

# In E-Commerce Era: Cracking Infringement Issues in the Clothing Industry by Design Patents

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**Keywords:** Design Patents, Clothing Industry, Electronic Commercial Platforms, Infringement.

**Abstract:** Rights holders and consumers have been negatively impacted by infringement issues in the clothing field as e-commerce explodes in recent decades with imitations. The paper studies how design patents can crack infringement issues with its best efficiency. Although there are copyright law and patent law safeguarding these legal issues, copyright law has its threshold for clothing, which creates a significant loophole for plagiarism. This makes researching design patents a better way for right holders to defend their designs. Unfortunately, application time for design patents is too long for clothing industry as clothing cycle lasts approximately four months, while application process normally undergoes six to eight months. The application progress makes designers to uphold their rights difficult, therefore, shortening time cycle is the priority. Furthermore, authorities can reference ways such as concept of unregistered designs and combination of design patents and other rights, protecting the same design with different rights simultaneously.

## 1 INTRODUCTION

Despite the existence of the fake fashion phenomenon for 150 years, the contemporary counterfeit fashion industry including clothes has transformed into an unparalleled force, surpassing any previous era and exerting a significant negative impact on both genuine fashion brands and customers (Araujo, 2024). Additionally, the appearance of electronic commerce provides counterfeit fashion products a global platform to a wider audience (Araujo, 2024). Technically, both copyrights and design patents are able to deal with the infringement problems in the clothing industry, in China, anti-unfair competition law and trademarks can also play a significant role in tackling infringement problems. It appears that the most logical and ideal path for designers to protect their "original works of authorship fixed in any tangible medium of expression" is through receiving copyright protection. However, in most regions, including America and China, copyrights only protect clothing being separable from the useful article instead of protecting it as a whole, meaning if the design on a piece of clothing is in any way functional or useful, it cannot be protected by copyrights. In other words, only the two-dimensional design on a clothing item is protectable if it is an original work of authorship. This regulation causes a legal loophole

used by plagiarists, claiming they are using three-dimensional designs or referencing the design in question yet not copyrighted drawings (Li, 2021). In that case, it is crucial to discuss design patents as another alternative solution to crack such difficulties in the clothing industry and according to Chinese patent law, article 42, once applied, people of interest can have this right for 15 years. This article will first explain the legal loophole copyright exists specifically, then delve into reasons to research design patents, legal problems design patents have and the dilemma designers face as right holders, and finally present some of the legal improvements that can be referenced by Chinese authorities and researchers.

## 2 PROBLEMS AND REASONS

### 2.1 Legal Loophole in Copyrights

Chinese courts tend to hold the position that the reproduction of clothing design does not reflect in the reproduction of aesthetic art, therefore it is not a reproduction within the meaning of copyright law, while the reproduction of clothing samples constitutes the concept of the reproduction in the copyright law (Yi, 2021). However, for the

reproduction of clothing samples, there is a limitation that only clothing whose practicality and artistry can be independent of each other can be safeguarded by copyrights as a work of art, leading to a situation that not all the clothing is included in the copyright law (Yi, 2021). Lawyers and professionals may suggest designers to protect their clothing designs by splitting them into constituent elements if elements in clothing are original, which may also achieve the effect of preserving their rights (Li, 2021). Still, there are some problems with this method, for instance, the patentable components of fashion design (i.e. zippers, buttons, etc.) are minimal, meaning some of the components are not able to be protected (Mills, 2009). In 2020, the Beijing intellectual property court judged a case, LINC Chic company sued Bosideng company, claiming the latter company infringed on their clothes, while the court suggested and finally convinced Bosideng company did not infringe LINC Chic's clothes, as the court said: Whether it is the hat design, pocket zip design, slanted pockets with graphics and logos under the right pocket or the dovetail design, zip design and pocket design, they are all the usual designs and combinations commonly used in garments, which could not be protected by copyrights (People's Court of Xicheng District, Beijing, 2018; Beijing Intellectual Property Court, 2020). Moreover, in this case, the court also mentioned that the artistic beauty of a garment on clothes cannot be separated from its functionality (People's Court of Xicheng District, Beijing, 2018; Beijing Intellectual Property Court, 2020). In judicial practice, courts hardly identify the judgement of originality, the judgement of 'contact plus substantial similarity' and define copying (Li and Ren, 2021). The defects of using copyrights as a legal weapon to protect designs are unfriendly to the clothing industry and cause designers to find it hard to defend their designs as safeguarding rights consumes a large amount of time and money, yet may eventually turn to failure.

## 2.2 Reasons times Explore Design Patents

Despite professions argue existing copyrights, design patents and other relevant laws are enough to tackle the infringement problems, however, firstly, the safeguarding path through copyrights is not straightforward and simple, rather than acquiring rights to an entire garment, image, or "look", designers must compartmentalize a piece of fashion into its functional, also consuming countless efforts yet may without a successful result (Mills, 2009). Moreover,

using the trademark as a protection also has a flaw and risk. In 2017, Gucci, a worldwide known luxury brand, sued Forever 21, a fast fashion company, claiming this fast fashion company has infringed their trademarks, which consist of three bands of specific depictions of green-red-green and blue-red-blue color combinations. However, Forever 21 soon required the court to cancel Gucci's exclusive trademarks registration, which led to the trail complicated and had potential risks for their exclusive registered trademarks (United States District Court Central District of California, Western Division, 2018). Not only the trail Gucci in America, but also other brands face this type of risk for different reasons as trademarks can be withdrawn, making trademarks not a capable weapon to protect designs. For example, in 2013, the authority in the United Kingdom revoked Gucci's GG trademark after nearly 20 years on the United Kingdom register (Worldip, 2018). In the same year, The China Trade Mark Office (CTMO) has canceled Burberry's trademark on its signature tartan pattern the mark on non-use grounds (Worldip, 2018). Additionally, once applicators are succeeded in getting their clothes a design patent, then dealing with infringement problems would be easier and more straight-forward, as design patents are different from copyrights in that an accused infringer has no defense of independent creation, as well as the whole clothes, would be protected instead of a part of clothes or art of work with originality in two dimensions (Locke, 2005).

## 3 IMPERFECTION OF DESIGN PATENTS

The main condition for registration of design patents is absolute novelty. Absolute novelty means the design must not be disclosed in any form prior to registration (Tarverdi, 2022). However, there is a huge legal imperfection design patents face, which is the application time are too long for seasonal clothing industry. It can take six to eight months for an application to be processed, making design patents a vase because a clothing cycle is around four months and this delay makes design patents ineffective to right holders in the clothing industry (Tarverdi, 2022). The delay affects the right holders of the patent exclusive, facing the risk of copying and imitation, moreover, the electronic commercial platforms have contributed to these such chaos on a large scale.

## 4 DILEMMA DESIGNERS FACE

With clothing trends constantly evolving and changing, fast fashion companies like Shein have taken the world by providing customers with cheap clothing that will show up on their doorsteps in days, not to mention this type of corporation has its own electronic commercial platforms or prominent presence on TikTok, Instagram and other large social media, through influencers, marketing and advertising, which even offers more convenience to their members (Gardner, 2024). However, this situation sacrifices independent fashion designers, whether big and small, having them face an ongoing challenge: ideas and designs stolen which are then directly or indirectly replicated by international companies for a fraction of the price (Gardner, 2024). Moreover, many designers are unable to fund the cost of litigation against fast fashion brands who have virtually unlimited resources and even ‘budget a set amount of money each year to pay settlements’ (Palladinetti, 2023).

To electronic commercial platforms, the official administration transfers part of its power to these platforms, hoping they can play a monitoring role in digital markets and easing the infringement problems, and eventually protects the intellectual property rights (Wang and Yang, 2022). It seems a good mechanism for the protection of intellectual property rights and right holders, however, in the process of specific implementation, while making the electronic commercial platforms bear too many obligations, the lack of necessary professional assistance from administrative organs also affected the enthusiasm of the platform to safeguard its rights (Wang and Yang, 2022). On the other hand, the e-commerce platform is essentially a commercial subject, pursuing profits is its ultimate goal, fairness and justice are not the value orientation of the platform, and it is easy to abuse private rights in the process of exercising power (Wang and Yang, 2022). In such conditions, the rights supposed belonging to designers are not well-protected and subjects of tort are also likely to argue based on some legal loopholes, while electronic platforms do not clearly judge these legal problems as they are not essential law enforcement.

## 5 SOLUTIONS

First of all, the prior solution is shortening the application time, while balancing the review quality, so that the design patents can be an effective right in

the seasonal clothing industry. Secondly, the European Union implemented a new, unique design right covering unregistered designs, which is a design that could be protected automatically without registration for three years since it was disclosed to the public and has presented the world with a way to protect right holders better, as well as in the UK (Witzburg, 2017). Chinese patent law has a similar regulation, in article 24, it says in some of the conditions the invention does not lose its novelty in six months, however, conditions do not include such as a disclosure taking place on the catwalk or in-store and publication in magazines or trade journals, which is not a beneficial and relevant provision to clothing industry. The British label Karen Millen initiated legal proceedings against Dunnes Stores in January 2007 based on an unregistered Community design right in its apparel, and sought an injunction and monetary compensation from the Irish High Court. Then Dunnes Stores subsequently appealed to the Irish Supreme Court, which stayed the proceedings and referred two questions to the Court of Justice of the European Union, which ultimately determined that (1) for the purposes of individual character, the overall impression a design produces on a user must be different from that produced by a design or designs taken individually, and (2) the right holder does not need to prove the individual character of the unregistered EU design in the infringement action; the right holder need merely indicate the features giving rise to the individual character of the design (Cassidy and Hing, 2015; Monroig and Woods, 2015). The decision provides designers with greater assurance that their distinctive designs are eligible for unregistered design protection and reduces the likelihood of an infringer successfully contesting a design's validity based on the existence of distinct elements of prior designs (Ladas and Parry, 2014). This way may compensate the problem about applying time in design patent, which is a worthy regulation to be referenced.

In France, which is known as the ‘capital of fashion’, in order to avoid the uncertainty of the application of the law, the French copyright law specifically states that all industrial designs, enjoy the protection of both industrial property law and copyright law at the same time, that is, the implementation of dual protection mode. Like France, Germany also adopts a dual protection model, with the subtle difference that Germany only grants copyright protection to clothing that is highly artistic and achieves a certain degree of aesthetics (Li and Ren, 2021). The combination of design patents and other rights also gives the authority a different and

whole new perspective to protect right holders more. Additionally, only when problems about rights belonging solved as improving design patents is an advanced progress and helping rights belonging be tackled, electronic commercial platforms could be a useful cooperative part, supervising the infringement problems with the authority, assisting right holders to protect their clothes, to be a machine to solve the dilemma designers face.

## 6 CONCLUSION

In conclusion, the fashion industry, especially in the clothing industry which this article discusses, as it has a massive market and global impact, not to mention the assistance of electronic commercial platforms with technology, demands comprehensive legal frameworks to protect rights holders and their clothes. The design patents used to be neglected as it is not as effective as copyrights, however, if its biggest imperfection could be improved or even solved in the future, then it would be a significant tool to crack the difficulties of infringement. Therefore, authorities and professionals must do more research in design patents and refer to more effective concepts that have appeared in other countries or are not offered in the world yet can be a superior idea to tackle existing problems. Moreover, as infringement problems in the clothing industry are an international issue with the digital platforms upgraded and connections between countries deepen, as well as the developments of Chinese companies such as Shein, there must be international awareness of the need for protecting intellectual property rights in fashion, creating international mechanisms that allow for global protection.

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