

Slow Fashion, Fast Fashion and Intellectual Property Rights

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ABSTRACT

This work explores how intellectual property protection interacts with the realities of the modern fashion industry, especially considering the fast fashion industry. It begins by outlining the sociological mechanisms that shape fashion to illustrate why the protection of fashion might be different from the protection of other works. The piracy paradox, a theory that suggests that copying and imitation within the fashion industry is beneficial for designers, is introduced as a central analytical lens. Following this, the alternative forms of Intellectual Property protection for fashion are presented to examine how well these are aligned with the realities of fashion.

1. INTRODUCTION

In 1992, Christian Louboutin made fashion history. While working in his studio, contemplating on how to enhance a clunky, black-soled shoe, he noticed his assistant applying a vibrant, red nail polish. Inspired, he applied the nail polish to the shoe's sole, and just like that, the iconic red sole was born.¹ This seemingly small design decision quickly became synonymous with the Louboutin brand. Recognising its value, Louboutin chose to protect the red sole through Intellectual Property (IP) on a worldwide scale.²

Following this, Louboutin was involved in legal battles across multiple jurisdictions, seeking to protect their iconic design. From the United States, to France, China, Japan and the EU, the red sole has been the subject of legal battle.³

The extensive litigation, costs, time and mental strain associated with fashion-related IP disputes, such as those involving Louboutin, underscore both the importance and the complexity of protecting creative assets in the

fashion industry. After all, the fashion industry is a \$1.7 trillion global market that continues to grow at a rapid pace. The industry's primary assets are its creative outputs, or fashion pieces, which are central to brand identity, market value, and consumer appeal.⁴ To maintain a good standing in the industry, it is essential that the fashion industry can effectively protect these assets. IP law provides one of the key legal frameworks through which such protection is secured.

Against this background, the following work discusses the mechanisms of IP protection and their suitability for fashion as a work and how they relate to the reality of the current fashion industry, especially considering fast fashion. By placing these legal questions in the cultural, social, and economic context of fashion, the aim of this paper is to provide a more nuanced understanding of both the possibilities and limitations of EU IP law in the fashion world.

2. UNDERSTANDING “FASHION”

To understand the IP protection of fashion, it is first important to understand the concept of “fashion”.

Evolving from something that was primarily used to protect our bodies, clothes and accessories have become much more. For some, it may be a way to express themselves, for some it may be a way to identify themselves with a certain group, and for some it may still be a way

1 La vie en red [sole]’ [Christian Louboutin] <https://us.christianlouboutin.com/us_en/red-sole> accessed 1 May 2025.

2 Sarah Friedman, ‘From Louboutin to Pink Insulation: How Can a Company Trademark a Color?’ [Library of Congress Blogs, 9 February 2024] <<https://blogs.loc.gov/law/2024/02/from-louboutin-to-pink-insulation-how-can-a-company-trademark-a-color/#:~:text=After%20two%20failed%20attempts%20in,registered%20on%20January%202011%2C%202008>> accessed 1 May 2025.

3 Judgement of the Court (Grand Chamber) of 12th June 2018, C-163/16, EU:C:2018:423, *Louboutin and Christian Louboutin; Christian Louboutin S.A. v Yves Saint Laurent America Inc*, 696 F3d 206 (2nd Cir 2012); Cassidy Aranda, ‘The Worldwide Trademark Battle over the Iconic Red Bottom Shoe’ [Chicago-Kent Journal of Intellectual property, 23 January 2023] <<https://studentorgs.kentlaw.iit.edu/ckjip/the-worldwide-trademark-battle-over-the-iconic-red-bottom-shoe/>> accessed 14 April 2025; Micah Kindred, ‘Red Bottom Heels: The Trademark Dispute’ (2023) 91 University of Cincinnati Law Review <<https://uclawreview.org/2023/03/07/red-bottom-heels-the-trademark-dispute/>> accessed 17 April 2025.

4 ‘Global Fashion Industry Statistics’ [Fashion United] <<https://fashion-united.com/statistics/global-fashion-industry-statistics>> accessed 6 February 2025.

to protect their bodies.⁵ Clothes and accessories have not only evolved from the wearer's perspective, but also from the creator's perspective. Today, the way clothes are designed is often considered an artform, where the designer is the artist.⁶

While fashion is closely related to clothes and accessories, the terms are not interchangeable. *Clothing* and *accessories* refer to tangible items worn by individuals (fashion in dress), whereas *fashion* refers to an intangible value attributed to these items (fashion in change).⁷ These intangible values are shaped and mirrored by shifts in cultural, social, economic and technological (CSET) values, and certain societal mechanisms.⁸

In terms of this work, fashion refers to the popularity of certain clothing and accessory trends as shaped by ongoing shifts in CSET values and societal mechanisms, and how these values are reflected in what we wear. The term "fashion pieces" will be used as an umbrella term for clothing, accessories and shoes.

2.1 The Mechanisms of Fashion: An Individualistic Perspective

Fashion is sustained by three core societal mechanisms: social distinction, the trickle-down effect, and imitation. These mechanisms explain *how* fashion operates within society. They form the structural basis of fashion's cyclical nature and its function as a marker of identity and status.⁹ Alongside these mechanisms, shifts in CSET values shape *what* fashion looks like at any given time. While the mechanisms remain relatively stable, CSET values are dynamic over time, continuously influencing the specific forms and meanings that fashion takes.

One of the core mechanisms of fashion is the cycle of renewal. The cycle of renewal refers to the phenomenon in which, once a particular style becomes widely adopted, those who first embraced it often move on to new trends. This behaviour is rooted in the mechanism of *social distinction*, where clothing becomes a means through which individuals express identity, status, and belonging.¹⁰ As early adopters identify new styles to signal taste or cul-

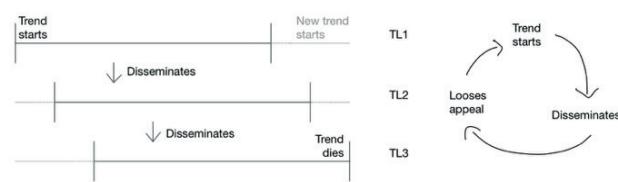
tural capital, these styles often become desirable to others, who in turn imitate them in pursuit of recognition.¹¹

Imitation, in this context, is not a consequence of fashion but a precondition for it. It functions in a social structure where individuals observe and respond to the choices of others.¹² Two forms of imitation can be identified: reverential imitation, driven by admiration, and competitive imitation, motivated by a desire to align oneself with aspirational reference groups.¹³

Finally, the *trickle-down theory* explains how fashion disseminates through society. According to this theory, trends typically begin among early adopters, often those with cultural or economic influence, and gradually spread outward and downward through imitation.¹⁴ This is the mechanism that explains why the need for social distinction sooner or later leads to a need for *newness*.¹⁵

Fashion functions as a symbolic reflection of *cultural identity*, representing aspects such as nationality, ethnicity, class, gender, sexuality, and societal attitudes toward the body.¹⁶ *Social movements* and shifts in societal attitudes also play a crucial role in shaping fashion trends. Broad social movements advocating gender equality, racial justice, and body positivity have challenged established fashion norms, expanding the boundaries of acceptability and aspiration.¹⁷ *Economic factors*, including shifts in production and consumption practices, profoundly influence fashion's accessibility and popularity. The rise of fast fashion has significantly altered the industry's economic landscape by increasing accessibility through lower pricing and faster production cycles.¹⁸ *Technological advancements* are furthermore crucial for shaping fashion trends at a broad scale, affecting how fashion is produced, distributed, and consumed globally.¹⁹

Figure 1 The Dissemination of Fashion and The Circle of Fashion



⁵ Evelin Van Keymeulen 'Copyrighting couture or counterfeit chic? Fashion Design: a comparative EU – US perspective' (2020) 7(10) Journal of Intellectual Property Law & Practice <<https://academic.oup.com/jiplp/article-abstract/7/10/728/831070?redirectedFrom=fulltext>> accessed 24 April. p. 728.

⁶ Ibid.

⁷ Yuniya Kawamura, *Fashion-ology: An Introduction to Fashion Studies* (Berg Publishers, 2005). p. 3–4.

⁸ See more in Chapter 2.1 and 2.2.

⁹ Kal Raustiala & Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) Virginia Law Review <<http://www.jstor.org/stable/4144970>> accessed 4 April 2025, p. 1717.

¹⁰ Fredric Godart & Patrik Aspers, 'Sociology of Fashion: Order and Change' (2013) 39:171–192 Annual Review of Sociology <https://www.researchgate.net/publication/234146860_Sociology_of_Fashion_Order_and_Change#fullTextFileContent> accessed 20 February 2025, p. 176.

¹¹ Kawamura [n 8], p. 5.

¹² Kawamura [n 8], p. 20.

¹³ Godart & Aspers [n 11], p. 176.

¹⁴ Godart & Aspers [n 11], p. 179.

¹⁵ 'Fashion Timeline' (Vintage Fashion Guild) <'The Evolution of Fashion Design: Past to Present' [Fibre2Fashion, October 2008] <<https://www.fibre2fashion.com/industry-article/3730/fashion-designing-the-then-and-now>> accessed 4 April 2025.

¹⁶ Kawamura [n 8], p. 32.

¹⁷ Emma Crasnitchi, 'The Economic Implications of Fast Fashion for the Developed and Developing World' (2024) Modern Diplomacy <<https://modern-diplomacy.eu/2024/01/26/the-economic-implications-of-fast-fashion-for-the-developed-and-developing-world/>> accessed 23 March 2025.

¹⁸ Godart & Aspers [n 11], p. 176.

¹⁹ Cf. 'Design Reform' (European Union Office of Intellectual Property) <<https://www.euiipo.europa.eu/en/designs/design-reform-hub>>, accessed 10 May 2025.

2.2 The Fashion Pyramid and Seasonal Cycles: An Industry Perspective

Fashion can be divided into five main categories in terms of the market and can be illustrated as a pyramid: mass market, bridge, diffusion, prêt-a-porter, and haute couture.²⁰

Figure 2 The Fashion Pyramid



Haute couture represents the most exclusive and luxurious tier of the fashion industry. Haute couture pieces often serve as the creative and visual identity of a brand, typically showcased at fashion shows and worn by celebrities on red carpets. Importantly, it is rarely the primary source of revenue for fashion houses.²¹

The primary revenue stream for many luxury fashion brands comes from prêt-à-porter (ready-to-wear) collections. While these garments still maintain a high level of quality, they are produced in standardised sizes and manufactured in larger quantities, making them more accessible to a broader audience. Prêt-à-porter occupies a space of "wearable luxury," combining high design with practicality.²²

Beneath prêt-à-porter in the fashion hierarchy is diffusion fashion, which includes secondary lines produced by major designers under separate labels. These collections are more affordable and easier to produce, aiming to reach a wider consumer base while still carrying the aesthetic of the main brand.²³

Bridge lines follow, offering designer-inspired clothing at even lower price points. These collections serve as a middle ground between high-end fashion and mass-market apparel. At the base of the fashion pyramid lies the mass market, which consists of everyday clothing produced in large quantities. These garments prioritise func-

tionality and affordability, and they cater to the general public's basic wardrobe needs.²⁴

One way that the industry controls the market is by dividing releases of fashion into seasons. By doing this, fashion houses ensure that there is always something new for the consumers to buy.²⁵

2.3 Applying the Social Mechanisms of Fashion to the Fashion Pyramid and Seasonal Cycles

The social mechanisms of fashion not only help explain how fashion trends emerge, circulate, and fade, but also provide a theoretical foundation for understanding the structure of the fashion pyramid. The pyramid itself can be seen as a material manifestation of these underlying social dynamics.

At its core, social distinction helps explain the existence of a hierarchy within fashion. Haute couture and luxury prêt-à-porter represent exclusivity, craftsmanship, and cultural capital. These upper tiers offer consumers the means to signal status, taste, and identity. The appeal of these tiers lies not only in their material quality but in their symbolic value. Their inaccessibility to the masses is precisely what renders them desirable. The pyramid thus mirrors the logic of distinction: those who can afford to "signal up" through rare or custom garments sit at the top, while those with fewer resources occupy lower tiers, where access to exclusivity is more limited or symbolic.

The ability of fashion to function socially and commercially depends on imitation. This mechanism enables styles and aesthetics from the top of the pyramid to filter downward and be adapted by broader audiences. Through processes of both reverential and competitive imitation, individuals in lower tiers adopt elements of higher-tier fashion to align themselves with aspirational groups. This adoption fuels the trickle-down effect, through which trends travel from elite circles to the mainstream. As trends become widely adopted, their perceived uniqueness erodes, prompting those at the top to seek out new styles and restarting the cycle.

2.4 Theories on the IP landscape of Fashion: The Piracy Paradox

The Piracy Paradox is a concept that was introduced by two American scholars, Kal Raustiala and Christopher Sprigman in their paper, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*. The paradox challenges the prevailing assumption within IP theory that legal protection is necessary to encourage innovation. It aims to explain why fashion designers may not actively pursue or rely upon available IP protections,

²⁰ 'The Fashion Pyramid of Brands (2024 Edition)' (Retailboss, 18 April 2024) <<https://retailboss.co/the-fashion-pyramid-of-brands/>> accessed 1 May 2025.

²¹ Divya Bala, 'Everything You Need to Know About The Inner Workings Of Haute Couture' (British Vogue, 6 July 2020) <<https://www.vogue.co.uk/fashion/article/behind-the-scenes-at-haute-couture>> accessed 1 May 2025.

²² Thomas Bernandt-Lanier, '#7 What is the fashion pyramid?' (Medium, 21 November 2024) <https://medium.com/@thomas_bln/7-what-is-the-fashion-pyramid-09a4e6a166a3> accessed 1 May 2025.

²³ Ibid.

²⁴ Ibid.

²⁵ Esmee Blazer, 'The fashion system: The fashion seasons explained' (Fashion United, 22 January 2022) <<https://fashionunited.com/news/background/the-fashion-system-the-fashion-seasons-explained/2024012257967>> accessed 1 May 2025.

despite the widespread occurrence of design copying and the theoretical availability of legal remedies.²⁶

The Piracy Paradox primarily addresses the copying of fashion trends which are inherent to the functioning of the industry. Contrary to the normative view that piracy, or copying, undermines creativity, Raustiala and Sprigman argue that copying plays a crucial and even generative role in the fashion ecosystem. They propose that innovation and imitation coexist in a form of equilibrium, sustained by two principal mechanisms: (1) Induced obsolescence, and (2) Anchoring.²⁷

Induced obsolescence is grounded in social distinction, the trickle-down theory and imitation. It refers to a phenomenon whereby the free appropriation of fashion designs accelerates the diffusion, or “the trickle-down”, of fashion, meaning that designs have a shorter life cycle which in its turn means that designers can get more business because they design new fashion that the social elite then adapt. As designs are copied and made accessible to a broader public, they lose their exclusivity, prompting higher-status consumers to adopt new styles to maintain social differentiation. The legal implications of this behaviour may be that designers choose not to protect their designs, as they still profit of them without protection.²⁸

Anchoring, on the other hand, refers to the social function of imitation as explained above. For the non-industry experts to recognize what is and what isn't fashion they often look to what others are wearing. For fashion trends to emerge and gain traction, they must be recognized as such. Copying designates certain styles as salient, signalling to consumers that a particular look is “on trend.” By anchoring specific styles as worthy, copying transforms them into dominant fashion narratives. This in its turn also drives business to the designers.²⁹

The legal implications, with background in induced obsolescence and anchoring, is that designers are less likely to seek protection because they don't need it. If robust IP protections were enforced, the diffusion of styles might be markedly slower, which would mean less business. The paradox doesn't in a satisfying way consider smaller, non-established creators. For these, appropriation of their designs may just mean no business as they are not recognized enough to get the recognition a big fashion house would because fashion houses and big designers are established on the market.

Although the Piracy Paradox is developed with the United States legal order in mind, the insights it offers remain relevant in other jurisdictions. In the EU, where design protection is more robust than under US law, litigation remains infrequent.

The Piracy paradox is closely related to the First-Mover Advantage which refers to the notion that original design-

ers may enjoy a limited window of opportunity to commercially benefit from their creations before imitations enter the market. In essence, this concept complements the mechanisms of induced obsolescence and anchoring, as it highlights the temporal gap between the release of an original design and the proliferation of copies. During this interim period, the designer may be able to attract customers and generate sufficient revenue to justify the creative and financial investment involved in producing the original work.³⁰

However, the viability of this advantage hinges on the assumption that there is a meaningful delay between the launch of the original design and the emergence of copies. In practice, especially given the speed and efficiency of today's globalised production and distribution systems, this assumption is increasingly questionable.³¹ This notion ties in well with the consideration of smaller creators as it highlights the need for a sufficient time window for the creator to make money on its product before it gets copied.

2.5 Fast Fashion and its Litigation

Fast fashion refers to “cheaply produced and priced garments that copy the latest catwalk styles and get pumped quickly through stores in order to maximise on current trends”.³² Rather than being a traditional part of the fashion industry, fast fashion can be viewed as a parallel and often competing industry, one that significantly influences the broader fashion ecosystem.

Figure 3 The fashion Pyramid and Fast Fashion



Two primary preconditions underpin the fast fashion model: (i) identifying commercially successful designs, and (ii) replicating and distributing those designs as

²⁶ Raustiala & Sprigman (n 10).

²⁷ Ibid., p. 1698.

²⁸ Ibid., pp. 1718–1727.

²⁹ Ibid., pp. 1728–1735.

³⁰ Ibid., p. 1759.

³¹ Ibid., p. 1762.

³² Rashmila Malti, 'The Environmental Impact of Fast Fashion, Explained' (Earth.org, 20 January 2025) <<https://earth.org/fast-fashions-detrimental-effect-on-the-environment/#:-text=The%20term%20fast%20fashion%20was,%2C%20forever%202021%2C%20and%20H%26M%20accessed%2017%20May%202025>

quickly as possible. Today, a fast fashion item can reach the market within as little as 15 days of a trend's emergence.³³

Whereas the traditional fashion industry once operated on a seasonal model of two to four collections per year, fast fashion has replaced these with a continuous release cycle. Many fast fashion brands now introduce new styles on a weekly, or even daily basis. This accelerated cycle has blurred the distinction between the originators of a trend and those who imitate it, disrupting established mechanisms of creativity, authorship, and attribution in fashion.³⁴ Important to note is that the copying is not limited to the big fashion houses, smaller creators are also affected by the copying.³⁵

As the fashion industry has shifted, legal disputes concerning design copying have become increasingly visible. The rise of fast fashion has not only triggered a growing number of lawsuits but also heightened public awareness of the challenges facing original designers. Today, litigation functions as more than a legal remedy, it has become a lens through which one can examine the shifting power dynamics.

Recent case law underscores evolving nature of these disputes. In *Dr. Martens v. Shein*, the British footwear company, through its parent AirWair International, alleged trade mark infringement, claiming that Shein marketed boots that closely resembled its iconic designs, even using images of Dr. Martens products to promote lookalikes. The case was later settled.³⁶

The dynamics become even more precarious when independent designers are involved. In one example, Welsh designer Sonia Edwards brought an action against Boohoo Group, alleging that the company had copied five of her original designs protected under unregistered design rights. While the court acknowledged the creativity of her work, the claim ultimately failed due to insufficient evidence that Boohoo had access to her designs, citing her limited market exposure and small social media presence.³⁷ This outcome reveals a core limitation in the existing legal framework: that success often depends as much on visibility and reach as on creative merit. For emerging designers with modest platforms and limited resources, asserting ownership and securing recognition remains a formidable challenge.

Even well-established brands encounter obstacles when attempting to enforce their rights. In *Adidas v. H&M*, a legal battle that spanned nearly 25 years, Adidas sought to protect its three-stripe trade mark from what it claimed was infringement by H&M's two-stripe design. Despite

the iconic status of the Adidas mark, the Dutch Supreme Court ultimately ruled in favour of H&M, concluding that the differences in stripe spacing and design prevented consumer confusion.³⁸ The decision underscores the difficulty of asserting exclusivity over minimalist or widely used elements in an industry where visual overlap is common, and the aesthetic lexicon is collective.

Some disputes never proceed to final adjudication but nevertheless leave a significant imprint on the public conversation. In *Kai Collective v. Boohoo*, the independent brand accused Boohoo of copying its distinctive "Gaia" printed mesh design.³⁹ Although the case was settled out of court, it sparked widespread attention across social media and fashion forums, illustrating how reputational harm and brand identity can be contested as much in the public sphere as in the courtroom. In this vein, platforms like Diet Prada, a social media platform known for exposing design plagiarism and industry malpractice, have become influential actors. Their public critiques, especially of fast fashion giants like Shein, now function as informal but potent mechanisms of accountability, especially where formal legal remedy may be inaccessible or cost prohibitive.

Together, these cases reveal the increasingly digital terrain of brand protection, where algorithmic visibility can be as commercially significant as physical product similarity. Furthermore, they reveal that litigation in the fast fashion era is rarely just about legal protection in the traditional sense. Rather, it often reflects broader struggles over authorship, visibility, and market access in an industry where originality and imitation are tightly intertwined.

3. THE SCOPE OF THE INTELLECTUAL PROPERTY PROTECTION OF FASHION

There are three main categories of IP rights that are relevant when it comes to fashion: Copyright, Design rights and Trade Marks. These will be discussed below, followed a comparison between the three.

3.1 The Copyright Protection of Fashion

Among the various forms of IP protection available to the fashion industry, copyright is often the first to come to mind due to its strong association with creative expression. Copyright arises automatically upon the creation

³³ Ibid.

³⁴ Alyssa Hardy, 'Everything You Need To Know About Fast Fashion' (Vogue, 24 April 2024) <<https://www.vogue.com/article/what-is-fast-fashion>> accessed 3 May 2025.

³⁵ Ibid.

³⁶ AirWair International Ltd. v. Zoetop Business Co., Limited, Case No. 5:20-cv-07696.

³⁷ Edwards v Boohoo.com UK Ltd & Ors (2025) EWHC805 (IPEC). See also Rachel Gittins 'Welsh designer loses court battle against fashion giants Boohoo over bikini copy claim' (The Independent, 30 April 2025) <<https://www.the-independent.com/news/uk/home-news/sonia-edwards-boohoo-bikini-case-b2742112.html>> accessed 5 May 2025.

³⁸ Lucas de Groot 'adidas v H&M' (Taylor Wessing, 9 April 2020) <<https://www.taylorwessing.com/en/insights-and-events/insights/2020/04/adidas-v-h-m-the-everlasting-battle-of-the-stripes>> accessed 5 May 2025.

³⁹ Tami Makinde 'Kai Collective vs Boohoo: Why we need to reevaluate our relationship with fast fashion' (Native, 5 March 2021) <<https://thenativemag.com/fast-fashion-boohoo-kai-collective/>> accessed 5 May 2025.



of an original work and typically lasts for the life of the author plus 70 years.⁴⁰

Under EU law, a “work” must be identifiable with sufficient precision and objectivity. This means that while fashion is sometimes dismissed as subjective, it is distinguishable from purely sensory impressions like taste and can be objectively identified and therefore can qualify for protection.⁴¹ Fashion must also meet the originality threshold to gain protection.⁴²

Originality requires the work to be the author’s own intellectual creation.⁴³ A work is an author’s own intellectual creation if free and creative choices have been made that reflect the author’s personality.⁴⁴ In *Painer*, a case concerning photography, the Court mentioned several different features that could indicate that a photograph reaches the originality threshold,⁴⁵ for fashion these features could translate to colour selection, silhouette alterations and fabric manipulation in fashion could satisfy this standard.

Copyright does not protect works that are purely functional. In *Brompton Bicycle*, the Court stated that shapes dictated solely by technical function are excluded, but

if creative choices remain, protection is possible.⁴⁶ For instance, a plain t-shirt may lack originality, but a version with a distinctive print or cut might qualify. Standard functional elements like belt loops or zippers are generally not protected unless used in an original way.

Lastly, it is important to acknowledge that copyright only protects against copying, it does not protect against independent creations of a similar or identical piece.⁴⁷ This means that while the protection arises at the creation of a work, the protection is limited to *direct* copying.

One logistical challenge with copyright is its enforcement. As there is no registration required, designers bear the burden of proving that their work qualifies for protection. This could mean that while the protection itself is free of cost, the cost of enforcement may equal or even exceed those of registered rights such as design protection.

3.2 The Design Protection of Fashion

Design rights protect the appearance of a product. This may include, but is not limited to, features such as lines, contours, shape, texture and colour. The EU offers two types of design protection: registered EU designs (REUD) and unregistered EU designs (UEUD), both of which require that the design be novel and possess individual character.⁴⁸

REUDs are obtained through registration with the European Intellectual Property Office (EUIPO) and

⁴⁰ Council Directive (EU) 2011/77 of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L265/1, art 1.

⁴¹ Judgement of the Court [Grand Chamber] of 13th November 2018, C-310/17, EU:C:2018:899, *Levola Hengelo*.

⁴² Judgement of the Court [Third Chamber] of 12 September 2019, C-683/17, EU:C:2019:721, *Cofemel*.

⁴³ Judgement of the Court [Fourth Chamber] of 16th July 2009, C-5/08, EU:C:2009:465, *Infopaq International*.

⁴⁴ Judgement of the Court [Third Chamber] of 1 December 2011, C-145/10, EU:C:2011:798, *Painer*, p. 89.

⁴⁵ *Ibid.*, p. 91.

⁴⁶ Judgement of the Court [Fifth Chamber] of 11th June 2020, C-833/18, EU:C:2020:461, *Brompton Bicycle*, p. 23.

⁴⁷ *Cofemel* (n43), p. 26.

⁴⁸ Art 4–6 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs. (CDR).

provide protection for up to 25 years, in five-year increments.⁴⁹ UEUDs arise automatically upon first public disclosure within the EU and last for three years.⁵⁰ The fashion sector, an industry that produces a large number of designs that have a short market life,⁵¹ was explicitly identified in Recitals 15–16 of the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (CDR) as a key beneficiary of the UEUD system.

To meet the novelty requirement, a design must not have been previously disclosed to the public. In *Easy Sanitary Solutions*, the Court held that novelty must be assessed by comparing the design to specific, clearly identified earlier designs, not general impressions or combinations.⁵²

The individual character requirement focuses on the overall impression the design makes on the informed user. An informed user is defined as someone with familiarity in the product area but not a technical expert.⁵³ In *Karen Millen*, the Court clarified that comparisons must be made with specific earlier designs and not hypothetical combinations. It broadens the scope of protection by including designs that give the same overall impression.⁵⁴

For fashion this means that the presence of armholes and waistbands does not preclude protection if the overall appearance is distinctive. For example, a unique cut, silhouette or surface treatment may give rise to a sufficiently different overall impression.

UEUDs do not protect against independent creation, therefore, while the protection is aimed at the fashion industry, it is a little limited in comparison to REUDs.

According to EUIPO data, fashion-related designs (e.g. clothing and headgear) account for roughly 8,5% of all REUD filings,⁵⁵ highlighting the sector's reliance on design rights.

3.3 The Trade mark protection of fashion

While copyright and design rights protect individual creations, trade marks protect the distinctive identity of a brand. In the fashion industry, where brand image, origin, and recognition are central, trade mark protection plays a crucial role in preserving consumer trust and market differentiation.

Under EU law, trade marks protect any sign capable of distinguishing goods or services from each other. Words, logos, colours, shapes, or combinations thereof can all

be protected under trade mark law.⁵⁶ Protection requires registration either at national level or through the EU Trade Mark (EUTM) system administered by EUIPO.⁵⁷ An EUTM provides unitary protection across all member states for an initial 10-year term, renewable indefinitely.

To be eligible for registration, a sign must be distinctive and clearly represented.⁵⁸ Lack of distinctiveness, or signs consisting solely of shapes or features that result from the nature or function of the product, may lead to absolute refusal. For example, in *Philips* the Court refused protection for the shape of a rotary shaver because its form was technically necessary.⁵⁹ Similarly, in *Lego Juris* the Court held that even if alternative designs exist, a shape primarily dictated by function is not registrable.⁶⁰

In fashion, this principle excludes protection for functional design features (e.g., the way a strap secures a bag or a fastening mechanism), even if widely recognized. Furthermore, acquired distinctiveness, where a mark becomes associated with a brand through use, does not always override exclusions based on functionality.

Non-traditional marks like colour can qualify. In *Louboutin*, the Court accepted that a red sole applied to a particular part of a shoe could function as a trade mark, provided the mark does not relate to the shape itself.⁶¹ This case affirms the potential for fashion brands to protect key visual identifiers, but only under precise legal framing.

Trade marks serve a complementary function: rather than protecting a garment's design *per se*, they protect symbols of brand origin. Louis Vuitton's Damier Azur pattern, for example, was denied protection due to lack of inherent and acquired distinctiveness, illustrating the high threshold for patterns that are common or decorative in nature.⁶²

Trade mark protection is more costly than copyright or UEUD but offers longer duration and broader enforcement.⁶³ It is particularly useful for iconic elements that endure beyond seasonal trends.

3.4 Cumulative and Complementary Protection of Fashion under EU IP Law

Fashion items often engage multiple layers of IP protection. In the EU, copyright, design rights and trade marks can function both cumulatively (protecting the same ele-

⁴⁹ Art 12 and 38, CDR.

⁵⁰ Art 11, CDR.

⁵¹ Recitals 15–16, CDR.

⁵² Judgement of the court [Fourth Chamber] of 21st September 2017, C-361/15 P and C-405/15 P, EU:C:2017:720, *Easy Sanitary Solutions*, p. 14.

⁵³ Judgement of the Court [Sixth Chamber] of 18th October 2012, C-101/11 P and C-102/11 P, EU:C:2012:641, *Neuman and Galdeano del Sel v José Manuel Baena Grupo*, p. 124.

⁵⁴ Judgement of the Court [Second Chamber] of 19th June 2014, C-345/13, EU:C:2014:2013, *Karen Millen Fashions*, p. 28–29.

⁵⁵ European Union Intellectual Property Office, 'EUIPO Statistics for Community Designs: 2003-01 to 2025-03 Evolution', p. 7.

⁵⁶ Council Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [codification] [2017] OJ L154/1. [EUTMR], art 4.

⁵⁷ Art 4 (a)–(b), EUTMR.

⁵⁸ Articles 4–7 EUTMR.

⁵⁹ Judgement of the Court of 18th June 2002, C-299/99, EU:C:2002:377, *Philips*.

⁶⁰ Judgement of the Court [Grand Chamber] of 14th September 2010, C-48/09 P, EU:C:2010:516, *Lego Juris v OHIM*.

⁶¹ Judgement of the Court [Grand Chamber] of 12th June 2018, C-163/16, EU:C:2018:423, *Louboutin and Christian Louboutin*.

⁶² Judgement of the General Court [Tenth Chamber] of 10th June 2020, T-105/19, EU:T:2020:258, *Louis Vuitton Malletier v EUIPO*, pp. 32–33.

⁶³ *Ibid.*

Table 1 Comparison of each protection's subject matter, purpose and key criteria

IP Right	Subject Matter	Purpose	Key Criteria	Protects Against
Copyright	Original works (of both literary, artistic and industrial character).	Encourage original works of the human intellect.	Originality and identifiability.	Unauthorized copying or reproduction of protected works. <i>Not</i> against independent creation.
Design Right	The visual appearance/feature of goods (e.g. shape, lines, colours, ornamentation).	Encourage innovation in visual design.	Novelty and Individual Character.	Copying that results in the same overall visual impression.UEUD: <i>Not</i> against independent creation.
Trade Mark	Distinctive signs identifying commercial origin (e.g. names, logos, colours, shapes).	Source indicator. Ensure market clarity and protect brand identity	Distinctiveness (inherent or acquired)	Unauthorized use likely to confuse consumers or dilute brand distinctiveness.

Table 2 Comparison of Copyright, REUD, UEUD, and EUTM Protections

IP Right	Cost of obtaining	Time to Acquire	Duration	Percentage of fashion-related filings
Copyright	None	Immediate upon creation	Life of author + 70 years	No official statistics
REUD	350€ + 125€ for each additional design	Registration process time (variable)	5 years, renewable up to 25 years	Clothing = 8.5% of filings
UEUD	None	Immediate upon disclosure within the EU	3 years	No official statistics
EUTM	850€ for one class + 50€ for second class + 150€ for each additional class	Registration process time (variable)	10 years, renewable indefinitely	Clothing = 4.6% of filings

ment under more than one regime) and complementarily (each regime protecting different aspects of the same product). This overlap is explicitly allowed under EU law. Article 96 of the CDR confirms that design protection is without prejudice to copyright and trade mark rights, while Article 9 of the Council Directive (EC) 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 affirms the independent operation of copyright law.

Cumulative protection occurs when the same feature meets the criteria for multiple rights. For example, a distinctive fabric print may qualify for copyright as an original work, design protection if novel and individually characterised, and trade mark protection if distinctive enough. This allows layered enforcement strategies and longer protection windows, particularly useful for iconic designs.

Complementary protection means that different rights protect different aspects of the same product. A handbag design may be protected under design law for its overall shape, under copyright for a printed pattern, and under trade mark law for its logo or signature colour scheme. Each right has a separate legal basis and enforcement pathway but works together to build a robust IP portfolio.

This multi-layered system provides flexibility and strategic advantages. For example:

- Copyright and UEUDs arise automatically and cost nothing but have limitations in scope or duration.
- REUDs and EUTMs require registration and upfront cost but offer longer protection and stronger legal certainty.
- When one right expires or proves unenforceable, another may still apply.

In fashion, where design, branding, and market perception intersect, understanding the interplay between IP rights is key. The EU's layered framework is both flexible and complex offering powerful tools, but requiring strategic navigation, especially for smaller players lacking legal resources.

3.5 Practical Considerations and Final Thoughts

While the EU offers a layered and flexible IP system, navigating it can be challenging in practice, particularly for small and medium-sized enterprises (SMEs), independent designers, and emerging brands. The legal thresholds for protection are rooted in doctrinal language and case law, often inaccessible to non-specialists. Designers may struggle to understand what is protectable or how to enforce their rights.

Copyright and UEUD offer low-barrier entry points, providing automatic protection without formalities or cost. However, enforcement can be difficult, especially when proving authorship or first disclosure. By contrast,



REUD and EUTM require upfront investment and strategic timing but offer stronger legal presumption and longer duration.

A further complication is the distinction between copying and independent creation. As clarified in *Cofemel* and *Karen Millen*, similar designs created independently do not infringe copyright or UEUD rights. This creates a legal grey zone for designers who feel wronged but lack a legal remedy.

Ultimately, fashion's ephemeral and fast-moving nature demands a pragmatic IP strategy. For trend-based pieces, UEUDs and copyright may suffice. For signature styles or brand identifiers, combining REUD and trademark protection may be more effective. The EU's system permits such combinations, but accessing its full potential often requires legal insight, financial resources, and strategic foresight.

4. AVAILABLE PROTECTIONS AND THEIR EFFICIENCY

Understanding how fashion functions is crucial to understanding why its protection under IP law is uniquely complex. Fashion is not simply the creation of garments, accessories, and shoes, it is a cultural, economic, and social phenomenon. It is trend-driven, fast-paced, and inherently collaborative. This dynamic benefits creativity and commerce but also challenges legal systems structured around notions of individual authorship and fixed forms of expression. The same fluidity that allows fashion to evolve rapidly is what makes it difficult to regulate.

Raustiala and Sprigman's theory of the piracy paradox argues that copying drives innovation in fashion by fueling trend cycles. Designers benefit from the diffusion of their styles because it keeps fashion in motion, encouraging consumers to seek out the next big thing. This theory made sense in an earlier era of fashion, when styles took time to spread and the original designer still had a chance to benefit commercially and reputationally before others imitated their work. But today, the emergence of fast fashion has changed the equation. Designs are now copied and reproduced at such speed and scale that the original designer may not even receive recognition, let alone a financial return, before being undercut in the market. What the piracy paradox assumes, a delay between creation and imitation, has been dramatically shortened, if not eliminated.

Many designers are ambivalent about IP enforcement. They generally distinguish between inspiration, which is viewed as a natural and even necessary part of the creative process, and direct copying, which is seen as harmful. While most designers agree that nothing in fashion is ever entirely new, they express a clear sense that taking an idea without acknowledgment crosses a line. These views are mirrored in the structure of EU IP law, which permits imitation through independent creation but prohibits unauthorized copying. The law, like the designers,

accepts that fashion involves shared references, while still drawing a line at outright replication.

This nuanced stance suggests that the piracy paradox may no longer capture the lived reality of designers. Rather than viewing copying as a strategic benefit, many now see it as a threat especially when it comes from powerful fast fashion companies that can replicate and distribute a design globally before the original creator has had time to build an audience or reputation. In this way, the current speed of the industry has begun to undermine the very foundations on which the piracy paradox rests.

Fashion can be protected under several types of EU IP rights. While these protections are robust in theory, their practical value depends on whether they are accessible, affordable, and effective in use. Many designers, particularly those working independently or within small enterprises, do not find it worthwhile to pursue legal protection or enforcement. This is not because they reject the idea of protection, but because the cost, time, and effort involved are often disproportionate to the potential benefit. A fashion piece may only be relevant for a few weeks or months; by the time a legal claim is filed and processed, the design may have already lost its commercial value. Even where automatic protection applies, as with UEUD, the burden of proof, the speed of the industry, and the emotional toll of enforcement deter many designers from asserting their rights.

Financial limitations are a key factor. Larger brands and fashion houses are better positioned to absorb costs and manage the administrative complexity of enforcement. Independent designers often cannot. Even among SMEs, there is significant variation in access to legal support and IP knowledge, which correlates closely with size and revenue.

Many designers are unfamiliar with how IP protection works, or even that it exists in the forms available under EU law. This is partly a consequence of the legal system's complexity and partly a failure of communication and outreach. Although the EU has attempted to reduce this burden through grants and IP vouchers targeted

at SMEs,⁶⁴ these efforts are not always widely known or fully utilized. Studies have suggested that IP awareness should begin earlier in life, with legal literacy continuing into higher education and professional training.⁶⁵ For designers outside traditional educational structures, targeted outreach and simplified digital resources could make a meaningful difference. A more integrated, accessible approach to IP information could help close the gap between the legal framework and the people it aims to protect.

Time is another barrier. Legal processes do not move at the pace of fashion. Even fast-track options are rarely fast enough. A design may be copied and exhausted within weeks of its release. If the designer cannot act immediately, the window for protection may close before any legal claim can be made. Moreover, enforcement requires time not just in the legal sense but in terms of the designer's own capacity: collecting evidence, securing legal advice, and confronting a larger party all take time away from designing and producing.

Emotionally, litigation can be draining. Designers have described the process of enforcement as isolating, intimidating, and all-consuming. Without institutional support or legal guidance, many simply choose to endure the copying and move on. For larger companies, by contrast, enforcement is often a routine part of brand protection. This contrast reinforces existing hierarchies in the industry and limits the reach of legal protection to those already positioned to take advantage of it.

These challenges suggest that the formal adequacy of EU IP protection does not translate into practical effectiveness across the industry. While the legal tools are available, they are not equally usable by all. As a result, many designs go unprotected not because they are ineligible for protection, but because the designers behind them cannot access the system. This disparity raises serious questions about the equity of the current framework and the broader implications for creativity and competition in fashion.

5. CONCLUDING THOUGHTS

IP law is built on the premise that innovation deserves protection and that exclusive rights serve as an incentive to create. If creators are routinely denied the ability to benefit from their work, that incentive erodes. The difficulty of enforcing rights in today's fashion landscape may therefore threaten not only individual designers but the long-term vitality of the industry. At the same time, the unique nature of fashion complicates a purely legal approach. In contrast to many other industries, fashion

often relies on visibility, not exclusivity. Copying may sometimes enhance a designer's reputation rather than harm it. In this way, IP's protective logic does not always align with the strategic logic of fashion.

Stakeholders view IP in different ways. Lawmakers typically understand it as a mechanism for stimulating creativity through economic reward. Copiers may see it as a risk or barrier, while designers themselves often see it as a multi-purpose tool: a deterrent, a badge of identity, a commercial asset, or a last resort. These fragmented understandings point to a deeper truth: there is no single role that IP plays in fashion, and no single reform that will solve its challenges.

Still, one thing is clear: fast fashion has changed the game. Its scale, speed, and operational model challenge the assumptions on which EU IP law was built.

What is needed is a broader, more systemic response. Reforming IP law alone is not enough. Instead, a wider initiative involving industry stakeholders, legal institutions, educators, and policymakers may be required. Such an initiative could help reassess not only how the law is written, but how it functions in practice. It could examine who benefits from the current system, who is left out, and what new tools or approaches might offer more equitable access.

As this article comes to a close, we return to where it began: the story of Christian Louboutin and his red soles. That impulsive stroke of colour became one of fashion's most distinctive symbols, so distinctive that it sparked litigation in courts around the world. Louboutin's success in securing trade mark protection stands as an emblem of what IP can achieve. But it also reveals how uneven that protection is. Not every designer has the means to defend their work across jurisdictions. Not every design will be deemed "distinctive" enough. And not every act of copying will be actionable.

IP protection may stand at the gates of fashion, like a guard outside Troy. But fast fashion is the Trojan horse already inside the walls.



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⁶⁴ 'SME Fund 2025' [European Union Intellectual Property Office, 2025] <<https://www.eipo.europa.eu/en/sme-corner/sme-fund/2025>> accessed 10 May 2025.

⁶⁵ Christina Wainikka, 'Nationella Immaterialrättsstrategier: En jämförelse av strategiska satsningar runt om i världen' (Svenskt Näringsliv, February 2025), p. 22.