

**Piracy, Intellectual Property Law and the Fashion Industry in
Thailand**

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Abstract

The impact of fashion piracy upon the global fashion industry is still under debate and raises many important questions. Some commentators think that piracy may gradually reduce the creativity of designers, and yet other commentators think that it can have a positive effect on the industry and increase levels of creativity.

Fashion piracy in Thailand is viewed by the Thai government as a major problem and obstacle that prevents investment in fashion in Thailand. It also affects international trade¹ relationships. The gradual enforcement of Intellectual property protection for the fashion industry should therefore be increased to help the industry survive and grow sustainably. However, there is an equally strong counter-argument that the fashion piracy industry may also increase levels of employment and develop essential skills in Thailand. Although Thailand is a developing country, its fashion industry is becoming one of its main industries both in terms of new Thai brands and also as a manufacturer of established global brands.² Thus, the appropriate level of Intellectual property and its enforcement is the thin line to be considered, and it may affect both the fashion industry in Thailand and foreign investments.

This thesis will investigate the question as to whether stronger intellectual property protection will support or restrain the development of the fashion industry in Thailand. This analytical study will have four parts. The first part is an overview of the global fashion system and piracy in the fashion industry. The second is the WIPO model law that will indicate the level of anti-piracy enforcement that should be applied

¹ Ministry of Commerce Thailand, "Counterfeit Crime in Thailand" (*ipthailand.go.th*, 2015) <http://www.ipthailand.go.th/index.php?option=com_content&view=article&id=34&Itemid=180> accessed 27 September 2015.

² Tradingeconomics.com, "Thailand GDP Growth Rate | 1993-2015 | Data | Chart | Calendar | Forecast" (2015) <<http://www.tradingeconomics.com/thailand/gdp-growth>> accessed 25 September 2015.

to the fashion industry in each country. The third part is a comparison of the role of Thai Intellectual property law in its developing fashion industry with that of the established industry in the UK and also India, the leading fashion manufacturing and unique fashion export country³ after the liberalisation of the Multi-fibre Arrangement (MFA) similar to China.

The fourth and final part of this thesis will be the recommendations for the Thai government regarding whether or not to develop Thai intellectual property legislation and its enforcement system to promote and strengthen the Thai fashion industry so that it becomes competitive in global trade. Conclusions will be drawn over whether or not piracy drives Thai designers to innovate to develop the fashion Industry because the lower cost of manufacturing in the global fashion industry is no longer a comparative advantage for Thailand⁴.

³ National Institute of Fashion Technology India, "Indian and unique Fashion products" (*Nift.ac.in*, 2016) <<http://www.nift.ac.in/>> accessed 20 January 2016.

⁴ Charnwoot Lotharukpong, "Report on the Future of Thailand's Textiles and Garment Industry" (International Chamber of Commerce Thailand, 2009).

Chapter 1

1. Introduction

1.1 The Background of the study

From the view of the Thai Government, fashion piracy is currently a major obstacle preventing fashion investment in Thailand and international trade⁵ that can affect the trade relationships in many agreements. The latest statistics of the intellectual property department of the Thai Ministry of Commerce shows that more than 2.3 million counterfeit items were seized, and 9,795 people were arrested in 2013 for fashion piracy crimes in Thailand. The Thai government tries to make the public aware of Intellectual property rights and their legal enforcement to fight against the manufacturing, importation and sale of counterfeit products in Thailand. Nevertheless fashion piracy crime is still increasing in Thailand. Many Thai weekend markets such as Chatuchak and Silom Road are well known to many international tourists as a paradise for the fashion piracy lover. This industry contributes a huge amount of revenue and work for people living in the area⁶.

An additional reason for the Thai Government to support the elimination of fashion piracy in Thailand is the point that Thailand is going to lose the position of a major country exporting textile and clothing in the global market due to the end of the Multi-fibre Arrangement (MFA). The WTO in 2005 promoted China and India to be the leading countries manufacturing textile and cheap fashion apparel for international trade. Many smaller countries could not compete with the

⁵ Ministry of Commerce Thailand, "Counterfeit Crime in Thailand" (*ipthailand.go.th*, 2015) <http://www.ipthailand.go.th/index.php?option=com_content&view=article&id=34&Itemid=180> accessed 27 September 2015.

⁶ "3D Protection in Thailand" (2015) 1 Word Intellectual Property Review Digest 2009 <<http://www.worldipreview.com>> accessed 29 January 2015.

economy of scale and the lower wages in production seen in China and India⁷. Moreover, Thailand as one of the countries that produce ready-to-wear fashion apparel was affected by the struggle to compete with the lower wages of neighbouring countries such as Cambodia and Vietnam⁸. These factors have led to both the domestic and export fashion markets in Thailand being faced with the slowdown of development during the last decade. Additionally, fashion piracy is also pointed out by the Thai ministry as another phenomenon that is destroying the fashion industry in Thailand⁹.

The Thai government is also preparing to develop the Thai fashion industry to be the complete production cycle from the upstream to the downstream and to upgrade the Thai textile and fashion industry to a higher level, especially in Thai workers' skills¹⁰. The Thai government believes that this development will increase Thailand's competitiveness and increase the opportunities in the higher fashion market that may create more jobs for Thai people soon¹¹. The clearing of fashion piracy in Thailand is set to be one of the pilot projects to strengthen the Thai fashion industry. The Thai government believes that this piracy is the obstacle preventing international investment from the global fashion brands to Thailand and eliminates the creations of Thai designers. However, the legislation in Thailand protecting the intellectual property rights in the fashion industry is still not clear due to the unclear fashion subject and the life cycle of fashion item itself being too short for the

⁷ Louise Edwards, "Changing Clothes in China: Fashion, History, Nation" (2009) 114 AM HIST REV.

⁸ (2015) <http://www.thailand.com/export/html/industry_garments.html> accessed 15 November 2015.

⁹ Fibre2fashion.com, "Thai Fashion Industry, Fashion Industry in Thailand, Fibre2fashion.Com" (2015) <<http://www.fibre2fashion.com/industry-article/10/976/sector-overview-the-fashion-industry-in-thailand1.asp>> accessed 25 September 2015.

¹⁰ P. Srihanam and S. Wannajun, "Development of Thai Textile Products from Bamboo Fiber Fabrics Dyed With Natural Indigo" (2012) 2 Asian J. of Textile.

¹¹ Charnwoot Lotharukpong, "Report on the Future of Thailand's Textiles and Garment Industry" (International Chamber of Commerce Thailand 2009).

registration and protection of Intellectual property rights in Thailand. From the aforementioned presumption, this may lead Thai designers to hesitate on investing their skills and time to create new designs and develop their brands in Thailand, which is the key to this government's developing projects¹².

Whilst the Thai government is being hesitant regarding the suitable level of Intellectual property rights protection that will support the confidence of Thai designers to improve their brand identity, which can enhance the development of the Thai fashion industry in a sustainable way, the question of whether the fashion industry in Thailand is threatened by the fashion piracy or not is still the issue that should be investigated

¹³.

In putting forward the aforementioned issue, this thesis will focus on the effectiveness of the intellectual property protection in Thailand and will analyse what the suitable level of intellectual property protection for fashion industry should be to help this industry survive and grow. Moreover, Thailand is a rapidly developing country and it is planned that the fashion industry will be a major industry¹⁴. Thus, the level of IP that is practical, which has been carefully considered, is significant for Thai development.

As mentioned above, in order to investigate whether stronger intellectual property protection can support the development of the fashion industry in Thailand, the researcher will analyse and make comparisons of the Thai Intellectual property system and its role in the fashion industry in Thailand with the UK as the model of a developed country having an effective legal system to protect their

¹² Bangkok Fashion Society (2015) <<http://www.bfs-bkk.com>> accessed 4 December 2015.

¹³ Kurt Sayers, "Taming the Tiger: Toward A New Intellectual Property Regime In Thailand" [2011] Lawasia, J.

¹⁴ Tradingeconomics.com, "Thailand GDP Growth Rate | 1993-2015 | Data | Chart | Calendar | Forecast" (2015) <<http://www.tradingeconomics.com/thailand/gdp-growth>> accessed 25 September 2015.

fashion industry in a comprehensive way¹⁵. Even though Thailand is a developing country whereas the UK is a developed country, it is worth investigating whether a harmonized IP protection system like the UK's could be applied to provide stronger protection as well as balance the creativity in Thailand's fashion industry.

This thesis also compares Thailand and India. India was chosen because it is a model for developing countries such as Thailand and has a similar culture and shares historical ancestry, as well as being one of the leading fashion manufacturers and exporters¹⁶. In particular, after the liberalisation of the MFA in China, India also has a legal system to protect their fashion industry through a different intellectual property rights regime, which includes the Design Act, 2000, the Indian Copyright Act, 1957, and the Trademarks Act, 1999. Protection of the fashion industry in India can be critically analysed as to how effective it is and the overlapping of each protection as well as the level of IP protection that India applies to the fashion industry as the example of a developing country.

Additionally, to investigate the effectiveness and the role model of IP law in the international mandate toward fashion piracy, this thesis will study the details of fashion design protection in the international regime and the TRIPs Agreement concerned with fashion design protection to justify its role as the international agreement of intellectual property protection prescribing the minimum standard of IPR enforcement for its member countries. Whether the critics of this agreement find it suitable for an intellectual property system in a developing country or not, especially in the protection of fashion design, will be discussed in this thesis.

¹⁵ Britishfashioncouncil.co.uk, "British Fashion Council" (2015)
<<http://www.britishfashioncouncil.co.uk/pressreleases/Facts--Figures-AW14>> accessed 27 January 2015.

¹⁶ National institute of Fashion Technology Indian, "Indian and unique Fashion products" (*Nift.ac.in*, 2016)
<<http://www.nift.ac.in/>> accessed 20 January 2016.

Finally, the results of this thesis will include recommendations for the Thai government on whether to develop the Thai intellectual property legislation and its system or not. Moreover, the appropriate level that can be used as a tool to promote and strengthen the Thai fashion industry in the crucial competitiveness of global trade at present, in which the lower cost of production is no longer the “hold all the trumps” for Thailand, will also be discussed¹⁷.

1.2 An Overview of the Thai fashion industry and its significance to the economics of Thailand

The fashion and textile industry are the one of major industries that contributes the huge economic value to the Thai economy. The restriction of the USA to Japan's quota for textiles and apparel imports in 1970 enhanced Thailand's fashion and textile industry to continually grow and contribute to the development of other industries of this country in the last three decades¹⁸. Additionally, from the benefit arising from the MFA (the Multi-fibre Arrangement of WTO), Thailand was granted more quotas for export to the USA when the quotas of the competitive countries such as China were used up at that time. Moreover, the reduction of tariffs on textile products to 0.5% by January 2000 due to the ASEAN free trade area (AFTA) in 1992 greatly enabled Thailand to become the leader of the textile industry among the member countries of ASEAN¹⁹. Since then, the textile and fashion industry has become a major earning industry for Thailand's exports and contributing to the nation's development.

¹⁷ Charnwoot Lotharukpong, "Report on the Future of Thailand's Textiles and Garment Industry" (International Chamber of Commerce Thailand 2009).

¹⁸ Fibre2fashion.com, "Thai Fashion Industry, Fashion Industry in Thailand, Fibre2fashion.Com" (2015) <<http://www.fibre2fashion.com/industry-article/10/976/sector-overview-the-fashion-industry-in-thailand1.asp>> accessed 25 September 2015.

¹⁹ Tradingeconomics.com, "Thailand GDP Growth Rate | 1993-2015 | Data | Chart | Calendar | Forecast" (2015) <<http://www.tradingeconomics.com/thailand/gdp-growth>> accessed 25 September 2015.

From the report of the Ministry of Industry of Thailand²⁰, the contribution of the fashion and textile industry accounts for approximately 17% of Thailand's GDP in 2014 and this industry is the largest manufacturing industry in Thailand because in 2014 around 2,500 factories were employing more than 824,500 employees, which was 20% of the annual national employment ratio in the Thai industry sector²¹.

Total number of Textile Industry Manufacturers in Thailand in 2014

Size	Number of Manufacturers
< 50 employees (Small)	1,492
50 - 200 employees (Medium)	697
> 200 employees (Large)	339
Total	2,528

Total industry employment: 824,500 employees

The ratio of the Thai Textile and Fashion Apparel items exported in 2014

Main Thai Export Products	(%)
Cotton gloves	0.30
Form-fitting: stockings, leggings, tights & socks	1.64
Bras	7.82
Apparel	90.24

Source: Thailand Textile Institute (www.thaitextile.org)

²⁰ (2015) <<http://www.oie.go.th/sites/default/files/attachments/article/TextileIndustry-intheFuture.pdf>> accessed 27 September 2015.

²¹ (2015) <http://www.thailand.com/export/html/industry_garments.html> accessed 15 November 2015.

Overview of Thailand's Fashion Industry

In the world, there are a very small number of countries capable of supplying the whole textile industry chain. Thailand is the one of them as it can develop the fashion industry from the upstream to the downstream²². This comparative advantage has been supported by Thailand's location in the tropical area, where this country is ready to grow the plants used as the materials of textiles such as silk and cotton. Intellectual development helps steer the country's textile industry into a blend of farming and petrochemical development which is capable of producing natural and synthetic fibres for clothes and fabrics manufacture, which can be sold in domestic and global markets both in the form of ready-to-wear clothing to the premium Thai silk.

Following are the details of the production sector from the upstream to the downstream of Thailand's textile and apparel industry²³:

Silk and Printed Cotton Fabric: Thailand has a large silkworm farming industry that produces silk filaments, which can be transformed and dyed to be premium silk. Even many silk manufacturers in Thailand are both in the local and factory system but the distinctive dyeing technique which can enlighten the sparkling of Thai silk is the core competitiveness value compared to other countries in the same region and leads Thai silk to be welcomed for the Haute Couture in leading fashion houses. The cotton manufacturing in Thailand can found in a small scale, but the cotton printed fabrics are quite a famous export item in the international markets of Thailand.

²² P. Srihanam and S. Wannajun, 'Development of Thai Textile Products from Bamboo Fibre Fabrics Dyed with Natural Indigo' (2012) 2 Asian J. of Textile.

²³ Fibre2fashion.com, 'Thai Fashion Industry, Fashion Industry in Thailand, Fibre2fashion.Com' (2015) <<http://www.fibre2fashion.com/industry-article/10/976/sector-overview-the-fashion-industry-in-thailand1.asp>> accessed 25 September 2015.

Yarn: Thai manufacturers are capable of spinning yarn in which the natural fibres (silk and cotton) may be imported from China or other neighbouring countries. This process is the valued added process for fibre to be ready to use as yarn.

Textiles: Thailand produces many types of knitted textiles that are used in many sections of the fashion industry with the developed technology, including special textiles that depend on the special demands of fashion houses in many leading countries in fashion.

Finishing, Dyeing and Printing: The technology for dyeing in Thailand was developed to meet the standards of the US and the EU's in which the chemicals have been proven to be harmless to both humans and the environment to pass the quality standards of international markets. However, the dyeing system with the cultural heritage of Thailand is used for the cotton fabrics, which results in the earth tone colours that are being welcomed by many organic markets.

Apparel: Thai apparel manufacturing is well known for leading fashion brands in terms of the Thai craftsmanship and detailing of the apparel by manufacturers producing clothing from uniforms to high fashion apparel.

High Fashion Outfits: Recently, several Thai brands have been introduced to global markets worldwide (e.g. the United States, Europe, and Japan) and managed to receive considerable attention. For instance, the brand "Sretsis" ("Sisters" when spelt backwards) is one of the successful women's ready-to-wear brands from Thailand. Established by three sisters, the firm has its headquarters in Bangkok. The brand started to capture huge public attention immediately after its products were worn by several famous people (e.g., Zooey Deschanel, January Jones, Paris Hilton, and

Beyoncé²⁴). Added to this, nowadays colourful children's outfits from Thailand are made for well-known household brands. This makes a big splash in many large department stores and fashion boutiques in the United States. For instance, "Millions of Colors" children's outfits are designed by a young Thai designer named Rujira and produced by a Thai manufacturer "Heart and Mind". The products are available at Barneys and Kitson.

Thai Innovations: Thai researchers have developed many special textiles to use in many fabrics and apparel, such as the anti-bacteria fabric that is coated with Thai herbs like lemongrass or coconut powder to enhance the uniforms of many workers in the hot and humid climate found in tropical countries. Moreover, the wide range of special textiles used for different demands of various industries are created by Thai researchers to help support the Thai textile industry²⁵.

However, in recent years the competitiveness of Thai goods in the textile's global market has been considered to be rigorous and tough. This is since several countries, China, in particular, have produced low-price textile products and gained more market share in Asian, EU and US markets. As such, these countries have become the main figures in the global markets. Despite this crisis, Thailand still has

²⁴ Nick Measures, 'Thai Designers Who've Found Success on the Global Stage' (*Where Thailand*, 2013) <<http://wherethailand.com/thai-designers-gone-global/>> accessed 25 September 2015.

²⁵ A wide array of clothing products have been developed Thai researchers. These include a special type of jackets particularly tailored to combat the extreme cold weather, heart rate monitor vest products; solar-powered jackets; anti-bacterial nylon socks; herb-coated bed sheets; anti-bacterial, anti-dust mite; and anti-bacterial fabrics made from polyester mixed with coconut charcoal powder. Furthermore, several Thai mills manage to meet the needs of various industries by introducing several cutting-edge technical textiles, including indutex (for awnings, tarps, filters, and other industrial purposes), mobiltex (to produce fabrics used in the automotive, aerospace, railway, and marine sectors), protex (to produce protective clothing and masks), medtex (used in implants, dressings and other medical purposes), geotex (used in erosion control), and agrotex (for crop protection).

the potential to grow and vie with other countries as there has been an upward trend in exporting high-quality garments.

Bangkok Fashion City, the government-initiated project, has played a vital role in boosting competitiveness in the textile and clothing industry. To illustrate, the project tremendously helps improve the quality of Thai products—enabling them to be more competitive and widely accepted in the global market. In the meantime, Thai manufacturers have shifted their focus to the new markets, with the aims of penetrating these new territories, as well as improving their production and marketing.

Even though Thailand's clothing and textile sectors were once heavily dependent on cheap labour, both private and public sectors are focusing their interest on maximizing the competitiveness of the industry by creating further innovations, enhancing the skill and competency of the nation's garment and textile businesses, and developing cutting edge technologies for greater efficiency.

Promotion of the fashion industry in Thailand to be the ASEAN fashion hub

Recently, the fashion industry in Thailand has received great support from the government and public sectors. For instance, the government has provided educational supports for 6,000 individuals—training them to be highly skilled professionals working in a wide range of careers (e.g., production specialists, merchandisers, and fashion designers). In addition, the government also contributes to creating up to 1.2 million jobs in the industry. The government's attempt in making the clothing business flourish was clearly manifested in the project entitled "Bangkok Fashion City", which was initiated with the aims of improving the quality of fashion design, expanding domestic and global markets, and fostering advanced

manufacturing. It is also expected that the project will be able to reach a higher level of skilled labour.

Additionally, the project pertains to the development of fashion education in Thailand. Among others, "Academia Italiana Design Institute", an Italian fashion school, has expanded its educational service to Bangkok. Moreover, New York's "Fashion Institute of Technology" has showed interest in establishing a fashion university in the country. As a result, several projects and programmes have been implemented by the government to enable Thailand's fashion industry to thrive in the regional competition, to boost sustainable growth and to facilitate trade and investment.

Moreover, Thailand is encountering a threat in vying with other countries, namely Indonesia, China, Pakistan, India, and Vietnam, which have relied tremendously on cheap labour. The competition among WTO member states in the global textile markets has been more intense since the beginning of 2005, when the full liberalisation of textile quotas under the World Trade Organization (WTO) commitments started to be used.

As is widely acknowledged, clothing products manufactured in Hong Kong, Korea, and Taiwan are considered high quality products. To thrive in this business, Thai manufacturers should focus on increasing the quality of their products. Additionally, logistic and supply chain business should be also enhanced to increase efficiency and promptness.

The government has acted to further strengthen this industry by setting up the "Bangkok Fashion City" project launched in February 2004, the aim of which is to turn

Bangkok into a fashion hub in the region of South-East Asia and into a world fashion centre by the year 2018. The cabinet approved a budget of THB 1.8 billion plus THB 487.9 million from the private sector for the project in 2005. Its goals are to promote all aspects of Thailand's fashion trade covering textiles, garments, jewellery and ornaments, footwear and leather industries on a grand scale and to establish the image of Bangkok as a centre of fashion designs in the member countries of ASEAN²⁶.

There are three factors that can explain the growth of the Thai fashion industry²⁷. The first factor which is possible unique for Thai fashion industry is the completion of the "fashion production cycle" accomplished with upstream, mid-stream and downstream fashion manufacturing²⁸. The upstream of this cycle is the production of raw material from silk to natural fibres and other synthetic fibres from petrochemicals, including the processing of weaving and knitting these fibres into textiles that can be the most excellent materials for the fashion industry. The mid-stream for this cycle is the printing and graphic designing including dyeing with high-level technology that can increase and enhance the value of raw materials from the upstream to be ready for fashion production²⁹. The final part of this cycle is the downstream processing where textiles will be transformed into garments that are ready for the domestic fashion industry and for export to other countries. This complete cycle of the textile and fashion industry in Thailand can be the comparative advantage to support the Thai fashion industry that is not the case in many countries. Although

²⁶ Preeya Patichol, Winai Wongsurawat and Lalit M. Johri, 'Upgrade Strategies in the Thai Silk Industry: Balancing Value Promotion and Cultural Heritage' (2014) 18 *Journal of Fashion Marketing and Management: An International Journal*.

²⁷ Charnwoot Lotharukpong, "Report on the Future of Thailand's Textiles and Garment Industry" (International Chamber of Commerce Thailand, 2009).

²⁸ Douglas Bullis, *Fashion Asia* (Thames & Hudson, 2000). Thailand.

²⁹ P. Srihanam and S. Wannajun, "Development of Thai Textile Products from Bamboo Fibre Fabrics Dyed with Natural Indigo" (2012) 2 *Asian Journal of Textile*.

the quality of textile production in Thailand may not be premium grade similar to France, Italy or Japan, the mid-range textile quality will be developed in the near future in order to enhance the growth of Thai fashion industry³⁰.

The other factor that can help to promote the growth of the Thai fashion industry is the internal Thai market. Thai people are very fashion conscious and love to dress to express their emotions. They support Thai festivals all year round, which can create the demands of the domestic fashion market. The last factor that results in demand for the Thai fashion industry is International tourism³¹. Approximately 30 million international tourists visit Thailand every year and increase the demands for new fashion ideas, which stimulates Thai fashion designers³².

Additionally, Thailand has been the central base of ready-to-wear factories for more than two decades, producing apparel under world famous brands due to the low wages with high craftsmanship qualities compared with the country of origin of the goods. Moreover, many Thai designers have recently become famous in the global fashion industry, including Thakoon Panichgul and Koi Suwannagate, the Thai contemporary fashion designers³³ whose collections have a distinctive signature of Thai culture, and have been regularly shown during New York Fashion Week since 2009³⁴.

However, after the end of the Multi-fibre Agreement of the WTO in 2005, which liberalised the quotas of textiles in the global trade, causing a decrease in Thailand's

³⁰ Ibid 38 p. 69

³¹ Bangkok Fashion Society (2015) <<http://www.bfs-bkk.com>> accessed 4 December 2015.

³² Bangkok international fashion fair (2015) <<http://www.bifandbil.com>> accessed 19 November 2015.

³³ Nick Measures, "Thai Designers Who've Found Success on the Global Stage" (*Where Thailand*, 2013) <<http://wherethailand.com/thai-designers-gone-global/>> accessed 25 September 2015.

³⁴ Fabian Holt and Maria Mackinney-Valentin, "Can Anyone Be a Designer? Amateurs in Fashion Culture" (2015) 3 *Artifact*.

exports of textiles and apparel . The percentage of exports in textile growth in Thailand was only 6% in 2005-2010, compared to 30% in China and 30% in Vietnam³⁵. This, is not a good sign for the Thai fashion industry³⁶. This situation is the result of India and China being dominant as the prominent figures in the fashion clothes and textile industries for international trade, and that many countries are not able to compete with them because of their economy of scale and the lower wages in production.³⁷

From the above phenomenon, Thailand, as one of the countries in Asia that has had a huge value in fashion and textile exports from the past until the present, was impacted due to the struggle to compete with the cheaper wages of China and India or even with Thailand's neighbouring countries such as Cambodia, Indonesia and Vietnam³⁸. Moreover, this situation has affected the domestic market of the Thai fashion industry since cheaper Chinese textiles are imported to compete in the domestic market, which has resulted in intense competition for small fashion entrepreneurs in Thailand who are struggling ³⁹. In fact , the decrease in fashion and textile exports from Thailand has resulted in the closing down of many fashion businesses with the loss of many jobs, which may affect the well-being of Thai people⁴⁰.

To resolve this issue, the Thai government prepared a strategy incorporated in the Eleventh National Economic and Social Development Plan and set a master plan

³⁵ (2015) <http://www.thailand.com/export/html/industry_garments.html> accessed 15 November 2015.

³⁶ Ibid 28

³⁷ J A Hall, "China Cast A Giant Shadow: The Developing World Confront Trade Liberalization and the End of Quotas in the Garment Industry" (2006) 5 J. International Business & Law.

³⁸ Thailand's hourly wage rate is 1.36 USD per hour, "Price Reports - Emerging Textiles - Textile Market Information" (*Emergingtextiles.com*, 2015) <<http://www.emergingtextiles.com>> accessed 13 November 2015.

³⁹ Adam Arvidsson and Bertram Niessen, "Creative Mass. Consumption, Creativity and Innovation on Bangkok's Fashion Markets" **(2014) 18 Consumption Markets & Culture.**

⁴⁰ J Li, "MFA Phase out - Impact on Chinese Worker, Mu" [2004] Asian labor update.

for this situation⁴¹. In order to upgrade the textile and fashion industry in Thailand, Thailand's fashion development project was established in the Ministry of Industry to enable the Thai fashion industry to be the premium quality fashion and textile producer rather than the low-cost fashion manufacturer that must compete with Thailand's neighbouring countries such as Vietnam, Cambodia and Indonesia, which have much lower costs of production than Thailand. In the primary stage, The Thai government had the directives to promote the fashion manufacturing in Thailand to replace their old machines with more modern technology by the tax reductive policy for machine importation to produce better quality textiles⁴².

The second stage of this plan is the development of fashion design and it's added value, including Thai brand identity because fashion design is the creative industry that the Thai government would most like to promote in the international market⁴³. This endeavour has been demonstrated by many Fashion Weeks and other organised events and fashion competitions held in the largest regions of Thailand since 2004. Moreover, the Thai government continued its development project to establish Bangkok as one of the world's fashion hubs by 2017⁴⁴, when many Thai universities began to offer fashion and garment courses to students to support this government project. A great deal of funding is provided for new entrepreneurs in fashion retail to create their brands and express their ideas in trade shows around

⁴¹ Preeya Patichol, Winai Wongsurawat and Lalit M. Johri, "Upgrade Strategies in the Thai Silk Industry: Balancing Value Promotion and Cultural Heritage" (2014) 18 Journal of Fashion Marketing and Management: An International Journal.

⁴² Ministry of Industry Thailand, "Bkkfashion/Project" (2005) <<http://www.moi.go.th>> accessed 16 September 2015.

⁴³ Bangkok International Fashion Fair (2015) <<http://www.bifandbil.com>> accessed 19 November 2015.

⁴⁴ <<http://www.bangkokpost.com/business/news/393252/bangkok-fashion-city-to-hit-runway-again>> accessed 1 December 2014.

Asia, and the Thai government has posited that it is high time to invest at least 3.74 billion baht to raise the awareness of Thai fashion brands.

This project is expected to attract more than 500 new domestic brands into the fashion retail market in 2018⁴⁵, thereby greatly increasing the employment value of Thailand's garment industry. Whilst this project inspires many campaigns to enhance the Thai fashion industry, the legal protection of fashion designs against fashion piracy in this country is still unclear because Thailand has neither policies nor legislation that directly deals with the protection of fashion designs. This may affect the efforts of the Thai government to enhance Thai designers' ability to develop their designs or increase their brand identities both for the domestic and international markets, whilst the copying in fashion industry is considered as a part of the "Pros or Cons" in the first step of young designers in Thailand.

1.3 Perception and Effects of fashion piracy in Thailand

According to many scholars, the copying of fashion designs appears to be a general trend in Thailand's fashion industry⁴⁶. Well-known designs are generally copied and famous designs or trendy items from some shops can spread like wildfire across the market within a week of their first appearance. Copying fashion designs in Thailand can be explained from two perspectives of "counterfeiting"⁴⁷, the first of which involves an attempt to produce an identical copy of an original western luxury or Thai famous brand product in order to deceive customers into thinking it is the original item

⁴⁵ Ibid 52

⁴⁶ Sitthichai Suwannalop, "Protection of Industrial Design according To the Copyright and Patent Law: Case Study Specifically in Fashion Clothing Design" (Master's degree, Ramkhamhaeng University 1998).

⁴⁷ Ministry of commerce Thailand, "Counterfeit Crime in Thailand" (*ipthailand.go.th*, 2015) <http://www.ipthailand.go.th/index.php?option=com_content&view=article&id=34&Itemid=180> accessed 27 September 2015.

sold at a slightly cheaper price and out of the original store. These articles may be sold on the internet or in shops near shopping centres in Thailand and claimed to be illegally imported by cabin crew to confirm that the item is authentic, but it is a tax-free import from abroad⁴⁸.

The second perspective of counterfeiting is done by small-scale designers. There are two categories of this kind of copy; the first is a “knock-off”, which is an original design, but can be seen to have a relationship with another designer’s work with just a slight change in the details, such as cheaper material, different colours, or ornaments. The second is a close copy, but using low-grade materials or textiles, and is sold at a lower price than the original item. There is no intention to deceive customers in both cases because the price and quality can be easily recognised; moreover, original designs are always sold in exclusive shops in leading shopping centres, not in weekend markets. It can be seen that these two copying styles may reduce the incentive of new fashion designers in Thailand rather than bring the benefit to their brands because the copyist is an effortless designer who has the lower investment than the original designer, who invested time and research to create “new designs” taking more than four months to finish each collection. Therefore, the copyist can sell their copy version at a cheaper price, which can reduce the market share of the authentic design.

Many counterfeit products can be found in markets in Thailand, especially the well-known markets in Bangkok, such as Silom Market and Chatuchak Weekend Market, where “fake” fashion and other counterfeit products from top to toe are sold

⁴⁸ Adam Arvidsson and Bertram Niessen, 'Creative Mass. Consumption, Creativity and Innovation in Bangkok's Fashion Markets' (2014) 18 Consumption Markets & Culture.

and attract customers from across the world⁴⁹. It is no coincidence that Thailand is called a “Fake Paradise” along with some cities in China on the Trip Advisor website. These counterfeits can also be seen on market stalls in more tourist-orientated areas of Thailand. Like Phuket or Pattaya. Many tourists regard buying “knock-off” fashion goods from a market as a challenge when visiting Thailand, and they buy some counterfeit products as souvenirs or gifts for their friends, whilst Thai people follow the latest runway trends, they may benefit from this phenomenon and enjoy their desired item at an affordable price. Therefore, the value of the counterfeit industry in Thailand is enormous in the shadow of the Thai economy and it indirectly enhances both employment and tourism in Thailand.

On the other hand, while the copied versions of famous brands may be welcomed by consumers who cannot afford the originals and could enable the brands to expand nationally, many Thai designers maintain that the constant copying of their designs and selling them in markets could cause them to lose 50% of their business within the first two weeks⁵⁰. Moreover, many people buying counterfeit products believe that it is only large corporations that are affected by the sale of counterfeit products. However, given that the work is all done illegally with no checks by the government or safety rules, it is harmful to both the manufacturers of the products and those who buy them. One of the most horrific aspects of counterfeiting is the treatment of the workers who produce the goods, who are sometimes child labourers in Thailand

⁴⁹ Ministry of Commerce Thailand, "Counterfeit Crime in Thailand" (*Ipthailand.go.th*, 2015) <http://www.ipthailand.go.th/index.php?option=com_content&view=article&id=34&Itemid=180> accessed 27 September 2015.

⁵⁰ Atthapol Jirotmontree, 'Business Ethics and Counterfeit Purchase Intention: A Comparative Study on Thais and Singaporeans' (2013) 25:4 *Journal of International Consumer Marketing*.

or neighbouring countries due to the legal minimum wage of Thai people in Thailand being too high for the counterfeit industry⁵¹.

Although the counterfeit market in Thailand may generate a huge income for some people and create more employment for Thailand, Thailand is regarded as being particularly susceptible to the infringement of intellectual property rights. This may also ruin the reputation of famous apparel brands and make them reluctant to establish Bangkok as the place to launch their “new trend” of clothing as well. In addition, it is also a huge obstacle to the ambition of Thailand to become the “Fashion Capital of Asia”, the success of which may create employment and income for Thailand in legally and sustainable ways. Therefore, the two-sided effect of fashion piracy in Thailand is an issue that will be carefully considered.

1.4 Intellectual property law protecting fashion design in Thailand

Although a number of researchers have studied this problem in relation to Thailand, when compared to the many researchers studying the piracy in the fashion industry in the global economy, most of the scholars that directly study this issue in Thailand have focused on economic and marketing research rather than approaching it from a legal perspective. For example, Attaphol Jiramontree, a Thai scholar whose study is entitled “Business Ethics and Counterfeit Purchase Intention: A Comparative Study on Thais and Singaporeans” found that more Thais decide to purchase and use counterfeit goods than Singaporeans. In addition, counterfeit consumption in Thailand is a socially acceptable behaviour; therefore, Thai people have increasingly viewed the utilization and purchase of illegal counterfeits to represent their status in a particular social group as common practice and are oblivious to the damage this

⁵¹ "Counterfeit Crime: Criminal Profits, Terror Dollars, and Nonsense" (2014) 52 Choice Reviews Online.

causes to the intellectual property value of the creator⁵². This research suggests that Thai people seem to regard copying and counterfeit products as a normal phenomenon in their country. Meanwhile, Adam Arvidsson and Bertram Niessen, scholars from University of Milano, Italy have conducted another study of the fashion industry in Thailand entitled “Creative mass: Consumption, Creativity and Innovation in Bangkok’s Fashion Market”. The results of their empirical research indicated that the copying of fashion designs in Thailand can take two forms, one of which is counterfeiting or the production of a “mirror copy of western luxury products”, while the other is executed by small-scale designers of Thai brands. This involves incorporating a design with the work of famous Thai and international designers, and this copy may be made of cheaper material and sold down market. The writer of this research also indicates that some Thai designers believe that copying may promote their design to more market groups or distinguish their brand and motivate them to create new designs for new and distinctive products⁵³. However, the truth is that selling their designs down market could reduce their revenue and force them to discount their collection before the end of the season. Therefore, their reward from this creative business is not the pursuit of fame as trendsetters in the fashion industry; they prefer to wait and Import other people’s designs into their work. It could be hypothesised from the foregoing that the copying of fashion designs in Thailand affects both customer behaviour and the Thai economy.

⁵² Atthapol Jirotmontree, 'Business Ethics and Counterfeit Purchase Intention: A Comparative Study on Thais and Singaporeans' (2013) 25:4 Journal of International Consumer Marketing.

⁵³ Adam Arvidsson and Bertram Niessen, 'Creative Mass. Consumption, Creativity and Innovation in Bangkok's Fashion Markets' (2014) 18 Consumption Markets & Culture.

Nevertheless, there has only been one study related to fashion design protection from a legal perspective, namely, “Research on the Protection of Industrial Design according to the Copyright and Patent Law: A Case Study Specifically in Fashion Clothing Design”, conducted by Sittichai Suwannalop. The writer suggests that, since fashion clothing design overlaps with industrial design, fashions designs can be protected by the copyright or patent law of Thailand, which is similar to the Registered Design Act in the United Kingdom⁵⁴. However, unlike the present study, this was not a critical examination of the advantages and disadvantages of adopting other jurisdictions and specific protection for the Thai Fashion industry because this research only conducted a comparison of design protection in the UK with Thailand under the Thai Patent Act and lacked a conclusion that can be applied because this research includes the use of UK law as the complete model for design rights in Thailand, which may neglect the fact that the UK and Thailand have quite different economic perspectives as developing and developed countries.

Seemingly, there appear to be several methods for fashion designers in Thailand to have their works protected legally. Even various intellectual property laws in Thailand seem to provide exclusive rights to fashion designs, such as a design patent, trademark and copyright provision, including unfair competition and passing off goods. However, none of these laws explicitly protects fashion designs from being copied. Therefore, the fashion industry in Thailand still lacks proper protection under the current legislation due to the unsuitable legal practices and the narrow interpretation of the officers, and this chapter will briefly analyse the obstacles to

⁵⁴ Sittichai Suwannalop, 'Protection of Industrial Design according to the Copyright and Patent Law: A Case Study Specifically in Fashion Clothing Design', (Ramkamhaeng University, 1998). pp. 3-5.

applying the current Thai intellectual property law to protect the fashion industry in Thailand under the Copyright Law, the Patent Act and the Trademark Law as follows:

(i) Protection of fashion designs under the Thai Trademark Law

A trademark is a common choice for designers to protect their products because trademark owners have the right to distinguish their fashion products from those of other brands. Trademarks do not provide a direct safeguard of fashion design but the method that designers can use trademark in their design can enable their limit under Thai trademark law. Under this Act, the trademark owner has the exclusive right to use the goods when the registration has been granted. Registered proprietors have the sole right to import their products into Thailand, sell or offer them for sale, and bring any lawsuit against anyone who imitates the mark, which constitutes criminal infringement⁵⁵.

According to the Thai Trademark Act 2000 section 4, a trademark is⁵⁶ “a mark used or proposed to be used or in connection with good or distinguish the goods with which the trademark of the owner of such trademark is used from goods under another person’s trademark.” A mark under the same section could be a “photograph, drawing, device, brand, name, word, letter, manual, and signature, the combination of colours,

⁵⁵ Registering a trade mark grants the trade mark owner the Exclusive Rights and ownership of the mark according to Section 44 of the Thai trademark act.

“Section 44 Subject to Sections 27 and 68, a person who is registered as the owner of a trademark shall have the exclusive right to use it for the goods for which it is registered.”

⁵⁶ The Thai Trademark Act 2000 sec. 6 - “To be registrable, a trademark must
(1) be distinctive.
(2) not be prohibited by this Act;
(3) not be identical or confusingly like another registered trademark.”

shapes or configurations of an object or any one or combination thereof". In order to qualify for protection by registration, the design of the mark must:

- (i) convey an additional meaning or be distinctive.
- (ii) not be similar or identical to a third party's registered trademark
- (iii) not constitute a mark that is barred under the Trademark Act under the public policy.

In 2000, the Thai Trademark Act was revised to follow the rules stipulated by TRIPS's Article 15. The definition of a "mark" was extended to include three-dimensional shapes. The Trademark Act prescribes a three-dimensional mark as the basis for the protection of fashion designs to include three-dimensional object or any shape in compliance with the TRIPS agreement, therefore, in theory, fashion designs may also be protected by the trademark law as a form of trade dress, but few applications to register a three-dimensional trademark have been successful⁵⁷. Although this amendment could theoretically have benefitted the registration of fashion designs since the year 2000, in practice, three-dimensional trademarks have been routinely rejected as a description of goods that are prohibited from being registered under this Act⁵⁸. Therefore, there has been no case of an application to exactly interpret the type of three-dimensional shapes that can qualify for protection under the trademark law in Thailand⁵⁹

⁵⁷ Jakkrit Kuanpoth, 'Trademark Protection for Three-dimensional Shapes in Thailand' (2011) 1 International Litigation Asia Review 33-35

⁵⁸ Section 4 of the Trademark Act B.E. 2534

"Mark is defined as a brand, name, word, letter, photograph, drawing, device, and manual signature, combination of colours, shapes or configurations of any object or any one or combination thereof".

⁵⁹ '3D Protection in Thailand' (2009) 1 Word Intellectual Property Review Digest 2009 <<http://www.worldipreview.com>> accessed 29 January 2015.

(ii) Protection of fashion designs under the Patent Act of Thailand

In Thailand, there is no specific law protecting design rights such as those found in the UK, but the closest right is the Design right. In the Thai Patent Act 1979, this right is prescribed, and the second type of patent granted under Thai law is the design patent because the first type of patent served to protect innovation. Obtaining a design patent in such an innovative industry seems to be an ideal way to safeguard fashion designs, but this is far from the case. Under the Thai Patent Act 1979, patents to protect designs are only available for 10 years⁶⁰; moreover, both theoretically and practically, patent rights are unsuitable for fashion designs because whether or not design patents should be granted for fashion designs is still debatable. Under Section 56 of the Patent Act, a patent may be granted “for a new design for industry, including handicrafts”. It is still doubtful whether the registrar (Office of The Intellectual Property, Ministry of Commerce) and the court would allow a broad interpretation of the statute or limit the protection to designs of industrial products. The fact that handicrafts must be “new” in order to be patentable is the main obstacle for interpreting the statute as protecting fashion designs because, by its nature, fashion is a formal pattern of dress that has been created for a long time. Furthermore, the protection of fashion design within the patent law seems to be interpreted that it must be seen as handcrafted or industrially applied for a design to be protected. Some fashion designs are neither handcrafted nor applied industrially or for utilization in industry.

However, it can be seen that the process of registration in Thailand involves disclosing all documents and printed publications, which may lead to an increase in

⁶⁰ Patent Act B.E. 2522 sec. 62 - “A design patent shall have a term of ten years from the date of filing of the application in the country...”

the number of imitations; therefore, the applicant will find it difficult to distinguish the original by comparing it with other applications.

Moreover, there are two other problems pertaining to the suitability of a design patent to protect fashion designs. The first problem is that the procedure for obtaining a design patent in Thailand involves the registrar conducting a thorough examination, which takes approximately one to two years, while the lifecycle of fashion is approximately three to six months. If designers have to wait for registration, they may not be able to obtain legal protection for infringement while their designs are still popular in the market. The second problem is that it seems difficult to be awarded damages in Thailand, and if they are awarded, they are usually inadequate to compensate designers for their loss of profit. This is because, under Thai law, damages will only be awarded if the loss can be proved, and it is impossible to exactly calculate the loss incurred by the knock-off phenomenon in fashion piracy.

(iii) Protection of fashion design under the Copyright Law in Thailand

Unlike the other protection systems, protection is automatic under Thai copyright law if fashion designs are among the various types of works that are eligible for protection as Artistic Works defined by the Copyright Act. Artistic Works, which include works of applied art, as defined in the Act;

“Artistic works are any one or more of the various categories of artistic work used for other purposes apart from the appreciation of the inherent value thereof, such as used for utility, decorative materials or equipment, or for commercial purposes.”

The period of protection for eligible works is 25 years, and the Act also stipulates that a work may be categorised as an artistic work regardless of whether or not it has artistic value. According to this principle, fashion designs which are regarded as works of applied art can be protected; therefore, the sale and production of “knock-offs” would not abide by the Copyright Act, which grants several exclusive rights. These include the right of adaptation, reproduction and expression to the public, and various acts of placing an order to import the protected products into Thailand without the copyright owner's permission, renting or making a rental offer, keeping in possession for sale, selling, making a sale offer would infringe the copyright and lead to criminal or/and civil liability.

Whilst this form of protection can protect designers in Thailand from low-price knock-offs, there is still an unsettled issue among practitioners and Thai scholars concerning the overlap of the application of copyright law with regard to design patents due to its over-protection, especially since the term of copyright protection is longer than other forms of protection. According to this issue, the Thai Supreme Court made a landmark decision in the mid-1990s in the case of the *DTC industry vs. the Thai Ball pen industry*⁶¹, which concerned the unauthorised copying of the external design and other design features of various models of ballpoint pens. One of the issues upon which the decision rested was whether the design of the pens could be protected under the Copyright Act as a “work of applied art”. It was held by the Court of the First Instance that the Copyright Act was applicable and the unauthorised production of imitation pens by the Thai ball pen industry amounted to the infringement of the DTC's rights. However, the Court of Appeal overturned the decision of the Court of the First Instance, and it was held that the pen design did not qualify as an artistic work. The

⁶¹ The Thai Supreme Court 767/1990 (available in Thai online/www.krisdika.com)

plaintiff then appealed to the Supreme Court, which held that the DTC's action in designing the pen verified the copyright⁶². While the courts are not bound by precedents and Thailand is a civil law country, the DTC case that got a landmark court decision by a Supreme Court can be taken as an authority for the proposition that copyright is viable to protect unregistered designs⁶³. In an opposing manner, the Supreme Court endeavoured to conserve the jury's attempt in limiting the case to the facts.

To summarize, a particular legislation to protect Thai fashion designs has not come into existence yet. Perhaps several intellectual property statutes could be relied upon to secure exclusive rights for fashion designs, including design patents, trademarks and copyright. In addition, passing-off claims against counterfeiter and the disloyal competition may be based on the general concept of obligations under the Commercial and Civil Code. However, all the applicable statutes contain some ambiguity and/or insufficiency⁶⁴. There is no definite established system of design registration as found in other jurisdictions.

Finally, the author is of the view that Thai fashion designers tend to protect their designs with the trademark under the registered logo rather than the other IP protection. However, even the registration of their logo is a sensible way for them to protect their brands, but in reality, it cannot directly protect their "design" because the knock-off or copy version could fill this gap in the market. Thus, it can be concluded

⁶² 3D Protection in Thailand' (2015) 1 World Intellectual Property Review Digest 2009. <<http://www.worldipreview.com>> accessed 29 January 2015.

⁶³ Siraphapha Rungpry and Edward J. Kelly, 'Protection of Fashion Design in Thailand' (2008) 1 Asia Law IP Review page 19.

⁶⁴ "Malisuwan, Ph D., Chayawan, PhD D., and Nandhakwang, PhD D., 'Industrial Property Rights Protection in Thailand' (2006) 14 International Journal of the Computer, the Internet and Management 1–7.

that the fashion designs' protection against counterfeiting and piracy in Thailand cannot be guaranteed. This situation may be the cause of the reduction of incentive of Thai fashion designers in Thailand.

2. The Research hypothesis

The research hypothesis is, "By comparing with other jurisdictions, Thailand can develop its intellectual property protection for its fashion industry, although fashion piracy is an obstacle to the Thai fashion industry".

3. Aims and objectives

3.1 Aims of the research

From the last decade, the Thai economy has been affected by many factors such as the instability of the political environment that led international investors to move their manufacturing to other neighbouring countries in South East Asia such as Vietnam, Malaysia, or Indonesia which have cheaper wages of production and more stable governments. Additionally, the decrease of exports in the textile and fashion industry that were affected by the cheaper products of China and India after the end of the MFA, are another factor that has frozen the growth of the Thai economy due to the textile and fashion industry being one of the major industries like the tourism industry that has contributed a major amount of revenue to this country for more than three decades.

The best preparation for the fashion industry of Thailand for the end of the MFA, which allows the lower wage countries (e.g. India and China) to be the leaders in the fashion and textile industry, is the Thai government's plan to develop the Thai fashion industry to be the fashion leader in the region and not lower its competitiveness to the

war of the cheaper fashion and textile industry. In addition, the Thai government makes an effort to encourage Thai people to be aware of the value of intellectual property that can help them to increase the value of their original products rather than making counterfeit products from well-known products of developed countries, which may not be a sustainable way to support the fashion industry in Thailand.

Therefore, the aim of this thesis is to provide proper recommendations for the Thai government if they need to improve the Thai intellectual property systems both in terms of enforcement and legislation to deal with the fashion piracy such as counterfeiting or knock-offs that may be an obstacle for fashion industry in Thailand. To find the best recommendations, this thesis will compare two legislations, the first of which is from the UK as the role model of a developed country and being a leading country in fashion having systematic and strong intellectual property protection for their fashion industry while the UK's fashion industry is still growing. The other legislation is India as the one of the developing countries having laws protecting their fashion industry in many intellectual property regimes but still being a leader of fashion industry in Asia and its fashion and textile industry is expected to be a major competitor to China in 2020 .In addition, this research will discuss the impact of fashion piracy in Thailand in order to investigate its suitable control for the Thai fashion industry.

3.2 Research Objectives

The purpose of this research is to analyse and compare the legislations of the model countries and the model laws protecting fashion design in order give recommendations on the development of the intellectual property system in Thailand

to deal with fashion piracy and enhance the capacity of the Thai fashion industry to compete with the other Asian countries. Therefore, it is significant to structure this research according to these key objectives as follows:

1. To analyse the impact of fashion piracy on the Thai fashion industry.
2. To analyse the effectiveness of the current intellectual property laws with regard to protecting the fashion industry in Thailand both in legislation and legal enforcement.
3. To identify the appropriate level that the laws should be reformed to promote the Thai fashion industry rather than being an obstacle to the development of this industry.
4. To give the systematic analysis by the comparative study of intellectual property law protecting fashion design in both a developed country and two developing countries with three jurisdictions, including their history and characteristics: the UK as the leading western fashion country, which has had laws to protect their fashion designs for a long time, India as a developing country having intellectual property law that is applicable to protect their fashion industry in many intellectual property regimes, and Thailand, a developing country which has no specific law to protect their fashion designs.

4. Research Questions

1. How does the current Thai intellectual property law protect the fashion industry, and is it adequate or inadequate?
2. What are the effects of fashion piracy on the fashion industry in Thailand?
3. Can the TRIPS agreement be the model law to protect fashion design from fashion piracy?

4. India is a developing country like Thailand but has IPR protection for the fashion industry; how effective is the Indian IP protection scheme for its fashion industry, and is having protection for fashion design a disadvantage or advantage for India's fashion industry?

5. Which components of IPR protection for the fashion industry in the UK enhance the success of their fashion industry, and why is this protection effective in application to their fashion industry?

5. Research Methodologies

This research aims to present a comprehensive study of the effectiveness and appropriateness of the laws protecting fashion design in Thailand that can support and enhance the development of the Thai fashion industry in a sustainable way. The appropriateness of the legislation and the legal practices of the UK, India and Thailand will be analysed, including the case study of fashion design counterfeiting in these countries; therefore, it is important to use the appropriate methods to analyse and study each issue and particular legislation.

The qualitative method, which is deemed to be a valid and reliable method, is the main approach used in this study. According to Dobinson and Johns' theories, there are two types of qualitative legal research, namely, doctrinal and non-doctrinal⁶⁵. Qualitative research in the form of an inquiry is applied in various academic disciplines,

⁶⁵ Bruce L. Berg, *Qualitative Research for the Social Sciences* (4th edn, Allyn & Bacon, 2001).

especially social sciences, with the main goal of acquiring an in-depth understanding of specific human behaviour and the reasons that govern such behaviour⁶⁶.

This research uses two types of qualitative methods that are often used in social science studies to ensure the validity of the research outcomes and lead to critical analysis⁶⁷. The two methods used in this research are doctrinal legal research and comparative legal research, and the reasons for combining these two methods will be explained below.

5.1 Doctrinal legal research

This thesis is principally library-based research, thus the main and core research method that will be applied for this thesis is doctrinal research methods. These methods are used to provide the systematic analysis of various intellectual property law regimes protecting fashion design in the model countries, including regulations and procedures that are relevant to fashion design protection in international mandates and TRIPs. This method is also used to exam how suitable the application of TRIPs is for protection of the fashion industry in developing countries and the relationship of TRIPs to the laws protecting fashion design in the developed country. Also, when conducting this doctrinal research, a historical view of the fashion and intellectual property law development of the UK, India and Thailand will also be adopted as to explain in more detail how it evolved over the time. Therefore, the doctrinal research in this thesis is not limited to only legal doctrine due to the fashion industry being concerned with economic, historical and even social perspectives. Thus, the doctrinal research is also concerned with the economic, social, and historical

⁶⁶ Catherine Marshall and Gretchen B Rossman, *Designing Qualitative Research* (Sage Publications 1989).

⁶⁷ Guy Holborn, *Butterworths Legal Research Guide* (Butterworths, 2008).

backgrounds of these three countries, especially their main issues in the fashion industry.

5.2 Comparative legal research

Comparative legal research is the main methodology that will be applied to address the research questions of this thesis. The term ‘comparative law’ means the comparison of the legal systems of the world, and the comparative legal methods are implemented to compare the laws or specific aspects of the laws of different jurisdictions, the legal system, or legal history⁶⁸. The important function of comparative legal methods is to provide better solutions regarding various issues that cannot be found in their own legal system. Therefore, comparative legal research is beneficial for legal development and even reforming the legal system when these two purposes are required⁶⁹.

Comparative legal research in this thesis will be designed to serve two goals; first, the comparison of similarities and differences of the legal systems protecting the fashion industry between the UK, India and Thailand; second, to find the recommendations for Thailand—calling for the reform of intellectual property system based on the experience of other jurisdictions, in all countries, regardless of their national wealth.

The jurisdiction that is used as the comparative model is divided into two sections, including the intellectual property systems protecting fashion design in developing and developed countries, the role that IP has in the fashion industry, their

⁶⁸ Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press, 1998).

⁶⁹ Reinhard Zimmermann and Mathias Reimann, *the Oxford Handbook of Comparative Law* (Oxford University Press, 2006).

IP enforcement level, and the public policy on IP and the fashion industry including its level of effectiveness, will be compared in this thesis.

India was chosen to be the comparative model of a developing country for Thailand due to several reasons: it is a developing country with the fashion industry being a major industry in its economic scale⁷⁰, and it is a developing country that has a legal system to protect its fashion industry while its fashion industry is dramatically growing. The United Kingdom was chosen as the model that represents developed countries since it has created a well-established and comprehensive system for IP law, but its fashion industry has been successful in both the past and the present.

Chapter 2

⁷⁰ India, "Ministry of Textiles" (*Texmin.nic.in*, 2015) <<http://www.texmin.nic.in>> accessed 11 November 2015.

2. Fashion piracy and intellectual property on the international stage

2.1 Historical impact of fashion on society and the economic perspective

Fashion has been connected to politics and economics throughout history. When Rome expanded its empire from Great Britain to Persia, Roman citizens used fashion to symbolise western civilisation in their colonies. The Byzantium Empire or Eastern Roman Empire with its capital of Constantinople survived the fall of Rome and became the epitome of style before being replaced by the Italian Renaissance in the late middle Ages. Before the fifteenth century, when India and China led the world economy, painted cottons from India and colourful Chinese silks became the firm fashion favourites of many wealthy westerners⁷¹.

Styles from the European courts and their powerful monarchies set the trend of international fashion in the seventeenth century, and this was followed by the Industrial revolution, which began in Western Europe in the eighteenth century and quickly spread to America⁷². By the beginning of the twentieth century, more than half of the world's goods were produced in these two regions and their fashion styles were established as the mark of a developed country. In the twenty-first century, designs from the catwalks of fashion capitals such as Paris, New York, Milan and London set the trends of apparel all over the world.

It is clear from many reports and economic reviews that fashion is one of the most powerful industries today in terms of its beneficial contribution to the global

⁷¹ Linda Welters and Arthur C. Mead, 'The Future of Chinese Fashion' (2015) 4:1 Fashion Practice: The Journal of Design, Creative Process & the Fashion Industry.

⁷² Steven Faerm, *Fashion* (Barron's 2010). p. 67

economy, especially in employment⁷³. From workers in the textile and leather industries to shop assistants, as well as in other related industries, such as logistics, advertising, and even the chemical industry used for fabric dyeing, the fashion industry, both directly and indirectly, creates a tremendous number of jobs in numerous countries. The huge value of the contemporary fashion industry depends on its market channels and the demands of customers worldwide. This business includes top-to-toe apparel designed by renowned fashionistas, from Vivien Westwood's famous hair band to the high-heeled shoes of Manolo Blahnik⁷⁴. These designers invest their time in the adding of value to the fashion industry with their innovative and iconic styles.

Fashion is also a much-studied issue in academia. It has been the subject of many disciplines during the past century, including sociology, psychology, and even the history of art. In terms of social theory, fashion has been the object of much research related to social classes and social change. The trickle-down theory of Veblen in 1899⁷⁵ is a classical sociological concept that focuses on the effect of fashion on different social classes. This theory criticises both the vertical and horizontal dissemination of fashion in society. Veblen theorized that new technologies and consumer goods initially come into the market at a price point that only the elite can afford. Over time, other companies manufacture their own, more affordable versions of such products, and the lower classes begin to purchase them.

⁷³ Lisa Jean Hedrick, 'Tearing Fashion Design Protection Apart At The Seams' (2008) 215 Wash & Lee Law Review.

⁷⁴ What to wear post, 'Rachel C, The importance Of Fashion Industry in Our Society' (2013) <<http://www.whattowearpost.com/The-Importance-of-Fashion-Industry-in-Our-Society>> accessed 20 February 2015.

⁷⁵ Thorstein Veblen, *the Theory of the Leisure Class* (Project Gutenberg).

In a recent psychology study, fashionable dress was found provides two basic functions for people: as a modifier of body processes and as communication for social events because clothing not only can protect the wearer from environmental harm but also be used as a symbolic representation of the emotional state or purpose of the wearer, such as black or dark coloured clothes worn for funeral ceremonies or the pastel coloured or white garments for weddings or celebratory events⁷⁶. Moreover, fashion and apparel have been combined with social norms and other social factors, such as class, ethnicity and gender in many societies in the past⁷⁷

In terms of fashion-ology, the fashion researcher, Kawamura, presents an interesting concept of fashion and intellectual property, arguing that “Fashion, in fact, has little to do with clothing as clothing is about material production, while fashion is about symbolic production”⁷⁸. She also extends the idea that fashion is immaterial and intellectual; in other words, it is fashion itself that is the object of an intellectual property right, not the material clothing or apparel, but nowadays, the fashion materials such as synthetic materials that are made and coated by specific processes to protect or clean itself from dirt are enriched with intellectual property⁷⁹.

Furthermore, in the book *The Fashion Design Course, Principles, Practice and Techniques of Steven Faerm*, which has been used in many fashion courses in many countries stated to support the difference between Fashion and Clothing that⁸⁰ “Fashion and Clothing may appear to be the same thing, but they are far from it.

⁷⁶ M. E. Roach-Higgins and J. B. Eicher, 'Dress and Identity' (1992) 10 Clothing and Textiles Research Journal.

⁷⁷ Louise Edwards, 'Changing Clothes in China: Fashion, History, Nation' (2009) 114 AM HIST REV.

⁷⁸ Yuniya Kawamura, *Fashion-Ology* (Berg 2005). p. 53

⁷⁹ 'Special Issue: Materials Research at Shanghai Jiao Tong University: (Adv. Mater. 3/2015)' (2015) 27 Adv. Mater.

⁸⁰ Steven Faerm, *Fashion-Design-Kurs* (Stiebner 2010).

Fashion is aspirational, content rich, unique, saturated message and artistic, but Clothing is lacking in specificity, common and just a product for the mass market". To clearly explain this idea, Faerm divides designers in the apparel industry into two groups, namely Fashion designers and Clothing designers. Fashion designers are not just creators of fashion, they are also involved in every phase of designing, presenting and producing clothing and accessories, while Clothing designers are usually employed by a clothing manufacturer or apparel company and work with a team headed by a creative designer under the concepts or current trends from the fashion designers under the limited material in order to achieve their market share.

2.2 The Value of the fashion industry in global economics, revolution and development

The growth of the fashion and textile industry can contribute to the growth of the global economy, especially in the area of employment⁸¹. In 2012, the global fashion industry was valued at US\$1.7 trillion and it employs approximately 75 million people in this huge industry⁸², from workers in the textile and leather industries to shop assistants, as well as personnel in other related industries, such as logistics, advertising, and even the chemical industry that is used for fabric processing.⁸³ The huge value of the contemporary fashion industry depends on its market channels and the demands of customers worldwide⁸⁴. This business includes top-to-toe apparel designed by renowned fashion-lover, from a Vivien Westwood's famous hair band to

⁸¹ Lisa Jean Hedrick, 'Tearing Fashion Design Protection Apart At The Seams' (2008) 215 Wash & Lee Law Review.

⁸² Global apparel, "Global Fashion Industry Statistics - Fashion News, Business, International Apparel Industry World Wide" (*Fashionunited.com*, 2016) <<https://www.fashionunited.com/global-fashion-industry-statistics-international-apparel>> accessed 22 January 2016.

⁸³ Frederic Godart, "The Power Structure of the Fashion Industry: Fashion Capitals, Globalization and Creativity" (2014) 1 International Journal of Fashion Studies.

⁸⁴ Margaret Bruce and Lucy Daly, ""Buyer Behavior for Fast Fashion"" (2006) Vol. 10, Journal of Fashion Marketing and Management: An International Journal.

the luxurious high-heeled shoes created by Manolo Blahnik⁸⁵. These designers invest their time in adding value to the fashion industry with their innovative and iconic styles.

The fashion and textile industry has been one of the most powerful industries throughout history⁸⁶. The Western merchant ships sailed from their home countries to trade their silver for Chinese silk or the vibrantly coloured textiles from India⁸⁷. This led the development to the eastern region as well as promoted China and India to the leaders of the garment and textile industry in the Eastern world.⁸⁸ In the beginning of the global fashion industry and the luxurious style of the European court was the symbol of a civilized country. The western people had the need for fabrics from the eastern countries not only for their basic purpose to cover themselves but also for the extravagant dress used as a symbol to show their social status and their class⁸⁹. The impression of Indian embroidered textiles and the delicate lace from Chinese attire in the emperor's court inspired the creation of fashion of European designers. Fashion couture has been limited to the upper social classes since the Industrial Revolution in the eighteenth century. The Industrial Revolution made fashion design and clothes a part of the concept of mass market production whereas in the past they were made by custom tailoring⁹⁰. In the middle of the eighteenth century, being the developer of machines producing woven cotton cloth from the traditional process made England the leader of cotton textile manufacturing after this revolution and shipped their cotton

⁸⁵ Luciana Zegheanu, "Fashion Trends' Impact on Society" (*not just a label*, 2016) <<https://www.notjustalabel.com/editorial/fashion-trends%E2%80%99-impact-society>> accessed 22 January 2016

⁸⁶ Ibid 11 p. 13

⁸⁷ Douglas Bullis, *Fashion Asia* (Thames & Hudson 2000). p. 208

⁸⁸ Ibid 1 p. 117

⁸⁹ Louise Edwards, "Changing Clothes in China: Fashion, History, Nation" (2009) 114 AM HIST REV. p. 36

⁹⁰ Steven Faerm, *Fashion* (Barron's 2010). p. 113

clothes back to Asia⁹¹. Following this, the advent of machinery development and the lower wages of production facilitated the USA becoming the leader of the textile industry in the 1870s - 1930s because they could produce cheaper cotton clothes and made them in the ready-to-wear styles⁹². However, in the early the 1930s, Japan came to be the leader of the textile industry from the comparatively lower wages for production, and this industry brought the growth and development of other relevant industries in Japan. After the 1970s, Japan was the role model for many countries in Asia such as China, Korea and Taiwan to enter into the war of textiles in which all players have to compete with the lower wages of their production. The fruits of this game could help accelerate the economic growth of this region and led to the development of their infrastructure to supply the logistics of this huge industry⁹³.

Nowadays, whilst many developing countries are still manufacturing cheap fashion goods the designs of fashion apparel from the western fashion capitals, such as Paris, New York, Milan and London are setting the trends and demands of apparel for the global fashion industry, and they have never been challenged by the cheaper wage competition in order to gain profits from the sales of amounts of cheap fashion products like the fashion industry in developing countries, where the fashion industries are huge and have brought significantly large amounts of revenue to their economies since the nineteenth century. Whether the fashion industry in developing countries being developed in the right way is a question will be debated in the third chapter of this thesis.

2.3 Fashion design hierarchy: the beginning of the fashion cycle

⁹¹ Katrina Honeyman and Clare Rose, "Researching The Garment Industry" (2009) 40 Textile History.

⁹² Paul Mantoux, *the Industrial Revolution in the Eighteenth Century* (Macmillan 1961). p 128

⁹³ Ibid 8 p .163

“Fashion is a form of art”⁹⁴ because it can reflect the social norms with its own language to its individual group the same as any other form of art such as a song, poem, sculpture or film. Throughout history, people have always expressed themselves through their personality according to their age, social hierarchy, occupation or their generation, and surely, the way they dress is a tool of this social behaviour⁹⁵. It is common knowledge of people that fashion is the dressing for social occasions or daily life⁹⁶, but it may be more than that because it can be defined as “Style” or the style of clothing and accessories, including jewelry to footwear worn by people to express the current trends and their attitude in each society⁹⁷.

However, fashion itself seems to be an abstract definition. Therefore, “fashion design” can be the expression of fashion idea from the designers. Fashion designers can translate the aesthetic beauty of the fashion into the tangible form like fashion apparel⁹⁸. The origin of fashion clothing and other fashion accessories was created and influenced by different cultural and social attitudes, which can reflect the story behind the fashion article⁹⁹. However, in the global fashion industry, the segment of fashion in the fashion hierarchy can be simply divided into three basic categories: (1) the first level is haute couture, (2) the second is ready-to-wear, (3) and the last category is mass market lines¹⁰⁰. The details of each layer can be explained as follows:

⁹⁴ Yuniya Kawamura, *Fashion-Ology* (Berg 2005). p 11

⁹⁵ Kim Johnson, Sharron J Lennon and Nancy Rudd, "Dress, Body and Self: Research in the Social Psychology of Dress" (2014) 1 *Fashion and Textiles*.

⁹⁶ Hildi Hendrickson, Anne Brydon and Sandra Nielsen, "Consuming Fashion: Adorning the Transnational Body" (1999) 72 *Anthropological Quarterly*.

⁹⁷ M. E. Roach-Higgins and J. B. Eicher, "Dress and Identity" (1992) 10 *Clothing and Textiles Research Journal*.

⁹⁸ *Ibid* 15 p .37

⁹⁹ Susan Elizabeth Ryan, "What Is Wearable Technology Art?" (2015) 8 *Intelligent Agent*. p. 14

¹⁰⁰ Pierre Valette-Florence, "Luxury and Counterfeiting: Issues, Challenges and Prospects" (2012) 19 *J Brand Managment*.

1) Haute couture is tailor-made for customisation to exactly fit the customer's size. Before the 1950s, all fashion was designed and produced on an haute couture basis¹⁰¹; therefore, fashion items seemed to be the craft for exclusive customers in which each item uses expensive fabrics and special techniques for decoration that are time-consuming, but which create the signature style of each haute couture house. Even now, designers for haute couture houses should be qualified and be a member of the Syndical Chamber for Haute Couture and have to show their collection twice a year with a minimum of 35 outfits per show to maintain their position in this chamber¹⁰². The famous brands that manufacture the Haute couture fashion are , for example, Chanel, Giorgio Armani, Christian Dior, Louis Vuitton, Thierry Mugler, and Junya Watanabe from Japan.

2) The second category of fashion items is Ready-to-Wear (Prêt-à-Porter). This collection is not made for the individual customer but can still be made in small quantities to maintain the "exclusive sensation" in their design that was produced under the limits of the standard size¹⁰³. The ready-to-wear collections will be presented by fashion houses during fashion week and the show is divided into two categories, which are designer collections and confection collections. The designer collections in ready-to-wear are more detailed and express a higher statement of design or philosophy than the confection collections and do not aim to sell but rather are for making an inspiration on international catwalks¹⁰⁴. The fashion houses for which

¹⁰¹ Toby Meadows, *How To Set Up & Run A Fashion Label* (Laurence King 2009). p. 32

¹⁰² Steven Faerm, *Creating a Successful Fashion Collection* (Barron's 2012).

¹⁰³ Ibid 26 p 36

¹⁰⁴ Maria Mackinney-Valentin and Stina Teilmann-Lock, "Copy Chic: Status Representation and Intellectual Property Rights in Contemporary Luxury Fashion" (2014) 1:1 History, Culture, Consumption.

most of their fashion items are ready-to-wear are DKNY, Calvin Klein, Emporio Armani, and Marc by Marc Jacobs¹⁰⁵.

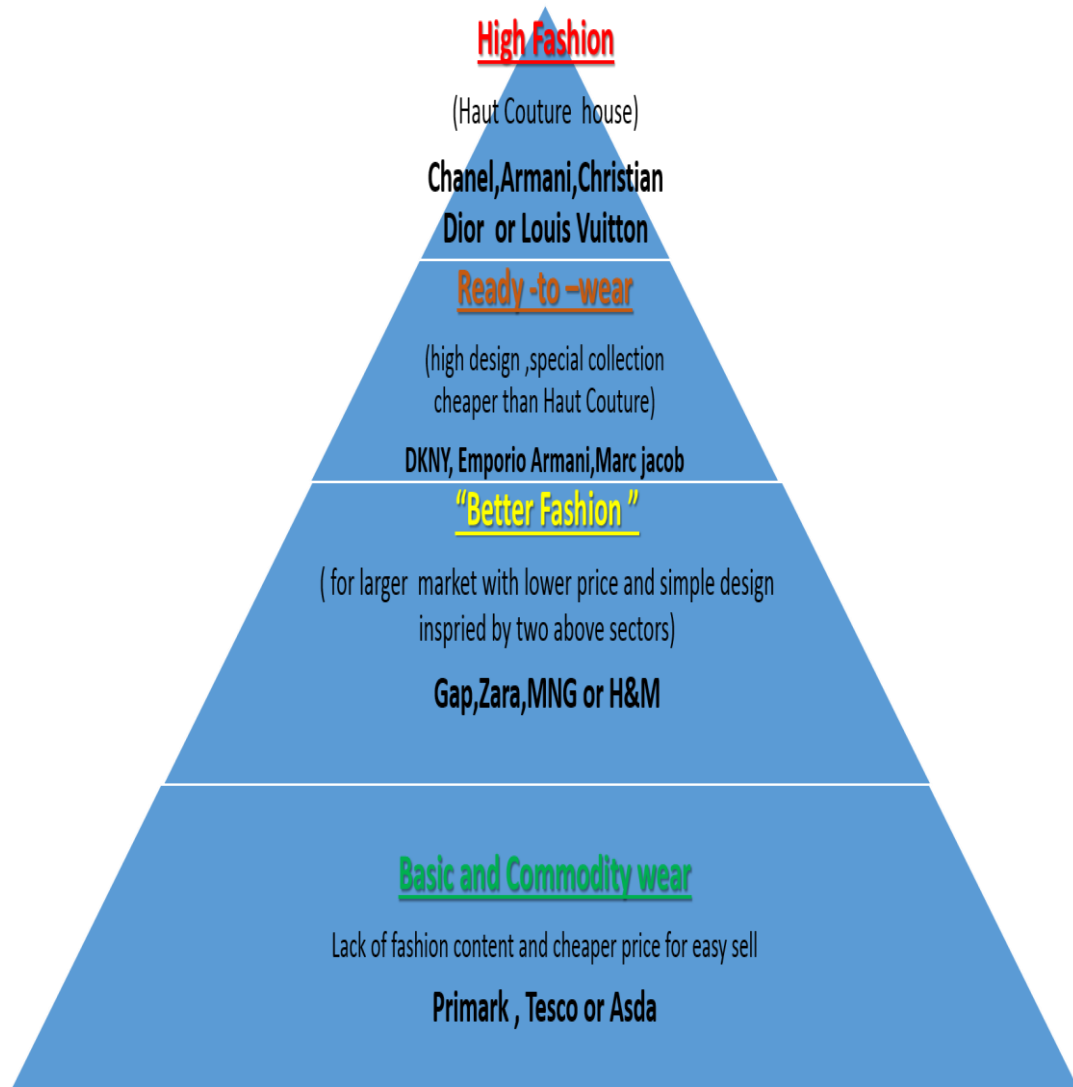
3) The last category of fashion design is the “mass market” that consists of better fashions and high street brands. Their customer base is wide ranging, and therefore, their designs should be simple without too many exaggerated details and using the limited materials to control the manufacturing price so that it can be accessible for their multiple customers¹⁰⁶. This sector also includes “fast fashion” such as Zara, Topshop, and H&M with designs that may be inspired by the former two categories and normally sold at cheaper prices¹⁰⁷. This sector includes the basic and commodity wear, for example Primark and Walmart in the USA. This subdivision of the fashion sector can be presented as a Pyramid Graph as follows.

¹⁰⁵ Toby Meadows, *How To Set Up & Run A Fashion Label* (Laurence King 2009). p. 34

¹⁰⁶ Jenna Sauers, "How Forever 21 Keeps Getting Away with Designer Knockoffs" <<http://jezebel.com/5822762/how-forever-21-keeps-getting-away-with-designer-knockoffs>> accessed 9 March 2015.

¹⁰⁷ Erika Myers, "Justice in Fashion: Cheap Chic and the Intellectual Property Equilibrium in the United Kingdom and the United States" (2009) Winter AIPLA Quarterly Journal.

The Hierarchy of fashion explained by brand status



2.4 The variations of fashion piracy

The fashion industry is the one of the most highly competitive industries, thus, to be successful in the fashion business fashion designers should create their own trends or follow the recent trends from the runway¹⁰⁸. Fashion designers may be

¹⁰⁸ Lisa Jean Hedrick, "Tearing Fashion Design Protection Apart at The Seams" (2008) 215 Wash & Lee Law Review.

inspired from world events, art from the past or present and even from the variations of cultural traditions from around the world. Moreover, the leading designers always do market research in order to use it to predict the future trends and set it as their inspiration before interpreting it into fashion designs. Finally, this process will create the fashion items for “the Must list” of celebrities and fashion lovers in their market.

Like many creative industries, when the innovator creates a new product other competitors might follow or interpret it in either way, but the easiest way to follow the other idea is copying, and the fashion industry is no exception because the originality and the copying in fashion items are used as the topic of discussion of many conferences. Gabriel “Coco” Chanel, the brand founder of Chanel explained that copying in fashion industry is a normal phenomena because the nature of this industry is “Reworking, Referencing and Remix”¹⁰⁹. However, in the fashion business the price of fashion items in leading brands like Louis Vuitton or Gucci may not be affordable for everyone, and the demand of customers who like to follow fashion trends but have a limited budget results in the fashion piracy for the world market.

The word “piracy” is “[t]he unauthorized and illegal reproduction or distribution of material protected by copyright, patent or trademark law”¹¹⁰. From this definition, piracy has unauthorized reproduction as the principle of the act. In the context applied to the fashion industry, fashion piracy can be divided into: (1) piracy in fashion designs and (2) piracy in the logos or labels of fashion brands. In practice, the form of fashion design piracy is relevant to one of two forms, which are knock-offs or counterfeits.

¹⁰⁹ Lauren E. Purcell, "A Fashion Flop: The Innovative Design Protection and Piracy Prevention Act" [2013] *Journal of Law and Commerce*, University of Pittsburgh.

¹¹⁰ Bryan A. Garner and Henry Campbell Black, *Black's Law Dictionary* (9th edn, West Group, 2009).

Whereas “knock-off” is defined as the act of copy or imitation of something popular and producing it without license from the originator¹¹¹, in the fashion piracy, a “knock-off” item is a close copy of the original article, including its distinctive elements and can be identical due to the mimicking of the famous products in fashion market, but is sold under a different label to the original item. Therefore, they are not made to deceive consumers regarding their origin, but the knock-off is intended to be the choice of consumers who cannot afford the original design with a “line for line” copy but in lower-priced versions¹¹².

Contrasting with knock-offs, a “counterfeit” is a copy of the full original design of fashion item, including its brand logo or even the label of the original item, in order to deceive the customer into believing that it is the original article¹¹³ because the vendor may display and claim it as the original item. Normally, the counterfeit act is involved in piracy of both the copying of the design and logo, but sometimes counterfeit products may copy only the famous fashion brand and attach it to a design that is different to the original design.

2.5 The first glance of impacts of counterfeits and knock-offs on the fashion industry

The true value of high-fashion brands is the signature of the designers who invest their time and hard work to produce inspirational sketches. The process of conveying their imagination to the manufacturer may take up to twenty-four months. Some of the styles will be permanent signatures, while others will have missed the season. For this

¹¹¹ Law Dictionary online, "Black's Law Dictionary - Free Online Legal Dictionary" (*TheLawdictionary.org*, 2015) <<http://thelawdictionary.org>> accessed 8 December 2015.

¹¹² Irena Tan, "Knock It Off, Forever 21! The Fashion Industry's Battle against Design Piracy" (2010) 893 *Journal of Law and Policy*.

¹¹³ *Ibid* 43

reason, high-end styles may be unaffordable to all followers of fashion; therefore, counterfeits and knock-offs are the only alternatives.

Basically, compared to other innovative industries, fashion and luxury goods are the first target of counterfeiters because the pattern or shape can be easily copied from a picture of the original product; moreover, the unaffordable price of luxury goods leads to the mass production of counterfeit products for customers who cannot afford the originals¹¹⁴. The increase in e-commerce in the past decade has enabled consumers to access counterfeit goods faster and more efficiently, and a growing number of brands are being affected, including well-known high street brands, not only the luxury brands as seen in the last decade. According to the Centre for Fashion Enterprises, both international and local brands are victims of this kind of crime. Fashion entrepreneurs in the UK lose an estimated £500,000 per year in revenue as a result of the counterfeit and passing-off industry¹¹⁵. The copying and production of counterfeit products is faster and more accurate than it used to be due to technological advances, which may support to deceive the customer who is familiar with the original item.

Some counterfeit products sold in flea markets can be identified by the materials used or erroneous details. However, many counterfeit products manufactured using high-tech equipment can exactly imitate the original, which makes it more difficult for customers to distinguish the authentic products from the counterfeits. This has driven

¹¹⁴ Ying Wang and Yiping Song, 'Counterfeit: Friend or Foe of Luxury Brands? An Examination of Chinese Consumers' Attitudes toward Counterfeit Luxury Brands' (2013) 26:4 Journal of Global Marketing.

¹¹⁵ Roxanne Elings, Lisa D Keith and George P Wukoson, "' Anti-Counterfeiting-in-the-Fashion-and-Luxury-Sectors-Trends-and-Strategies' (2013) 1 Anti-counterfeiting 2013 – A Global Guide.

original fashion companies to develop innovative security devices to help their customers to track the authenticity code and ensure that the article is an original before deciding to purchase it¹¹⁶. Although this may be the one of the benefits of fashion piracy in the perspective of product development, the investment in this innovation may be the cost affecting the price of the item.

Moreover, the poor standard of quality in the processing of counterfeit products also affects the customers who buy them. Counterfeiters can sell their products more cheaply because they do not adhere to the international manufacturing standards or even the minimum standards for public safety. For example, the fabrics used in counterfeit products may have some toxins left over from the bleaching process that may cause a serious allergic reaction¹¹⁷.

However, the degree of impact on the fashion industry varies, and fashion designers hold different perspectives regarding the impacts of counterfeiting on their business. While some consider it to be annoying but are flattered that another designer wants to copy their design, others find it harmful and a breach of their intellectual property rights. According to Mucia Prada, the copying and expanding of her designs is an advantage for her brand because it increases the demand for luxury brands. Similarly, Tom Ford, the ex-art director of Gucci, has been known to say that nothing makes him happier than seeing copies of what he has done because it shows that he did something right and was able to be a trend setter at that time¹¹⁸.

¹¹⁶ Mary Gehlhar and Diane Von Furstenberg, *the Fashion Designer Survival Guide* (Kaplan, 2008).

¹¹⁷ *WIPO Magazine*, "Intellectual Property in the Fashion Industry" (2005), p. 16, http://www.wipo.int/sme/en/documents/wipo_magazine/5_2005.pdf [Accessed November 29, 2014].

¹¹⁸ Jenna Sauers, "How Forever 21 Keeps getting away with Designer Knockoffs" <<http://jezebel.com/5822762/how-forever-21-keeps-getting-away-with-designer-knockoffs>> accessed 9 March 2015.

Many scholars have proposed theories about the effects of fashion design piracy on the fashion industry. Some conclude that copying is part of innovative business practices, including fashion design, and it can accelerate the trends of fashion and stimulate designers to create more new designs. However, others argue that copying may reduce the incentive for designers to challenge the result of fashion piracy, especially young designers who cannot support themselves. This is because the pirating of their design prevents them from earning a return on their investment because the person selling the item in the retail store is not the one who designed it with the time and investment both for innovation and economics. Therefore, the limited financial support may lead young designers to give up at the first hurdle¹¹⁹.

According to a British Fashion Council report, the fashion industry directly accounted for approximately £6.6 billion of Gross Value Added (GVA) to the economy of UK in 2009-2010¹²⁰. Still, the Centre for Fashion Enterprise scrutinized data and estimated that amongst small and medium-sized designer enterprises (SMEs) the loss of their revenue as a result of fashion piracy and counterfeit products is around £100,000 per year, which can restrict a UK designer's ability to expand and trade in some overseas territories under their existing brand name. As a business matures, this estimated figure resulting from this issue could grow to £500,000 in lost revenues including loss of licensing opportunities.

2.6 The latest phenomenon of copying in the fashion industry: “Fast fashion”

Fashion is the result of the desire of privileged people who want to “stand out from the crowd”. When the elites in society purchase an item of fashionable clothing,

¹¹⁹ Pierre Valette-Florence, 'Luxury and Counterfeiting: Issues, Challenges and Prospects' (2012) 19 J Brand Manager.

¹²⁰ The Value of the UK Fashion Industry, British Fashion Council and Oxford Economics, 2010

some consumers are inspired to emulate how they look by dressing in a similar way. This trickle-down phenomenon from the elites to the masses forms a fashion cycle because, having observed their style permeating the mass market, leading fashion designers move on to creating the next style to distinguish themselves from others¹²¹. Fashion designers become engaged in the process of creating new fashionable items to respond to the demand of fashion elites in this cycle and introduce their creations in seasonal runway shows. This presentation process, aided by the latest technology, can lead to the almost instant copying of fashion designs as soon as the show finishes. This exact copying or “counterfeiting” results in the rise of “fast fashion”, which may reduce the value of a distinctive design of a luxury brand, even before it hits the market, and many studies in the literature address the issue of copying fashion designs from different perspectives.

Fashion can be defined as a specific style or practice that is widely accepted by a group of people in society at a particular time; however, its lifecycle tends to be short, being driven by market conditions and consumer demand. Therefore, success in the fashion apparel business depends on retailers’ speed in capturing a trend before it changes. Fashion shows on runways, which were always restricted to designers, buyers or fashion managers, provided a great deal of inspiration to the fashion industry. However, these shows have become more public since 1999, with the development of mass media, and photographs of the latest fashion shows can be seen on websites or in magazines. As a result, a wide range of consumers are able to access exclusive designs inspired by the runway. Fashion retailers such as Topshop, Zara, MNG or H&M can rapidly adapt these designs to attract customers. Their

¹²¹ Sheppard Mullin “Faking it: what designers should know about Piracy, Purse Parties, and Parking Lots”, [http://www.fashionapparelblog.com/2007/11/articles/ipbrands protection /Nov 16 2007](http://www.fashionapparelblog.com/2007/11/articles/ipbrands%20protection/Nov%2016%202007).

interpretation of these designs can be on sale in their high street stores within 2 or 3 weeks of appearing in the shows¹²².

The distinction between interpreting and copying for fast fashion is crucial, as there is a thin line between them, which is difficult to explain, but it can be implied from the intention of the designer in many cases. The fast fashion business is a good example because there are many intellectual property issues related to knock-off designs in the fashion industry. Most fast fashion styles seem to be exact or close copies of the original design rather than an interpretation¹²³. Fast fashion retailers can imitate the original design within a week of the début show of high-end fashion designers, which is faster than the creators, who can take more than four months to produce their products for retailers. This is because the photographs taken of the apparel on the runway are instantaneously sent to the manufacturers to produce a mass knock-off design in a very short time.

Moreover, fast fashion brands such as ZARA, H&M and Forever 21 are able to provide their fashion consumers with the current trends at cheaper prices because they outsource their production to countries like Bangladesh and India, where there is cheap labour and attractive tax policies¹²⁴. Many of the factory workers are paid less than the minimum wage, and they may have to work for more than 20 hours for a shift because their wages are insufficient to support their families. Nevertheless, it creates

¹²² Lisa Jean Hedrick, 'Tearing Fashion Design Protection Apart at The Seams' (2008) 215 Wash & Lee Law Review.

¹²³ Irena Tan, 'Knock It Off, Forever 21! The Fashion Industry's battle against Design Piracy' (2010) 893 Journal of Law and Policy.

¹²⁴ Arielle. K Cohen, "Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma" (2012) 217 Chicago-Kent Journal of Intellectual Property.

the jobs and revenue for many people in undeveloped countries, but sometimes it also increases problems involving illegal child labour due to illegal employment being a part of this phenomenon, which is a significant international human rights issue.

However, fast fashion retailers, for example Topshop or Zara, are trying to create their fashion style by adapting and interpreting the latest fashion trends from high-end brands to retail at affordable prices. Although these brands attempt to avoid close copying and employ their own in-house designers to interpret the original design from the latest show of famous brands in fashion week, they have still been accused of closely copying an original brand. For example, the British fast fashion retailer, Topshop, was forced to pay the high-fashion brand, “Chloé”, £12,000 due to legal action over a yellow mini dress copied and sold for only £35, while the original designed by Cloé was priced at £185.¹²⁵

2.7 The Fashion industry and IPR protection

Fashion is a global industry, and high-end luxury brands, such as Gucci, Hermès, Louis Vuitton, Prada, and their teams of designers, are the leaders in developing fashion trends across the world. The United States fashion industry was valued at more than US\$350 billion in the first half of 2014¹²⁶. The trends in the fashion world often begin with famous brands from fashion cities, such as Milan, London, New York,

¹²⁵ In 2007, Topshop was forced to destroy 2000 dresses after designer brand Cloé claimed that they were identical to a dress of their own. The high street copy sold for £35 a piece, £150 less than the original, which would make it very attractive to buyers. It was reported that before the case was filed, 774 of the designs in question had already been sold before Topshop were forced to remove the remaining stock and post an 'out of stock' message on its shopping site of their clothes and pay Chloe £12,000 in damages. See <http://www.dailymail.co.uk/news/article-470999/Topshop-forced-destroy-35-copycat-dress-Chloe-calls-lawyers.html> [Accessed November 25, 2014].

¹²⁶ Companiesandmarkets.com, 'US Apparels Industry Reached a Value Of \$330 Billion In Revenue' (2014) <<http://companiesandmarkets.com>> accessed 10 February 2015

Paris, and Tokyo. The trend in each season is introduced in a fashion show with a runway, commonly known as a catwalk. These shows include the creations of designers who are seeking to promote their garments and accessories, as well as acquire some early orders from buyers who sit in the front row near the stage. Each of these creations, however, has value, which gives it a high price, and not everyone can afford fashion apparel designed and produced by leading brands; therefore, counterfeit goods are an affordable alternative for consumers who like to follow the fashion trends, which results in fashion piracy.

The true value of fashion items is the signature of designs from designers who invest their time and hardship to produce the inspirational sketches, the process of conveying their imagination to the finish product, which may take up to twenty-four months¹²⁷. Some of the styles will be the permanent signatures in the fashion industry, while many disappear after a season. Basically, fashion design from the luxury brands are the first target of fashion piracy due to their unaffordable prices, but at present¹²⁸, a growing number of brands are being affected, including well-known high street shops to the local young designer brands because the increase of e-commerce and data interchanging in the past decade has enabled the access to counterfeit products by customers within reach of their “click” and the pictures of the new collection in the latest fashion show from the large cities of fashion like Milan or New York can be sent to the counterfeit or knock-off manufacturers before the “after party” of many fashion shows has even started. This can lead to the instant copying of fashion design as soon as possible. According to a report from the Centre for Fashion Enterprise of the UK, both international and local brands are the victims of this crime. Fashion entrepreneurs

¹²⁷ Toby Meadows, *How To Set Up & Run A Fashion Label* (Laurence King 2009). p. 63

¹²⁸ Erika Myers, "Justice in Fashion: Cheap Chic and the Intellectual Property Equilibrium in the United Kingdom and the United States" (2009) Winter AIPLA Quarterly Journal.

in the UK lose an estimated £500,000 per year in revenue as a result of fashion piracy¹²⁹.

Being the result of human intellect and creativity like other innovations, fashion design can be the subject matter for IPR protection similar to other types of intellectual property, but the conflicting view of whether fashion design needs IPR protection is still debated in many conferences. Outside of academic research, many fashion designers have a different view of the effects of copying on their business. While some consider it normal and annoying, others find it harmful and a breach of their intellectual property rights. Mucia Prada, the executive director and the brand founder of Prada, stated that the copying of her designs is an advantage to her brand because it increases the demand for the brand¹³⁰. Similarly, Tom Ford, the former art director of Gucci, also asserted that “nothing make him happier than seeing the copy version of their designs” because it shows that he did the right thing¹³¹.

The well-known opponents of fashion design protection, Raustiala and Sprigman, argue that IPR protection is not necessary in this industry¹³² because the presence of IPR protection for fashion may affect the fashion cycle, which is driven faster by copying that increases the turnover of designs and their sale. Their opinion is based on the “trickle-down theory” in which it is assumed that the copying of fashion starts from the highest to the lower layers of the fashion industry. However, this theory

¹²⁹ Britishfashioncouncil.co.uk, "British Fashion Council - News" (2014)

<<http://britishfashioncouncil.co.uk/pressreleases/Fact--Figures-AW14>> accessed 3 November 2015.

¹³⁰ Alexandra Grant, "They Said/We Said: Prada's CEO (aka Miuccia's Husband) Thinks Counterfeit Goods are Not All that Bad" | Fashion | FASHION Magazine |" (*FASHION Magazine*, 2012)

<<http://www.fashionmagazine.com/fashion/2012/05/25/they-saidwe-said-pradas-ceo-aka-miuccias-husband-thinks-counterfeit-goods-are-not-all-that-bad/>> accessed 22 January 2016.

¹³¹ Kal Raustiala and Christopher Jon Sprigman, *The Knockoff Economy* (Oxford University Press 2012). p. 38

¹³² Kal Raustiala and Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design" (2006) 92 Virginia Law Review.

may not be applied to the current fashion industry where the copying can occur between all sectors of fashion and may proceed from the lower to the top as well.

On the other side of the argument, the proponents of Intellectual property protection for fashion design argue that the fashion industry is one of the highest valued industries in the world and the key factor of fashion design is “design”; when an outstanding designer fulfils the independent desire of their customers, the value of the intellectual property and the value of fashion retail are increased and the value of this industry is enlarged. Therefore, each design is expensive and difficult to create. Without any protection in intellectual property rights for the fashion industry, the easy copying of the valuable innovations will increase and may result in the discouragement of the creation of the new designs and future investment in this industry¹³³ because designers whose designs have been copied cannot receive profits from their creativity, because consumers went to the copyist instead. The proponents of this protection also maintain that the absence of the IPR protection can decrease the efforts of the young designers to build and develop their own brands.

Although the effects of counterfeiting and fashion piracy have long been discussed, some researchers in marketing found that the availability of counterfeit products may increase the brand awareness of the original brand and give more value to the authentic product¹³⁴. Moreover, many previous studies state that the fashion piracy phenomena helps to increase innovation in the clothing industry as the elite shoppers of leading fashion brands will seek the new designs of the genuine item when they have seen the crowds wearing fake outfits or knock-offs of their style, and

¹³³ C Scott Hemphill and Jenifer Suk, "The Law, Culture, and Economics of Fashion" (2009) 61 Stanford Law Review.

¹³⁴ Tedmond Wong, "TO COPY OR NOT TO COPY, THAT IS THE QUESTION: Wong, Tedmond, To Copy Or Not To Copy, That Is The Question: The Game Theory Approach To Protecting Fashion Designs" (2012) Vol. 160 University of Pennsylvania Law Review.

this will drive the designers to create the new “iconic designs” for the fashion industry¹³⁵.

Moreover, Wall and Large have expressed the idea that the consumption of counterfeit products should be considered both in the perspective of public and private interest. Fashion piracy may harm the fashion customer because of poor quality materials and also safety, but it quite difficult to deceive the real customer of a luxury brand who can recognise the authentic and the imitation items at the first glance. In addition, piracy in the fashion industry has a role to drive the development of design in each season due to the desire of elite customers to be the trend setters who would like to stand out from the crowd in society. Such customers demand new designs from fashion designers rather than looking back to their wardrobe of the past. Wall and Large seem to support the roles of fashions piracy in the sense of employment rather than its impact on the economics, which needs more research to support the claims of lost revenue calculated upon the retail sales at full price¹³⁶.

Lauren Howard, however, argues that¹³⁷ copying may reduce the incentive of young designers to challenge the results of this fashion piracy, especially for young fashion designers who have limited financial support and need income for their ideas to maintain their dream in the fashion industry rather than to smile and think that the copy version of their first collection is the right thing. Therefore, this fashion piracy may result in the young designers giving up at their first step.

¹³⁵ Kal Raustiala and Christopher Jon Sprigman, *The Knockoff Economy* (Oxford University Press 2012).

¹³⁶ Wall, D.S. and Large, J. (2010) 'Jailhouse Frock: Locating the public interest in policing counterfeit luxury fashion good' *British Journal of Criminology*, 50(6)

¹³⁷ Lauren Howard, "An Uningenious Paradox: Intellectual Property Protection for Fashion Designs" (2009) 78 *Columbia Journal of Law & the Arts*.

From the above different attitudes of scholars, it can be seen that the protection of fashion design should be implemented at the appropriate level, and it should be applicable in order to use it as a tool to drive the development of design for the fashion industry. According to the nature of fashion, fashion designers may refer to an existing design because common cycles of fashion trends in each season have never been totally new but are always created from the basis of the ordinary structure of apparel. Referring to the previous collection of other fashion designers as the inspiration seems to be acceptable in this industry¹³⁸. Therefore, the overprotection of fashion design by IPR may pause the cycle of creativity in this industry. However, the appropriate level of protection can ensure that the new designers who have limited financial means to support themselves and need their income to enlarge their methods of creativity in the fashion industry. Therefore, when they dare to create their brand or production line, it can bring jobs to their community before allowing them to collapse from the effects of fashion piracy during their first step.

2.8 Literature review

The literature review is a significant part before conducting any research. The reason for reviewing the literature is to discover the important variables of the topic and identify the supporting ground of the theories¹³⁹. Moreover, the other purpose of the literature review is to find the new perspectives of the hypothesis in order to provide the framework of the research and find the gaps in the previous research in the academic community. As mentioned in the aims, this research is to provide the

¹³⁸ Arielle, K. Cohen, "Designer Collaborations as A Solution to the Fast -Fashion Copyright Dilemma"" (2012) 217 Chicago-Kent Journal of Intellectual Property.

¹³⁹ Guy Holborn, *Butterworths Legal Research Guide* (Butterworths 2008).

recommendations for the Thai government to review the current intellectual property law system in Thailand in order to effectively protect fashion design and enhance the potential of the Thai fashion industry. Therefore, the researcher will formulate the focus of the literature review according to the research questions, which can make a sufficient argument with regard to the research objectives in three areas that are:

(1) The problem of the intellectual property system for fashion design protection in Thailand.

(2) Does fashion design in Thailand need IPR protection?

(3) The applicability of TRIPS for the creative industries in the developing countries.

(1) The problem of intellectual property system for fashion design protection in Thailand

After the end of the MFA in 2005, Thailand's fashion and textile industries were facing the challenges from the high level of competitiveness of China, India and other neighbouring countries such as Vietnam, Indonesia, and Cambodia due to their lower cost of production in this industry. In addition, the influx of cheap imports from those countries is also threatening the domestic market in Thailand. To survive this situation, according to the report of the Thai government in 2004, the Ministry of Industry in Thailand prepared the project to develop the Thai fashion industry by focusing on the "value added" of Thai fashion brands with improved design and brand identities. This project was launched by the Thaksin Shinawatra administration in 2006.¹⁴⁰

¹⁴⁰ Preeya Patichol, Winai Wongsurawat and Lalit M. Johri, "Upgrade Strategies in the Thai Silk Industry: Balancing Value Promotion and Cultural Heritage" (2014) 18 *Journal of Fashion Marketing and Management: An International Journal*.

Also, there was a strategic plan aiming to form the creative economy, but due to the instability of the government, this project was neither implemented nor sustained until 2012. The Ministry of Industry revived this project with more focus on supporting the talented local designers by importing advice and experts from leading countries in fashion, for example Italy and France in order to develop the designs of local brands. However, the problem of copying in fashion design from local designers in the lower markets in their community could reduce their revenue and push them to discount their latest collection before the appropriate time. Therefore, Thai young designers may prefer to wait for the trends from leading fashion house and interpret them into their work.

After reviewing the relevant literature that was written in both Thai and in English concerning the issue of fashion piracy in Thailand, the author found that most of the literature is research from the perspective of marketing and consumer behaviour towards the counterfeit products in the fashion market in Thailand. The research from a Thai scholar, Atthapol Jiramontree, was conducted with the quantitative methods with Thai and Singaporean participants showing the attitudes of Thai people towards counterfeit products is a common phenomenon and socially accepted behaviour in Thailand more than in Singapore¹⁴¹. This research also found that Thai people also think that only luxury fashion houses are the victims of fashion piracy. It can be seen that the above research was conducted with a limited number of people in the focus group, which cannot be assumed to represent the consciousness of fashion piracy in the attitudes held by the people living in Thailand; however, from this result it can be seen that the consciousness of people in Thailand

¹⁴¹ Atthapol Jiramontree, "Business Ethics And Counterfeit Purchase Intention: A Comparative Study On Thais And Singaporeans" (2013) 25:4 Journal of International Consumer Marketing.

toward the value of intellectual property rights are lower than that found in developed countries such as Singapore, where the intellectual property is the “invisible gold” in their sense of business. The value of Intellectual property can produce an unlimited source of income for their businesses in spite of the limit of the area in Singapore. Thus, from this research, this low awareness of Thai people regarding IPR may be the major obstacle to developing Thailand to enter into the innovative economics and may cause Thailand to become stuck in the position of a consumer economic in the future.

Another scholarly work supporting this argument in fashion piracy in Thailand was conducted by the Italian scholars Adam and Bertam, who studied the fashion piracy market in Thailand and found that the consuming of counterfeit items in Thailand seemed to be a common phenomenon¹⁴². They identified the two factors causing the unresolved problem of fashion piracy in Thailand as: (i) the materialism in Thai people living in the large cities who cannot afford the authentic fashion items but would show their elite status by using the copied version of the original design of high-end brands like Gucci or Prada whilst their community views that these behaviours are acceptable. Another factor that has a major impact on this issue is the transparency of intellectual property law enforcement with regard to the fashion piracy in Thailand because although the shops selling the pirated products are situated near the police stations, the practicalities for counterfeit crime will be applied to this market when the Thai government have the strict policy to eliminate the piracy market. Finally, when the fashion piracy sellers pay the corruption money to police officers or have personal deals with the officers, this case seems to be resolved without any legal enforcement.

¹⁴² Adam Arvidsson and Bertram Niessen, "Creative Mass. Consumption, Creativity and Innovation on Bangkok's Fashion Markets" (2014) 18 Consumption Markets & Culture.

According to this research, the attitude toward the value of intellectual property rights in developing countries such as Thailand is a huge obstacle to developing the innovative industry in this country and ruins the incentive of designers to create new designs to market and the enforcement of the law is too flexible for copyists. These phenomena seem to be similar to those found in other developing countries worldwide. Thus, the corruption of government officers in Thai society needs to be resolved as a priority in order to enhance the intellectual property law enforcement. However, this research is lacking an argument on the other side of fashion piracy in Thailand that may lead the local businesses in the tourism hub cities to generate income for the local people in Thailand.

It can be seen from the above that there has been no research directly conducted to study the legal perspectives concerning fashion piracy in Thailand. Thus, Thailand needs a research study on the appropriate level of legislation to deal with fashion piracy in Thailand. As we know, the present situation of the fashion industry in Thailand has been threatened by the growth of the fashion industry in China and India; therefore, the measure that can help the Thai fashion industry to survive in this situation is not only the marketing strategy in brand identities but also the proper implementation of legislation protecting the fashion industry in Thailand. It might be possible that the agreement on trade-related aspects of intellectual property (TRIPs) and the comparative study of laws protecting the fashion industry in other countries, both developing and developed countries, in order to determine the suitable level of protection for fashion designs will help the Thai government to enact the best laws and practices to deal with fashion piracy in Thailand and develop the Thai fashion industry in a sustainable way.

(2) Does fashion design in Thailand need IPR protection?

The fluidity of the IPR rights is caused by the fact that such rights can be adapted to fit a wide array of products ranging from daily life to the extravagant lifestyles of people in this age of globalisation¹⁴³. Keith Granet stated in his book¹⁴⁴ that “[t]he modern economics are now transformed into Design Economics”, in which the company have to create their original designs to distinguish themselves from others and use the lower cost of production countries like China and India to be manufacturer, which will make them the leaders in the market in both pricing and product identities¹⁴⁵. This concept presented that the “creativity is the core strategy for every industry in globalization” including the fashion industry where the unique designs have become the value-adding elements of every fashion item.

Intellectual property and the creative industries for example Music, Publishing and Art seem to be parallel subjects in the global business world. However, the creative industries like the Fashion industry and whether they need to be protected by the intellectual property laws are a common issue discussed in many conferences. Unsurprisingly, many scholars believe that copying in the fashion industry is quite common due to the limits of the structure of clothing and fashion items, which were invented in the early stages of this industry. The arguments that the copying is the nature of this industry and “a part” of creativity and style in fashion history is supported by many scholars; therefore, this literature review in this part would analyse both the proponent and opponent views on “the need of IP protection in the fashion industry” in order to identify the lost perspectives of the arguments.

¹⁴³ Ying Wang and Yiping Song, "Counterfeit: Friend or Foe of Luxury Brands? An Examination of Chinese Consumers' Attitudes toward Counterfeit Luxury Brands" (2013) 26:4 Journal of Global Marketing.

¹⁴⁴ Keith Granet, *The Business of Design* (Princeton Architectural Press, 2013).

¹⁴⁵ Pierre Valette-Florence, "Luxury and Counterfeiting: Issues, Challenges and Prospects" (2012) 19 J Brand Manag.

To be successful, fashion designers must create trends, or at least follow quickly when new trends emerge. A successful designer researches and predicts the next “big thing” that will be popular and could be a famous item of celebrities or be on the “Must List” of fashion lovers in their market. Fashion design requires professionals to constantly be in tune with the marketplace, what’s trending currently, and what economic indicators may influence buying decisions in the future. Market research includes following competitors as well as consumer demands. A strong business sense is an important ingredient in a successful career in the fashion industry¹⁴⁶.

Fashion can also be said to be evidence of social change in each era. Contemporary fashion has been created by reflecting society throughout history, similar to other creative work, such as films, architecture, literature, and even music¹⁴⁷. The internal strategy of all creative industries is originality and the imitation of ideas, and the fashion industry is no exception. Gabriele ‘Coco’ Chanel explained the entire economic and cultural mechanism of fashion by stating that, “Fashion is made to become unfashionable; the copying appropriation, derivative reworking, referencing and remix are essential elements of fashion”¹⁴⁸

The stated mission of many fashion brands is to design something new that can be said to be an “iconic design”. Hermès Birkin bag is a good example as it can be recognised at first glance because of its distinctive shape, and this has made it popular with celebrities and wealthy people for more than two decades. Despite the Birkin bag costing US\$5,000, there is no shortage of people willing to subscribe to a long waiting

¹⁴⁶ Steven Faerm, *Creating a Successful Fashion Collection* (Barron’s 2012)

¹⁴⁷ Frédéric Godart, 'The Power Structure of the Fashion Industry: Fashion Capitals, Globalization and Creativity' (2014) 1 *International Journal of Fashion Studies*.

¹⁴⁸ *Ibid* 12 p. 52.

list to possess one; however, the iconic style may inspire other designers because styles seem to circulate in the fashion industry and imitation is an occupational hazard¹⁴⁹. When famous designers lead the trends, others tend to interpret or follow them to reduce the risk of producing an unsuccessful product.¹⁵⁰.

Without any doubt, fashion is the product of human intellect performing their creativity and should be the subject matter for IPR protection in the intellectual property regime similar to other artistic and creative articles. However, the notable theory of two law professors, Raustiala and Sprigman, which presented “the piracy paradox” stated that¹⁵¹ rather than being a disadvantage, when copying in fashion industry, the copyist is the factor that is accelerating the creativity in fashion cycles and increases the innovation in this business because the originator will create the new design that has more innovation than the last design in the fashion industry. The fashion designer has to design a better product in order to step away from the counterfeit item. This may be the simple systematic process of many creative industries. Moreover, Sprigman also argues that copying in the fashion industry is common based upon the “trickle-down theory” that shows the copying of fashion design occurred between the fashions hierarchies from the top to the lowest, and this phenomenon increases the demand of fashion consumers from the upper class to the

¹⁴⁹ Some fashion experts argue that no new fashion design is truly unique – that all new fashion is influenced by prior and existing designs. David Wolfe of the Doneger Group – a company specialising in “global market trends and merchandising strategies to the retail and fashion industry”, claims that “all fashion designs are merely rearrangements of existing elements that are used by all designers” (<http://www.doneger.comweb/231.html>).

¹⁵⁰ Wilcox et al., “Why do Consumers Buy Counterfeit Luxury Brands?” (2009) 26(2) J.M.R. 247.

¹⁵¹ Kal Raustiala and Christopher Sprigman, “The Piracy Paradox: Innovation and Intellectual Property in Fashion Design” (2006) 92 Virginia Law Review.

lower level of the fashion market. This is in line with the research of Wong, T.¹⁵², who presented that the copying in “Fast fashion chains” like Zara, H&M or Topshop are beneficial to the public because the customers have an affordable choice for their desirable trends, which runs the process of the mass economics of a country, but from the research of Wong, this argument seems to neglect to consider that the fast fashion chains could still sell their fashion items at the cheaper prices if they design it themselves because the comparative advantage of the fast fashion business is from the economy of scale in manufacturing, not the cost from hiring their own fashion designers.

Moreover, in the theory of Sprigman and Raustiala, there seems to be a perspective as if the fashion industry was frozen for the last fifty years because the nature of the current fashion business has a strict “expiry date” in the end of each season, whereas the speed of copying in the fashion industry compared to the last decade is completely different. The presumption of the trickle-down theory states that when the design from the highest level in fashion hierarchy is going out of fashion, the lower level will copy it to be a hit and fashion designers can gain benefits from their design during the period of this transformation. However, it is undeniable that the development of data interchanging can help accelerate the copyist to produce the counterfeit product in the overseas factories several days after the show, and this circumstance threatens the cycle of fashion business because the most important result of piracy in the fashion industry is that the copied version of a design reduces the profitability of the original.

¹⁵²Wong, Tedmond, To Copy or Not to Copy, That is the Question: The Game Theory Approach to Protecting Fashion Designs" (2012) Vol. 160 University of Pennsylvania Law Review.

In addition, the presumption of these two scholars, who claim that the copying has always occurred from the highest level like Haute couture to the lower high street brand, is not true according to the research of Lauren Howard, who stated that a high-end brand may be inspired by the lower layers of the fashion industry especially in the avant-garde looks from the haute couture houses that combine the idea of a social event with the wearable art in each show¹⁵³. Therefore, the appropriate level and easily accessible laws protecting fashion design will be beneficial for young designers and small business owners who will be the next large company in the fashion business after they are strong enough for the fashion cycles and copying.

Hemphill and Suk also stated that the lack of IP law in the fashion business will discourage future investment from designers to invest their money and their time to create new designs that may create benefits to the unscrupulous copyist if the results of the endeavour never comes to the creator¹⁵⁴. It can be seen that this situation is certainly more important to the young designers than the well-established designers who can let the copied item be the tool of their brand awareness as the luxury design. Additionally, it is undeniable that the levels of financial support between young designers and well-established designers are different. The young designer usually does not have sufficient money to let the fashion piracy challenge their creativity for the next season. In the end, the lack of fashion design protection will let the well-established designers in the fashion industry dictate the trends and the imitators will merely follow them inconsequentially, and finally, the diversity of creative style will be ruined¹⁵⁵.

¹⁵³ Steven Faerm, *Creating a Successful Fashion Collection* (Barons 2012).

¹⁵⁴ Lauren Howard, "An Ingenious Paradox: Intellectual Property Protection for Fashion Designs" (2009) 78 *Columbia Journal of Law & the Arts*.

¹⁵⁵ C Scott Hemphill and Jenifer Suk, "The Law Cultural and Economics of Fashion" (2009) 61 *Stanford Law Review*.

However, Ying Wang and Yiping Song attempt to illustrate that Intellectual property in the fashion industry is unnecessary because the consumer of counterfeits does not share the market with the genuine article¹⁵⁶. Therefore, the fashion piracy is harmless to the luxury fashion item. However, this argument seems to be questionable because, who can be the guarantor that the person who can afford the authentic item could not be persuaded by the copyist to buy the copy? With the advantages of technology, some models of fashion items are limited and it is difficult to find the original to compare with before determining which to buy, especially in the case of the second-hand markets of luxury items in e-commerce, where the word "genuine" appears on the page to seduce fashion lovers worldwide. As long as fashion piracy exists, every fashion consumer will have an equal opportunity to choose the fake version of their desirable item at the price that is lower than that of original article.

Although the negative impacts of fashion piracy has been researched by many scholars which shows that the suffering of the brand owner from the loss of sales and impacts upon the brand identity are undeniable for the committing of this fashion crime, Wall and Large gave the critical idea that the brand reputation for luxury brands will be affected by the counterfeit goods when the customer believes that the item they bought from market is a genuine product. Therefore, if the customers buy it with the sense of recognition in the selling place or the price of genuine goods, this is their rational choice rather than being deceived¹⁵⁷. The authors also concluded that the impact of counterfeiting varies according to the type of product being counterfeited. If the counterfeiting occurs in safety-critical goods, it will result in the negative impact on the public interest and needs immediate sanctions rather than in the fashion

¹⁵⁶ Ying Wang and Yiping Song, "Counterfeit: Friend or Foe of Luxury Brands? An Examination of Chinese Consumers' Attitudes toward Counterfeit Luxury Brands" (2013) 26:4 Journal of Global Marketing.

¹⁵⁷ Ibid 138 p 21

industry. In which the fashion counterfeiting may accelerate the growing of innovation in this industry.

Even though there are many scholars that show the advantage of counterfeit products that can help their customers be aware of brand identities and arouse their needs to buy the originals when they can afford to buy them¹⁵⁸. In the research of Bhardwaj and Fairhurst, it was shown that the counterfeit business generates revenue to the economy of developing countries through counterfeit manufacturing¹⁵⁹. In contrast, from the other side of the counterfeit industry, the low wages of employees as well as the below-standard level of safety for manufacturing producing counterfeit products in developing country such as Bangladesh or India involves the human rights issues and is a major problem for their country. Even though some people think that it generates income for poor people living in developing countries, actually the child labour and the kidnapping of students to be employees in manufacturing are increasing and ruin the opportunity of these developing countries to provide the wealth and well-being for their people in a sustainable way¹⁶⁰. The author has more views about the quality of counterfeit products produced with the below-standard manufacturing that may harm the public because the process of dyeing or detailing of each item may leave the toxic materials that can cause irritation to consumers while the source of production and manufacturer cannot be investigated¹⁶¹.

In addition, another issue that has been discussed in many conferences is the overlapping of intellectual property protection in fashion design. This issue has never

¹⁵⁸ Margaret Bruce and Lucy Daly, ""Buyer Behavior for Fast Fashion"" (2006) Vol. 10, Journal of Fashion Marketing and Management: An International Journal.

¹⁵⁹ Vertica Bhardwaj and Ann Fairhurst, "Fast Fashion: Response To Changes In The Fashion Industry" (2010) 20 The International Review of Retail, Distribution and Consumer Research.

¹⁶⁰ Louise B Simmons, *Welfare, the Working Poor, and Labor* (ME Sharpe 2004). p. 335

¹⁶¹ Motoko Aizawa and Salil Tripathi, "Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers" (2015) 1 Business and Human Rights Journal.

been studied before because normally, copyright, patent and trademark law have their own protection of works. However, the thin line between these three areas may not be perfectly clear. Therefore, it is possible in many circumstances that the fashion design owner can obtain more than one protection from the intellectual property regime. The problem of overlap between the intellectual property regimes, such as design protection in the fashion industry and copyright, is an issue in many countries. Since the copyright is deemed to protect the form of artistic work in the product not their function and is also stronger than other intellectual property rights¹⁶², many scholars have suggested that copyright is the best fit protection for the fashion industry rather than the protection for the print in fabric¹⁶³ because this intellectual property right will automatically give protection without any requirement of registration and grant protection that lasts for the whole life of the author and can be their heritage.

This idea seems to be adequate for the protection of short life-cycle production such as fashion items, most of which “hit the market” no longer than four months, and the process of registration for design rights or trademark may take more time than this. Moreover, the cost of registration may burden the designers who have more than fifty items in each collection. The protection of fashion design by copyrights will automatically come into existence when the art has been created; hence, many cases of counterfeiting have arisen from the argument of whether the unregistered fashion designs are protected by copyright or not, whilst the definition of copyrightable work in the fashion industry are varied in each country related to their legislation and high court decisions. In particular, the issue of “usefulness” in fashion items is difficult to

¹⁶² M.C. Miller, "" Copyrighting the "Useful Art" Of Couture: Expanding Intellectual Property Protection for Fashion Designs" (2014) 1617 William and Mary Law Review.

¹⁶³ Brittany West, "A New Look for The Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Protection Act (IDPPA)" (2011) 5 The Journal of Business, Entrepreneurship & Law <<http://digitalcommons.peperdine.edu>> accessed 6 April 2015.

separate from its artistic nature, and this issue led to the overprotection of the fashion industry and this situation of overlaps. This overlapping protection will be problematic for the doctrine of IP law, which strives to balance the private property rights and the access of the public to the creation¹⁶⁴. Moreover, the overlap of protection can bring the unnecessary costs for obtaining protection for the IP owner, which may eventually affect to the cost of products and services for the public¹⁶⁵. This issue is the best subject matter to be identified with the comparative study in this thesis in order to discover the best recommendations with regard to reform of the IP law protecting the fashion industry in Thailand.

(3) The applicability of TRIPS to protect the fashion industry

One of this research's questions is: "Can the TRIPS agreement be the model law to protect fashion design from fashion piracy?" Related to this is the question of how the member countries of this Agreement can apply it to their IPR protection of the fashion industry. Therefore, this part of the literature review will be aimed at evaluating the literature concerned with the applicability of TRIPs to the developing countries in order to find the views of scholars toward this issue and find the middle ground of this discussion.

IP law in the international aspect has an increasing significance for international trade in this age of globalisation. Its importance is a major issue for the global community, especially to the creative industries, including the fashion industry. The different levels of measures dealing with piracy and IP infringement between

¹⁶⁴ Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (Oxford University Press, 2008).

¹⁶⁵ Guillermo Jiménez, Barbara Kolsun and Guillermo Jiménez, *Fashion Law* (2nd edn, Fairchild Books, 2014).

developing and developed countries are still the problem affecting international investment and there is a need to reach a consensus in many levels of agreement.¹⁶⁶

The basic character of Intellectual Property Rights is varied in the view of many scholars. Some see it as the right concerned with economic or commercial processes when it can bring revenue to the creator and can be traded as a product in the global community, while others think that it involves the political or human rights of the author who can be referred to as the owner of the originality of the article. The standards of IP protection depends on the internal law or policy of each country. In order to solve this problem, many treaties have been created to harmonise the gaps and create the standards protecting intellectual property rights at the international level, but the most dominant treaty is the Trade Related Aspect of International Property Rights (TRIPs), which was formed in the Uruguay Round of Trade Negotiations in 1995. Under this agreement, membership in the World Trade Organization, including both developed and developing countries, should enforce their protection of IP rights as the minimum level of this agreement in the economic aspect¹⁶⁷.

This agreement also incorporates the major principles of the Berne Convention, Paris Convention and other treaties concerned with IPR to cover the protection of intellectual property rights in all regimes. However, the issue of its application in the developing countries over intellectual property rights and the human rights in the case of compulsory licenses in regard to AIDS¹⁶⁸ is still being debated as well as the

¹⁶⁶ "The International Regulation of IPRS in a TRIPS and TRIPS-Plus World" (2005) 6 the Journal of World Investment & Trade.

¹⁶⁷ Donna Gervais, *The TRIPS Agreement: Drafting History and Analysis* (3rd edn, Sweet and Maxwell, 2008).

¹⁶⁸ Margo Bagley, "Legal Movements in IP: TRIPS, Unilateral Action, Bilateral Agreements, and HIV/AIDS" SSRN Electronic Journal.

pressure of developed countries toward the piracy crimes in creative industries such as music or movies in developing countries, which are still unresolved issues.

Many scholars have stated their support for the implementation of TRIPS in developing countries as well as developed countries and believe that TRIPS will help increase the economic development in developing countries. In 2002, the report presented by the Commission on Intellectual Property Rights to the British government summarised the issue of “whether the Western-style protection of Intellectual property rights can stimulate the innovation and creativity in developing countries or not ” as “there is no reason why a system that works for developed countries could not do the same in developing countries because the intellectual property rights are necessary to stimulate the economic growth, which can reduce the poverty in developing countries”.

Additionally, Dru Brenner-Beck suggests supporting the intellectual property protection in developing countries because¹⁶⁹ “[P]rotection of intellectual property rights directly benefit developing countries’ development by: 1) promoting the transfer of technology from the developed countries, 2) encouraging the direct foreign investment in developing countries, 3) stimulating the Research and Development into problems specific to developing countries, and 4) strengthening the incentives for domestic innovation and creativity due to the protection providing ”the fuel of interest to the fire of genius creator”. This argument insists that the protection of intellectual property rights in developing countries not only benefits the developing countries in an economic perspective but also creates an innovation industry because the revenue gain is significant for the originators.

¹⁶⁹ Dru Benner-Beck, “Do as I say Not as I Did, 11 UCLA pac. Basin L.J.84 ,101(1992)

Robert Brewster also argued¹⁷⁰ to support the strengthening of IP protection in developing countries by stating that the stronger IP protection in developing countries can encourage the Foreign Direct Investment (FDI) and can increase the research and development, thus stimulating the domestic innovation in developing countries. From the 75% of 1,987 companies from the survey viewed that the inadequacy of the protection of intellectual property rights in developing countries make them hesitate to transfer or license their technology to the companies in developing countries, not only the IP enforcement.

Moreover, M.B. Wallerstein¹⁷¹ stated that developing countries need the intellectual property protection for their development of innovation because the developed countries complaints will stimulate the awareness of intellectual property rights in developing countries that can support the innovative industry itself, including the strong international competition for developing countries as well. Therefore, the inadequacy of protection of IPR in developing countries may bring more advantages than disadvantage in the long term. In addition, the proponent of this view, J. Michael Finger¹⁷² has also raised many alternatives for developing countries to prepare their economy and promote their traditional communities' values into the protection of an intellectual property rights system similar to developed countries in order to increase the jobs and well-being of their people through their intellectual property rights. However, this argument seems to neglect to consider that the nature of economic and cultural factors or even the attitude of people toward the significance of the counterfeit

¹⁷⁰ Robert Brewster, "The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property" (2012) 1 China Journal of international law.

¹⁷¹ M.B. Wallerstein, "Global Dimensions of Intellectual Property Rights in Science and Technology" [1993] National Academic Press, Office of International Affairs.

¹⁷² J. Michael Finger, "Introduction and overview, in poor people's knowledge. Promoting Intellectual property in Developing Countries". Available at [//www.netlibrary.com](http://www.netlibrary.com)

industry in developed countries and developing countries are different. One style of law could not be completely applied to all for IP laws in every country.

From these arguments, the conclusion that the weaknesses of IPR protection may eliminate the incentive of people to conduct R&D locally is reasonable in the view of the author because the simple logical idea that “people always plant their tree for its fruits or shade” could apply to any investment, including the innovation industry. Therefore, when an imitator continuously benefits from the work of the originator, the pursuit of creativity will be eliminated. However, the conclusion of Dru and Robert concerning the direct foreign investment may lack evidence because the factor of investment from the international investors to developing countries may depend on other factors such as the stability of the government or the sufficiency of the infrastructure of a developing country as well¹⁷³.

The final argument, which stated that the strong IP protection will generate income and well-being for the people in developing countries, is supported by the research of Frank J. Penna conducted in 2004¹⁷⁴, supported by the World Bank Institute. This research was a study on an African music project that was done in order to evaluate the benefits of creativity for the developing countries in Africa because the music industry in Africa has the best potential in comparison with other creative industries of this region. This project was influenced by the success of Nashville, the poor and indistinguishable city in Tennessee, USA, which impacted the music industry in the US. Therefore, Nashville will be the role model of African countries in that the success of the music industry can contribute jobs and prosperity to people living in the

¹⁷³ Vassilis Monastiriotis and Rodrigo Alegria, "Origin of FDI and Intra-Industry Domestic Spillovers: The Case of Greek and European FDI in Bulgaria" (2011) 15 Review of Development Economics.

¹⁷⁴ Frank J. Penna et al.; the African Music Project, in *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* 95/97, available at www.netlibrary.com

African countries. Frank concluded from this research that the stronger IP laws will help increase the potential of the music industry in many African countries and that TRIPS could be an effective tool for African governments to adapt its principle to protect their innovative industries such as music.

However, this research had a limited conclusion because TRIPS was established to harmonise the different standards of IP protection in each member country including developing countries; therefore, the overprotection in creative industries, for example music, film and fashion, is quite a delicate issue because unbalanced protection may cause the monopolistic status of the creator with regard to public access, which may be opposite to the doctrine of Intellectual property law. Therefore, it should be reconsidered with the other factors of each industry, including the effects of its balancing between public accessibility and the rights of the author, especially in developing countries, where music is the cheapest entertainment for their people, this issue will be the subject matter for this thesis as well.

Unsurprisingly, many scholars are on the opposing side of the argument and support the applicability of TRIPS to developing countries, especially in application to the pharmaceutical industry. Mohamed Salem¹⁷⁵ stated that the intellectual property law has been created by the idealism of western people, which cannot be fit to the society of developing countries, especially for medical innovation because this issue is concerned with patients' rights. From the same side of this argument, Marci A. Hamilton stated in his research that if TRIPS is successful without any argument

¹⁷⁵ Mohamed Salem Abou El Farag, "Trips, Trips-PLUS, Developing Countries and Public Health: The Case of Egypt" (2008) 5 Journal of International Biotechnology Law.

from developing countries, it will be “one of the most effective vehicles of Western imperialism in history that was created by the developed countries”¹⁷⁶.

Frink and Prima Brago have determined the cost of implementing IP laws in developing countries and found that in case of strengthening the protection of copyright or patent, it could slightly increase the cost of educational materials or medical items in developing countries; therefore, their affordability is limited by the higher costs¹⁷⁷. This argument can be supporting evidence that the import of goods from developed countries to developing countries, such as movies or music, is normally costly to access and out of reach for people from the middle and lower classes in developing countries. Therefore, the cost of IP in goods and services will be the added costs and higher prices for consumers.

From these arguments, the enforcement of TRIPS in some industries concerning human rights issues is debatable because it depends on the view of the beholder based on where they are. From the view of the creator, the reward from their investment can help increase the incentive of their creativity, whereas in the view of humanism, the innovation of the pharmaceutical industry should be accessible for all levels of patients and not to be limited by its overpricing. Therefore, the balancing of protection will be the alternative recommended for this issue and needs to be studied.

For the creative industries and the TRIPS, to support the argument that stronger IP law is not suitable for developing countries, Keith Markus¹⁷⁸ studied the Lebanese

¹⁷⁶ Merci A. Hamilton, “The TRIPS Agreement: Imperialistic, Outdated and Overprotective”, 29 Vand.J. Transnat’l.L.613,614 (1996)

¹⁷⁷ Casten Frink & Carlos A. Primo Braga, “How stronger protection of Intellectual Property Rights Affects International Trade Flows” Available at <http://www.netlibrary.com>, accessed 12 June 2016

¹⁷⁸ Keith E. Markus “Strengthening Intellectual property rights in Lebanon, in Intellectual Property and Developments: lessons from recent academic research 259,263 (Casten Fink & Keith E. Markus eds., 2005) available at http://www.worldbank.org/research/IntellProp_Temp.pdf.

film industry as the model country for the study of the effects of stronger IP laws in developing countries. He found that the Lebanese film industry enjoys the limit of enforcement of copyright in their country because the industry has claimed that the stronger IP protection may cause job losses from the counterfeit industry of local people in Lebanon, and the cost of copyright protection decreases the competition of smaller production firms in this industry, which would finally allow the larger monopolies to dominate their film industry. Even though the lack of innovation in production in this industry would not be compatible in the global market, it serves well for the Middle East market and contributes a large amount of revenue to this country. Moreover, Ruth L. Okediji suggested in the perspective of the counterfeit industry that “developing countries should be able to take advantage of piracy in IP to increase the jobs and innovation in their country in order to strengthen their economy before implementing TRIPS as the same standard as developed countries”¹⁷⁹. From these arguments it can be seen that both scholars’ arguments that the strong protection of IP in creative industries is an obstacle to the development of developing countries. However, it is undeniable that the inadequate IP protection in creative industries may ruin the incentive of new creators in this industry, which will finally result in creating a monopoly in this market.

After the review of the different positions regarding this issue. Although there has been no research directly conducted to study the application of TRIPS for the protection of the fashion industry in developing countries, it can be seen that the benefits of strengthening IP laws in developing countries depends on the pre-existing conditions of each developing country and their domestic industries. The combining of

¹⁷⁹ Ruth L. Okediji, *The international Relation of Intellectual property: Narratives of Developing Country Participation in the global Intellectual property system*. 7 *Sing. j Intl'Comp L*.315,355-57(2003)

the two extremely different attitudes toward the stronger protection in IP rights of TRIPS by tailoring the domestic IP law of each developing country may be the alternative for this issue and has not been seriously studied. Therefore, this is the subject matter for this thesis to evaluate and contribute in its conclusion. Additionally, the strengthening of IP law in developing countries may be tailored by a country's specific needs, including the cost of strengthening the IP laws in each industry, which should be considered and compared with the benefits and its ability to be competitive in the global market. The international agreement for IP referred to TRIPS has many shades of grey, and therefore, some of its shades may be the best match to protect the fashion industry in Thailand. Therefore, this hypothesis needs to be investigated with an in-depth analysis and use of the factors and evolution of the fashion industry in both developing and developed countries in order to find the "best fit" of legislation to protect the fashion industry in Thailand.

Chapter 3

3. Protection of fashion design by international mandates

3.1 Background

As discussed in previous chapters, fashion piracy may affect the development of the fashion industry worldwide, but the level of its impact on the public sector may be subject to the economic situation in all countries, irrespective of their national wealth. Regarding the hypothesis of this research, which is “By comparing with, other jurisdictions Thailand can develop its intellectual property protection for its fashion industry, although fashion piracy is an obstacle to the Thai fashion industry”. Therefore, the study of the protection of fashion design in international mandates will help support the hypothesis above and integrate the strengths and weaknesses in each system to adapt to the nature of the Intellectual property protection in Thailand.

This chapter will start with the study of the details concerning the intellectual property protection which prescribed under the TRIPs agreement in order to clarify the rights of fashion design under the regime of protection by the World Intellectual Property Organisation (WIPO). As mentioned earlier, the end of the MFA has left many fashion and textile manufacturing countries struggling with cheaper wage competition. Since the MFA was one of numerous WTO agreements, one of the aims of this thesis is to determine whether the WTO agreements, for example the Agreement on the Trade–Related Aspects of Intellectual Property Rights (TRIPs), can be an appropriate model law to help Thailand to protect and develop its fashion industry in order to deal with the fashion piracy.

In order to evaluate the appropriate level of intellectual property rights protection for fashion design, this chapter contains a brief explanation of the protection

of design, including fashion design, prescribed in international agreements such as the Paris Convention for the Protection of Industrial Property of 1883, the Berne Convention for the Protection of Literary and Artistic Works of 1886, and the WTO's Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS). The minimum standards and guidelines of IPR enforcement for both developing and developed member countries of the WTO were established in these agreements. Therefore, the application of IPR protection to design in developing countries, as stipulated in these agreements, is also discussed in this chapter in order to investigate the likelihood of these agreements being directly applied as the model law to protect the fashion industry in a developing country such as Thailand.

The fashion industry is an Intellectual Property (IP)-intensive industry, which continues to generate and commercially utilise creative and innovative ideas. Apart from being intangible, IP is similar to any other kind of physical property in that, under the law, it has a legal owner and can thus be sold, bought or licensed and the law is applied to protect their rights¹⁸⁰. However, despite the fashion industry being undeniably one of the crucial intellectual property businesses that needs to be protected by legislation, many countries have varying levels of protection for this creative business depending on the significance of the fashion industry to their economy. Furthermore, it is important to be focused on the overlapping areas in IP protection as fashion design is a good example of the overlap of the protection of Intellectual property (copyright) and Industrial property (trademark, patent and design) because it can be protected by copyright law, trademark law, design law, and even by patent law in some cases. For example, in the case of a jacket;

¹⁸⁰ M.C. Miller, "" Copyrighting the "Useful Art" Of Couture: Expanding Intellectual Property Protection for Fashion Designs" (2014) 1617 William and Mary Law Review.

- The trademark refers to the brand of jacket, e.g. Chanel.
- Copyright protects any 2-dimensional graphic print on the fabric of the jacket.
- The design rights may protect the appearance and shape of the jacket (or part of it).
- Finally, a patent that covers the function, construction or operation of a product might apply to an innovative fastener on the jacket or a new type of material.

From the perspective of the fashion design industry, the intellectual property rights can be applicable at various stages of production. In terms of the upstream level, since this entails the production of raw materials, the machinery requires patent protection. In the early 19th century, England dominated the global textile trade and this trade played a huge role in the early stages of the Industrial Revolution due to the English development of yarn spinning. However, the stealing of the secret of the spinning machine by US spies ended the glorious era of England's textile industry, and this led to an awareness of the necessity of IP protection in the fashion and textile industry.¹⁸¹

IP rights also play a role in protecting both the midstream and downstream of this industry. The midstream includes the dyeing, printing and finishing processes, which require a specific and unique design to ensure that the fabric or printing will succeed in the war of unique designs in the fashion industry; therefore, the IP rights that can be applied to this process can be the copyright, trademark, design rights, traditional knowledge, or patents, including geographical indication if the textile in fashion goods is made from the materials with geographical indication. The downstream entails the process of transforming the textiles into garments; thus, it requires a tailoring team (fashion designer, pattern cutter and tailors who work

¹⁸¹ P Rivoli, *Travels of a T-Shirt in the global economy, second edition* (John Wiley & Son, 2009) p. 94

together) with a high degree of creativity. Because of the fluid nature of the production, many IP rights can also be used to protect most of the processes at this level.

3.2 Protection of the fashion industry by the Paris and Berne Conventions

It can be seen that there has been an overlap of protection in IP rights in the fashion industry as a result of two fundamental conventions on intellectual property law since the nineteenth century, namely, the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886, in which the minimum standards and rules for the equal treatment of member states for the protection of intellectual property were established¹⁸². The overlap of the protection of fashion design from these two conventions is because 'Industrial property' is defined in the Paris Convention as follows:

“(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition”¹⁸³.

Meanwhile, in Article 2 of the Berne Convention, 'intellectual property' is defined as follows:

“The expression “**literary and artistic works**” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expressions, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature;

¹⁸² Denis Cohen, *The International Protection of Designs* (Kluwer Law International, 2000).

¹⁸³ The Paris Convention for the Protection of Industrial Property of 1883, Article 1 (2)

dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science”.

It can be seen that the above two conventions on intellectual property law have been substantially expanded since the past by means of partial reform, which seems to include a more creative format, as well as the terms of protection being extended longer than before. Intellectual property has begun to be separated from the product. Trademark protection exemplifies this significant change because it used to refer to the originality of the product,¹⁸⁴ whereas now, it more often represents the economic value of the brand, such as in the cases of Coca-Cola and Yves St. Laurent, where the brand names are more profitable than the products¹⁸⁵.

However, a number of countries have regulated or adopted legal principles from international mandates, such as the TRIPs agreement, to specifically protect design rights, including fashion design. This protection is available for both types of right—registered or unregistered. While some European countries, for example Italy and France, have provided protection for fashion design for more than two decades, a

¹⁸⁴ Aaron Schwabach, “Intellectual Property: A Reference Handbook” (Contemporary World Issues) 1 (2007).

¹⁸⁵ Brittany West, "A New Look for the Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Protection Act (IDPPA)" (2011) 5 The Journal of Business, Entrepreneurship & Law <<http://digitalcommons.peperdine.edu>> accessed 6 April 2015.

number of others have refused or hesitated to protect works related to fashion. For example, copyright protection in America does not protect wearable apparel because it is a “useful article”¹⁸⁶. The design of apparel is only protected by the US Copyright Act when it is separable and independent from the functional element, which makes it generally hard to copyright clothes or garments under this Act.¹⁸⁷

The current international framework for intellectual property protection of the WTO is the TRIPS Agreement, which harmonises the degree of IP protection systems in WTO member states. The WTO has closely worked with the World Intellectual Property Organisation (WIPO), which is a United Nations agency established in 1967 to promote the protection of IP among states. Since 1996, the WIPO’s mission has been “to develop a balanced and accessible international IP system that rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest”¹⁸⁸. However, unlike the TRIPS, the WTO and the WIPO have no dispute settlement function or fundamental rules for member states. This lack of enforcement of standards was a strong reason to establish the TRIPS agreement. At the first round of negotiations, the developed countries that owned the majority of IP and had well-developed technology, namely the EU, Japan and the US, strongly supported the formation of the TRIPS Agreement, whereas many developing countries, notably Brazil, Korea and India, perceived that the existing framework of TRIPS would be disadvantageous for them to have inexpensive access to foreign

¹⁸⁶ U.S. Copyright Act Section 101.

¹⁸⁷ Wong, Tedmond, “To Copy or Not to Copy, That is the Question: The Game Theory Approach to Protecting Fashion Designs” (March 27, 2012). University of Pennsylvania Law Review, Vol. 160, p. 1139, 2012.

¹⁸⁸ Ibid 2

knowledge; therefore, many developing countries' economies cannot afford to apply the TRIPS agreement¹⁸⁹.

The TRIPS agreement will be examined in detail in the next section, with an analysis of how it can relate to the textile and fashion industry.

3.3 Protection of fashion designs under the TRIPS agreement

The WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), which was negotiated in the Uruguay Round between 1986 and 1994, introduced intellectual property rules into the multilateral trading system. It was established to harmonise the international intellectual property rights of member countries of the World Trade Organisation (WTO) by setting a standard minimum level of protection for members. Therefore, each member state was required to structure its intellectual property law in compliance with this Agreement¹⁹⁰. The basic obligation of each member country is to comply with the protection of IP as provided for in the Agreement.

The TRIPS agreement contains the following five broad areas of intellectual property protection for WTO member states:

- (1) the basic principles of the trading system and other international intellectual property agreements that will be applied to all member states;
- (2) the proper protection for the intellectual property of member states;
- (3) an adequate standard of enforcement of the intellectual property rights of each country within its own territory;

¹⁸⁹ T Woods, "Copyright Enforcement at all costs? Consideration for Striking a Balance in the international Enforcement Agenda, 37 AIPLA Q.J 357 (2009)358

¹⁹⁰ Donna Gervais, *The TRIPS Agreement: Drafting History and Analysis* (3rd edition, Sweet & Maxwell 2008).

- (4) the settlement of disputes related to intellectual property between members states;
- (5) Special transitional arrangements during the period of introduction of the new system.

3.3.1 TRIPS and Fashion design protection

Part II of this Agreement contains seven substantive divisions that deal with different types of IPR. The way in which each right can be applied to the fashion industry will be examined in Chapter 4 with a more detailed analysis of how each right can be used in the context of fashion design protection by examining the IP laws of the UK, India and Thailand.

(i) Copyright

Section 1 of Part II of the TRIPS Agreement is dedicated to copyright and related rights. The agreement also requires its members to comply with Articles 1-21 of the Berne Convention. However, members are not obliged by the TRIPS to respect the rights conferred in Article 6bis of the Berne Convention such as the moral right.¹⁹¹ This means that it is left to the member countries to consider whether to include the moral right in its national IP legislation or not. The Berne Convention also allows developing countries to limit the rights of production and translation of copyrighted work in certain conditions.

In the context of fashion design, it is not clearly prescribed in this agreement if the pattern of garments can be protected; therefore, it is left to the member countries themselves to determine whether or not the drawings for fashion design will be eligible

¹⁹¹ A moral right is the right to claim authorship and object to any derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation.

for copyright protection. Although there is nothing in the TRIPS agreement that states that a drawing of a design cannot be protected as long as it expresses an idea that comes from the human intellect, Thai Law has chosen to exclude it from the list of works that can be protected by copyright law.¹⁹²

(ii) Trademarks

In terms of fashion design, the definition of a trademark is also included in Article 15 (1) of the TRIPS, in which the general rules and definition of a trademark are described as:¹⁹³ “[a]ny sign capable of distinguishing ...goods or services...” Arguably, this definition is sufficiently broad to include three-dimensional marks, since at least some shapes and packaging designs are inherently capable of distinguishing any relevant goods and services, and those that are not are most likely to be capable of acquiring distinctiveness through use¹⁹⁴. Therefore, it may also be possible for fashion design to be used as a trademark to register the shapes of goods. For example, Converse and Camper both have 3D trademark registrations for shoes, and distinctive styles, such as the Louis Vuitton print and Burberry check, can also be registered as trademarks because they also consist of unusual subject matter, such as a single colour, the 3-dimensional shape of a product, or its packaging, sounds, an olfactory

¹⁹² Section 4 of the Thai Copyright Act 1994

193 Article 15 of the TRIPS

Protectable Subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words, including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make them registrable depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

¹⁹⁴ Susan Elizabeth Ryan, 'What Is Wearable Technology Art?' (2015) 8 *Intelligent Agent*.

sign, a moving image, a hologram, a taste, or the texture of a product, which can be considered as Protectable Subject Matter of this article. The right to reject registration is contained in the first paragraph of this section in which member countries are granted the exclusive right to deny registration as long as they do not derogate from the provisions in the Paris Convention.¹⁹⁵

The essential requirement for protection is that the average consumer will perceive the trademark as indicating that the goods or services originate from a particular commercial source. However, it should be noted that there seems to be an obstacle for the trademark registration of shapes in fashion in the form of having to demonstrate that the shape is distinctive to the design of the fashion item because the shape of the goods may be the result of the nature or utility of the products.

However, the TRIPS agreement also contains a provision concerning well-known marks, which was established to fulfil the protection required by Article 6bis of the Paris Convention that requires a member country to refuse or cancel the registration of a well-known mark, as well as prohibit the use of the well-known mark of another member country. This principle affects counterfeit products in developing countries, since this Agreement establishes a protection scheme for well-known marks that have never been registered in developing countries, especially luxury brands in the fashion industry, thereby also granting them the protection of trademark law.

In fact, the appropriate way for fashion designers to obtain IP protection for their designs is quite difficult unless they add their registered trademark to the design¹⁹⁶. Many well-established designers include their registered trademark in the Fabric Print

¹⁹⁵ Article 15(2) of TRIPS

¹⁹⁶ K V Tu, Counterfeit fashion: The interplay Between Copyrights and Trade mark law in original fashion design and designer knock-offs, 18 *Tex.intell. prop. L.j* 219 (2009-20010)423

in order to use the protection of a registered trademark to cover the design of the fashion item. This practice has proved to be particularly useful in countries that do not extend copyright protection to fashion design, since the availability of some form of IP protection is better than none in a number of jurisdictions¹⁹⁷.

(iii) Industrial Designs

Fashion design, especially in “textile designs”, can be protected by industry design protection, which is established in the special provision for short life-cycle production in Articles 25(2)¹⁹⁸ and 26, which make up Section 4 of Part II of the TRIPS Agreement. According to Article 25(1) of the TRIPS Agreement, members are obliged “to provide for the protection of independently-created designs that are new or original”. However, members may not extend the protection to designs that are essentially dictated by a technical or functional consideration.

Since fashion designs typically have a short product life-cycle, are numerous, and are particularly vulnerable to being copied, the provisions related to the formalities for protecting industrial designs in the textile sector are given special attention in Article 25.2 of the TRIPS Agreement, as follows;

¹⁹⁷ J Davis, *Between the Sign and the Brand: Mapping the boundaries of the registered Trade mark in the European union Trade mark Law*” In *Trade mark and Brand: an inter disciplinary critique* ed, L Bently, J Davis and JC Ginsburg (Cambridge University Press, 2008)⁸⁰

¹⁹⁸ **SECTION 4: INDUSTRIAL DESIGNS of TRIPS. Article 25**
Requirements for Protection

1. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

2. Each member shall ensure that the requirements for securing protection for textile designs, particularly with regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or copyright law.

“Each member shall ensure that requirements for securing protection for textile design, in particular with regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law”.

It can be seen that this provision to set the standard to protect textile designs is broadly construed and attempts to deal with the sensitive needs of textile designers. This provision recognises three specific areas that may cause problems for contracting members in the protection of textile designs. Firstly, the high level of fees could deter applicants in the textile sector, since numerous applications may be necessary to secure effective protection for each collection. This would especially have a negative effect on small enterprises and firms in developing countries. Secondly, the examination of the application should not unreasonably delay the granting of protection or curtail its duration in such a way as to render the protection ineffective. Finally, publication, which is generally considered to be one of the basic principles of the registration system, could be a problem in the case of textile designs, which would have the adverse effect of increasing the counterfeiting of the published design before the original articles can be delivered to the market.

These provisions also specify that industrial designs are entitled to at least 10 years of protection, during which the owners of the protected designs are able to prevent the manufacture, sale or importation for commercial purposes of articles bearing or embodying a design which is a copy, or essentially a copy, of the protected design. Members must also comply with the relevant provisions of the Paris Convention on industrial design.

In cases where informal protection is accorded, the provision explicitly recognises that member countries are free to meet this obligation, either by using industrial design law or copyright law, because “textile designs” can cover two-dimensional designs (e.g. the pattern on clothing material or embroidery), as well as three-dimensional designs (e.g. a model for a dress).¹⁹⁹ This provision seems to encourage fashion designers and textile designers to register their designs in order to protect them from the knock-off phenomenon.

(IV) Geographical Indications

In the Trips Agreement, the Geographical Indication (GI) identifies the origin of a product as being a particular member country in order to confirm or ensure the good characteristics or quality of its geographical origin²⁰⁰. It is stated in Article 22(2) of the TRIPS that member countries will be subject to legal sanctions for misleading the public about the geographical origin of goods. Article 10bis of the Paris Convention also requires members to refuse the registration of a trademark that misleads the public of the geographical indication of the goods.

From the perspective of the fashion industry, geographical indication plays a role in the textile industry, which is evidenced by the fact that 20 of the 124 GI protections given by the Indian Government are for textile and garment protection. The first textile granted GI protection in India was Pochampally textiles²⁰¹, and the protection of the design will prevent it from being counterfeited, which will be of benefit to the textile cluster in this district. A great many traditional tie and dye fabrics in many clusters in

¹⁹⁹ Thomas Cottier and Pierre Véron, *Concise International and European IP Law* (Kluwer Law International, 2011). p. 84

²⁰⁰ Article 22(1) TRIPS

²⁰¹ Pochampally is a small town in the Nellore district of Andhra Pradesh (now Telangana). The uniqueness of the textiles is in the centuries-old craftsmanship of the handloom cluster. This textile was used for the maharajah and royal family in the early times of Indian history.

India have changed due to competition from cheaper fabrics, and the national heritage has been diminished by the rise in fashion manufacturing. Therefore, the Geographical Indications of the TRIPS may be a minor factor to compete with the current strong influences of materialism²⁰².

V) Patents

In terms of the fashion industry, a patent can only be applicable to fashion designs to a limited extent, because the only way a patent seems to apply to fashion is the invention or process of creating textiles in the first stage of manufacturing. Patentable matter is prescribed in the Article 27(1) as “any invention whether product or process in all fields of technology, provided they are new, involve an inventive step and are capable of industrial application”. The TRIPS also requires member states to consider whether the patentable product is imported or locally produced without discrimination.

In contrast, another way that a patent can be used to protect fashion design is if the textile itself is eligible to be patented. If the fabric has been directly produced using a patented process, it will also be protected by the patent. The TRIPS requires its member states to protect a patent for a period of not less than 20 years from the date that the registration is filed²⁰³.

3.3.1 Enforcement of the TRIPS Agreement

The minimum standards for the enforcement of IPRs for member countries is stipulated in Part III of the TRIPS agreement, and the way in which these three counties adapt their IPRs to confirm to the TRIPS agreement is illustrated in this section.

²⁰² D. Rangneker “Indication of Geographical Origin In Asia: Legal and Policy Issues to Resolve in Intellectual Property and Sustainable Development: Development Agenda in a Changing World, ed. R. Melendez-Ortiz and P. Roffe (Edward Elgar Publishing, 2009) p. 273

²⁰³ Article 33 TRIPS

i) General Obligations

Article 41(1) contains the general obligations of the TRIPS member countries to enforce IPR according to the Agreement, namely, “to permit effective action against any act of the infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to future infringement”. Moreover, this article also contains a guideline for the procedure to be used to enforce IPRs, namely, that it “shall be applied in such manner so as to avoid the creation of barriers to legitimate trade and provide a safeguard against their abuse”.

Moreover, it is also prescribed in Article 41(2) that “the procedure concerning the enforcement of intellectual property rights shall be fair and equitable and should not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays”²⁰⁴. This principle illustrates that the Agreement attempts to offer guidance about the way that member countries should enforce IPR, namely, for a reasonable reason, in writing, and without delay. The relevant parties should have the opportunity for a judicial review of the final administrative decision; however, this right is subject to the provision in the member’s legal jurisdiction based on the importance of the case²⁰⁵, and it is not applicable in criminal cases.

According to Article 41(5), member countries have no obligation to provide a separate judiciary review, especially when implementing the enforcement of intellectual property into their general law. The flexibility of the TRIPS is indicated in the last part of this section, where it is shown that member countries are not obliged to use expenditure to enforce an IP case more than other laws in their country.²⁰⁶

²⁰⁴ Article 41(2) TRIPS

²⁰⁵ Article 41(4) TRIPS

²⁰⁶ Article 41(5) TRIPS

ii) Civil and Administrative Procedures and Remedies

Section 2 of the TRIPS contains guidance for a fair and equitable process, including evidence, injunction, and other remedies that may be available for IP cases in member countries in order to comply with the Agreement. This section is entitled “Civil and Administrative Procedures and Remedies”.

iii) Provisional Measures

Section 3 contains guidance for member countries on how to ensure the effective enforcement of IP by encouraging the judicial authorities to order effective provisional measures to prevent the infringement of intellectual property and its entry to the commercial channels. This includes imported goods after being cleared by customs and the preservation of the relevant evidence of alleged infringement.²⁰⁷

iv) Special Requirement Related to Border Measures

Section 4 contains specific requirements for Customs Authorities related to border measures.²⁰⁸ This provision illustrates that, not only does the TRIPS apply to the legislative and judicial authorities, but the enforcement of IPRs is also significant for border control. It is well known that many cases of intellectual infringement are caused by the ineffective inspection of border authorities.

(v) Criminal Procedures

It is stipulated in Section 5 that criminal procedures should be available in member countries, at least in cases of wilful trademark counterfeiting or

²⁰⁷ Article 50(1) TRIPS, and details of the provisional measures are provided in Articles 50(2) to 50 (8)

²⁰⁸ Article 50-60 TRIPS.

copyright piracy, and the available remedies should include imprisonment and or a monetary fine commensurate with the level of the crime.²⁰⁹

It can be seen from Section 2 of the TRIPs that the Agreement attempts to persuade member countries to harmonise their internal laws with the TRIPs in a flexible way by making them aware of the relationship between border control and IPR infringement. However, many negotiators point out that harmonising the TRIPs to developed countries and developing countries with different economic levels is problematic.

3.3.2 TRIPs and Developing Countries

The TRIPs is an agreement that attempts to harmonise the unequal enforcement of IP rights between developed and developing countries. This has been recognised as a particularly sensitive issue ever since the preamble of the Agreement and it has been discussed at many stages of the conference. The first debate in which this issue was acknowledged was in the Uruguay Round, when leading industrialised WTO Members such as Japan, the EU, and the USA attempted to convince developing countries to enforce and adopt an effective and high level of IPR protection as part of the WTO framework.²¹⁰

There was insufficient international trading to enforce IP infringement before the TRIPs Agreement; therefore, the TRIPs Agreement was an attempt to set the minimum standard for judicial procedures, including the settlement of disputes. However, this minimum standard for the international protection of IP rights seems to

²⁰⁹ Article 61 of the TRIPs

²¹⁰ F M Abbott, TRIPs in Seattle: The Not So surprising Failure and the future of TRIPs *Agenda*, 18 BERKELEY J.Int.L.165 (2000)166

be too strict for many developing countries,²¹¹ and can be criticised from four narratives of the original TRIPS.²¹² The first narrative is that this Agreement was perceived as a “bargain” between the guarantee of freer access for developing countries to the free market of developed countries, especially in terms of textiles and agricultural products, in exchange for the higher protection of IPs in WTO member states, which are mainly developed countries. It is obvious that this so-called “bargain” is far from being on equal terms. The second narrative is “coercion”,²¹³ whereby the TRIPS is seen as a tool to trap developing countries into having no choice. If they want to be part of the WTO, they must accept the obligations stipulated in the TRIPS. The next narrative is “ignorance”. Many developed countries perceived that the TRIPS standard would enhance the IPR in developing countries. This could promote creativity and innovation that would attract foreign investment, which would help to accelerate their economic growth; however, this benefit seemed to be ignored by the developing countries themselves. The final narrative is “self-interest”,²¹⁴ which means that both developed and developing nations attempt to protect their own interests. In terms of the developed countries, their crucial IPR industries are entertainment and pharmaceuticals, from which they make a huge profit. As for developing countries, they can access cheap knowledge of foreigners’ innovations. Thus, from the perspective of developing countries, TRIPS seems to be an obstacle to their interests.²¹⁵ The TRIPS has also been seen by critics as “a tool to transfer the wealth from poorer countries to richer ones”.²¹⁶

²¹¹ T Woods, Copyrights Enforcement at all costs? Consideration for striking a balance in the international Enforcement Agenda, 37 AIPLA Q.J.347(2009) 350-360

²¹² P K YU, TRIPS and its discontents, 10 Marq. Intell. L. Rev.369(2006) 371

²¹³ *ibid*

²¹⁴ P K YU 376

²¹⁵ F M Abbott above 166

²¹⁶ T wood 360

However, from another perspective, the acceptance of the TRIPS by developing countries enhances the development of the standards of their products and widens their market. China is a notable example of a developing country that has accepted the TRIPS and benefitted from being a member of the WTO. China is now one of the largest global economies and Chinese-made products can be found in every household in the world, from utilitarian goods to high-end products, including textiles and clothing, manufactured by the so-called awakening dragon since the country opened up in the 1980s.²¹⁷

K. E. Markus is a strong supporter of the theory that stronger IP enforcement will aid the economic development of developing countries. He maintains that the reform of IPR protection in developing countries “will attract a significant new inward flow of technology, the blossoming of local innovation and cultural industries, and the faster closing of the technological gap between themselves and developed countries”.²¹⁸ He also proposes that there are four conditions that can help to promote the efficiency of IPR in developing countries, namely the implication of an IPR standard, the enhanced capacity of people to use and develop IPR, the promotion of a freer market, and the promotion of competitive policies in their countries.²¹⁹ The empirical research of Straus²²⁰ can be used to support this argument. He points out that the exports of developing countries, for example Cambodia, Bangladesh and Macao, have benefitted from the freer trade of textiles and clothing by sixty to eighty percent since implementing TRIPS, and this has helped to increase their GDP.

²¹⁷ J Straus, “The Impact of the New World Order on Economic Development: The Role of the Intellectual Property Rights System”, 6 J. Marshall Rev. Intell. Prop L.1(2006-2007)3

²¹⁸ K E Maskus, Intellectual Property Rights and Economic Development, 32 case W.Res J.Int; IL 471 (2000)495

²¹⁹ Ibid 496-501

²²⁰ Ibid 14

Moreover, Brewster reveals that TRIPS has some “surprising benefits” for developing countries²²¹ because even the minimum standard of the TRIPS is higher than their standard, but it remains flexible. This can be seen from the case of China’s IPR,²²² when the panel decision of the WTO was that, if a state already has effective remedies and sufficient enforcement, the TRIPS does not interfere with the internal affairs of its member countries and the standard of their bar, even if it is lower than that expected by the rights holders in developed countries.

Another surprising benefit of the TRIPS is the “retaliation” system.²²³ This can be explained by the example that, when developed countries subsidise their industries, such as cotton or textiles in violation of the WTO rules, and acts as an obstacle to the exports of a developing country, the developing country can retaliate according to the WTO rules by suspending the IPRs of the developed country, such as suspending the consideration of a patent for pharmaceuticals or a copyright of a software program. This retaliation is accepted by the WTO within certain limits. There was a case of retaliation between a developed and developing country that involved the United States subsidies on upland cotton.²²⁴ In this case, when Brazil found that the US was subsidising its cotton industry, it announced that it would retaliate against the US in March 2010 by suspending many pharmaceutical patents that applied to American firms.²²⁵ Finally, Brazil won the case and agreed to suspend the retaliation in exchange for a revision of the US Farm Bill 2012 and payment of compensation of \$147 million

²²¹ R Brewster, “The Surprising Benefit to developing Countries of Linking International Trade and Intellectual Property”, 12 Chi. J Int’l L 1 (2011-2012)

²²² China – IPR World Trade Organization, Report of the Panel, China- Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WTO Doc No WT/DS362/R (Mar 19,2009)

²²³ W R Cornish, D Llewelyn and T Alpin, “Intellectual Property: Patent, Copyright, Trade Mark and Allied Rights”, 7th edon (Sweet & Maxwell, 2010) 659, 16-28.

²²⁴ United States Subsidies to Upland Cotton DS 267 <

http://www.wto.org/english/tratop_e/dispu_e/case_e/eds267_e.htm>(last accessed 23may2016)

²²⁵ R Brewster 50

to the Brazilian cotton industry. After this case, the US government agreed to accept cotton products from Brazil to support the US cotton industry. This can be a good example of how developing countries can use the retaliation system of the TRIPS as a benefit and a tool to protect their industry and interests.

Developing countries initially entered into the TRIPS agreement in exchange for the chance to access the free market in developed countries, especially in terms of agricultural products and textiles; however, many developing countries now use the potential and value of the TRIPS to enhance their economies by becoming owners of IPRs.²²⁶ IP protection is seen as an effective way to protect human capital²²⁷ and use it in a sustainable way to promote the economy, and this entails administering the IP system in an appropriate way. Although it is evident from the above discussion that strong IP enforcement can be beneficial for developing the industry in developing countries as well, the question of whether IP could benefit the fashion industry or not will be debated later in this paper after considering the level of protection provided to the fashion industry by the IP system in three countries in the next chapter.

3.4 The perspective of fashion design protection in the leading fashion countries

The key factor in the fashion industry is 'design'. When an outstanding design meets the independent desire of consumers, the value of the intellectual property in fashion retail increases and the income of the industry is enlarged. It is the design that makes the price of a bag from an Italian brand totally different from that of a Japanese

²²⁶ A Yap, "IP as a Tool for Economic Growth in ASEAN: Issues, Challenge and the Way Forward", Third Annual Asian IP Law and Policy Day- Recent Development in IP Law and Policy in Asia, Lecture Notes of Lecture delivered on April 19, 2006 at the Third Annual Asian IP Law and Policy Day, Fordham University, New York City
²²⁷ T Wattanaputtipisan, "IP Rights and Enterprise Development: Some Policy Issues and Options in the ASEAN", Asia Pacific Development Journal 2004 Vol. 11

brand, even if the quality of the leather is the same and both bags are made in the same factory in India. Moreover, white cotton t-shirts that have the letters 'YSL' on the collar cost six times more than white cotton t-shirts designed and sold by a local brand in Dubai. This difference relates to one word, namely, 'design', which is the key driver of success of many creative businesses and also the subject of intellectual property law. The relationship between fashion and intellectual property law is a complex one²²⁸. It is hard to fit the combined concept of creation, business strategy, and legal protection with the fashion and clothing business because creativity is basically inspired by other people's work, while the purpose of intellectual property protection is to support the development of innovation and creativity of humans.

In theory, there are a number of ways in which intellectual property law can protect fashion; in fact, the protection of fashion is the subject of many intellectual property laws, such as copyright, design and patent law. Fashion drawings are usually protected by copyright law and are protected as 'artistic modules' in some countries²²⁹. The technical process of sewing can usually be protected by patent law, and the signature or name of the designer are certainly protected by trademark law. A particular model is sometimes so distinctive and well-known that it may also be protected as a trademark. Examples are the Hermès handbag, "Kelly", which was designed in 1956 and become famous when it appeared on the arm of Princess Grace of Monaco, and Chanel's two-tone knitted woollen jacket called the "Chanel Suit",

²²⁸ Maria Mackinney-Valentin and Stina Teilmann -Lock, 'Copy Chic: Status Representation and Intellectual Property Rights in Contemporary Luxury Fashion' (2014) 1:1 History, Culture, Consumption.

²²⁹ Estelle Derclaye, 'Are Fashion Designers Better Protected in Continental Europe than In the United Kingdom? A Comparative Analysis of the Recent Case Law in France, Italy and the United Kingdom' (2009) 13 Journal of World Intellectual Property.

which was originally designed in 1952 and broke the traditional pattern of a working women's dress at that time.

The recent debate regarding the relationship between fashion and intellectual property has been primarily based on the context of copyright law. However, there is no universal intellectual property protection to protect designers from the unauthorised copying of their designs and legislation related to the IPR protection of fashion differs from country to country. While the protection of fashion design would benefit all ranges of the fashion industry from luxury brands to high street brands, in reality, the plaintiffs in legal suits are usually always internationally high-fashion brands²³⁰.

As the core protection of fashion design, copyright law is a more attractive option than other kinds of legal protection because it is formless and, unlike design rights and trademarks, it requires no registration and no fee. Moreover, the term of protection in copyright is equal to the lifetime of the creator plus seventy years. Copyright also grants an original work a wider scope of protection in terms of direct or indirect copying²³¹.

However, the regime of copyright law is different in every country; for example, France has a long history of granting copyright protection for fashion design, while fashion is excluded from protection in the USA. Most court decisions related to copyright infringement depend on the "substantial similarity" between the original and the copy with no burden on the copier to prove the intention to deceive²³². It can be

²³⁰ Vertica Bhardwaj and Ann Fairhurst, 'Fast Fashion: Response to Changes in the Fashion Industry' (2010) 20 *The International Review of Retail, Distribution and Consumer Research*.

²³¹ *Ibid* 22 p. 43

²³² Scafidi, Susan, *Intellectual Property and Fashion Design* (August 23, 2006). *Intellectual Property and Information Wealth*, Vol. 1, No. 115, 2006.

assumed that there is a thin line between the substantial and insubstantial nature of each lawsuit related to copying a fashion design because the negotiation in court and its definition seem to shift with time²³³.

This section will examine the laws relating to the fashion protection in the leading countries in fashion in order to evaluate the appropriate level which may apply to develop the intellectual property system protecting the fashion industry in Thailand if the fashion piracy has an effect on the development of the fashion industry.

3.4.1 The European Union

Many leading countries in fashion located in the EU have various levels of fashion design protection. However, the European Union created a uniform standard to protect designs, including fashion designs, in the form of registered and unregistered Community Design in 2003²³⁴. The European Union registration system in terms of fashion design broadly defines the term 'Registrable Design', as "the appearance of the whole or part of a product resulting from the feature of, in particular, the lines, contours, colour, shape, texture, and/or materials of the product itself and/or its ornamentation". Furthermore, the design must be new and distinctive from known or registered designs.

In this system, the primary registration of fashion design protection lasts for five years and is then renewable for an additional five years. The total term of the renewal must be no more than 25 years and there is no restriction on the number of designs in

²³³ Julie P. Tsai 'Fashioning Protection: A note on the Protection of Fashion Design in The United States', 9 Lewis & Clark Law Review.447 (2006).

²³⁴ Directive 98/71/EC was aimed at the harmonisation of national provisions relating to the eligibility and protection of registered designs in order to ensure the free movement of goods and freedom of competition within the European Union.

one application. However, if the application involves multiple designs, they should all be dissimilar and separable. In implementing this registration, the European Union provides the exclusive rights for the owner of a registered design to use it and prevent it from being reproduced, offered on the market, imported, exported, used or stocked for such purposes as producing products incorporating the design, which do not give a different overall impression²³⁵.

In terms of unregistered community designs, the European Union provides the same standard protection as for registered designs, but it lasts for a shorter period²³⁶. The unregistered Community Design protection seems to serve sectors of industry with short durations, such as fashion, since it offers formless protection and suits the nature of the fashion business better than the registered system because the fashion industry has a large number of designs with a short market life. Therefore, protection without the burden of registration is an advantage for designers, who are less concerned about long-term protection. The Community Unregistered Design Right starts when creators first disclose their design to the public and lasts for three years from the time they make it available to the public.²³⁷

3.4.2 France

The national law of each European country provides a different level of design protection. The conditions to obtain copyright protection specified by each member

²³⁵ Christopher M. Aide, *The Community Design: European Union-Wide Protection for Your Design Portfolio*, 1 Nw. J. Tech. & Intel. Prop. 35 (2003).

²³⁶ OHIM, "*The Community Design: Frequently asked questions on the Community Design*", question 1.6, and <http://oami.europa.eu/ows/rw/pages/RCD/FAQ/FAQ.en.do> [Accessed 13 December 2014].

²³⁷ Ben Smulders, *The European Community and Copyright*, International Copyright Law and Practice, at EC-46 (Paul Edward Gellereed, 2006).

state are different according to the level of originality. France, traditionally a strong supporter of the fashion industry and the home of haute couture, has long had a deep conceptual awareness of the protection of fashion design as a form of intellectual expression²³⁸. Fashion design was protected as an applied art in the Copyright Act 1973, and this protection was extended to the French Intellectual Property Code, in which Article L.112.2 was prescribed to protect “the original work of the mind and creation of the seasonal industries of dress and articles thereof”, including the pattern and non-functional aspects. Moreover, French copyright law prescribes the moral and patrimonial rights to authors from the time the original work is created. In terms of the principle of moral right, Section L121-9 of the French IP code grants designers four main branches of this right²³⁹, namely, (i) the right to integrity, which prohibits the modification or deconstruction of their design, (ii) the attribution of their work and the right to be identified as its author, (iii) the right to choose how to publicise their work, and (iv) the right to withdraw or take back their work from being disclosed. This moral right is also extended to their heirs without expiration. The patrimonial right grants the author the exclusive right of reproduction, financial compensation and distribution from the sale of their designs as inherited²⁴⁰.

²³⁸ Holger Gauss, Borianna Guimberteau, Simon Bennett & Lorenzo Litt, “Red Soles Aren’t Made for Walking: A Comparative Study of European Fashion Laws”, 5 *Landslide* 6, available at http://www.americanbar.org/publications/landslide/2012_13/july_august/red_soles_arent_made_walking_comparative_study_european_fashion_laws.html.

²³⁹ Jean-François Bretonnière & Thomas Defaux, “France: French Copyright Law: A complex coexistence of moral and patrimonial prerogatives”, available at <http://www.iammagazine.com/issues/Article.ashx?g=17e4662b-dbdd-4a41-9dcf-b58838853682>.

²⁴⁰ N. Elizabeth Mills, *Intellectual Property Protection for Fashion Design: An Overview of Existing Law and a Look toward Proposed Legislative Changes*, 5 *SHIDLeR J. L. COm. & Tech.* 24 (2009).

The Implication of French copyright law on fashion design could be seen when Yves Saint Laurent sued Ralph Lauren for infringement based on its moral and patrimonial rights. Yves Saint Laurent sued Ralph Lauren, accusing the company of copying a black tuxedo that Mr Saint Laurent had first created in 1966 and shown again as part of the haute couture in his fall collection for 1991-92. The court ruled that the Ralph Lauren ready-to-wear version was strikingly similar, so much so that an ordinary customer would not be able to tell the difference²⁴¹.

A design is granted protection from the date it is created without the need for registration. However, the condition that challenges designers is showing the originality of the design because the fashion industry is a trend follower by nature; therefore, it is hard to find the originality in their works. Moreover, the French court tends to strictly adhere to the originality of the design and typically rejects the copyright protection of designs that should be considered but are not original or are similar to other designs.

3.4.3 Italy

In Italy, which is home to some of the most prominent fashion houses in the industry, fashion designers can obtain protection for fashion design under its copyright system. The Italian copyright law (the “LDA”) affords protection to the following;

“Work of the mind having a creative character and belonging to literature , music, figurative art, architecture, theatre or cinematography, whatever their mode or form of expression shall be protected under in accordance

²⁴¹ Societe Yves Saint Laurent Couture SA v Societe Louis Dreyfus Retail Management SA [1994] E.C.C. 512 (Trib Comm (Paris)).

with this Law,” and “(i)n particular, protection shall extended to...industrial design work that have creative character or inherent artistic character”.

This principle can be illustrated by the case of *Vitra Patente AG vs. High Tech. SRL*, when the court of Florence extended copyright protection to a chair design for the reason that “high-profile designer furniture” is worthy of protection because its aesthetic element transcends its functional use; thus, it may be considered to be art²⁴². However, fashion designs do not need to be registered for copyright protection under the “LDA”. Italian fashion designers can seek an ex-parte protection for their designs by acquiring a temporary court injunction and then asking for a permanent court injunction or compensation for the damage of unregistered work. The copyright for fashion designs lasts for a designer’s lifetime, plus seventy years after their death²⁴³.

Moreover, fashion designers in Italy can protect their designs using both copyright and design protection because the Italian Industrial Property Code (the “CPI”) protects designs that are registered with the Italian Patent and Trademark Office (the “IPTO”) and any applicable design registration.

3.4.4 The United States of America

The fashion industry is one of the United States’ largest industries, generating more than US\$300 billion in revenue every year²⁴⁴, despite which there is limited legal

²⁴² Preliminary ruling from the Tribunale di Milano (Italy) lodged on 16 June 2009 — *Vitra Patente AG v High Tech Srl* (Case C-219/09) 2009/C 205/40.

²⁴³ Gauss, Guimberteau, et al, supra note 25.

²⁴⁴ American Apparel and Footwear Association, Innovation Design Protection and Piracy Prohibition Act, //www.wewear.org/aafa-on-the-issues/category/?CategoryID=45. Accessed on 24 November 2014.

protection for fashion designs. The US fashion industry has tried for many years to convince the Congress to pass a bill to extend design protection to apparel design, pointing out that this would bring the United States to the same standard of fashion design protection as other countries, such as France, Italy and the United Kingdom, where there are specific laws that enable fashion designers to obtain protection. A bill to protect fashion design in the US has been introduced to Congress more than seventy times without success; however, three forms of intellectual property rights are available to protect fashion design in the US, namely Copyright, Trade Dress, and Design patents²⁴⁵.

At first glance, the copyright protection for fashion design in the USA seems to be efficient because textiles and clothing are considered to be wearable art, which is able to be copyrighted²⁴⁶. However, garments and accessories are not protectable under the concept of 'Useful Article', because it is difficult to consider that the design of clothing can be separated from its function²⁴⁷. On the other hand, the print, pattern, unique colour or outstanding combination of colours or elements used on the design are protectable under US copyright law if they can be identified separately from the utilitarian aspect of the item and are capable of existing independently²⁴⁸. However,

²⁴⁵ Theodore Briggs, "Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law" 24 *Hasting Comm&Ent.L.J.*169, 171-202(2002).

²⁴⁶ M.C. Miller, "Copyrighting the 'Useful Art' of Couture: Expanding Intellectual Property protection for fashion designs" (2014) 1617 *William and Mary Law Review*.

²⁴⁷ Brittany West, "A New Look for the Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Protection Act (IDPPA)" (2011) 5 *Journal of Business, Entrepreneurship & Law* <<http://digitalcommons.peperdine.edu>> accessed 6 April 2015.

²⁴⁸ Lauren E. Purcell, "A Fashion Flop: The Innovative Design Protection and Piracy Prevention Act" [2013] *Journal of Law and Commerce*, University of Pittsburgh.

the fashion industry is trying to lobby Congress to extend the copyright protection of fashion designs by amending Chapter 13 of Title 17 of the Innovative Design Protection Act to protect fashion designs by copyright for up to three years.

Trade dress is the second choice for fashion designers to obtain protection in the US. According to the Lanham Act, trade dress is part of trademark law, which is commonly used to protect a word, symbol or phrase used by entrepreneurs to identify their creation and distinguish it from others. However, trademark law has recently been extended to protect other aspects of a product, including colour, packaging design and trade dress. The principle of trade dress is the protection of visual characteristics of a product that can identify the source of the product by conveying a secondary meaning to customers but are not functional in themselves²⁴⁹. Trade dress protection is divided into two categories, namely protection for product packaging and protection for product design. This principle can be illustrated by the opinion of the US Supreme Court in the case of *Wal-Mart Store vs. Samara Brothers*²⁵⁰. Walmart Store was sued by Samara on the grounds of infringement of its children's clothing design. Samara brought this action for, *inter alia*, infringement of unregistered trade dress under §43(a) of the Trademark Act of 1946 (Lanham Act) and attempted to use trade dress protection for this non-registered design and claimed that its children's clothing design was the trade dress, not the packaging. However, the court ruled that, in this case, there was insufficient evidence to support a conclusion that Samara's clothing designs could be legally protected as distinctive trade dress for purposes of §43(a). In this case, the

²⁴⁹ Kevin V. Tu, "Counterfeit Fashion: The Interplay between Copyright and Trademark Law in Original Fashion Designs and Designer Knockoffs" (2010) 4:3 Texas Intellectual Property Law Journal.

²⁵⁰ *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 US 205 - No. 99-150. Argued 19 January 2000 - Decided 22 March 2000.

court has ruled that product design, also like colour, cannot be inherently distinctive, since it almost “invariably serves purposes other than source identification”. Therefore, in order to qualify for protection of trade dress, a plaintiff must demonstrate that its trade dress has ‘acquired’ distinctiveness or ‘secondary meaning’.

However, due to nature of the fashion business, it is quite difficult to present the secondary meaning in the fashion industry because it is such a fast-changing business; therefore, the second meaning should be more associated with the brand than the design²⁵¹. However, trade dress seems to be useful for some designs; for example, the famous case of the red-sole shoes of *Christian Louboutin vs. Yves Saint Laurent*²⁵², the owner of a US trademark registration for shoes with a red-lacquered outsole, Louboutin, sued Yves Saint Laurent (YSL) for trademark infringement after YSL introduced a line of entirely monochromatic shoes including red shoes with a red outsole in 2011. The parties did not dispute that the red outsole became closely associated with Louboutin, but the trial court held that Louboutin’s red outsole was not protectable as trademark because the single colour mark in fashion industry are “aesthetics functional” that cannot be protectable as a trademark.

Louboutin appealed to the Second Circuit, which reversed the district court’s decision and were of the opinion that it was an error to set a different standard for a “single colour” that is used for any other industry to the fashion industry. Thus, the Second Circuit held that ‘the aesthetic functional’ is ineligible for trademark protection if the design feature is essential to the use of the article and affects the article’s cost or quality and the protecting of the design feature would significantly undermine a

²⁵¹ Peter Louis Chasey, "Control Over Counterfeits: The Most Important Right the Lanham Act Confers on Those Who Register Under It" (2002) 12 J. Contemp. Legal Issues 158.

²⁵² *Christian Louboutin v. Yves Saint Laurent*, 696 F.3d 206(2012).

competitor's ability to compete. Therefore, the court held that aesthetic or ornamental trade dress can be protected as long as it does not significantly undermine competition. However, this case provided no guidance concerning how to determine when competition is "significantly" undermined.

Following the challenging requirements for the protection of a fashion trademark through trade dress, the last option for fashion designers to protect their design is a Design Patent. There are three kinds of patents available under the US Patent Act; namely, a Utility Patent, a Design Patent and a Plant Patent. Fashion designers can protect their designs with a design patent, which protects the look of the design, the ornamentation and the novel and non-functional aspects. Designers are required to stipulate the features that need to be protected because this protection is applied to the design concept, not the exact product sold in the market.

Most design patents are granted to the designs of accessories, such as handbags, jewellery, and shoes. Clothing designs are generally deemed to be unprotectable under this right because clothing is considered to be functional and not novel due to it being difficult to prove its originality. However, designers can apply to protect the key element of their designs or the elementary parts of their apparel design. Moreover, although the design patent does not limit the number of designs to be protected, a significant obstacle for designers to protect their designs under the patent rights is the time taken to obtain the protection, which is not conducive to the lifecycle of the fashion industry²⁵³. Since the US has no specific legislation to protect fashion designs and US fashion designers have been unsuccessful in lobbying

²⁵³ Courtney Daniels, 'Made in America: Is IDDPPA the Answer to the United States Fashion Industry's Quest for Design Protection.' (2011) 113 University of Miami Business Law Review.

Congress to obtain better protection, US fashion designers should consider applying one of the various forms of protection, such as trademark copyright and patents, which are available in different conditions²⁵⁴.

From the laws protecting fashion design mentioned above, it can be seen that in each country the crucial laws protecting the fashion industry vary, but they have a mutual concept that fashion design is one of the forms of art that the creators have their right to gain a benefit from, but the length of time of protection prescribed does not give a monopoly to the creator.

Chapter 4

4. The comparative study of the intellectual property system protecting the fashion industry in the UK, India, and Thailand

²⁵⁴ Laura C. Marshall, "Catwalk Copycats: Why Congress should Adopt a Modified Version of the Design Piracy Prohibition Act", 14 J. Intell. Prop. L. 305, 319.

4.1 Introduction

Because Thailand is a developing country, it could be useful to compare the intellectual property laws of both developed and developing countries when seeking the best model for Thailand to review its IP legislation to protect its fashion industry. The UK is chosen as the example of a developed country in this study for three reasons. Firstly, it is one of the leaders in the world's fashion and textile industries. Secondly, it has a long history of implementing specific legislation to protect its fashion industry, and this will be examined to demonstrate how this legislation was shaped to fit the nature of the fashion cycle. Thirdly, the UK's legal system is based on common law, whereby the decisions of the court are used as guidance in future cases. This has facilitated the reform and development of IPR protection into its current form, especially for businesses with a fast turnover such as the fashion industry. Therefore, it will be useful to examine the UK model to ascertain if the legal system of IPRs in the fashion industry supports the UK's fashion industry or hinders it.

In the 19th Century, before the introduction of various IPR protection laws, intellectual property rights in the UK were protected by industry-specific legislation. In terms of the fashion and textile industry, the pre-modern Intellectual Property law was the Designing and Printing of Linen Act 1787, which was the first to address the counterfeiting of printing and design. This Act gave copyright protection to those who invented, designed and printed any new and original design on linen, cotton, or muslin for two months after the first publication (extended to three months in 1974). Designers were the sole proprietors, who had the right to reprint their design and mark their name on every piece of textile. This Act had a huge impact on the development of the fashion

industry at that time because it increased the monopoly²⁵⁵ of the textile industry during the age of the Industrial Revolution.²⁵⁶

The British textile industry was extremely productive by the early 19th century because of the proliferation of slave labour. However, although the fashion and textile industry grew rapidly, it was competitors such as the French who were accredited with adding value by focusing on unique designs, rather than the number of products. The fashionistas at that time considered that “the aesthetic designs from Paris, the capital city of fashion in France, add value with the lace or ribbon, even if it is made in the UK”.²⁵⁷ Therefore, British designers attempted to convince the government that the way to stimulate the British fashion industry was to review the law to give more protection to lace designs, textile designs, and even ribbons. Thus, the Copyright of Design Act 1839 was extended to protect products from designers who embellished wool and silk with linen cotton, wool, and silk.

In addition, the Act was designed to protect the British textile industry from imported Indian cotton by stating that the cotton fabric that could be protected should be made in the UK. This illustrates that Britain used intellectual property protection to safeguard its interests from competitors, while simultaneously stimulating growth.

The 1893 Act could be regarded as the foundation of modern design law because it not only provided protection for existing textile designs, but for every new or original design. Therefore, creative businesses were fully supported by this Act during the Industrial Revolution, because protection of the ornamentation or shape of

²⁵⁵ B Sherman and L Bently, “The Making of Modern Intellectual Property Law – The British Experience”, 1760-1911, 4th edn (Cambridge University Press, 2008) 3

²⁵⁶ *Ibid* 64

²⁵⁷ P Rivoli, “The Travels of a T-Shirt in the Global Economy”, 2nd edn (John Wiley & Sons, 2009) 37

their designs was beneficial for their success.²⁵⁸ The British registration system was founded on this Act, since designs could not be protected by it until they were registered with the Board of Trade; however, the registration of fashion and textile designs was heavily criticised as being redundant by the Calico Printers' Association, which had always recorded the designs and number of prints. The Association argued that the process of registration would allow the inspectors to see the designs or prints before they were published, which would increase the chances of copying in the fashion and textile industry.

A new Design Act was introduced in 1842 in order to consolidate the previous Act and prescribe the principle of remedies in cases of design infringement; however, it failed to clearly define the subject matter that could be protected. Finally, the definition of design protection in this Act was extended in 1843 to include the functional features of designs, which only exacerbated the problem of protecting designs related to the physical human form, such as fashion products, since it limited designs associated with the human body.²⁵⁹

It is clear that the Copyright law and Design law were developed in parallel in this pre-modern era of IP law in the UK, when the consideration of copyright and design registration was transferred from the Board of Trade to the UK Patent Office at the end of the 19th Century. This time, fine art was assigned protection by copyright law, whereas applied art was protected under design law. This distinction between fine and applied art was clearly guided by the Copyright Act 1911, in which it was stated that fine art should be "unique and not made to be multiplied". Therefore, mass-produced items were assigned protection by the design law. This demonstrates that

²⁵⁸ B Sherman and L Bently (64-65)

²⁵⁹ M Briffa and L Gaga, "Design Law – Protecting and Exploiting Rights", 1st edn (the Law Society, 2004) 56

the copyright law at that time exclusively protected fine art and the textile and fashion industry did not benefit from it. In addition, the copyright law during the 19th Century was associated with the literary domain and beyond a connection with trade and commerce, while design law and patents were created to support the development of commercial products.

The notion of separating copyrightable objects from industrial designs or patents led to copyright giving automatic protection in the 1911 Act. This was based on the idea that copyright is purely artistic; thus, it is not in the same category as design objects, which are initiated for commercial purposes. This Act was an attempt to reform the definition of 'artistic' and was amended by the Registered Designs Act 1949, which also contained a system for design registration. Then, the law protecting design underwent a major change in 1956 to give more protection to many kinds of work. This was when the design rights in the UK began to become parallel and overlap with copyright, and the two began to meet in the Copyright Act of 1956. The provision in the Act that aimed to protect the "work of aesthetic craftsmanship" was sufficiently broad to protect the diagrams, maps, charts, or plans of a creator; thus, the copyright would cover the original drawings of an artist, which could be vulnerable to two or three dimensions of infringement.²⁶⁰

However, many designers found that this Act was problematic because a tailor-made product is based on the human body or a three-dimensional figure without the need for drawings. Therefore, this Act was replaced by the Copyright, Designs and Patents Act 1988 ("CDPA") and developed into the Intellectual Property Act 2014. This came into effect on the 1st October 2014 and is the current legislation.

²⁶⁰ Section 9(8), UK Copyright Act 1956

After the UK joined the European Union, the CDPA was continuously amended to comply with the EU Directives. In 1991, the European Commission published a Green Paper for Design Protection with the aim of harmonising the national laws with the Community's design protection. This proposal became a directive in 1993 and a regulation in 1994. The 1993 Directive granted designs protection throughout the entire European Union with just one registration, and despite being the subject of many different opinions, it was adopted on the 13th October 1998, and in 2001, it became Council Regulation 6/2002, which prescribes the Design Protection for the entire Community.

This Council Regulation created a new regime for registered and unregistered designs, which could be applied throughout the European Community by means of one registration with the Office of the Harmonisation of the Internal Market (OHIM) and protection was granted for 25 years from the date of filing the application. The unregistered design rights provide protection for the design for a term of three years after the date on which the design was created and published in the European Union. Nevertheless, these two rights coexist within the national IP rights, which gives fashion designers in the UK many channels to protect their designs. However, the overlap of protection for the UK's fashion design is still unclear, because sketches or drawings can be protected under copyright law, while three-dimensional designs can simultaneously benefit from both the registered and unregistered design rights, but which of these offers the most support for the UK's fashion industry is still debatable.

4.2 Intellectual property system for the protection of fashion designs in the UK

Although this section is focused on an examination of the UK's IP legislation, it may be limited to the relevant provisions and cases concerned with fashion design under the UK copyright law, design rights and trademark law.

4.2.1 Copyright protection for fashion designs

Fashion designers in the United Kingdom can choose from a number of ways to protect their designs, the first of which is copyright protection, which is automatically granted if a creative idea has been fixed in a tangible form. In order for a work to be protected, (i) it must be original, and (ii) it must have been produced by a UK citizen or someone who lives in the United Kingdom or in a country that is a member of the Berne Convention or the WIPO Copyright Treaty. However, the work needs to comply with the prerequisites prescribed in the treaty. The term of copyright protection in the UK is the lifetime of the author plus seventy years,²⁶¹ and the work needs to be an artistic and original creation in order to qualify for protection. According to Section 4(1) of the CDPA 1988, an 'artistic work' is defined as being original and possessing one of the following characteristics:

- (a) A graphic work, photograph, sculpture or collage,
- (b) A work of architecture, being a building or model for a building, or
- (c) A work of artistic craftsmanship.

According to this definition, for a work to be original, the designer must not have copied others' work and must have used a substantial amount of design skill with independent taste and judgement. In the case of *Interlego v. Tyco*, which was related to Lego's toy bricks, the court considered that a minor modification of the design on a drawing could

²⁶¹ Section 12(2) CDPA as substituted by regulations made on the 19 December 1995, which came into force on 1 January 1996.

not be regarded as original because Lego had simply repeated its earlier design with merely a slight modification. Dimension and tolerance were not likely to illustrate 'visual signification' which could warrant a separate copyright from the earlier design.²⁶²

The relevant provision for fashion design in the Copyright Act can be found in Section 4(1)(c) of the CDPA, which refers to 'a work of craftsmanship'. However, since the definition of the work is a legal initiative, it is difficult to identify the type of work that can be regarded as 'craftsmanship'. In the case of *George Hensher Limited v Restawhile Upholstery Lancs Limited*, five judges took a different approach to works that could be considered as 'craftsmanship' when they all agreed that a chair manufactured for the mass market or the utility of the design did not constitute craftsmanship. In fact, there is no consistent definition of 'craftsmanship', with some considering that the creator should demonstrate an artistic aspiration rather than the commercial benefit of the design. This has been a subject for debate ever since the UK introduced its IP law and it has been left to the courts to use their discretion on a case-by-case basis. However, although the definition of 'artistic' may be subject to the individual case, the UK court seems to agree that a copyright should be automatically cancelled out by design protection.

The case of Ossie Clark in *Radley Gown Limited v. Costa Spyrou [1975] FSR 455* was the first time that a fashion design was perceived to merit copyright protection because the court found that a dress designed using sufficient skill, labour and judgement of the designer can possess both aesthetic and artistic value. However, although this case somewhat paved the way for fashion design to obtain copyright

²⁶² *Interlego v Tyco [1988] RPC 343JC*

protection in the UK, it still did not lead to a clear definition of 'artistic craftsmanship'. On the other hand, in the case of *Eduard Rudolph Vermant & Others vs Boncrest Limited [2000] Ch D*, it was held that, although a sample of patchwork designed by a seamstress was a work of craftsmanship, it was insufficiently 'artistic' to be an aesthetic work. These two cases illustrate the court's different points of view of fashion design products that are generated by a subjective consideration based on a qualitative approach.

When fashion designers have been awarded copyright protection for their designs, the next question that arises is whether the scope of protection in the jurisdiction can protect the fashion designs from infringement. In Section 16 of the CDPA, it is prescribed that the owner of a copyrighted work has the exclusive rights to copy the work, and the infringement of copyrighted work is also addressed in Sections (2) and (3) as follows:

(2) the copyright of a work is infringed by a person who, without the licence of the copyright owner, does or authorises another to do, any of the acts restricted by the copyright.

(3) this part refers to the doing of an act restricted by the copyright;

(a) in relation to the work as a whole or any substantial part of it, and

(b) either directly or indirectly; immaterial of whether any intervening act infringes the copyright.

It is evident from the above section that the question of copyright in the fashion industry is based on whether or not there was an intention to infringe the substantial part of another design because most designs in the mass fashion industry begin with a reference to the latest collection of many renowned designers. The case that can

provide the guidelines for consideration of the issue of substantial copying in fashion design is the *Designer's Guild Limited vs. Russell Williams (Textiles) Limited [2000]1 WLR 2416*, in which the plaintiff claimed that its fabric design had been infringed by Russell Williams (Textiles) Limited.

The plaintiff was a fabric and fashion designer, and its fabric design in 1995 was called 'Ixia'. It consisted of flowers scattered over a striped line in an impressionist style, having been inspired by Matisse's cut-outs based on "handwriting and feel". Later, in 1996, the designer, Russell Williams, produced an impressionist striped design with scattered flowers called 'Marguerite' in Belgium and the Netherlands during the spring Trade fair. Thus, the plaintiff alleged that the defendant had intentionally copied the Ixia design. In the first instance, the judge gave the opinion that the defendant had copied the essential feature and substantial part of the plaintiff's original design, but the Court of Appeal reversed this decision because, although the defendant had used the same technique as the Ixia design of the defendant, it had not used the same visual effect in Marguerite and the number of flowers and their places were different. However, when the plaintiff appealed to the House of Lords, the decision of the Court of Appeal that the defendant had copied the substantial design of the plaintiff was overturned on the grounds that the substantial part of the work aimed to protect the quality rather than the quantity of the work and the design features of Marguerite could not be considered as "original", despite being created with modifications. This case illustrates that, although only part of the original design may have been modified, if it can be seen to have been modified from the original design, it may be regarded as copyright infringement.

The reason that many designers in the UK prefer copyright protection to other IP rights is that copyright is automatic, and their work will be protected by copyright law

as a “substantial part of design”. Although the test of substantiality is subject to a case-by-case decision, the Designers Guild can argue that the quality derived from the original is more significant than the quantity of the design that was copied.

4.2.2 Design right for the protection of fashion design

The second form of protection is design right. As mentioned in the previous chapter, the UK has a long history of IP development, and copyright law and design right can be seen to have a joint history of being developed in parallel. This is supported by the consideration of the court that a design right may be awarded in cases where a design does not accord with the prerequisites of a copyright. The UK’s present legislation contains two kinds of design right, namely an unregistered design right and a registered design right. Registered and unregistered industrial designs are protected in the UK by the Intellectual Property Act 2014, which came into effect on 1 October 2014. This protection generally protects designs in terms of the way an object looks, its shape, its visual appeal, etc., and it is divided into unregistered and registered design protection. The UK law and the European Community (EC) law have similar provisions related to the protection of both unregistered and registered designs. The most prominent difference between these laws in terms of design is the geographical extent of the protection. The other differences mainly relate to protection for surface decoration and ownership rights.

An unregistered design right is not a monopolistic right and proof of copying is required before relief can be obtained for infringement. This right also protects the 3-dimensional aspects of a design provided that it is original. As for a registered design right, this right does provide a monopolistic right and proof of copying is not required before relief can be obtained for infringement. It is also not limited to the three-

dimensional aspects of a design, as well as providing protection for other aspects, such as the texture and colour of the design.

In the previous UK law, the right of unregistered designs subsisted in *“any aspect of the shape or configuration of the whole or part of an article”*.²⁶³ This meant that, although a whole design and parts of a design could be protected, a small cropped area, i.e. a section of a part that forms a trivial element of a design, was no longer afforded protection. However, this definition has now been changed to *“the shape or configuration of the whole or part of an article”*²⁶⁴, which means that the phrase, *“any aspect of”* has been removed. Therefore, the criteria to be eligible for protection under this right have been simplified to cover all of the surface and decoration of the design. Also, the UK’s unregistered design right automatically protects the design for 10 years after it is first sold or 15 years after it was created, whichever is the earliest, while registered designs can be given exclusive rights of use for up to 25 years of protection. Therefore, unregistered protection may be sufficient for products with a short market life, such as those in the fashion world.²⁶⁵

However, unregistered rights also have some disadvantages for fashion designs. For example, since only direct copies, rather than independently-created designs, infringe an unregistered right, designers need to document dates to prove infringement, and they may find it difficult to obtain enforcement quickly, which is crucial in this fast-moving industry.

A registered design right in the UK is different from an unregistered design right because the registration of the design automatically gives it a monopolistic right. The

²⁶³ Copyright, Designs and Patents Act 1988, Section 213

²⁶⁴ The Intellectual Property Act 2014 (Narrowing the definition of an unregistered design, Section 1(1) & (2))

²⁶⁵ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs.

registered design right was first introduced in the Registered Design Act 1949, which is still the applicable provision today, and it was last amended in 2001 to comply with the European Design Directive. The UK Patent Office is the authority responsible for registration in the UK.

In Section 1 of the 1949 Act, a registered design is defined as “any feature of the shape, configuration, pattern or ornament applied to an article by any industrial process. It should be appealing as judged by the eyes and the design should be new”. This indicates that the design should not resemble a prior registered design or a design that was published in the UK before the application date. Moreover, designs in a 2D or 3D format can be registered if they meet the prerequisites of the law. The term of protection for a registered design is five years and it can be renewed for a maximum of 25 years. According to the amendment generated by the European Design Directives²⁶⁶, there is no need for designs to be industry applicable because the registered design protection is extended to protect both works of art and sculpture.

The primary requirement for a registrable design is that it must be new and have an individual character. The ‘newness’ of the design can be determined by the differences between the overall design and the design that was made available before the filing date or not based on a previously registered or expired design.²⁶⁷ When designers register their designs, they are automatically granted monopolistic rights, and in contrast to copyright or unregistered designs, there is no need for proof of the intention to copy; rather, the burden of proof is on the infringer. Registration will take

²⁶⁶ European Design Directive-Directive 98/71 /EC of the European Parliament and the Council, 13 October 1998

²⁶⁷ Section 1B(3) of the Registered Design Act 1949

place within two months of receipt of the application after the relevant documents have been approved.

However, for the fashion industry, where the fashion cycle follows the seasons, some designs may become legendary, whereas others will be forgotten in a matter of days; therefore, the registration of such designs may entail increased costs and require much more time than the lifetime of the design in the market. Registered design may be suitable for a design that is not expected to be the trend in every season, such as accessories or home decoration items; on the other hand, some designs that prevail season after season in the fashion market are valuable and should be registered as an “iconic” design in order for it to act as brand awareness for customers. A good example of this is the ‘Kelly bag’ from Hermes.

4.2.3 Trademark protection for fashion design

Unlike copyright or design rights, trademarks do not directly protect fashion designs. The function of a trademark is different from that of these rights because design rights and copyright aim to protect the expression and design of the creator, whereas trademarks were created to use in trade and distinguish one product or service from another. According to W R Cornish,²⁶⁸ a trademark has three functions, the first of which is to indicate the source or connect the trademark owner to the goods or services. Secondly, the trademark guarantees that the quality of the goods or service will meet customers’ expectations. Thirdly, the trademark advertises the image of the product in terms of its origin or quality, and this function is relevant to the development of the trademark as a kind of branding in marketing; therefore, the higher

²⁶⁸ W R Cornish, D Llewelyn and T Alpin, *Intellectual Property: Patent, Copyright, Trade Mark and Allied Rights*, 7th edn (Sweet & Maxwell, 2010) 655

the investment in branding, the stronger the mark²⁶⁹. In terms of the fashion industry, designers can strengthen their mark by investing in a brand as well. The mark can remind customers of the brand and be the basis of goodwill to empower sales.

Trademark protection In the UK can be found in the Trademark Act 1994, in which a trademark is defined as follows:

“Any sign capable of being represented graphically, which is capable of distinguishing goods and service of one undertaking from those of other undertakings. A trademark may in particular consist of words (including personal names), designs, letters, numerals, or the shape of goods or their packaging”.

According to Section 10 of the Act, “a person infringes a registered trademark if he uses in the course of trade a sign which is identical to the trademark in relation to goods or services which are identical to those for which it was registered”. In the UK, alleged trademark infringement arises from the infringer’s intention to confuse the public as to the producer of the goods or service of the registered mark. However, the reputation of a well-known mark also grants protection, even if it is an unregistered mark, under the tort of passing off.

Based on the idea that “nobody has any right to represent his goods as the goods of somebody else”,²⁷⁰ passing off is a special law in the UK that eradicates the gap between unregistered trademarks when registration is not possible under the Law. The action of passing off was developed in common law in the case of *Jif Lemon in*

²⁶⁹ W R Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?*, 1st edn (Oxford University Press, 2004)

²⁷⁰ Per Lord Halsbury in *Redaway v Banham* [1896]A.C 199 at 204

Reckitt & Coleman Ltd v Borden Inc.,²⁷¹ when three elements of passing off were considered. Firstly, the mark will have to have been produced and attached to the goods or services of the claimant and goodwill supplied in the minds of the public. Secondly, the claimant will have to prove that the defendant intended to lead or was likely to lead the public to be confused or believe from the mark that such goods or services belonged to the defendant. Lastly, the defendant will have to prove that the misrepresentation has caused him to suffer or be likely to suffer. However, only the well-known marks of established designers are likely to benefit from this law.

Regarding the UK's fashion industry, designers normally use trademark protection by incorporating their trademark into the design, such as printing the mark or a word on the textile or attaching it as the logo of their design. However, it may be difficult to automatically interpret any design in the fashion industry by its mark unless the design is distinctive as the symbol of a brand or fashion house. When broadly reading the definition of a trademark in the 1994 Act, "A Trademark may consist of....designor the shape of goods", a design that can represent the distinction of goods will benefit from both the trademark law and the passing off law in the UK.

4.3 India's fashion industry and the intellectual property system protecting its fashion designs

China and India were declared the leaders of the world's fashion manufacturing after the multi-fibre agreement ended in 2005, due to the competitive advantage of cheaper wages compared to other countries in the region and their potential of textile manufacturing. India will be evaluated as a model of a developing country with a law

²⁷¹ *Reckitt & Coleman Ltd v Borden Inc.* [1990] 1 All ER 873

that has many regimes to protect the fashion industry, which is expected to have a significant impact on the global market.

India's fashion industry originated thousands of years ago in ancient India, when the type of costume people wore indicated their status and wealth, as well as their religious and social orientation. The style of fashion of people living in ancient times can be seen in the sculptures and ancient paintings in many temples. The majority of clothing seems to have been simple with loin-cloths for men and bare to the waist for women. However, the wearing of jewels also reflected their status and social ranking and those who were wealthy with a high social status tended to wear more detailed and embroidered clothing. When the Aryans migrated to the Indian subcontinent from other regions of Asia, they brought more complex clothing to the Indian population, which consisted of upper and lower garments. They also introduced the art of body draping that is still visible and continues to influence the style of Indian fashion today. Each region and state in India has its own native costume, garments, and accessories that illustrate their traditional heritage.

The success of India's fashion industry over the past decade has propelled it from the local markets to the international marketplace with a huge growth in the number of domestic designers and the demand of a new generation of people living in large cities such as Delhi and Mumbai and those in the state of Uttar Pradesh.²⁷² The number of large annual fashion events, including Indian Fashion Week, which has the official support of the Indian government, is an indication of this significant growth. Rural districts, such as Tamil Nadu, Tirupu and Gurgaon in the south of India, are the hub of ready-to-wear manufacturing, while northern states such as Madhya Pradesh

²⁷² India, "Ministry of Textiles" (*Texmin.nic.in*, 2015) <<http://www.texmin.nic.in>> accessed 11 November 2015.

and Ludhiana are the centres for bridal garments and embroidery patchwork that have been exported to the UAE, Europe, and the USA for more than three decades.²⁷³

A report from the Associated Chambers of Commerce and Industry of India (ASSOCHAM) states that the net worth of this industry has dramatically increased from Rs 200 crore to Rs 1,000 crore during the five-year period of 2010-2015 and is likely to account for 0.32% of the net worth of the international industry. According to this assessment, the domestic fashion industry in India will have a compound annual growth rate of approximately 40% in 2018, which is expected to reach 60% by 2020. This phenomenon generates a significantly large number of jobs, with eight million people employed in this industry alone, 70% of whom are women who live in rural districts.²⁷⁴

According to the research of the Indian marketing scholar, Tapobrata Dey,²⁷⁵ the main factor that supports the growth of this industry is India's long history as a major exporter of fashion materials for the global fashion industry. The colourful fabrics and traditional embroidered patterns that have been used in many costumes at the European courts throughout the centuries are important products, which have been exported from this country since trading began and has contributed to the development of India up to the present.

Additionally, the National Institute of Fashion Technology (NIFT)²⁷⁶ states that the factor that most enhances the fashion industry in India is the media. Bollywood is a huge entertainment industry that produces movies and commercial advertising for

²⁷³ Douglas Bullis, *Fashion Asia* (Thames & Hudson, 2000). p. 257

²⁷⁴ Assocham.org, "Assocham India: Oldest, Leading, Largest and Apex Chamber of Commerce and Industry of India" (2015) <<http://www.assochem.org/>> accessed 8 November 2015.

²⁷⁵ Tapobrata Dey, "Retail Fashion Trend Analysis in India" SSRN Electronic Journal.

²⁷⁶ National institute of Fashion Technology India, "Indian Fashion Factor" (*Nift.ac.in*, 2016) <<http://www.nift.ac.in/>> accessed 3 December 2015.

consumption in countries all over the world. A fashion scene in a movie or a famous Bollywood performer wearing a combination of western and traditional dress on the cover of a fashion magazine arouses Indian people's fashion awareness and encourages them to adapt to the changing trends of global fashion. In addition, the three largest fashion groups in India, namely Arvind, Madura Fashion and Reliance, plan to bring their own fashion brands to the Asian market in 2017 with the official support of the Indian government.

4.3.1 Intellectual Property Rights for fashion designs in India

Similar to the fashion industry in other parts of the world, Indian designers are faced by the threat of piracy in fashion design. The high technology brought by globalisation has made this practice of piracy very easy. The current Intellectual Property regime, which is used by India as a tool to combat fashion piracy, will be analysed in this section. Since the IPR protection for fashion design in India is established in three different legislations, namely, the Designs Act 2000, the Indian Copyright Act 1957, and the Trademark Act 1999, it will be briefly reviewed as: (1) fashion design protection under the industrial design right, (2) fashion design protection under copyright, and (3) fashion design protection under a trademark.

4.3.1.1 Fashion design protection in India under the industrial design right

Most countries protect their fashion industry with a design right and in India it is protected by the Designs Act 2000,²⁷⁷ in which protection is offered for “designs” that are registered under this Act. The “designs” that can be protected by this Act should be as defined in Section (d), as follows;

²⁷⁷ Enacted on 25 May 2000, the Design Act came into force on the 11 May 2011. The full text of this Act can be retrieved from http://www.ipindia.nic.in/ipr/design_act.PDF.

“(D)esign” means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two-dimensional or three-dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of Sub-section (1) of Section 2 of the Trade and Merchandise Marks Act, 1958 or property mark as defined in Section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of Section 2 of the Copyright Act, 1957”.

According to the above definition, only “designs” that fit the definition prescribed in this Act can be registered and protected after registration. The “designs” that can be registered should meet the following criteria;

- (1) The design must be new or original.
- (2) The design should never have been published or disclosed elsewhere in India or another country in any form before the date of filing this registration.
- (3) The design must be significantly distinguishable from any known design or any part of any known design.
- (4) The design should not express any sign of scandalous or obscene matter.²⁷⁸

A broad reading of this description illustrates that this Act does not grant protection to the entire garment, but only protects an individual aspect of the fashion article, for example the shape, colour or pattern of its design when the design meets the criteria of a “design” in Section 2 and has been registered under this Act.

²⁷⁸ Section 4 of the Design Act 2000

Additionally, the proprietors of designs that have been registered under this Act will have the exclusive right to apply their design to any article in any class in which the design has been registered. This can be interpreted to mean that the registered design cannot be protected in any article but the one in the class in which the design was designated at the date of filing for registration in Schedule III of the Design Rules, 2001.²⁷⁹ The period of protection of a design under the Design Act is ten years from the date of registration²⁸⁰ and this can be extended for a further five years in the second period. The piracy of a design registered under this Act will be punished by paying the owner of the design a sum not exceeding Rs 25,000 for every act of piracy, including the contract debt or damage recovery from such an act. Although, at first glance, this seems to broadly protect the Indian fashion industry through the Design Act, this Act is still not properly aligned with the nature of this industry in the following three areas;

- (i) This act only protects registered, not unregistered designs

The Design Act is prescribed to only provide protection for registered designs; therefore, fashion designers who do not often register their designs cannot be protected from the impact of fashion piracy, including filing a suit for illegal copying. This reflects the gap in protection in that it does not fit the nature of the fashion industry in which designs are changing with every season. Hence, the absence of protection for unregistered designs under this Act will impose a huge burden on the Indian fashion industry. Therefore, the efficiency of the protection afforded by this Act should be reviewed with a comparison of the concept of automatic protection in the regulations of the EU and the UK.

²⁷⁹ The goods from a fashion designer may fall under the following class of goods in classes 2, 3, 5, 10, and 11 that were framed by the central government of India in Section 47 of the Design Act.

²⁸⁰ Section 11(1) of the Design Act

- (ii) The process of registration is excessively time-consuming

The period of registration of a design under this Act is extremely time-consuming as it takes approximately 12 months from the date of filing to receive a certificate of registration compared to the dynamic cycle of the fashion industry, in which every item has a shelf-life of not more than one season of 3 months. Although this Act offers another option whereby designers can register their design before the date it is first presented in the market, the nature of fashion design is like any other innovative industry where the secret of new creations has its own value; thus, the filing process may violate this principle by disclosing details and thus lead to the design losing its competitive edge.²⁸¹

- (iii) Limited damage compensation

The Design Act prescribes that the total damage for the piracy of fashion articles should not exceed Rs 25,000,²⁸² but in the fashion industry, this may be insufficient to compensate for the loss of profit or goodwill from the actual piracy.

These three reasons can show the interval of protection of fashion design under the Designs Act 2000 of India.

4.3.1.2 Fashion design protection under copyright in India

Copyright seems to be the preferred method for artists to protect their art in many countries that provide protection for creativity, because it does not require registration and the duration of the protection is longer than other intellectual property regimes. The Indian Copyright Act 1957 is the law that was established for copyright

²⁸¹ Poojan Sahny (2012) "The Design Act, 2000: A Fashion Faux Pas", 1-12 retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185519 (accessed on 28/12/2013), p. 4

²⁸² Section 22 of the Design Act

protection in India.²⁸³ Fashion design is eligible for a copyright under this law, but there is a special provision in Section 15 that causes the protection of ‘designs’ under the Copyright Act and Design Act to overlap. A solution to this overlap can be summarised by the following three principles;

1. Designs that are able to be registered under the Designs Act 2000 and have been registered will only be protected under the Design Act and not the Copyright Act.
2. Designs that are not able to be registered under the Design Act will be protected under the Copyright Act 1957 but they should be original artistic works.
3. Designs that are able to be registered under the Designs Act 2000 but have not been registered can be protected under the Copyright Act on the condition that it has not been reproduced more than fifty times by an industrial process by its owner, the licensees, or any other person.

When comparing these two Acts, it is clear that the protection of fashion designs under the Copyright Act 1957 is more advantageous than that provided by the Designs Act 2000, from the perspective of the duration and there being no requirement for registration. Therefore, fashion designers in India prefer to apply for the protection of their designs under this Act. However, when referring to the overlap of protection in these two Acts, there is still a question of determining whether a fashion item is a ‘design’ in the sense of the Design Act or is an “artistic work” under the Copyright Act.

²⁸³ The latest version came into force on 21 June 2012. The full text of this Act can be retrieved from <http://www.copyright.gov.in/ipr/CopyrightRules.PDF>.

The Indian Court established the core principle for this issue with the decision of the Delhi High Court in the case of *Rajesh Marsani vs. Tahiliani Design Pvt. Ltd*²⁸⁴. In this case, Mr Tahiliani, the plaintiff and founder of Tahiliani Design Pvt., who had a huge fashion business in India, claimed that Rajesh Masrani, the defendant (the appellant in the appeal), had infringed his copyrighted work, since the artistic work in the sketches of garments and accessories used in the course of development by the plaintiff and the garments and accessories themselves, including the pattern or embroidery on the fabric, were copyrightable items under Section(i)(iii) of the Indian Copyright Act 1957, having been created with artistic craftsmanship. In addition, it could be seen that the defendant's products imitated the colour and substantial details of his copyrighted work.

The defendant/appellant raised his appeal against the plaintiff by claiming that the sketches and drawings of a design are not eligible for protection under the Copyright Act, 1957 because the textile design did not fit the definition of 'artistic work' in Section 2(c) (i) of the Copyright Act 1957; therefore, the plaintiff had no right to claim copyright protection due to the lack of ownership of the design.

However, the plaintiff/respondent countered the claim by stating that the printed pattern and the embroidered patchwork on the fabric was original and 'artistic work', which was different from the 'design' in Section 2(d) of the Designs Act 2000, which required registration before protection; therefore, these drawings and sketches of the pattern were automatically protected under Section 2 of the Copyright Act 1957. The plaintiff was the owner of the copyright of any creative work that was created by a designer employed by the plaintiff's company. Moreover, this print was in the couturier

²⁸⁴ Appeal No.: FAO (OS) No. 393/2008 (decided on 28 November 2008 by Sikri and Mammaham JJ.)

line of the company, tailor-made for individual customers; therefore, fewer than twenty copies of the pattern had been produced, which met the criterion of the overlap protection between the Design and Copyright Acts, which prescribed that protection could not be provided to 'artistic work' that had been produced in large quantities.

After carefully analysing the provisions of the Designs Act 2000 and the Copyright Act 1957 and the contentions of both parties, the Honourable Court of Justice in Delhi held that the defendant had infringed the copyright, which had automatically been provided protection by the Copyright Act ever since its existence. The court further explained the decision on the grounds that the drawing of the pattern was entitled to protection by the Copyright Act because the pattern was not a 'design' according to the Designs Act, and it was created to be reproduced fewer than fifty times, which related to the definition of 'artistic work' in the Copyright Act, since this Act aims to protect 'the form of Art' more than the 'design for industry'. This decision established the principle for the fashion industry to use copyright to exclusively protect fashion design for haute couture or custom tailor-made lines in India. Although the clear distinction between 'artistic work' and 'design' in the fashion industry still needed more definition in this case, the quantity of reproduction in fashion design could be a thin line of the overlap of the protection of the fashion industry segment, because the design for mass market collections may benefit from protection under the Designs Act 2000, but the couture lines are more suitable for protection under the Copyright Act in India.

4.3.1.3 Fashion design protection under Trademark law in India

The use of a trademark in the fashion industry can be divided into two perspectives, the first of which entails using a trademark to protect a fashion brand and its prestigious premium. The fashion house can attach its logo, symbol or any name to the surface of a fashion article, such as a fashion accessory or clothing item in order to distinguish its brand from others. The second involves protecting the design. The trademark will protect a fashion article when it is visibly integrated with a design or can become an element of that design. Therefore, the use of a trademark to protect a fashion design is more limited than its protection of a fashion brand.

Trademark protection for fashion designs in India is subjected to the Trade Mark Act 1999 under the simple condition that a fashion design that is able to be registered as a 'design' according to Section 2(d) of the Designs Act 2000 cannot be registered as a 'trademark' under this Act. This principle has been established to prevent the overlap of protection in India's intellectual property regime.

However, in the case of *Micolube India Ltd. vs. Rakesh Kumar, trading as Saurabh Industries & Ors.*,²⁸⁵ the decision of the judgement by the Delhi High Court unlocked the protection of fashion design as a trademark for passing-off with their opinion in paragraph 22.8 of this decision as follows:

“[H]aving regard to the definition of a design under Section 2(d) of the Designs Act, it may not be possible to register simultaneously the same mater as a design and a trademark. However, post registration under section 11 of the Designs Act; there can be no limitation on its use as trademark by the registrant of the design. The reason being that the use of

²⁸⁵ Appeal No.: RFA (OS) No. 25/2006(decided on 28/05/2009 by Sikri and Mammaham JJ.)

a registered design as a trademark is not provided as a ground for its cancellation under Section 19 of the Design Act”²⁸⁶ From this decision, the court held that the suit for passing off action in registered design under the Design Act could be instituted if that design was being used as trademark after its registration with the Designs Act 2000.

4.4 Intellectual Property Rights for fashion designs in Thailand

4.4.1 Development of intellectual property for the fashion industry in Thailand

According to the records in the Vachirayan Library, the first intellectual property rights in Thailand in 1892 had the aim of protecting the copyright of a poem written by King Chulalongkorn²⁸⁷. Then, in 1897, Thailand adopted a civil law system with the assistance of lawyers from France, Belgium and Japan. This process was part of the modernisation of Thailand under the auspices of the Chakri Dynasty, and the first international court was established in 1899. This court was presided over by both Thai and European judges in order to demonstrate that the standard of justice in Thailand was the same as in western countries.²⁸⁸ The Thai government was aware of the importance of being part of the global community, especially for the development of intellectual property; therefore, Thailand has been a member of international conventions as far back as 1931, when the Berne Convention was adopted, and then the WIPO in 1989.

²⁸⁶ Case No.: CS(OS) No. 1446 of 2011 (decided on 15 May 2013, Majority opinion was given by Rajiv Shakhder and Sanjay Kishan Kaul, J.J., whereas dissenting opinion was rendered by Manmohan Singh, J.) Also reported in: 199 (2013)DLT 740.

²⁸⁷ Proclamation of Vachirayan Library for the protection of Literary Works, RS 111(1892) (Thai)

²⁸⁸ Aorgan, Trips to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court, Fordham International Law Journal Volume 23:795 issue 3 1999 Article 8 (2000) 799

The first developed version of the Thai copyright law was the Copyright Act 1978, and this was subsequently amended in 1994. The latest amendment by a ministerial regulation in 1997 aimed to strengthen the position of copyright holders and comply with the TRIPS agreement.

The current trademark law in Thailand is the Trademark Act 2000, which provides the trademark holder with criminal remedies, which is an improvement over the previous 1991 version. As with the other intellectual property acts, the Patent Act 1992 was enacted to comply with the TRIPS agreement and was especially modified to protect pharmaceutical products at the same standard as many other countries.²⁸⁹

The most significant change in Thailand's IP legislation occurred in 1997 with the establishment of the Intellectual Property and International Trade Court (IP and IT court). This was the first court specifically established within the Thai legal system with the authority to draft its own rules, separately from the civil law system,²⁹⁰ in order to enable it to be developed in line with the rest of the world.

Due to the unstable political and governmental issues in Thailand occurring since 2001, the IP system has not been a priority over the past decade and the only development of intellectual property has been the Geographical Indication Act 2004. Although the policy to support Thailand's creative industries was initially based on a plan to promote the Thai economy under a democratic regime, this has tended to change with changes in government. A good example may be the initiative to develop IP related to creative industries by means of the OTOP project (One Tambon (district)

²⁸⁹ C Antons, Intellectual property Law in Southeast Asia: Recent legislative and Institutional Development, present at the second International symposium on International Law "Alternative frame work for the validation and the implementation of Intellectual property in Developing Nations" History and Governance Research Institute, University of Wolverhampton, UK, (3 February 2006)

²⁹⁰ Ibid

One Product) in 2003. The aim of this project was to enable products made by local communities, especially local textile manufacturers, to survive in the domestic market and increase the awareness of the Thai brand in both local and international markets.

Many regions of Thailand have their own characteristic textiles and garments that are made using traditional knowledge or cultural heritage in the weaving process. The OTOP project encouraged Thai designers to use the fabric from local communities to create fashionable goods in modern styles and offered certification with the distinctive OTOP mark to guarantee the origin of the products.²⁹¹ However, this project was not successful because of two obstacles, the first of which was that most of the traditional textile patterns were made by elderly women in the local communities, while the younger generation has moved to large cities such as Bangkok; thus, it was hard for the production to meet the demand. The second barrier was that the use of low-level technology for the dyeing or fading processes could not maintain durable colours and modern Pantone standards, which is key for materials used in fashion design.

From the perspective of IP, the above obstacles risk losing Thai Traditional Knowledge (TK) in the near future if the Thai government continues to hesitate to enact a law to protect it.²⁹² The appropriate way to protect Thai cultural heritage is not to conserve the old traditional ways, but to adopt modern technology to enhance the characteristics of the traditional textiles. If Thailand manages its traditional textiles well and develops them to fit the modern fashion industry, these local products may respond to the demand for unique fabrics and rich designs in the international haute

²⁹¹ Rangnekar, 'Indication of geographical origin in Asia: Legal and policy issue to resolve; in *Intellectual Property and Sustainable Development: Development Agenda in Changing World*, ed. R Melendez-Ortiz and R Roffe (Edward Elgar Publishing, 2009).

²⁹² *ibid*

couture fashion market, similar to the way that India uses its traditional textiles to add value to its fashion design.

After this previous project, the Thai government continued to develop the Thai fashion industry as the core product of the textile industry in Thailand. In 2005, the government led by Thaksin Shinawatra announced a policy to promote Bangkok as the leading fashion city in Asia with the aim of transforming Thailand into a hub of fashion design as opposed to a land of low-end clothing manufacturers as seen in neighbouring countries. This project was underpinned by a fashion week and fashion shows in Bangkok and other Asian countries in order to attract buyers from the global market. It also involved the collaboration of many fashion academics in prominent fashion countries such as Italy and the UK in order to develop the design skills of Thai fashion designers for the international market.

Unfortunately, this project only lasted for one year until the end of the democratic government in 2006, but the fruit of this policy is the existence of young Thai fashion designers, who graduated from a joint programme of international designers from Italy and the UK with high fashion skills and are continuing to create their own unique fashion brands.

However, in 2012, Thailand's Ministry of Industry revived this project, although its scope was narrowed to a road show during fashion week and at international trade events and the import of talented designers from leading countries in fashion as lecturers in universities in order to develop the work of Thai designers to compete with the lower-cost clothing of neighbouring countries such as Cambodia and Vietnam. However, the aim of the project seemed to be the local rather than the international market because Thailand was faced with an influx of cheaper fashion products from

China and Vietnam that was harming the domestic market and reducing sales of Thai fashion brands.²⁹³

As an initiative of the Department of Trade Promotion with the cooperation of the Ministry of Culture, a trade show called the “Bangkok International Fashion Fair“ was held all year round in 2013. As a part of this project, Thailand held an annual “Contemporary Fashion Contest” in order to encourage young Thai designers. Young designers who won this contest were supported to participate in international fashion shows such as the London or Paris fashion weeks.²⁹⁴ This was a chance to promote local Thai fabrics at an international event, and although this contest was small compared to the previous project like the “Bangkok Fashion City Project”, it was sustained for two years until the next change in government to a military one in 2014.

It can be seen from the development of Thai IP systems that there is no relationship between textiles and IP law in the country, unlike the history of IP law in the UK or India, where textiles and clothing design have been key to the development of the IP law. Thailand merely has plans to promote the designs of fashion rather than supporting this industry with the development of an IP system.

4.4.2 Thailand and the legislation to protect the fashion industry

While Thailand has no specific law to protect fashion designs, Thai designers seem to be able to find protection from the current IP law in many ways. Therefore, the protection of fashion design in Thailand under the current IP regime is examined below in order to evaluate its effectiveness in protecting Thai fashion designs.

²⁹³ ‘To appease the PM , the Department of Export Promotion Revives Bangkok Fashion City’ *Manager Newspaper* (translated from Thai), 6 August 2016

<<http://www.manager.co.th/Business/ViewNew.aspx?NewsID=9500000106410>>

²⁹⁴ K Pungkanon, ‘Tradition with a Contemporary Twist’ *The Nation*, 22 May 2016

<<http://www.nationmultimediacom/life/TRADITION-WITH-A-CONTEMPORARY-TWIST-30182487.html>>

4.4.2.1 Protection of fashion designs under the Thai Copyright

The Copyright Act 1994 is the current Copyright Act in Thailand. Similar to the principle of protecting artistic work under the TRIPs Agreement, which can be extended to protect fashion designs as considered by member countries, ‘artistic work’ in Section 4 of the Copyright Act 1994²⁹⁵ refers to “a work of painting or drawing, which means the creation of a configuration consisting of lines, light, colour or any other element, or the composition thereof, of one or more materials”. Meanwhile, Section 4(7) also defines a ‘work of applied art’ as being “a work which takes each or a composition of the work mentioned in this section for utility apart from the appreciation of the merit of the work, such as the practical use of such work, decorating materials or appliances used for commercial benefit, whether with or without artistic merit, and shall include photographs and plans of such works”.

However, it is stated in Section 6 of this Act that protection will be denied to “ideas, procedures, processes or system or methods of use or operation or concept, principle discoveries or scientific or mathematical theories”.

Thus, it can be assumed that fashion design in Thailand may be protected under Section 4(1) of the Copyright Act, which provides protection for drawings. This will include the patterns of fashion designs, while the designs themselves may be applied art that meets the requirement of originality and creativity according to Section 4(7) of this Act.

The next question for Thai designers when they receive a copyright under this Act involves the scope of protection for the infringement of copyrighted work. Part 5 of the Act states that infringement involves the act of “reproduction or adaption” or

²⁹⁵ Section 4, Thai Copyright Act 1994

“communication to the public” without the permission of the right holder.²⁹⁶ Section 31 of the Act describes the circumstances that may be considered as indirect infringement, as follows:

“Whoever knows or should have known that work is made by infringing the copyright of another person and commits any of the following acts against the work for profit shall be deemed to infringe the copyright:

- (1) Selling, holding for sale, offering for sale, letting, offering for lease, selling by hire purchase or offering for hire purchase;
- (2) Communicating to the public;
- (3) Distribution in a manner which may cause damage to the owner of the copyright;
- (4) Self-importation or importation on order into the Kingdom.

However, the protection of drawings in fashion design may provide monopolistic rights for the fashion industry if the definition of a drawing in fashion design only includes the definition of “drawing’ in this section. The protection of fashion drawings is insufficient for the protection of fashion designs from fashion knock-offs because only a minor change may be necessary in the case of copying a fashion design from a drawing, which is a common fast fashion phenomenon in Thailand.

4.4.2.2 Protection of fashion designs in Thailand under the Thai Patent Act

When comparing the design right of both the UK and India, the closest right in Thailand is the Design patent under the Thai Patent Act. The protection of designs under this Act is not divided into registered and unregistered designs as in the UK, since the development of protection is more related to a patent than a copyright. The

²⁹⁶ Section 15(5) concerns licensing of rights which are exclusive to the owner of copyrights.

Design patent is one of two patent rights in Thailand, the second of which is the Innovation patent.

The Design patent is prescribed in the Thai Patent Act 1979,²⁹⁷ and the definition of 'design' is defined in Section 3 as "any form or composition of lines or colours which give a special appearance to a product and can serve as a pattern for a product of industry or handicrafts"; meanwhile, Section 56 of the Act also stipulates that, for a design to be registered for a design patent, it should be a "new design and applicable for industry or handicrafts". Based on this provision, the specific framework of a patentable design in the Act should be applied to industrial designs or handicrafts, whereas fashion designs may not qualify for protection from this right, since the qualification of "new" is hard to apply to the fashion industry. This is because the pattern of clothes or accessories in fashion design seem to be limited to the human frame and these patterns have been developed over a long period of time; thus, several fundamental designs cannot be said to be sufficiently "new" to warrant protection from this type of patent.

Moreover, some fashion designs cannot be applied to either industry or handicrafts and may only have been created as fine art or just an object for forming an idea or inspiring the collection of a designer. Therefore, this is also an obstacle to applying the protection of a Design patent to fashion designs in Thailand.

In addition, the registration process for a Design patent in Thailand may increase the copying in the fashion industry because the disclosure of all the relevant documents before registration in this process reveals the details of each design to the public before it is produced for the market. The process of registering for a patent in

²⁹⁷ The Thai Patent Act 1979 was amended by the Patent Act (No. 2) 1992 and Patent Act (No. 3) 1999.

Thailand takes in 12 to 24 months, which is too slow for a fast-moving industry such as fashion, where each design may only be displayed for approximately three months.

4.4.2.3 Protection of fashion design in Thailand under the Thai Trademark Law

The Trademark Law Act 2000 is the current trademark law in Thailand. The definition of a 'trademark' prescribed in Section 4 of the Act is "a mark used or proposed to be used on or with the goods to distinguish the goods with which the trademark of the owner of such trademark is used from goods under another person's trade's trademark".²⁹⁸ The form of a 'mark' is also defined under the Act as a "photograph, drawing, device, brand name, word, letter, manual, signature, combination of colours, shape or configuration of an object or any one or combination thereof."²⁹⁹

It can be seen from the above that the definition and framework of a trademark in Thailand follow those of the TRIPs Agreement, whereby the shape of a three-dimensional design is registrable as a trademark. This definition may provide some degree of hope to the fashion industry in Thailand if fashion designs can benefit from a trademark because three-dimensional designs are qualified to be registered, such as the Federal Trade Dress rights in the USA. Currently, it is hard to succeed in registering three-dimensional designs as a trademark in Thailand because they are always associated with a description of the goods, which is prohibited from being registered as a trademark under Thai law.

Moreover, a distinctive trademark is a significant factor for registering a trademark in Thailand; therefore, it is hard to see how a three-dimensional design in the fashion industry can be distinctive, since it should comply with the shape of a

²⁹⁸ Section 4 of the Thai Trademark Act 2000

²⁹⁹ Section 6 of the Thai Trademark Act 2000

human form³⁰⁰ similar to all other three-dimensional fashion designs. Thus, this type of trademark would be unable to distinguish the producer of the goods in the market, since it would appear identical to other three-dimensional marks that were registered previously. This makes this kind of mark difficult to register; thus, it is doubtful that three-dimensional marks can apply as trademarks for the benefit of the Thai fashion industry soon.

An additional characteristic for a trademark to be registrable in Thailand is that it should not be prohibited under good morals in Thailand, neither should it be similar to the symbol of Thai royalty or the name of a member of the Thai royal family in order to protect the representative or sign of a project under royal patronage. For example, the skulls, crosses, or crowns that are renowned parts of the neo-punk designs of many fashion designers such as Vivien Westwood or Alexander McQueen would definitely be rejected for registration under the Thai trademark law.

However, another option for fashion designers in Thailand to benefit from trademark protection is to obtain protection for the fabric of the product if it is printed with the designer's name or brand logo. Thus, a garment made with such printed fabric

³⁰⁰ The Thai Trademark Act 2000

Section 7. A distinctive trademark is one which enables the public or users to distinguish the goods with which the trademark is used from other goods.

A trademark having or consisting of any one of the following essential characteristics shall be deemed distinctive:

- (1) A personal name, a surname not being such according to its ordinary signification, a name of juristic person or trademark represented in a special manner;
- (2) A word or words having no direct reference to the character or quality of the goods and not being a geographical name prescribed by the Minister in the Ministerial Notifications;
- (3) A combination of colours represented in a special manner, stylized letter, numerals or invented word;
- (4) The signature of the applicant for registration or some predecessor in his business or the signature of another with his or her permission;
- (5) A representation of the applicant or of another person with his or her permission or of a dead person with his or her ascendant, descendant and spouse, if any;
- (6) An invented device.

Names and words not having the characteristics under (1) or (2) if used as a trademark with goods which have been widely sold or advertised in accordance with the rules prescribed by the ministry by the notification and if it is proved that the rules have been duly met shall be deemed distinctive.

is automatically protected. However, to date there have been few Thai brands that have used fabric printed with their logo or name on their design because they think it might limit the content or details in the printed fabric. Also, Thais believe that fabric printed with names or numbers is only for prisoners and hospital patients.

Trademark infringement in Thailand is prescribed in Section 109 of the Act. Someone who imitates a trademark is liable to imprisonment for two years or a fine not exceeding 20,000 baht, or both. Although this is considered to be quite a harsh penalty, according to the latest report from the Department of Intellectual Property, the incidents of counterfeiting in Thailand are increasing year over year, especially in the fashion industry of both Thai and international brands.

4.5 Conclusion

From the above study, we can compare the legal regime protecting fashion design in United Kingdom, India, and Thailand in the table below.

The law protecting fashion design	United Kingdom	India	Thailand
Trademark law	<p style="text-align: center;">✓</p> <p>Protect under the trademark act 1994 * protect both registered and well know mark *Unregistered trademark may be protected</p>	<p style="text-align: center;">x</p> <p>If the fashion design is registrable as the design Act it cannot be registered as trademark. But may receive the benefit of the</p>	<p style="text-align: center;">x</p> <p>Under the Thai trademark act 2000, only a fashion logo can be protectable not for fashion design itself which cannot meet the</p>

	<p>under the idea of “passing off” * hard to interpret that every fashion design is protectable under the definition of Trademark.</p>	<p>principle of passing -off.</p>	<p>requirement of distinctive. Under this law to register as trademark.</p>
<p>Copyright law</p>	<p>✓ The Copyright, Designs and Patents Act 1988 will protect “the artistic work” including fashion design * Automatic protection However, the test of substantial of design is very hard to determine is subject to a case by case</p>	<p>✓ Protect fashion design under the Indian copy right act 1957 * there has an overlap of protection between copyright act and Design Act * fashion design has a stronger protection as “artistic work” in copyright act than registered design under the design Act,200 * the determining of being an artistic work or design depend on the number of</p>	<p>× Even the copy right act 1994 prescribed to protect an artistic work including the fashion drawing and fashion pattern which can be implied as the applied art under section 4 (7) but this protection is not sufficiency to protect fashion design from fashion piracy like knock off which can be done in a minor change of the original fashion drawing.</p>

		copies of work. thus, the haut couture will be benefit from copyright protection than other class of fashion design	
Industrial design protection	<p>✓</p> <p>Protect under (1) the registered design Act 1949 and the Copy right, Designs and patent Act,1988</p> <p>* new and distinguish</p> <p>*protect both registered and unregistered design</p> <p>* register will gain the monopolistic right and no need to proof for the intention of imitation which is contrast to the unregistered design right</p>	<p>✓</p> <p>Protect under the design act 2000</p> <p>*new or original</p> <p>*never been disclosed in public</p> <p>*distinguishable from well know design</p> <p>* no rude or scandalous object</p> <p>* no protection for unregistered design</p>	<p>×</p> <p>Thailand has no industrial design protection but the Thai patent design Act 1979 prescribing to protect only the new design and applicable for industry. Thus, not all fashion design can meet this requirement.</p>

It can therefore be concluded from the comparative study of the three countries, namely India, the UK and Thailand, that each of them has its own priorities in developing IP to support its fashion industry and that this has a major impact on the ability of this industry to support these countries' economic growth. As a leading hub of the creative economy in the world, the UK has already developed strong protection for its fashion industry with a well-established IPR system. It has also focused on boosting the creative industries with a recognition of their value to the economy by developing an IP system to support these industries since the nineteenth century. Moreover, the UK seems to support innovative industries by amending the law to provide many options for inventors and creators to receive IPR protection. The outstanding protection for UK fashion is the design right of both registered and unregistered designs, which could be a role model for many countries to protect their fashion industry.

India is in the process of developing its IP system as a strategy to enhance its economy. Over the last decade, not only has its IT industry grown in terms of international trade, but the "Bollywood" movie industry has also been key to strengthening India's economy. The movie industry in India also affects its fashion industry, while its distinctive cultural heritage is another factor that supports the Indian fashion industry in the global market. India's government is attempting to enact an IP system to protect fashion designs and clarify the position of right holders in fashion design between the overlap of the Copyright and Design Right. It is also using Geographical Indications to protect the unique patterns of the fabric, which are India's

rich cultural heritage that give it a comparative advantage over the cheaper wages of other fashion-producing countries.

The development of Thailand's IP system has been slow because of the country's unstable political situation. Despite there being many initiatives to promote Thailand's fashion industry, they have all been unsustainable due to the frequent changes in government and policies, so that they have had little effect on publicising or developing the Thai fashion industry. Fashion designers have endeavoured to use their traditional heritage combined with a modern design, but this is not able to be advanced to a niche market such as India, where a combination of IP and policy support the fashion industry, due to the lack of effective management and support from successive Thai governments.

The IP system in Thailand used to support the creative economy is unclear, because most of Thailand's IP laws were enacted to be in harmony with the TRIPS Agreement rather than with the objective of supporting the Thai fashion industry. There is neither an official policy nor a plan to implement IP for the Thai fashion industry. Although the Department of Intellectual Property in Thailand has attempted to develop an effective registration system for an IP regime, preventing counterfeiting depends on a ministerial plan and the political agenda, which has been unstable for the past decade, becoming a severe obstacle for long-term development.

The conclusion drawn from the comparative study will be discussed in the next chapter and the research question of whether Thailand needs to develop a set of laws to protect fashion designs will also be addressed. Moreover, several recommendations for the Thai government will be provided.

Chapter 5

5. Conclusion

5.1 Introduction

Piracy in the fashion industry may be a serious challenge for the legitimate producer or new designer because the evolution of fast fashion has harmed many fashion industries across the world as design data is transferred in minutes from the cat walk to counterfeiters. The actual impact of fashion piracy on the fashion industry is, however, still being debated by many scholars. The way the leaders in the fashion industry in developed countries survived was by strengthening their fashion industry with a strategy that enhanced the rich content of their design and evolving their IPR systems to support their fashion industries rather than extend or specific the anti-counterfeiting law.

Thailand is a developing country and its fashion industry is new compared to that of other countries. Although successive Thai governments have tried to initiate projects to support the growth of this industry over the past decade, these projects were hampered by the unstable political situation and they were eventually abandoned as being unable to support and protect the Thai fashion industry in a sustainable way.

However, it has several advantages in that its fashion industry is a complete cycle industry and Thailand is located in the heart of the ASEAN; therefore, its fashion industry, especially “summer fashion”, can benefit from Thailand’s rich cultural heritage and unique climate. However, the fashion piracy in the fashion industry in Thailand is still being an irritation for many Thai fashion designers who may lack of the deep knowledge of fashion system and may lose their incentive for investing in the development of their brand in both the local and international market.

In addition , the other weakness of the Thai fashion industry is the lack of new machinery based on the low foreign direct investment over the past decade as a result of political instability. This has led to decreasing production in the fashion industry and depriving Thailand of using its comparative advantages compared to neighbouring countries such as Vietnam or Cambodia. According to this study, the Thai government projects seem to have focused on the design content and failed to address this issue. Finally, each project introduced by successive governments was abandoned with the transition of a new government and there is now no plan to review the IP strategy or otherwise support the fashion industry.

Therefore, the aim of this thesis was to analyse the strategy and IPRs systems in both developed and developing countries using the UK and India as the respective model countries and study their way of regulating their fashion industry under the IP system . The results of this analysis were expected to provide an answer to the

research question of whether Thailand needs to review its IP system to support its fashion industry from fashion piracy, the recommendation below is for the Thai government in the case that they need to review the Thai legal system supporting the developing of fashion industry.

5.2 Review of intellectual property protection in copyrights

It is evident from the research that, from the perspective of designers, a copyright is appropriate to protect their fashion design because this is an automatic right and can be widely applied to many kinds of art or applied art, including fashion design. The copyright in the UK, India and Thailand seems to provide adequate protection for fashion designs because it protects the pattern or drawing of designs in fashion industry. However, there is still a gap in the protection against counterfeits because a slight change of the original design or pattern may affect the protection under this right so that many top brands or high-end designers believe that continual innovation may be the smartest weapon to deal with the fast-fashion phenomenon of which copying is part of the cycle. The designer who has been copied bears the burden of proof of the intention to copy and the litigation process is both time-consuming and costly. It may be worth it for well-established designers, but it may ruin the incentive of young designers to move to the next step in the fashion industry.

Many young Thai designers may know little of their rights under Copyright law because fashion courses in Thailand do not include this fundamental legal knowledge; therefore, they may find it difficult to protect themselves when they are faced with a counterfeiter. The UK government funds an office called ACID (anti copying in design) where designers can obtain free advice and knowledge of legal action. The establishment of such an office in Thailand would be useful to support young Thai designers and increase their confidence to establish their brand. As

part of the ASEAN, If Thai designers could use copyright as a universal right to protect their fashion patterns, they could licence it to a neighbouring country to finish the product, thereby taking advantage of cheaper wages and the free trade agreement to manufacture fashion products in Vietnam or Cambodia. This will benefit the Thai fashion industry and designers may also derive income from licencing fashion patterns to other ASEAN countries. On the other hand, this may cause a loss of employment for Thais in the fashion industry; thus, the Thai government could offer training and a value-added plan for their traditional knowledge like traditional textiles and convince Thai designers to use it as the material for high-end products in the international fashion market.

5.3 Development of design rights

Design right is the IPR protection of the product design that exists in both the UK and India, but the nearest IPR for this right in Thailand is the Design Patent. The design right for fashion designers to protect their design has a time limit that is shorter than that of a Copyright, but it can still be of benefit to creative industries such as fashion; thus, a design that has had a monopoly for a long time may be an obstacle for creating new designs in the fashion industry. This may refer to the structure or pattern of clothes or accessories that were produced a long time ago.

In the UK and India, one of the greatest benefits of the design right is that, unlike copy right, the counterfeiter bears the burden of proof of a counterfeit product from a registered design; thus, fashion designers in both the UK and India can be confident that they will fully benefit from the protection throughout the protected period. However, the nature of the fashion industry is that each collection involves many designs and it may not be sensible or economically viable for designers to register all their designs to receive protection under the registered design right, so they may have

to decide which items will be outstanding in their collection and worth the time and money for registration.

Another design right in the UK and India that can support this fast-moving industry is the unregistered design right, which offers automatic protection for fashion designs in each collection, but for a limited time.³⁰¹ However, the burden of proof in cases of infringement will be borne by the fashion designer. Although this seems to be difficult compared to the registered design, automatic protection is more suitable for the fashion industry and designers in these countries, since there is no need to focus on legal protection; rather, they can emphasise new innovation.

There is no design right in Thailand because its legislation to protect industrial design is based on the minimum standard of the TRIPS agreement, so that design patents are the IPR support for industrial design in Thailand. However, the conditions to receive a patent may not be as suitable for the Thai fashion industry as it is for other industries because designs need to relate to industry or handicrafts to obtain a patent registration, and many fashion designs cannot relate to both or any of these. Moreover, having to disclose the design during the process of registration may benefit counterfeiters in Thailand. They can take a sketch to their manufacturer before the creator has time to launch it in the market. Therefore, Thailand should follow the example of the UK and India and introduce a design right to support creative industries like the fashion industry, especially for unregistered designs that are automatically protected for a limited time, and prevents a long-term monopoly in the industry.

³⁰¹ Unregistered design right protect design for 10 years since the first marketing or 15 years since the creation of design

5.4 Development of the Thai Trademark to support the fashion industry

The trademark is not directly concerned with fashion design, but its aim is to protect the good reputation of the designer's brand; however, designers can apply the regime of trademark protection to their design by embedding their registered trademark into their fashion product or printing the mark on the fabric which automatically extends the protection to the fashion item. The difference between trademarks and other IPR like copyright or design right is that the trademark does not protect the design of the fashion item; on the other hand, it does protect the marketing of the brand. A strong trademark can increase the demand for the fashion design under the mark, as well as enhancing its market power.

Trademarks are beneficial for the fashion industry in the UK because British brands are well known in the fashion market, while in the Indian fashion industry, the sustainable development of Indian brands is based on a plan for its fashion industry to be a global brand and rooted to the Indian community through "Bollywood" culture around the world. While many Thai fashion brands such as Sretsis or Takoon shine in global fashion market, they are supported by huge financial inputs from foreign companies because branding in the global market is extremely costly. Thailand has many great fashion brands but the lack of funding to build them in the global market may be seen as a step too far; however, building the reputation of Thai fashion brands as cultural textiles may benefit Thailand as a developing country with a wealth of cultural heritage and diverse traditions. If Thai traditional textiles are used in fashion design by high fashion designers both in Thailand and on the international stage, this will increase the value of the Thai fashion industry in a sustainable way.

For the Thai Trademark law, the way to support the branding of fashion industry is to consider the register of 3 Dimension Mark and set the applicable system support

this Mark. The registrable of 3 Dimension Trademark in Thailand especially in fashion industry will pave the way to protect the copying of distinguish design of Thai fashion Brand which will enhance the incentive of design in fashion industry in Thailand.

5.5 Gradual development of Enforcement of intellectual property crime in Thailand

The normal enforcement of IPR in Thailand can be divided into two levels, the first of which is enforcement by the state and the second is enforcement by the IPR owner. In Thailand, the state seems to enforce IPR rather than private individuals because the counterfeit industry is considered to be a crime in Thailand, punishable by the law.³⁰² However, cooperation between the private sector and the state will lead to more effective enforcement. Some recommendations to support the enforcement of IPR are provided below.

Thailand's national IP strategy is enforced by the state, unlike the model countries, and the stability of the government has a huge impact on the strength of enforcement. The "Bangkok Fashion City" project is a good example of a government initiative to strengthen Thailand's creative economy in 2002, but it was not a long-term plan because of political instability. Although this project was revived in 2012, the strategy to use IP as the core tool to support the Thai fashion industry was changed to only focus on increasing sales in the international market and increasing the number of Thai fashion brands rather than giving Thai fashion designers an incentive and legal knowledge. Meanwhile, in India and the UK, their fashion and IP strategies are constantly reviewed in response to the rapid changes in the global fast-fashion market, but the Thai IP was last reviewed in 2004.

³⁰² K Sayers, Taming the Tiger: Toward a new Intellectual Property Regime in Thailand, 2000-2001 Law Asia J.89 (2000-2001)

Although Thailand has a special court for IP cases, according to information from the Ministry of Justice, most IP cases related to the fashion industry are based on trademarks and well-known marks of international brands. Like many developing countries, the counterfeit industry is flourishing in Thailand and generates a huge income for those who are engaged in it. It cannot be denied that the copying of styles in the fashion industry helps to accelerate the cycle of fashion, and counterfeit products may increase the demand for authentic products; however, in a developing country, the income from counterfeit crime is not sustainable income and may affect Thailand's reputation on the global stage. Thailand has been in the top ranking for counterfeit crime by the USA since 2003 and has never moved from that position, especially for copyright and trademark counterfeiting. However, the Thai government seems to only act against this crime when it is time to negotiate trade agreements before returning to the status quo after the trade deal has been agreed. This "trap" is the largest obstacle to Thailand's acquisition of direct foreign investment, as well as a huge political issue.

Processing an IP claim in Thailand normally takes around 1-2 years, while in the UK, infringement cases can be settled by the Patent County Court (PCC), which makes it easier and quicker than the normal court because the case can be resolved within 24 hours. This corresponds with the nature of fast industries, like fashion. The procedure of the PCC court also provides a small claims track which limits the claim to £500 to support young designers and the simplification of counterfeit claims. In my opinion, the PCC model from the UK could be adopted by Thailand, especially for large provinces, in order to assure local Thai designers that IP enforcement is practical. On the other hand, it will encourage local or young designers to establish their brand or business without being concerned about a complex legal procedure if someone copies

their designs. Settlement in a local IP court may change the attitude of Thai designers toward copying in the fashion industry and they may perceive that it can simply be reduced or controlled by legal enforcement.

5.6 Development of education to raise Thai people's awareness of the significance of IPR

In most Asian cultures, repeating the steps taken by forefathers is the best pathway to learning, whereas people in western countries criticise each others' work to develop the next innovation and refer to the previous work for inspiration. In Thailand, education related to the awareness of IPR is not included in the Thai educational system, apart from an undergraduate law degree. As a result, many Thai designers are unaware of what to do in cases of IPR infringement. Also, it may be especially difficult for young Thai designers to access legal services because of the expense. Thus, the Thai government should include IP awareness in the education system at the high school stage.

Apart from developing the education system, the Department of Intellectual Property in Thailand should provide IPR workshop training without limiting the attendants' background knowledge because most of the current training offered by this department is for people who have a law degree or are officers in criminal procedure rather than focusing on IP right owners based on the reason that IP law is not suitable for people with no legal background. Although, the content of IP law is quite complex, it is crucial to adapt it for people who work in innovative industries. Thus, the training may be in the form of a case study and accompanied by a handbook containing useful information for Thai fashion designers and manufacturers to make them aware of how to enforce their IP rights.

5.7 Establishment of a Thai Fashion Industry Association

The private sector is an important component of the development of the fashion industry in many countries because the right owners are the key factor to strengthen the enforcement of IPR because they are the only people who know their need and the value of IP to their business. The UK has a British Fashion Council, which is the centre of British fashion designers. This organisation provides useful information and IP knowledge on its website, while the protection of British designers' interests by recommendations for the British government is the main duty of the organisation.

Thailand has no such organisation, but the web boards or social media of many fashion websites of design schools are useful for the centralisation of Thai fashion designers. However, these may not be sufficiently strong representatives of Thai designers against the enforcement of IP in the fashion industry; therefore, Thai fashion designers should consider establishing a private organisation or association with the cooperation of the state to be representative centre for the Thai fashion industry that can provide both academic and fundamental legal advice to its members. Moreover, attending international fashion industry conferences may help to increase the comparison of methods used by fashion associations in other countries and enable designer to directly provide the Thai government with some useful recommendations in order to review both the strategy and litigation in Thailand to better support the Thai Fashion Industry.

5.8 Development of branding and a collaborative project for Thai designers

Not only is there a need for an effective law to protect fashion design and support the Thai fashion industry, but it is also important to enforce it in appropriate way. As Thailand is a developing country strong enforcement may be harmful

to the Thai economy because Thai people are making many of the lower end products, therefore, an immediate enforcement of IPR may affect the economic structure especially as it may end up putting people in the counterfeit industry out of their jobs. Therefore, to support the programme encouraging the counterfeit producers to develop their own brand may be an effective way to eliminate the counterfeit system in this country.

Thai designers should consider IPR as the core strategy to develop their brand because, in the global fashion industry, a well-known trademark is not only beneficial for increasing the demand and sales of fashion items, but also for IPR. A well-known mark will lead to a “dilution trademark” which will benefit from the passing off of many common law countries. Also, the Thai court seems to use this principle for many counterfeit cases. Therefore, continually developing their brand will benefit both their business and any legal aspects they may encounter.

The influx of “fast fashion” is a good example that harms the fashion industry but the recent collaboration between high fashion brands and high street brands can help to reduce the copying in this industry. As is known, in the fashion hierarchy, haute couture or high-end brands such as Gucci, Balenciaga, Chanel, or Louis Vuitton are at the top of this cycle and are often copied or interpreted by the lower categories or high street brands such as Topshop, Zara, or H&M. However, many high-end brands seem to ignore this copying and continue to innovate. They even feel that copying can benefit their brand awareness, but many brands believe that this phenomenon reduces the incentive of designers.

However, in 2013, Balenciaga and H&M collaborated in a design project. H&M’s special spring collection was designed by the Balenciaga designer, Alexander Wang.

This collection amazed customers of both brands by proving that a highly detailed design could be sold at an affordable price in the high street. This proves that beyond copying or interpreting, cooperation may be the best solution to reduce the impact of the fast fashion phenomenon between high-end brands and high street brands because if the high-end brands keep moving to be the leaders of fashion design and increase their brand awareness, the copiers will always be their followers and cannot harm their brand recognition.

Designers in Thailand could consider this model and apply it to their brand. Although there are not as many high-end brands or haute couture in Thailand as in developed countries, counterfeiting is the largest obstacle for fashion designers to receive the income in return for investing their time. Copying can happen from young designers to top designers in this industry; therefore, if they launched a campaign of joint design, they could all continue to develop their designs and make customers aware of their brand rather than considering the effect of someone copying their design.

5.9 Focusing on content of design for the Unique Thai Design rather than increase more protection.

The final recommendation is the argument to support the benefits of fashion piracy in Thailand because fashion piracy is the shadow industry for every fashion industry in the world, even if it may reduce the incentive of young designers or eliminate the amateur designer who cannot survive within the highly competitive industry. On the other hand, as being a sign of social status rather than a functional item like other goods, the fashion piracy item has a nature which more complex than another counterfeit item. The elite consumer of the fashion industry is driven to the new design of this industry with their desire to be a “trend setter”

in the fashion cycle will finally arouse an innovative system in this industry³⁰³. The unbelievable impact of fashion piracy to the fashion industry luxury brand owner is the increasing of sales of the authentic item. This argument can be supported by research that many counterfeit consumers may be eager to buy the authentic one to lift them up to a higher level of social status. Therefore the first look-alike counterfeit item that was bought from the counterfeit market may have been some "inconsistent feeling" of being upper class for them. However, many designers may argue that the unauthorized production may ruin the good reputation of the authentic item. This curiously may be argued with the two reasons as follows. The first reason is the customer buying the authentic product will find it hard to buy the counterfeit item unless they have an intention to buy it, because being the owner of the authentic item, they can recognize the real and the fake from the first glance or touching. Although the technology of imitation is developed and can produce the mirror item, many luxury fashion brands seem to deal with this development with an authentication code to check back with their shop in order to ensure the authenticity of the item and support the feeling of prestige as an authentic lover. Another supporting idea is that the counterfeit item may support the sale of the authentic product in the case that the counterfeit version is made of low-quality material and gives a negative experience for its customer, therefore the customer will consider buying the authentic product rather than the counterfeit product next time.

For the reasons outlined above, the existence of fashion piracy may be brutal to Thai fashion industry and may relate to the decrease of western capitalists

³⁰³ Barnet, J. (2005) "Shopping for Gucci on Canal Street: Reflection on Status Consumption, Intellectual Property and the Incentive Thesis, Virginia Law Review, 91(6):1381-1423.

in Thailand. However, on the other side of the argument, the existence of the counterfeiting industry in Thailand may have another aspect that can be used as a tool to develop Thai fashion industry. If it is developed in an appropriate way such as promoting skill of fashion workers from copying the designer to being a modifier and finally to be the creators. Therefore, focusing on promoting Thai unique design blended with the glamour of Thai cultural heritage and modern western style instead of creating a culture of legal fighting against fashion piracy may be the most effective way to support the Thai fashion industry to compete with leading fashion countries in world.

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