



Path of Protecting Intellectual Property Rights on Fashion Design

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Abstract. Fashion has become an important carrier of aesthetics in the eyes of modern people and fashion design has also become an important factor affecting the development of the fashion industry. With the increasing problems of intellectual property infringement of fashion design, it has correspondingly become an important topic as how to protect the Intellectual Property rights of fashion design. There are generally four paths of Intellectual Property protection for fashion designs: Copyright, Design Patent Right, Trademark Right and Anti-Unfair Competition Law Protection. The path of protecting copyright of fashion designs is the most comprehensive, but it has higher requirements for originality and aesthetics of fashion designs. The condition for protection by Design Patents is that the aesthetic nature of the fashion design shall be distinguished from the fashion functionality. The condition for protection under Trademark Law is that the achievement of distinctiveness in fashion design. The conditions for protection under the law against Unfair Competition are that the fashion product causes certain impact and that the fashion design leads to confusion; Each of the four protection paths has its own strengths and weaknesses. The fashion design in China is still in a mature stage of development, and a comprehensive protection path shall be adopted, which is characterized by the copyright protection as the main focus with the Design Patent Rights, Trademark Rights and Anti-Unfair Competition Law protection as complementary.

Keywords: Fashion design · Intellectual Property protection · Trade dress · Design Patent

1 Intellectual Property Issues in Fashion Design

Fashion design is a general term for a comprehensive design, which belongs to the category of arts and crafts, and is an artistic expression combining practicality and artistry. Fashion design art, as a carrier of the dressing function of people, has not only

the commonality of general applied art, but also its own uniqueness in design content and form as well as artistic expression.

The earliest practical case in China that focused on the Intellectual Property Rights of fashion design was the “First Case of Chinese Fashion Design Copyright” in 1999- “The Fashion Copyright Infringement Dispute between Hu Sansan and Qiu Haisu”. Especially since China’s accession to the World Trade Organization in 2001, the Intellectual Property Rights of fashion designs have received increasing attention. In recent years, with the establishment of the fashion design industry, the rise of fashion design and a large number of fashion design brands, the problem of Intellectual Property infringement of fashion design has also become increasingly salient.

Judging from the types of infringement, the problems of Intellectual Property Rights of fashion design mainly include copying or counterfeiting fashion design, confusing or taking advantage of famous fashion design brands, etc. In the type of copying or counterfeiting fashion design, the main manifestations include the highly similar designs of fashion pattern, fashion graphics and the overall style of fashion, which not only causes losses to the intellectual creation and economic gains of fashion designers, but also disturbs the order of the fashion design market; Confusion or taking advantage of famous fashion design brands mainly include the high degree of similarity in brand logo design, brand packaging design, brand publicity design, etc.

In response to this, there have been more and more calls for the necessity of Intellectual Property protection for fashion design, and so are the discussions and theoretical studies about the specific path of Intellectual Property protection for fashion design. The existing researches mainly hold two viewpoints: one is that the copyright of fashion design should be protected by multiple paths, for example, both Hao Min [1] and Jin Yin [2] believed that fashion design can be protected by multiple and comprehensive Intellectual Property Rights such as Copyright, Patent Right and Trademark Right; The other view is that fashion design is more suitable for adopting the separate protecting path. For instance, it is considered that the multiple Intellectual Property protection modes are more suitable for developed countries where the fashion design industry has become very mature, while there are still less well-known brands in fashion design industry in China. Therefore, it is necessary to adopt the separate protection mode with clear division between Copyright Law and Patent Law as appropriate. Generally speaking, among the existing research, there have been some research results on Intellectual Property Rights of fashion design, but relatively speaking; the systematic and targeted research results are still insufficient. Therefore, in this paper, it is intended to analyze the necessity of Intellectual Property protection of fashion design from a systematic perspective and to explore the optimal path of Intellectual Property protection.

2 Necessity of Protecting Intellectual Property Rights on Fashion Design in China

2.1 Fashion Designs Are Eligible for Intellectual Property Protection

First, fashion design is immaterial. Different from physical fashion, fashion design is the crystallization of fashion styles, patterns, overall styles, etc. It is essentially the artistic

expression form of designers. It is widely believed in the Intellectual Property circle that the substantive characteristic of Intellectual Property is that the object is immaterial, that is, the object of Intellectual Property protection is the immaterial intellectual achievements carried on the material carrier [3, 4]. The immaterial nature of fashion design is consistent with the characteristics of the object of Intellectual Property protection.

Second, fashion design is creative. The process of fashion design can be divided into five steps, including: triggering inspiration; Looking for design concepts; Confirming design concepts; Design development; Extract and integrate all the analytical results for the final design. In this process, the fashion designers are required to constantly look at different fashion elements and integrate the design elements to innovate or even create new ones. The vitality and essence of fashion design lies in aesthetics and innovation, which conform to the creative character of the Intellectual Property object.

2.2 Protection of Intellectual Property Rights for Fashion Design Is a Demand for the Development of the Fashion Industry

According to relevant data and industry research reports [5], since 2014, China's fashion industry has been above 20 billion pieces, and in 2015 and 2016, the output was more than 30 billion pieces. In 2019, enterprises above designated size of China's fashion industry completed fashion production of 24.472 billion pieces. In 2020, under the impact of COVID-19 epidemic, enterprises above designated scale of the fashion industry completed a cumulative output of about 21.09 billion pieces. See the chart below for details (Fig. 1).

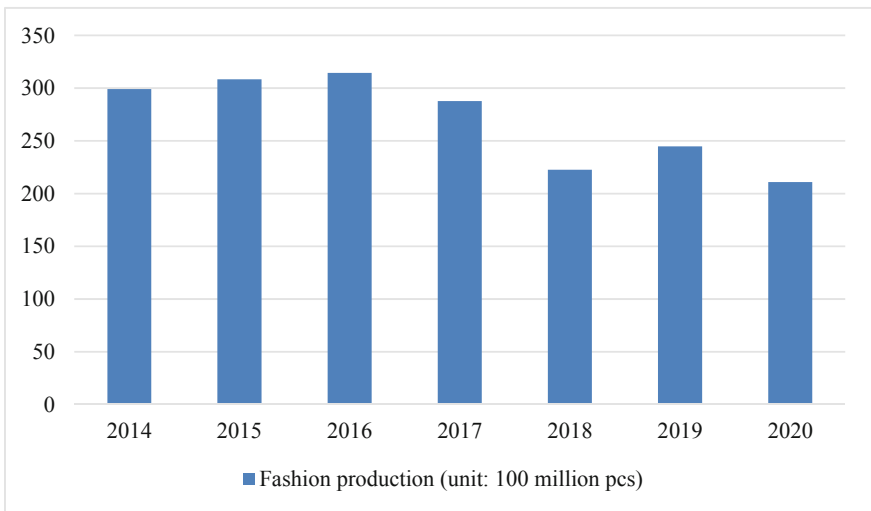


Fig. 1. Statistical table of fashion production in China

In recent years, young consumers have gradually become the main force of the fashion industry, and consumer philosophy has also been on the rational trend. With the

steady growth of the high-end and low-end consumer markets of the fashion industry, the intermediate markets are on the gradual decrease, and such development trend is also fully consistent with the trend of fashion production in the statistical chart in the past three years.

With the development of the fashion industry, China's fashion industry has transformed into a fashion consumption trend of culture, fashion, branding and image, which are all dependent on fashion design. The personalization and fashion factors of fashion design are also gradually becoming the important factors in consumers' choice of fashion. It can be said that fashion design plays a vital role in the development of the fashion industry. However, disputes over Intellectual Property infringement of fashion designs are gradually increasing. It is imperative to strengthen the protection of Intellectual Property rights of fashion design, but the actual implementation is obstructed by loads of difficulties in fashion design [6].

3 Comparison of Intellectual Property Protection Paths for Fashion Design

An overview of the situations in both China and abroad, the existing Intellectual Property protection paths for fashion design are mainly four categories, namely the path of Copyright protection, the path of Patent protection, the path of Trademark protection and the path of Anti-Unfair Competition Law protection.

3.1 Path of Copyright Protection

It is not specified under the Chinese Copyright Law which objects are protected in the field of fashion design. Article 3 of China's *Copyright Law* adopts a legislative model that combines "exemplifying clause" and "miscellaneous provisions" to determine the types of works; nevertheless, fashion designs are not among the enumerated types of works, nor are they included in the exemplifying clause as a matter of course. In other words, fashion designs do not necessarily fall under the category of Copyright protection. However, in terms of the application of the law, Article 3 of the *Copyright Law* provides that the term "works" as referred to in the *Copyright Law* means intellectual creations with originality in the literary, artistic or scientific domain, insofar as they can be reproduced in a tangible form. It is generally accepted that three conditions shall be met simultaneously for a work to be protected by Copyright: first, it is an intellectual production in the literary, artistic and scientific domain. Second, it shall be original, i.e. it is created by the author alone; Third, the intellectual output can be expressed in certain forms. Accordingly, fashion designs that are characterized by originality, high aesthetic value and can be expressed in a certain form are works and can be protected by *Copyright law*.

At present, there is also no international convention that explicitly provides for the protection of Copyright in the field of fashion design, however, Section IV, Article 25(2) of the *TRIPs Agreement* requires member states shall choose either industrial design law or Copyright Law for the protection of textile designs. Although *Berne Convention* and *WCT* do not directly address the protection of "fashion designs" in their texts, they require member states to protect Works of Applied Art in their domestic legislation, and

fashion designs can be protected under *copyright law* as Works of Applied Art. Although China's *Copyright Law* does not directly provide for Works of Applied Art, as a member of *Berne Convention* and *WCT*, Works of Applied Art shall be protected.

Thus, from a practical point of view, fashion designs with originality and high aesthetic value that comply with the law can be protected by the *Copyright law* as Art Works, Graphic Works, Model Works and Applied Art Works respectively in the different stages of fashion production. However, it is worth discussion as how fashion designs can be protected by *Copyright law*.

On the one hand, the originality of fashion design is reflected in the aesthetic value of tailoring, color matching, pattern design, etc. It is not easy when conducting the determination of originality and the similarity of two works in the comparison course of Copyright infringement. In the 1999 case of "the Fashion Copyright Infringement Dispute between Hu Sansan and Qiu Haisuo" [7], in which the plaintiff and the defendant were student and teacher, and the plaintiff argued that the defendant's award-winning fashion design *Story of Spring* had copied her design, thus suing to the court for copyright infringement. After the first and the second instance, the court held that the fashion design consisted of design elements, artistic shapes, craft structure and color matching, and was both practical and artistic, and shall be protected by *Copyright law* as works of applied art. Although the court affirmed that the fashion design can be a work, the court of first and second instance held that the overall expression of the fashion works of the plaintiff and defendant were different and so are their expression of emotions and thus did not constitute an infringement.

On the other hand, it can be found from the practical cases that *Copyright Law* requires a high level of aesthetics in fashion design. *Copyright law* does not protect creativity and colors or styles that are not original, and therefore it would be difficult to defend the rights when some of the popular simple and elegant fashion designs on the market are copied. In the lawsuit case between "HERAS Company and Dream Swallow Company" [8], the court of second instance held that the generic elements used by the plaintiff in the fashion design did not constitute original expression and could not be protected by *Copyright law*, otherwise it would lead to the tremendous monopoly of the design elements of the fashion, thus resulting in an imbalance of rights. In order to reflect the originality, the creative inspiration and individuality of the fashion designer shall be expressed artistically with a more aesthetic value through the combination of artistic modelling and color fabric.

3.2 Path of Patent Right Protection

In the context of textile design protection, *WTO* has suggested that "fashion" designs can easily be protected by invoking the industrial design protection methods [9]. Article 2 of China's *Patent Law* stipulates that "The term "design" refers to any new design of a product's shape, pattern or a combination thereof, as well as the combination of the color and the shape or pattern of a product, which creates an aesthetic feeling and is fit for industrial application". If the fashion design is to pass appearance design protection, the following three conditions must be met:

First, fashion design is the novelty of the overall or partial shapes, patterns, colors and the combinations thereof. Based on their own aesthetics, fashion designers create fashion

design results that are both aesthetic and practical by using aesthetic knowledge and the comprehensive application of colors, lines, and design elements, and fashion designs should be distinctly different from existing designs or design features and combinations on the market.

Second, the fashion design can be applied in industry, for example, it can be applied to mass production of fashion. Fashion design is not only a conceptual design but should be used for realization of mass production insofar as the current conditions such as fashion materials, fashion production technology and so on are available. The designed fashion shall be able to fulfill the practical function of wearing.

Third, fashion design shall have its aesthetic value. Although it is in the category of a patent, the technical requirements of appearance design are not high, and the focus is on the aesthetic “appearance design”, which is not recognized as a patent in many countries, and the examination criteria for design applications in China are not strict either. The aesthetic value of fashion design should be based on public acceptance.

Fashion designs can be protected by the appearance design system, but an important condition for appearance Design Patent protection is that the aesthetic nature of the design must be separated from its functionality. In other words, for fashion design, it should be aesthetically pleasing, which must be separated from the wearing function of fashion; if the tailoring and overall design of the fashion is necessary for the wearing function as a fashion, then it cannot be protected by the appearance design. However, most aesthetic designs of fashion are so integrated with functional utility that they can hardly be identified as aesthetic as required by the appearance design. In addition, fashion design enjoys a more highlighted timeliness than other designs. It is not so complicated in terms of the design application process, but it takes about six months from application to authorization. However, fashion is a seasonal commodity, and by the time a design is obtained, the fashion will be out of fashion.

3.3 Path of Trademark Protection

Fashion designs are generally not directly protected by *Trademark Rights Law*, which can protect Trademarks for fashion products but not fashion designs per se. This is because the function of Trademarks is to distinguish between different product providers and to enable consumers to be clearly aware of the origin of commodities. However, the possibility of fashion designs being protected by *Trademark Law* still exists. According to Article 9 of the *Trademark Law* in China, a distinctive trademark is indispensable in order to register and obtain protection under *Trademark Law*. If the fashion design itself obtains distinctiveness in design appearance because of its strong recognition, then it can also be protected by registering the Trademark. In addition, according to Article 11 of the *Trademark Law*, the aesthetic nature of the Trademark should also be separated from the functionality of the commodity, that is, if the fashionable aesthetic appearance of the fashion design cannot be separated from the function of the fashion such as covering and keeping warm, it is also not possible to apply for a registered Trademark for protection. This is the same requirement for Design Patent protection, where the fashion design should have a non-functional aesthetic nature.

The path to Trademark protection for fashion designs has been relatively lenient internationally. For example, the United States has been protecting the fashion design

industry through *Trademark Law*, namely, by defining that fashion designs are protected through trade dress. Today, China is also beginning to move towards granting *Trademark Law* protection for designs. For example, the fashion shoes of the French luxury footwear brand Christian Louboutin are characterized by a “uniform color of red soles”, and many celebrities wear the shoes of that brand, thus forming a certain social awareness and public influence. Generally, the relevant public will deem the shoes of that brand the same as the “red-soled high heels” (hereinafter referred to as “red-soled high heels”). It is exactly because of this, shoes of this brand were granted an international trademark registration for the distinctive feature “red color (Pantone 18.1663TP) used on the sole”. However, in 2010, the application for territorial extended protection of the trademark for “red-soled high heels” in China was hindered when the Trademark Office rejected the application, considering that it lacked distinctiveness in terms of distinctive feature of the shoes – “red soles”, thus rejecting the application. After the review, the first and the second instance court litigation, the Higher People’s Court of Beijing Municipality made a final judgment at the end of 2018 [10], finding that “red for shoe soles (Pantone 18.1663TP)” belongs to a single color trademark with a limited location of use and can be protected, which means that China has for the first time protected a single color with a limited position, thus providing a very important path for the protection of Trademark Rights for fashion designs. Elements such as a single color of a fashion design are not protected by Intellectual Property Rights, but if such a single element gains distinctiveness in a designated position, it can be protected through *Trademark Rights Law*. In this case, it poses a very high requirement in terms of the recognition and visibility level of the fashion design in society, and if the public does not form a wide recognition on the design elements used in the designated position of the fashion, then it cannot be protected by *Trademark Rights Law* either, and may not be practical for a fashion design that has just been put on the market (Fig. 2).



Fig. 2. “Red-soled high heels” G1031242 trademark pattern (Color figure online)

3.4 Path of Anti-Unfair Competition Protection

It is most prone to have copying and free-riding problems in fashion design. Although it is still quite rare for people to mention the protection of the Intellectual Property rights of fashion designs through the perspective of *Anti-Unfair Competition*. However,

the *Anti-Unfair Competition Law*, which protects the order of market competition, can effectively regulate the copying, counterfeiting and free-riding in fashion designs on the market. According to Article 6 of the *Anti-Unfair Competition Law* in China, it can be considered as unfair competition if there is an unauthorized use of a logo that is identical or similar to the decoration of another person's goods with a certain influence, or if there is a confusing act that is sufficient to lead people to believe that it is another person's goods or that there is a specific connection with another person.

Fashion design includes the design of fashion decoration itself and fashion packaging, and the unauthorized use of fashion decoration design shall be deemed as copying or counterfeiting fashion design. The decoration of fashion packaging is an important factor for the public to identify and choose from different fashion. Therefore, the unauthorized use of fashion packaging decoration not only damages the intellectual achievements of fashion designers, but also causes confusion to consumers, which can be regarded as Unfair Competition and shall be regulated. However, the prerequisite of identifying such confusion is that the logo of the goods needs to have "some influence" in the market, namely the fashion design should have "some influence" on the public.

4 Choice of Path of Protecting Intellectual Property Rights on Fashion Design in China

The past two decades have witnessed great changes taken place in China's fashion design. From the early years when fashion was only used to meet the basic function of covering up body and keeping warm, to the present situation that it has become an important carrier for modern people to meet aesthetic needs. Besides fashion quality, fashion design has become one of the most important factors affecting sales in the fashion market. However, as a later starter, and also due to the lack of design innovation abilities, China's fashion design is not yet fully mature. Moreover, the market competition pressures, and copying have seriously damaged the initiative of original designers and affected the development of the fashion industry.

From the discussion in the previous parts, it can be seen that there are many Intellectual Property protection paths in fashion design. Nevertheless, each protection path has its own applicable conditions and restrictions. The specific comparison is as shown in the following figure (Table 1).

By comprehensive comparison, the four Intellectual Property protection paths of fashion design have their own advantages and disadvantages. Therefore, China should adopt a comprehensive and diversified path of the Intellectual Property protection for fashion design. Among them, the Copyright protection path has the advantages of the simplest procedure, the shortest time cost and the most comprehensive protection scope, which is most suitable for the Intellectual Property protection of the fashion design in China, especially seasonal fashion design. However, in case there is a dispute over Copyright infringement of fashion design, and when identifying Copyright infringement, both the creative and aesthetic requirements of fashion design are relatively high, so it is difficult to directly identify as an infringement.

For example, in 2019, Shenzhen designer ROARINGWILD could not help but complained on the Internet that the latest fashion of HLAJEANS, a fast fashion brand under HLA, copied several of his original fashion designs [11] in 2018 (Figs. 3, 4 and 5).

Table 1. Comparison of intellectual property protection condition

	Applicable conditions	Restricted conditions
Copyright	Originality and aesthetics	High requirements for aesthetics
Design patent	Aesthetics	Differentiation between aesthetics and function
Trademark right	Distinctiveness	High requirements of distinctiveness, differentiation between aesthetics and function
Anti-Unfair competition	Constitute “confusion”	Have some influence in society



ROARINGWILD SS2018



HLA JEANS SS2019

Fig. 3. Comparison of two styles of fashion design (1)

It can be seen from the comparison diagram that from the overall visual effect, the fashion designs of the two companies are indeed very similar by integrating the design factors such as color matching, tailoring characteristics, overall fashion type and fashion materials in fashion design. In addition, Shenzhen designers' fashion was sold on the market earlier than HLA, which can basically be considered as copying in fashion design. However, although the original fashion designs of ROARINGWILD would be recognized by the relevant public as fashionable fashion, it is difficult to be recognized by the court in terms of originality and aesthetics of Copyright protection. The fashion of Shenzhen ROARINGWILD is characterized by color combination, logo of large letters and fashion tailoring. Although these designs would leave a fashionable impression to people, and they are also sought after by the fashion industry; however, on the one hand, these designs cannot highlight the originality of designers as the design elements such as T-shirt stripes and dark green are the public primary colors of fashion design. On the other hand, it is debatable whether the large neckline design of these fashionable fashion designs constitutes the aesthetics in the *Copyright Law*. Therefore, in this case, it is more



Fig. 4. Comparison of two styles of fashion design (2)



Fig. 5. Comparison of two styles of fashion design (3)

suitable to adopt protection through appearance design or Anti-Unfair Competition. Due to the strong seasonality of fashion design, the application time for appearance design may be too long. However, if such fashion design is recognized by the relevant public, it can also be protected through Anti-Unfair Competition, which may be more effective.

In conclusion, a comprehensive protection path shall be adopted for the fashion design in China, which is characterized by the Copyright protection as the main focus with the Design Patent Rights, Trademark Rights and Anti-Unfair Competition Law protection as complementary. That is, under the condition that fashion design can be recognized as a work, it will be protected by Copyright, otherwise it will be subject to

the application for appearance design or Trademark protection according to the characteristics of fashion design, or if the fashion has certain influence in society, it can be protected under *Anti-Unfair Competition Law* (Fig. 6).

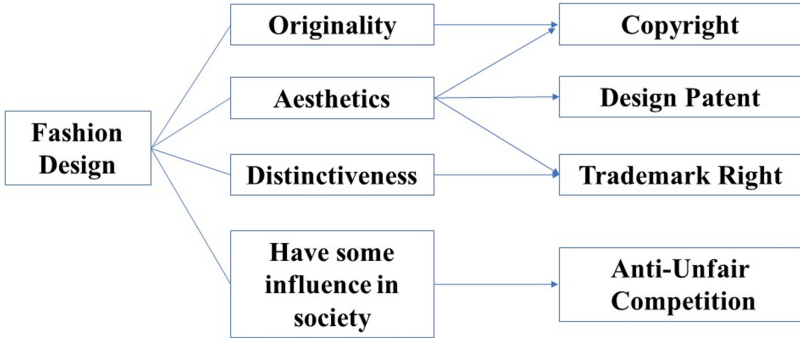


Fig. 6. Model of Intellectual Property protection on fashion design

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References

1. Min, H.: Analysis of intellectual property protection modes related to fashion design. *Intellect. Prop.* **9**, 33–36 (2019)
2. Yin, J.: Intellectual property protection of fashion design. *Silk* **10**, 56–57 (2019)
3. Yang, L.: *Basic Theory of Intellectual Property(I)*. China Social Science Press, Beijing (2013)
4. Qian, W.: *A Course of Intellectual Property Law*, 6th edn. China Renmin University Press, Beijing (2019)
5. Zhiyan.org. https://www.cir.cn/Pdf/FangZhiFuZhuang/22/ResearchofChina’sClothingIndustryMarket_1686722.pdf. Accessed 5 Feb 2021
6. Bo, Y.: <http://data.chinaxwcb.com/epaper2017/epaper/d6651/d5b/201712/83664.html>. Accessed 5 Feb 2021
7. Higher People’s Court of Beijing Municipality (2001). No. 18 Civil Judgment
8. Higher People’s Court of Hebei Province (2007). No. 16 Civil Judgment
9. Zheng, Z., Xue, R.: *WTO Accession and Intellectual Property Protection*. China Foreign Economic and Trade Press (2000)
10. Higher People’s Court of Beijing Municipality (2018). No. 2631 Administrative Judgment
11. ROARINGWILD Official. <https://mp.weixin.qq.com/s/1YrD79G9ITDGkwNCJSnlNq>. Accessed 5 Feb 2021