

Fashionising Intellectual Property

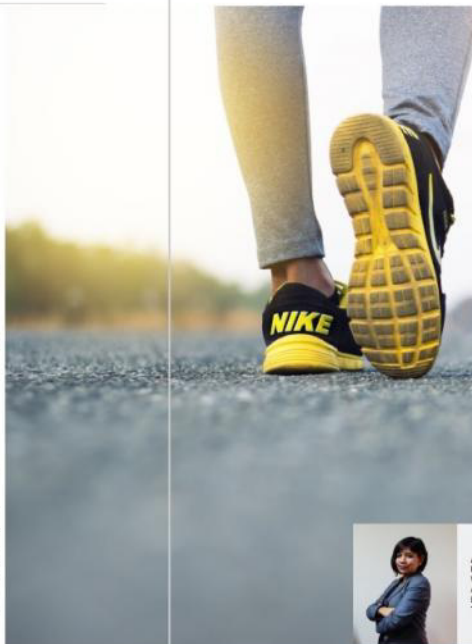
The fashion world is present in all aspects of everyday life, from the clothes or shoes we choose to go to work, study or attend an important event, according to Bárbara Pardo Navarro, fashion is "one of the artistic activities with the most social movement that exists today, (...) [based on] an aesthetic and expressive beauty, characteristic of which the fine arts deal with". Also, the author cited Enrique Loewe, who mentions that "fashion was always a mirror of society at a particular time. So if someone in two hundred years would like to analyze society at this time, the best method would be to study fashion, much more than through monuments" (Pardo 2008: 10).

Fashion reinvents itself, changes and meets the standards of each society as well as technological changes and we focus on Peruvian society, the fashion industry grows every day and a part of this is the success of great designers who have had the idea to demonstrate their creativity not only at a national level but also at an international level, creating and presenting fashion events, among which Lima Fashion Week, Liffelife and Peru Moda stand out, in which all kinds of designs are exposed, creating a space for the development of the creativity of national designers as well as

for international designers who seek in our country the suitable market to commercialize their trademarks.

It is realistic to mention big trademarks when we talk about fashion and this is due to the great role played by them being the main identification card at the time of commercializing a product, these great trademarks that previously seemed inaccessible are increasingly closer to the public consumer due to the so-called "fashion democratization" in which the clothing and accessories of high-end designers or world-famous trademarks are accessible to all public because trademarks

or designers create alliances with multibrand or department stores, these collections receive the name of capsule collections and they are of limited edition generating a high demand. The commercialization of fashion has brought benefits for all the parties involved, the first beneficiary is the store due to the large number of people who purchase the product, the second beneficiary is the trademark or the designer who benefits from the marketing of the advertising carried out by the store and also by the customer who acquires the item and finally the consumer who will buy a product from a designer or a high end trademark at a reasonable price.



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It is perhaps the importance of trademarks to commercialize a product in the world of fashion, the desire to bring the big trademarks to the public consumer added to the lack of creativity or originality which generates clear examples of plagiarism or trademark piracy, among which we can cite one of the most important trademarks of sports: the fashion design by Nike Innovate CV, a well-known trademark, registered in different countries of INDECOPI, in which a considerable amount of copiers and imitators have been filed against the trademark plates of this brand and well known trademark that has been unilaterally sought to copy the characteristic design through the following trademark: (File No. 150430-2015), (File No. 150451-2014), (File No. 495890-2012).

Another case in which there is a clear example of piracy that could be quite common in the Peruvian market is the imitation of the trademark of the polo player that belongs to the company The Polo - Lauren Company. If, whose design has sought to be reproduced in the following trademarks: (File No. 150427-2014), (File No. 1538693-2013), (File No. 150430-2014). Although there is a constant risk of ambiguous taking ownership of designs or trademarks of designers, many of them do not protect their designs either because they are unaware of the terms of protection offered by the national legal system or because they do not access because costs or other factors. Thus, after reviewing the key concepts and analyzing the main obstacles in the world of fashion, it is necessary for this article to provide a clear scope regarding the forms of protection that designers have regarding their creations.

In Peru, we have a protection regime called "buenos usos" in which copyright and industrial property do not, as far as copyright is concerned, it is pertinent to refer to Legislative

Decreto No. 822, the Copyright Law, which points out in subparagraph 4) of article 4 that "the copyright is independent and separate from the industrial property rights that may exist about the work" and in subparagraph 1) of article 2, which expressly states that the applied works of art are protected, defined as "an artistic creation with utilitarian functions or incorporated into a useful article, being a work of craftsmanship or produced on an industrial scale" (subparagraph 2) of Article 2 of the Copyright Law).

Likewise, the Intellectual Property Chamber of INDECOPI read on a case related to modes of creation, making it clear that fashion designs could obtain protection by copyright. In the Resolution N. 183-2011 / IP-INDECOPI, about complaint for infringement to the author's rights the following was indicated:

"Applied works of art include both-dimensional forms (such as drawings) and three-dimensional ones (such as models). Considering the characteristics of the applied works of art, it is possible that said work can also be protected as industrial design, to the extent that they comply with the requirements demanded by the law of the matter. (...) National legislation does not contain a rule that prohibits providing this double protection to applied works of art, so it can be understood that it is possible to make it. However, this does not mean that any work of applied art also enjoys protection as an industrial design or vice versa, since it may be the case that an applied work of art has been made accessible to the public, using therefore the novelty required by the industrial property law to protect an industrial design".

On the other hand, the importance of the protection of fashion designs is such that the Directorate of Copyright of Inospoo has created a "Guía to Copyright in the Fashion

Industry" (Induspoo 2013), which aims to provide more information according to the needs of each sector in the industry, but as has been established in the aforementioned guide, the creation or design of fashion are not only protected in terms of copyright but also "as industrial design (for example the design of a certain fabric pattern presenting a trademark)"; to the extent that this type of work is a two-dimensional or three-dimensional creative that can be incorporated into fashion creations and then produced on an industrial scale. For example, the pattern design of the INDECO trademark will be protected, but not the model or design of the fashion item itself.

Another form of protection and on which we will focus in the protection as a distinctive sign rather than a trademark or sign, what is sought here is to protect the trademark or logo registered before the Directorate of Distinctive Signs of INDECOPI but the protection is not provided with respect to the garment to which such trademark or logo is applied.

Trademark protection becomes the most recurrent medium for designers. According to professors Huatupa and Soriano, "trademarks help maintain the premium prestige of different trademarks, and can be very valuable for clothing companies and accessories. The fashion industry invests heavily in pursuing the unattainable goal of its trademarks" in the same sense, Dr. Susan Scarcell, specialist in the fashion law field, states that "the most universally applicable and flexible protection mechanism for fashion design is that of the law of registered trademarks, whether on an interior label or on the exterior element of a design, virtually all clothing objects constitute a trademark in some form. The ease of trademark registration ensures that the virtually all designers have access to the protection of their names and logos attached to their products."



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On the other hand, the following is stated in the WIPO Magazine: "instead of protecting designs, most fashion designers prefer to protect their trademarks, applied directly to their products and which usually protect the registration relating to trademarks. Trademarks make it easy for designers to select imitators and help consumers identify their brands" (WIPO 2008).

taking into account the importance and presence of designers regarding the protection of their creations as a distinctive sign, it is appropriate to focus on the existing forms of trademark protection among which we find registration of fashion trademarks. According to Article 134 of Decree 822 of the Andean Community, corresponding to the Common Regime on Industrial Property in Peru and the other countries of the Andean Community, there are several objects that can be registered as trademarks, being that Companies or designs can request the registration of word or figurative trademarks. The applications can be regarding: Designs, names or pseudonyms Logotypes that are included in labels or images that will be placed on fashion products. A fashion line or a collection Registration of fashion design as a trademark. Two-dimensional or three-dimensional trademarks are a clear example of this type of mark, it is necessary to mention that to access the registration of a two-dimensional or three-dimensional trademark, it is necessary that the design that is intended to be registered corresponds to a specific business origin, this absence of necessary attributes that give distinctiveness has been

grounds for denial regarding some trademarks that were intended to be registered in class 18 and 25, when the following was argued: "It is not endowed with the necessary attributes to be the means by which the products are identified and differentiated from others of the same kind in the market, since such figure will not be perceived by the consumer as a distinctive sign of a certain business origin, while it does not have any peculiar characteristics whose sole presence allows the consumer to determine the business origin of the products that intends to distinguish".

Another classic example of this type of marks corresponded to the consumer as well as the other trademark registered as a trademark in class 25, which present a special design that makes them different from each other.

We can not ignore also one of the most emblematic cases corresponding to the ANDANAS trademark where it was intended to register the characteristic design of the three lines in a shirt and which was subsequently granted by resolution No. 2004-2015 / IP-INDECOPI and No. 2005-2015 / IP-INDECOPI since, according to the evidence presented, it was determined that the public consumer could associate the aforementioned design with the applicant company and therefore the trademark is a trademark of the applicant company and others that are commercialized in the market. Being the case in addition that the aforementioned product acquired distinctiveness due to its constant use in the market.

Finally, it is important to mention the products in the world of fashion because they are in different classes in a dispersed way, for example, the design of perfumery products are found

in class 03; articles of jewelry, costume jewelry, precious stones are found in class 14 or costume jewelry, leather and leather as well as animal skins are registered in class 18; in the case of clothing, footwear, headgear, these are classified in class 25; however, it should be noted that as stipulated in Article 131 of Decree 822 (...) classes of the International Classification referred to in the previous paragraph will not determine the priority or distinctiveness of the products or services expressly indicated."

taking into account the aforementioned, industry cases being orders when issuing a resolution, there have been cases in which the products of class 25 and class 14 have been registered in the same case against EMBL, L. SABELL and others (Resolution N. 114-2014 / IP-INDECOPI) or in the case of the trademark applied BILLABONG and others (Resolution No. 114-2003 / CSD-INDECOPI). In view of concluded we can state that the fashion industry has evolved considerably in our country and has positioned itself as one of the most important, due to its importance of creativity, creation and innovation and it is essential that those who are involved recognize the use and more specifically to Intellectual Property law as the ideal means to protect their creations either by registering their trademark or protecting their copyrights, among others, which would bring multiple benefits and prevent further cases of piracy or plagiarism.



1. <https://www.scribd.com/document/17320204/Induspoo-2013>
2. <http://www.inospoo.gob.pe/Documentos/Induspoo-2013.pdf>
3. Resolución N. 114-2003 / CSD-INDECOPI

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