



SCHOOL OF  
ECONOMICS AND  
MANAGEMENT

# **The Fashion Industry: Intellectual Property Rights and Sustainability in the realm of Fast Fashion and E- Commerce.**

**How infringement on designers and brands challenges  
intellectual property rights and impacts sustainability in the  
fashion industry.**

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# Abstract

The fashion industry is one of the largest industries in the world, a multibillion dollar industry on the manufacturing and selling of clothes. With the rise of social media and digitalization of fashion, meaning that brands are carrying over to digital means of showcasing their products like social media, fashion trends have never been more accessible to the general market than ever. However, the fashion trend cycle is decreasing which means trends are rapidly progressing, with the advent of micro trends, fast fashion and counterfeit products re purchased by consumers as an affordable alternative. With this, small businesses and companies that operated offline were faced with negative effects, rather than wanting to buy quality clothing, it seemed for many buyers, the idea was to buy for cheap and throw it away after a few wears. However, many brands are faced with infringement from fast fashion, as fast fashion brands and counterfeits tend to mock or copy their designs and infringe on another brand's intellectual property rights (IPRs). On top of that, the environmental concerns is growing since the pandemic, an emphasis on the focus of climate change and how fast fashion contributes to greenhouse gases and emissions in the atmosphere, as well as bad labor practices and synthetic cheap textiles that pollute the world's rivers. Brands are pushing for a sustainable agenda, but with fast fashion infringement constantly improving, the need for IPRs to be safeguarded is essential. This thesis aims to explore the challenges posed by fast fashion and e-commerce, between the challenges of IPRs that brands are faced with as well as the intersectionality that sustainability centers itself in. Where does intellectual property protection: trademark, copyright, design, or patent apply when questioning other e-commerce based fast fashion and regular fast fashion brands, practices on infringement while producing and selling their own products? And what is the criteria for sustainability practices within the fashion industry? How does the second-hand market fuel sustainability and what could this mean for IP protection? Beginning with an overview of the fast fashion industry and the role of e-commerce, this thesis then explains the different types IPRs—copyrights, designs, patents, and trademarks—and examines how these rights are infringed upon by fast fashion and e-commerce brands, followed by case studies and legal analyses of frameworks developed and enacted in the European Union, the research aims to provide a comprehensive understanding of the current landscape of IPRs in fashion, the challenges posed by fast fashion and e-commerce, and the potential pathways for promoting sustainability within the industry, including upcycling and

second hand fashion. The thesis focuses on the implications of greenwashing and the environmental impact of fast fashion, highlighting the detrimental effects on sustainability, and how the intersectionality of sustainability and IPRs co-exist.

**Keywords:** intellectual property law; European Union; sustainability; fashion; fast fashion; e-commerce; counterfeit; second-hand; infringement

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# Abbreviations

AFA	Application For Action
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
COSME	EU Programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises
CRD	Registered Community Design
EC	European Commission
EU	European Union
EUIPO	European Union Intellectual Property Office
EUROPOL	European Union Agency for Law Enforcement Cooperation
EUTMR	European Union Trademark Regulation
IP/IPR	Intellectual Property Rights
MS	Member States (of the European Union)
RCD	Registered Community Design
SME	Small and Medium Sized Enterprises
WTO	World Trade Organization
UCD	Unregistered Community Design
UK	United Kingdom
US/USA	United States





# 1 Introduction

## 1.1 Introduction

### 1.1.1 Background

The fashion industry is one of the world's largest business sectors, a multi-billion-dollar global enterprise on the production and manufacturing of marketing and selling clothes <sup>1</sup>. Fashion is defined as “the prevailing style of a particular time.” <sup>2</sup> In the fashion industry, fashion trends and designs cycle meaning that they change seasonally in various ways, including colors, silhouettes, fabrics, and prints, as well as adhering to trends showcased on social media and other entertainment-based platforms. The notable fashion capitals in the world: New York City, USA, Paris, France, Milan, Italy, and London, UK, house some of the most luxurious fashion brands, and also host their respective fashion weeks in which designers will showcase their designs on runways and celebrities and anyone who is invited to be showcased will witness those designs and promote the companies and fashion houses participating.

With the rise of social media and digitalization of fashion, meaning that brands are carrying over to digital means of showcasing their products like social media, fashion trends have never been more accessible to the general market than ever. “Styling service Stitch Fix reported that clients referencing TikTok as inspiration and guidance for trends and styles had increased by 85% in the last two years.” <sup>3</sup> Before the 2020s, celebrities were the main point of fashion inspiration, and fashion magazines were vital to the cultivation of fashion trends. Fashion trends were carefully curated and only accessible to a select portion of the population. “This group of people was small, and our access to them was neatly curated, which ultimately limited the public's exposure to potential new trends and kept fashion cycles slower.” <sup>4</sup> However, over time, this trend cycle grew greatly saturated by social media and fast fashion, and fast fashion businesses capitalized on the rapid progressing of trends for their own monetary gain.

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<sup>1</sup> Valerie Steele and John S Major, “Fashion Industry | Design, Fashion Shows, Marketing, & Facts” (*Encyclopedia Britannica*, November 16, 2023) <<https://www.britannica.com/art/fashion-industry>>.

<sup>2</sup> Courtney Lang, “How Is Fashion Protected by Copyright Law?” (*Copyright Alliance*, December 17, 2022) <<https://copyrightalliance.org/is-fashion-protected-by-copyright-law/>>.

<sup>3</sup> Danny Parisi and Danny Parisi, “Why TikTok Became the Breeding Ground for Fashion Trends” (*Glossy*, January 25, 2023)

<sup>4</sup> The Twilight Fashion Renaissance: How Gen Z Is Reviving 2000s Fashion” (*The Teen Magazine*) <<https://www.theteenmagazine.com/the-twilight-fashion-renaissance-how-gen-z-is-reviving-2000s-fashion>>

### 1.1.2 The Fashion Trend Cycle

The fashion cycle, in question, is noted as the “20-year rule”, a phenomenon in which a particular fashion trend or style will circulate over two decades, from the innovation of the trend to the execution to the innovators adorning themselves in those fashion trends, followed by the general public showcasing the trend, ending with the stragglers, the last of the people to keep the trend before it dies out, and the timespan varies based on what kind of trend, but generally trends from the past will reemerge after 20 years. The most notable example is the resurgence of the “Y2K” style, which was a popular style of clothing in the early 2000s, made a comeback in 2020: in May 2020, searches for the phrase “Y2K Fashion” spiked from 3% to 38%.<sup>5</sup> And being 20 years later, this is an example of a trend that has followed the 20-year fashion cycle. Beforehand, there was more time for a trend to reach the general market before the next trend stepped in.

However, with the rise of the internet and fast fashion, trends have been reaching the general market even faster than in previous decades, and while it brings some positives, such as companies seeing profit in regards to current trends “In 2020, Juicy Couture saw their revenue increase to 14.95 million in the third quarter of the year, right as Covid hit and Y2K started to come back after years of company losses.”<sup>6</sup> This brought major traction over to fast fashion websites, and e-commerce based fast fashion sites such as Forever 21, Shein, Temu, FashionNova, ASOS, and a myriad of other sites. And in 2020, the fashion e-commerce market was estimated to be \$752.5 billion USD, a triple billion industry.<sup>7</sup> With this, small businesses and companies that operated offline were faced with negative effects, rather than wanting to buy quality clothing, it seemed for many buyers, the idea was to buy for cheap and throw it away after a few wears.<sup>8</sup>

## 1.2 Legal Implications of IP Rights and Sustainability Being Affected From Fast Fashion

Infringement from these fast fashion e-commerce brands is ongoing and rampant in the fashion sector. For instance, three independent designers filed a suit in the United States for the reason that Shein sold exact copies of their work and that Shein’s design process is infringing on their IP rights for

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<sup>5</sup> Walshav, “Is the 20 Year Fashion Cycle Still Relevant? - Walshav - Medium” *Medium* (May 29, 2023) <<https://medium.com/@walshav/is-the-20-year-fashion-cycle-still-relevant-da28979c6827>>.

<sup>6</sup> *ibid*

<sup>7</sup> “The State of the Ecommerce Fashion Industry: Statistics, Trends & Strategies to Use in 2024” (*Shopify*, March 16, 2024) <<https://www.shopify.com/enterprise/blog/ecommerce-fashion-industry>>.

<sup>8</sup> *ibid*

their products.<sup>9</sup> Unsurprisingly, these are also all companies that have had major traction on their websites as fashion trend cycles keep on going faster. The infringement aspect violates several laws, including for EU Member States (MS) to prohibit other members from denying copyright protection to designs that meet the requirements for copyright protection which is supported from Article 17 of the Design Directive, and fashion designs registered under as Registered Community Designs are subject to protection from infringement. The Design Directive was intended to subject designs, both registered and unregistered to receive the protections under MS. Currently, the scope of intellectual property protection in fashion is through the EU Designs Protection Directive 98/71/EC, which allows for EU wide protection at the discretion of MS, and because of the wide scope of design defined, fashion articles are included, and where applicable, can also be protected by copyright.

However, Copyright, design, and other areas of infringement are becoming an issue as the media is curating these unsustainable fashion brands to have a bigger outreach so those sites can gain consumers. A major example of this was Temu's commercial at the Superbowl 2024, one of the most coveted events for the United States, airspace for a commercial can easily run over a million dollars, depending on what kind of commercial and how long it will be, because millions of people are viewing worldwide. "A year after making its advertising debut at the Super Bowl, Chinese-backed online shopping platform Temu is redoubling efforts in its most important market with a second ad on America's biggest stage and \$15 million in coupons and other giveaways."<sup>10</sup> Other companies, including Forever 21, Fashion Nova, ASOS and Shein also has faced legal action for copyright and trademark infringement in cases where their designs are identical to those of other designers.<sup>11</sup>

On top of all this, counterfeit products is another major issue the fashion industry struggles with. Europol enacted the first EU wide operation on the takedown on counterfeit fashion with the help of the European Union Intellectual Property Office (EUIPO)<sup>12</sup>. In their operation, they found over 2 million counterfeit fashion items all of which had an estimated value of 87 million EUR.<sup>13</sup> While this number is astonishing, it is not a new practice,

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<sup>9</sup> Ellie Violet Bramley, "'Details I Made, They Made' – Designers Hit Back at Shein's Imitation Game" *The Guardian* (September 4, 2023) <<https://www.theguardian.com/business/2023/sep/02/details-i-made-they-made-designers-hit-back-at-sheins-imitation-game>>.

<sup>10</sup> Juliana Liu, "Online Superstore Temu Doubles down on Super Bowl with TV Ad and \$15 Million in Giveaways" (*CNN*, February 12, 2024) <<https://edition.cnn.com/2024/02/12/tech/china-temu-super-bowl-ad-hnk-intl/index.html>>.

<sup>11</sup> "How Common Is Copyright Infringement in Fast Fashion?" (May 9, 2023) <<https://www.jmw.co.uk/articles/intellectual-property-solicitors/how-common-is-copyright-infringement-fast-fashion>>.

<sup>12</sup> "About EUR 87 Million Worth of Fake Clothes, Shoes and Accessories Seized | Europol" (*Europol*, June 6, 2023) <<https://www.europol.europa.eu/media-press/newsroom/news/about-eur-87-million-worth-of-fake-clothes-shoes-and-accessories-seized>>.

<sup>13</sup> *ibid*

according to Europol. “The trade in counterfeit goods online has significantly increased in the past few years. The market share of e-commerce platforms has risen in the recent years, which also applies for advertisements of counterfeit goods on the social media platforms.”<sup>14</sup> And as with fast fashion, counterfeit goods are lacking in sustainability criteria as well as infringing on IP rights.

### 1.3 Sustainability and Its Challenges With Fast Fashion and E-Commerce

#### 1.3.1 The Reality of Sustainability in Fast Fashion

One of the biggest challenges to the fashion industry is sustainability. It is not uncommon for one to hear that fast fashion does not necessarily pose sustainability as its biggest label. “While clothing manufacturing has been highlighted as a cause of considerable environmental damage (e.g., greenhouse gas emissions, and water consumption), clothing usage also has a significant effect.”<sup>33</sup> The Ellen MacArthur Foundation estimated in 2017 that 73% of yearly fiber and garment production is burned, while just 12% is recycled or used for new goods.”<sup>15</sup> Fast fashion brands use cheap materials like polyester which allows them to sell their products at an affordable price, but the cost is much graver. Shein was under fire for having hazardous materials in their clothing. “Shining SHEIN: A business model based on hazardous chemicals and environmental destruction by the NGO Greenpeace, SHEIN products have illegal levels of chemicals in breach of European Union regulations.”<sup>16</sup> While these companies dominate the US market, they also have a significant impact on the EU market, with over 108 million users.<sup>17</sup> Many of the employees working for these companies, especially Shein, are faced with long work hours and little to no pay. Many countries in the EU, notably France, as well as the United States, has been aware of the implications on sustainability regarding fast fashion. For instance, lawmakers in France approved for a bill to impose penalties on clothing created by fast fashion products, with penalties rising up to 10 EUR by 2030. “French lawmakers unanimously approved a bill to impose increasing penalties on fast fashion products, rising to €10 (£8.56) on each item of clothing by 2030.”<sup>18</sup>

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<sup>14</sup> *ibid*

<sup>15</sup> Fernanda Donaire Passoni Maria Elena Aldescu, “Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies.” (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

<sup>16</sup> Guest, “The Case of the Giants SHEIN and Temu” (*Thegreensideofpink*, August 18, 2023) <<https://www.thegreensideofpink.com/style-en/fashion/2023/shein-and-temu/?lang=en>>.

<sup>17</sup> Clothilde Goujard, “Chinese Fashion App Temu Could Face Strict New EU Content Rules” *POLITICO* (April 12, 2024) <<https://www.politico.eu/article/chinese-fashion-app-temu-could-face-strict-new-eu-content-rules/>>.

<sup>18</sup> Tiffanie Darke, “Fast Fashion: The French Are Bringing Shein and Temu to Heel. Can Britain Follow Suit?” *The Guardian* (March 16, 2024) <<https://www.theguardian.com/commentisfree/2024/mar/16/fast-fashion-french-bringing-shein-and-temu-to-heel-can-britain-follow-suit>>.

### 1.3.2 Upcycling and Secondhand Fashion

To combat this and to find solutions, many markets are introducing second hand as a wave for pre-loved clothing by luxury brands. The trend of “green fashion” has been on a rise in recent years, in response to the climate crisis. Sites such as TheRealReal, Poshmark, and Depop, are examples of e-commerce-based websites that sell a plethora of sustainable of fashion items, from fast fashion to luxury items. Fortunately, this market also grew in 2020, the same time frame as fast fashion did. “The resale market has ballooned in size since 2020 with an estimated value of between \$100 – \$120 billion. Preowned clothing now makes up 25% of the average secondhand consumer’s wardrobe.”<sup>19</sup> This practice is far from new. Many designers have taken part into upcycling even before the 21<sup>st</sup> century. “Dapper Dan, an African-American fashion designer, 60 employed upcycling methods before the term was coined. Dapper Dan redesigned customers.”<sup>20</sup> Sustainable fashion follows the European Green Deal, a plan aimed at making Europe a greener economy. In Art. 37 of the Charter of Fundamental Rights, it clearly showcases the importance of environmental protection.<sup>21</sup> Fashion brands also recognize the need for a greener economy, and thus the resale market has been entered by luxury brands to be able to sell their products to reputable sellers at a lower cost to consumers who want to partake in sustainable shopping, and this not only bolsters the resale economy, but also offers protecting from counterfeit products that may enter the market from fast fashion or other e-commerce based brands infringing on their creations as well as products that may be sourced unethically.<sup>22</sup>

Since the COVID-19 pandemic, despite the plethora of consumers that take part into fast fashion, there are also consumers are avid for wanting to shop sustainably, transitioning to ‘conscious clothing consumption.’.<sup>23</sup> This is also a practice that has since been seen on social media. “With the rise in popularity of thrift shopping, the prominence of platforms like Depop for reselling and buying used (often vintage) clothes has encouraged younger people, particularly those interested in fashion, to abandon the “fast fashion” of Forever 21 and H&M.”<sup>24</sup> This also impacted how consumers acted after

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<sup>19</sup> Dan Breen, “Green Is Good: IP Considerations for Sustainable Fashion Brands” (*brandwrit.es.law*, October 24, 2023) <<https://brandwrit.es.law/green-is-good-ip-considerations-for-sustainable-fashion-brands/>>.

<sup>20</sup> Fernanda Donaire Passoni Maria Elena Aldescu, “Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies.” (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

<sup>21</sup> Martin Senftleben, “Developing Defences for Fashion Upcycling in EU Trademark Law” [2023] GRUR International <<https://academic.oup.com/grurint/article/73/2/99/7486461>>.

<sup>22</sup> Fernanda Donaire Passoni Maria Elena Aldescu, “Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies.” (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

<sup>23</sup> *ibid*

<sup>24</sup> Feminist Equal Rights Alliance, “Sexist ‘Eco-Shaming’ of Fashion YouTubers: A Best Dressed Case Study” *Medium* (December 29, 2021) <<https://ferauoft.medium.com/sexist-eco-shaming-of-fashion-youtubers-a-best-dressed-case-study-cd5c55a22bc9>>.

the pandemic, to which according to a survey by the European Textile and Clothing Industry, 80% sought for more quality clothing on the market <sup>25</sup> and thus, helping the resale market circulate.

Having said this, there is a bigger challenge that needs to be addressed: Fast fashion companies have been and constantly infringe on sustainable and designer creations, and the implication of mass production and wide distribution at the stake of sustainability, or lack thereof, questions the intersectionality between intellectual property law and sustainability in the fast fashion industry amidst rapid climate change and a post-pandemic economy.

#### **1.4 Purpose and Research Questions**

As the fashion industry continues to grow, and the internet grows to be an even bigger powerhouse, e-commerce fast fashion & regular fast fashion brands will have a bigger part, capable of feeding the desire of the consumers for trendy clothing at an affordable cause, with little to no regard given to the aspects of sustainability and intellectual property rights within the European Union as well as how IP rights operate within countries like the United States. This thesis aims to research and analyze how intellectual property rights operate within the fashion industry, exploring the criteria for protection and infringement within the fashion industry sector by investigating the realm of fast fashion and e-commerce based fast fashion brands, as well as the infringement of intellectual property rights from fast fashion onto sustainable and luxury brands and the controversy between the ethics & implications on sustainable practices and how that affects the consumer market. Alongside that, this thesis aims to seek out what solutions are there to mediate the growth of these consumeristic groups, including a discussion on upcycling and second-hand products and what that means for sustainability and IP.

Research Question(s):

*Where does intellectual property protection: trademark, copyright, design, or patent apply when questioning other e-commerce based fast fashion and regular fast fashion brands, practices on infringement while producing and selling their own products?*

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<sup>25</sup> Fernanda Donaire Passoni Maria Elena Aldescu, "Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies." (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices->

*What is the criteria for sustainability practices within the fashion industry? How does the second-hand market fuel sustainability and what could this mean for IP protection?*

## **1.5 Delimitations**

The boundaries of this thesis will mainly focus on European Union IP law and some aspects of United States IP law as well as other international laws. While certain cases and content will reference US law, as many fast fashion markets operate the US as well as the EU, this paper aims to focus on the European Union in regard to sustainability and intellectual property rights within the fashion industry. This paper will try to utilize trademark, design, and copyright protection when investigating the implications of infringement and the impact of sustainability, as all these IP rights play a major role within fashion law, and each IPR intersects each other, no one IPR will be investigated further in depth than the other. However, in some instances, copyrights, designs, patents, and trademarks will be further discussed in depth depending on the context and/or case law presented.

## **1.6 Method and Materials**

The method is following the EU legal method in regard to intellectual property rights within the EU. Several legal documents and regulations are utilized and referenced, such as the European Union Trademark Regulation (EUTMR), the European Union Design Directive, the EU Regulation 6/2002 on Community Designs, as well as the EU Regulation 608/2013 on customs and IPRs. An emphasis on empirical research was utilized in question to sustainability, as sustainability is not exclusively a legal issue. A comparison between EU and US IP laws and regulations was done as a way to give reference to how other major world markets operate in the context of IPRs. This research also used case studies, referencing cases such as *Cofemel vs G Star Raw* that set a precedence for fashion and IP in the EU. Given the topic, many fashion blogs and videos were referenced, including Youtubers with a fashion niche as well as fashion magazines like *Vogue*. Also, intersectionality of sustainability and the impact it has on a business can pose economic, social, and environmental issues as well. As a result, data analysis on market data and trends was utilized to understand the trends and consumer habits in fast fashion as well as industry data and statistics on the environmental damage from fast fashion, and the impact second-hand and upcycling has on the environment, From this, the thesis can effectively aim to provide a comprehensive overview of the challenges of IPRs and sustainability in the realm of fast fashion and the businesses that they affect.

## 1.7 Outline

The thesis will structure out as follows: First, I will discuss an overview on the fast fashion industry and how it operates in the global market as well as how e-commerce fast fashion developed and how these industries capitalize on social media and the trend cycle being more marginalized than ever. Next, I will discuss intellectual property rights in the fashion industry and examples of how they may be showcased, albeit mostly by non-fast fashion examples as their IP rights are more stagnated than other brands. With this, I will divulge into the infringement of IP rights in the fashion industry brought upon by fast fashion and e-commerce based fast fashion brands and cases that have been brought up, and how e-commerce fast fashion and fast fashion act in regards to IP rights, which in then will go into a discussion on infringement of design and counterfeit products, in aims of answering the first research question. Then, I will bring upon the implications of sustainability and greenwashing from fast fashion brands as it is important to highlight the legal implications of greenwashing with fast fashion, and the legal implications those brands may face when being dealt with the consumer market and IPRs, with a discussion on the circular economy and the advents of second hand shopping and upcycled fashion and how they can be impacted/impact IPRs in aims of answering the second research question.



## 2 The realm of Fast Fashion and E-Commerce in the Global Market.

### 2.1 What Is Fast Fashion?

Fast fashion has been an important aspect of the consumer shopping market, offering clothing that normally, would be expensive by luxury and sustainable brands, but through fast fashion brands, they can mark the prices for cheaper. Over the last decade. Especially in the last decade, there has been a rise of fast fashion brands and is usually represented by current fashion trends. “Fast fashion describes low-priced but stylish clothing that moves quickly from design to retail stores to meet trends. The collections are often based on styles presented at Fashion Week runway shows or worn by celebrities.”<sup>26</sup> Major retailers such as Forever 21, Zara, H&M, all are fast fashion-based companies that operate in the same way, by aiding consumers that want high fashion at lower cost, through making several hundreds, even thousands of pieces of clothing at a time and cycling it out when the next set of trends come.<sup>27</sup> For instance, Zara as a brand can have finished products in a matter of weeks, and producers in the factories in Spain can produce 2000 to 4000 pieces at a time.<sup>28</sup> The origin of fast fashion can be dated back to the 20<sup>th</sup> century and early 21<sup>st</sup>.

*“In the late 1990s and 2000s, low-cost fashion reached a peak. Online shopping took off, and fast fashion retailers like H&M, Zara, and Topshop took over the high street. These brands took the looks and design elements from the top fashion houses and reproduced them quickly and cheaply. With everyone now able to shop for on-trend clothes whenever they wanted, it’s easy to understand how the phenomenon caught on.”*<sup>29</sup>

Fast fashion uses cheaper, lower quality materials such as polyester to be able to make these clothing, and to be able to have it made out in mass quantities. The EU defines fast fashion as “high volumes of lower quality garments at low price levels.”<sup>30</sup> Fast fashion brands will operate to where

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<sup>26</sup> Adam Hayes, “Fast Fashion: How It Impacts Retail Manufacturing” (*Investopedia*, April 28, 2024) <<https://www.investopedia.com/terms/f/fast-fashion.asp>>.

<sup>27</sup> *ibid*

<sup>28</sup> *ibid*

<sup>29</sup> Srauturier, “What Is Fast Fashion and Why Is It so Bad? - Good on You” (*Good on You*, August 7, 2023) <<https://goodonyou.eco/what-is-fast-fashion/>>.

<sup>30</sup> Brooke Roberts-Islam, “Fast Fashion Is the Industry’s Sustainability Scapegoat. Here’s Why That’s Wrong, and What Should Happen.” *Forbes* (November 29, 2023) <<https://www.forbes.com/sites/brookerobertsislam/2023/10/12/fast-fashion-is-the-industrys-sustainability-scapegoat-heres-why-its-dangerous-and-what-should-happen/>>.

there will always be a stock of items in their stores so they do not have to worry about losing profit and leaving consumers satisfied. By being able to replicate trends set out by influencers and social media, brands are able to produce items at a mere 52 micro-seasons a year, which can translate to one set of clothing a week.<sup>31</sup>

## 2.2 How The Trend Cycle Affects Fast Fashion

When discussing the purposes of fast fashion, it is important to analyze the impact of trends and social media and how fashion styles have circulated. Fashion as a whole is reciprocal, focusing on current trends and replicating them to fit the current styles. The cycle can be split into 5 instances: the introduction, rise, peak, decline and obsolescence.<sup>32</sup> For the 20<sup>th</sup> and early 21<sup>st</sup> century, trends can be carried out for a longer period of time of up to 20 years. These trends are subtly curated, using magazine editorials, fashion shows and red carpet events where a small group of societal elites, models and celebrities would view these styles and then wear them.<sup>33</sup>

This was a slow cycle, and some have even remarked this as the ‘20 year rule’, where fashion cycles and trends would circulate and then come back into style around 20 years later.<sup>34</sup> This is most notable with streetwear styles from the 1980s making a comeback into the style of the 2000s, and from the early 2000s, styles most commonly named as the ‘Y2K style’, an era of resurgence and rebellion given the turn of the century, would be revived in the 2020s, 20 years later. And fast fashion notes this, and pays attention to the trend cycles, and in turn, generates products from these trends to be able to be easily accessible to the regular consumer market. On one hand, this seems like it is benefiting consumers, from being able to wear the same styles as major celebrities and influencers, but the rate of which fashion trends and styles is increasing, makes fast fashion brands push out more styles and trends, over-saturating the market and creating what is known as micro-trends, and this over-saturation was heavily impacted by the COVID-19 pandemic.

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<sup>31</sup> Audrey Stanton, “What Is Fast Fashion, Anyway? - The Good Trade” (*The Good Trade*, May 3, 2024) <<https://www.thegoodtrade.com/features/what-is-fast-fashion/>>.

<sup>32</sup> Mélanie Mollard, “Understanding Fashion Trend Life Cycles: The 5 Stages” (*Heuritech*, December 27, 2023) <<https://www.heuritech.com/articles/five-stages-of-fashion-trend-life-cycle/>>.

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

### 2.3 COVID-19, Social Media, and Fashion: How The E-Commerce Market Grew

The COVID-19 pandemic impacted the entire world, where the economy was revolutionized to adjust to operating amidst a pandemic. This took a toll on the fashion industry, as consumer habits adapted, and many aspects of the fashion industry almost made the whole sector go nearly bankrupt. A report from The State of Fashion by McKinsey & Company states that the economic profit of fashion companies suffered great economic loss, up to a 90% of loss of profit in 2020, whereas in 2019 profits were increased by 4%.<sup>35</sup> . “Consumers substantially reduced their spending on fashion during the COVID-19 lock-downs, quickly identifying clothes, shoes, and fashion accessories as a ‘non-essential’ category of consumer goods [...] long periods of full and partial lockdowns resulted in unprecedented rates of decluttering wardrobes and increased textile donations”<sup>36</sup> As a result, the fashion industry was struggling to maintain production, preserving intellectual property rights, and adapting to e-commerce, and struggling to adapt to the business model pre-pandemic, which consisted of the way of selling products, steps needed to design, manage, and promote to the consumer experience, and the legal implications and governance of these particular steps.<sup>37</sup> With the fashion industry at an all time low, the e-commerce industry rose, with fast fashion-based e-commerce models taking advantage of this opportunity.

*“Fast fashion enterprises increase their IT investment expenditures, which is to be a driving force for the development of e-commerce. The term “fashion tech” referring to new technologies and digitalization of the industry appears in this context. For example, it is crucial to make shopping easier for customers- in many places, work on technologies that, for example, will enable the selection of the right size of clothing by virtually trying on the clothes is in progress.”*<sup>38</sup>

Online shopping has always been around as a way for consumers to be able to buy various products including clothing, however, amidst the pandemic, people wanted safer and more convenient ways to shop, e-commerce platforms became the go-to destination for fashion enthusiasts and everyday consumers alike. This gave rise to fashion brands to enter the e-commerce

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<sup>35</sup> McKinsey and Company, “The State of Fashion” The State of Fashion <<https://www.mckinsey.com/~media/mckinsey/industries/retail/our%20insights/the%20state%20of%20fashion%202020%20navigating%20uncertainty/the-state-of-fashion-2020-final.pdf>>.

<sup>36</sup> Katia Vladimirova and others, “Fashion Consumption during COVID-19: Comparative Analysis of Changing Acquisition Practices across Nine Countries and Implications for Sustainability” (2022) 5 Cleaner and Responsible Consumption 100056 <<https://www.sciencedirect.com/science/article/pii/S2666784322000109>>.

<sup>37</sup> *ibid*

<sup>38</sup> Katarzyna Bilińska-Reformat and Anna Dewalska-Opitek, “E-Commerce as the Predominant Business Model of Fast Fashion Retailers in the Era of Global COVID 19 Pandemics” (2021) 192 Procedia Computer Science 2479 <<https://doi.org/10.1016/j.procs.2021.09.017>>.

world and digitalize their brand, but this also gave birth to new companies, like Shein, Fashion Nova, and Temu, e-commerce fast fashion brands that serve as a place for consumers to be able to get trendy clothes and accessories at a affordable cost. “In 2020, while the sales of American fashion brands declined by 20%, Shein, an online based clothing company, saw sales rise by 150%.”<sup>39</sup>

E-commerce brands operate the same way as other brands do, follow through with trends, curate and design products, and then produce them to sell to the global market. However, with growing consumer demand, fast fashion e-commerce brands push out thousands of styles, and as stated previously, oversaturate the market to create micro trends, which impact fashion trend cycles to create new trends at a faster rate. fashion, as a whole, is getting faster. “At five of the major high-street brands, 57 percent of products online are less than three months old, Edited found, indicating that even mid-tier brands are scrambling to catch up with the “ultra-rapid Sheins and Fashion Novas of the world.”<sup>40</sup> Social media also found a new role, being able to house influencers and celebrities and the general public now has more access. A notable Youtuber, Mina Le, analyzes this issue of fast fashion e-commerce brands and trends.

*“With the rise of social media, celebrities now have a stronger hold on our culture because we have more access to them, and brands absolutely know this. Which is why they hustle to get big celebrities like Kylie Jenner to wear their products, because they know that immediately after she posts the clothing item, it’s probably going to become a trend [...] But of course, everyone has the same idea, and everyone online is now posting the same dress. It’s no longer cool, let’s trash it.”<sup>41</sup>*

This practice is accelerating, with trends becoming smaller as few as months at a time. The 20-year rule as once was defined when talking about fashion cycles is now growing smaller and smaller. Social media has given the general public power to become these trendsetters, rather than giving that role exclusively to celebrities and renowned influencers, to be able to set their own trends, and the more trends there are, the more rapid fast fashion and e-commerce will act on it and generate more and more products. Le states that in 2020, Shein was the most popular fast fashion brand on

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<sup>39</sup> Angela Covalli, “The Impact of Online Shopping Trends and the Rise of Fast Fashion” *Medium* (September 23, 2023) <<https://medium.com/@ascovalli/the-impact-of-online-shopping-trends-and-the-rise-of-fast-fashion-5036bc71a74d>>.

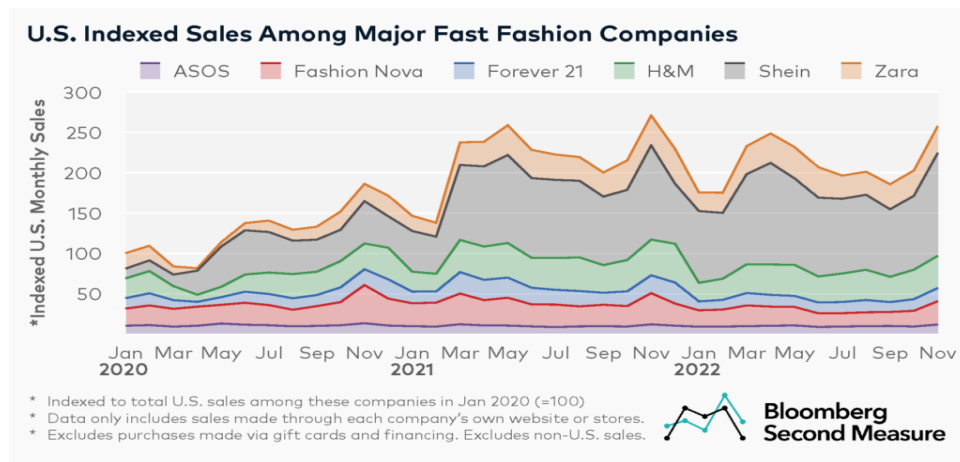
<sup>40</sup> Jasmin Malik Chua, “Sourcing Journal” *Sourcing Journal* (October 21, 2021) <<https://sourcingjournal.com/sustainability/sustainability-news/edited-2021-fashion-sustainability-report-recycled-denim-shein-primark-digital-apparel-308894/>>.

<sup>41</sup> Mina Le, “Tiktok Is Kind of Bad for Fashion” <<https://www.youtube.com/watch?v=JR3z8lq2cNM>>.

social media, making about 10 billion dollars in sales, over double of what they made in 2019.<sup>42</sup>

## 2.4 Overview of United States and European Union Consumer Habits Post Pandemic

An overview of the consumer habits since the pandemic is clear noted: fast fashion companies and e-commerce based fast fashion companies have been effective in dominating the sales in the fashion market during and post-pandemic, both in the European Union and the United States.



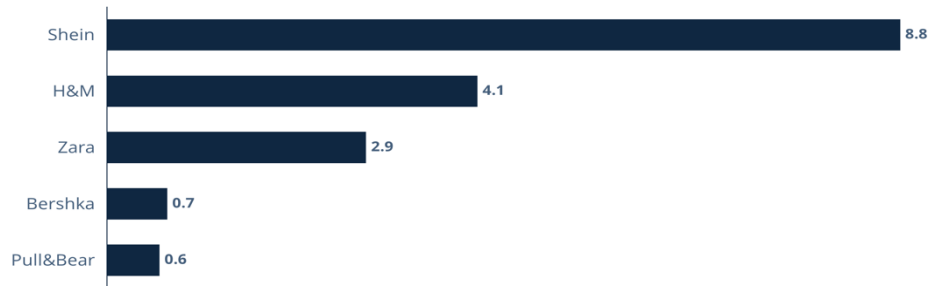
*“Shein earned 12 percent of U.S. fast fashion sales. In November 2022, Shein accounted for 50 percent of sales among these fast fashion competitors.”<sup>43</sup>*

<sup>42</sup> ibid

<sup>43</sup> Janine Perri, “Shein Holds Largest U.S. Fast Fashion Market Share - Bloomberg Second Measure” (*Bloomberg Second Measure*, January 18, 2023) <<https://secondmeasure.com/datapoints/fast-fashion-market-share-us-consumer-spending-data-shein-hm-zara/>>.

## ONLINE NET SALES OF SELECTED FAST FASHION BRANDS IN EUROPE, 2023

in billion US\$



Notes: First party net sales generated after deduction of returns, allowances for damaged or missing goods and any discounts allowed.  
Sources: ECDB.

ECDB

*"Even years post-pandemic, Shein is Europe's leading online fashion store, with net sales of 8.8 billion USD in 2023. Its highest online net sales among the top 100 online fashion stores in each market are observed in Spain, France, Italy, Portugal, and Greece."* <sup>44</sup>

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<sup>44</sup> Ecdb, "Online Fast Fashion in Europe: Market Size, Top Stores & Trends" *ECDB* (May 2, 2024) <<https://ecommercedb.com/insights/where-online-fast-fashion-sells-best-in-europe/4638>>.

## 3 Fashion and Intellectual Property Rights

### 3.1 What is Intellectual Property In Fashion?

There are various implications on fast fashion regarding numerous issues that they face. One of them is the question of intellectual property.

*“One of the hallmarks of the luxury fashion industry is creative expression. Logos, patterns, shapes, and symbols are the result of substantial creative energy and financial expenditure. In addition, luxury brands direct significant resources into cultivating their relationship with customers, so that clients ultimately associate the brand with a particular style, experience, and level of quality.”<sup>45</sup>*

Intellectual property serves as one of the most important aspects for creative expression in the fashion industry. Designer and luxury brands pride themselves on cultivating relationships with customers, and making sure their products are the best quality they can produce so they can establish a good foundation for a relationship with a customer.<sup>46</sup> Intellectual property rights can be conferred into four distinct categories: trademarks, design, copyrights, and where applicable, patents. In countries like the United States, trademark and patent protections are more applicable towards fashion, and within areas like the European Union, copyright and design protection are more applicable towards fashion, but every aspect of these IPRs do have a function within fashion. The European fashion market regarding IP is significantly more expanded than the United States fashion market, and this explains why the European Union has had laws since the 15th century that preserves creativity and innovation within the fashion sector.

*“European fashion markets significantly predate the US fashion industry. This explains why IP law for fashion and textiles has existed for much longer and is more expansive in Europe. That is a plus for European designers. New York’s fashion industry got started thanks to licenses from*

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<sup>45</sup> Fernanda Donaire Passoni Maria Elena Aldescu, “Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies.” (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

<sup>46</sup> *ibid*

*Parisian designers to produce lower-cost garments and accessories. That's how New York effectively became the home of fashion licensing.”*<sup>47</sup>

The EU's legal framework for intellectual property protection offers multiple aspects of protection for various types of IPRs. This framework is essential for maintaining the integrity of the fashion industry, encouraging innovation and creativity, and ensuring that brands and other businesses and creators can reap the benefits of their intellectual efforts. Effective enforcement mechanisms and remedies are in place to combat infringement and uphold IP rights across the EU through various IPRs.

### **3.1.1 Trademarks**

Trademarks consist of any signs, logos, names, letters, colors, the shape of goods or the packaging of the products, anything that distinguishes the brand. Trademarks not only help identify the brand, but they also help protect the brand in being able to identify the differences between one and the other<sup>48</sup>. Brands can register trademarks with the EUIPO for protection across all EU MS. Consumers identify a brand by its logo, or even a specific element such as a pattern, and can then identify the brand and identify with the image of the brand.<sup>49</sup> Consumers are now captivated of what the brand represents and its values and any negativity on the brand will have a detrimental effect on its image, which then correlates to its sales.<sup>50</sup> In the EU, trademark protection covers word marks, figurative marks, shape marks, and combinations of said marks as well as patterns, positions, and single-color marks.<sup>51</sup> In the fashion industry, distinctive styles like the Burberry check or the Louis Vuitton 'LV' monogram print are registered as trademarks. These trademark protections can also be extended to SMEs, small and medium size enterprises, which is especially important in that as 90% of businesses in the EU are SMEs.<sup>52</sup> Most countries follow the WIPO agreements on the international registration of marks, the United States Patent & Trademark Office (USPTO) handles all the trademark registrations within the US, but in the EU, it is mostly a unitary system governed by the EUIPO.<sup>53</sup> Counterfeiting as an issue, is something many designers are concerned with, and many fashion houses know this. If a design is counterfeited, and with many countless fake products on the market, brands rely on trademarked labels. “Fashion labels make it easier for designers to

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<sup>47</sup> “The Role of IP Rights in the Fashion Business: A US Perspective” <[https://www.wipo.int/wipo\\_magazine/en/2018/04/article\\_0006.html](https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html)>.

<sup>48</sup> “Europe - IP Specials - IP in the Fashion Industry” (*IP Helpdesk*) <[https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry\\_en](https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry_en)>.

<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

<sup>52</sup> *ibid*

<sup>53</sup> Klemchuk PLLc, “Differences between US and International IP Law | Klemchuk” (*Klemchuk*, February 9, 2024) <<https://www.klemchuk.com/ideate/intellectual-property-law-us-international>>.



detect imitations and help fashion users to identify preferred items.”<sup>54</sup> And fashion houses even make it a notion to promote advertisements to showcase their trademarks to attract consumers and stray them away from counterfeits.<sup>55</sup>

### 3.1.1.1 Trademark Regulation (EU) 2017/1001

An important trademark to the fashion industry is known as the European Union Trademark Regulation (EUTMR), helps state out the rules for how to obtain a trademark in the EU, and it even covers the requirements for what can constitute as a sign that can be trademarked, to which a trademark needs to be distinctive, lawful, and one that is still available.<sup>56</sup> Also, especially important for the fashion sector, this regulation covers colors, shapes, positions, patterns, and even made in signs.<sup>57</sup> This regulation is important to keep fashion trademarks enforceable and harmonized throughout the EU and allows for fashion brands to take control of their trademarks, and allows for these rights to gain protections within the EU that any trademarks unregistered would lack. This also helps protect against counterfitting of these products, which is an issue that the fashion industry continues to be plagued with.



*As an example, Chanel registered the three-dimensional shape of a handbag before the INPI in Class 25 goods for bags. (French trademark registration No. 4120437, filed by Chanel on 24 September 2014, in classes 14, 18 and 25.)<sup>58</sup>*

## 3.1.2 Copyright

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<sup>54</sup> “Design Law in the European Fashion Sector” <[https://www.wipo.int/wipo\\_magazine/en/2008/01/article\\_0006.html](https://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html)>.

<sup>55</sup> *ibid*

<sup>56</sup> “Fashion Law” <<https://www.globallegalpost.com/lawoverborders/fashion-law-2116409480/france-561604550>>.

<sup>57</sup> *ibid*

<sup>58</sup> *ibid*

Copyright applies to the literary and artistic works, which can range from books to music to paintings and to even films.<sup>59</sup> Copyright allows for the authority to control the communication on the use of the work, and the prohibiting the use of the work.<sup>60</sup> In the EU, every EU country which has signed the Berne Convention, which allows for copyright protection without the need to file for any kind of registration or any fees<sup>61</sup>, which means that this protection is automatically applied to a creation, and this right exists for 70 years after the author's death. As of 2011, the Court of Justice of the European Union (CJEU) established that the MS have the full authority to determine the extent of the criteria for copyright protection for fashion. While copyright is an intellectual property right that is in essential in other sectors, within the fashion industry, it is bolstered with other IPRs like trademarks, designs, and patents for brands to be able to undergo a registration process and to have tangible protection. And, while both the EU and the US are part of the Berne Convention, an international agreement from a multitude of countries on the ordinance of copyright law, some EU member states have additional prerequisites for copyright protection.<sup>62</sup>

### 3.1.2.1 Copyright and Information Society Directive

This is an important directive for copyright protection in the EU. This aims to harmonize copyright protection throughout the EU.<sup>63</sup> This highlights that on top of phonogram, photographs, and other forms of media, artistic elements like graphics on a clothing item can be protected as the author's own intellectual creation.<sup>64</sup>

### 3.1.3 Design

Design are used to protect the appearance of a product or protect a certain part of the product that pertains to its uniqueness. It plays a role for the fashion industry for design aspects of an item. For instance, if the bag has a unique design or if the jacket has a aspect of it that is unique in appearance.<sup>65</sup> An example would be the red sole bottom of footwear sold by Christian Louboutin is an example of a design that is protected by EU Design IP. Design protection as an IPR has an important function in the fashion industry as it can protect the structure of the design of clothing, and the design to be protected must have novel character. The European Union

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<sup>59</sup> "Europe - IP Specials - IP in the Fashion Industry" (*IP Helpdesk*) <[https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry\\_en](https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry_en)>.

<sup>60</sup> *ibid*

<sup>61</sup> *ibid*

<sup>62</sup> Klemchuk Plc, "Differences between US and International IP Law | Klemchuk" (*Klemchuk*, February 9, 2024) <<https://www.klemchuk.com/ideate/intellectual-property-law-us-international>>.

<sup>63</sup> OPOCE, "EUR-LEX - 32001L0029 - EN" <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A32001L0029>>.

<sup>64</sup> *ibid*

<sup>65</sup> "Europe - IP Specials - IP in the Fashion Industry" (*IP Helpdesk*) <[https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry\\_en](https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry_en)>.

allows for design protection to fall under two categories: Unregistered Designs and Registered Designs. Unregistered Community Designs (UCDs) are automatic and can provide up to three years of EU wide protection against the infringement of that design, but that is the only right UCDs have.<sup>66</sup> Unlike UCDs, Registered Community Designs (RCDs) are obtained via the European Intellectual Property Office (EUIPO), and RCDs not only are protected against infringement of their design, but they also can give the right holder authority against other brands selling products that evoke a similar impression as the RCD.<sup>67</sup> This is a major advantage EU designer have compared to those who want to seek out protection in the US, as the US does not have a design system like the EU's UCD/RCD, which could make it tricky for US designers to seek out protection if it is not revolving around a trademark.

### 3.1.3.1 European Union Design Regulation (06/2000) & European Union Design Directive (98/71/EC)

The European Union laid out key legal framework for avid design protection within the EU, and these two are some of the most important to highlight.

According to the World Intellectual Property Organization (WIPO), this regulation introduced the Community Design system, as explained earlier between RCDs and UCDs.<sup>68</sup> This regulation aimed to protect design rights for all those affected within the EU allowing for registration of designs which can last up to 25 years with renewable 5-year periods.<sup>69</sup> They explicitly state that, "Some of those sectors produce large numbers of designs for products frequently having a short market life where protection without the burden of registration formalities is an advantage and the duration of protection is of lesser significance."<sup>70</sup> Which of course, is what the fashion industry exactly is.

The other directive which aids fashion and design protection is the European Union Design Directive, which helped harmonize protection for unregistered designs, which was useful to gain protection up to 3 years without any unregistered designs, and also was found useful by designers who were concerned from counterfeit infringement.<sup>71</sup>

### 3.1.4 Patents

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<sup>66</sup> ibid

<sup>67</sup> ibid

<sup>68</sup> "Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community Designs, European Union (EU), WIPO Lex" <<https://www.wipo.int/wipolex/en/legislation/details/6414>>.

<sup>69</sup> ibid

<sup>70</sup> ibid

<sup>71</sup> "Design Law in the European Fashion Sector" <[https://www.wipo.int/wipo\\_magazine/en/2008/01/article\\_0006.html](https://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html)>.

Patents are an interesting category regarding fashion and intellectual property, but they can serve a purpose that may be overlooked by many people. Even technical advances to a particular fabric can bolster a business for its sales and keep it competitive amongst other brands.<sup>72</sup> Patents grant exclusive right over inventions, products, given that this product must be novel in offering a technical solution that the average person isn't able to achieve. An example of this is common with sports fashion. Speedo developed a fabric by the name of 'FastSkin' which they patented to aid swimmers in competitions, by allowing the wearer when swimming to be able to achieve faster times as this particular fabric reduced resistance in the water.<sup>73</sup> While there is no framework in the European Union aimed to help at patents within fashion, the use of patents within the fashion industry is not limited to luxury and big brands. SMEs are also able to innovate using patents, which is helpful for smaller companies to be able to secure patent rights to their inventions to be able to grow and develop their brand. One of the main differences between the EU and the US for patent laws is that the United States allows a grace period of 12 months after disclosure of the invention, while the European Union does not allow such a grace period.<sup>74</sup> It's also to note that the European Union patent laws are governed by the European Patent Convention (EPC), which is separate from EU Law.<sup>75</sup>

## 3.2 How Landmark Cases Impacted IP in the Fashion Industry

In the European Union, there have been several cases in the past on IP infringement upon creators. One of the most important cases was on Yves Saint Laurent (YSL), in which the company challenged Ralph Lauren based on copyright infringement after seeing a similar tuxedo dress Ralph Lauren had created in 1966, which was showcased during the Fall Fashion week of 1991-1992 in the French courts. The aspect of the tuxedo dress was that the YSL version used silk as the fabric with higher quality materials, while the latter used wool, and the price difference was drastic: 15,000 USD vs 1,000 USD.<sup>76</sup> Despite the differences between the two garments, YSL won the lawsuit, and this was the first ever case utilizing copyright protection in

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<sup>72</sup> "Europe - IP Specials - IP in the Fashion Industry" (*IP Helpdesk*) <[https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry\\_en](https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry_en)>.

<sup>73</sup> "Europe - IP Specials - IP in the Fashion Industry" (*IP Helpdesk*) <[https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry\\_en](https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-fashion-industry_en)>.

<sup>74</sup> AMY M SPINDLER, "COMPANY NEWS; A Ruling by French Court Finds Copyright in a Design" (<http://www.lapres.net/>, May 19, 1994) <<http://www.lapres.net/stlaurent.html#:~:text=Yves%20Saint%20Laurent%20had%20sued,commercial%20court%2C%20also%20awarded%20Mr.>> accessed May 15, 2024.

<sup>75</sup> Stanford Law School, "The Patent Application: A Comparison between Europe and the U.S. | Stanford Law School" (*Stanford Law School*) <<https://law.stanford.edu/projects/the-patent-application-a-comparison-between-europe-and-the-u-s/>>.

<sup>76</sup> AMY M SPINDLER, "COMPANY NEWS; A Ruling by French Court Finds Copyright in a Design" (<http://www.lapres.net/>, May 19, 1994) <<http://www.lapres.net/stlaurent.html#:~:text=Yves%20Saint%20Laurent%20had%20sued,commercial%20court%2C%20also%20awarded%20Mr.>> accessed May 15, 2024.

regard to fashion, and where fashion in intellectual property was treated with the same regards and concerns as other products from other sectors.<sup>77</sup> “The case has riveted the French fashion community, not only because of the famous personalities involved, but because it is the first time a designer has been able to protect a dress as ‘intellectual property.’”<sup>78</sup> Landmark cases have significantly changed the way IP protection was viewed in the fashion industry, reinforcing the importance of design, trademark, copyright, and patent laws. This set the precedence for how the fashion industry can operate utilizing intellectual property and how cases of infringement are challenged.

Another case that questioned how intellectual property rights, in particular copyright and design protection are operated in the EU in more recent times, was the case of *Cofemel v G-Star Raw*, C-683/17. The case revolved around two companies, G Star and Cofemel, with the latter being accused of copyright infringement from G Star for producing clothing that resembled a similar design to their own in 2019.<sup>79</sup> The CJEU was asked to look over Article 2(a) of the InfoSoc Directive to analyze how the term “work” should be viewed, to which the CJEU responded with the notion that “work” is independently assessed in the EU, and a designer in that particular MS should not be bound by the interpretation of the MS.<sup>80</sup> In other words, EU directives have no impact on individual brands.<sup>81</sup> The CJEU deemed that aesthetics should not be relevant in deeming copyright protection, which meant that designers can now achieve copyright protection by mere originality. Many MS such as Italy and Portugal which originally required higher level of originality for copyright protection, their laws are essentially scrapped under the new EU ruling the CJEU enacted.

*“To make this originality/functionality contradiction work (full cumulation), the CJEU effectively lowered the threshold of ‘originality’ needed for copyright protection to ‘any degree of freedom in the aesthetic design of the product’ - even if such degree is marginal or highly restricted by the functional requirements; as opposed to the standard before Cofemel, which was the author's own intellectual creation and the ability to make free and creative choices (Painer), where such choices were not dictated by the functional requirements.”<sup>82</sup>*

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<sup>77</sup> *ibid*

<sup>78</sup> *ibid*

<sup>79</sup> View Archive, “How the European Union Tries to Protect Fashion Designs” (*The Fashion Industry Law Blog*, August 19, 2021) <<https://fashionindustrylaw.com/2021/08/19/how-the-european-union-tries-to-protect-fashion-designs/>>.

<sup>80</sup> *ibid*

<sup>81</sup> View All Posts by Valentina Mazza, “Does the Cofemel Decision Mark the End of ‘Artistic Value’?” (May 11, 2020) <<https://thefashionablelawyers.com/2020/05/11/does-the-cofemel-decision-mark-the-end-of-artistic-value/>>.

<sup>82</sup> “The Copyright Implications of Cofemel - Latest Blog Articles - Maastricht University” (January 29, 2020) <<https://www.maastrichtuniversity.nl/blog/2020/01/copyright-implications-cofemel/>>.

This introduced a new industry wide bias against the implications of copyright protection being easily tangible<sup>83</sup>. Majority of European brands are SMEs, and this impacted the way fast fashion operated.

### 3.3 Intellectual Property Infringement from Fast Fashion

Infringement is unfortunately common in the fashion industry, and with the advent of social media and online content, fashion is subject to trademark, design, and copyright infringement which poses a threat to financial and intellectual property interests as well as creativity. Fast fashion brands often face IP infringement issues due to their business model, but they continue to influence the market by driving innovation and changing consumer expectations. Fashion, as an industry, as discussed in the introduction, is a industry dominated by seasonal and/or micro trends, and whereas designers create looks bi-annually, fast fashion recreates these looks at a faster pace, saturating the trend market and the notion of exclusivity was gone.<sup>84</sup>

*“Due to trends’ time-sensitive nature, they follow a shortcut path in their designing. For instance, it typically takes up to one year to prepare a new collection, although the most successful fashion brands have significantly reduced the length of this process to less than six to eight weeks, from research and product design to delivery of products to the market. Also, their designs conform with the ‘hot looks’ of the season, frequently sharing similarities with hundreds of others, new and old. After all, their goal is to sell large quantities fast, being aware of the limited duration of a trend’s lifespan.”<sup>85</sup>*

This fast span of trends, unfortunately, puts brands at a vulnerable spot for infringement, and it already has happened in numerous instances. Adidas, a German sportswear chain sued Thom Browne, an American sportswear chain, claiming that the use of their stripes pattern is identical to that of the way Adidas uses their pattern.<sup>86</sup> This held up the standard that even if a pattern is changed, it can still be infringement of a trademark if the overall impression is confusingly similar to the consumer eye.<sup>87</sup> Zara was sued by a smaller designer by the name of Amiri for infringing on the artist’s design

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<sup>83</sup> *ibid*

<sup>84</sup> Audrey Stanton, “What Is Fast Fashion, Anyway? - The Good Trade” (*The Good Trade*, May 3, 2024) <<https://www.thegoodtrade.com/features/what-is-fast-fashion/>>.

<sup>85</sup> Ioanna Lapatoura, “Copyright Originality in Fashion: Industry-Induced Bias against Small Designers in a Sector Dominated by Seasonal Trends - Kluwer Copyright Blog” (*Kluwer Copyright Blog*, June 8, 2023) <<https://copyrightblog.kluweriplaw.com/2022/02/21/copyright-originality-in-fashion-industry-induced-bias-against-small-designers-in-a-sector-dominated-by-seasonal-trends/>>.

<sup>86</sup> “From Zara to Adidas, the State of Design Infringement in the Fashion Industry” (February 2, 2023) <<https://www.omniaretail.com/blog/the-grey-area-of-design-infringement-in-the-fashion-industry>>.

<sup>87</sup> *ibid*

rights on a specific pair of pants that included a pleather detail, which led to the brands making a settlement.<sup>88</sup>

There are more cases of infringement from fast fashion industries, because unfortunately, current copyright and intellectual property laws favor fast fashion giants.<sup>89</sup> Zara, in particular, is notorious for infringing on protected designs by other fashion houses. In 2015, OTB, known as Only The Brave, which owns designer labels such as Diesel and Marna, the fashion house filed a suit against Zara for infringement on their designs. OTB claimed that Zara infringed on Diesel's RCD right referring to a woman's skinny jeans, and Marini's UCD right for a sandal.<sup>90</sup> Zara was manufacturing and selling these copycat designs of the luxury brand's own products, which led to this cause being brought up by the Court of Milan, and the Court of Milan referenced both the Brussels Regulation and the CJEU's case on Nintendo vs Big Ben. From the Brussels Regulation, they referenced from Article 8(1) that a person or a organization can be sued in a MS even if they are not from there, and also if the claims are closely connected that they need to be both represented in the same hearing.<sup>91</sup> Zara, being a Spanish fast fashion company, was tried in Italian courts over infringement from Italian luxury brands, which was taken into consideration when they also referenced the CJEU Nintendo vs Big Ben case. Despite not relating to fashion, this was one of the biggest cases for intellectual property throughout Europe and this was the first time this particular CJEU case was referenced in a court of law.<sup>92</sup>

Forever 21 is another American major fast fashion conglomerate with a myriad of IP infringement complains made against them. Puma, a German fast fashion chain filed a lawsuit in the California District Court, claiming that Forever 21 trademark infringed on Puma's "Fenty" design shoe, a collaboration between Puma and famous singer Rihanna, Forever 21 was selling a knock off pair, alongside selling another shoe that copied a design known as the "Creeper" style.<sup>93</sup> While this was held within a US based court, this lawsuit was due to the concern of protection of IPRs for entering the EU market. The likelihood of confusion for consumers when looking at the products Puma and Forever 21 were both pushing out, Puma found the similarities of their designs to be an issue, especially when Puma's design known as the "Formstripe" which Puma had trademarked, has become so synonymous with the brand, similar to Adidas's three stripes or Nike's

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<sup>88</sup> *ibid*

<sup>89</sup> *ibid*

<sup>90</sup> Fulvio Mellucci, "Bird & Bird's Latest DesignWrites Article: 'Fast Fashion' Beware: Zara Gets Caught up in EU-Wide Infringement and Damages Claim" (*designwrites.law*, July 5, 2019) <<https://designwrites.law/fast-fashion-beware-zara-gets-caught-up-in-eu-wide-infringement-and-damages-claim/>>.

<sup>91</sup> *ibid*

<sup>92</sup> *ibid*

<sup>93</sup> Flatfee, "Lesson Learned Puma v Forever 21 (2017) Trademark Lawsuit Case Study" (*Flatfee*) <<https://flatfeecorp.com/articles/puma-versus-forever-21-2017-trademark-lawsuit-europe>>.

“Swoosh”.<sup>94</sup> The case was brought to trial in 2017, and the Court ended up ruling in favor of Forever 21.

On top of infringement from fast fashion brands with their own products against other brands, counterfeit cases are a huge issue, as the next part will discuss, counterfeit products and products from e-commerce brands are adding even more of an impact on the infringement of IP rights in fashion.

### **3.4 E-Commerce Fast Fashion Infringement and Fast Fashion As A Contender for Counterfeit Products**

As e-commerce fast fashion grows, the industry must balance rapid production with sustainable practices within IP enforcement to maintain a competitive yet ethical marketplace. However, in the midst of e-commerce and the internet pervading fashion, fashion is taken to new heights as e-commerce enters the midst, and infringement is accelerating.

A particular example is on Leora Aileen, a small business owner who lives in the Netherlands and creates illustrated tote bags, bookmarks and other book-related content. For months, her most popular product was a tote bag she illustrated inspired by The Reader tarot card, for 13.99 EUR. Aileen sold hundreds of bags on her own website, and then decided to discontinue the product in order to promote new designs. But in July, one of her customers alerted her that identical “The Reader” tote bags had popped up on Temu and Shein for less than 6 EUR.<sup>95</sup> Temu’s website said that more than 200 of the bags had already been sold, with customers commenting on the bags’ quality. The problem with trying to stop infringement from happening with these major e-commerce companies, is that they will either ignore the request or list another version of the same item, which is exactly what happened a few weeks later after Aileen already tried to report for intellectual property infringement. Ailene’s, and many other sustainable designers, are at risk for having their businesses and their intellectual property affected by these major e-commerce conglomerates.<sup>96</sup>

Shein is also a notable brand that peaked during the pandemic and post pandemic which has numerous flags of trademark and copyright infringement. In 2018, Shein was sued by Levi Strauss, a notable American denim manufacturer, for copying a particular stitching pattern on the jeans

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<sup>94</sup> *ibid*

<sup>95</sup> Andrew R Chow, “Designers Are Accusing Temu of Selling Copies of Their Work” *TIME* (January 16, 2024) <<https://time.com/6342387/temu-copy-work/>>.

<sup>96</sup> *IBID*



that they were selling.<sup>97</sup> In 2021, Shein was countered by AirWair, the manufacturer of the famous Dr. Martens boots, for directly copying and counterfeiting their boot, and also advertising their products with AirWair's advertisements for their own Dr. Martens boots.<sup>98</sup> Chrome Hearts, an American luxury brand based in Los Angeles, California, also sued Shein for unauthorized use of their intellectual property rights. They claimed that Shein created products that resembled what Chrome Hearts sells to their customers and that Shein's products bear marks that are somewhat indistinguishable to the Chrome Hearts counterparts.<sup>99</sup> The basis was that "Chrome Hearts purchased and inspected the accused products and confirmed they did not originate from Chrome Hearts or contain authentic Chrome Hearts marks."<sup>100</sup> This case was a catalyst, with other brands like H&M, as well as three independent designers, shortly after also setting Shein under fire for copyright infringement.

The problem when it intersects with the space of e-commerce is the rapid speed of infringements that it happens is exponentially increased.

*"The speed at which Shein works is said to encourage the abuses. "It happens again and again", says Quinn Jones, co-founder of earring manufacturer Kikay and one of the victims of counterfeiting on the platform. "It is on Shein to do the due diligence, because until they stop running their business this way, they are just continually hurting small businesses, people trying to support themselves." <sup>101</sup>*

As mentioned earlier, the e-commerce hubs that peaked during the pandemic faced significant issues with IP infringement, but in particular, e-commerce fast fashion brands and in house fast fashion are now counterfeiting products from SMEs to luxury brands for their own gain, which has caused a lot of issues within the scope of IP protection in the EU. Protection of IPRs since counterfeiting has entered the space posed a much more significant challenge for sustainable, small, and large luxury brands, and designers alike.

The criteria for intellectual property infringement from e-commerce based fast fashion and regular fast fashion brands are bringing increased emphasis on EU trademarks, copyrights, designs, and patents - all of which can apply

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<sup>97</sup> dev@grandiz.com, "Shein under Fire for Trademark Infringement - RetailDetail EU" (*RetailDetail EU*, June 14, 2021) <<https://www.retaildetail.eu/news/fashion/shein-under-fire-trademark-infringement/>>.

<sup>98</sup> ibid

<sup>99</sup> Trama, "Chrome Hearts vs. Shein: Trademark Infringement in the Fast-Fashion Industry" (*Trama*) <<https://www.tramatm.com/blog/category/fashion/chrome-hearts-vs-shein-trademark-infringement-in-the-fast-fashion-industry>>.

<sup>100</sup> ibid

<sup>101</sup> dev@grandiz.com, "Shein under Fire for Trademark Infringement - RetailDetail EU" (*RetailDetail EU*, June 14, 2021) <<https://www.retaildetail.eu/news/fashion/shein-under-fire-trademark-infringement/>>.

to monitor and halt infringement by e-commerce fast fashion brands producing and selling wrongfully infringed products within the EU. In the space of fast fashion and e-commerce, brands are recognizing a pattern from infringement practices and continue to halt any fast fashion brand infringing on their designs.

## 4 Criteria for Sustainability and IP Rights within Fast Fashion

### 4.1 Legal Implications of Counterfeit Goods and IP

#### 4.1.1 How Counterfeit Goods Impact The Fashion Industry

The spotlight cast on counterfeit fashion products inside the European Union as well as worldwide has significant negative impacts on intellectual property rights and sustainability efforts within the industry. Counterfeit products are products that are an invalid or unauthorized imitation of a brand's product, and they are meant to copy and represent that brand and their products usually sold at a lower cost.<sup>102</sup> Internationally, counterfeit products constitute for about 2.5% in the scope of trade at an estimated value of 461 billion USD.<sup>103</sup> And in 2020, the value for counterfeits for being sold on a global scale is 1.8 trillion USD.<sup>104</sup> However, in the EU, the situation presents itself at 5% of imports and trade within the EU, and the EU being one of the largest market sectors in the world, this presents problems.<sup>105</sup> According to Europol, one of the largest EU organizations that aims at combating counterfeiting in all industries, they state "Counterfeiting and piracy are a threat to sustainable business models based on intellectual property and patenting, because they also discourage innovation and work against the economic growth that is based in it."<sup>106</sup> The EU alone loses 16 billion EUR a year from fake fashion and cosmetics, and in particular, the fashion industry loses 12 billion EUR annually to counterfeit products and brands.<sup>107</sup> Specifically, MS Germany, France, Spain, Italy, Austria, some of

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<sup>102</sup> Fernanda Donaire Passoni Maria Elena Aldescu, "Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies." (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

<sup>103</sup> "Counterfeiting and Product Piracy | Europol" (*Europol*, March 14, 2024) <<https://www.europol.europa.eu/crime-areas/intellectual-property-crime/counterfeiting-and-product-piracy>>.

<sup>104</sup> Lg, "How Does Counterfeiting Affect Brands?" (*Potter Clarkson*, March 1, 2024) <<https://www.potterclarkson.com/insights/how-does-counterfeiting-affect-brands/>>.

<sup>105</sup> "Counterfeiting and Product Piracy | Europol" (*Europol*, March 14, 2024) <<https://www.europol.europa.eu/crime-areas/intellectual-property-crime/counterfeiting-and-product-piracy>>.

<sup>106</sup> *ibid*

<sup>107</sup> "EU Loses €16 Billion a Year to Fake Clothing, Cosmetics and Toys, EUIPO Report Finds" (*World Trademark Review*) <<https://www.worldtrademarkreview.com/article/eu-loses-eu-16-billion-year-fake-clothing-cosmetics-and-toys-euipo-report-finds>>.

which are the largest centers for fashion, lost 8 billion EUR between 2018-2021 in sales due to counterfeit products.<sup>108</sup>

As noted earlier, social media has a big impact on the advertising of these fast fashion brands, and as a result, 20% of the fashion advertised in the various social media sites like Instagram, are of fake fashion products.<sup>109</sup> The consumer market for counterfeit fashion is high, and in 2020, every MS had at least 5-20% of their consumer market indulge in buying counterfeit products.<sup>110</sup> In the digitalization of online markets and e-commerce, Gucci, Louis Vuitton, and other luxury are constantly being counterfeited with their designs for handbags and other leather goods being the most affected.<sup>111</sup> The high demand for a brand equates to an even higher chance of it being potentially counterfeited. With fast fashion on the rise, and continuing to grow, this opens the channel for counterfeit products, hence why brands like Shein and Temu are facing major criticism for counterfeiting other brands. Designers and brands establish healthy relationships with consumers by the quality and authenticity of their products, counterfeit products have the unfortunate side effect of posing a negative impact on that relationship. A study from Incopro found that 66% of consumers were ripped off after purchasing counterfeited goods and thus, it halted them from having the desire to purchase anything from the brand that the particular product was trying to copy, and 34% of consumers stated they would not buy anything from a brand if that brand was susceptible to counterfeiting online.<sup>112</sup> Consumers buy luxury products from brands for the status it upholds, but when counterfeiting impacts the way a brand operates, they face a risk of not just the consumer basis, but also at a loss for innovation. Intellectual property at its core protects designers and brands from infringement by allocating rights for their designs to be protected, but when counterfeit products impact a brand's image, it not only has the effect of consumers not buying those counterfeit products but it has the unintended cause of consumers straying away from buying actual authentic products.

*“Firms whose intellectual property rights (IPRs) are infringed are also affected by unfair competition and the sale of cheaper low-quality goods making unlawful use of their brands, resulting in lower revenues and profit*

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<sup>108</sup> “Counterfeit Goods Cost EU Industries Billions of Euros and Thousands of Jobs Annually” (EUIPO) <<https://www.euipo.europa.eu/en/news/counterfeit-goods-cost-eu-industries-billions-of-euros-and-thousands-of-jobs-annually>>.

<sup>109</sup> Us\_Mwright, “What Impact Do Counterfeits Have on the Fashion Industry?” (Red Points, September 5, 2023) <<https://www.redpoints.com/blog/fashion-counterfeit-impact/>>.

<sup>110</sup> European Union Intellectual Property Office, “Economic Impact of Counterfeiting in the Clothing, Cosmetics, and Toy Sectors in the EU” (2024) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2024\\_Clothing\\_Cosmetics\\_Toys/2024\\_Economic\\_Impact\\_of\\_counterfeiting\\_in\\_clothing\\_cosmetics\\_toys\\_FullR\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2024_Clothing_Cosmetics_Toys/2024_Economic_Impact_of_counterfeiting_in_clothing_cosmetics_toys_FullR_en.pdf)>.

<sup>111</sup> Jing Daily and Jing Daily, “These 4 Types of People Buy Fake Luxury Goods: Why Even Rich Chinese Consumers Choose Counterfeit Brands, and How to Stop Them” *South China Morning Post* (May 31, 2021) <<https://www.scmp.com/magazines/style/luxury/article/3135454/these-4-types-people-buy-fake-luxury-goods-why-even-rich>>.

<sup>112</sup> Lg, “How Does Counterfeiting Affect Brands?” (Potter Clarkson, March 1, 2024) <<https://www.potterclarkson.com/insights/how-does-counterfeiting-affect-brands/>>.

*for the legitimate owners. Even in cases where buyers of fake goods would not buy the corresponding original goods, they would be likely to buy other affordable legitimate goods; the consequences of buying counterfeit goods therefore go beyond the attacked brands to cause economic impacts on sales by any legitimate seller.”*<sup>113</sup>

Counterfeits pose many effects: As sales fall, the amount of jobs also fall, and a study conducted by the EUIPO found that between 2018-2021 found significant job losses as a result of counterfeit goods. Just within the fashion and clothing sector, over 160,000 jobs were lost.<sup>114</sup> In fact, many countries in the EU that act as producers (such as Portugal, Romania, and Poland) lost as much as 80% in employment.<sup>115</sup> Therefore, it can be inferred that widespread counterfeiting and infringement practices hinder IP innovation, which in turn hinders job growth in the industry, but there is another factor that counterfeits, and fast fashion have on: sustainability.

Fast fashion products and counterfeits do not have the same standard of quality as sustainably made and genuine products do, and can pose negative effects, like chemicals and toxic fabrics and materials, which not only damage the consumer with any effects they may have been masked with, as discussed earlier from Shein’s callout for toxic chemicals in their products but has direct impact on the environment and labor market.

#### **4.1.2 Environmental Impact and Sustainability**

It’s no secret that the environment is detrimentally impacted by the clothing industry. Greenhouse gases, carbon emissions, and water consumption are all impacting our planet, and the clothing industry is one of the biggest contending factors contributing towards those issues.<sup>116</sup> Fashion production accumulate as much as 10% of carbon emissions, and the fact that 85% of these unused textiles go to waste is daunting.<sup>117</sup> The biggest fast fashion houses all are the top contenders for the catastrophic environmental effects.

*”The time it takes for a product to go through the supply chain, from design to purchase, is called a ‘lead time’. In 2012, Zara was able to design,*

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<sup>113</sup> European Union Intellectual Property Office, “Economic Impact of Counterfeiting in the Clothing, Cosmetics, and Toy Sectors in the EU” (2024) <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2024\\_Clothing\\_Cosmetics\\_Toys/2024\\_Economic\\_Impact\\_of\\_counterfeiting\\_in\\_clothing\\_cosmetics\\_toys\\_FullR\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2024_Clothing_Cosmetics_Toys/2024_Economic_Impact_of_counterfeiting_in_clothing_cosmetics_toys_FullR_en.pdf)>.

<sup>114</sup> *ibid*

<sup>115</sup> *ibid*

<sup>116</sup> Fernanda Donaire Passoni Maria Elena Aldescu, “Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies.” (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

<sup>117</sup> Rashmila Maiti, “Fast Fashion and Its Environmental Impact in 2024 | Earth.Org” (*Earth.Org*, March 4, 2024) <<https://earth.org/fast-fashions-detrimental-effect-on-the-environment/>>.

*produce and deliver a new garment in two weeks; Forever 21 in six weeks and H&M in eight weeks. This results in the fashion industry producing obscene amounts of waste.”*<sup>118</sup>

For water consumption, the fashion industry consumes 700 gallons of water to produce one single cotton shirt and over 2000 gallons of water to produce a single pair of jeans, and the leftover dye from the clothing is polluted into rivers, lakes, and the oceans.<sup>119</sup> Followed by microplastics, a 2017 report from the International Union for Conservation of Nature found that 35% of microplastics were found in cheap clothing material like polyester or cotton, which can take up to 200 years to degrade.<sup>120</sup> On top of that, the plastic degraded in the world’s oceans is toxic, and harms marine life wherever affected.<sup>121</sup> Over 80 billion pieces of clothing are consumed, which is over a 400% increase over the last two decades, and this is largely attributed to trends and consumer habits.<sup>122</sup> Just in 2014, the average person accumulated over 60% more clothing than in previous years, and its turnover rate was nearly halved<sup>123</sup>. In 2019, it was found that 62 millions tons of clothing was accumulated and consumed worldwide, which is problematic when one considers that the average American dumps out 82 pounds, or roughly 38 kilograms of wasted clothing a year<sup>124</sup> and the average European discards 24 pounds, or about 11 kilograms of clothing.<sup>125</sup>

The accelerating rate of the growth of fast fashion has made it one of the most labor-intensive industries in the world, and as a result, outsourcing from third world countries has become a common practice, especially in countries like India, Bangladesh, Vietnam, and China.

*“The fast fashion industry employs approximately 75 million factory workers worldwide. Of those workers it is estimated that less than 2% of them make a living wage. This leads to workers living below the poverty line and the European Parliament has even described the conditions of factory workers in Asia as “slave labor”. Many garment workers are working up to 16 hours a day, 7 days a week. The textile industry also uses child labor*

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<sup>118</sup> *ibid*

<sup>119</sup> *ibid*

<sup>120</sup> *ibid*

<sup>121</sup> *ibid*

<sup>122</sup> Emma Ross, “Fast Fashion Getting Faster: A Look at the Unethical Labor Practices Sustaining a Growing Industry” (*International Law and Policy Brief*, October 28, 2021) <<https://studentbriefs.law.gwu.edu/ilpb/2021/10/28/fast-fashion-getting-faster-a-look-at-the-unethical-labor-practices-sustaining-a-growing-industry/>>.

<sup>123</sup> *ibid*

<sup>124</sup> Rashmila Maiti, “Fast Fashion and Its Environmental Impact in 2024 | Earth.Org” (*Earth.Org*, March 4, 2024) <<https://earth.org/fast-fashion-detrimental-effect-on-the-environment/>>.

<sup>125</sup> “The Impact of Textile Production and Waste on the Environment (Infographics) | Topics | European Parliament” (*Topics | European Parliament*) <<https://www.europarl.europa.eu/topics/en/article/20201208STO93327/the-impact-of-textile-production-and-waste-on-the-environment-infographics>>.

*particularly because it is often low skilled, so children can be exploited at a younger age.”*<sup>126</sup>

The dangers this poses towards the workers from the implications of fast fashion is high. For instance, the largest factory fire in modern history was a factory operated by fast fashion brands. In 2013, the Rana Plaza building due to major structural issues and overcrowding, came crashing to the ground and left over 1,100 people dead, leaving thousands more injured.<sup>127</sup> The lack of proper management of the facility and the lack of concern from the owners caused the factory to ultimately fall to its demise. Over 29 fast fashion brands operated in this particular factory, including Zara, Mango, Primark, and The Children’s Place, all major retailers in the US & Europe<sup>128</sup>, with little to no compensation given to the deceased’s family and loved ones. After this incident, inspections were done on over 1000 factories utilized by fast fashion companies, and there was over 80,000 issues within the factories and safety codes, as well as labor law violations.<sup>129</sup> Counterfeit fashion also follows a similar pattern, with equally damaging environmental and sustainable negatives. Usually, counterfeit manufacturers will prioritize cost-saving measures rather than prioritizing quality control.<sup>130</sup> However, the illegal incentives of counterfeit manufacturers pose even more challenges. Because so, the question of unemployment is ambiguous, counterfeit workers are usually subject under unauthorized and unethical behaviors and practices, as well as child labor practices are common.<sup>131</sup> Illegal trade practices are a common notion, with the products failing to meet the standards of quality. And due to COVID-19, the practices of counterfeiting through e-commerce has grown.<sup>132</sup> According to Europol, the counterfeit goods that were seized at its borders did not comply with EU safety standards, and were outsourced from outside the EU.

With current trends following, global textile productions are projected to be from 58 million tons from 2000, to 145 million tons in 2030<sup>133</sup>, carbon

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<sup>126</sup> Emma Ross, “Fast Fashion Getting Faster: A Look at the Unethical Labor Practices Sustaining a Growing Industry” (*International Law and Policy Brief*, October 28, 2021) <<https://studentbriefs.law.gwu.edu/ilpb/2021/10/28/fast-fashion-getting-faster-a-look-at-the-unethical-labor-practices-sustaining-a-growing-industry/>>.

<sup>127</sup> “Rana Plaza” (*Clean Clothes Campaign*, March 28, 2024) <<https://cleanclothes.org/campaigns/past/rana-plaza>>.

<sup>128</sup> *ibid*

<sup>129</sup> Emma Ross, “Fast Fashion Getting Faster: A Look at the Unethical Labor Practices Sustaining a Growing Industry” (*International Law and Policy Brief*, October 28, 2021) <<https://studentbriefs.law.gwu.edu/ilpb/2021/10/28/fast-fashion-getting-faster-a-look-at-the-unethical-labor-practices-sustaining-a-growing-industry/>>.

<sup>130</sup> “(26) The Sustainability Paradox: Counterfeiting’s Negative Influence on Eco-Conscious Brands | LinkedIn” (June 6, 2023) <<https://www.linkedin.com/pulse/sustainability-paradox-counterfeitings-negative-influence-harris/>>.

<sup>131</sup> *ibid*

<sup>132</sup> European Union Intellectual Property Office, “Economic Impact of Counterfeiting in the Clothing, Cosmetics, and Toy Sectors in the EU” (2024) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2024\\_Clothing\\_Cosmetics\\_Toys/2024\\_Economic\\_Impact\\_of\\_counterfeiting\\_in\\_clothing\\_cosmetics\\_toys\\_FullR\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2024_Clothing_Cosmetics_Toys/2024_Economic_Impact_of_counterfeiting_in_clothing_cosmetics_toys_FullR_en.pdf)>.

<sup>133</sup> *ibid*

emissions are aimed to also be increased by 50% by 2030.<sup>134</sup> This has numerous implications on sustainability in the future, as the environment would be more damaged and intellectual property rights would be even more difficult to protect, as discussed previously, the more implications on brand faults and counterfeit, the more likely people are to stray away from the brands, which lowers brand sales, and hinders creativity and brand growth as a whole.

*“Counterfeiting jeopardizes job opportunities within the fashion industry. As legitimate brands suffer from reduced sales and revenue, they may be compelled to downsize their workforce or restrict new employment opportunities. This not only affects the livelihoods of individuals but also hampers the growth and development of the industry as a whole.”<sup>135</sup>*

Brands operating in the European Union fashion sector is impacted by sustainability, whether it's from the brand reputation or the quality of the products the brand sells, to succeed in the future, brands in the EU need to safeguard their intellectual property rights while transitioning towards more environmentally sustainable business models and production methods.

With the escalating environmental impact of textile production, coupled with rampant counterfeiting and infringement from fast fashion that continuously violates IP rights, diminishes brand quality and reputation, all the while diverting sales from legitimate companies, this poses an existential threat to the long-term viability of the fashion sector within the EU. Addressing this multifaceted challenge will require a united effort by brands and right-holders, policymakers, and consumers to prioritize sustainability to strengthen IP protection, and foster a fair, ethical, and environmentally responsible fashion ecosystem.

## **4.2 What solutions have been placed in effort to combat Intellectual Property Infringement in the EU?**

It is empirically noted that the biggest challenges to combating IP infringement alongside sustainability and protection are social, economic, and environmental.<sup>136</sup> Fast fashion and counterfeit brands especially those stemming from e-commerce, have practices on infringing on trademarks, copyright, and designs of legitimate brands, and the sustainable implications

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<sup>134</sup> Psci, “The Impact of Fast Fashion on the Environment — PSCI” (*PSCI*, July 20, 2020) <<https://psci.princeton.edu/tips/2020/7/20/the-impact-of-fast-fashion-on-the-environment>>.

<sup>135</sup> “(26) The Sustainability Paradox: Counterfeiting’s Negative Influence on Eco-Conscious Brands | LinkedIn” (June 6, 2023) <<https://www.linkedin.com/pulse/sustainability-paradox-counterfeitings-negative-influence-harris/>>.

<sup>136</sup> Fernanda Donaire Passoni Maria Elena Aldescu, “Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies.” (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

it has on the environment and labor are detrimental, with lack of protection for employees working underneath those companies on the manufacturing end, to the overproduction of goods causing negative impacts on carbon emissions and water supplies. Despite the ongoing rapid infringement, the EU has set out legal framework to dictate intellectual property practices as well as challenging sustainability to new heights, including regulations to control trade within the EU to combat counterfeiting, and regulations with sustainability as a priority. The EU also has goals on what they want to achieve with sustainability and IPRs, most notably working towards Agenda 2030, which is a mission aimed to make sustainability global, including increased protections on both IPRs and sustainability. Also, the upfront of sustainable fashion and shopping fashion second hand or upcycling, while has been around for years, has gained recent notoriety with the positive impacts of sustainability and the potential for streamlining IPRs making it both a choice with a positive impact for consumers and brands alike.

#### **4.2.1 Legal Frameworks and Campaigns Set to Challenge Infringement**

The EU over the years has recognized the increasing urgency of these challenges and implemented a comprehensive legal framework to combat infringement from fast fashion and e-commerce who continue to plague on other brands while also counterfeiting their own products, and the EU is working on pushing towards sustainability and finding solutions to its challenges. Over 54% of fashion goods are detained at EU borders for counterfeit infringement.<sup>137</sup> To combat this, EU Regulation 608/2013 is a notable regulation for anti-piracy and anti-counterfeiting. “Such goods should, in so far as is possible, be kept off the Union market and measures should be adopted to deal with such unlawful marketing without impeding legitimate trade.”<sup>138</sup> This replaced the EC 1383/2003, to which the newer regulation expands on these rights to covers other sectors, including fashion. This also allowed a more straightforward allowance for destroying counterfeit goods from entering the market without a court order and gave more power to brands and right-holders<sup>139</sup> The regulation aims at enforcing IPRs at the EU’s borders to create supervision for potential counterfeit goods when importing or exporting trade in or out of the EU.

Border control utilizes data from brands via an application called the Application for Action (AFA) that brands and right-holders can submit a trademark, design, patent, copyright, geographical indication, and any other information border control might need.<sup>140</sup> Depending on the kind of protection needed, a national application applying for only one MS or a

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<sup>137</sup> “Null” (*European Commission - European Commission*, April 19, 2013) <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_13\\_346](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_346)>.

<sup>138</sup> “Regulation - 608/2013 - EN - EUR-LEX” <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32013R0608>>.

<sup>139</sup> *ibid*

<sup>140</sup> *ibid*



union application applying for all EU MS can be filled out. This in turn allows border control utilizing the information from the AFA to effectively map out which products through careful analysis of the products imported and if any suspicious ones are found, they can send samples to the right holders to analyze further if they are found for any kind of infringement of that particular IPR.<sup>141</sup> Furthermore, the European Commission (EC) has instilled the Counterfeit and Anti-Piracy Information System (COPIS) to facilitate information in IPR protection relating to AFAs and any noted cases on infringement discovered.<sup>142</sup> Fortunately, post-pandemic, the use of AFAs and the information systems circulating them have been online, making it more effective for brands and customs to access with minimal paperwork needed, which saves time that can be allocated to more management of product control.<sup>143</sup> In 2019, the EU border customs seized counterfeit and other harmful goods worth almost 760 million EUR, with counterfeited clothing making about 5% of the total cost<sup>144</sup>, with more seizures and detentions of products increasing every year.

Furthermore, the EU has established procedures in cooperation with law enforcement agencies, online counterfeit sales monitoring, public awareness campaigns, and international cooperation efforts to combat IP infringement and diminishing the growth of fast fashion and counterfeiting effectively. Through programs and public campaigns, the push for protecting IPRs and promoting sustainability has been a priority for the EU.<sup>145</sup>

### **4.3 How IPRs and Sustainability can Co-Exist**

#### **4.3.1 Legal Frameworks and Campaigns Set to Challenge Infringement**

The push for sustainability has always been a goal the EU has aimed for. And to weed out fast fashion, Members of the European Parliament (MEPs) as well as MS banned the destruction of unsold clothes and footwear earlier in 2023, While the ban will only effect major brands after 2 years and SMEs after 6 years, it's a start for brands to be sustainable. MEP Alessandra Moretti states:

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<sup>141</sup> *ibid*

<sup>142</sup> “Defend Your Rights” (*Taxation and Customs Union*) <[https://taxation-customs.ec.europa.eu/customs-4/prohibitions-and-restrictions/counterfeit-piracy-and-other-ipr-violations/defend-your-rights\\_en](https://taxation-customs.ec.europa.eu/customs-4/prohibitions-and-restrictions/counterfeit-piracy-and-other-ipr-violations/defend-your-rights_en)>.

<sup>143</sup> “Post-Brexit UK (and EU) AFA Recordal Process” <<https://www.marks-clerk.com/insights/articles/post-brexit-uk-and-eu-afa-recordal-process/>>.

<sup>144</sup> “EU Customs Stopped Fake and Potentially Dangerous Goods Worth Nearly €760 Million in 2019 | NJORD Law Firm” (*NJORD Law Firm*) <<https://www.njordlaw.com/eu-customs-stopped-fake-and-potentially-dangerous-goods-worth-nearly-eu760-million-2019>>.

<sup>145</sup> *ibid*

*"It is time to end the model of 'take, make, dispose' that is so harmful to our planet, our health and our economy."* <sup>146</sup>

Moreover, the European Parliament (EP) is adopting regulations for the EU to halt the consumption of fast fashion and greenwashing, which is one of the biggest deceptions fast fashion brands utilize to mask the reality of their ongoings for consumer approval. The EP defines greenwashing as "The practice of giving a false impression of the environmental impact or benefits of a product, which can mislead consumers." <sup>147</sup> Companies like H&M, Zara, and Nike all use greenwashing tactics to give a false hope of impression to their consumers that they are being ethical, when they aren't. An example of which can be derived from H&M's "Conscious" collection. Launched in 2011, the items were promoted to have "50% sustainable materials" and wanting to aim towards exclusively using recycled materials by 2030. <sup>148</sup> However, the reality is that H&M is still very much operating in the typical fast fashion method.

*"Promoting recycling and encouraging consumers to do the same cannot make up for the 3 billion garments the company produces on a yearly basis. Many also criticize its sustainability claims to be vague and greenwashing, highlighting the lack of transparency in regards to reducing its environmental impact and carbon emissions throughout the supply chain."* <sup>149</sup>

So many more brands are operating in the same way, which is why transparency of sustainability needs to be clearly noted. That is why under new EU law, extended and more strict criteria for fast fashion being sustainable are implemented including but not limited to the following <sup>150</sup>:

1. Environmental claims need proof.
2. If a product is repairable, it must be proven.
3. Labels on sustainability need to be approved by an authority figure.
4. If a product claims to have emission reductions, it needs to be verified.

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<sup>146</sup> Martina Igini, "5 Fast-Fashion Brands Called out for Greenwashing" (*Earth.Org*, March 4, 2024) <<https://earth.org/fast-fashion-brands-greenwashing/>>.

<sup>147</sup> "Stopping Greenwashing: How the EU Regulates Green Claims | Topics | European Parliament" (*Topics | European Parliament*) <<https://www.europarl.europa.eu/topics/en/article/20240111STO16722/stopping-greenwashing-how-the-eu-regulates-green-claims>>.

<sup>148</sup> Martina Igini, "5 Fast-Fashion Brands Called out for Greenwashing" (*Earth.Org*, March 4, 2024) <<https://earth.org/fast-fashion-brands-greenwashing/>>.

<sup>149</sup> *ibid*

<sup>150</sup> Advertising Standards Authority | Committee of Advertising Practice, "11 Environmental Claims" (*ASA | CAP*) <[https://www.asa.org.uk/type/non\\_broadcast/code\\_section/11.html](https://www.asa.org.uk/type/non_broadcast/code_section/11.html)>.

This can also impact supply chains as if the destruction of goods is banned, brands are possibly going to have to think of new ways to utilize their unused or unsold fashion products and the model that many fast fashion brands operate on might shift in a different, more sustainable direction.<sup>151</sup>

Sustainability as its core is not just a legal issue, but the intersectionality of economic and social issues as well, which is why several legal frameworks aim to promote sustainable practices in fashion, including the EU Forced Labour Regulation and Guide, which bans products made from forced labor, EU Product Environmental Footprint Guide, which aims to measure the environmental emissions brought on by fast fashion and reduces poor sustainable practices, as well as the EU Eco-design for Sustainable Products Regulation, which prompts brands to design their products for durability, which can reduce consumption and promote circularity, and these regulation is a particular regulation that has been enacted in various other ways.<sup>152</sup> None of these regulations are exclusively for a legal issue, but rather they exist to combat other issues aside from legality, like environmental and social ones.

#### **4.3.2 Legal Frameworks and Campaigns Set to Challenge Sustainability with IPRs**

As stated previously, AFAs are aimed to help brands protect their IPRs, however they largely benefit larger brands as many SMEs are limited in their resources on how they can go about protecting their IPRs.<sup>153</sup> However, this wasn't exclusive to brands, the EU tapped into consumers to bring awareness directly to those buying the product.

The EC has jumpstarted many campaigns to mitigate infringement and to protect SMEs, which make up the majority of all EU businesses. They launched the Stop Fakes Campaign in 2012 which “raise consumer awareness about the dangers of fake goods and to promote closer cooperation between the Commission, national authorities, industry and consumers.”<sup>154</sup> Counterfeit fashion has also proven to have unsafe chemicals, which is how the EU legislated REACH, which mandates all chemicals to be tested in EU and to prevent harm to consumers inside its borders.<sup>155</sup> In the fashion sector, one of the most important campaigns to date has been the EU Programme for the Competitiveness of Enterprises and

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<sup>151</sup> Bella Webb, “The EU Is Taking on Fashion’s Open Secret: Destroying Unsold Goods” *Vogue Business* (December 7, 2023) <<https://www.voguebusiness.com/story/sustainability/the-eu-is-taking-on-fashion-s-open-secret-destroying-unsold-goods>>.

<sup>152</sup> “12 Key Sets of Legislation Affecting the Fashion Industry in the EU, US, and UK | TDI Sustainability” <<https://www.tdi-sustainability.com/12-key-sets-of-legislation-affecting-the-fashion-industry-in-the-eu-us-and-uk/>>.

<sup>153</sup> “EU Support” (*Internal Market, Industry, Entrepreneurship and SMEs*) <[https://single-market-economy.ec.europa.eu/sectors/textiles-ecosystem/fashion-and-high-end-industries/eu-support\\_en](https://single-market-economy.ec.europa.eu/sectors/textiles-ecosystem/fashion-and-high-end-industries/eu-support_en)>.

<sup>154</sup> *ibid*

<sup>155</sup> “Null” (*European Commission - European Commission*, April 19, 2013) <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_13\\_346](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_346)>.

Small and Medium-sized Enterprises (COSME) which provides access to allocated resources aimed at aiding smaller brands through the creation of the brand, expansion of the brand, and business transfer into the market.<sup>156</sup> However, COSME went further to push for a call for sustainable and reciprocal fashion, with the goal for improving the environment and facilitate competition within fashion. As a result, the European Innovation Council and SMEs Executive Agency (EISMEA) funded 4 projects in 2021 with the help from 15 MS.<sup>157</sup> These projects ranged from helping SMEs to introduce sustainable methods to generate a reciprocal fashion economy, to promoting SMEs' innovations for sustainable methods. And these programs help SMEs ultimately seek protections from infringement from other brands with avid financial and logistical help.

Having said that, a circular economy for fashion might be just the thing to be able to promote sustainability, where secondhand fashion and up cycling can seek a second life. Several EU regulations are present to promote a circular economy, and a particular advent of reciprocity is sustainable fashion practices, notably upcycling and second-hand, but second hand and upcycled fashion can potentially also have an impact on IPRs.

#### **4.4 Upcycling, Second-hand, and The Impact of Greener Practices on Shopping**

Intellectual property practices were not created with sustainability in mind, but as the growing issue for sustainability increases and the amount of infringement in fashion is growing, the lines for IPRs and sustainability. As stated previously, sustainability is not exclusively a legal issue, and the goals for sustainability should be addressing the environmental and economic impact of fast fashion too.

*“It should be recognized that in order to achieve a global goal, it is necessary to adhere to idealistic views, sometimes giving up tempting commercial benefits. Advocates of reducing the environmental consequences of fast fashion suggest various solutions: favoring slow fashion, increasing consumers’ awareness and willingness to change their attitudes, and strengthening IP protection of fashion design.”<sup>158</sup>*

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<sup>156</sup> “COSME” (*Internal Market, Industry, Entrepreneurship and SMEs*) <[https://single-market-economy.ec.europa.eu/smes/cosme\\_en](https://single-market-economy.ec.europa.eu/smes/cosme_en)>.

<sup>157</sup> “Four COSME Projects Help to Make Fashion More Sustainable” <<https://clustercollaboration.eu/content/four-cosme-projects-help-make-fashion-more-sustainable>>.

<sup>158</sup> Irene Calboli, “Pushing a Square Pin into a Round Hole? Intellectual Property Challenges to a Sustainable and Circular Economy, and What to Do About It” (2024) 55 *Deleted Journal* 237 <<https://link.springer.com/article/10.1007/s40319-024-01431-1>>.

In her article writing about a proposed harmonization towards sustainability with IP and fashion globally, Tarverdi states that intellectual property is needed to avoid threats of sustainability and human rights, and in the case of fast fashion, neither of those things are a key factor they take into account.<sup>159</sup> However, an advent of upcycling and second-hand fashion has created new waves for IP to be streamlined, as well as promoting sustainable practices.

Reflected in the EU Strategies for Sustainable and Circular Textiles, the strategy is to make clothing and textiles more durable, repairable, reusable, and recyclable.<sup>160</sup> Luxury brands, in particular, are highly known for the exceptional quality in their products, which is why consumers have trust in what they sell. With destruction of unused textiles on the prospect of being banned in the EU, the shift towards second-hand is growing stronger.

#### 4.4.1 Second-Hand Shopping

Aside from fast fashion and online e-commerce based fast fashion, consumers were also seeking out affordable and sustainable methods of shopping. And a growing understanding of climate change was shown after the pandemic, with 70% of consumers urging a need for the fashion industry to take a role in addressing and combatting climate change.<sup>161</sup> Even through social media, sustainable fashion trends have increased. “Driven by an interest in sustainability, numerous fashion brands actively utilize social media as a medium to communicate sustainability information and/or develop a conscientious brand image”<sup>162</sup> which has been seen with fast fashion over the years, but rapid infringement and sustainable concerns stray consumers away into a different direction.<sup>163</sup>

Consumers also want to play a part in aiding at environmental protection, striving to uniqueness. Several social medias, YouTube, Instagram, all have content on sustainable shopping and secondhand shopping. A popular YouTuber with a platform of over 3 million subscribers, BestDressed, known as Ashley, uploads a plethora of videos on thrift hauls, vintage

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<sup>159</sup> Leyla Tarverdi, “Protecting Fashion Design: A Comparative Legal Approach and an Environmental Justification” [2021] Social Science Research Network <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4052286](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4052286)>.

<sup>160</sup> Fernanda Donaire Passoni Maria Elena Aldescu, “Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies.” (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

<sup>161</sup> *ibid*

<sup>162</sup> Li Zhao and others, “The Use of Social Media to Promote Sustainable Fashion and Benefit Communications: A Data-Mining Approach” (2022) 14 Sustainability 1178 <<https://www.mdpi.com/2071-1050/14/3/1178>>.

<sup>163</sup> Fernanda Donaire Passoni Maria Elena Aldescu, “Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies.” (*4iP Council*, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

fashion, and shopping sustainably. However, she does this in replicating her own style and uniqueness, something so many other consumers are trying to achieve. Many other influencers have followed the same direction of influencing for sustainable shopping, which has impacted audiences to make it a goal for uniqueness and originality has always been a goal for consumers to strive for in their shopping choices while aiding at environmental protection.<sup>164</sup> Despite the fact secondhand shopping is not new, it has grown in popularity due to the growth of e-commerce markets.<sup>165</sup> In 2020, during the pandemic, Google and Lyst saw 37% of search data saw sustainable fashion related content being researched, and 74% of millennials and 62% of Gen Z are willing to pay more for sustainable clothing.<sup>166</sup> On top of that, many consumers see designer products as investments, amplifying the need to obtain it more, seen as with luxury brands like Hermes, who sell the Birkin bag, one of the rarest and sought after bags in the world.<sup>167</sup> This all opened up waves for resale sites, such as TheRealReal, a luxury consignment site to take flight.<sup>168</sup>

*“An important part of the marketing strategy of online luxury second hand marketplaces, such as Vestiaire Collective or TheRealReal, is to offer a shopping experience that exhibits an aura of exclusivity, adapted to the specific expectations of customers in the context of online shopping (e.g., allowing them to find similar products to the ones they already bought/viewed)”<sup>169</sup>*

And it just might bring positives for sustainability. According to a report by ThredUp, another second-hand e-commerce retailer, states that purchasing one used item can eliminate up to 6 pounds of CO2 emissions.<sup>170</sup> Second hand shopping can also make luxury products more accessible to budget conscious shoppers, largely because second-hand products are lower in price, usually at a 30% to 70% discount in some sites<sup>171</sup>, as a result, consumers can acquire higher quality clothes at a lower price point than retail price. Brands in the fashion industry is becoming more aware of the environmental impacts of fashion, and with this newfound field to enter to, are taking new ways of selling their clothing. Patagonia, a sustainable brand on outdoors wear, has a “Worn Wear” line that is built on sustainability. On

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<sup>164</sup> ibid

<sup>165</sup> Irene Calboli, “Pushing a Square Pin into a Round Hole? Intellectual Property Challenges to a Sustainable and Circular Economy, and What to Do About It” (2024) 55 Deleted Journal 237 <<https://link.springer.com/article/10.1007/s40319-024-01431-1>>.

<sup>166</sup> “Sustainability Trends and IP Issues for Fashion Brands” (Perkins Coie) <<https://www.perkinscoie.com/en/news-insights/sustainability-trends-and-ip-issues-for-fashion-brands.html>>.

<sup>167</sup> Fernanda Donaire Passoni Maria Elena Aldescu, “Fashion, Intellectual Property (IP) & Sustainability - Best Practices, Interactions and Strategies.” (4iP Council, October 30, 2023) <<https://www.4ipcouncil.com/research/fashion-intellectual-property-ip-and-sustainability-best-practices-interactions-and-strategies>>.

<sup>168</sup> ibid

<sup>169</sup> ibid

<sup>170</sup> “(25) The Benefits of Buying and Reusing Secondhand Clothes | LinkedIn” (February 19, 2023) <[https://www.linkedin.com/pulse/benefits-buying-reusing-secondhand-clothes-dr-glenn-hole-ph-d-/->](https://www.linkedin.com/pulse/benefits-buying-reusing-secondhand-clothes-dr-glenn-hole-ph-d-/).

<sup>171</sup> ibid

their website, they state “Worn Wear allows you to trade in and buy used Patagonia® gear. 85% of clothing ends up in landfills or gets incinerated. \* One of the best things we can do for the planet is keep stuff in use longer and reduce our overall consumption.”<sup>172</sup> Other brands, like Levi’s and Lululemon, also have a similar program with their brand<sup>173</sup>, and luxury brands are also entering the secondhand sector, with brands like Gucci, Burberry, and Chanel entering sites like TheRealReal.<sup>174</sup>

Naturally, with brands entering the second-hand space, an emphasis on IP protection is needed. With second-hand shopping, while cases of counterfeiting can happen. Most luxury resale sights have authentication services that verifies if the item is legit or counterfeit, but as seen with TheRealReal, sold a fake \$3,600 Christian Dior bag to a customer.<sup>175</sup> Authentication services can verify the bag is an original creation for the brand, and all associated IPRs are tied with that product, but sometimes a fault can slip through the cracks. The relationship between IP and a circular economy co-existing can bring challenges, and companies involved in reselling IP protected products can run into EU-wide or national trouble in a MS.<sup>176</sup> The CJEU discovered that IP owners objected to the resale of genuine products when they were sold through third party sites, largely because it could undermine the appeal of the luxury that the brand strives to epitomize.<sup>177</sup>

#### 4.4.2 Upcycling

However, the bigger challenge with sustainable shopping is with upcycling. Upcycling can be defined as remaking or restyling a article of clothing or accessory, made from scraps of fabric or other unused materials.<sup>178</sup> Originally utilized by smaller scale designers and brands, luxury brands took to upcycling to promote the brand’s sustainability. For example, louis Vuitton’s 2021 presentation showcased a line of sneakers that were upcycled from the 2019 collection.<sup>179</sup> However, while upcycling can pose to have sustainable positives just like second-hand shopping, the realm of IPRs are blurred.

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<sup>172</sup> Patagonia Worn Wear, “Used Patagonia® Clothing & Gear | Worn Wear” (*Patagonia Worn Wear*) <<https://wornwear.patagonia.com/>>.

<sup>173</sup> “Sustainability Trends and IP Issues for Fashion Brands” (*Perkins Coie*) <<https://www.perkinscoie.com/en/news-insights/sustainability-trends-and-ip-issues-for-fashion-brands.html>>.

<sup>174</sup> *ibid*

<sup>175</sup> *ibid*

<sup>176</sup> Irene Calboli, “Pushing a Square Pin into a Round Hole? Intellectual Property Challenges to a Sustainable and Circular Economy, and What to Do About It” (2024) 55 *Deleted Journal* 237 <<https://link.springer.com/article/10.1007/s40319-024-01431-1>>.

<sup>177</sup> *ibid*

<sup>178</sup> Sustainability Trends and IP Issues for Fashion Brands” (*Perkins Coie*) <<https://www.perkinscoie.com/en/news-insights/sustainability-trends-and-ip-issues-for-fashion-brands.html>>.

<sup>179</sup> *ibid*

*“In practical terms, this indicates that repurposed products containing materials adorned with logos and other trademarks may indeed be subject to trademark infringement claims if they can be distinguished from the original products on a substantial level. Even if the original product is employed with certain enhancements, such as the addition of fringes to a handbag, the repurposed product may still be viewed as materially distinct from the original, which may raise trademark infringement concerns.”*<sup>180</sup>

Upcycling can potentially be infringing on IPRs depending on the piece itself. For instance, when textiles utilize original patterns or original designs, and the upcycled product negatively affects the original work, it could likely be infringing on trademark or copyright. In the case of Louis Vuitton S.A.S. vs Sandra Ling Designs, the latter utilized pre-owned Louis Vuitton goods into her creation of her new products, but by adding her own embellishments, Louis Vuitton argued that the first sale doctrine, which is defined as once a product with a trademark has been purchased, it cannot be resold into the market.<sup>181</sup> However, the two parties came to a deal of Sandra Ling owing Louis Vuitton 603,000 USD.

It is important to consider intellectual property rights in these matters, and with e-commerce into the scene, it insinuates challenges for brands to be able to protect their IPRs entering the secondhand market. For upcycled pieces, even if the upcycled ones differ, the Courts may likely view that trademark as equivalent to the original, which may be grounds for infringement.<sup>182</sup> The EUTMR must be consulted, and it states that infringement can occur under double identify in Article 9(2)<sup>183</sup>, and there could potentially be trademark infringement if the two pieces are found to be similar<sup>184</sup>. If a part of a Chanel blazer which is adorning the double C logo is attached to an upcycled pair of trousers, the double identity clause can be a factor, even if they are not blazers.<sup>185</sup> However, there is no direct case law yet applicable towards upcycling infringement from the CJEU, so the line of IPR infringement and upcycled clothing is ambiguous.

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<sup>180</sup> Drsika Bhutani, “Fashion Thrifting and the Intellectual Property Rights Landscape” (*Lexology*, April 26, 2024) <<https://www.lexology.com/library/detail.aspx?g=d2c0a6de-f0d0-400a-8425-eea0659f9d5a>>.

<sup>181</sup> *ibid*

<sup>182</sup> *ibid*

<sup>183</sup> *ibid*

<sup>184</sup> *ibid*

<sup>185</sup> *ibid*



## 5 Conclusion

The fashion industry is constantly evolving. Fast fashion and e-commerce sectors present significant challenges to the protection and enforcement of IPRs. Driven by the need to rapidly produce and distribute trendy clothing, often infringing on IPRs of established fashion houses, fast fashion and the e-commerce boom has exacerbated this issue, making it easier for counterfeit and infringing products to be purchased by consumers. This infringement not only undermines the creative efforts of original designers but also leads to significant economic losses for sustainable and designer brands. The legal framework set in the EU for IPR in the fashion industry is convoluted and while the EUTMR and other legal frameworks provide some protection, the enforcements of such IPRs remains a challenge. Counterfeiting also is another significant issue linked to fast fashion. Not only infringing on IPRs but also imposes major safety risks to consumers and the illegal nature of counterfeit manufacturers poses dangers to those workers. Moreover, the challenge of sustainability in the fast fashion industry is a problem. The environmental impact of fast fashion has significant contributions to carbon emissions, water consumption, and waste. The production of which often involve harmful chemicals which can impact the consumers in a negative way, as seen with brands like Shein, who constantly perform below the bar for sustainability practices. Also, the labor practices in the fast fashion industry are equally concerning. The reliance on cheap labor in developing countries often leads to exploitative, unsafe working environments, as seen with the Rana Plaza collapse in 2013.

The practices of greenwashing where brands falsely claim being environmentally conscious further complicate things. Legal implications for greenwashing are changing, but it is clear that more emphasis on enforcement are needed to hold brands accountable, and so to address these challenges, the fashion industry must adopt more sustainable practices. From a legal perspective, there is a need for more of an emphasis on regulations to protect IPRs in the fashion industry. This includes clearer guidelines on upcycling and the use of trademarks in second-hand products. There is already issues of consumer confusion between brands and counterfeit ones, and it makes consumers not want to support that brand that was ripped off out of loss of trust. Harmonization of these regulations are necessary to effectively combat counterfeiting and IPR infringement in the global market. The fashion sector faces challenges within the protection of IPRs and sustainability in the fashion industry. Addressing these challenges requires a multifaceted approach, involving stricter regulations, better enforcement, and increased consumer awareness on the effects of sustainability from fast fashion.

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