EDITORS' PREFACE

Miuccia Prada said in an interview: 'The job is to do something interesting with ideas . . . and if it is copied I couldn't care less.'[1] Gabrielle 'Coco' Chanel was reported to have declared that imitation was the highest form of flattery.[2] It would seem that there is little that is completely new or original in the world of fashion. Over a decade ago, at the awards ceremony of the Council of Fashion Designers of America, author Fran Lebowitz quipped that 'homage is French for stealing'.[3] In music, we call it sampling. In other cultural circles, it is known as appropriation. Many fashion brands today, however, do not simply sit back and enjoy the copying or referencing of their creations by another designer. They are more likely to assert their intellectual property rights that span the spectrum of trademarks, copyright, patents, registered designs and geographical indications in order to protect their brand investments and businesses.

This book is long overdue. There are countless books on intellectual property law, numerous books on fashion theory and a few books on fashion law but hardly any on fashion *and* intellectual property. This book assembles a constellation of some of the best-known intellectual property scholars around the world to present their analysis of how different aspects of intellectual property laws interact with and regulate the fashion industry. Some of the chapters also feature an interdisciplinary analysis of

[1] Andrew O'Hagan, 'Power of One | Miuccia Prada's Circle of Influence', *The New York Times Style Magazine* (May 27, 2013) <https://www.nytimes.com/2013/05/27/t-magazine/power-of-one-miuccia-pradas-circle-of-influence.html>.

[2] Fridolin Fischer, 'Design Law in the European Fashion Sector', *WIPO Magazine* (February 2008) (citing Paul Morand, *L'allure de Chanel* [Hermann, 1996]) <https://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html>.

[3] Guy Trebay, 'Ideas & Trends: Fashion Replay; Imitation Is the Mother of Invention', *The New York Times* (July 7, 2002) <https://www.nytimes.com/2002/07/07/weekinreview/ideas-trends-fashion-replay-imitation-is-the-mother-of-invention.html>.

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fashion and intellectual property, drawing from key classical and contemporary writings in cultural studies.

Trends in the Fashion Industry

Fashion is a multi-billion-dollar global business, which is not surprising because of our basic need to wear clothes and shoes. The fashion system thrives on ephemerality, novelty, seduction and hedonism. In 2019, McKinsey reported that research showed that the average person today buys 60% more items of clothing than they did 15 years ago. In a survey done in Britain, one in seven consider it a fashion faux pas to be photographed in an outfit twice.[4]

For the fashion industry around the world, 2020 was the year in which everything changed. At the start of 2020, the luxury fashion industry was enjoying a boom and then the pandemic hit. When COVID-19 ravaged the world in 2020, the fashion industry suffered its worst year on record with almost 75% of listed companies losing money. According to the McKinsey Global Fashion Index analysis, fashion companies posted approximately a 90% decline in economic profit in 2020, after a 4% rise in 2019.[5] In *The State of Fashion 2021* report, it was observed that 'the pandemic will accelerate trends that were in motion prior to the crisis, as shopping shifts to digital and consumers continue to champion fairness and social justice'.[6] With diminished demand for fashion, the trendsetters at the apex of the fashion industry have been rethinking their business models. A full recovery of global fashion sales to pre-pandemic levels was expected to come around the third quarter of 2022 at the earliest.[7] However, things are not that rosy. Eighty-four per cent of industry leaders said they expect market conditions to decline or stay the same in 2023, with the global slowdown, rising inflation, geopolitical instability and supply chain disruptions brought about by the war in Ukraine and further outbreaks of the new COVID-19 variants[8] and, more recently, the Israel-Hamas war. In *The State of Fashion 2024* report released at the end of November 2023, 'uncertainty' was the word most

[4] The Business of Fashion and McKinsey & Company, *The State of Fashion 2019* (2018) 39.
[5] The Business of Fashion and McKinsey & Company, *The State of Fashion 2021* (2020) 10.
[6] Ibid, 11.
[7] The Business of Fashion and McKinsey & Company, *The State of Fashion 2021* (2020) 25.
[8] The Business of Fashion and McKinsey & Company, *The State of Fashion 2023* (2022) 12.

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often mentioned by executives surveyed;[9] the top-line year-on-year growth is expected to be lacklustre as consumers restrain spending after a post-pandemic shopping surge.[10] That being said, the LVMH group nonetheless outperformed Nike in terms of economic profit.[11] Last but not least, sustainability is a buzzword in the fashion industry as new regulations in the European Union and the United States will require brands and manufacturers to reduce greenhouse gas emissions and waste; fast fashion houses such as Shein and Temu have already come under scrutiny.[12] According to McKinsey, of the fashion executives survey, '12 percent cite sustainability as a principal opportunity for 2024, placing it at the top of the C-suite agenda'.[13] By 2025, it appears that the non-luxury sector will be driving the increase in economic profit. In *The State of Fashion 2025* report, fashion executives shared that they will be shifting their focus to 'finding ways to differentiate, whether through new designs, customer experiences or finding new customer niches.'[14]

Just a few years ago, fashion leaders were anticipating a continuation of the post-COVID chic casualisation trend that took hold during the pandemic with casualwear, followed by sportswear and sneakers, being the highest-ranking categories in terms of where executives see the greatest growth potential.[15] According to *The State of Fashion 2021* report, this form of casualisation is a trend that 'is likely to emerge as a dominant force across many fashion categories in 2021' as more flexible work-from-home arrangements are entrenched around the world.[16] This has evolved into the 'gorpcore' trend at the time of writing – functional, outdoors-inspired fashion – which luxury fashion players such as Dior, Prada and Burberry have established as part of their permanent collections.[17]

[9] The Business of Fashion and McKinsey & Company, *The State of Fashion 2024* (2023) 10.
[10] Ibid, 14.
[11] Ibid, 112.
[12] Ibid, 11.
[13] Ibid, 17.
[14] The Business of Fashion and McKinsey & Company, *The State of Fashion 2025* (2024) 13.
[15] The Business of Fashion and McKinsey & Company, *The State of Fashion 2023* (2022) 16.
[16] The Business of Fashion and McKinsey & Company, *The State of Fashion 2021* (n 5) 27. See also Patricia Marx, 'The Slob-Chic Style of the Coronavirus Pandemic', *The New Yorker* (July 13, 2020) <https://www.newyorker.com/magazine/2020/07/20/the-slob-chic-style-of-the-coronavirus-pandemic>.
[17] The Business of Fashion and McKinsey & Company, *The State of Fashion 2024* (2023) 52–55.

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At the same time, gender-fluid fashion is 'gaining traction amid changing consumer attitudes towards gender identity and expression … [with] the blurring of lines between menswear and womenswear'.[18] Resale revenue is also expected to grow to US$47 billion by 2025, from US$15 billion in 2022[19] – 11 times faster than apparel retail overall – and these upcycling and resale businesses are likely to attract the attention of luxury brands such as Chanel and Rolex, which will want to enforce their intellectual rights.[20]

Last but not least, fashion brands are making forays to explore the nascent opportunities associated with technologies like the metaverse and non-fungible tokens (NFTs). Brands are expected to embrace creative campaigns, new media channels and the metaverse,[21] as NFTs are strategically deployed to build communities and stronger affinity for the brand.[22] The metaverse conjures up possibilities of a space without limits where our physical selves move seamlessly into virtual worlds as digital avatars in altered realities to play, work, learn, create, shop, socialise and trade. Even though things are looking less rosy at the time of writing as the metaverse is looking more and more like a collage of virtual games and social networking sites that lack interconnectedness and interoperability, fashion brands are nonetheless making inroads into this new digital environment. In particular, luxury fashion brands such as Louis Vuitton, Gucci, Balenciaga, Dolce & Gabbana and Burberry, as well as sporting apparel titan Nike, are actively exploiting the metaverse with a proliferation of online collaborations, digital experiences and NFT sales.

Scope of This Book

This book is divided into four parts. The Part I comprises two chapters that adopt different theoretical perspectives in an attempt to understand

[18] The Business of Fashion and McKinsey & Company, *The State of Fashion 2023* (2022) 18. See also ibid, 55–58.

[19] Ibid, 44.

[20] E.g., *Chanel, Inc. v. Shiver and Duke, LLC, et al., 1:21-cv-01277 (SDNY)*; *Copad SA v Christian Dior Couture SA*, Case C-59/08, ECLI:EU:C:2009:260 (ECJ, April 23, 2009). See also 'Chanel Settles Trademark Suit against Resaler; Site Crepslocker Over its Use of Chanel Name, Logo' (The Fashion Law, July 7, 2021) <https://www.thefashionlaw.com/chanel-settles-trademark-suit-against-crepslocker-over-resale-offerings/>.

[21] The Business of Fashion and McKinsey & Company, *The State of Fashion 2023* (2022) 19.

[22] Ibid, 101, 103–106.

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the meaning of fashion, its role in contemporary society and how intellectual property laws may respond to this phenomenon. The Part II has five chapters that address how the kaleidoscope of established intellectual property doctrines – more specifically the laws relating to trademarks, copyright, patents and design rights – are and can be applied to fashion. Part III presents two chapters that interrogate two successful business models that skirt on the fringes of intellectual property infringement: fashion upcycling and *shanzhai* fashion. Part IV concludes with two chapters that evaluate emerging issues regarding the protection of traditional knowledge, culture, heritage and craftsmanship.

Part I

In 'Fashion, Post-postmodernism and Intellectual Property', David Tan discusses how fashion – the way we dress – is often an important reflection of the zeitgeist or the spirit of a given point and place in time. He contends that the fashion phenomena of recent years, such as self-disruption, upcycling and phygital experiences, can be studied as characteristics of a post-postmodern condition where a new cultural paradigm has emerged. The term *post-postmodern* has appeared in an increasing number of scholarly works that address a new cultural milieu – one that faces shifting global political centres and geopolitical boundaries, threats of climate change and an endangered ecosystem, destabilisation from armed conflicts and pandemics, obsessions with autonomous individuality, accelerating advances in artificial intelligence and the pervasiveness of information and communications technology in our daily lives. This chapter explores how such theories may be relevant to understanding contemporary fashion trends and their implications for intellectual property laws.

Barton Beebe, in 'Intellectual Property Law and the Dream of Post-scarcity Society', explains that luxury fashion seeks to aestheticize scarcity and transform its possession into a sign of social distinction. Intellectual property law plays a crucial role in this process. In this chapter, he considers the social function that intellectual property law may continue to play in a purportedly 'post-scarcity' society of the future, asserting that though intellectual property law has long played a technologically progressive role in modern societies, its social function in such societies has been and will continue to be largely reactionary. Even in an otherwise post-scarcity society, intellectual property law will be used, as it is already being used, to preserve 'social scarcity' and regulate signs of social distinction.

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Part II

In 'Fashion's Function in Intellectual Property Law', Christopher Buccafusco and Jeanne C Fromer make the point that clothing designs can be beautiful, but they are also functional. Indeed, fashion's dual nature sits uneasily in intellectual property law, and its treatment by copyright, trademark and design patent laws has often been perplexing. Much of this difficulty arises from an unclear understanding of the nature of functionality in fashion design. This chapter argues that aspects of garment designs are functional not only when they affect the physical or technological performance of a garment but also when they affect the perception of the wearer's body. Generally, clothes are not designed or chosen simply to look good. They are also characteristically designed or chosen to look good on. This approach clarifies the appropriate treatment of fashion design in intellectual property, and it exposes the conceptual limitations of the US Supreme Court's copyright decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*

Vicki Huang, in her chapter 'Shape Trademarks Are in Fashion: A Study of Footwear and Sneakers in Australia', confronts one of the most significant sartorial transformations in recent history – the evolution of the sneaker from sports equipment to high-end fashion. Expanding demand and competition in the sneaker market (primarily driven by renewed interest in fashion by men) has meant designers are seeking more ways to protect the overall appearance of their shoe designs. This chapter demonstrates that empirically, the sneaker revolution has increased demand for Australian 3D shape trademarks as an adjunct to, or replacement for, registered design rights. It presents this trend as a cautionary tale for those who might call for a sui generis design right for fashion. Ultimately, the failed demand for Australian design rights appears to stem from failing to consider aspects of culture, commerce and the matrix of related rights, particularly trademark rights.

In 'Non-traditional Trademarks, Distinctiveness and the Fashion Industry', Susanna Leong and Irene Calboli analyse the use of non-traditional trademarks (NTTMs) in the fashion industry. With reference to selected cases in the United States, the European Union and Singapore, the authors study the arguments for and against the protection of these signs as trademarks, as well as the appropriate test for the evaluation of distinctiveness. Although some fashion designers and enterprises have celebrated victories in court, it has been widely noted that the registration and protection of these NTTMs can be problematic and potentially

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detrimental to innovation in the fashion industry. The authors also critically examine the different tests of 'association' and 'reliance' as discussed in recent court decisions on acquired distinctiveness of NTTMs and conclude with a recommendation that the 'reliance' test is the preferred test.

Roger Allan Ford in 'Utility Patents and the Fashion Industry' reviews the fashion industry's uses of utility patents. The chapter first provides an overview of the fashion industry's patenting activities, looking at how many patents are granted for fashion-related inventions and how large apparel companies obtain those patents. It then examines companies' use of patents, looking at how patent litigation in the fashion industry compares to other industries. Finally, it turns to the uneasy tension in fashion between function and aesthetics, examining the specific technologies and inventions being claimed in fashion patents to see what can be inferred about the relationship between fashion and intellectual property.

Working from the premises that fashion designers ought to enjoy some form of intellectual property protection over their creations and that they benefit from such protection, Robert Burrell and Emily Hudson in 'Barriers to Enforcing Design Rights over Fashion in the United Kingdom' explore the problems that fashion designers are likely to face when seeking to enforce their rights in the United Kingdom. Like other commentators, they conclude that design laws in the United Kingdom are in need of reform. They also demonstrate that Brexit has made the problems faced by designers worse, without necessarily creating the policy space for meaningful national reform. The consequence is that designers are likely to rely even more heavily on the copyright system, but this merely shifts the tensions of Brexit from the legislative and political realms to the judicial realm.

Part III

Fashion upcycling offers unprecedented opportunities for the sustainable reuse of clothing: using second-hand garments as raw materials for new creations, upcyclers can transform used pieces of clothing into new fashion products that may become even more sought-after than the source material. Martin Senftleben, in his chapter 'Fashion Upcycling and Trademark Infringement: A Circular Economy/Freedom of the Arts Approach', tackles how upcycling may trigger allegations of consumer confusion and unfair freeriding when fashion elements bearing third-party brand insignia become components of the upcycled product.

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Considering the overarching policy objective to ensure a circular economy, the use of trademark-protected fashion elements for upcycling purpose can be qualified as a particularly important form of artistic expression. The chapter concludes that the referential use defence in the European Union can be invoked successfully to rebut infringement arguments – regardless of whether these arguments are based on confusion, blurring, tarnishment or unfair freeriding.

Since the 2000s, Chinese factories have been notorious for imitating and copying luxury fashion designs, a phenomenon known as *shanzhai*. In their chapter '*Shanzhai* Fashion and Intellectual Property in China', Jyh-An Lee and Jingwen Liu explain that within the fashion industry, two primary categories of *shanzhai* practices exist: the imitation or copying of a brand's name or trademarks, referred to as 'counterfeits', and the imitation or copying of a brand's designs, referred to as 'knockoffs'. While brand owners can easily enforce their legal rights against the trademark-infringing counterfeits, knockoffs remain a significant concern for international brand owners, since these design features are frequently denied trademark protection. The authors contend that recent judicial practices suggest that fashion designs and design features in China can be protected under the Anti-Unfair Competition Law. Moreover, Chinese courts are increasingly open to the registration of signature design patterns NTTMs, including three-dimensional trademarks and colour trademarks. This chapter provides a comprehensive exploration of China's evolving approach to these issues and provides a detailed comparison of copyright, trademark, design patent and unfair competition protections against fashion copycats.

Part IV

Dev S Gangjee, in 'Threads That Last: Geographical Indications for Textiles', investigates the potential use of geographical indications (GIs) for both increased visibility and as an effective legal regime to protect a hard-earned reputation for traditional crafts and textiles. He argues that supporting traditional textiles through this form of IP has additional synergies with the shift towards more sustainable production and consumption in the global fashion industry. By utilising natural fibres, organic dyes, artisanal modes of production and fabrics intended to be worn multiple times, GIs can be positioned as the polar opposite of fast fashion; as 'threads that last'. However, the methods for legally 'locking in' sustainability commitments are still being developed, while there are

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countervailing economic pressures to 'backslide' on sustainable modes of production.

In 'Culture and Cosmopolitanism in the Global Fashion Industry', Kal Raustiala and Christopher Jon Sprigman posit that the global fashion industry is increasingly subject to accusations of cultural appropriation. Their chapter analyses why the fashion industry's practices – in particular, its mashup-magpie mode of creativity and its rapid innovation cycle – make it a frequent target of these claims. They explain the challenges to legal protection for cultural designs, explore and critique the normative case for property claims in traditional cultural designs and offer a qualified defence of the industry's practice of re-interpreting those designs. The authors suggest that many designs seen as originating in a particular culture have roots that extend outward to other cultures; this network of cultural interchange often undermines any particular ownership claim. And while appropriation can signal disrespect for source cultures and be objectionable for that reason, appropriation is not disrespectful per se, as there are strong normative arguments supporting many instances of appropriation.

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We hope you will enjoy this meticulously curated collection of essays and, even as fashions change and new styles emerge, we trust that they will remain a fashionable read in the years to come.

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