Spojené státy americké, pro něž je vyšší výskyt soudních řízení zcela příznačný. Každá forma ochrany je spárována s nejvýznamějšími rozhodnutími národních soudů nebo institucí Evropské unie. Cílem této rigorózní práce je poskytnout spolehlivý základ pro kritické hodnocení aktuální legislativy a rozhodovací praxe a zejména zodpovědět, zda tyto jsou dostatečné pro ochranu duševního vlastnictví módních značek či nikoli.

Klíčová slova: móda, ochranné známky, průmyslové vzory, autorská práva, ochrana, kopírování, dobré jméno, právní odvětví.

Abstract in English

Fashion Law

This rigorosum thesis carries the name of the recently established field of law. The fashion law has to uphold its status through fulfilment of the field-specific criteria; therefore, the fashion law is introduced on the background of a three part conceptual classification – fashion business law, fashion public law and fashion intellectual property law. The first chapters are dedicated to the establishment of the fashion law with respect to its wide academic acceptance. The second chapter outlines fashion business law with a special view to intellectual property licensing, due to its influence on the reputation of the fashion companies, which is crucial in such a competitive field. The topic of fashion public law is included as well in the second chapter as a necessary part of the legal field which might provide an alternative look at the issue of protection of the fashion companies' intellectual property. The entire third chapter addresses the fashion companies' intellectual property: patents, copyright, fashion designs and trade marks as suitable forms of protection of fashion designs and fashion brands. Individual forms of protection are presented in the international context with specific statutory requirements of the respective way of protection. A relevant part of the last chapter is focused on the case law of countries historically linked to fashion such as France, Italy and the litigious United States of America. Every form of protection is coupled with the most important cases decided by national courts or institutions of the European Union. The objective of this thesis is to provide a solid foundation for critical assesment of the actual legislative and decision-making practise; whether it is sufficient for the protection of the fashion companies' intellectual property, or not.

Key words: fashion, trade marks, designs, copyright, protection, copying, reputation, legal field.