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INTELLECTUAL PROPERTY PROTECTION IN THE FASHION INDUSTRY
UNDER EU INTELLECTUAL PROPERTY LAW

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

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SUMMARY

Currently, fashion is a multi-million-dollar fast-growing industry that plays a significant role in the European economics. Due to the fact that the fashion industry needs constant changes, creations, innovations and amendments, Intellectual property rights and its protection remains a cornerstone of the European fashion industry model. However, the common rules provided by the European Intellectual property law are sometimes not effective enough in order to protect designers from increasing piracy, as current legislation does not take into account the specific features of this industry. That is the reason why it is not clear if current legislation is able to provide adequate regulation and protection to the fast-moving fashion industry.

The analysis starts with the economic analysis of the fashion industry within the European economic system and highlighting the main challenges of the fashion industry, namely, Fast fashion phenomenon and counterfeit. Gaining an insight into the nature of the fashion industry, the IP rights that are most relevant to the fashion industry, namely trademarks and designs, are presented in order to analyse the registration process and applicability of these kinds of IP rights to the fashion industry. The ability to provide the necessary protection of the designers' interests is also under consideration. After determining trademarks and designs as useful tools for IP right protection for the fashion industry, the influence of Fast fashion phenomenon and anti-counterfeit policy, as well as the necessity of IP rights protection in the fashion industry will be analysed.

The main emphasis throughout the thesis is placed upon analysing the legal and practical issues which arise in case of intellectual property protection in the fashion industry within the European Union and suggesting a different solution.

TABLE OF CONTENTS

SUMMARY	2
TABLE OF CONTENTS	3
INTRODUCTION	5
1. FASHION INDUSTRY IN THE EUROPEAN UNION	7
2. INTELLECTUAL PROPERTY PROTECTION FOR THE FASHION INDUSTRY IN THE EU	18
2.1. Trademark protection and its value for the fashion industry	18
2.2. Design protection and its value for the Fashion Industry	31
3. FAST-FASHION PHENOMENON AND ANTI-COUNTERFEIT POLICY – INFLUENCE ON THE FASHION INDUSTRY	39
CONCLUSION	45
BIBLIOGRAPHY	49
Primary sources	49
Legislation.....	49
Case law	49
Secondary sources	50
Books.....	50
Articles	51
Official publications.....	53
Website.....	54
APPENDICES	56

LIST OF ABBREVIATIONS

EU	European Union
WIPO	World Intellectual Property Organization
SCT	The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications
TMD	European Parliament and Council Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version)
The Madrid Agreement	The Madrid Agreement Concerning the International Registration of Marks
The TRIPS Agreement	The Agreement on Trade-Related Aspects of Intellectual Property Rights
TLT	The Trademark Law Treaty
The Singapore Treaty	The Singapore Treaty on the Law of Trademarks
CTMR	The Council Regulation 207/2009/EC of 26 February 2009 on the Community trade mark (codified version)
EUIPO	European Union Intellectual Property Trademark
EUTM	European Union trade mark
IR	International Registration (trademark)

INTRODUCTION

The fashion industry is of great value for the modern world and the European economics. Every year it earns billions of euros. Nowadays, the fashion industry is not only designed to satisfy the primary needs of mankind, but also is directly related to the ways of self-expression of an individual and his self-affirmation. Consumerism and continuously growing public appetite for fashion goods move the global fashion business.

Intellectual property rights and its protection is a cornerstone of the European fashion industry model. This fast-growing industry needs constant changes, creations, innovations and amendments. Due to the fact that Europe remains the centre of high-end fashion, protection of Intellectual Property rights remains a core feature of the European legal regime. Unsurprisingly, the fashion industry is among the most Intellectual Property intensive industries, constantly creating and commercializing new ideas and innovations. However, the fashion industry faces a lot of challenges on a regular basis, many of which have a negative impact on it. The most widespread ones are Fast fashion phenomenon and counterfeit goods.

On the one hand, European Intellectual Property law is sufficiently developed to provide adequate protection of different types of IP, namely, trademarks, designs, copyright and others, which are also important for the fashion industry. On the other hand, intellectual Property law provides common rules, which should be applicable for all the industries, starting from food production to high-tech industries. Undoubtedly, for objective reasons, legislation is not capable of providing special IP protection regimes for every single industry. Nevertheless, common rules do not always take into account specific features of an industry that prevent them from providing adequate regulation and protection. The fashion industry is a fast-moving field where everything can change within two or three months, which is why many options provided by current legislation may be ineffective in order to be protected from the increasing piracy.

The aim of this thesis is to analyse legal and practical issues which arise in case of intellectual property protection in the fashion industry within the European Union and to find possible solutions. For that purpose, the economic analysis, the role of the fashion industry in the global and European economics at large and the main challenges of the contemporary fashion industry will be presented in first part of the thesis. The two main types of Intellectual Property related to the fashion industry, namely, trademarks and designs will be presented in the second part of the

thesis. Also, all the features concerning the registration process, as well as value and place of trademarks and designs protection in the fashion industry will be given in the second part. The influence of the Fast fashion phenomenon and anti-counterfeit policy of the fashion industry will be presented in the third part of the thesis. The research question of the thesis is whether the current European intellectual property law provides adequate capabilities to the fashion industry in order to protect intellectual property rights and interests with regard to the main features of this industry.

This research is unique owing to the fact that there is almost no information about protection of the intellectual property rights in the fashion industry provided by the legal literature – only common information about trademarks and designs protection in general can be found. Moreover, there is no complete and complex analysis of all the legal issues regarding intellectual property rights protection in the field of fashion. Even if some kinds of research are presented, they deal only with one of the multiple legal issues. Such researches do not provide full and detailed information.

1. FASHION INDUSTRY IN THE EUROPEAN UNION.

1.1. Fashionindustry in the EU economic system.

Nowadays fashion is not merely a necessity of a person to cover up nudity and protect from vagaries of the weather, but first of all fashion is “anything that is the current trend in look of a person”¹ including but not limited to apparel, accessories, bags and footwear. Moreover, some wardrobe items become investments. Thus, in 2017 at Christie's auction house in Hong Kong a bag by Hermès known as Birkin was sold. At the beginning of the sales the price of the bag of the brand varied from 6 to 10 thousand US dollars. However, during the auction a participant paid 377 000 US dollars for it. Such situations are not unique for the high fashion industry. Nevertheless, that proves the great importance of fashion for the society. Fashion surrounds us everywhere and is directly related to personality and self-expression which is why fashion goods are in demand among consumers. As is known, demand creates supply. All over the world fashion is a multi-billion dollar and fast-growing industry.

Titans of luxury fashion are French concerns LVMH (Louis Vuitton Moët Hennessy), Kering SA and Swiss holding Richemont and a few independent brands. French concerns LVMH own such brands as Louis Vuitton, Givenchy, Fendi, Celine, Loewe, Kenzo, Thomas Pink, Emilio Pucci, Donna Karan, Bulgari, Christian Dior. Kering SA owns such brands as Gucci, Alexander McQueen, Yves Saint Laurent, Stella McCartney, Balenciaga, Oscar de la Renta. Swiss holding Richemont owns such brands as Chloe, Maison Azzedine Alaia, Net-a-Porter Ltd. Also there are some independent brands like Chanel, Prada Group, Hermes, Armani, Hugo Boss and some others.

The overwhelming majority of these fashion brands are geographically located in Western Europe, namely, there are large fashion houses and billionaires who made a fortune in fashion. According to the information presented by the European Commission, the largest number of fashion companies are located in France, Italy, the United Kingdom, Germany and Poland.

¹Valerie Cumming, *Understanding Fashion History*(Costume & Fashion Press, 2004).

Moreover, the highest fashion manufactory activity is founded in Italy, Spain, Portugal, Greece, as well as in Poland, Bulgaria, Hungary and Romania.²

It should be noted that high fashion is an extremely profitable business. For example, in 2011, the profitability of EBITDA (Earnings before interest, taxes, depreciation and amortization; it can be used to analyse and compare profitability among companies and industries as it eliminates the effects of financing and accounting decisions. EBITDA is often used in valuation ratios and compared to enterprise value and revenue)³ in Chanel was 24%, Kering – 23%, LVMH – 29%, and Prada Group – 26%.

According to the statistics data, the common worldwide revenue of the fashion industry in year 2016 is approximately 356 million US dollars. In year 2022 the forecasted revenue is 712,5 million US dollars. In year 2017 worldwide revenue in the field of fashion was a little more than 417 million US dollars, but in 2018 revenue should be approximately 480,9 million US dollars. The revenue is expected to show an annual growth rate (2018-2022) of 10.3% resulting in a market volume of US\$712,517m in 2022.⁴

The European Union fashion market statistic data shows that fashion market in Europe is the largest one compared to others.

The United Kingdom has the largest market in Europe, with an expected value of 77 billion U.S. dollars in 2020; this is more than the total combined clothing markets of Eastern Europe. However, the Eastern European apparel segment is still showing signs of growth, with 2017 expected to show a market value of 68 billion euros. Even though the UK is leading in terms of market value, Germany is at the front regarding clothing and apparel market share, with 19.8 percent of the European market represented there.⁵

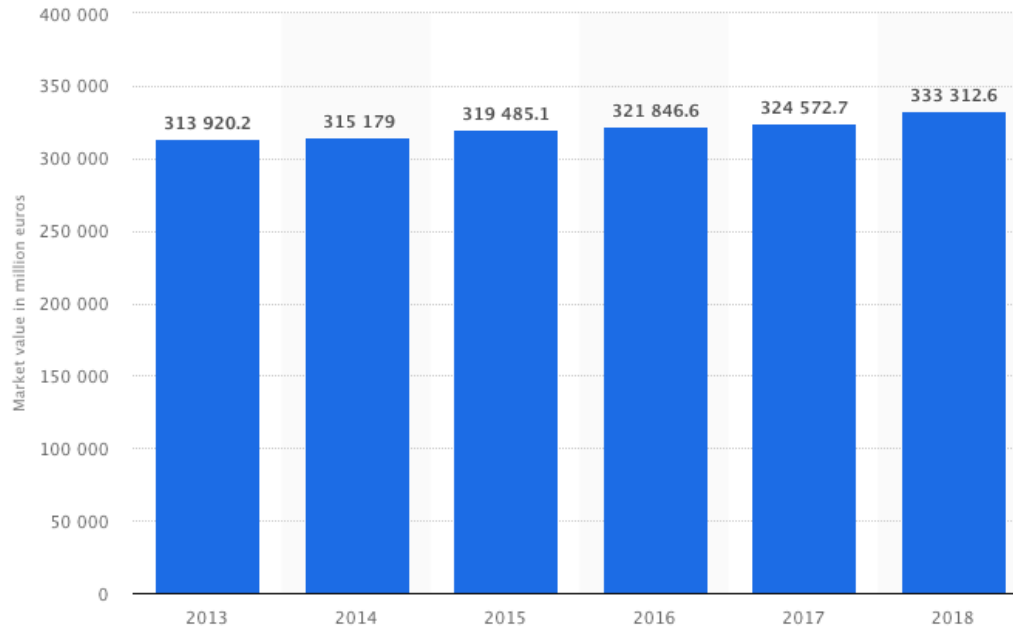
² Fashion and high-end industries. Available on https://ec.europa.eu/growth/sectors/fashion/high-end-industries_en Accessed April 25, 2018.

³ EBITDA - Earnings before interest, taxes, depreciation and amortization. Available on <https://www.investopedia.com/terms/e/ebitda.asp> Accessed 26 April 2018

⁴ Revenue in the "Fashion" segment. Available on <https://www.statista.com/outlook/244/100/fashion/worldwide#marketStudy> Accessed April 25, 2018.

⁵ Apparel and clothing market Europe - Statistics & Facts. Available on <https://www.statista.com/topics/3423/clothing-and-apparel-market-in-europe/> Accessed April 25, 2018.

According to the statistical data in the Western Europe (mentioned below in the diagram), the market value of apparel and footwear from 2013 to 2018 (in million euros) are between 313 920 million euro in 2013 and 333 312 million euro in 2018.⁶



The market value of apparel and footwear in Western Europe in 2015 was 319.4 billion euro, in comparison with fashion market volume in Russia in 2015 that was 75,9 billion US dollars (approximately 62,3 billion euro). The market value of apparel and footwear in Western Europe in 2017 was 335.1 billion euro and it is going to increase.

Talking about other statistic data, for instance, fashion market apparel export from the EU countries to non EU countries is approximately 117,2 billion US dollars, the Swiss market is the largest importer from the European Union, with a value of 3.4 billion euros.⁷ Switzerland, the USA and Japan are traditional export markets for the EU. Approximately 62% of all goods manufactured in the EU by high-end brands typically sold outside the EU. European fashion

⁶Market value of apparel and footwear in Western Europe from 2013 to 2018 (in million euros). Available on <https://www.statista.com/statistics/491447/apparel-and-footwear-westen-europe-market-value/> Accessed April 25, 2018.

⁷Ibid.

goods represent 74% of the global value of all fashion goods. The value of European high-end exports is estimated at EUR 260 billion – about 10% of all EU exports.⁸

*The fashion and high-end industries represent European cultural heritage and expertise. With 5 million people directly employed in the fashion value chain and over 1 million people employed in high-end industries, they provide an important contribution to the EU economy.*⁹

As it is confirmed by governmental bodies of the European Union, the fashion industry plays a significant role in the European Union economic system. Also, the fashion industry is a quite important part of economic system of several EU member states, like France, United Kingdom, Italy, Spain and Germany.

*In 2006, the UK Government formally adopted the term “creative economy” to capture the sense of the wider contribution of the creative industries to economic and social life. Since then, it has increasingly recognized the importance of the creative industries, in particular the fashion industry, as a generator of jobs, wealth and cultural engagement.*¹⁰

Speaking about the role of the fashion industry in the European economic system, it also should be mentioned that the fashion industry is most closely interrelated to such production sectors as leather industry and textile industries. All these production sectors annually generate a huge turnover which is why they are so important for the economics. Moreover, this is not the only common feature of these related industries.

*Fashion and creative industries such as the textiles and clothing, footwear, and leather sectors, operate at the crossroads between arts, business, and technology. They are in a strategic position to link creativity to innovation at a time when culture-based creativity is an essential feature of business innovation in the new economy.*¹¹

The correlation between arts, business and technology together with creativity and production generate the necessity to protect their own place in a rapidly developing market within the competitive economic environment.

⁸ Fashion and high-end industries. Available on https://ec.europa.eu/growth/sectors/fashion/high-end-industries_en Accessed April 25, 2018.

⁹ Ibid

¹⁰ Iona Silverman, “Copyright and Fashion:A UK Perspective” , WIPO Magazine, 2014. Available on http://www.wipo.int/wipo_magazine/en/2014/03/article_0007.html . Accessed April 25, 2018

¹¹ Textile and clothing industries. Available on https://ec.europa.eu/growth/sectors/fashion/textiles-clothing_en Accessed April 25, 2018.

1.2. Challenges for the European fashion industry.

Despite the enormous importance of the fashion industry and its role in the contemporary social and economic fields, the fashion industry faced a lot of different challenges. Among such challenges the European Commission named the growing number of counterfeit goods and the protection of intellectual property rights.¹²

The fashion industry is a fast-moving industry, because fashion changes from 2 to 4 times a year, and an average length of one fashion period is approximately 3 months or one season. That is why fashion companies are forced to be quick-thinking in creating trends to keep up with the competitors and satisfy consumers. The major part of trends may come and go very quickly. Nevertheless, there are some items that can become classical after their release.

There is a one year waiting period at the French fashion house Hermès for the classic “Kelly” Bag, which grew to fame in 1956 after Princess Grace Kelly of Monaco appeared carrying the bag on the cover of LIFE Magazine. The classic Chanel suit – designed by Coco Chanel in the 1930s – is still sold today, for US\$5,000 a suit. Many fashion houses strive to create such classic design pieces. When they succeed, if they have not obtained the appropriate IP protection in time, imitators will be able to ‘free ride’ on their creative work.¹³

Without fear or favour no one could know beforehand whether particular fashion item will become classical or not. Normally, fashion companies unceasingly create new goods, so trends constantly change within a short period of time. Extreme dynamism, constant changes and tough competition between brands are the main features of the fashion industry. It is the main reason why traditional brand protection methods are not always appropriate.¹⁴

The Fashion Law is a relatively new legal discipline developed to respond to the needs of the Fashion industry. Although this new field involves many different legal disciplines, the Intellectual Property (in particular, Trademark, Designs, Copyright

¹² Fashion and high-end industries. Available on https://ec.europa.eu/growth/sectors/fashion/high-end-industries_en Accessed April 25, 2018.

¹³ IP and Business: Intellectual Property in the Fashion Industry. Wipo Magazine, May 2005

¹⁴ Tania D'Souza-Culora, Andrew Sim, James Whymark. “IP enforcement in the Fashion industry, 2015. Available on <http://www.worldtrademarkreview.com/Intelligence/Anti-counterfeiting/2015/Industry-insight/IP-enforcement-in-the-fashion-industry> Accessed April 28, 2018

*and licensing strategies related to these assets) is a core element of Fashion Law.*¹⁵

Taking into consideration that new ideas and the process of creating are the bases of the fashion industry, protection of the intellectual property remains an important way to safeguard fashion companies. However, because of extreme dynamism of the fashion industry, in certain cases it may be largely ineffective. One of the reasons is that to protect certain types of intellectual property, namely trademarks, designs and patents, there is an envisaged registration procedure. Commonly, registration procedure requires time and investment. So, intellectual property protection often considerably lags behind the production pace and pace of development of the industry.

Furthermore, not only extreme dynamism of the fashion industry makes intellectual property registration ineffective. In the fashion industry there is another common phenomenon, which in some sense is also quite harmful both to the fashion industry as a whole and to individual companies or fashion houses. In the Digital Age, during the last 20 years ubiquitous Internet development changed the traditional way of thinking, but for the fashion industry it has changed everything. The “Fast-fashion” phenomena have appeared in many respects owing to the Internet and modern technologies.

The best way to describe the “Fast-fashion” phenomena is to illustrate it. Nowadays Fashion Weeks are the most significant events in the fashion industry. There is so-called “BIG 4” – the four most important “Fashion Week” shows in Paris, London, New York and Milan.¹⁶ Fashion Weeks are held “twice” a year to show the upcoming collection for Spring/Summer season in winter and Autumn/Winter season in summer. Fashion Weeks give opportunity to designers to showcase new collections for the vast number of people including designers and fashion houses representatives, journalists and fashion observers, retailers, models, celebrities and potential buyers around the world.

After the show retailers and buyers “decide” which fashion items they want to retail or promote. Normally, fashion goods are available in stores slightly before the season starts. For example, if Fashion Week is held in the first week of February, that means that goods will be available on

¹⁵ International Trademark Association (INTA) keeps educating on Fashion Law. Available on <http://www.ipwisely.com/blog/international-trademark-association-inta-keeps-educating-on-fashion-law> Accessed April 28, 2018

¹⁶BiG Four Fashion Week Calendar. Available on <http://fashionweekonline.com/calendar> Accessed April 29, 2018

the market in the middle or in the end of March. Fast-fashion retailers use this gap to “copy” the upcoming collection even before they are available for consumers.

It is important to note that Fast-fashion retailers do not copy designs line-by-line. As a general rule, they imitate design presented by the top designers during Fashion weeks. Moreover, they use their own labels and brands for fashion goods. However, using high technologies, they do it so quickly, that the original designer has no chance of selling original products. Because of mobile Internet, digital cameras, smartphones, and the possibility to stream videos or photos of the fashion shows online, Fast-fashion retailers could send all the necessary information to their manufacturers in China or India right during the fashion show. Mr. Jeffrey Banks, a fashion designer and a longstanding member of the Executive Board of the Council of Fashion Designers of America (CFDA) on behalf of CFDA described Fast-fashion phenomenon as follows:

In the blink of an eye, perfect 360 degree images of the latest runway fashions can be sent around the world. And of course, they can be copied...[T]here are even software programs that develop patterns from 360 degree photographs taken at the runway shows. From these patterns, automated machines cut and then stitch perfect copies of a designer's work. Within days of the runway shows, the pirates at the factories in China and other countries where labor is cheap are shipping into this country those perfect copies, before the designer can even get his or her line into the retail stores.¹⁷

In their turn, manufacturers are able to create cheaper version of original goods within several days or even hours. It takes less than one month to produce thousands of low-cost knockoffs (an unauthorized copy or imitation).¹⁸ It provides possibility to Fast-fashion retailer to deliver and start to sell knockoffs within two-three weeks after the original design was disclosed. The emergence of the Fast-fashion phenomenon is also provoked by a change in consumer habits of buyers. Modern consumers are not ready to buy latest fashion goods only twice a year when the new season's collection is released. They want to buy fashion goods as soon as possible and do it much more often. That is why fashion industry has to adjust to customer needs and be active and

¹⁷ Equal Access to Justice Reform Act of 2005: hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary, House of Representatives, One Hundred Ninth Congress, second session, on H.R. 435, May 23, 2006, p. 11-12

¹⁸ Knochoff. The Free Dictionary. Available on <https://www.thefreedictionary.com/knockoff> Accessed April 29, 2018

dynamic. In these circumstances “knockoffs can reach the stores before the originals”.¹⁹ It is very important in fashion industry to be the first who creates and provides a new design, being late can be fatal. Fashion industry is so fast that two or three week’s delay can make a big difference.

*When this happens, the original designers are being denied the economic fruits of their creative labors, which could in turn provide a disincentive to innovate.*²⁰

Besides, production and promotion in the market of the knockoffs deprive designers of any opportunity to return the investment and make profit from creating a new design before fashion goods become unfashionable or will be superseded from the market by the influx of cheap imitations.

*A designer’s investment can be significant; the initial design process — from initial sketches to final garment production—typically takes between eighteen and twenty four months, and many young designers participate in every aspect of production, including pattern making and physical construction of the garment. Moreover, the capital required for the production of a new garment line is sizeable; industry professionals suggest that new designers begin with \$1 to \$5 million, however, many designers begin with considerably less. Tuleh and Gunmetal launched lines in 1998 with initial investments of \$225,000 and \$300,000, respectively.*²¹

In contrast to original designers, Fast-fashion retailers do not invest in creation process, in quality control. In addition, they use cheap raw materials. As a result, they endure minimal financial risk. However, they can choose the best fashion items from all available fashion lines and make a huge profit without any risk and significant investment.

For example, in 1996, American fashion designer Narciso Rodriguez created a dress for Carolyn Bessette worn during her marriage ceremony to John F. Kennedy, Jr. Rodriguez estimated that pirates produced an estimated eight million copies of the dress before he was able to market his design. The copies wide distribution greatly limited Rodriguez’s ability to recoup his initial investment; in total, Rodriguez sold a paltry forty dresses. Though Rodriguez admittedly received greater notoriety from the publicity

¹⁹ Eric Wilson, Before Models Turn Around, Knockoffs Fly, N.Y.Times, September 4, 2007, at A1, A15.

²⁰ Pamela Samuelson, “Should Economics Play a Role in Copyright Law and Policy?”, 1U.Ottawa L.&Tech.J. 3,3 (2004)

²¹ Katelyn Brandes, “Design Protection in the United States and European Union: Piracy’s Detrimental Effects in the Digital World”, 37 Brook. J. Int’l L. (2012). Available at: <http://brooklynworks.brooklaw.edu/bjil/vol37/iss3/8> Accessed 29 April 2018.

*surrounding his design, he emphatically stated, “all the publicity and the knockoffs didn’t pay my bills.”*²²

Not only high-fashion designers suffer damages because of knockoff producers and retailers, but also small fashion companies or self-employed designers incur losses. For instance, Jennifer Baum Lagdameo, a designer and a cofounder of the Ananas brand, successfully promoted handbags which approximate retail value was from 200 US dollars to 400 US dollars. In year 2006 wholesale retailer refused to purchase handbags produced by Jennifer Baum Lagdameo, because wholesale retailer “opted for a less expensive near-perfect copy made from inferior materials.”²³ After that Jennifer Baum Lagdameo continues to create new handbag designs, but the loss of wholesale sales significantly worsens the situation of her small business because it leads to loss of income and reduces the opportunities for creation of new designs.²⁴

Nevertheless, it is necessary to distinguish between two types of Fast-fashion retailers. The first type stands for fashion copyists, who copy design line-by-line with small differences from the original or even without any differences. The most recognizable fashion copyist is an American company “Forever 21”. “Fast-fashion retailer Forever 21 operates over 600 stores”²⁵ in the United States, Europe, Canada, Japan, Korea, and others.

The second type of Fast-fashion retailers includes fast-fashion designers. Fast-fashion designers use original designs from fashion shows and adopt them. They use some ideas to create similar design, but not identical one. The most well-known fast-fashion designers are Swedish company Hennes&Mauritz, which is more recognisable as H&M and Spanish retailer ZARA. These two companies use their own designers who create fashion goods on the basis of popular trends. On top of that, H&M and ZARA use quick response system to get quick access to the market. Once Allen Schwartz, a designer of H&M, said that he has “collections that emulated runway trends, which would be delivered to stores so quickly, they beat other major designers to the racks”.²⁶

²² *ibid.*

²³ Equal Access to Justice Reform Act of 2005: hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary, House of Representatives, One Hundred Ninth Congress, second session, on H.R. 435, May 23, 2006, p. 78

²⁴ Katelyn Brandes, “Design Protection in the United States and European Union: Piracy's Detrimental Effects in the Digital World, 37 Brook. J. Int'l L. (2012). Available at: <http://brooklynworks.brooklaw.edu/bjil/vol37/iss3/8> Accessed on 29 April 2018,

²⁵ FOREVER 21, Forbes. Available on <https://www.forbes.com/companies/forever-21/> Accessed 29 April 2018,

²⁶ ABS by Allen Schwartz. Available on <https://www.weconnectfashion.com/businesses/abs-by-allen-schwartz-b050532d-c737-4c63-9a59-39099bec385f> Accessed April 29, 2018.

For example, the Spanish retail fashion chain, ZARA, uses a proprietary information technology (IT) system to shorten their production cycle – i.e. the time from identifying a new trend to delivering the finished product – to a mere 30 days. Most of their competitors take from 4 to 12 months. The company receives daily streams of e-mail from store managers signaling new trends, fabrics and cuts, from which its designers quickly prepare new styles. The fabric selected is immediately cut in an automated facility, and sent to work shops. A high-tech distribution system, with some 200 kilometers of underground traces and over 400 chutes, ensures that the finished items are shipped and arrive in stores within 48 hours.²⁷

Moreover, according to the unconfirmed information, Latvian company KREISS LLC (KREISS, SIA), which is one of the largest logistics company in Baltic region, daily sends dozens of trucks to deliver goods for ZARA.

ZARA is not an independent company by itself; it belongs to a well-known Inditex group. The Inditex group, in addition to Zara, includes Massimo Dutti, Pull and Bear, Oysho, Uterqüe, Stradivarius, Bershka. Inditex group does not disclose the data on revenue in particular countries, but the value of the ZARA brand grows from year to year and in 2017 it amounted to 18.5 billion dollars, while Inditex's net profit for this year increased to 3.157 billion euros. The company employs more than 162 thousand people. The Inditex group has 7 292 stores worldwide under the brands ZARA, Pull & Bear, Massimo Dutti, Bershka and others. And the owner of Inditex, Amancio Ortega, with a fortune of \$ 77.9 billion, entered the top five Forbes in 2017.

Taking into consideration that nowadays Fast-fashion and counterfeiting goods, which will be analysed further, have significant impact of Fashion industry as a whole, the fashion industry is forced to react swiftly and decisively. Protection of Intellectual Property is a very important way to protect not only the core element of the industry, namely creation of new trends, but also economic interest of the fashion companies. Intellectual Property protection system is quite well-developed in the European Union. However, as it was already mentioned, fashion industry has its own specific features that are often not taken into consideration and not considered. That is the main reason why existed Intellectual Property protection often may be largely ineffective. Especially, it is clearly seen in case of Fast-fashion or counterfeit. Nevertheless, this issue is very important for the future development of the fashion industry. First of all, to highlight the main

²⁷ IP and Business: Intellectual Property in the Fashion Industry. WIPO Magazine. Available on http://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html Accessed on April 29, 2018

issues, the current Intellectual Property protection system should be examined from the fashion industry prospective. This seems to be reasonable due to the fact that only understanding of main problems can lead to their solution.

2. INTELLECTUAL PROPERTY PROTECTION FOR THE FASHION INDUSTRY IN THE EU.

Intellectual Property rights by nature are the monopoly rights granted by the governmental bodies through the registration procedure to protect innovators and encourage them to disclose their innovations. As a rule, this monopoly is granted for a limited period of time, depending on the particular type of Intellectual Property rights, and is valid within the limits of the territory where Intellectual Property rights are registered.

As it was previously stated, Intellectual property protection, namely, trademark, design and copyright protection, is the cornerstone of a fashion company's strategy which should provide protection from Fast-fashion retailers and counterfeiting. All these components together and any of them individually are the production policy's part of any company, independent designer or a fashion house that are involved in the fashion industry.

In terms of this chapter all these elements, specifically, trademarks, designs and copyright will be analysed and examined separately one by one. Additionally, specific area of anti-counterfeiting policy of the European Union will be studied as well.

2.1. Trademark protection and its value for the fashion industry.

According to the definition provided by the World Intellectual Property Organization, trademark is a sign which is capable of distinguishing goods and services from others originated from the other undertaking and protected by intellectual property rights.²⁸

As it is stated in the definition, the main purpose of trademark is to determine the origin of goods and services. In the fashion industry it is highly important to identify the origin of particular fashion goods, as the choice of consumers largely depends on this thing. In fashion, like in no other industry, the consumer is oriented towards the brand. Fashion industry is that type of industry, where consumer focuses on the brand, even more than on other characteristics of the product.

²⁸ World Intellectual Property Organisation. Trade marks. Available on <http://www.wipo.int/trademarks/en/>. Accessed May 1, 2016.

*Profitability of Fashion business is linked to branding success, so that Trademarks are an essential element in this field, and constitute the main source of the advertisement message transmitted to customer regarding specific styles and tastes.*²⁹

Fashion companies invest a significant amount of money and a lot of effort in the creation, development and promotion of their brands, because brands are the core elements of the fashion industry. Trademark registration gives an opportunity to protect fashion company from anyone who will “free-ride” on the identical or similar trademark and get profit at the expense of another's reputation.³⁰ Moreover, by fulfilling the main function of trademark – determining the commercial origin of the goods, it also provides the information about the quality of goods and their value to consumers. Thus, trademark also helps to maintain the reputation of a company. Trademarks are useful to both famous fashion houses and to small companies or independent designers.

The Italian clothes company, Pickwick, offers an interesting example of the strategic use of a trademark to build a successful business in the fashion industry. Pickwick now sells a range of casual fashion wear to adolescents across Europe. But not so long ago, all that the company had was the trademark itself, which depicted a young, faceless boy with a spiky hairstyle. The trademark owner started his business by selecting items he judged would have particular style appeal to teenagers, adding his distinctive trademark and distributing them through the local shops in Rome. Initially, the business costs were kept low by operating from a garage.

*Teenagers perceive the Pickwick logo as trendy and are willing to pay extra for clothes bearing its trademark. Today, the company subcontracts the manufacturing and focuses on marketing, distribution and monitoring and controlling the use of the trademark.*³¹

According to all previously mentioned, it seems like trademark protection is an important mechanism used by fashion companies to protect their brands from piracy and illegal use, as well as to indicate the origin of the produced fashion goods. Just to illustrate the current situation regarding trademark protection, according to the research conducted in TMVIEW³² database by owner, LVMH owns 67 European Union Trademarks (EUTM), that are still in force (Annex 2); BURBERRY owns 41 EUTM (Annex 3); PRADA owns 51 EUTM (Annex 4); HERMES owns

²⁹ International Trademark Association (INTA) keeps educating on Fashion Law. Available on <http://www.ipwisely.com/blog/international-trademark-association-inta-keeps-educating-on-fashion-law> Accessed May 1, 2018

³⁰ Michelle Morris, “ Intellectual Property law and the Fashion Industry. ” 2016. Available on <https://www.linkedin.com/pulse/intellectual-property-law-fashion-industry-michelle-morris> Accessed May 1, 2018

³¹ IP and Business: Intellectual Property in the Fashion Industry. WIPO Magazine. Available on http://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html Accessed on May 1, 2018

³² TMVIEW, free trademark database. Available on <https://www.tmdn.org/tmview/welcome#> Accessed May 1, 2018

43 EUTM (Annex 5); GUCCI owns 116 EUTM (Annex 6); BALENCIAGA owns 18 EUTM (Annex 7). Taking into consideration that this particular analysis includes data only concerning European trademarks, but does not include data about national trademarks or IR, which are also undoubtedly registered in the names of the above mentioned companies, it is possible to conclude that protection of trademark rights is widely used by fashion companies.

Furthermore, it seems reasonable to find out what exactly fashion companies want to protect using trademark registration system. According to the Article No. 4 “Signs of which an EU trade mark may consist” of the Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 of the European Union trade mark (codification):

An EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

distinguishing the goods or services of one undertaking from those of other undertakings; and

being represented on the Register of European Union trade marks (‘the Register’), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.³³

There are two main types of trademarks that could be protected under the EU Intellectual Property law: traditional trademarks, namely, words, logos, letters, numerals, or combinations thereof; and non-traditional trademarks, like 3-dimensional shapes of goods or their packaging, single colours, sounds, olfactory signs (scents), motions, holograms, tastes, texture of the goods or any other sign that can fulfil the main function of the trademark. In its turn, in accordance with classification provided by the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) (which was established by WIPO to study, coordinate and provide guidance in laws harmonization (including the procedure) in the field of trademarks, industrial design and geographical indications)³⁴ non-traditional trademarks could be divided into visual non-traditional trademarks, namely, shapes of goods and packaging, positional signs, colours, motions, holograms, texture of the goods; and non-visual non-traditional trademarks,

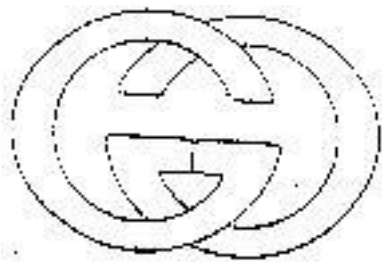
³³Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (Text with EEA relevance), OJ L 154, 16.6.2017, p. 1–99. Available on <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R1001> Accessed May 1, 2018

³⁴World Intellectual Property Organisation, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, New types of marks. Available on <http://www.wipo.int/policy/en/sct/>. Accessed May 3, 2016.

namely, sounds, olfactory signs (scents) and tastes. All these types of trademarks may be useful for the purpose of distinguishing the origin of the fashion goods. However, fashion companies usually register traditional trademarks, like words, logo or letters; and non-traditional, namely, 3-dimensional shapes of goods or their packaging and in several cases positional trademarks. The following are examples of trademarks registered by the fashion companies:

1) It is possible to register a word or several words that will serve as a trademark. For example, Word EUTM Nr. 004336202 – “GUCCI FLORA” owned by GUCCI. As well, it is possible to register personal name of the designer as a trademark, like Word EUTM Nr. 003140456 – “MICHAEL KORS” owned by Michael Kors.

2) Figurative trademarks or logo also often registered by fashion companies. For example, Figurative EUTM Nr. 000122051 owned by GUCCI.



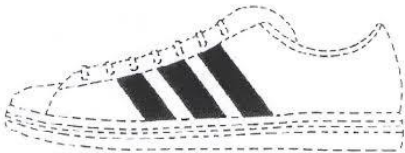
As well, it is possible to register figurative trademark that will consist of distinctive print. For example, Figurative EUTM Nr. 003940442 owned by BURBERRY.



3) Speaking about non-traditional trademarks, a 3-dimensional shape of good is quite often registered as a trademark in fashion industry. One of the examples is famous handbag shape, EUTM Nr. 004467247 owned by HERMES.



4) One of the widely known position trademarks is Adidas AG three stripe position mark which consists of “three vertical, parallel stripes of equal width which are featured on the sides of sports and leisure garments in a colour which contrasts with the basic colour of those garments”. This is presented in the first case.³⁵ – EUTM Nr. 003517646.



A positional mark is an absolutely specific type of sign, that is not used very often because of its specific features. According to the information provided by WIPO, position marks are specified “by the position in which they appear or are fixed on a particular product”.³⁶ This means that position of the sign is that particular essential element which makes it distinctive. If an element is placed in a different way, that will not constitute the use of trademark, so it will become another sign which is not protected anymore by the existing registration.

The European case law established the general principal that relevant consumers normally do not use the shape of good or its packaging, position mark to identify the commercial origin of the good. This means that such marks are not distinctive, so they do not fulfil the main function of the trademark. That is why in practice such applications are rejected.

³⁵Judgment in Adidas AG andt adidas Benelux BV v Marca Mode CV and Others. C-102/07, EU:C:2008:217

³⁶World Intellectual Property Organisation, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, New types of marks. Available on <http://www.wipo.int/policy/en/sct/>. Accessed May 3, 2016.

*A relevant consumer pays less attention to the shape than to a word or a figurative element, especially in the case of mark consisting of the shape of the product or packaging.*³⁷

By taking a closer look at this, in case *Think Schuhwerk GnbH v OHIM* an appellant filed an application for registering a Community trademark (after October 1, 2017 - EUTM) represented as follows: shoes with red shoe lace aglets as a Community trade mark.



This application was rejected by all the authorities. The reason of the rejection was indistinctiveness of an applied mark. According to the decision, there was no evidence that relevant consumer used red shoe lace aglets as an indicator of the commercial origin of the good. Moreover, originality and novelty of mark were not taken into consideration because they cannot provide sufficient distinctiveness.³⁸

For the same reason designated people rejected trademark registration in case *X Technology Swiss GmbH v OHIM*, where an applicant applied for registration of the position trademark presented as follows:

*The positional mark is characterised by an orange colouration, of the shade “Pantone 16-1359 TPX”, in the form of a hood covering the toe of each article of hosiery. It does not cover the toes entirely; it features a limit, which, viewed from the back and the side, appears essentially to be horizontal. The mark always appears in sharp colour contrast to the remainder of the article of hosiery and is always in the same place”*³⁹

³⁷The European Union Intellectual Property Office. An overview of conditions for registration and scope of protection for various trade mark categories under comparison from the perspective of the CTMR. Available on:http://euipo.europa.eu/en/office/ejs/pdf/von_Kapff.pdf. Accessed on: May 5, 2016

³⁸Judgment in *Think SchuhwerkGnbH v OHIM*, C-521/13, EU:C:2014:2222.

³⁹Judgment in *X Technology Swiss GmbH v OHIM*. T-547/08, EU:T:2010:235.



However, there are several cases of positional marks that were registered because of acquired distinctiveness through use. One of the widely known positional trademarks is EUTM Nr. 002292373 owned by Levis Strauss & Co. This position trademark is represented as follows:

*a rectangular red label, made of textile, sewn into and protruding from the upper part of the left-hand seam of the rear pocket of trousers, shorts or skirts.*⁴⁰



As it is seen, normally, a relevant consumer does not use such marks as shape or positional marks to distinguish commercial origin of the goods. So, it is not easy to get registration for such types of trademarks. However, it is possible, if distinctiveness is acquired through use. Nevertheless, 3-dimensional trademarks are often used for fragrances.

In its turn, traditional trademarks, like words or logo have higher degree of distinctiveness, so it is easier to registered such trademarks in all fields of production, as well as in fashion industry. This principle was established by the case law of the European Court of Justice. Annette Kur and Thomas Dreier in their book stated that “a priori, nominative or figurative signs are more distinctive than non-traditional signs.”⁴¹. That is why in fashion industry, as in others, traditional trademarks are more common.

⁴⁰Judgment in Colloseum Holding AG v Levi Strauss & Co, C 12/12, EU:C:2013:253.

⁴¹Annette Kur and Thomas Dreier. European intellectual property law : text, cases and materials.(Cheltenham, UK : Edward Elgar, 2013) p.178 ;

Trademark rights could be established in several ways – firstly, trademark rights could be established through registration of the sign as a trademark; secondly, through the actual use of a sign to indicate the origin of the goods.

In 1975, famous international fashion house Bottega Veneta presented its first collection of handbags featuring a design on the outside consisting of thin strips of fabric threaded together. Over the years, the design, famously known as the “Bottega Weave”, became a recognizable feature referring to the fashion house. Unlike other fashion brands, Bottega Veneta didn’t use a logo or a brand name on the outside of its products, and the weave design served as the product’s visual signature alerting consumers.⁴²

When Bottega Veneta applied for trademark registration, registration authority refused application because of trademark indistinctiveness. Nevertheless, Bottega Veneta provided evidences that distinctiveness was acquired through use. After that trademark was registered.

However, registration of a sign as a trademark is the easiest way, which is why registration is recommended. Moreover, if protection is applied for EUTM (European Union Trademark) or IR (International Registration), registration is mandatory.

As it was mentioned previously, trademarks rights are established within particular jurisdiction or territory where protection of trademarks is claimed. There are three possibilities to register a trademark within the EU territory. The first possibility is to register EUTM – a trademark that will be protected within all the EU Member States by filing one application in EUIPO. This method is preferable if a fashion company or a designer are interested in promoting goods in all the EU Member States. Usually, big fashion companies and fashion houses use EUTM because it is cheaper than registered national trademarks in every Member State separately and it takes less time. The second possibility is to register the International trademark (IR) that will be designated to the EU or one or several Member States. It is a very useful option if a fashion company or a designer are interested in registration not only in the EU, but also in third countries. The third possibility is to register trademark in one or several Member States. In this case it is important to understand that registration in one or several Member States, as well as registration of IR in one or several Member States, does not provide protection in all the EU countries, merely in countries where protection is claimed. Nevertheless, it is also an available option, which can be useful case-by-case. Moreover, if, for instance, national or International

⁴² Harshini Tippareddy, “ Intellectual Property Rights in the Fashion industry ” . Available on <http://studentorgs.kentlaw.iit.edu/ckjip/intellectual-property-rights-fashion-industry/> Accessed May 2, 2018

trademark is registered in one or several EU Member States, and another undertaking applies for similar or identical EUTM, an applied trademark could be opposed on the basis of earlier registered trademark. Thus, registration of trademark in one or several EU countries is also a useful option for Intellectual Property protection.

From the procedural point of view, before applying for trademark registration, it is highly recommended to conduct a so-called Trademark Search. Trademark Search is a specific search that is conducted for the purpose of finding whether or not there are some obstacles to register trademarks. The main idea is to find identical or confusingly similar trademarks that could be countered to the mark in question, if there are some. Case-by-case earlier trademarks could be countered to an applied trademark by the registration office, if a mark is applied through national procedure, as well as through the international procedure (Madrid system), but not in the EU, just in one or several Member states. EUIPO do not examine the applied trademark to check if there are possible conflicts between applied and earlier trademarks. However, according to the procedure, there are three months for earlier trademarks holder to file opposition against applied trademarks. Of course, opposition is not mandatory for the registered trademark holders. It depends on many factors, for example, the use of trademarks by the holder, financial opportunities of the holder, trademarks similarity degree and others. Nevertheless, such risks exist and no one can guarantee whether opposition will be filed or not. In practice there are some cases when applied trademarks are opposed to earlier trademarks that are registered in respect of different goods or services and the similarity of trademarks is extremely dubious.

Trademark Search is conducted by the main element. Usually, if it is word trademark or logo, which includes word element, the word or words will be the main element. Also it is possible to conduct search by visual elements. For that purpose, in year 1973 the Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks established a special classification – The Vienna Classification. Now this classification is administered by the WIPO.⁴³

It consists of a hierarchical system that proceeds from the general to the particular, classifying the figurative elements of marks into categories, divisions and sections, on the basis of their

⁴³ Vienna Classification (figurative marks). Available on <https://euipo.europa.eu/ohimportal/en/vienna-classification> Accessed May 2, 2018

*shape.*⁴⁴

There are several sources that provide databases for conducting Trademark Search. First of all, every national patent office has their own database, where it is possible to check all the national trademarks registered in that particular country. However, normally database is in national language and not always provides an English version. So, it could be difficult for foreigners to conduct a search. For instance, Latvian Patent Office database provided possibility to conduct search in Latvian or in English.⁴⁵ Secondly, it is possible to conduct EUTM search in database provided by the EUIPO.⁴⁶ Thirdly, it is possible to conduct search within IR designated to the EU or the EU Member States in Madrid Monitor.⁴⁷ Besides, there is a fourth possibility to use TMVIEW database, which is used by trademark attorneys, because it provides an option to conduct search within all national trademarks protected in the EU Member States, within EUTM and IR. Several different options are available.⁴⁸

The second important point before applying for registration is to ensure that a trademark could be registered. The Article 7 of the Regulation 2017/1001 of the European Union trade mark provide absolute ground for refusal.⁴⁹

With regard to the fashion industry, all previously cited could be expressed as follows: 1) it is impossible to register trademark “COTTON” or “T-Shirt”, because such trademarks describe type of goods and cannot determine the commercial origin. Moreover, such word should stay free from use by any undertaking to ensure freedom of competition; 2) Trademark “MACKINTOSH” OR “BROGUE” cannot be registered, because these are generic terms, the first one – for coats and the second one – for shoes; 3) Laudatory words and expressions could not be registered as trademarks, for example, the expression “THE BEST OF THE BEST”; 4) 3-dimensional shapes resulting from the nature of goods, for instance, an ordinary button or a zip; 5) Words that are offensive could not be registered.

French Connection UK registered the acronym FCUK as a trade mark in the UK in 1998. They

⁴⁴Ibid.

⁴⁵Search for trademark in register. Available on <http://databases.lrpv.gov.lv/databases/en/trademark/search> Accessed May 2, 2018

⁴⁶EUIPO eSearch plus. Available on <https://euipo.europa.eu/eSearch/> Accessed May 2, 2018

⁴⁷Madrid Monitor. Available on <http://www.wipo.int/madrid/monitor/en/> Accessed May 2, 2018

⁴⁸TMview. Available on <https://www.tmdn.org/tmview/welcome> Accessed May 2, 2018

⁴⁹Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (Text with EEA relevance), OJ L 154, 16.6.2017, p. 1–99. Available on <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R1001> Accessed May 1, 2018

used it extensively in store, on clothing, and in advertising. In 2004 Dennis Woodman, applied to have the trade mark invalidated by arguing that registration should not have been allowed since the mark was offensive. Woodman's application was refused, as was his appeal. It was held that 'the intrinsic qualities of the mark FCUK are not such as to render it objectionable. It is not a swear word even though it ... has been used to evoke a swear word'.

It is also worth noting that whether a mark is refused on the grounds of offensiveness can depend on the goods or services in relation to which you want to register that mark. For example, the mark SCREW YOU was accepted in the UK for condoms and various alcoholic and non-alcoholic beverages; but was not accepted by OHIM in relation to sunglasses, clothing and footwear (amongst other goods). This was because the latter goods would be marketed to the general public, and it was held that the words SCREW YOU would inevitably offend some members of the public; while purchasers of, say, condoms would be less likely to offended.⁵⁰

Going back to the first point, descriptive trademarks could not be registered. Undoubtedly, descriptiveness is directly related to goods in respect of which registration is required.

Marks must not describe the goods for which they are being registered. Words that have been refused registration include SHIRT & SHOE GROUP and EVER-SO-SOFT, both for clothing, because they were considered too descriptive. However, words can be descriptive of other goods. For example while EVER-SO-SOFT was disallowed for clothes, it was successfully registered for footwear, as softness is not a characteristic typically associated with shoes.⁵¹

Nevertheless, in some jurisdiction, for example, in Latvia, a descriptive word could be amended by the original figurative element. It can constitute a distinctive logotype. However, such logo should be extraordinary, otherwise, Latvian Patent Office can admit that it is primitive figurative execution. Ultimately, distinctiveness is the main function of the trademark, so it should be original and capable of constituting a trademark in accordance with the existing legislation.

If there are no obstacles for trademark registration under the law and the results of Trademark Search are acceptable, the third step before applying for registration is preparing the List of goods. The List of goods is a very important part of future application and registration, because trademark will be valid only in respect of applied goods. So, from the practical point of view, it is important to compose the most comprehensive list of goods. Usually, trademark attorneys recommend their clients to prepare the List of goods as full as possible, including all goods that will or could be sold under trademark in question. This is primarily due to the fact that, after the

⁵⁰ Intellectual Property in the Fashion Design Industry. Trademarks. Available on <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Trademarks-Download1.pdf> Accessed May 2, 2018

⁵¹Ibid.

application is filed, the List of goods cannot be expanded. It is impossible to add some goods after the application is filed. It is possible only to shorten the List of goods by removing unnecessary goods. The only real possibility in this case to file a new application.

For the procedural purposes all the goods were divided into classes. All the classes are included in Nice Classification. The Nice Classification (NCL), established by the Nice Agreement (1957), is an international classification of goods and services applied for the registration of marks.⁵² The Nice Classification includes 45 classes.⁵³ The classes that are most relevant to the fashion industry are: class 3 – fragrances; class 9 – sunglasses, electronic devices cases; class 14 – jewellery and watches; class – 18 – handbags, luggage, leather goods, umbrellas; class 23 – yarns and threads, for textile use; class 24 – textiles; class 25 – clothing, footwear, headgear; class 26 – lace and embroidery, ribbons, and braid, buttons, hooks and eyes, pins and needles, artificial flowers, dressmaker’s articles, badges; class 35 – retail services; class 40 – tailoring, clothes alteration services.⁵⁴ Also other classes in particular classes could be appropriate.

After preparing the list of goods, an application could be filed. Together with filing an application fee should be paid. Application fee depends on particular circumstances. For instance, the basic fee for EUTM registration in one class is 850 euro, the fee for the second class is 50 euro, for the third and more classes – 150 euro for each additional class.⁵⁵ Application fee for IR depends on many circumstances, but when it comes to trademark registration in the EU from Latvia, the total fee for word trademark will be 1550 Swiss francs.⁵⁶ Application fee for national trademark could be very different from country to country. Latvian application fee for one class is 90 euro, for each additional class 30 euro and 95 euro is the registration fee.⁵⁷

The application is followed by the examination. If the examination was successful, a trademark will be registered. In EUIPO after the examination there is an opposition period that lasts 3 months. If no opposition is received, a trademark will be registered. If an opposition is filed,

⁵²Nice Classification. Available on <http://www.wipo.int/classifications/nice/en/> Accessed May 2, 2018.

⁵³List of goods and services in Class order. Available on <http://www.wipo.int/classifications/nice/nclpub/en/fr/> Accessed May 2, 2018

⁵⁴Ibid.

⁵⁵Fees and payments. Available on <https://euipo.europa.eu/ohimportal/en/fees-and-payments> Accessed May 2, 2018

⁵⁶International Registration of Marks – Fee Calculator. Available on <http://www.wipo.int/madrid/feecalc/FirstStep?Lang=E&ForDate=20180328&Origin=LV&Classes=1&ServCd=EN&EM=Y> Accessed May 2, 2018

⁵⁷Fees for legal protection of trademarks. Available on <http://www.lrpv.gov.lv/en/trademarks/fees> Accessed May 2, 2018

results could be different. One of the possible scenarios is negotiation. Sometimes an applicant and earlier trademark's holder could agree for co-existence with some conditions. Another possible option is a full opposition procedure.

The Pretty Dress Company London Ltd (PDCL) made an application to register the mark SO COUTURE! (above) in 2010. The registration was opposed by another fashion company whose trade mark portfolio included the marks "SO...?" and "SO ...? CHIC", and who argued that PDCL's mark was similar to their marks and that this was likely to cause confusion in the minds of the public. The UK Registry considered the way the applicant's mark "SO COUTURE!" would look and sound to an average, reasonably informed and observant consumer. It was held that "SO ...? CHIC" in particular had a high degree of similarity in concept, look and sound with the applicant's mark, due to the fact that each mark uses punctuation; that each mark begins with the word SO; the fact that the second word of each begins with C; and that the words 'couture' and 'chic' both evoke high fashion. These similarities, and the fact that the goods in question were identical (dresses), contributed to the opposition's success. SO COUTURE! was refused registration on the grounds of likelihood of confusion.⁵⁸

However, in a standard situation, if Trademark Search is conducted well, the risk of opposition decreases, and a trademark is more likely to be registered. After the registration a trademark can last forever. For that purpose, a trademark should be renewed every ten years by paying renewal fee. This is one of the main reasons why trademarks are beneficial. In contrast to other types of Intellectual Property, a trademark could be protected as long as necessary. The second reason is that trademarks help to distinguish the commercial origin of the company, as well as to protect the brand identity and sustain commercial reputation. Moreover, trademarks help in the struggle with counterfeit products. Also, a trademark can be commercialised by licensing or franchising. "Pierre Cardin has famously licensed his mark Pierre Cardin to many products, and has over 800 licensees globally."⁵⁹ "Trademark law will allow you to keep others from adopting identical or similar trademarks (in connection with similar goods) and illegally siphoning your consumer goodwill."⁶⁰ Trademark registration is also very beneficial to the consumers, because it helps to identify the source of goods and reflect the fashion company's reputation and quality.

⁵⁸ Intellectual Property in the Fashion Design Industry. Trademarks. Available on <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Trademarks-Download1.pdf> Accessed May 2, 2018

⁵⁹ Intellectual Property in the Fashion Design Industry. Trademarks. Available on <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Trademarks-Download1.pdf> Accessed May 2, 2018

⁶⁰ Michelle Morris, "Intellectual Property law and the Fashion Industry", 2016. Available on <https://www.linkedin.com/pulse/intellectual-property-law-fashion-industry-michelle-morris> Accessed May 2, 2018

“Trademark registration is strongly recommended to enhance the available protection.”⁶¹ However, as it was presented in the previous chapter, it is important to understand how it can help to protect fashion companies from Fast-fashion and counterfeiting. In case of counterfeiting goods, a trademark is really a very important mechanism that helps to enhance protection of fashion companies and facilitate in counteraction to counterfeiting goods provided by customs and other responsible governmental bodies. This matter will be analysed below. Talking about Fast-fashion, trademark protection seems to be insufficient, because Fast-fashion retailers are not interested in using similar trademarks. Their goal is to copy and imitate the design, but not a trademark. Moreover, they actively use their own trademarks on copied design. Consumers never see any other trademarks apart from ZARA written on the company’s goods. The same situation exists in H&M shops and in other shops owned by Fast-fashion retailers. For instance, Inditex S.A. – the owner of ZARA brand – owns 70 EUTM (Annex 15). Based on this, it can be concluded that trademarks do not provide sufficient protection against Fast-fashion retailers, despite the fact that trademark protection is highly important in fashion companies strategy of the Intellectual Property protection.

2.2. Design protection and its value for the Fashion Industry.

Fashion design is undoubtedly the cornerstone of the fashion industry. The main task of the fashion industry is to create and develop the appearance of a new good. A consumer is always waiting for something new and original from the fashion industry. The process of creation and its result is the basis of the fashion industry. A design is the appearance of a product: its shape, patterns and colours.⁶² According to the paragraph a of the Article No. 3 of the Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs:

⁶¹ Fashion and Intellectual Property: Many Options to Protect Your Design, But No One-Stop Shop. IP law Bulletin. May 30, 2017. Available on <https://www.lexology.com/library/detail.aspx?g=f6ba8878-4226-45ea-be4a-097afaecde69> Accessed May 2, 2018

⁶² Designs. EUIPO. Available on <https://euipo.europa.eu/ohimportal/en/designs> Accessed May 3, 2018

*"design" means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation;*⁶³

In the European Union and in some Member States fashion design could be protected in two ways – Community or national design rights protection or national copyrights protection. In some countries it is possible to use both.

Within the fashion industry frameworks, design rights can protect the design, look or structure of goods. It can protect the whole product or part of it, or even both. In context of fashion, the design right plays an important role in IP protection strategy. According to the EU legislation, there are two types of design rights: unregistered design or registered design.⁶⁴

Unregistered design is a design that could be protected without registration for three years since it was made available to the public.⁶⁵ So, the protection appears automatically as soon as a particular design was disclosed. In general, a design should be disclosed so that, in the ordinary course of business, it became disclosed for people working in field of fashion.

*A Disclosure might take place on the catwalk or in- store, by presentation at trade shows, publication in magazines or trade journals, or during discussions at meetings with a third party (such as a potential retailer, distributor, licensee or press representative) which have not been covered by a confidentiality or non-disclosure agreement. A Disclosure can take place in the EU or alternatively via some means that is likely to come to the attention of the relevant industry circles in the EU; for example, at a trade fair such as Utah international trade Fair in the USA that attracts EU buyers or in an international trade magazine that is distributed in the EU.*⁶⁶

On the other hand, a Community registered design could be protected for 25 years in total, taking into account that the first registration period is 5 years with a prolongation period every 5 years from the filing date.⁶⁷ The registered design is protected against any similar design without any evidence of original design being copied. According to the EU legislation:

⁶³Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ L 3, 5.1.2002, p. 1–24*

⁶⁴Ibid

⁶⁵Ibid.

⁶⁶ Intellectual Property in the Fashion Design Industry. Design Rights. Available on <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-DesignRights-Download1.pdf> Accessed May 3, 2018

⁶⁷Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ L 3, 5.1.2002, p. 1–24*

*A registered Community design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it.*⁶⁸

Moreover, according to the Regulation:

*The exclusive nature of the right conferred by the registered Community design is consistent with its greater legal certainty. It is appropriate that the unregistered Community design should, however, constitute a right only to prevent copying.*⁶⁹

The regulation contains several requirements for a design to be protected. For the purpose of registration, a design should be “new” and should “have individual character”. A design is new “if no identical design has been made available to the public”, and has individual character “if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public”.⁷⁰ In case *Jimmy Choo Ltd. vs Towerstone Ltd.*⁷¹ it is stated that:

*Jimmy Choo brought court proceedings against Towerstone Limited, a company which had an Oxford Street bag shop claiming it had infringed its Community registered and unregistered design rights in the ‘Ramona’ bag. Although a detailed comparison showed minor differences between the two bags including the difference in texture and the absence of the ‘Jimmy Choo’ logo on the strip buckles, the court held that an informed user would gain the same overall impression from the Towerstone bag as from the Ramona and found it infringed Choo’s Community registered design. Comparing the two bags side by side the court held the inference of copying was ‘overwhelming’ as given the number of identical features it was highly unlikely the two designs were independently created. The court held that Towerstone had also infringed Choo’s Community unregistered design.*⁷²

This case is important also due to the fact that the decision contains an explanation of the term “informed user” and “overall impression”. The informed user is not an average user, but a user with a certain degree of knowledge, who may notice the similarity or difference between bags, but is not an industry expert.⁷³ In its turn, the overall impression means that “an informed user can find virtually no difference between the design and an earlier design.”⁷⁴ However, returning

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid

⁷¹ Judgment in *Jimmy Choo Ltd. vs Towerstone Ltd.* [2008] EWHC 346

⁷² Intellectual Property in the Fashion Design Industry. Design Rights. Available on <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-DesignRights-Download1.pdf> Accessed May 3, 2018

⁷³ Intellectual Property in the Fashion Design Industry. Design Rights. Available on <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-DesignRights-Download1.pdf> Accessed May 3, 2018

⁷⁴ Susanna Monseau, “European Design Right: A Model for the Protection of All Designer from Piracy” , *American Business Law Journal*, Vol.48, Issue 1, Spring 2011, p. 61

to the previous point and talking about the requirement of something “new”, it is quite difficult to determine the novelty in case of fashion items. The best example of this is a four-pocket women’s jacket designed by Coco Chanel in year 1954. In this case the designer just changed the neckline of a men’s suit jacket and added two pockets. So, it is controversial when it comes to innovation and originality.

An infringement of design rights occurs when a third party uses a design which is identical or confusingly similar to an earlier design. According to the legislation, “use” means:

*The making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.*⁷⁵

An important point is that for in order to protect an unregistered design from infringement, evidence of copying must be provided.

As it was stated in the Regulation, registered design rights provide longer and stronger design protection. However, the fashion industry is very dynamic and fast-moving. That is why registration procedure, which takes some time, could be useless, if goods become unfashionable in three months after their release. Nevertheless, the Regulation provides one useful legal instrument which is called “grace period”. The Regulation noted that sometimes it is necessary to provide a designer with an opportunity to test goods embodying design before deciding whether a design should be protected through registration procedure or not. This rule is very important to the fashion industry, because if some products come and go within several months, it makes no sense in investing time, efforts and money in such design registration. Especially, taking into consideration that under the necessary conditions such short-life design will be protected under unregistered design rights for three years. On the other hand, if a design becomes “iconic” one, it will be necessary to protect it for a longer period of time than three years. In this case registration procedure is required. The grace period gives a designer an opportunity to determine whether the design becomes classical or will be in demand for a short period of time. The grace period lasts twelve months and begins when the design was disclosed for the first time.

An application for design registration could be filed at any time within the grace period. As well as a trademark, a design could obtain registration in three ways. Firstly, a Community Design

⁷⁵Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *OJ L 3, 5.1.2002, p. 1–24*

should be registered through the EUIPO to obtain protection within all the EU Member States by filing one application. Secondly, a design could be registered through national registration system available in the national Patent Office. Thirdly, it is possible to register the international design through The Hague International Design System. The Hague System provides the possibility to register design in over 68 countries, including the EU. The Hague System, as well as The Madrid System, is administered by WIPO.⁷⁶

Before filing an application, design attorneys usually advise their clients to conduct prior design search in order to find out whether there are any identical or similar designs which can become an obstacle when registering a design in question. National design search could be provided through the national database, for example, Latvian Patent Office provides design database (also in English) through which a special search among Latvian national designs could be conducted.⁷⁷ The Community Design search could be conducted through the EUIPO search system.⁷⁸ Also there is an international design search system called Hague Express available for the purpose of design search within international designs.⁷⁹ Similarly to trademarks, there is one more possibility to use DESIGNVIEW database, mainly by design attorneys, because it provides an opportunity to conduct search within all national designs protected in the EU Member States, within Community Designs and International Designs.⁸⁰

Designs are also protected for particular goods. For the purpose of registration, a special classification of goods was established.⁸¹ Totally, Locarno Classification includes 32 classes and 219 subclasses.⁸² Classes which are most relevant to the fashion industry are: class 02 – articles for closing and haberdashery; class 05 – textile piece goods, artificial and natural sheet materials; class 10 – watches; class 11 – jewellery.⁸³

⁷⁶Hague – The International Design System. Available on <http://www.wipo.int/hague/en/> Accessed May 8, 2018

⁷⁷ Search for industrial designs in registered. Available on <http://databases.lrpv.gov.lv/databases/en/design/search> Accessed May 8, 2018

⁷⁸EUIPO eSearch plus. Available on <https://euipo.europa.eu/eSearch/> Accessed May 8, 2018

⁷⁹Hague Express. Available on <http://www.wipo.int/designdb/hague/en/> Accessed May 8, 2018

⁸⁰DesignView. Available on <https://www.tmdn.org/tmdsview-web/welcome.html?lang=en> Accessed May 8, 2018

⁸¹Locarno Classification. Available on <http://www.wipo.int/classifications/locarno/en/> Accessed May 8, 2018

⁸²About the Locarno Classification. Available on <http://www.wipo.int/classifications/locarno/en/preface.html> Accessed May 8, 2018

⁸³ Handbook on industrial Property Information and Documentation. Available on <http://www.osim.ro/brevete/manuale.osim/manualompi/handbook/eng/05/e050401.pdf> Accessed May 8, 2018; Class description. Available on https://www.ipd.gov.hk/eng/intellectual_property/designs/locarno2.htm Accessed May 8, 2018

When a design application is filed, some official fee is required.⁸⁴ A design application should contain also visual representation that clearly and in detail indicates the subject of protection from all sides. Unlike trademarks, one design application may contain several design options. In its turn, a trademark application can contain one trademark. If it is necessary to protect different variants of trademarks, each variant should be applied separately. After an application has been filed, it is followed by examination. First of all, formal examination checks formalities – whether a design can be qualified as “design”, and that it does not fall within exemptions.⁸⁵ During examination the EUIPO does not conduct design search. Thus, novelty and individual character criteria will be examined only if the third party applies for invalidation. If no objections are raised, a design will be registered.

There are two main advantages of registered design rights as compared to unregistered design rights. First of all, in case of infringement, designers can rely on registration to prove their rights. However, owners of unregistered design rights should provide sufficient evidence to prove their rights. Secondly, in case of registered design, the owner should not prove the fact of infringement. It is sufficient for a contested design to create similar overall impression like registered design. In case of unregistered design, owners should prove infringement by providing sufficient evidence. From the practical point of view, it is difficult to prove the fact of infringement in case of unregistered design on the basis of evidence.

One example of a successful use of Community design right is the dispute between French designer Chloé and UK retailer Topshop over two dresses. Chloé sold a £185 yellow dress styled to look like dungarees, featuring external pockets and a belt. Topshop then introduced a dress which was very similar in design and colour, retailing at £35. Chloé alleged that Topshop had infringed its Community design rights, and agreed to settle the matter out of court in return for Topshop's destruction of all unsold dresses and a £12,000 payment. However, Topshop did not admit infringement.⁸⁶

Nevertheless, according to the Intellectual Property Law of the EU, designers have an option to protect their creations as registered design rights through registration procedure or use

⁸⁴ See: Fees & payments. Available on <https://euipo.europa.eu/ohimportal/en/rcd-fees-and-payments> Accessed on May 8, 2018; Fees for legal protection of industrial designs. Available on <http://www.lrpv.gov.lv/en/industrial-designs/fees> Accessed May 8, 2018; Hague System Fee Calculator. Available on <http://www.wipo.int/hague/en/fees/calculator.jsp> Accessed May 8, 2018

⁸⁵ Intellectual Property in the Fashion Design Industry. Design Rights. Available on <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-DesignRights-Download1.pdf> Accessed May 3, 2018

⁸⁶ Intellectual Property in the Fashion Design Industry. Design Rights. Available on <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-DesignRights-Download1.pdf> Accessed May 3, 2018

unregistered design rights without any registration. In the field of fashion, unregistered design is sometimes a very useful instrument for design protection. The most vivid example is *Karen Millen v. Dunnes Stores*⁸⁷ case regarding unregistered design rights protection. In 2007, Karen Millen filed an action against Dunnes Stores that was based on infringement of unregistered design rights. According to the case, defendant copied two garments, “namely, a striped shirt and a black knit top.”⁸⁸ After Karen Millen’s success in the first instance court, the defendant filed the appeal to the Irish Supreme Court. The Irish Supreme Court referred to the the Court of Justice of the EU. The main question was about the individual character. According to the CJEU decision, “the test to find individual character shall be made comparing the design as a whole.”⁸⁹ Due to the fact that a designer usually adapts and uses some elements or ideas that were created in the past, it is very difficult to prove an absolute novelty in the fashion industry.

*This decision “require fast fashion retailers to think twice when producing similar products to other fashion house, since the task of challenging the validity of unregistered design rights will cost more than they have believed.”*⁹⁰

Professor Monseau stated that an unregistered design “is real innovation of the European design right”⁹¹ In the same article, Professor Monseau stated, that a short-period protection is “obviously useful protection for designers in a dynamic industry like fashion”⁹² However, she also stated that “no simple way to measure how much this protection is used because, unlike registered designs, there is no registry to check.”⁹³ However, analysing whether the use of unregistered design is widespread or not, Erika Myers analysed litigation. She declared that “there has been little litigation in Europe concerning unregistered designs for clothing or fashion accessories”⁹⁴

⁸⁷Judgment in *Karen Millen Fashion Ltd v. Dunnes Stores, Dunnes Stores (Limerick) Ltd*, Case C-345/13, CJEU, June 19, 2014.

⁸⁸Should fashion design be protected. Available on <https://law.maastrichtuniversity.nl/ipkm/should-fashion-design-be-protected/> Accessed May 10, 2018

⁸⁹Ibid.

⁹⁰ Ibid

⁹¹Susanna Monseau, “European Design Right: A Model for the Protection of All Designer from Piracy”, *American Business Law Journal*, Vol.48, Issue 1, Spring 2011, p. 61

⁹²Ibid

⁹³Ibid

⁹⁴Erica Myers, “Justice in Fashion: Cheap Chic and the IP Equilibrium in the United Kingdom and the United States” , 37 *AIPLA Q.J.* 47, note 9, at 80(2009)

According to the Raustiala and Springman's research: "There has been little use of registered designs in the fashion industry in Europe", because "pervasive but unutilized regulation in Europe is not useful to the fashion industry"⁹⁵ Contrariwise, Professor Monseau believes that:

*The rare use of registered designs in Europe makes sense because fashion is a seasonal industry, and most designs will not have a long enough shelf life for registered design rights to be necessary or useful.*⁹⁶

Additionally, she added that "the disadvantages of registered designs for fashion [...] time and expense".⁹⁷ "Instead, unregistered design rights are more likely to be useful to fashion designers."⁹⁸

In practice, both types of design right protection are useful. The World Intellectual Property organization noted that the question whether or not a new design should be registered, must be considered on the case-by-case basis. Design registration should protect designer from copying of his creations and fight with infringers of design rights.⁹⁹ This procedure is necessary for long-life goods which became iconic or classical over time. These products need longer protection – more precisely, at least 25 years' protection provided by the Registered Community Design rights. For short-life products unregistered design rights should be sufficient to protect the design that comes and goes within one season. In this case three years' protection is more than sufficient. Besides, it helps to save time and investment.

Undoubtedly, design right is the center of the fashion industry. Design is what fashion industry is about. It should be protected anyway. The European Union legislation provides some useful types of protection that are actively used by fashion companies and designers to protect their rights. However, the degree of activity of Fast fashion retailers, not to mention their multimillion-dollar income, shows that the conventional level of design protection in the EU is not sufficient. As it was previously mentioned, Fast fashion retailers build their business upon new design imitation.

⁹⁵Kal Raustiala, Christopher, "Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design", (2006), Virginia Law Review, 1687, Volume 92, Issue 8.

⁹⁶Susanna Monseau, "European Design Right: A Model for the Protection of All Designer from Piracy" , American Business Law Journal, Vol.48, Issue 1, Spring 2011, p. 60

⁹⁷Ibid

⁹⁸Ibid

⁹⁹ IP and Business: Intellectual Property in the Fashion Industry. WIPO Magazine. Available on http://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html Accessed May 11, 2018

Conversely, unregistered or registered design right should protect a designer from imitation that provides the same overall impression. In this case it is unclear, whether design rights protection is able to cope with its task or not. Moreover, it is hard to determine whether this problem occurs from the feature of the Fast fashion phenomenon or because of insufficiently developed legislation in the field of Intellectual Property protection. If the actual state of things results from the feature of the Fast fashion phenomenon, it is necessary to clarify how two huge parts of the fashion industry should interact with each other so as not to interfere with each other and not to invade each other's economic space. On the contrary, if the actual state of things results from insufficiently developed legislation in the field of Intellectual Property protection, it is necessary to realise which part of the EU legislation does not work in the right manner to protect fashion companies from infringers. Due to the fact that these issues are very important for the development of the economically strong fashion industry, it is necessary to pay due attention to the solution of these problems by the legislator and the practitioner.

3. FAST-FASHION PHENOMENON AND ANTI-COUNTERFEIT POLICY – INFLUENCE ON THE FASHION INDUSTRY.

Eric Holder, Attorney General of the United States, once noticed: “Intellectual property crimes are not victimless. The theft of ideas and the sale of counterfeit goods threaten economic opportunities and financial stability, suppress innovation and destroy jobs.”¹⁰⁰ Fast fashion

¹⁰⁰Federal Courts Order Seizure of 82 Website Domains Involved in Selling Counterfeit Goods as Part of DOJ and ICE Cyber Monday Crackdown. Available on <https://www.justice.gov/opa/pr/federal-courts-order-seizure-82-website-domains-involved-selling-counterfeit-goods-part-doj> Accessed May 12, 2018

retailers are thieves who steal ideas. It is what people usually think about Fast fashion retailers, because they use ideas of high-fashion designers and create something similar. However, it seems to be dishonest, because they can start selling new products faster and cheaper than high-fashion designers. As Erika Myers rightly remarked: “copying occurs between all layers of the fashion industry.”¹⁰¹ Professor Monseau, with reference to Susan Scafidi, noted that “all designers are influenced by each other, and even high-end designers sometimes borrow too much of their peers’ work.”¹⁰² The best example of this is the iconic little black dress presented for the first time in the movie *Breakfast at Tiffany’s* by Audrey Hepburn. The iconic little black dress was created by Coco Chanel in 1920s and later was innovated and improved a hundred times by countless designers on different levels of the fashion industry. It is a standard practice in the field of fashion that designers are influenced by and also have an influence on other designers. George Bernard Shaw said:

*If you have an apple and I have an apple and we exchange these apples, then you and I will still each have one apple. But if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas.*¹⁰³

Similar situation happens with fashion every day. It is necessary to note that high-end designers not only exchange ideas between themselves, but also often collaborate with Fast fashion retailers to create new collection for mass market shops. In 2006, a famous designer Vera Wang worked together with mass market store Kohls. In 2009, a famous shoes designer Jimmy Choo cooperated with one of the most popular Fast fashion retailers – H&M. Together they launched the limited edition line of shoes, clothing and accessories. In the memoirs of Tamara Mellon, cofounder and former Chief Creative Officer of Jimmy Choo, the collection was sold out within 24 hours. H&M from their side noted that collaboration with Jimmy Choo was the most successful they have ever had. In the end of 2015, H&M partnered with Balmain. They released clothes, accessories and shoes collection that was sold out immediately. These collections are available for a short-time and prices of products are quite low in comparison with normal prices of these famous brands.

¹⁰¹Erica Myers, “Justice in Fashion: Cheap Chic and the IP Equilibrium in the United Kingdom and the United States” , 37 AIPLA Q.J. 47, p. 58 (2009)

¹⁰²Susanna Monseau. “European Design Right: A Model for the Protection of All Designer from Piracy” , American Business Law Journal, Vol.48, Issue 1, Spring 2011, p. 36

¹⁰³George Bernard Shaw. Quotes. Available on <https://www.goodreads.com/quotes/23088-if-you-have-an-apple-and-i-have-an-apple> Accessed May 12, 2018

In 2014, Creative Director of Balmain Oliver Rousteing during an interview with the Independent newspaper noted:

*“I love seeing a Zara window with my clothes mixed with Celine and Proenza [Schouler]! I think that’s genius. It’s even better than what I do. [...] I’m really happy that Balmain is copied – when I did my Miami collection and we did the black and white checks, I knew they would be in Zara and H&M. But they did it in a clever way – they mixed a Céline shape with my Balmain print! Well done! I love that”.*¹⁰⁴

Collaborations are not the single way how high-fashion designers interact with Fast fashion retailers. Some fashion houses, for example, Armani, Dolce & Gabbana, Calvin Klein and others have their own lower-cost brands for mass market stores. However, this has not happened often because the brands do not want to lose their exclusivity. Moreover, not all high-fashion companies want to see their products in mass market stores. Such brands, as Louis Vuitton and Chanel do not sell their products from previous collections to the discount stores. Handbags by Chanel and other goods are only sold in Chanel stores. On top of that, they burn all the unsold goods. Iconic goods never lose their high price, because Chanel views them as items that do not lose value. In 2005, the former creative director of Gucci fashion house noted that they conduct simple research and determine that the Fast fashion or counterfeit customers are not consumers of Gucci products. That means that the target audience of Fast fashion and high-fashion companies differs. As a general rule, those who can buy original Gucci or Chanel garments never buy counterfeit or ZARA.

Fast fashion retailers like ZARA and H&M do not copy designs line-by-line. They use ideas and elements to create their own collection for the mass market shops that will be available to the average mass market consumers. From the economic point of view, business interests of Fast fashion companies and high-fashion companies do not intersect. In particular, it happens because Fast fashion companies like ZARA and H&M use their own names and trademarks to indicate the origin of their goods and do not pretend to be a part of luxury segment. Moreover, they make high-fashion designs popular and available for mass consumption. It is also important to add that European Fast fashion retailers avoid complete copying of designs. It is confirmed by low

¹⁰⁴Freya Drohan, “I love seeing a Zara window with my clothes!: Why Balmain’s Creative Director is happy for high street copycats.” Available on <https://www.independent.ie/style/fashion/style-talk/i-love-seeing-a-zara-window-with-my-clothes-why-balmains-creative-director-is-happy-for-high-street-copycats-30468527.html> Accessed May 12, 2018

number of lawsuits filed against ZARA and H&M, namely, between 2000-2010 ZARA was never put to trial, whereas H&M had only two lawsuits. Thus, the absence of lawsuits confirms the fact that Fast fashion retailers do not pose a significant danger to designers in the sense of violating their intellectual property rights. From the other point of view, fast-fashion retailers do not ask permission before copying new designs. If designers are satisfied with current situation, it is not harmful for all parties. But if brand, like Dior or Chanel, want to keep their exclusive character, it seems doubtful that they agree with the status quo. The question why is it so arise. Why famous fashion houses do not file lawsuits against fast-fashion retailers. The most logical answer to this question is that there is no proper legislation provided to protect interests of designers.

It is important to distinguish between different types of copying. There is a big difference between counterfeit goods and substantially similar goods. The knockoff is product of Fast fashion industry, which uses ideas and elements of the original design, but not line-by-line copying. Counterfeit is nearly identical to the original product which pretends to be sold as the original one. Counterfeit normally includes identical design, trademarks, labels and other elements. However, the quality is very low. Thus, counterfeit brings not only financial loss, but also harms the reputation of fashion companies. “In the EU trade in counterfeit and pirated goods amounted to up to 5 % of imports or as much as EUR 85 billion (USD116 billion)”.¹⁰⁵ In contrast to Fast fashion goods, counterfeits encroaches on all market segments: 1) secondary market, in which consumers consciously buy counterfeit; and 2) primary market, in which consumers buy counterfeit, but are still sure that they buy original items.

According to the information provided by the Latvian Patent office, in year 2017, 81 484 counterfeit goods units were arrested by the Latvian customs authorities. In comparison to 2016, it is by 26 920 goods, or 49% more. In year 2017, fake shoes, clothes, accessories, watches were mostly found. In most cases, consignments of counterfeit goods detained were shipped from China, Hong Kong and Turkey. Several months ago, two containers with 17,472 pairs of shoes

105 OECD/EUIPO (2016), Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact, OECD Publishing, Paris. Available on https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Mapping_the_Economic_Impact_study/Mapping_the_Economic_Impact_en.pdf Accessed May 13, 2018

with "Nike" trademarks imported from China and destined for a recipient in Russia were discovered at customs control point of the Freeport of Riga. According to the information provided by the Nike Owner's authorized representative, the total remedy for material damage to Nike Innovate C.V. following the value of the original goods is approximately 1.74 million euros.¹⁰⁶

According to the EUIPO and the Organization for Economic Cooperation and Development (OECD), analysis on trade in counterfeit goods was held in 2016 and showed that around 2.5% of world production was falsified. In turn, the international trade in counterfeit and pirated goods has a turnover of \$ 461 billion (EUR 338 billion). The study noted that free trade areas employ 66 million people and generate direct trade-related added value of more than 365 billion euros (500 billion dollars). The 2018 research finds that more than 3,500 free trade areas in the world have contributed to the development of trade routes, while due to poor regulation, it has become a positive environment for counterfeit goods flows. The study confirms the link between free trade areas and counterfeit goods. The existence, number and size of free trade areas in the country are related to the increase in value of exported counterfeit goods. An additional free trade area in the economy increases the value of exported counterfeit goods by 5.9%.¹⁰⁷

It goes without saying that most of scholars and public authorities claim that Intellectual property should be protected and unauthorised. However, some scholars argue that design protection in the field of fashion is meaningless, because the public domain could be extended only if fashion design is out of protection. This idea is called "Piracy paradox."¹⁰⁸ The authors of Piracy paradox Kal Raustiala and Christopher Springman argued that the public and private interests should be balanced. Public interests are more important than private ones. The main idea is that piracy is very beneficial to the fashion industry, even though it violates the interests of designers. Under this principle, some trends will dissolve because of piracy while others, the best ones, will

¹⁰⁶ SRS Customs Board holds 17 472 pairs of fake Nike shoes. (in latvian) Available on <http://www.lrv.gov.lv/lv/patentu-valde/aktualitates/nozares-zinas/vid-muitas-parvalde-aiztur-17-472-parus-viltotu-nike-apavu> Accessed May 13, 2018

¹⁰⁷ OECD/EUIPO (2018), Trade in Counterfeit Goods and Free Trade Zones: Evidence from Recent Trends, OECD Publishing, Paris/EUIPO. Available on https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/Trade_in_Counterfeit_Goods_and_Free_Trade_Zones/Trade_in_Counterfeit_Goods_and_Free_Trade_Zones_en.pdf Accessed May 13, 2018

¹⁰⁸ Kal Raustiala, Christopher, "Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design", (2006), Virginia Law Review, 1687, Volume 92, Issue 8.

gain ground. This cycle impels the fashion industry to innovate and create new trends. Thus, they concluded that the fashion industry develops better when Intellectual Property protection is weak.¹⁰⁹

Nevertheless, based on today's reality, other scholars, for instance, Professor Monseau, and public authorities do not agree with that. At this point, fashion loses more than gains owing to piracy. So, this theory is not proper. Governments of different countries are ready to solve the problem with counterfeit at the highest level. In year 2012, the EU signed The Anti-Counterfeiting Trade Agreement (ACTA). The aim of this agreement was to establish the international standards for Intellectual property rights enforcement and establish the international legal framework for targeting counterfeit goods. However, there were many issues with this agreement. The ACTA was not ratified and was rejected in the EU because of potential threats to civil liberties.¹¹⁰

Today, anti-counterfeit policy provided by the customs authorities within all the EU Member states is the most effective tool to stop or even to prevent the spread of counterfeit goods in the EU. Usually counterfeit goods include brand names, logos, and other decals. In this meaning, trademark protection is the most effective solution because trademarks usually could be easily recognised by customs authorities. In all the EU countries customs have rights to seize and destroy counterfeit goods which infringe trademark rights. What is more, a new customs regime has been recently adopted within the EU. It allows to seize counterfeit goods that infringe copyrights. It is very beneficial to fashion companies, which can now also rely on copyright to prevent counterfeit goods from entering the EU. However, if customs seize and destroy goods incorrectly, the right holder is obliged to compensate any suffered losses.

It is also possible to record Community or national design registrations with customs in order to protect design rights. Within the territory of the EU, customs authorities have a lot of experience in dealing with counterfeit infringing design rights. It is especially useful if a design is registered with regard to part of an item. Nevertheless, unregistered design rights are limited in comparison

¹⁰⁹ Ibid.

¹¹⁰ Anti-Counterfeiting Trade Agreement. Available on https://en.wikipedia.org/wiki/Anti-Counterfeiting_Trade_Agreement Accessed May 13, 2018

with registered design rights and cannot be recorded with customs. That is why it is more difficult to seize goods protected under registered design rights.¹¹¹

As it was previously presented, within the EU there are many possibilities for fashion companies to protect their IP rights including trademark or design registration, unregistered design and others. Besides, the EU governmental authorities also provide special tools, like new customs regime to make IP protection effective. Thus, fashion companies should not choose between different types of Intellectual property protection. On the contrary, it is better to employ all of them to provide effective and adequate protection of their interests.

CONCLUSION

As previously noted, the fashion industry is a constantly growing industry which has a significant influence on the European economics. Nowadays, fashion is not merely a necessity to satisfy primary human needs to cover up nudity and protect from vagaries of the weather. Fashion stands for philosophy, lifestyle, and style of thinking. Fashion is a modern “God” with millions of

¹¹¹ Tania D'Souza-Culora, Andrew Sim, James Whymark. IP enforcement in the Fashion industry. Through leadership. 8 may 2015. Available on <http://www.worldtrademarkreview.com/Intelligence/Anti-counterfeiting/2015/Industry-insight/IP-enforcement-in-the-fashion-industry> . Accessed May 13, 2018

followers. Fashion items are not just apparel or accessories; they become investments or pieces of artwork. Fashion is a social phenomenon that characterizes our century. Fashion surrounds us everywhere from movies or magazines to shops, markets and streets. Considering high demand, it is not a surprise that fashion is a multi-million-dollar industry with a large cash turnover and income.

Like any other economically significant industry, the fashion industry faces different types of challenges. As it was presented in the thesis, the growing number of counterfeit goods within the EU and the lack of protection of intellectual property rights are the most significant issues based on influence on the fashion industry.

The main feature of the fashion industry is its fast-moving character. Usually, fashion trends are changing from 2 to 4 times a year. The average length of one fashion period is approximately one season. The most part of trends may come and go very quickly, only several of them may become iconic. That is the reason why designers are forced to be quick-thinking to keep up with the competitors and satisfy consumers. However, it takes time and money investments to create a new trend. On the other hand, by means of modern technologies, Fast fashion retailers are able to provide all the necessary information to their manufacturers in China or India immediately, right during the fashion show. They made new fashion trends available to consumers within several days. They do it so quickly, that the designer has no chance of selling original products.

Trademarks and designs are two IP rights that are most related to the fashion industry. Trademark is a sign with the main function to determine the commercial origin of goods. There are several registration regimes available. National, international or European registration differ by territory of protection, but provide the same scope of protection. Trademarks may be very useful when it comes to protection of IP rights against counterfeit and piracy. Designs protect the appearance of goods which is why design protection is the cornerstone of all the IP rights in the field of fashion. Legislation provides two options for design protection. Short-term protection without any registration or long-term protection that is gained through registration procedure. Both of them are useful on the case-by-case basis, providing protection to the creation and innovation results.

Certainly, Fast fashion retailers do not copy fashion designs line-by-line. They use an idea provided by high-end designers or some distinctive original elements to create similar but not identical designs. Taking into consideration that exchange of ideas is a usual practice in the field

of fashion, a significant part of high-fashion designers does not see the danger in Fast fashion phenomenon. Some of the designers confirm that Fast fashion industry helps to popularise new trends among mass market consumers. However, there are still some fashion houses – like Louis Vuitton, Dior, Gucci or Chanel – that want to keep their exclusivity. They do not sell goods at a discount, do not release cheap product lines. They maintain their luxury brand status. Nevertheless, like other designers, they are copied by Fast fashion retailers. From this point of view, the argument that there are no lawsuits against Fast fashion retailers, should face two aspects. The first one is that Fast fashion is not very harmful to the fashion industry. The second one is that fashion retailers do not ask for permission to copy some brands. If brands are satisfied with the current situation, it is convenient for all parties. But if brands like Dior or Chanel want to keep their exclusive character, it seems doubtful that they agree with the status quo. Hence, there is a question – why don't famous fashion houses file lawsuits against Fast fashion retailers? The most logical answer to this question is that there is no proper legislation provided in order to protect interests of designers. Nevertheless, it is impossible to deny that the target audience of Fast fashion and high-fashion companies differs. Those who can buy original items by Gucci or Chanel will probably never buy counterfeit or ZARA.

Besides, a rapidly growing number of counterfeit goods also impacts the fashion industry badly. Counterfeit carries both direct and indirect damages, not to mention the harm it does to the reputation of the fashion companies. Several years ago the EU adopted a new customs policy created to fight against counterfeit goods. It gives right to customs authorities to seize and destroy counterfeit because of trademark or design right infringement. However, this is not sufficient. It is proved by rapidly growing percentage of counterfeit goods within the EU market. That is why legislation amendments should be provided not only within the borders of the EU, but also around the world because counterfeit is a worldwide issue. In 2011, there was an attempt to establish legal regulation and framework for counterfeit goods turnover. This attempt was unsuccessful. Nevertheless, it means that legislation should be amended on all levels from local to international ones.

In conclusion, all the issues that exist in the fashion industry confirm that current intellectual property legislation does not provide sufficient protection to the intellectual property rights of the designers. The question concerning Fast fashion phenomenon remains controversial. Probably, within strong IP protection environment Fast fashion phenomenon would not be able to prosper

as much as it does now. The growing number of counterfeit goods faces gaps in European anti-counterfeiting policy. Several other theoretical and practical questions are not resolved.

The aim of this thesis is to analyse legal and practical issues which arise in case of intellectual property protection in the fashion industry within the European Union and to find possible solutions. The research question of the thesis is: whether current European intellectual property law provides adequate capabilities to the fashion industry in order to protect intellectual property rights and interests with regard to the main features of this industry. Following on from the previously discussed and analysed data, it can be stated that the research question has been answered.

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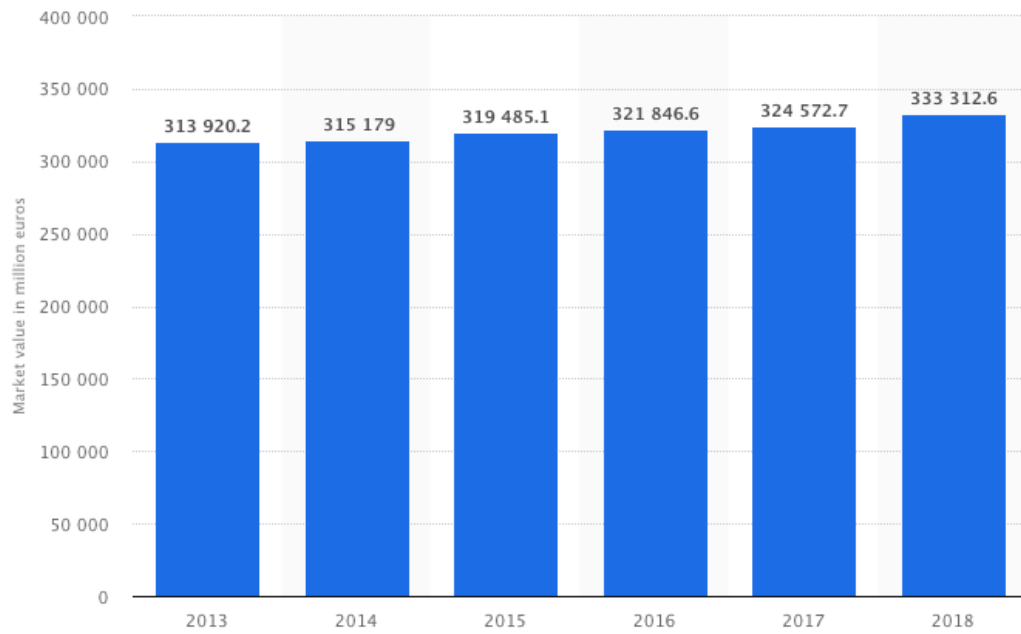
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APPENDICES

Annex 1.



Annex 2.

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List of results

WIPO Global Brand DB Page 1 of 1 10 20 30 50 75 100 | Displaying results 1 - 67 of 67

	Graphic representa...	Trade mark name	Trade m...	Designa...	Application nu...	Registration n...	Trade mark st...	Nice class	Applicant name	Application date	Trade mark type	Registration d...	Sen
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<input type="checkbox"/>		YSATIS	EM	EM	001073576	001073576	Registered	3	LVMH FRAGRANCE BRANDS (...)	26-01-1999	Word	19-12-2003	
<input type="checkbox"/>		IRREGISTIBLE	EM	EM	003844859	003844859	Registered	3	LVMH FRAGRANCE BRANDS (...)	19-05-2004	Word	04-10-2005	
<input type="checkbox"/>		MotionRepair	EM	EM	010417442	010417442	Registered	1,3	LVMH FRAGRANCE BRANDS (...)	15-11-2011	Word	19-04-2012	
<input type="checkbox"/>		SERIAL COLORS	EM	EM	010333342	010333342	Registered	3	LVMH FRAGRANCE BRANDS (...)	28-09-2011	Word	07-02-2012	
<input type="checkbox"/>		MotionCorrect	EM	EM	010508919	010508919	Registered	1,3	LVMH FRAGRANCE BRANDS (...)	20-12-2011	Word	30-05-2012	
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<input type="checkbox"/>		BURBERRY	EM	EM	001058312	001058312	Registered	3,18,25	BURBERRY LIMITED	26-01-1999	Word	27-03-2000	
<input type="checkbox"/>		BURBERRY BRIT	EM	EM	003322922	003322922	Registered	3	BURBERRY LIMITED	21-08-2003	Word	04-03-2005	
<input type="checkbox"/>		BURBERRY BLACK LABEL	EM	EM	004708467	004708467	Registered	9,14,18,25	BURBERRY LIMITED	26-10-2005	Word	25-08-2006	
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List of results

WIPO Global Brand DB Page 1 of 1 10 20 30 50 75 100 | Displaying results 1 - 51 of 51

	Graphic representa...	Trade mark name	Trade m...	Designa...	Application nu...	Registration n...	Trade mark st...	Nice class	Applicant name	Application date	Trade mark type	Registration d...	Sen
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<input type="checkbox"/>		miu miu	EM	EM	005644681	005644681	Registered	9,28	PRADA S.A.	15-01-2007	Figurative	24-01-2008	
<input type="checkbox"/>		CS MONOGRAM 1.0	EM	EM	008769598	008769598	Registered	25	PRADA S.A.	18-12-2009	Figurative	21-09-2012	
<input type="checkbox"/>		PRADA	EM	EM	012152492	012152492	Registered	18,24,25	PRADA S.A.	18-09-2013	Figurative	13-02-2014	
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<input type="checkbox"/>		PRADA MILANO	EM	EM	010612257	010612257	Registered	18,25	PRADA S.A.	02-02-2012	Figurative	13-06-2012	
<input type="checkbox"/>		GRANELLO	EM	EM	000575332	000575332	Registered	9,14,16,18,25	PRADA S.A.	18-07-1997	Figurative	22-01-2003	
<input type="checkbox"/>			EM	EM	011451549	011451549	Registered	18,24,25	PRADA S.A.	21-12-2012	Figurative	04-02-2014	

Annex 5.

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WIPO Global Brand DB Page 1 of 1 10 20 30 50 75 100 | Displaying results 1 - 43 of 43

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<input type="checkbox"/>			EM	EM	014578785	014578785	Registered	14,18,25	HERMES INTERNATIONAL	22-09-2015	Figurative	21-01-2016	
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<input type="checkbox"/>		VENDANGES	EM	EM	002477529	002477529	Registered	25	HERMES INTERNATIONAL	26-11-2001	Word	24-01-2003	

Annex 6.

The screenshot shows the TMview search results for the term 'GUCCI'. The search interface includes a search bar with the text 'Search by trade mark name, application and registration number.' and buttons for 'Search' and 'Clear'. Below the search bar are 'Advanced search' and 'Filters' buttons. The results table is titled 'WIPO Global Brand DB' and shows 100 results. The table columns are: Graphic representation, Trade mark name, Trade mark status, Designation, Application number, Registration number, Trade mark status, Nice class, Applicant name, Application date, Trade mark type, and Registration date. The results include various Gucci trademarks such as 'GG', 'SNAFFLE BIT', 'ICON BIT', 'GUCCI 1921', and 'GUCCI GUILTY'.

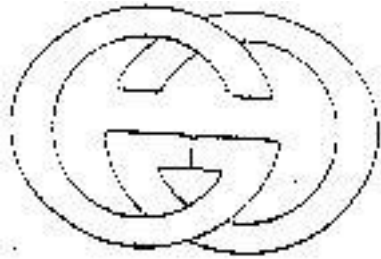
Graphic representation...	Trade mark name	Trade m...	Designa...	Application nu...	Registration n...	Trade mark st...	Nice class	Applicant name	Application date	Trade mark type	Registration d...
	GG	EM	EM	014441778	014441778	Registered	3,9,14,18,25,35	GUCCIO GUCCI S.p.A.	05-08-2015	Figurative	18-12-2015
		EM	EM	009604349	009604349	Registered	4,21,30,41	GUCCIO GUCCI S.p.A.	16-12-2010	Figurative	26-04-2011
	SNAFFLE BIT	EM	EM	009388547	009388547	Registered	18	GUCCIO GUCCI S.p.A.	21-09-2010	Word	04-02-2011
	ICON BIT	EM	EM	008130627	008130627	Registered	18	GUCCIO GUCCI S.p.A.	02-03-2009	Word	11-11-2009
		EM	EM	004689741	004689741	Registered	18,25	GUCCIO GUCCI S.p.A.	17-10-2005	Figurative	05-04-2007
	GUCCI 1921	EM	EM	009383894	009383894	Registered	14,18,25	GUCCIO GUCCI S.p.A.	17-09-2010	Word	02-02-2011
	GG	EM	EM	003824638	003824638	Registered	25	GUCCIO GUCCI S.p.A.	07-05-2004	Figurative	03-08-2005
	GUCCI GUILTY	EM	EM	009220181	009220181	Registered	3	GUCCIO GUCCI S.p.A.	02-07-2010	Word	17-12-2010

Annex 7.

The screenshot shows the TMview search results for the term 'BALENCIAGA'. The search interface is identical to the one in Annex 6. The results table is titled 'WIPO Global Brand DB' and shows 18 results. The table columns are: Graphic representation, Trade mark name, Trade mark status, Designation, Application number, Registration number, Trade mark status, Nice class, Applicant name, Application date, Trade mark type, and Registration date. The results include various Balenciaga trademarks such as 'BALENCIAGA', 'BALENCIAGA.DENIM', 'BALENCIAGA PARIS 10, AVENUE GEORGE V', 'BALENCIAGA PARIS', 'AQUABOTANICA', 'SUGARENA', and 'ARENA LEATHER'.

Graphic representa...	Trade mark name	Trade m...	Designa...	Application nu...	Registration n...	Trade mark st...	Nice class	Applicant name	Application date	Trade mark type	Registration d...
		EM	EM	006475751	006475751	Registered	6,9,18,25	BALENCIAGA	19-11-2007	Figurative	23-01-2009
	BALENCIAGA	EM	EM	011865805	011865805	Registered	9,14,18,25,35	BALENCIAGA	16-05-2013	Word	19-09-2013
	BALENCIAGA.DENIM	EM	EM	006483044	006483044	Registered	25,26	BALENCIAGA	20-11-2007	Figurative	03-10-2008
	BALENCIAGA PARIS 10, AVENUE GEORGE V	EM	EM	013315064	013315064	Registered	18,25	BALENCIAGA	29-09-2014	Word	27-01-2015
	BALENCIAGA PARIS 10, AVENUE GEORGE V	EM	EM	008506834	008506834	Registered	3	BALENCIAGA	31-07-2009	Figurative	27-01-2010
	B. BALENCIAGA PARIS	EM	EM	012783296	012783296	Registered	3	BALENCIAGA	10-04-2014	Figurative	15-08-2014
	AQUABOTANICA	EM	EM	011485505	011485505	Registered	3	BALENCIAGA	05-02-2013	Word	06-06-2013
	SUGARENA	EM	EM	013707898	013707898	Registered	18	BALENCIAGA	02-02-2015	Word	21-05-2015
	ARENA LEATHER	EM	EM	013315072	013315072	Registered	18,25	BALENCIAGA	29-09-2014	Word	27-01-2015

Annex 8.



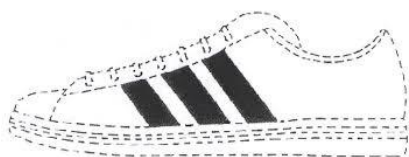
Annex 9.



Annex 10.



Annex 11.



Annex 12.



Annex 13.



Annex 14.

