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Fashion as Art: Rights and Remedies in the Age of Social Media

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Abstract: Today's increasingly widespread recognition of fashion's artistic value has revamped the debate on the appropriateness of rights and remedies provided by IP law to fashion designs. From an Italian–US comparative perspective, this article inquires whether copyright protection, traditionally accorded to artists, is eligible and applied for fashion, detecting that rights and remedies are better accessible to major fashion companies and for iconic items, while they are not easily attainable by smaller designers. Analyzing a number of case studies, this article describes a growing phenomenon in the age of the digital revolution, that is, controversies regarding the fashion world tend to be disputed on social media rather than in courtrooms. Beyond the debate on which existing formal legal tools are suitable for fashion, the purpose is to bring the phenomenon of informal self-regulation out of court into conversation, examining advantages and disadvantages. Social media platforms are more suitable to fashion's nature and dynamics, and ultimately, their verdicts seem to obtain better results than litigation, balancing the unequal positions of established and emerging brands.

Keywords: fashion; art; copyright law; intellectual property law; artistic value; social media; comparative law

1. Introduction: Fashion and Art Intertwined

A lobster dress, a shoe hat, red painted fingernails gloves are only a few of the iconic pieces that the fashion designer Elsa Schiaparelli and the surrealist artist Salvador Dalì created together from 1935 to 1954, closing year of the Schiaparelli maison in Paris. Such out-of-ordinary collaboration has been referred to as the one that opened the ongoing, prolific dialogue between the fashion and art worlds (Cutler and Tomasello 2015; Geczy and Karaminas 2012)[1].

Especially in the *haute couture*, but also in the *prêt-à-porter*, stylists and artists have constantly been a mutual source of inspiration, influencing and stimulating each other's innovation and creativity.

From the historical Mondrian day dress by Yves Saint Laurent and Souper dress by Andy Warhol in the 1960s[2], through the incursions of artists Jackson Pollock, Dan Flavin, Sol Lewitt, and

[1] Previous collaborations involved Paul Poiret with Raoul Dufy and Jeanne Paquin with Lèon Bakst of the Ballets Russes in pre-war France. In Italy, the Futurist movement was very engaged in the theory and the design of fashion. Several manifestos on clothing were issued over the years. Fortunato Depero designed the colorful futurist vests in 1923–1924, Giacomo Balla designed the Futurist men and women's clothing, and Ernesto Thayaht invented the unisex jumpsuit.

[2] The painter Piet Mondrian did not create the Mondrian day dress alongside Yves Saint Laurent for his 1965 Autumn collection, but the Dutch artist's work served as inspiration for the designer to realize a dress that has become one of the most long-lasting symbols of the cross-fertilization between fashion and art. In 1966–67 the

Robert Morris into the fashion magazines, the relationship between fashion and art flourished in the early 90s with designers such as Rei Kawakubo of Comme des Garçons, Hussein Chalayan, Martin Margiela, and Alexander McQueen. It is, then, only in the last fifteen years that thriving collaborations between fashion brands and artists have exponentially increased. To name a few, Louis Vuitton, in particular when Marc Jacobs was the creative director, started famous partnerships with such artists as Richard Prince, Yayoi Kusama, Takashi Murakami, and more recently Jeff Koons.

The boundaries between the two spheres are crossed so repeatedly to become more and more blurred.

In the early 80s, fashion started its transition into museum spaces, with fashion exhibitions on view in the most prestigious cultural institutions around the world[3]. At the same time, established museums opened their doors to fashion by inaugurating permanent collections dedicated to couture garments[4].

Over the past decade, there has been a remarkable increase in the number and popularity of fashion exhibits, as well as in the size of the audience they can attract[5]. Furthermore, fashion houses have been creating their own museums (including virtual ones, such as the Valentino Garavani Virtual Museum) dedicated to designs and models from their historical collections, iconic objects, photographs and press clippings, evidence of careers that have spanned groundbreaking decades over the last two centuries. The Salvatore Ferragamo Museum and the Gucci Garden in Florence are among the most successful instances of such a proliferating phenomenon of clothing on display outside retail storefronts.

Tightly connected to the entering of fashion objects into gallery spaces is the rise of archives, both public and private, with the purpose of preserving and valuing fashion as cultural heritage. Several public institutions have become repositories of historical garments, textiles and related artifacts[6], and private companies have been investing significant resources in building, maintaining

artist Andy Warhol, blurring the boundaries between art and fashion, designed a series of paper dresses titled the Souper dress for the Campbell Soup company, which gave each customer a dress in exchange for two soup cans' labels plus one dollar.

[3] The Metropolitan Museum of Art in New York organized a major exhibition of Yves Saint-Laurent's works in 1983: it was the first time that such a recognition was granted to a living tailor. In 2017 Rei Kawakubo, founder of Comme des Garçons, will have been the next one to be recognized in this way. Schneier, Matthew. 2017. A Sneak Peek at the Met's Rei Kawakubo/Comme des Garçons show. *The New York Times*, 6 March. Available at: https://www.nytimes.com/2017/03/06/fashion/rei-kawakubo-comme-des-garcons-met-museum-exhibit-paris-fashion-week.html. Since then, the MET hosted a number of fashion exhibitions, from the celebrated Alexander McQueen's "Savage Beauty" in 2011, to the last, less conventional "Camp: Notes on Fashion". Ferrier, Morwenna. 2019. How will Met Gala 2019 guests translate camp into costumes? *The Guardian*, 3 May. Available at: https://www.theguardian.com/fashion/2019/may/03/how-will-met-gala-2019-guests-translate-camp-into-costumes. In 2000, the Italian designer Giorgio Armani's retrospective was presented at the Guggenheim Museum in New York and then moved to Bilbao, Berlin and London. Breward, Chris. 2003. Shock of the frock. *The Guardian*, 18 October. Available at: https://www.theguardian.com/artanddesign/2003/oct/18/art.museums (all websites last accessed on 1 January 2020).

[4] Above all, the pioneeristic Anna Wintour Costume Center of the Metropolitan Museum of Art, with Diana Vreeland as a special consultant from 1972 to 1989, the Fashion Room (No. 40) of the Victoria & Albert Museum in London, but also the Museum of Costume and Fashion of the Uffizi Gallery in Florence and the Musée des Arts Décoratifs of the Louvre Museum in Paris.

[5] In 2015, Alexander McQueen's "Savage Beauty" show at the Victoria & Albert Museum in London broke all the records, being the most visited exhibition in V&A history and even prompting the museum to stay open 24 hours a day during the last weekends of the exhibition. See *The Guardian*, 3 August 2015, available at: https://www.theguardian.com/fashion/2015/aug/03/alexander-mcqueen-show-savage-beauty-most-popular-victoria-and-albert-history (last accessed on 1 January 2020).

[6] The Prato Textile Museum in Italy is one of the most important cultural institutions for studying and preserving the textile industry, ancient and contemporary fashion. See the museum website: https://www.museodeltessuto.it/?lang=en (last accessed on 1 January 2020).

and promoting their own archives in order to enhance their brands' history and identity (Calanca and Capalbo 2018).

2. Background and Premises: The Widespread Recognition of Fashion's Artistic and Cultural Value

The interaction between fashion and art has been a highly discussed topic in popular culture and the mass media, among professionals of both the fashion and art communities, as well as scholars from various disciplines, including fashion theory, art history, cultural studies, aesthetics, sociology, anthropology.

Leaving aside the classical debate on whether fashion is art (Norell et al. 1967), this article is based on the premise that increasingly over the past two decades, the creative endeavor of fashion has been celebrated by the experts and the general public (Buccafusco and Fromer 2017). Fashion "is now recognized as a form of creative expression" (Scafidi 2006). More precisely, fashion objects' artistic, aesthetic, expressive value has been widely and commonly accepted, in addition to their functional, utilitarian, non-expressive nature as industrial products.[7] What has been generally acknowledged is that clothing serves the practical purpose of covering the body, but also represents a mean of expressing individual creativity for fashion designers and consumers[8] alike (Palavera 2016; Simmel 1957).

"[T]he fact that [fashion] is, usually, designed to be worn […] does not prevent it from being meaningful, and the art world's continued fascination with fashion [, as well as its increased presence in museums internationally,] underlies its cultural significance." (Arnold 2009). As one of the most influential phenomena of the modern world, fashion reflects and, at the same time, has a profound role in, shaping human culture. "[O]n a parallel footing to art", fashion contributes to the "larger system of visual culture and communication" we are embedded in (Sischy and Celant 1982).

The widespread recognition of this multifaceted nature of fashion creations as functional, artistic, and cultural objects makes their legal treatment very difficult and raises the debate on the appropriateness, effectiveness and fullness of the different kinds of protection offered to fashion items by intellectual property (IP) law.

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[7] "European fashion industries are at the crossroads where manufacturing meets creativity." Commission Staff Working Document. Policy Options for the Competitiveness of the European Fashion Industries 'Where Manifacturing Meets Creativity', Brussels, 26.9.2012, SWD (2012) 284 final.

[8] The function of communication derived from wearing a piece of clothing, even if not a deliberate act of will and self-expression, is in any case unavoidable. "It's impossible to wear clothes without transmitting signals" Morris, Desmond. 1977. Manwatching: A field guide to human behavior. New York: Abrams. "The right to wear is a corollary of the freedom of speech" (Palavera 2016). See *Cohen v. California*, 403 U.S. 15 (1971), the famous US Supreme Court case where wearing a jacket with the lettering "Fuck the draft. Stop the war" is obviously equivalent to verbal communication. However, also note *Tinker v. Des Moines Independent Community School District* 393 U.S. 503 (1969), where wearing black armbands to protest the Vietnam war is protected as symbolic speech "closely akin to pure speech". "Symbolism is a primitive but effective way of communicating ideas", *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 632 (1943).

It is worth to mention the related issue of fashion as identity. Fashion is inextricably related to both individual identity (cf. the artwork by Barbara Kruger "I shop therefore I am") and collective identity (each subculture's clothes are often well defined and recognizable, used as a sort of uniform expressing the identity of the group). See Barnard, Malcolm. 1996. Fashion as Communication. London: Routledge. A critical factor in the construction of identities through fashion is related to the so-called cultural appropriation issues, raising when the dynamism of communication leads mainstream fashion to improperly appropriate meanings that specific groups attribute to certain types of garments and accessories (see infra).

In the Italian legal system, fashion creations have been traditionally protected as functional products by industrial property law[9], a bundle of rights which includes designs[10], patents[11], and trademarks[12], and by provisions against unfair competition[13].

How is fashion protected for its artistic and cultural value? Does fashion receive the same types of protection as art?

The field of art in Italy is regulated by cultural property law, enshrined in the Code of Cultural and Landscape Property[14], and by copyright law[15].

As far as the first branch is concerned, nowadays, cultural property law regime does not generally apply to fashion, although single objects or collections may be included under the notion of 'cultural heritage'.[16]

The Cultural Property Code establishes conditions and requirements that are not usually consistent with the nature of fashion: the objects must not be made by a living author, nor produced less than fifty years ago.[17] Fashion items are made for daily use and, even when they are part of museums' exhibitions or private collections and archives, they are often created by living designers.

The current wider appreciation of fashion's cultural value,[18] according to a few scholars, may have opened a new path towards the future recognition of fashion objects under the discipline of cultural property law.[19] It might be interesting to inquiry whether this may be a suitable kind of protection for fashion but that goes beyond the scope of this article.

Regarding copyright regime, one can argue that fashion has been protected by copyright law for a long time. At the same time, however, the recognition of the artists' protection for fashion designers has always been heatedly discussed among scholars, legislators and judges.

Originally, the debate swung between the two extreme positions of who, on the one side, regarded fashion as a utilitarian object and who, on the other side, considered apparel as a form of artistic expression. Adopting a comparative perspective, the two poles corresponded to the opposite approaches of United States and France.

In the US, copyright protection is reserved exclusively for works of art, therefore, industrial designs may not, as a matter of principle, be assimilated to artistic works protected by copyright. At

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[9] Code of Industrial Property ('C.I.P.'), Legislative Decree no. 30 of 10 February 2005. The notion of Industrial Property was introduced as a sub-category of Intellectual Property (IP) by the Italian literature, simply to juxtapose intellectual products with an industrial character, regulated by industrial property law, to mere intellectual products, regulated by copyright law. In the United States, the notion of intellectual property has a partially different definitory and regulatory meaning. The notion covers indistinctly the different kinds of protection afforded by trademarks, design patents and copyrights.

[10] Registered design, art. 31 ss. C.I.P. At the EU level, 'unregistered design' regime was introduced by art. 11 Regulation 6/02/CE of 21 December 2001.

[11] Art. 45 ss. and 82 ss. C.I.P.

[12] Art. 7 ss. C.I.P. Trademarks law was recently subject to significant amendments by Legislative Decree no. 15 of 20 February 2019 in compliance with the EU Directive 2015/2436.

[13] Art. 2598 ss. Civil Code.

[14] Legislative Decree no. 42 of 22 January 2004.

[15] Law no. 633 of 22 April 1941 and art. 2575 ss. Civil Code.

[16] Private collections need a specific declaration of cultural interest. For instance, last April 2019, the archive owned by the well-known Italian stylist Renato Balestra, featuring over forty thousand sketches and drawings, has been declared by the Archival and Bibliographic Superintendency of Lazio, on behalf of the MiBAC, an item of "particularly important historical interest" (art. 13 ss.), including it under the notion of "bene culturale", according to the Code of Cultural and Landscape Property (art. 10).

[17] Art. 10(5). On the subject, see Caponigri, Felicia. 2017. Problematizing fashion's legal categorization as cultural property. *Aedon*. 2. See also Casini, Lorenzo. 2016. Ereditare il futuro. Dilemmi sul patrimonio culturale. Bologna: Il Mulino; *Id*. 2018. Riprodurre il patrimonio culturale? I "pieni" e i "vuoti" normativi. *Aedon*. 3.

[18] Work summary, Study Commission for the Identification of Public Policies for the Protection, Conservation, Enhancement and Use of Italian Fashion as Cultural Heritage. Available on the Ministry of Cultural Heritage (MiBAC) website (last accessed on 1 January 2020).

[19] Caponigri, Felicia. 2017. Problematizing fashion's legal categorization as cultural property, *cit.*

the very most, if the utilitarian product presents artistic features that can be identified separately and independently from the support to which they are associated, such features may enjoy copyright protection. Consistent to a dominant commercially driven approach, the US intellectual property regime for fashion designs has been built around the common idea of fashion as a thriving industry that is not damaged at all by plagiarism[20] (Andrews 2012), and, even if it functions with limited or low levels of IP protection, it has still incentives to create and innovate (Raustiala and Sprigman 2006).

In France, the *théorie de l'unité de l'art*[21] affirms that art may be expressed in any forms, and fixed in any material support. If artistic features are embodied in a functional article, such a creative expression deserves recognition as a work of art and cannot be distinguished and disqualified merely because it is associated to a utilitarian object[22]. Therefore, copyright law explicitly protects fashion creations, without assuming any distinction between fine arts and applied arts[23].

Today, the general widespread recognition of fashion's artistic value has led to interesting developments, towards a higher level of fashion's protection as a work of art. Nonetheless, the status of fashion under copyright law maintains, in fact, a certain degree of uncertainty and lack of use, therefore the question on to what extent fashion can be offered the same protection as art remains open for investigation.

This article first analyzes fashion's copyright regimes in Italy and the United States. Despite the increasingly widespread recognition of the art-like nature of fashion and a general trend towards an enhanced protection, the copyrightability of fashion objects as works of art is still a debated issue among scholars and in case law. Second, several criticisms will be made on the appropriateness, and even the necessity, of this kind of protection, in light of the peculiar nature and dynamics of fashion. The analysis will take into consideration two key factors of the current times: the social media advent and the unequal positions of well-established fashion houses and emerging designers. Last, analyzing a number of case studies, a growing phenomenon can be described, that is, controversies regarding the fashion world tend to be disputed on social media rather than in courtrooms. The author's purpose is to bring such a phenomenon of self-regulation out of court into conversation, examining the advantages and disadvantages. Social media platforms are more suitable to fashion's nature and dynamics, and ultimately, their verdicts seem to obtain better results than litigation, balancing the unequal positions of established and emerging brands, and enforcing IP rights more effectively and rapidly. Fashion cases are global: the article focuses on the Italian legal system adopting a comparative approach, in particular referring to the United States context.

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[20] I am aware that the terms 'plagiarism', 'piracy', and 'counterfeiting' have different technical meanings in both the Italian and the United States legal systems. In the present article, I use 'plagiarism' or 'piracy' when referring to copyright infringements; 'counterfeiting' is used when industrial property rights violations are involved. Generally, I tend to use the term 'copying'.

[21] Art. L. 112-1, French Code de la propriété intellectuelle: "Les dispositions du présent code protègent les droits des auteurs sur toutes les oeuvres de l'esprit, quels qu'en soient le genre, la forme d'expression, le mérite ou la destination".

[22] See Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, Ninth Session, Geneva, 11–15 November 2002. Industrial Designs and their Relations with Works of Applied Art and Three-Dimensional Marks.

[23] French Code de la propriété intellectuelle, Art. L 112-2: "14°) 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".

3. The Legal Protection of Fashion as Art

3.1. From 'Separability' to 'Artistic Value' Requirement

The general debate on fashion as art has been in the background along the path towards the recognition of copyright protection, typically the domain of the artists, to fashion creations.

Prior to 2001, Italian copyright law afforded protection to works of art applied to industry, only if their artistic value could be expressed and appreciated independently of any functional purpose, being ideally separable from the industrial products to which they pertained,[24] in a very similar way to the provisions of the current Law on Copyright in the United States.[25]

If few cases on two-dimensional designs, including a Naj-Oleari pattern for fabrics, considered the artistic features separable, therefore protected,[26] the so-called requirement of separability ('scindibilità') was soon interpreted by judges as "non-existent in the three-dimensional objects of industrial design", thus rendering the provision de facto inapplicable.[27] Overseas, the United States courts had been elaborating numerous tests to determine both physical and conceptual separability of the artistic qualities from the object's functional character ('separability' or 'useful articles' doctrine); the multiplicity of cumbersome, unclear and competing tests led to conclusions mostly for the non-copyrightability of three-dimensional designs of useful articles.[28]

If, so far, the Italian and US approaches were alike, the Italian scenario was about to drastically change with the implementation of the European Union Directive 98/71/EC in 2001[29]. The Law on Copyright was amended, abrogating the separability requisite, and determining the new conditions for copyright to be granted to industrial design objects in, besides having a creative character, displaying an inherent artistic value[30].

Moreover, the Directive required member states to comply with the principle of cumulation between design and copyright regimes of protection[31]. From that moment on, fashion objects could

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[24] Art. 2.4, L. of 22 April 1941 n. 633, abrogated by Lgs. D. no. 95/2001: "works of sculpture, painting, drawing, engraving and similar figurative arts, including scenic art, even if applied to the industry, provided that their artistic value could be appreciated separately from the industrial nature of the products to which they pertained".

[25] 17 U.S.C. § 101 (1976): "The design of a useful article […] shall be considered [eligible for protection as a work of art] 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". The 1976 Copyright Act, which revised the prior 1909 version, incorporated the Supreme Court landmark decision *Mazer v. Stein*, 347 U.S. 201 (1954), expressly protecting "two and three-dimensional works of fine, graphic, and applied art".

[26] *Fiorucci spa v. Manifattura Naj Oleari spa*, Civil Court of Cassation, sec. I, judgement no. 7077 of 5 July 1990; see also Como IP court, order of 12 February 1996.

[27] Civil Cassation Court, sec. I, judgement no. 10516 of 7 December 1994, which denied copyright protection to the famous chaise-longue by Le Corbusier.

[28] In most cases, US judges seem to base their decisions on a "we know it when we see it" rationale. See Perlmutter, Shira. 1990. Conceptual Separability and Copyright in the Designs of Useful Articles. *J. Copyright Soc'y U.S.A.* 37: 339. See also Keyes. 2008. Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law. *Ohio State L. J.* 69:109; Report of the House Committee on the Judiciary contextual to the entry into force of the Copyright Act (H.R. Rep. No. 94-1476 1976). A few important judgements: *Kieselstein-Cord v. Accessories by Pearl, Inc*., 632 F.2d 989, 990 (2d Cir. 1980), *Carol Barnhart, Inc. v. And with. Cover Corp*., 773 F.2d 411, 412 (2d Cir. 1985), *Brandir International v. Cascade Pacific Lumber Co*., 834 F.2d 1142 (2nd Cir. 1987), *Whimsicality v. Rubie's Costume Co*., 891 F.2d 452 (2d Cir. 1989), *Pivot Point International, Inc. v. Charlene Products*, Inc. 372 F.3d 913, 930–31 (7th Cir. 2004), *Jovani Fashion, Ltd. v. Fiesta Fashions*, 500 Fed. App'x 42 (2d Cir. 2012), *Star Athletica, LLC v. Varsity Brands, Inc*., 580 U.S. _ (2017) (see infra).

29 Legislative Decree no. 95 of 2 February 2001.

[30] Law on Copyright (n. 633/1941), Art. 2, n. 10: "works of industrial designs which themselves have a creative and artistic value".

[31] Article 17 of the Directive 98/71/EC. Art. 5.2 (prohibition of cumulative protection), D. R. no. 1411/1940, abrogated by Lgs. D. no. 95/2001.

potentially be protected not only as industrial products under the Code of Industrial Property, but also as artistic creations under the Law on Copyright.

In the ideal spectrum of fashion copyright protection, where the United States are on the one end, with fashion as part of "IP's protection gap or negative space" (Raustiala and Sprigman 2006), falling through the cracks of IP protection in a "doctrinal no man's land" (Rosenblatt 2011), and France is on the opposite end, providing the same type of protection for both fine and applied arts on the basis of the theory of unity of art, the Italian approach shifted from the former and moved closer to the latter.

The EU Directive had left each member state free to determine the extent to which, and the conditions under which, copyright protection would have been conferred (art. 17). The majority of the IP scholars agrees that the Italian legislator added, besides the creative character, the 'inherent artistic value' criterion (art. 2 no. 10 L. 633/1941) for a dual reason: first, to let the design regime be the ordinary tool of protection for fashion products, and second, to prevent industrial design objects of daily use from obtaining an indiscriminate access to the strong monopolistic protection afforded by copyright (Dalle Vedove 2001; Bonelli 2003; Galli 2004; Fabbio 2012; Morri 2013; Vanzetti and Di Cataldo 2018). Copyright, in fact, encompasses both the right of economic exploitation of the work during the author's life and for seventy years after their death, and the time-unlimited moral rights to have authorship recognized and to preserve the integrity of the work.[32] In addition, copyright does not require registration or any other formality as a prerequisite for protection. In this way, then, even when any other form of IP protection is expired or unavailable, copyright may still be invoked.[33]

In sum, despite having expanded the protection for industrial design compared to the pre-2001 regime, the intention of the legislator was to limit the scope of the provision in order to avoid the opening of the floodgates to an arbitrary, over-extended protection for industrial products, and thus interfering with the proper functioning of the market (Spada et al. 2002).

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[32] Moral rights include right of attribution or paternity (art. 20 L. 633/41), right of integrity (art. 20 L. 633/41), right of withdrawal (art. 142 L. 633/41 and art. 2582 Civil Code), and right of disclosure (implied in the art. 142 L. 633/41). In the United States, moral rights do not apply to industrial design. After the late ratification of the Berne Convention in 1989, they are attributed "only to the author of a work of visual art" (VARA, 17 U.S. C. § 106A(b)) and explicitly excluded for applied art (17 U.S.C. § 101: "A work of visual art does not include—(A)(i) […] applied art"). See the latest US Copyright Office report on "Authors, Attribution, and Integrity: Examining Moral Rights in the United States", 23 April 2019, available at: https://www.copyright.gov/policy/moralrights/full-report.pdf (last accessed on 1 January 2020).

The extension of moral rights to fashion design is a recently debated issue among US academics and case law. On the implementation of a *sui generis* form of moral rights for fashion, see Ruff, Elise, 2017. If the Shoes Fit: The Effects of a Uniform Copyright Design Test on Local Fashion Designers. *The John Marshall Review of Intellectual Property Law*. 17:262; Andrews, Katelyn N. 2012. The most fascinating kind of art: fashion design protection as a moral right. *N.Y.U. Journal of Intell. Prop. & Ent. Law*. Vol. 2:188; and also, Akanegbu, Anuli. 2012. Fashion's Moral Dilemma: Exploring How a Lack of Moral Rights in the United States Disproportionately Harms Emerging Fashion Designers. 8 May. Available at: https://ssrn.com/abstract=2054783 or http://dx.doi.org/10.2139/ssrn.2054783 (last accessed on 1 January 2020). See also Wade, Margaret E. 2011. The Sartorial Dilemma of Knockoffs: Protecting Moral Rights without Disturbing the Fashion Dynamic. *Minnesota Law Review*. 96: 336; Hansmann, Henry, Santilli, Marina. 1997. Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis. *J. Legal Stud.* 26: 95.

[33] This is the case of the Moon Boot decision, see infra.

3.2. *Judicial Interpretation of 'Artistic Value' and Its Latest Developments*

After the reform, the Italian courts have been playing a crucial role in defining the broad 'artistic value' standard. The judges followed the approach suggested by the legislator and, consistently with the ratio of the new provision, proved extremely cautious in extending copyright protection to industrial design. Several decisions even considered the chaise-long designed by the worldwide famous architect and artist Le Corbusier as creative product lacking artistic value, with the motivation of its serial, large scale reproducibility. Such a reasoning meant denying the eligibility for copyright protection to industrial design in toto, since reproducibility represents the very nature of industrial design objects[34].

It took five years before the Specialized section for industrial and intellectual property matters of the Milan Court issued a decision granting copyright protection, not specifically to fashion, but to industrial design[35]. The famous Panton chair by Verner Panton, according to the judges' opinion, comprised a particular degree of creativity and an inherent artistic value because that was the "general perception that might have been consolidated in the society and especially in the cultural circles"[36]. An additional parameter for the copyrightability of the Panton chair was its display in the collections of many contemporary art museums, thus confirming its significance and value beyond a mere characterization as a model of chair, rising interest not only among design experts and consumers but also the general public.

The subsequent case law allowed copyright protection for industrial designs of well-known products, created by worldwide celebrated designers and artists, exhibited in museums and included in art textbooks as representative of a specific period or artistic movement. None of the cases concerned fashion designs yet, mostly regarding, again, design objects such as the Panton chair[37], or the Arco lamp, realized in the 1960s by Achille and Pier Giacomo Castiglioni for the Flos company, "expression of that post-war style research, characterized by essentiality and formal rigour"[38], or finally, the chaise longue by Le Corbusier, icon of the Italian rationalism, made in 1928 and exhibited all over the world, "whose aesthetic value is still intact decades after its creation, confirming the specific representative capacity of an artistic taste, which can differentiate this product from the congeries of ephemeral and ordinary design production"[39].

With the purpose of maintain a high threshold to protection, 'per se artistic value' was so conceived as to reserve the special copyright defense to the most valuable, above-average design ('fascia alta' or 'alta gamma') (Franzosi and Scuffi 2014).

In order for a design to meet the requirement, the courts, throughout their decisions, have set out an objective standard, to be measured by several indicators: among others, the display in contemporary art or design museums' collections, the reproduction of the work in art or design publications, experts' opinions, technical consultants' reports, the achievement of design's awards,

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34 *Cassina spa v. Dimensione Direct Sales srl*, Bologna court, order of 3 August 2004; *Cassina spa v. Galliani Host*, Monza court, orders of 23 April 2002 and of 16 July 2002.

35 *Vitra Patente ag v. High Tech srl*, Milano IP court, order of 28 November 2006, confirmed in appeal by Milano IP court, order of 18 January 2007. See Naj-Oleari, Marella. 2007. Tutela d'autore per il design. *Sole 24 Ore*. 3 January. Available at: https://www.studioscarpellini.it/wp-content/uploads/2012/07/03gennaio2007.pdf (last accessed on 1 January 2020).

36 *Id*.

37 *Vitra Patente ag v. High Tech srl*, Milan IP court, judgement no. 9917 of 13 September 2012.

38 *Flos spa v. Semeraro Casa & Famiglia spa*, Milan IP court, judgement no. 74660 of 29 December 2006; *Flos spa v. House World Arredamento*, Florence specialized court for business matters, judgement no. 525 of 16 February 2010.

39 *Cassina spa v. High Tech srl*, Milan IP court, judgement no. 2311 of 17 February 2014. See also *Ca. spa v. High Tech srl*, Milan IP court, order of 28 April 2011.

the author's fame, the affiliation to a well-known artistic movement, but also commercial success, willingness of consumers to pay high prices for the work, and exclusive distribution channels[40].

The nature of fashion—vocation for temporariness—does not seem to comply with such standards: it is quite rare that a piece of clothing can last more than one season, let alone being able to historicize the taste of a period. This seems to be the assumption every time a judge hears a case on apparel design copyright. So, the Rome IP court denied the presence of artistic value to a pair of earrings of the designer Delfina Delettrez, the fourth generation of the Fendi family, because they did not raise that particular collective appreciation associated with works of art[41]. The same occurred for Max Mara's 'The Cube', a modular winter coat, not recognized as an art piece because "the three letters of fashion museums produced by the plaintiff [were] not sufficient to prove the existence of a design object whose artistic value is universally known and appreciated"[42]. A few more cases. The design of Conbipel's 'Opale' scarf: however original and creative, it did not seem to have, according to judges, an artistic value whose perception had been consolidated in the collective imagination[43]. The costumes of the television show 'Ballando con le stelle', on the other hand, were appreciated by the large audience, but they were not so recognized by museums or specialized journals[44].

A complete reversal of this judicial trend occurred when the IP specialized section of the Milan court, in 2016, decided for the copyrightability of the 'Moon Boot' (Appendix A, Figure A1), the popular après-ski designed in 1970 by Giancarlo Zanatta, against the 'Anouk' model by the Anniel group[45]. Design registration had expired, there was no three-dimensional trademark on the shape of the boot: copyright protection was claimed, and judges granted it on the basis of compelling evidence filed by the applicant[46]. Inspired by the Apollo 11 moon landing and very much in vogue at that time, then resurfaced as a fashion trend in the early 2000s, Moon Boot is considered an "icon of the Italian design and a symbol of its capacity to guide the taste of an epoch in matter of daily use objects". "Not surprisingly, the snow boots have been the subject of important publications focusing on Italian and international contemporary design, received favorable criticism from experts and gathered a vast enduring popularity". Lastly, in 2000 Moon Boot was chosen "as one of the newest symbols of 20th century design at an international level by the Louvre Museum" and exhibited in its rooms.

For the first time in the Italian legal system, a fashion product enjoyed copyright protection.[47] Such an outcome is not to be taken for granted because its precedents clearly show that, while the application of the 'creative character' condition has been self-evident as "any expression of the author's personality", the quid pluris required by the artistic value has been subject to a particularly rigorous assessment to be made on a case-by-case basis.

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40 *Thun spa v. Egan srl*, Civil Court of Cassation, sec. I, judgement no. 7477 of 23 March 2017; *Metallo spa v. City design srl*, Civil Court of Cassation, sec. I, judgement no. 23292 of 13 November 2015. See Fabbio, Philipp. 2016. Che cos'è arte? Una sentenza del Tribunale di Venezia sul "valore artistico" delle opere di design e sul giudizio dell'esperto. *Riv. Dir. Ind*. 1:62; *Id*. 2015. Contro una tutela autoriale "facile" del design. Considerazioni a margine di una recente pronuncia della Cassazione tedesca (Bundesgerichtshof, sent. 13 novembre 2013 - "Geburtstagszug") e brevi note sul diritto italiano vigente. *Riv. Dir. Ind*. 2:45.

41 *De. Be. v. Delettrez srl and De. De. Fe*., Rome IP court, judgement of 13 June 2011.

42 *Max Mara Fashion Group srl v. Liu Jo spa*, Milan IP court, judgment no. 6397 of 21 May 2015, confirmed by Milan Court of Appeal, sec. 1, judgement no. 1893 of 5 May 2017.

43 *Frame srl v. Conbipel spa*, Torino IP court, order of 5 November 2013.

44 Rome IP court, order of 29 January 2015.

45 *Tecnica group spa v. Anniel group spa*, Milan IP court, judgement no. 8628 of 12 July 2016.

46 Varese, Elena, La tutela delle forme delle creazioni di moda: problemi e prospettive, 29 March 2019, lecture in the context of 'Fashion Law. Diritto e cultura nella filiera della moda' course, University of Florence.

47 This was the first case concerning industrial fashion products. Copyright was previously granted to a high fashion dress that was handmade and not industrially manufactured. It was a unique piece realized on commission for a showgirl who published the dress on her website without attribution. The dressmaker obtained the right to attribution and a compensation of court costs (Milan IP court, order of 11 December 2014).

Several scholars noted the significant impact that the Moon Boot judgement might have for the future. If upheld by subsequent case law, the decision would have been the leading case that paved the way for copyright protection of fashion items (Caselli 2017; Barabino and Varese 2016).

At the moment, if this case has been followed by recognitions of artistic value to iconic industrial design objects as the Vespa motorbike or the Avalon armchair[48], the few judgements involving fashion or fashion-related items did not accord protection ex art. 2 no. 10 of the L. 633/1941[49]. For instance, the 'screw heel' model realized by the designer Dina Subkhankulova and allegedly copied by Prada: the judges have no doubt that "[i]t certainly cannot be considered sufficient documentation [to prove its artistic value,] an award received during a footwear fair in Russia or the publication of the model in some commercial magazines"[50]. An interesting case regarded rosaries. In considering them not protectable under copyright law, the Venice court of appeal added an important indication for the judges to interpret the 'artistic value' criterion: the widespread distribution, and thus the commercial success of the product, cannot be a proof of its artistry[51].

If, so far, the Moon Boot case had no impact on fashion controversies, the tendency would be likely to change after the latest decision by the European Court of Justice, *Cofemel v. G-Star*.[52]

In Portugal, the clothing company G-Star successfully sued Cofemel for copyright infringement. The case reached the Portuguese Supreme Court, which stayed the proceedings and asked the EU Court whether the Directive 2001/29 on the harmonization of certain aspects of copyright precluded national legislation to provide an additional criterion as the qualification as "artistic creation" or "work of art" for an industrial design to be copyrightable. Last September 2019, the European judges established that copyright may be granted to "any original subject matter constituting the expression of its author's own intellectual creation"; no extra requirement must be fulfilled.

The Italian criterion of 'artistic value' is challenged, like any other extra set of criteria required for copyright protection in other EU countries. Even if the European Court clarifies that the requirement is to be identified also bearing in mind its specific indications in *Cofemel*[53], and thus the evaluation "is to be a thorough one, […] the judgment clearly mandates a change of approach" (Rosati 2019). The decision was delivered only few months ago: it will be interesting to track the evolutions in the Italian context.

At this stage, a closer comparison with the United States is worth making because, in spite of different legal frameworks and doctrinal backgrounds, resembling trends can be highlighted.

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48 *Zhejiang Zhongneng Industry Group Co Ldt v. Piaggio & C. spa*, Torino Court of appeal, sec. V, judgment no. 677 of 16 April 2019; *Cassina spa v. Centrufficio Loreto spa*, Milan IP court, order of 5 August 2017; *Trifirò Salvatore v. Sony Music Entertainment spa*, Milan IP court, order of 15 June 2017.

49 *G.R. v. E.C.*, Bologna IP court, judgement no. 457 of 20 February 2019, regarding clothing; *Rolex spa v. Swift Company srl*, Torino IP court, judgment no. 1509 of 16 September 2019, regarding specific models of watch bezels by Rolex.

50 *Dina Rinatovna Subkhankulova v. Prada spa*, Milano IP court, judgement no. 8219 of 24 July 2017.

51 *L.A.L. srl v. Ghirelli srl*, Venice Court of Appeal, judgement of 2 May 2017.

52 *Cofemel—Sociedade de Vestuario sa v. G-Star Raw cv*, Court of Justice of the European Union, judgement C-683/17 of 12 September 2019. See Court of Justice of the European Union. Copyright protection may not be granted to designs on the sole ground that, over and above their practical purpose, they produce a specific aesthetic effect. Press Release No 109/19, Luxembourg, 12 September 2019. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-09/cp190109en.pdf (last accessed 1 January 2020).

53 *Id*. According to the Court, there is no original work whether originality is "dictated by technical considerations, rules or constraints which leave no room for creative freedom".

3.3. Enhanced Protection for Fashion? A New Separability Test

Traditionally, in the US legal system, fashion is protected under the various regimes of intellectual property law: trademarks[54], trade dress[55], design patents[56], and copyright[57].

A longstanding debate exists on what should be the most appropriate and effective protection for fashion items, whether design patent or copyright regime; mutatis mutandis, such a debate is common to the Italian scholarship. The opposing arguments originate from "fashion's hybrid nature of creative activity consisting in the design of mass-produced practical objects, the shape of which harmonizes and merges the functional and aesthetic profiles in one, thereby increasing the commercial value of industrial products so made" (Floridia 1984; Giudici 1989).

Opponents to copyright protection believe that fashion's functional nature is prevailing and that renders a patent approach, provided for manufactured articles, more suitable to protect fashion objects. On the contrary, proponents of copyright protection identify the growing acceptance of fashion designs' artistic value, even with their functional aspects, as an indication that designers are artists and deserve the protections afforded by authorship status (Ellis 2010; Tsai 2005).

Copyright advocates have made several attempts to change the law, in order to remove the 'separability' requirement and extend copyright protection to industrial design. Two bills were introduced into Congress: the 2006 Design Piracy Prohibition Act ("DPPA")[58], which was revised as the Innovative Design Protection and Piracy Prevention Act ("IDPPPA") in 2010[59] and reintroduced in 2012 as the Innovative Design Protection Act ("IDPA")[60]. This last proposal has yet to be passed by either house of Congress.

Whereas the efforts at legislative level fell short, an unexpected window opened up few years later in the judiciary. The Supreme Court, in its 2017 opinion on *Star Athletica L.L.C. v. Varsity Brands Inc*.[61], accorded copyright protection to Varsity Brands' designs of stripes, chevrons, zigzags, and color-blocking realized to be incorporated on cheerleading uniforms, and copied by Star Athletica, the competing brand producing clothing and accessories for athletics (Appendix A, Figure A2).

The decision has been hailed as a turning point in the longstanding debate on what should be the most appropriate and effective protection for fashion, whether design patent or copyright regime, potentially shedding light on the future copyrightability of fashion designs.

The Star Athletica Court received fifteen amicus curiae briefs, analyzed nine different previous tests to determine the separability between useful and decorative elements, and eventually created one of its own. "[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate

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54 The Lanham Act, against the sale of goods that bear confusingly similar marks, 15 U.S.C. § 1125(a) (2006), dilutive marks, § 1125(c), or counterfeit marks, § 1114.

55 A product may be protectable as 'trade dress' when it is so distinctive as to have 'secondary meaning', *i.e.* consumers associate the design of the product with its source and consider the design to be source identifying. See *Wal-Mart Stores, Inc. v. Samara Bros., Inc*., 529 U.S. 205 (2000).

56 35 U.S.C. 171.

57 17 U.S.C. § 101.

58 H.R. 5055, 109th Cong. (2006).

59 S. 3728, 111th Congress (2010).

60 S. 3523, 112th Congress (2012).

61 *Star Athletica L.L.C. v. Varsity Brands Inc*., *cit*. For case notes and comments, see Fashion Law Institute et al. 2017. Brief of Fashion Law Institute et al. as Amici Curiae in Support of Respondents in Star Athletica v. Varsity Brands. Available online: https://www.scotusblog.com/wp-content/uploads/2016/09/15-866-respondent-amicus-FLI.pdf (last accessed on 1 January 2020); Denicola, Robert. 2018. Imagining Things: Copyright for Useful Articles after Star Athletica v. Varsity Brands. *U. Pitt. L. Rev*. 79: 635; Caponigri, Felicia. 2017. Conceptual Separability in Star Athletica L.L.C. v. Varsity Brand Inc. et al: "Designs" of Useful Articles as (Non)Copyrightable Subject Matter? *Law and Media working paper series*. No. 5/2017; Buccafusco, Fromer; Ruff, Elise, 2017, *cit*.; Schroeder, Jared, Kraeplin, Camille. 2019. Give Me A ©: Refashioning the Supreme Court's Decision in Star Athletica v. Varsity into an Art-First Approach to Copyright Protection for Fashion Designers. *UCLA Entertainment Law Review*. 26:1.

from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated".[62]

Applying this test to the decorations on the cheerleading uniforms, it can be concluded that, first, the arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms could be qualified as pictorial, graphic, or sculptural works, and second, such two-dimensional works of art could exist independently from the uniforms' utilitarian features, "for example, on a painter's canvas".[63]

For the first time, fashion design was considered copyrightable, and the expectations on the future implications for the fashion industry were high.

Since the 1954 leading case *Mazer v. Stein*[64], that upheld the copyrightability of statuettes of Balinese dancing figures used as bases for table lamps, courts have been struggling to draw the line between the expressive/protected and functional/unprotected aspects of useful objects. "The line between art and industrial design […] is often difficult to draw": it is Justice Thomas himself in the opinion of the Court that stresses the importance of this decision to "resolve widespread disagreement over the proper test for implementing § 101's separate-identification and independent-existence-requirements"[65]. The separability test applied for industrial designs' copyright protection "has confounded courts and commentators" over the years (Denicola 2018)[66]: finally, the Star Athletica Court explicitly addressed the issue, aiming to bring order to the former chaos.

In fact, though, the test established in Star Athletica leaves "too much room for ambiguity" (Mulam 2019)[67]. Justices Breyer and Kennedy, in their dissenting opinion, objected that the test might render potentially any industrial design copyrightable. "That is because virtually any industrial design can be thought of separately as a "work of art" […] What design features could not be imaginatively reproduced on a painter's canvas?"[68]. The result would be quite a radical departure from the previous regime of copyright protection.

Further critics to Star Athletica's lack of clarity came already a week after its delivery, when the Puma brand filed a lawsuit against Forever 21 for allegedly copying designs from their Fenty-by-Rihanna footwear collection. The Californian district court judge, who decided against Puma, took the chance "to point out a large flaw in Star Athletica over how much of a difference has to exist for a product to count as copyright infringement" (Mulam 2019)[69].

62 *Star Athletica L.L.C. v. Varsity Brands Inc.*, *cit.*

63 *Id*.

64 *Mazer v. Stein*, *cit*.

65 *Star Athletica L.L.C. v. Varsity Brands Inc.*, *cit.*

66 "Of the many fine lines that run through the Copyright Act, none is more troublesome than the line between protectible pictorial, graphic and sculptural works and unprotectable utilitarian elements of industrial design", Goldstein, Paul. 1989. Copyright: Principles, Law and Practice. Boston: Little Brown. "Courts have twisted themselves into knots trying to create a test to effectively ascertain "whether the artistic aspects of a useful article can be identified separately from and exist independently of the article's utilitarian function". *T Masquerade Novelty, Inc. v. Unique Indus.*, 912 F.2d 663, 670 (3d Cir. 1990).

67 Even only the first prong of the test, deciding whether the design is a pictorial, graphic or sculptural work, is a long-debating and unsolved question. Cf. "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." Justice Holmes, *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 251 (1903). The Holmes prescription has been repeatedly invoked by judges to justify their restraint in deciding about artistic matters, stating their inadequacy to engage in aesthetic determinations. See Palandri, Lucrezia. 2016. Giudicare l'arte. Le corti degli Stati Uniti e la libertà di espressione artistica. Firenze: FUP.

68 *Star Athletica L.L.C. v. Varsity Brands Inc.*, *cit.*

69 *Puma SE v. Forever 21, Inc*. (2017), 2:17-cv-02523 U.S. District Court for the Central District of California.

If the actual impact on fashion industry is still limited—so far, are copyrightable the designs of a banana costume[70] and of a swimsuit[71]—, what is undisputed is that the Star Athletica decision has revamped the debate on what is the most suitable protection for fashion designs, in particular, which kind of regime fits better with the nature and characteristics of today's fashion world.

Now that upholders of copyright should be closer to achieve their goals and a new path towards strong, enhanced protection for fashion has been opened, the status of fashion's protection is still uncertain.-The dual question arises as to whether copyright regime is suitable to fashion's logics and dynamics, and even to whether there is any need of such kind of protection in the fashion world.

3.4. Copyright Fashion-Related Criticisms: (a) Unsuitable, (b) Unnecessary, (c) Harmful

According to many fashion designers and legal scholars, the Star Athletica decision signed an important evolution in the field of intellectual property law as a significant strengthening of protection for the fashion industry. Despite the different legal framework, the Italian Moon Boot decision was similarly perceived as a crucial step for the fashion community.

Nonetheless, the role of IP in the every-day of fashion practice is very limited, if not insignificant.

In the United States, the core forms of IP law provide only very limited protection for fashion designs. Fashion creations might be covered under trademark law, but occasionally, and only for the more established companies with better-known logos. The subcategory of trademark law that is defined as 'trade dress' is even more restricted, being applied only for a few, truly iconic and enduring products. Design patents are extremely expensive and require an excessively long review process, at odds with the speed of fashion cycles.

Similar criticism could be made for the Italian high IP regime of protection for fashion products. Even if Italy presents a wide plethora of pervasive regimes, including the special tool of the EU unregistered design, "the behavior of fashion industry firms [does not change] much from one side of the Atlantic to the other" (Raustiala and Sprigman 2006).

In spite of the enthusiasm with which the Moon Boot and Star Athletica decisions have been welcomed in their respective legal systems, even the strong protection they would have granted has remained, in fact, unutilized. Using the words of the ECJ Advocate General Szpunar in the *Cofemel* decision, "despite the fact that the protection of works of applied art is as old as IP, it is not something that has been devoid of issues"[72]. Several observations can be formulated in the attempt to explain this phenomenon.

First, fashion is characterized by short product life cycles. Due to its long duration, copyright does not seem suitable to fashion's dynamics because it would accord an over protection to apparel designs, giving a strong monopoly to the designer, discouraging creative expression, stifling innovation, and limiting the free competition on the market.

Second, copyright protection is unnecessary for the fashion world because data and statistics show that fashion is a fast-growing, multi-billion dollar business that does not seem economically harmed by plagiarism, even if copies have exponentially increased in recent years. Rather, a so-called "piracy paradox" argument has been developed, according to which "copying produce a faster creative cycle and more consumption of fashion due to the quicker deterioration of apparel's status-conferring value" (Raustiala and Sprigman 2009). This process would explain why the fashion business is not harmed by extensive and free ride copying; not only, this would even represent a benefit and a push for designers and the industry as a whole. Conversely, upholders of copyright argue that such an accelerated fashion cycle has other, more severe harmful effects that might be mitigated by an increased protection, above all, environmental damages and exploitation of low-cost manufacturing by outsourcing part of the production process. However, the piracy paradox, if ever valid, seems applicable only regarding major fashion houses with major financial capability.

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[70] *Silvertop Associates Inc. v. Kangaroo Manufacturing Inc.*, No. 18-2266 (3d Cir. 2019).

[71] *Triangl Group Ltd. v. Jiangmen City Xinhui District Lingzhi Garment Company* (S.D.N.Y. 2017).

[72] *Cofemel—Sociedade de Vestuario SA v. G-Star Raw CV*, Court of Justice of the European Union, *cit.*

Third, the availability of copyright protection can even be harmful, bringing more drawbacks than benefits, especially to emerging designers.

"Fashion is a very hierarchical business. […] Established fashion designers and couture houses at the top of the pyramid have the resources and in-house legal teams to combat copycats with intellectual property remedies" (Wade 2011). Such instruments are mostly accessible to major fashion companies, while they are not easily attainable by smaller designers.[73]

In Italy, the narrow interpretation of the 'inherent artistic value', made by the judges of the famous Moon Boot après-ski, goes in the direction to limit copyright protection to a few historical fashion items, excluding creations of the seasonal collections, conceived to stay in stores only for a limited amount of time. These ones constitute the largest part of the production in the fashion industry. Iconic products are not the daily business of the apparel brands.

Judges do not seem to rule in favor of emerging designers, whose products could achieve protection on the basis of their artistic qualities, but not of their long-lasting presence on the market, substantial marketing efforts, or capability to be exhibited in a museum. The current approach seems to rather privilege already well-established, solid companies.

Similarly, in the US, Professor Ronald Mann analyzed the cheerleading uniforms' case from the viewpoint of the small firm Star Athletica founded by a former employee of the dominant industry leader Varsity Brands, and concluded that "it has become increasingly obvious that broad protection for industrial designs provides considerable market power for industry leaders" (Mann 2017). Yet, when piracy creates an obstacle, this mainly stands in the path of small brands.

Overlapping regimes of protection are theoretically able to grant each fashion object a case-by-case, ad hoc, specific kind of protection. In practice, though, these tools do not seem appropriate to the logics and nature of fashion, especially considering fashion's classic hierarchical vocation and the unbalanced dynamics between major fashion labels and independent designers.

The current phase of the digital revolution has exacerbated the whole situation but, ultimately, has also offered an alternative solution.

3.5. The Digital Revolution

Over the past decade, the evolution of the Internet and the advent of the social media networks have made, on the one side, fashion more accessible and available, and, on the other side, the work of copycats much easier and faster.[74]

The phenomenon of piracy in fashion is not new at all. Back to the beginning of the *haute couture*, at the end of the nineteenth century, fashion houses sent stylists to fashion shows in Paris to sketch designs and buy individual pieces to be copied. However, the technological change "that's happened in the last ten years […] has changed the game one hundred percent. The protection hasn't caught up to the level of technology" (Hernandez 2011).

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[73] This is confirmed by interviews I conducted with Italian emerging designers, like the Florentine brand SuperDuper Handmade Hats.

[74] See Wade, Margaret E. 2011, *cit*., 337: "Fashion piracy is not a new phenomenon, but with the rise of new technology and evolving consumer behaviors, copycat fashion is more common than ever before". See also Adler, Amy, Fromer, Jeanne C. 2019. Taking Intellectual Property into Their Own Hands. *California Law Review*. 107: 1455; Roth, Judith S., Jacoby, David. 2009. Copyright Protection and Fashion Design. In Advanced seminar on copyright law (PLI Intellectual Prop. Handbook Ser. No. G-967, 2009): "The advent of online, real time access to the exhibition of new designs and rapid-fire manufacturing capabilities through CAD and other technological advances have facilitated design piracy"; Reasons to Stop Fashion Piracy: The Testimony of Susan Scafidi. 2006. Available at: http://www.arts-of-fashion.org/stopdesignpiracy.html (last accessed on 1 January 2020).

Fashion blogs, websites, and the social media accounts of the brands themselves instantly broadcast runaway shows photos worldwide: from that moment on, copying designs, counterfeiting logos, and reproducing *haute couture* garments for mainstream consumers becomes a matter of days for the largest apparel retailers.[75]

Social media, then, are used in a smart way by emerging designers, who effectively self-promote their work, uploading their creations to the different digital platforms available today. If this gives benefits to the independent creatives, on the other side, fast fashion giants, such as Zara, H&M, Forever 21 and Urban Outfitters, can quickly and cheaply reproduce the latest designs' trends easily found online, and ship the items out to stores almost immediately—often before the original designers can even start to produce the collection.[76]

The rapid technological progress has exacerbated the inadequacy of intellectual property rights against plagiarism, with the consequence of mostly harming, once again, the emerging designers. Whereas "major fashion houses have such strong brand recognition that consumers identify the original garment and still choose to buy the original over the copy" (Scafidi 2007), an emerging designer's brand is not known yet and, if a copy enters the market before the original, the consumers will not be aware that they are not buying an original design.

At this point, regardless of the formal protection offered by IP law, it is unlikely that small brands could effectively resort to those instruments. Emerging designers usually "lack deep pockets to chase down versions they find similar (Binkley 2010), and before of that, to preventively register their creations, which, however, would rarely meet the requirements.

With the digital revolution, though, comes the other side of the coin. Social media offer the small designers an alternative way, free and accessible, to solve their conflicts and obtain compensation.

"Despite the increased availability of legal protection, one can see little litigation involving fashion designs" (Raustiala and Sprigman 2006). Rather, a more widespread use of social networks by emerging, independent designers and artists in the attempt to seek justice against plagiarism can be identified.

NYU Professors Adler and Fromer wrote an extensive article on the subject, using a diverse array of recent examples; their work has been my sherpa through the next section.

4. Fashion Controversies on Social Media rather than in Courtroom

4.1. Tuesday Bassen v. Zara

In 2016 Tuesday Bassen, an independent apparel designer and illustrator based in Los Angeles, discovered by chance that her original illustrations for pins and patches had been unlawfully reproduced by the multinational company Zara[77]. With the evolution of technology, the ease of copying and counterfeiting has increased, but so it has the ease of detecting copies (Adler and Fromer 2019). Initially, Bassen was aware of only four of her patches taken by Zara. Then, with the help of colleagues and friends, including the artist Adam Kurtz, Tuesday found two more of her pieces, along with seventeen other young artists' works; none of them was first contacted by Zara for a license agreement. Adam Kurtz's immediate reaction was the launching of Shop Art Theft, a Tumblr blog

[75] "[T]here [are w]eb sites now where you get a runway show, and they can literally zoom into the garment front and back, copy stitch for stitch, and pretty much print it and make it in a couple days flat and ship it before we ourselves can even take orders on the product", Hernandez, Lazaro. 2011, *cit*.

[76] Cf. my interview with Veronica Cornacchini and Matteo Gioli by SuperDuper Hats, talking about Zara insiders sent to Pitti Immagine in Florence, one of the most important fashion fairs in Italy, to photograph previews of new designs, 4 April 2019.

[77] See Puglise, Nicole. 2016. Fashion brand Zara accused of copying LA artist's designs. *The Guardian*, 21 July. Available at: https://www.theguardian.com/fashion/2016/jul/21/zara-accused-copying-artist-designs-fashion; Zara Comes Under Fire for Copying Indie Artists Designs. *The Fashion Law*, 20 July 2016. Available at: http://www.thefashionlaw.com/home/zara-comes-under-fire-for-copying-indie-artists-designs (both last accessed on 1 January 2020).

that compared major retailers' allegedly copied products with the original designs. Kurtz added also the links to the artists' websites and invited to support them by purchasing their artworks[78].

In similar cases, even if the small designer decides to embark on litigation and sue someone for copyright infringement, the timing of a legal process contrasts with the speed of fast fashion industry. The consequence is that fast fashion retailers have very little fear of producing by exploiting emerging designers' works, because the products of fast fashion clothing chains disappear from the store shelves before a lawsuit can even be filed against them.

Tuesday Bassen's case is far from an isolated one: there is an entire community of designers whose work has been copied without any consent.[79] For this reason, the LA based illustrator decided to take legal action against Zara, despite the heavy financial costs, and through her lawyer sent a cease-and-desist letter to the retailer. This one replied: "The lack of distinctiveness in the designs that are supposed to be his client's makes it very difficult to establish that a significant part of the population anywhere in the world would associate drawings with Tuesday Bassen".

After Zara's refusal to take her claims seriously, the designer decided to post the letter on her Instagram account (Appendix A, Figure A3). Her large following took her side, writing comments and sharing the post so that the case rapidly became very popular on the Internet.

Given such a great support of the public opinion to Bassen, Zara changed its tone and made a completely different statement: "Inditex [Zara is the main brand of the Inditex group] has the utmost respect for the individual creativity of all artists and designers and takes all claims concerning third party intellectual property rights very seriously. Inditex was recently contacted by the lawyers of artist Tuesday Bassen who noted the use of illustrations in some badges sourced externally and on clothes in its Group stores. The company immediately opened an investigation into the matter and suspended the relevant items from sale. Inditex's legal team is also in contact with Tuesday Bassen's lawyers to clarify and resolve the situation as swiftly as possible. We are also currently investigating other allegations of illustrations used on badges provided by external suppliers on a case by case basis."

Nowadays, it is commonplace for emerging designers to use social networks as free platforms to share and promote their work, but also as a place to assert their voice in case their work has been plundered by a fashion giant. Reactions on these platforms are instantaneous and in most cases very supportive: the backing of thousands of people from around the world pushes the established fashion houses to reformulate their first response, to offer apologies, to seek an agreement with the small designers' lawyers or directly with the designers, and to take reparative measures such as the withdrawal of the items from the sale and the launch of investigations on external suppliers.

As a matter of fact, despite existing formal regimes of protection, a large number of fashion controversies tend to be informally disputed on social media platforms rather than in courtrooms. Especially when the conflict involves emerging designers against well-established fashion brands, Facebook, Instagram, Twitter are powerful tools capable to balance the positions of the different players at stake and to bridge the divide between big retail companies and small independent creatives.

A brand cannot simply ignore countless comments often characterized by the recourse to 'shaming' techniques (Grinvald 2011) if it wants to protect its public image—or its sales.

4.2. The Reputation Factor: The Cool and the Bully

Certain factors, such as reputation and recognition, assume a decisive role in the fashion industry.

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[78] The Tumblr blog is still active at shopparttheft.tumblr.com. Such an instrument is very powerful, cf. the famous Diet Prada Instagram page and its unrelenting coverage on fashion allegedly copycatting cases, at https://www.instagram.com/diet_prada/ (both last accessed on 1 January 2020).

[79] In 2016 Emily Oberg, designer for her own company Sporty & Rich, accused Forever 21 and Fresh Tops of replicating her graphic sweatshirt designs. James Soares accused Urban Outfitters of stealing his graphic printing designs that were sold on his site, Society 6 (Ruff 2017).

Intellectual property regulates the fashion world only up to a certain point. Fashion is a normative system made up of unwritten rules that often weigh more than written ones. In other words, the fashion community is governed by social norms and ethical considerations that have more influence on both producers and consumers' decisions, and generate a more significant impact, than legal norms.

Social networks are effective means of exerting pressure on major companies, being able to build a good or bad reputation, to shape the public opinion, and to affect the outcome of a conflict. In light of these considerations, deciding to file a lawsuit, or sometimes even just to ignore a social campaign, may be an improper, even self-defeating, choice for a fashion giant.

If a fashion house chooses to bring a case before a court, it is very probable, regardless of a favorable legal outcome, that in practice such a fashion company would obtain different results, that can span from bad reputation and exclusion from the fashion community, to boycott and consequent drastic drop in sales. With legal action comes the risk of being labelled as "bully"[80] or "not cool",[81] and in fashion world the importance of "the cool factor" (Adler and Fromer 2019) is not to be underestimated. Similar logics and unspoken rules govern the art world as well.

The role of the bully was played by Louis Vuitton, which in 2011 sued the Danish, Amsterdam-based artist Nadia Plesner[82] for her work 'Darfurnica', where the multicolored 'Audra' bag, a Vuitton model as reinterpreted by the artist Takashi Murakami, was worn by a black malnourished child (Appendix A, Figure A4). Plesner responded explaining why one should be allowed to include references to status symbols in artworks. The Court of the Hague agreed with the artist. Vuitton did not win the case because an average observer would not have deduced from the painting the association of the fashion house with the genocide in Darfur, rather, connecting the famous LV pattern to an idea of luxury. "Owners of the most famous companies should accept a large critical use of their brands"[83]. Vuitton did not suffer damages to its name and reputation from the use of its 'Audra' bag in Plesner's work, while its public image was damaged, instead, after the artist's social media campaign, claiming her right to freedom of expression.

4.3. Gucci and GucciGhost

Emerging designers and independent artists who decide to resort to social media to seek their relief for IP infringement could accomplish probably even more than what they could have hoped to derive from a successful lawsuit. The path is faster and cheaper, and also more "attention-grabbing than court trials" (Adler and Fromer 2019), bringing the creative to the unexpected attention of the

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[80] See Rosenblatt, Elizabeth L. 2013. Fear and Loathing: Shame, Shaming, and Intellectual Property. *DePaul L. Rev*. 63:1; and also Chan Grinvald, Leah. 2011. Shaming Trademark Bullies. *Wis. L. Rev*. 2011:625 (discussing how businesses and individuals use shaming techniques to defend themselves against trademark bullies).

[81] Adler and Fromer (2019) underline the phenomenon of "cool" cease-and-desist letters as a way to subvert a "bully" label. See also Tim Nudd, Tim. 2017. Netflix Sent the Best Cease-and-Desist Letter to This Unauthorized Stranger Things Bar. *AdWeek*, 20 September, reporting positively on a "quite adorable" cease-and-desist letter written to the owners of an unauthorized *Stranger Things* bar "in the style of the *Stranger Things* universe". Rosenblatt (2013) discusses a creative cease-and-desist letter from Jack Daniel's that generated good publicity for the rightsholder. On the contrary, the Mattel company has many times proven to be "not cool". First, suing the MCA Records for the pop song 'Barbie Girl' by Aqua, see *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002). Then, deciding to sue the artist Tom Forsythe, who photographed naked Barbie dolls in absurd sexual positions on kitchen appliances, creating the series "Food Chain Barbie", see *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 802 (9th Cir. 2003).

[82] It is not the first episode of the controversy between Plesner and Vuitton. A different lawsuit was filed by the fashion brand against the artist in 2008. See Artist Chronicles 3-Year fight with Louis Vuitton in New Book. *The Fashion Law*, 9 July 2015. Available at: http://www.thefashionlaw.com/home/artistfightslouisvuitton (last accessed 1 January 2020).

[83] *Nadia Plesner Joensen v. Louis Vuitton Malletier sa*, Court of the Hague, Civil Law Section, 389526/ KG ZA 11-294, 4 May 2011. Nadja Plesner published on her website the verdict delivered by the court of the Hague: http://www.nadiaplesner.com/upl/website/simple-living--darfurnica1/VerdictEnglish.pdf (last accessed on 1 January 2020).

public. The resonance created by social media platforms grants the author their right of attribution of their works. Furthermore, as in the Bassen case, where Zara declared that it would have reached Ms. Bassen's lawyers to find the best solution, the small designer certainly obtains monetary compensation.

However, sometimes, compensation can be even more. That happens when, instead of filing a lawsuit, sending a cease-and-desist letter or shaming online, the parties start actual collaborations. Controversies are handled by "[re-appropriating] perceived misappropriations, therein generating new creative works" (Adler and Fromer 2019). In these situations, conflictual aspect is completely overcome.

Trevor "Trouble" Andrew, a Brooklyn based artist and former professional athlete, wanted the Italian fashion brand Gucci to notice him[84]. When in need of a Halloween costume, he turned a Gucci linen into a ghost costume, and GucciGhost was born. From that moment on, he started to paint a graffiti-like version of the Gucci logo not only on clothing but on a variety of objects, posting every creation on his Instagram account (Appendix A, Figures A5 and A6). Finally, Gucci reacted, but in a completely unexpected way. Alessandro Michele, Gucci's creative director, decided to hire GucciGhost and commission him its 2016 Fall collection. Fashion insiders and consumers' reaction was of appraisal of such an audacious and surprising tactic. Certainly, Gucci had much more financial benefits than from a litigation against a young emerging artist. At the same time, the brand avoided the misattribution of Andrew's work and claimed the attribution of its logo. Not to mention the advantage of having bypassed a legal battle that might have easily been unsuccessful due to 'fair use' defenses.[85]

4.4. Gucci and Dapper Dan

During the presentation of the Gucci 2018 Cruise collection, there was a garment on the catwalk that many immediately identified as the derivative of a puff-sleeved bomber jacket created by Daniel Day, better known as Dapper Dan, a designer who, between the late 1980s and early 1990s in his atelier in Harlem, contributed to that mix of styles which he defined as a "macho type of ethnic ghetto clothing", associated with African-American hip hop culture. Dapper Dan gave shape to a unique imagery, in which co-habited both an awareness of the artistic and cultural relevance of a whole community and a sense of upliftment and social advocacy, expressed through the appropriation and ironic reuse of the logos of the great European luxury brands.

The director Alessandro Michele replied to the online plagiarism allegations with declarations of homage to the creativity of Dapper Dan, implemented by mixing fabrics and accessories with Vuitton, Fendi and, precisely, Gucci logos (Appendix A, Figure A7). All without licenses, which partly motivated the closure of his store in 1992. A shop atelier that in January 2018 reopened with the financial support and collaboration of Gucci, in some way closing the circle (Appendix A, Figure A8).

Dapper Dan's fans, including many celebrities, resorted to social media to call out Gucci for its appropriation. Such mainstream media coverage is likely what led Gucci to its apologetic reaction and to the announcement of the Gucci–Dapper Dan joint venture (Adler and Fromer 2019)[86].

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[84] On the case, see Adler, Fromer. 2019, *cit*. Additionally, see Gucci's Alessandro Michele: Creative Genius or Glorified Copycat? *The Fashion Law*, 9 August 2017. Available at: http://www.thefashionlaw.com/home/guccis-alessandro-michele-saddened-by-claims-of-copying; and In Conversation with Trouble Andrew on Gucci website: https://www.gucci.com/it/it/st/stories/inspiration-and-codes/articles/agenda_2016_issue05_guccighost_collection_troblu_andrew_qa (both last accessed on 1 January 2020).

[85] The US 'fair use' doctrine is a defense against a claim of copyright infringement on the basis of a limited and 'transformative' use, such as parody, of copyrighted works.

[86] See Schneier, Matthew. 2017. Did Gucci Copy 'Dapper Dan'? Or Was It 'Homage'? *The New York Times*, 31 May. Available at: https://www.nytimes.com/2017/05/31/fashion/gucci-dapper-dan-jacket.html; Cooper, Barry Michael. 2017. The Fashion Outlaw Dapper Dan. *The New York Times*, 3 June. Available at:

The case of Gucci imitating Dapper Dan's jacket carries further implications and goes beyond copycat controversies to find itself at the center of the so-called cultural appropriation debate.[87] (Scafidi 2005). Even if it is not the subject matter of this article, it is worth mentioning that cultural appropriation cases are, too, most effectively solved through the social control on digital platforms.[88]

4.5. From Litigation through Settlement to Social Media: Advantages and Disadvantages

The copying of original designs, as well as other kinds of fashion-related or art-related cases, are all issues that call for both legal, written, formal and extralegal, unwritten, informal considerations during their assessment.

Reputation has always been a key factor for fashion companies, but in the last few years "social media has changed the game" (Adler and Fromer 2019). First, the sentence is delivered with a click and becomes viral overnight, therefore, brands need to be responsive and act quickly if they want to have a chance to repair the damage. Second, everyone has been empowered to "wage campaigns that can bring a brand to its knees in a matter of hours" (Adler and Fromer 2019).

The result is that social networks provide accessibility to satisfactory remedies to all, especially to small designers and emerging artists who do not usually have the money and the capacity to initiate judicial action. In this regard, the fashion pyramid structure that marks huge disparities between strong and weak actors might be potentially overcome.

What can be identified as a growing phenomenon in the fashion world is that equal access, justice, resolution, and fair compensation seem to be obtained in a different and yet effective manner out of court.

As stated in the previous paragraphs, IP laws play an insignificant role in the field of fashion: in fact, the available rights and remedies are not appropriate to fashion dynamics. In search of other venues in which fashion designs can receive adequate protection, in case of dispute, fashion actors most of the time decide not to lodge complaints before a court, but they rather step away from the juridical, passing through the extra-judicial, and ultimately landing on the social. From litigation, through cease-and-desist letters and settlement agreements, to the judgment of the public opinion in social media courtroom: the juridical sphere is definitely abandoned, yet regulation is still in place.

Resolution of controversies through social media often accomplishes the same results of the ones that could be expected from a successful litigation: monetary compensation, getting attribution of one's own work and avoiding misattribution of the copyist's work (Adler and Fromer 2019). Frequently, as it has been already mentioned, such outcomes are even greater if gained outside the juridical sphere.

Certainly, the path to relief is faster and cheaper than bringing a lawsuit before a court. The secondary effect is not contributing to the judicial system overload. Furthermore, it may be sharable the objection according to which courts lack the expertise to solve disputes on fashion issues and may not be the best option in such cases.

The advantages that can be delineated by the phenomenon of getting satisfaction through social media are numerous and varied. A few more. Regarding established fashion companies, they not only avoid negative publicity and reputational damages, but rather, they enhance the brand's image for being cool, while invoking law and undertake litigation would have done the opposite, building a bad reputation for being a bully. As far as small designers and emerging artists are concerned, instead, the rise of the Internet and social media has equipped them with a powerful weapon against

https://www.nytimes.com/2017/06/03/fashion/dapper-dan-harlem-gucci.html; Cochrane, Lauren. 2017. Homage or copy? Why fashion (especially Gucci) loves Dapper Dan. *The Guardian*, 2 June. Available at: https://www.theguardian.com/fashion/2017/jun/02/homage-or-copy-why-fashion-especially-gucci-loves-dapper-dan (all last accessed 1 January 2020).

[87] Cartner-Morley, Jess. 2017. Dapper Dan and Dries van Noten address cultural appropriation debate. *The Guardian*, 1 December. Available at: https://www.theguardian.com/fashion/2017/dec/01/dapper-dan-and-dries-van-noten-address-cultural-appropriation-debate (last accessed on 1 January 2020).

[88] This is the subject of an upcoming article.

big retailers and brands. The inequality between parties regarding access to justice is balanced through the opening of an alternative avenue to find solutions and get satisfaction.

Speed, efficiency and equal access[89] have their own downside. The resolution of controversies through social networks has been faced with several criticisms, above all, the lack of procedural guarantees ensured in a fair trial.[90] Additionally, social media outcry lacks accuracy and might boost the spread and circulation of incorrect or false information, undervaluing the cost of mistakes for the unjustly, or partially unjustly, accused party[91]. Social protests, boycotts, campaigns, petitions, and shaming may lead to uncalibrated forms of punishment.

Another concern regards the balancing between the competing interests of the rightsholder's protection and of the public's freedom to copy. An extra-judicial way of controversies' resolution might lead to unduly limitations to the free market, undermining creativity and competition.

However, it is this article's assumption that "informal social control as an alternative to formal law" (Strahilevitz 2005) brings more benefits than disadvantages. Against a backdrop of inadequate legal regulation, the digital age enables "self-help" (Adler and Fromer 2019) as a more efficient and accessible alternative to legal action.

5. Social Media as an Alternative Method of Conflicts Resolution: Is this the End of the Story? A Caveat

The resolution of controversies through social media is a powerful and an effective tool, suitable to fashion's nature and logics. For this reason, rethinking and reproposing categories, rights and remedies offered to fashion designs by traditional IP law should not be the effort.

The need for regulation, according to the author, should rather lie in the dynamics of the Internet. The more urgent and pressing challenge seems to be that one of bringing the law into the digital world, with the function of controlling the new battleground that are social networks.

In this latest phase of the digital revolution—the age of social media—, the recourse to social networks does not happen only ex-post, in case of conflict, but also ex-ante, when designers connect to consumers and create communities around their brands, developing personal interactions.

Social media have deeply affected the way people acquire and process information. While Facebook, Instagram, and Twitter reflect common opinions, beliefs, attitudes, at the same time they shape them, playing a prominent role in the formation of public opinion. In this regard, it becomes vital to regulate the way public opinion is formed on social media.

Against the anti-regulatory thesis claiming to support free speech, but in fact protecting and expanding property rights of media corporations, it is our concern that social media platforms should be regulated by the law (Balkin 2004).

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[89] Costs of access to justice in civil proceedings are expensive and include court fees, lawyer fees, transportation costs, time spent by litigants on a procedure. Even if big fashion companies could afford such costs, they still would need to adjust for the increased costs of litigation and filing expenses, and they would likely pass these new costs on to consumers, meaning raising the cost of clothing.

[90] Article 111 of the Italian Constitution sets the principles of the due process of law. Art. 111 states that all parties shall be entitled to equal conditions before an impartial, third-party judge. To guarantee that, all judicial decisions shall include their reasoning. Furthermore, any party can appeal to the Supreme Court of Cassation in case of violations of law. In the United States, Fifth and Fourteenth Amendments contain a due process clause that, due to the broad interpretation by the Supreme Court, includes the protection of fair procedures.

[91] The risk is that a copyist might bring a lawsuit for defamation against excessive shaming. However, most of the contents posted on social media are the truth, plus are statements of opinions rather than facts. These conditions are absolute defenses to defamation. For such reasons, a defamation lawsuit is unlikely to succeed.

Mass media are controlled by a relative handful of very wealthy corporations. Mark Zuckerberg, co-founder and CEO of Facebook, is so influent he even forged his own coin[92]. Few owners control the flow of digital content through the networks, and control the distribution, use, transformation—manipulating information, allowing fake accounts, altering campaigns, addressing information, selecting information—to the extent of controlling individuals' life choices, desires, and opinions.

Against this background, the law has still an essential part to play and my proposal for future research is to acknowledge and define such an important role. Public regulation is necessary to guarantee an open, transparent, trustable space, available to a wide variety of speakers.

And if it is true that law is ill equipped to deal with many of the most important problems in the digital era, not knowing nor understanding how social media and ever-changing technologies work, it remains crucial to create a legal framework able to regulate, even if to do so it needs the contribution of private parties (administrative agencies, software designers, tech companies).

In the European context, a regulatory solution, even involving social media providers, seems more acceptable than in the United States, where the free speech clause protected by the First Amendment prohibits in absolute terms state interference.

Law should enter the game in a different role and form: legal protection, but with the help of self-regulation, policies and guidelines, principles of soft law, technological designs and structures.

However, this is material for another article.

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Appendix A

Figure A1. Moon Boot in *Tecnica group spa v. Anniel group spa.* Photo by the Author at Triennale Design Museum, Milan.

[92] https://libra.org/en-US/. Kharif, Olga. 2019. Why (Almost) Everybody Hates Facebook's Cryptocurrency Libra. *Bloomberg*, 16 July. Available at: https://www.bloomberg.com/news/articles/2019-07-16/why-everybody-almost-hates-facebook-s-digital-coin-quicktake (last accessed 1 January 2020).

Figure A2. Designs of cheerleading uniforms in *Star Athletica v. Varsity Brands.* Source: Appendix to the Opinion of the Court.

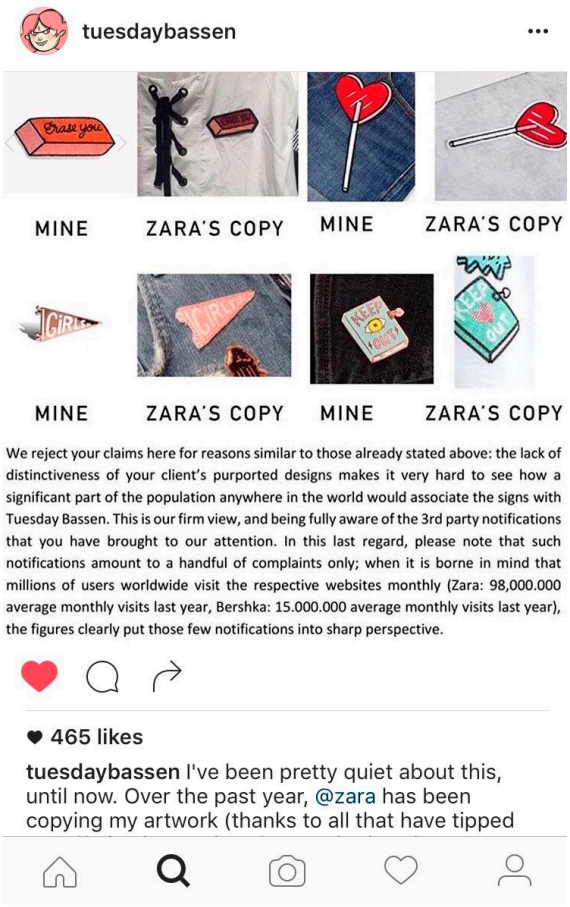

Figure A3. Tuesday Bassen copied by Zara. From Bassen Instagram profile.

Figure A4. Darfurnica, Nadia Plesner, 2010. From the artist's website http://www.nadiaplesner.com/.

Figure A5. A work by GucciGhost. From Trouble Andrew Instagram profile, 24 Jun. 2018.

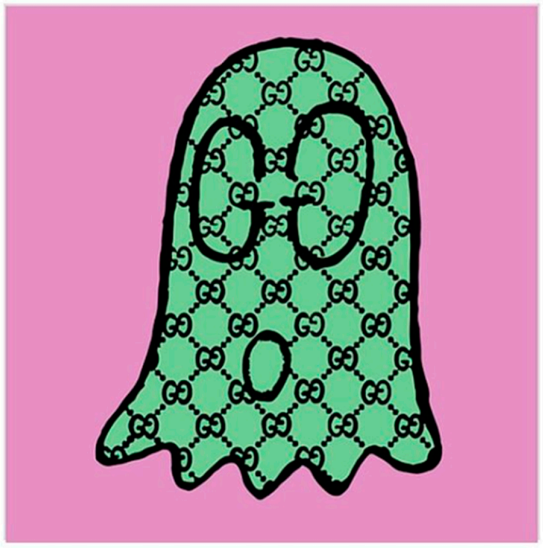

Figure A6. A work by GucciGhost. From Trouble Andrew's Instagram profile, 28 Sept. 2019.

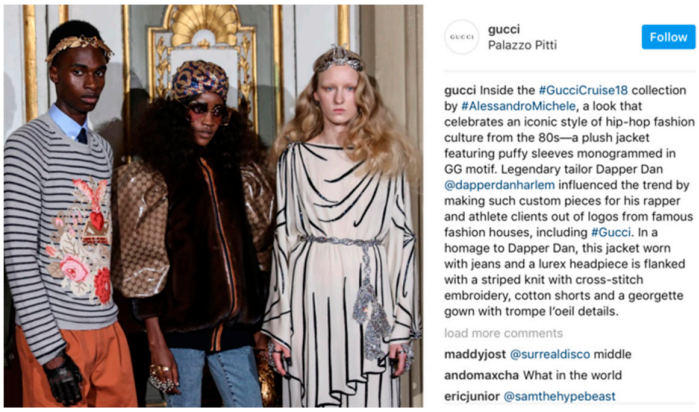

Figure A7. Gucci jacket, Cruise 2018 collection, 'inspired' by Dapper Dan. From Gucci Instagram profile.

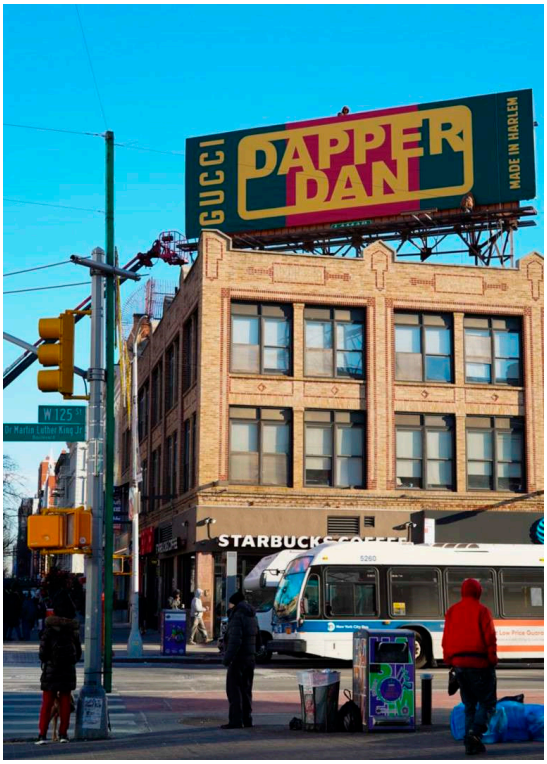

Figure A8. Dapper Dan-Gucci boutique, New York, 2018. From Gucci website.

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