

Using intellectual property to reduce the environmental and human rights harm of fast fashion in New Zealand

I. Introduction

Fashion is a multi-billion-dollar industry that has no national boundaries. The segment of the market that caters to the young is extremely lucrative. Fashion designers are creative people; they want their clothes to be distinct and appealing. If a design proves successful competitors will copy it to avoid falling behind. The reaction has been for designers to turn to copyright law for protection. The protection they find is both limited and in a state of transition.

Judge Finkelstein in *Muscat v Le*.¹

While an Australian case, this quote succinctly sums up the fashion industry in Australia, New Zealand and worldwide— an industry which continues to grow and shows little promise of slowing down. A major global business, the fashion and clothing industry is a 1.7 trillion-dollar (USD) market worldwide (2022).² Previously, fashion came out in seasons— spring/summer, winter/autumn— and designers would release clothing lines biannually. Now, brands release over 50 “micro-seasons” each year.³ Globalisation and social media have contributed to this acceleration, with a rapid rise and decline of trends (“microtrends”), cheaper clothes due to outsourcing, and faster response to runway or celebrity looks by companies.⁴ Trendier, cheaper, faster. Consumers are spoilt for choice and receive instant gratification— and the impacts on human rights, the environment, and intellectual property (IP) are devastating.

This newly emerged “fast fashion” model relies on mass-produced clothing in developing countries with weak human rights protections, for lower-cost manufacturing than in developed countries with stricter laws.⁵ Developing countries are utilised and harmed at many levels in the supply chain, for example, “waste colonialism” is used to describe developed countries shipping their waste (including clothing waste) to countries with low or

¹ *Muscat v Le* [2003] FCA 1540; 60 IPR 276.

² Ellen Macarthur Foundation “Fashion and the circular economy” (n.d.) <ellenmacarthurfoundation.org>.

³ Janie Xu “The Legality of Fast Fashion”(2023) NULJI<www.thenulj.com>.

⁴ Kathryn Keir “A Call for Transparency: How Should the New Zealand Government Approach Removing ‘Chains’ from Corporate Supply Chains?” (LLB(Hons) Dissertation, University of Auckland, 2018) at 2.

⁵ Dr. Preeti Arya “What is fast fashion, and why is it so controversial?”(2023) CNN <edition.cnn.com>.

non-existent environmental regulations around handling the waste.⁶ Further, the fashion industry is the third highest polluting industry, accounting for 10% of annual global carbon emissions. The environmental harm is severe.⁷

Intellectual property and fast fashion are connected. To achieve rapid production of trend-following garments, fast fashion companies are known to take heavy inspiration, or fully copy, the designs from other companies or runway couture. In an August 24 letter to the US Securities and Exchange Commission, attorneys general for sixteen states declared that fast fashion giant Shein is “stealing other designers’ work” and relying on a “network of putatively independent suppliers [that] allows it to immediately create or exploit trends— often blurring the lines of intellectual property and copyright.”⁸ There have been attempts to utilise intellectual property for fashion designs across the world, and there are varying levels of protection; at one end of the spectrum, France has strong and specific protection for fashion designs, while conversely the United States fashion industry essentially exists in a ‘doctrinal no man’s land’.⁹ The United Kingdom (UK), Australia and New Zealand (NZ) offer minimal to moderate fashion design protection.¹⁰

Research Question

How can intellectual property in New Zealand can be utilised to reduce the environmental and human rights harm of fast fashion?

This paper is not intended to be an exhaustive exposition of all aspects of intellectual property law, nor of laws affecting fashion, in NZ. The academic literature surrounding using intellectual property to reduce the fashion industry’s harm is scarce. This essay aims to establish why IP should be strengthened to undermine fast fashion and consequently reduce its’ environmental and human rights impacts. This essay also aims to discuss how NZ’s protections for fashion design could be changed to achieve this.

To determine how intellectual property can be utilised to address fast fashion, the following will be considered:

⁶ Micheal Neilson “Petition for New Zealand to ban plastic waste exports to developing countries”(2023) NZHerald<<https://www.nzherald.co.nz>>.

⁷ UNEP “Environmental costs of fast fashion”(2022)<www.unep.org>.

⁸ Jordyn Holman “Politicians to Shein: Not So Fast on U.S. Expansion” NYTimes (2023)<www.nytimes.com>.

⁹ Tedmond Wong “To copy or not to copy, that is the question: The game theory approach to protecting fashion designs”(2012) U.Pa.L.Rev., 160(4), 1139–1193 at 1148.

¹⁰ Wong, above n9, at 1148.

- The extent of fast fashion’s harm and the need for better laws;
- New Zealand’s intellectual property laws for fashion designs;
- Observations on New Zealand’s intellectual property fashion protection;
- Recommendations for New Zealand’s legal approach to fashion design.

Part II of this paper will provide an overview of fast fashion and explain its’ reliance on copying designs. It will discuss the impact of inadequate intellectual property protection on environmental harm and human rights violations, and the interconnectedness of these three areas. Part II will establish a rationale for focusing on intellectual property to reduce the harm caused by fast fashion. Part III will set out the intellectual property protection for fashion designs in NZ: Design protection, copyright protection and trademark protection. Areas for improvement will be identified. Part IV will make recommendations.

II. Establishing the Rationale for Intellectual Property Fashion Protection

A. Fast Fashion Explained

The problem is cheap clothes with a short shelf life. It’s called fast fashion. Since World War II, what we wear has grown cheaper and cheaper while coming from further and further away. We ask about the scale of the carbon footprint and social cost, and how TikTok and Instagram have further fed that buying frenzy. The world’s favourite sport is not football. It is shopping.¹¹

Fashion has been called “capitalism’s favourite child”.¹² As early as 1690, Economist Nicholas Barbon praised fashion for its ability to “dress a man as if he lived in a perpetual spring– he never sees the autumn of his cloth”.¹³ Fashion is where art meets utility, yet it has always relied heavily on symbolic value over use. For the wealthy, the fashion cycle meant clothing was replaced long before it was necessary– unlike other commodities that were replaced only once worn out.¹⁴ Consequently, the fashion industry has always been somewhat wasteful, but was restricted by manufacturing and distribution limitations. Until the mid-

¹¹ Kal Raustiala and Christopher Jon Sprigman “Faster Fashion: The Piracy Paradox and its Perils”(2021) 39 CAELJ 535 at 535.

¹² Giannino Malossi “The Style Engine” (New York, Monacelli Press, 1998), at 68.

¹³ Tansy Hoskins “Neoliberalism and Fashion”(2015) 14 OLR 8 at 8.

¹⁴ Hoskins, above n13, at 8.

1950s, fashion brands would launch seasonal collections biannually (spring/summer; autumn/winter).¹⁵ Centuries later, a growing obsession with couture fashion, alongside globalisation, has resulted in the birth of an environmental and human rights beast known as “fast fashion”.¹⁶

Fast fashion is an approach to the design, creation, and marketing of clothing fashions that focuses on the production of garments in bulk, and as quickly as possible, in response to current trends to make those trends quickly and cheaply available to consumers.¹⁷ The term was first popularised in a 1989 New York Times article to describe the clothing retailer Zara’s first store opening in the United States and the company’s goal to produce a garment from concept to consumer in merely 15 days.¹⁸ Traditional seasonal sales have been replaced by short runs of trend-based fashion, which means pressure to buy is increased.¹⁹ Now, brands release over 50 “micro seasons” each year.²⁰ Retailer Fashion Nova introduces 600–900 new items per week.²¹ Fast fashion giant Shien added between 2,000 and 10,000 styles to its app daily between July and December in 2021.²² Associate Professor of Fashion Jennifer Whitty at Victoria University estimates that Shein’s website produced 49 billion garments in 2022 alone.²³

Quickly selling mass quantities of stock requires it to be sold at a low price. Consequently, fast fashion garments must be made as cheaply as possible— from the design stage to production— resulting in clothes that are low quality. This also ensures garments will wear out faster and force consumers to buy more frequently. What has emerged is an industry characterised by deregulation, subcontracting, and trend-driven production, focused on selling billions of short-lived units each season for maximum profit.²⁴

1. Globalisation

The rapid globalisation of business has resulted in fast fashion and further exacerbated its harm. While globalisation has brought cheaper products and increased employment opportunities in the developing world, it has led to the proliferation of multinational

¹⁵ Xu, above n3, <www.thenulj.com>.

¹⁶ <www.thenulj.com>.

¹⁷ Arya, above n5 <edition.cnn.com>.

¹⁸ <edition.cnn.com>.

¹⁹ Hoskins, above n13, at 9.

²⁰ Xu, above n3, <www.thenulj.com>.

²¹ Raustiala and Sprigman, above n11, at 546.

²² Astha Rajvanshi “Shein Is the World’s Most Popular Fashion Brand”(2023)<time.com>.

²³ Mava Moayyed “NZ landfill boss sees alarming rise in clothing waste”(2023)<www.1News.com>.

²⁴ Hoskins, above n13, at 8.

corporations (“MNCs”) with supply chains extending across multiple countries and suppliers.²⁵ Often, several stages of the supply chain are carried out in countries with poor, informal, or sometimes non-existent environmental and labour regulation practices.

The size of MNCs makes it difficult to place blame for environmental and labour harm, and means these harms are often hidden— a company employing tens of thousands of people across multiple state boundaries cannot reasonably know the exact working conditions of each employee, or may intentionally ignore harm because it benefits their businesses.²⁶ The emergence of MNCs has made supply chains even more complex, with MNCs employing high levels of subcontracting and a preference for arm’s length contractual relationships with independent suppliers to reduce liability. This means responsibilities for harm can be diffused among a range of different companies and actors, creating uncertainty about where responsibility lies.²⁷

While globalisation is not solely to blame for fast fashion’s rise, it has heavily contributed.

B. Faster, Cheaper, Trendier: Fast Fashion’s Reliance on Copying Designs

For couture, it takes an average of eighteen to twenty-four months for a designer’s original concept to be produced in final form. The process starts with predicting what trends will be popular in eighteen to twenty-four months (when the garment is in its’ final form)— this generally begins with an investigation of textile and colour trends. The prediction of colour trends is a meeting by various experts of design industries and the output is an annual colour report which affects apparel, accessories, home furnishings and other design-oriented product industries.²⁸ The couture designers choose a “colour story”: a palette of colour selected from the annual colour report, with which to base their designs for the future season. Then, the designer can proceed to review textile trends. These are calculated by services that research international fashion, street fashion, and the experimental fashion of young people in fashion-centric cities.²⁹ Designers will then start an ongoing inspiration process, in which they sketch or use digital modelling to create the new garment designs. Next, fabrics and construction techniques will be decided, and a sample will be created. This sample will be scrutinized and

²⁵ Keir, above n4, at 7.

²⁶ At 7.

²⁷ Ministry of Business Innovation and Employment *Modern Slavery Legislation: Final Report* (July 2021) MBIE at 10.

²⁸ Aleksandra Spevacek "Couture Copyright: Copyright Protection Fitting for Fashion Design" (2009) 9 JMIPL 602 at 604.

²⁹ Spevacek, above n28, at 605.

adjusted, before the design steps into the manufacturing stage. A designer goes through this process for every new clothing line created. The garments will be shown at fashion or trade shows, where the public and any copyists will first see the new line: this is the stage where the designs become susceptible to less expensive and more quickly produced copies.³⁰

This description is to paint a picture of the extensive time commitment for the fashion design process, and the origin of the traditional spring/summer and autumn/winter fashion cycle. It is an antithesis of the approach taken by fast fashion retailers— more production, more sales, more profit. The internet has accelerated the copying process further: media from fashion and trade shows are shared online quickly, allowing copiers almost immediate access to new designs. With digital technology, garments can be copied accurately and produced quickly and at a low cost— increasing the risk of IP infringement.³¹ Fast fashion retailers currently have little incentive to hire designers to create an entirely original line. Due to the lower quality materials, lower design costs and popularity among consumers, retailers are making large profits and relying more on copying designs to match demand.³²

1. The extent of design copying by fast fashion retailers

Blatant copying, or heavy inspiration, of luxury fashion looks worn by celebrities, internet content creators, or from designer couture launches, is widely known on social media and has earned the title “dupes” – a term originating from “duplicates”.³³ The goal of companies manufacturing and selling “dupes” is to provide trends to the consumer while at the height of the garment’s popularity, at inexpensive prices in comparison to the emulated luxury garments.³⁴ In a US case, Italian fashion house Gianni Versace called Fashion Nova a “serial infringer” specializing in knock-offs and claimed Versace’s “iconic” designs were copied— see figure 1.³⁵ Fashion Nova was sued at least 8 times from 2013-2019.³⁶ Shein is notorious for copying designs, and is facing a growing number of lawsuits across many countries.³⁷ Luxury labels are not the sole targets of dupes; independent designers whose consumers are the mass market are also affected. In July 2024, three independent designers filed a lawsuit in

³⁰ At 605.

³¹ Cassandra Elrod “The Domino Effect: How inadequate intellectual property rights in the fashion industry affects global sustainability” 2017 IJGLS [24] 575-595 at 594.

³² Elrod, above n31, at 578.

³³ See Merriam-Webster’s definition of “dupe”.

³⁴ Arya, above n5, <edition.cnn.com>.

³⁵ Blake Brittain “Versace, Fashion Nova sew up dress copying dispute shortly before trial”(2021) Reuters <www.reuters.com>.

³⁶ Brittain, above n35.

³⁷ Ellie Bramley “Designers hit back at Shein’s imitation game”(2023) Guardian <www.theguardian.com>.

the US alleging that Shein sold “exact copies” of their work and that doing this is “part and parcel of Shein’s ‘design’ process and organizational DNA”.³⁸

In recent years, a new phenomenon has emerged— the practice of fast fashion retailers copying their most immediate competitors.³⁹ For example, this year fast fashion brand Uniqlo made a claim against Shien, alleging the form of the “imitation product” that Shein is selling “closely resembles” Uniqlo’s viral shoulder bag.⁴⁰ In Uniqlo v. Shien, the contested products are not expensive— unlike a Zara copy of a Celine cardigan, where the price differential is USD\$50 compared to USD\$3000+, Uniqlo’s Mini Round bag retails for USD\$19.90, whereas one of Shein’s alleged copies was selling for less than USD\$5. From a pricing perspective, this appears to be firmly rooted in aggressive competition to the lowest possible prices.⁴¹

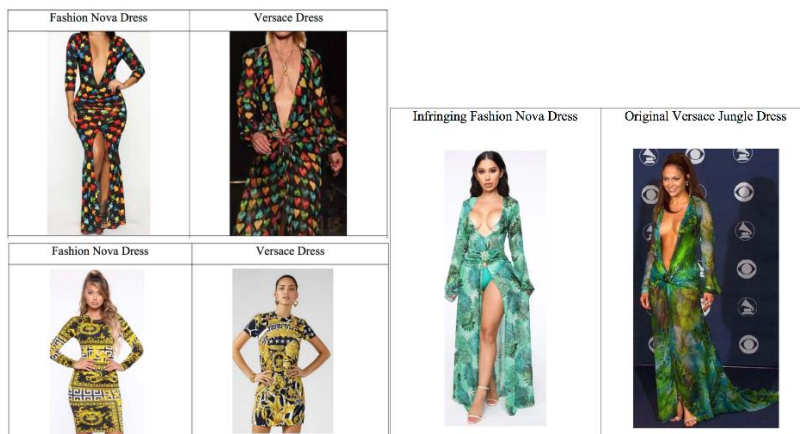


Figure 1: Claimed Versace copies by FashionNova. Image credit: The Fashion Law.

High rates of copying in the fashion industry reduces the desirability of new designs and therefore consumers quickly demand new designs at a constant rate.⁴² Copying is a “...turbocharger that spins the fashion cycle faster, so things come into fashion faster, they go out of fashion faster, and that makes fashion designers want to come up with something new because we want something new.”⁴³ This quickens the fashion cycle.

³⁸ Bramley, above n37.

³⁹ TFL “AI is Changing How Fast Fashion Retailers Pick Their Targets”(2024)<www.thefashionlaw.com>.

⁴⁰ Jessie Yeung “Uniqlo sues Shein for allegedly copying its viral shoulder bag”(2024) CNN<edition.cnn.com>.

⁴¹ TFL, above n39.

⁴² Whitney Potter “Intellectual Property’s Fashion Faux Pas: A Critical Look at the Lack of Protection Afforded Apparel Design Under the Current Legal Regime” 16 *Intell.Prop.L.Bull.* (2011) 69 at 83.

⁴³ Interview with Kal Raustiala, (National Public Radio, 10 September 2012), transcript available at <www.npr.org>.

The extent of copying in fast fashion is vast to increase profits. This amplifies the trend cycle. This allows them to manufacture excessively high volumes of clothing, at a low cost to the company but a high cost to the environment and human rights.

C. A Domino Effect: Human Rights, Intellectual Property & the Environment

This demand for trendy clothing at low-costs and pressure from short turn-around times and results in intense exploitation of both people and resources in the supply chain. Globally, the inadequacy of IP protections and its contribution to the fast fashion model is not environmentally sustainable.⁴⁴

1. Environmental harm

The fashion industry's carbon emissions exceed that of all international flights and maritime shipping combined.⁴⁵ If the current rate of clothing production continues, the industry's greenhouse gas emissions will increase more than 50% by 2030.⁴⁶ The biggest emissions are in the raw materials production stage of the supply chain.⁴⁷ Tearfund observes an upward trend in the production of faster, cheaper plastic-based fibres made from virgin materials. The most widely used fibre is conventional polyester which is one of the most polluting.⁴⁸

If current fashion demographic and lifestyle patterns continue, global apparel consumption will rise from 62 million metric tons in 2019 to 102 million metric tons in 2029.⁴⁹ With consumption comes waste, and the industry produces about 500,000 tons of plastic microfibres into the ocean, equivalent to 50 billion plastic bottles.⁵⁰ This is particularly harmful as microfibres cannot be extracted from the water and spread throughout the food chain. This harm is a direct contribution of fast fashion's model of mass-production: 158 million tonnes of emissions could be reduced if excess inventory was minimised by merely 10%.⁵¹

The pollution and demand of water is an issue. Each year the industry uses 93 billion cubic metres of water, or enough for five million peoples' consumption. According to the 2022 Tearfund Ethical Fashion Report, the industry is the second highest user of global freshwater

⁴⁴ Elrod, above n31, at 589.

⁴⁵ UNEP, above n7, <www.unep.org>.

⁴⁶ <www.unep.org >.

⁴⁷ Peter Keegan, Sarah Knop, Bonnie Graham "2022 Ethical Fashion Report"(2022) Tearfund <www.tearfund.org.nz> at 38.

⁴⁸ Keegan et al, above n47, at 38.

⁴⁹ UNEP, above n7, <www.unep.org >.

⁵⁰ <www.unep.org >.

⁵¹ Keegan et al, above n47, at 42.

supplies.⁵² Around 20% of the world's wastewater comes from fabric dye treatments and 87% of all clothing fibre inputs are incinerated or landfilled. According to the United Nations Environment Programme, one pair of jeans requires 3,781 litres of water to make, from cotton production to store delivery. That equates to around 33.4 kilograms of carbon equivalents. Studies show that water demand will exceed the amount supplied by 40% in 2030.⁵³

2. Human rights harm

Another consequence of the fast fashion phenomenon is an increase in forced labour.⁵⁴ In 2013, the collapse of the Rana Plaza garment factory in Bangladesh, which killed more than 1,130 workers, highlighted poor working conditions and the lack of health and safety protections for workers.⁵⁵ Around 60 million people work in textiles, clothing, leather and footwear.⁵⁶ Despite the millions impacted, 90% of final stage facilities fail to pay living wages to any of their staff, and 9.2% pay living wages to some.⁵⁷

Alongside poor pay, overworking is also prevalent: one UK documentary found that employees in one of Shein's 6,000 Chinese factories were working 75-hour shifts.⁵⁸ Nike's Corporate Responsibility Report indicated this by stating that the "demand for continuously new styles leads to mandatory overtime in many overseas factories."⁵⁹ Further, workplace injuries and accidents are more likely to occur where workers are subject to long hours without breaks.⁶⁰

Workers are exposed to toxic chemicals and unsafe work conditions.⁶¹ According to Human Rights Watch, tannery workers in Bangladesh experience health problems resulting from repeated chemical exposure, such as lung cancer, acid burns, and soft tissue sarcoma. Some of these workers are children as young as seven.⁶²

Children are often victims of labour exploitation. There is a clear link between countries with low wages for adults and child labour, as children work to support their families' basic

⁵² At 5.

⁵³ Elrod, above n31, at 586.

⁵⁴ At 589.

⁵⁵ MBIE, above n27, at 12.

⁵⁶ Keegan et al, above n47, at 7.

⁵⁷ At 7.

⁵⁸ Rajvanshi, above n22, <time.com>.

⁵⁹ Elrod, above n31, at 590.

⁶⁰ At 590.

⁶¹ At 590.

⁶² Keegan et al, above n47, at 38.

needs.⁶³ The COVID-19 pandemic impacted supply chain tracing and monitoring and detracted from meaningful engagement with victims of forced and child labour.⁶⁴ Further, it was estimated that 9 million more children were pushed into child labour by 2023 because of rising poverty.⁶⁵

3. Summary

Globally, inadequate IP protection allows for copying fashion designs, which fuels retailer demand and consequently contributes to the vast human rights violations and environmental harm produced. Trend turnover quickening and the extensive copying of designs by retailers to match consumer demand has resulted in the fast fashion phenomenon. This is not conducive to sustaining global resources. This unexpected value in IP protection could be utilised to reduce harm caused by fast fashion. This would decrease consumer demand and the frequency that retailers facilitate shipments from overseas manufacturers. Manufacturers that exploit human labour to provide cheaper goods with a quick turnover rate.⁶⁶

The benefit and detriment of using IP law to address the environmental and human rights harms of fast fashion lies in its unique focus. Unlike laws specific to environmental or human rights protection, IP law is primarily concerned with protecting economic and moral rights associated with novel creations or inventions. This focus can be advantageous: by leveraging a private law mechanism, rights can be used by one business against another. This effectively leads to industry self-regulation without relying on state enforcement of public law frameworks for environmental or human rights protection. However, one limitation to this approach is its lack of direct focus on environmental and human rights harm reduction: it does not provide a specific or targeted solution. IP protection should be utilised to reduce fast fashion's harm but should not replace other attempts at regulating injury caused by the fashion industry.

In many parts of the world, IP law has been poor at providing protection for fashion because clothing is a mixture of creative expression and utilitarian functionality.⁶⁷ Fashion's significance goes beyond mere usefulness. In the absence of fashion-specific IP law,

⁶³ Elrod, above n31, at 590.

⁶⁴ Keegan et al, above n47, at 10.

⁶⁵ At 10.

⁶⁶ Elrod, above n31, at 591.

⁶⁷ Wong, above n9, at 1148.

protections are often inadequate due to the uncomfortable fit of copyright and design protection. This section will set out the current IP laws relevant to fashion design in NZ.

III. Intellectual Property Law in New Zealand

There is no single form of IP specific to the protection of fashion design in NZ. Rather, protection relies on copyright, design and trademark. This blend of protections is an area of confusion for designers, companies and legal practitioners.⁶⁸

A. Design Protection

Apart from copyright, fashion designers could find protection against unauthorized use of registered designs in the Designs Act 1953 (Designs Act). Design protection is somewhat straightforward compared to copyright yet is not heavily used for fashion designs.⁶⁹

Design encompasses shape, configuration, pattern, or ornament features applied to an article by any industrial process or means but is not concerned with the construction or function of the article.⁷⁰ Thus, purely functional designs are excluded from protections. A design registration provides protection for all aspects of appearance, including shape, configuration, pattern or ornamentation.⁷¹ As most garments involve an aspect of designer choice, design protection is generally available provided it meets the originality threshold. Importantly, a design cannot be registered unless it is novel, thus it cannot be publicly disclosed in NZ before the application is filed (with limited exceptions).⁷²

The Designs Act creates a regime for registration of new designs which grants that proprietor complete control to apply the design to a named article.⁷³ This protection is for up to 15 years from registration.⁷⁴ The Designs Act is territorial, meaning that separate applications must be made to register a design in every desired country.⁷⁵ However, where a designer files an

⁶⁸ Devita Pathi and Griffith Hack “The copyright/design overlap- will it ever come into fashion?”(2009) IPSANZ (78) 14 at 14.

⁶⁹ Anna Kingsbury “Copyright in fashion design in New Zealand and Australia” [2015] NZLJ 134 at 134.

⁷⁰ Design Act 1953, s.2(1).

⁷¹ Above n70, s.2.

⁷² S.5.

⁷³ S.6.

⁷⁴ S.12.

⁷⁵ S.2.

application in both NZ and another country within a 6 months period, they can get priority protection for those designs.⁷⁶

The test for infringement is the article's visual similarity assessed in the eyes of a customer or consumer; if an article is substantially different in appearance to any registered or published design, it will not constitute an infringement.⁷⁷

(i) Originality in design protection

The originality bar under the Designs Act is higher and harder to meet than the copyright threshold– the design must be “new and original” at the time of application.⁷⁸ The originality threshold is whether the design is substantially similar in appearance to any article already made (i.e., registered or published in NZ).⁷⁹ A design cannot be registered if it fails this threshold. The Designs Act follows novelty in NZ, not worldwide. This differs from copyright, where a proprietor must prove copying. This threshold can be difficult, but possible, for fashion designs to meet given fashion's derivative nature. Further, prior publication can remove originality, with limited exceptions.⁸⁰

Protection in the absence of Design registration is the domain of copyright and trademark protection.

B. Copyright protection

Copyright is the legal protection given to owners of qualifying works that grants them exclusive exploitation rights and protects their expression in that work.⁸¹ It is governed by the Copyright Act 1994 (Copyright Act). Traditionally, copyright in NZ derives from three key concepts: “the incentive thesis”, “sweat of a man's brow, and “thou shall not steal”.⁸² Copyright is available without registration or other formalities.

The duration of copyright protection for artistic works is the life of the author plus 50 years from the end of the year in which the author dies.⁸³ For computer-generated works, duration

⁷⁶ S.21.

⁷⁷ *RB Watson & Co Ltd v Smith Brothers Ltd*[1963] RPC 147.

⁷⁸ Above n70, s.5(2).

⁷⁹ S.5.

⁸⁰ S.10.

⁸¹ Copyright Act 1994, s.16.

⁸² Robert Batty “There goes my outfit: Copyright in the fashion industry in Australia and New Zealand”(2009) 15 NZBLQ 8, at 18.

⁸³ Above n81, s.22(1).

begins from the end of the year in which the work is made.⁸⁴ During this time, the copyright owner has the exclusive right to reproduce, distribute, and adapt the copyrighted work. The period for industrially applied work of artistic craftsmanship is 25 or 16 years for other forms of artistic work.⁸⁵ Industrial application is when 50 or more three-dimensional copies are made of the work— this category is most applicable to fast fashion.⁸⁶

Qualifying works include several descriptions:⁸⁷ the first description is “literary, dramatic, musical, or artistic works”.⁸⁸ The category “artistic works” is most applicable to the fashion industry.

(i) The category of ‘artistic work’

“Artistic work” is broad and controversial. The Copyright Act defines it as “a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or... a work of artistic craftsmanship.”⁸⁹ The Act does not define works of artistic craftsmanship, indicating they do not fit into the other two classes of artistic works.

The courts have protected a range of objects found to fall under “artistic work”. A sample garment has been found to be a model,⁹⁰ and; sewing patterns and design sketches have been held to be artistic works.⁹¹ *Lakeland Steel Products Ltd v Stevens* held that an object could be categorized as a “model” if it was produced with the aim of being a representation rather than a final product.⁹² Graphic works are defined to include paintings, drawings and prints: this may cover an artwork that is printed onto a garment, like graphic t-shirts.⁹³ *Prima facie*, sketches, prototypes and sewing patterns of garments could be individually capable of copyright.

(ii) The sub-category of ‘artistic craftsmanship’

The leading authority on a work of artistic craftsmanship is the High Court case of *Bonz Group Pty Ltd v Cooke*.⁹⁴ In *Bonz*, the claim related to hand-knitted woollen cardigans

⁸⁴ S.22(2).

⁸⁵ S.75(1).

⁸⁶ S.75(4).

⁸⁷ S.14(1).

⁸⁸ S.14(1)(a).

⁸⁹ S.2(1).

⁹⁰ *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd (No 2)*[1989] 1 NZLR 234 at 245.

⁹¹ *Radley Gowns v Spyrou*[1975] FSR 455 at 466.

⁹² *Lakeland Steel Products Limited v Stevens*(1975) 6 TCLR 745 at 750.

⁹³ Above n81, s.2.

⁹⁴ *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216.

featuring animals in sporty poses, such as Kiwis playing golf. The Court held that unlike drawings and models, a work of artistic craftsmanship must have some aesthetic appeal. Justice Tipping held:⁹⁵

They are certainly works of artistic craftsmanship in that those making them, the handknitters, need to impart a sufficient degree of skill, experience and effort in creating the ultimate product. The idea of craftsmanship relates more to the execution of the work than to its design. The idea demoted by the word artistic relates more to design than execution.

Tipping J held that while a work of artistic craftsmanship needed to be made by a craftsman and an artist, these could be two different people. On the facts, there was a principle designer at Bonz, and also a team of people who hand-knitted the garments. The Court was satisfied that the designer was the artist, the knitters were the craftsmen, and their combined labour and skill meant the garments could be considered works of artistic craftsmanship. Ultimately the case failed due to the Court's finding the Bonz' garments bore no resemblance to Mrs Cooke's garments.⁹⁶

Limited case law has followed this decision and Australia and the United Kingdom have taken a narrow approach to categorising "artistic work". Judges may potentially seek to differentiate hand-knitted jumpers from mass-produced garments.⁹⁷ Further, it is not clear what the court considers having "aesthetic appeal".

(iii) Determining the existence of 'copying'

For artistic work, 'copying' can be of three-dimensions of a two-dimensional work, and of two-dimensions of a three-dimensional work.⁹⁸ This means infringing copies can be two-dimensional to three-dimensional, and vice versa. For example, making an object based on a drawing could infringe copyright.⁹⁹ This gives the designer of an artistic work the exclusive right to reproduce the work in either two-dimensional or three-dimensional form.

⁹⁵ Above n94, at 223.

⁹⁶ At 225.

⁹⁷ Lauren Butchers "From Fast Fashion to Wearable Technology- the intersection of design, innovation and the law in New Zealand" 2018 IPSANZ [113] 33-44 at 35.

⁹⁸ Above n81, s.2.

⁹⁹ Pathi and Hack, above n68, at 23.

To constitute an artistic copyright infringement, copying must be either of the whole or a substantial part of that work.¹⁰⁰ There also must be sufficient objective similarity between the original work and the alleged copy, and there must be a causal link between the articles to suggest copying.¹⁰¹ Direct or indirect copying will infringe, and it is immaterial whether any intervening acts themselves infringe copyright.¹⁰²

Indirect copying is relevant to fashion design where copying of a three-dimensional object, the garment, also copies the drawings and/or prototypes of that garment, and therefore indirectly infringes copyright in the underlying three-dimensional work.¹⁰³ In *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd*, the court found that in copying a dress, the defendant had consequently copied a prototype of the dress which constituted a model. This was irrespective of the defendant's not having access to the original work that was alleged as copyright infringement.¹⁰⁴

Infringement in artistic cases is an area of difficulty, in particular indirect copying. The general approach by the court is drawing a line between the unprotectable idea or concept, and the protectable expression of that idea or concept. The court then focuses on the similarities between the two, and whether the work is infringed.¹⁰⁵ The focus is on the part taken and the plaintiff's copyright work in its entirety, and whether the part taken is substantial and more than an idea.¹⁰⁶ Originality of the plaintiff's work is also considered.

(iv) Originality in copyright

A work must be sufficiently original to be protected by copyright. The originality test is: "...whether sufficient time, skill, labour or judgment have been expended in producing the work."¹⁰⁷ While this is a low threshold of originality, it proves difficult for fashion protection.¹⁰⁸ Hillyer J in *Thornton Hall Manufacturing Ltd* held:

¹⁰⁰ Above n81, s.29(2)(a).

¹⁰¹ *Wham-O Manufacturing Co v Lincoln Industries Ltd*[1984] 1 NZLR 641 (CA).

¹⁰² Above n81, s.29(2).

¹⁰³ Above n90, at 239.

¹⁰⁴ Above n90, at 239.

¹⁰⁵ Kingsbury, above n69, at 135.

¹⁰⁶ *Henkel KgaA v Holdfast New Zealand Ltd*[2007] 1 NZLR 577 at 591.

¹⁰⁷ *University of Waikato v Benchmarking Services Limited*[2004] NZCA 90 at [27].

¹⁰⁸ Butchers, above n97, at 36.

“...there must always be certain fundamentals in any garment which frequently has sleeves, usually a back, certainly a front, possibly a collar, pockets, buttons, etc.”¹⁰⁹

In the fashion industry, “anchoring” is used to describe identifiable trends that emerge from a particular influence or season. Collation is the holistic combination of features being used in a new and original way, rather than in individual features.¹¹⁰ Copyright is likely to exist in collation, because of fashion’s derivative nature, “anchoring” and the functional restraints of clothing.¹¹¹ In *Thornton Hall Manufacturing Ltd*, the court found that the various combined features of a dress created a novel garment capable of copyright, but the individual features could not.¹¹² In *Henken KgaA v Holdfast New Zealand Ltd*, the supreme court held that in the absence of sufficient labour or skill in creating the article, then another “arrangement of the same unoriginal features may not have to depart greatly from the copyright arrangement to avoid infringement”.¹¹³

(v) Secondary infringement

Secondary infringement of relevance to artistic copyright is established in sections 33-37. These provisions cover infringement by importing,¹¹⁴ possessing or dealing infringing copies,¹¹⁵ providing means for making infringing copies.¹¹⁶ Unlike primary infringement, it requires a knowledge element to be met: “knows or ought reasonably to know” of infringement.¹¹⁷ The definition of ‘infringing copy’ is established in section 12.¹¹⁸

C. Trademark Protection

Trademark protection for fashion design is not greatly relevant to this paper but is worthwhile mentioning. In the fashion industry, trademark protection allows designers to register logos, brand names, and other distinctive signs associated with their products which ensures they cannot be used without permission.¹¹⁹ Once registered, the ® symbol shows it is protected. A trademark takes a minimum of 6 months to acquire and lasts up to 10 years.¹²⁰

¹⁰⁹ Above n90, at 241.

¹¹⁰ Butchers, above n97, at 36.

¹¹¹ At 36.

¹¹² Above n90, at 244.

¹¹³ Above n106, at 591.

¹¹⁴ Above n81, s.35.

¹¹⁵ S.36.

¹¹⁶ S.37.

¹¹⁷ Part 2.

¹¹⁸ S.12.

¹¹⁹ Trademark Act 2000, s.5.

¹²⁰ NZIPO “Trademark Act 2002 Practice Guidelines” (n.d.) 1.

Trademark greatly disincentivises, and offers legal recourse for, the copying of brand elements.

D. Observations on Protection in New Zealand

While copyright in NZ provides more fashion protection than many other countries, it is inadequate as a means of reducing fast fashion and subsequently the harm caused.¹²¹

Copyright is confusing and uncertain. It is not clear under current case law whether a mass-produced garment will constitute an “artistic work” or “work of artistic craftsmanship”. The side-by-side and/or flawed recollection tests used to determine infringement provides minimal guidance for designers wanting to clarify their rights or understand if recourse is available.¹²² Very few fashion cases for copyright go to court,¹²³ which supports evidence of confusion surrounding what qualifies as copyright protection or merely a derivation in the context of the fast-paced fashion industry. This makes copyright impractical for most designers.

Design protection offers practical solutions to many of the issues raised by copyright protection. The advantages of registered designs are clear. It provides a registered proprietary right which documents the design itself, the date of creation, and the owner of that right. To prove copyright infringement for an unregistered design, each of these points must be established: it is essential to demonstrate that copyright exists in the work, that ownership of the copyright is established, and that the alleged infringer copied the work. This can be difficult to prove and can result in lengthy and expensive court proceedings.¹²⁴ By contrast, the owner of a registered design need only establish the alleged copy does not substantially differ from the registered design. Further, registered designs are easily accessible and published, serving as a record and an effective deterrent for potential infringers. Copyright lacks a centralized registration system, offering minimal deterrence.¹²⁵

However, in practice design registration for garments is seldom used in NZ.¹²⁶ This may be because of the practical issues raised by the originality threshold: it does not allow for prior public disclosure. The process takes a minimum of 6 months and costs \$100+GST per design registered, which is time consuming and expensive given the fashion cycle’s continual

¹²¹ Wong, above n9, at 1148.

¹²² Butchers, above n97, at 41.

¹²³ Batty, above n82, at 34.

¹²⁴ Butchers, above n97, at 37.

¹²⁵ At 37.

¹²⁶ At 37.

change.¹²⁷ By the time a designer registers a design, several trends will have passed. Further, it requires designers apply for protection before knowing whether their design will be successful (and worthy of seeking protection).

Despite its' benefits, design registration is ill-fitted for the fashion industry and needs improvements to reduce fast fashion and its' harm.

IV. Recommendations

One recommendation is to introduce Unregistered Design Rights (UDR).¹²⁸ This is an informal design protection established merely by the public disclosure of a design, that lasts for a more limited term than the inordinate length of copyright. UDRs suit the fashion industry: it protects designs with a short market life where designers wish to gain immediate protection without the burden of registration formalities, and where the duration of protection is less important.¹²⁹

A leading example is the European Union's Unregistered Community Design (UCD). Unlike the EU's registered design protection, UDCs grant the right to prevent commercial use of a design where infringing design is intentional and made in bad faith.¹³⁰ It does not cover the independent development of a similar design. The EU's protection covers three-dimensional and two-dimensional designs, and the product's complete appearance, including the colours, shapes, lines, contours, materials and textures. This is more coverage and stronger fashion protection than the UK's implementation of UDR's, which protects shape and configurations and only three-dimensional designs. The EU's protection lasts for three years from the public release date within the territory of the EU and cannot be extended.

Uncertainties are inherent in such a system. When a similar UDR system was considered in Australia, it received little support. The Australian Law Reform Commission (ALRC) considered the system would come with some clear disadvantages when compared to a registered design right. A manufacturer may not know whether the period of protection remains in force at the time of "copying", or whether their product is sufficiently similar to constitute infringement. The seller of a product may not know whether the manufacturer

¹²⁷ IPONZ "Designs" (n.d.) < www.iponz.govt.nz >.

¹²⁸ EU IPO "Designs in the European Union" (n.d.) < euipo.europa.eu >.

¹²⁹ Regulation on Community Designs No 6/2002 (EU), Recitals 16, 25.

¹³⁰ EU IPO, above n128, < euipo.europa.eu >.

copied it. These uncertainties would need to be addressed in the definition of the UDR, which may in turn lead to more complex enforcement procedures. Additionally, to enforce the right the owner must prove that the “infringer” has knowledge of the owner’s design, if not the intention to copy it.¹³¹ The ALRC stated “this is an extra evidentiary burden and diminishes to some extent the benefit of not having to establish that the design meets the innovation threshold”.¹³² While some of these uncertainties apply to registered design rights, it is easy to prove ownership and a knowledge element is not required.

While these are valid concerns, providing some level of unregistered design rights appears appropriate to target fast fashion. UDRs can provide useful protection given fashion’s cyclical nature and short shelf life as they provide immediate protection where registration proves inefficient and costly.

Uncertainties lie in proving the right exists and copying was intentional. These could be mitigated by encouraging original designers to make records accessible through their websites and on the garments themselves. This could be similar to France’s environmental information law requiring information to be made available instore and online after sale, on labelling and any other clear and comprehensive means.¹³³ Additionally, there could be a different knowledge threshold for large multinational corporations that would be considered fast fashion retailers. For example, Shien is built on mass-production reliant on searching the internet for designs, so it may be reasonable to hold them to a higher standard of care when ensuring their adherence to design infringement laws.

Another recommendation is to implement an initial twelve month “grace period” in which designers can launch their products and use this time to determine whether their garment will be successful over that period before seeking registered protection.¹³⁴ During this period, the design would effectively be protected by copyright. Currently, to maintain novelty a design must not be disclosed to the public or used prior to registration. This would also mean unsuccessful or microtrend garments would likely not be registered and effectively have no protection under either copyright or design law.¹³⁵ Importantly, it will remove prior public

¹³¹ <euipo.europa.eu>.

¹³² Warwick Rothnie “The vexed problem of copyright/design overlap”(2005) IPSANZ (60) 33 at 38.

¹³³ AGEC Decree 2022-748 (published 29 April 2022, entered into force 1 January 2023).

¹³⁴ Rothnie, above n132, at 35.

¹³⁵ Pathi and Hack, above n68, at 24.

disclosure as a barrier to achieving novelty, which suits the fashion industry and would improve design registration for fashion protection. This is consistent with patent law: NZ provides the inventor with a 1-year grace period prior to application, allowing for public use and testing of the product without destroying novelty.¹³⁶

Conclusion

Serious consideration should be given to implementing stronger fashion design protection laws as a private law mechanism to reduce the human rights and environmental harm caused by fast fashion.

IP laws in many countries are inadequate to address the newly emerged fast fashion phenomenon. Central to fast fashion's success is the extensive copying that enables production of high volumes of low-cost, trendy garments. Unlike laws specifically designed to protect human rights and the environment, IP law focuses on moral and economic rights associated with novel creations and inventions. Businesses can leverage IP to protect their designs and make profit.

Therefore, an unexpected value lies in utilising IP to restrict the ability to copy designs, thereby undermining the fast fashion model. While not an all-encompassing solution, it promotes industry self-regulation and would significantly reduce the harms caused.

Protection for fashion designs is unclear and inadequate. This paper makes two recommendations to reduce NZ's shortcomings: introducing Unregistered Design Rights and a grace period for design registration. By implementing these, intellectual property could be utilised to reduce the environmental and human rights harm of fast fashion.

¹³⁶ IPONZ "The Patent Examination Manual"(n.d.), s.9.

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