# EXPLORATION OF LEGAL REMEDIES AVAILABLE TO FASHION DESIGNERS IN GHANA THROUGH GLOBAL INDUSTRY PRACTICES: A REVIEW

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## ABSTRACT

Although copyright law gives design protection to designers in most countries, the process appears to be unfriendly to fashion design. The complex nature of its application coupled with the current fashion business model of constants introduction of new trends embedded in the theory of planned obsolescence makes it daunting and unappealing for designers to seek design protection. Literature reveals similarities of the copyright act in countries where it is operated including Ghana and the associated challenges. The recent call for industry transition to sustainable models positions fashion designers in Ghana to take advantage of their predominantly user-centred model for custom made garments to pursue design practices that encourage individualism to promote emotional attachments and product longevity for sustainability.

**Keywords:** Global Fashion Industry; Design Theft; Legal Remedies; Ghana Fashion Industry

## 1.0 INTRODUCTION

The clothing and textiles sector is a significant part of the world's economy. The garment industry is reportedly the world's third-biggest manufacturing industry after the automotive and technology industries. As a global creative industry, it generates billions of sales to the worlds' most developed countries like the USA, UK, France and Italy and recent fashion conscious nations like Australia. Atkinson et al (2016) reported that France has a well-developed fashion industry with the top 30 fashion brands generating $16 billion annually. The US industry about a decade ago was estimated to be a 200 billion dollar industry (West 2011, Hemphill 2009 as cited in Elavia 2011). The Ghana fashion industry is a recent phenomenon, best described to be a growth stage with limited information to develop accurate statistic.

Fashion apparel according to Mencken (1997) is a multi-billion dollar industry that has no national boundaries. Within the last decade, consumers have gained knowledge increasingly of specific designers and their offerings. The fashion industry's activities have become a core of magazines and newspapers news coverage, with a focus on the endless designer expressions and recently the threatening environmental and social exploitation of its activities. Countless television shows and feature films exploit the fashion industry world. Most consumers have a visual command of the distinct style of their favourite designers: Chanel, jersey-knit double-breasted suits in contrast colours with trademarked brass buttons, Chanel 2.55 handbag, the Burberry trench coat to mention a few.

Characterized by exclusive runway shows, glossy magazine covers, expensive boutiques lining the streets; fashion houses and haute couture like Chanel, Louis Vuitton, Hermès, and Prada create designs and sell expensive couture that are within the purchase of a limited few. New York Fashion Week, for example, creates "a tremendous amount of press and buzz for some of the world's most expensive clothes, whereas in Ghana, some of the established and famous local brands like Christie Brown, House of Poan, Jenesus and grace the runways ones in a year.

May 2021 - Fashion And Textiles Review, ISSN: 2665-0983

The industry can be categorized into two types of designers; High end and Mass Fashion with designers like John Galliano, Mac Jacob, Vivien Westwood and Mass retailers like Zara, H&M, Next among others. High-end designers have a mandatory role of coming up with innovative pieces each season and are regarded as trendsetters who showcase at runways during fashion weeks with popular guest including editors, celebrities and other designers from the lower spectrum, retail buyers, models etc. The high budgets spent to host a show limits it to brands with the financial muscle to partake. The traditional twice a year shows run in February for Spring/Summer and in September for Autumn/Winter with recent variations in months. In Ghana, industry categorization of brands is yet to be established leaving participation of shows to the appropriateness of a brand's collection and financial readiness. The shows are non-seasonal and are organized by Mercedes Benz Fashion Week (August), Glitz Africa Fashion Week (October) and Accra Men's Fashion Week (October).

It must be emphasized that the fashion business is categorized into micro, small to medium and large scale firms. While major global brands are corporate entities with designers implementing corporate decisions (Claxton and Kent 2016), in Ghana, firms are in the majority of Small to Medium-scale Enterprises (SME), (JICA 2008,

Ghana Statistical Services) with designers doubling as founders of these brands. However, designers in all these categories engage in creative design process backed by research. Research is central to the fashion business. Fashion houses subscribe to services like WGSN, Première Vision, Promo Style, and Pantone etc. for forecast information on colour, trims, fabrics and silhouette ideas for the next season. The information from these trend houses is translated into concepts specific to the brand and made visible in colour, silhouettes, prints and details. As designs are showcased for buyers to select and order, the time lag between when the orders are made and products are ready on the shop floor gives room for these innovations to be copied. In that regard, there are two streams; brands that adapt original designs and those that engage in outright copying of other brands' designs; the latter usually associated with mass-market brands. However, copying is still reported even among

May 2021 - Fashion And Textiles Review, ISSN: 2665-0983

high-end brands. In a heavily trend-driven industry such as fashion, designers would have access to trend information from the same sources which inevitably results in similar offerings from different brand. This situation is dissimilar to the local fashion environment where customer participation in the design process is largely the case and hence designs could be tailored to suit individual personal preferences. However, copying is a common practice of the industry regardless of the approach.

Again fast-changing technological environment in the operations of the fashion industry makes it even easier for designs to be copied or knocked off. With smartphones and sophisticated technology at play coupled with the global production of clothes at low-cost prices means that consumers get to enjoy versions of the original designs at many affordable prices. Fast fashion with its model of rapid production of trendy and affordable products has changed the landscape of the fashion industry with players like Swedish retailer H&M, Spanish retailer Zara and American retailer Forever 21. These fast fashion retailers can quickly produce versions of original designs, nowadays in a matter of weeks and even days (Barnes and Lea-Greenwood 2010). Similarly in Ghana, since there are no trend research companies as pertained to other developed fashion economies, designers mostly look up to globally established brands for design directions. In the process of creating new concepts from their chosen inspiration, they become susceptible to copying and appropriation. In the current wave of sustainability discourse, does the industry's continuous and rapid introduction of new designs as a remedy to seemingly lack of design protection sustainable?

## 2.0 THE FASHION INDUSTRY'S REPORTED COPIED CASES

Copying is a common practice of the fashion industry even though the adaptation of existing garment features is viewed as the safest and best practice. It is reported that in a French court ruling, according to Lampasona (2015), Yves Saint Laurent was awarded $395,090 in damages from Ralph Lauren for "counterfeiting and disloyal competition." Yves Saint Laurent accused Ralph Lauren of copying a black tuxedo

a dress that Saint Laurent first created back in 1966, and showed it again during the fall collection of 1991-1992. The dresses created by Ralph Lauren were seized and impounded. This is a typical case of high-end copying which affirms the fact that copying exists at every level of the fashion industry. Coming down the ladder are reported cases of copying especially by fast fashion retailing. Lampason (2015) again asserts that the three major fast-fashion retailers especially Forever 21, is notorious for copying and known to be a copycat with numerous lawsuit against the brand. Between 2003 and 2008, Forever 21 was a defendant with fifty-three lawsuits, compared to two for H&M and zero for Zara. "8 The allegations against Forever 21 include 79 "close copying."' Some popular plaintiffs against Forever 21 include Anna Sui, Diane Von Furstenberg, Harajuku Lovers, Anthropologie, and Bebe Stores, Forever 21 continues to copy high fashion designs, season after season.

There are ways of creating a designer's look and this is by interpreting the spirit of a high-end brands collection through cheaper materials and techniques. Most stylish designers adopt the enhanced design approach to enable the drifting away from the original. When high-end designers painfully go through creating original designs they are ripped off by those who interpret their looks into lower version and since consumers are aware of the transient nature of fashion, a majority will engage in the less expensive items in order to express themselves with the current trend. Some high-end designers have adopted a collaborative approach with retailers to have lower versions of their originals merchandised on their shop floors so they can benefit from sales from those approaches. An example is a collaboration between Target and Italian luxury knitwear designer Missoni in September of 2011 for a limited edition which experienced an unusual huge demand. Other designers create second lines directed to different target markets so they can compete with fast fashion brands. Notable of this strategy is Giorgio Armani who has a second line that is lower priced than their premier to target a different consumer group. His distinct lower-priced lines include Emporio Armani and Armani Exchange. For fear of blurring their brands' identity, some oppose this strategy and would rather burn excess stock. Brands like Luis Vuitton,

May 2021 - Fashion And Textiles Review, ISSN: 2665-0983

Chanel and Burberry have however come under strong criticism for towing this line of burning items.

## 3.0 INSPIRATION OR APPROPRIATION

Designers draw inspiration from history to culture and anything that sparks creative imagination. Pozzo (2020) purports that the constant desire to innovate with original and effective solutions led Western designers to incorporate other cultures' distinctive looks, reinterpreted by the designer's creativity and sensitivity to other cultures. Notable are Yves Saint Laurent African inspired, Christian Dior in 1989

Indian inspired, John Galliano's 2007 Geisha-inspired makeup, In 2010, and Jean-Paul Gautier 2010 reference to Andean cultures. Although this may seem usual with creative processes, the use of other cultural looks without authorization has raised concerns of appropriation. The complexity of this issue according to Alspaugh (2019) is heightened in an increasingly pluralistic society in which many people might want to explore and appreciate aspects of cultures to which they do not belong. Therefore, the motives for appropriation might range from a well-meaning intercultural exploration to a negative expression of xenophobia. Pozzo (2020) affirms that in more recent times, we do have to acknowledge that the use and misuse of cultural and religious symbols, as well as the appropriation of particular expressions of local folklore by Western designers, ended up under the magnifying glass of numerous critics.

Perhaps the most clear-cut definition of cultural appropriation according to McAuliffe (2015) was given by Susan Scafidi, an author and law professor at Fordham University, who wrote as follows; “Taking intellectual property, traditional knowledge, cultural expressions, or artefacts from someone else’s culture without permission. This can include unauthorized use of another culture’s dance, dress, music, language, folklore, cuisine, traditional medicine, religious symbols, etc. It’s most likely to be harmful when the source community is a minority group that has been oppressed or exploited in other ways or when the object of appropriation is particularly sensitive, e.g. sacred objects.”

May 2021 - Fashion And Textiles Review, ISSN: 2665-0983

Designers (Western) do take inspiration from other cultures and reinterpret them conceptually, which should have been seen as embracing diversity but authorization of these cultural looks are not sought for and reinterpretation to a large extend drifts from the meanings associated with these cultural and religious looks making it offensive for the origins. Pozzo (2020) outlines a number of designers who recently had come under immense criticism over the use of these cultural and religious looks. In 1994, Claude Eliette, Chief executive of Chanel, had to apologize for putting a verse of the Koran across the chest of Claudia Schiffer when she modelled a new evening dress in Paris. The affair, that was irreverently dubbed 'the Satanic Breasts' threatened Chanel's exports to the Muslim world after Hasan Basri, the head of Indonesia's ulema, the doctors of the Muslim religion, described the use of those verses as 'an insult to our religion' (O'Shea 2013)

Most recently, three videos released for the campaign of Dolce & Gabbana were showing a young Asian model, wearing a red sequin D&G dress, having trouble eating Italian foods such as pizza, pasta, and cannoli with chopsticks. Playing on a bad double entendre characterized by sexual innuendo, in the video featuring cannoli, a male narrator asked the model "is it too huge for you?" (Pan 2018). The final result was that the Italian luxury company was forced to cancel the fashion show already scheduled in Shanghai, while their products were removed from several Chinese online retailers.



Figure 1. Some Images that were deemed as Culturally Insensitive
Source: BBC January 2020

Figure 1 is a collection of three images that recent advertising campaigns accused of insensitivity and cultural appropriation. Dolce & Gabbana trivialising Chinese culture in a campaign in 2018. Gucci pulling a jumper that resembles blackface in 2019. Commes Des Garçons using cornrow wigs on white models in 2020.



Figure 2. Gigi Hadid in dreads for Marc Jacobs, Gucci models in Sikh-style turbans, Victoria's Secret angels in Native American headdresses. Source: BBC January 2020



Figure 3. Comme des Garçons' controversial cornrow styling.

Source: The Guardian (January 2020)



Figure 4. Fashion editor Lauren Indvik says Ralph Lauren have had a successful, diversity recruitment model in place for years Source: BBC January 2020

Fashion houses are now focusing on recruiting for diversity as seen with Ralph Lauren's diversity recruitment model with a representation of models from different cultures on the runway. There is a call on the fashion industry to not just take inspiration from cultures but use people from these cultures to represent their ideas instead of using white models who bear no relationship with cultures they explore for their designs. While designers may take inspiration from the past, buy research from trend companies or take expressions from other cultures and reinterpret them (while most becomes offensive) remediation processes are difficult to access or are non-existent, making copying more of a norm in the fashion industry the world over.

## 4.0 DESIGN PROTECTION AND PRACTICES IN SOME COUNTRIES

As copying becomes rampant and issues of appropriation is becoming a concern to minority groups and other cultures aside from Western cultures, one would have thought that there would be stringent protection for the intellectual property of designers and cultural and religious heritage. Where there are laws, accessing it is challenged with requirements that are almost difficult to comply with. The following paragraphs review design protection laws in some countries (France, Japan, United

May 2021 - Fashion And Textiles Review, ISSN: 2665-0983

Kingdom and Australia) and the reason for the absence of same in other jurisdiction like USA.

It is important to understand variants of copying that occurs in the fashion industry and the professed remediation available for infringement. Elavia (2011) reviews Raustiala's (2006) distinction between copying and counterfeiting. According to Raustiala (2006), the first major copying difference in the industry stems from original versus counterfeited goods. There are counterfeit goods and trademark counterfeiting. Counterfeit goods are when a designer's protected trademark and their design are used and reproduced by someone or a company that is not the original designer. This is illegal as it violates trademark protection for a designer. Trademark counterfeiting is when someone else uses a designer's trademark but not their design. For example, someone else could produce a pair of sunglasses and use the Chanel trademark, but not any particular sunglass design of Chanel.

## 4.1 Design Protection in the USA

Elavia (2011) asserts that the only available design protection in the USA is trademark protection. Designers who have registered their logos enjoy protection from copying. Currently, there is no copyright law to protect designers in the USA even though it's arguably seen as the best protection a designer can have. There are three methods of obtaining design protection: trademarks; patents; and copyright protection. These are however shrouded in obstacles making them difficult for designers to pursue. A trademark is a "word or symbol used by a manufacturer to identify and distinguish his or her goods from those manufactured or sold by others" (Eguchi, 2011), however, it protects only the word or symbol but not the entire clothing which is regarded as a useful article. In effect, someone can copy the garment design and be safe. Patent law provides the most intellectual property protection for original designs if they receive a design patent. While patent appears comprehensive (covering shape, ornamentation etc), according to Eguchi (2011), the criteria for qualifying for a patent is that a design must be a new invention and "must present a non-obvious improvement over the prior art. Meeting these criteria is too difficult and again the long process of obtaining a

patent deters designers from taking this option as Patent and Trademark Office takes over 25 months to complete the process by which time the season for which the design was made would have elapsed. On copyright, Eguchi (2011) further asserts that the law is the most logical path for designers to take and would allow designers to protect "original works of authorship fixed in any tangible medium of expression. Copyrights protect designs with original expression, including graphics and text, but they do not protect "useful articles that have intrinsic utilitarian functions. Even though they have decorative aspects that qualify them for copyright, their shapes are considered functional and thus disqualifies them. The dimension of separability either physically or conceptually creates another hindrance, in that, if a design is embedded in a garment design and can exist separately from the garment then that element can enjoy copyright protection; in most cases, this is not practicable.

## 4.2 Design Protection in the European Union

Design protection under the European Union has a reformative history however, by the current law design protection extends to not only the shape and function of a design but also any ornamentation on the design. European copyright protection applies to E.U. member states and other international arrangements that apply to a member state. It is the member states' duty to protect registered designs and a design can qualify for protection if it is "new and has individual character" (European Directive, 1998) as cited by Elavia (2011). All member states of the European Union follow the laws governing design protection, however for a design to meet the protection of the law, it must meet four standards: a) A design must be registered in order to receive protection; b) The owner of the design has exclusive rights to the specific design; these rights protect the original designs from copies and "substantially similar designs;" (Raustiala, 2006) c) Protection for a design covers "lines, contours, colours, shape, texture, and/or materials and ornamentation" of the design; (Raustiala, 2006) d) A design can receive a total of 25 years of protection. It is important t to note that the EU protection does not extend abroad however firms can apply for protection in non-EU countries through Hague Organisation which allows designers to

apply to the World Intellectual Property Organisation (WIPO). Since the USA is not part of the WIPO, designers elsewhere can freely copy American designers without facing litigation. Even though the EU offers design production, few high-end designs register their design particularly bags and much of the registration is done by mid-level brands.

## 4.3 Design Protection in Japan

Registered designs in Japan are given 20 years of protection and covers "shape, patterns, colours or any combination thereof," or "graphic images in an article" (Designs Act, 2006). However, for a design to qualify, it must meet three criteria; first, a design that was known in Japan or another country before an application has been filed is not eligible for design registration. Second, a design that is shown in a distributed publication or was made available through electronic communications in Japan or another country before filing for an application is not eligible to be registered. Third, a design must have not been easy to create. More specifically, if "a person ordinarily skilled in the art of the design would have been able to easily create the design based on shape, patterns, or colours, or any combination thereof" it would not be granted protection (Designs Act, 2006). Design registration is stringent and costly in Japan deterring designers from going through the process.

## 4.4 Design Protection in Ghana

In Ghana, copyright law does exist, and like any other jurisdiction, seeks to provide the exclusive right to authors. The law provides ownership of copyright to eligible works except for folklore. According to William Bascom, as cited by Pozzo (2020) for example, "the tern folklore has come to mean myths, legends, folk tales, proverbs, riddles, verse, and a variety of other forms of artistic expression whose medium is the spoken word" and Taylor (1959) adds that folklore of physical objects includes the shapes and uses of tools, costumes and the forms of villages and houses with the mode of transmission through generations but not attributed to a person and hence heightening the complications of providing copyright. More recently, Boateng (2013) has discussed

efforts by the Ghanaian government since the 1970s to protect cultural works—characterized as folklore, or indigenous works—through intellectual property

legislation, a complex undertaking that has had little success. In Ghana copyright act is available for the following; Literary works, Artistic works, Musical works; Sound recordings; Audio-visual works Choreographic works, Derivative works; and Computer software or programs excluding; Ideas; Concepts; Procedures; Methods; or Other things of a similar nature.

Like other jurisdictions, in Ghana the Copyright Act requires the work to be original. Even though fashion items may qualify to be artistic and will attract copyright, the originality of fashion items the world over have been in dispute based on the fact that designers draw inspiration from the same or similar source and draw from cultural and national influences to create the design. The exemptions provided under the Act in Ghana even makes it more limiting. However, once a designer is able to prove the originality of the created work, it can be afforded protection under copyright law as the case in countries where copyright is effective.

## 5.0 LIMITATIONS TO DESIGN PROTECTION AND THE BIRTH OF THE CREATIVE COMMONS

The procedural challenges surrounding copyrighting for designers and the limiting freedom on users part has resulted in the birth of the creative commons crafted by Stanford University law professor Lawrence Lessig and others in December 2002 to provide a set of copyright licenses free for public use. There are various options available to creators to choose from under the creative commons website. As a convenient option to traditional copyright practice, the creative commons has witnessed growing popularity with some 145 million creations registered as of June 2006 (Rohter, 2006, cited in Kim (2008). Created in favour of the public interest, the literature reveals that fashion designers do not necessarily engage in the creative commons as appears to be the case of music artist and other groups in the creative industry.

## 6.0 CONCLUSION

Design protection is the right of the originators to have control over their works, be it designers, custodians of culture and religion. Authors argue that copyright is the most practical source of protection to designers, (West 2011, Lampasona 2015, Mencken 1997). However, the difficulties surrounding copyrighting especially in the fashion industry does not make it possible for seeking protection, especially in the US. In Europe where procedures are not stringent, fewer designers register their works and there even appears to be copying (Scruggs 2007). Also is the angle of the piracy paradox named by intellectual property (IP) professors at UCLA Law School, Kal Raustiala and Christopher Sprigman. Proponents of the intellectual Property law are of the view that copying will destroy innovation. However, the fashion industry proves to be an exception to this theory. Without copyright adherence, the industry globally is one of the economic giants for most developed nations with constant innovation which is a feature of the planned obsolescence theory. Raustiala (2006) argues that the lack of IP protection in the industry allows copying and diffusion of styles to happen and then designers create new designs, thus moving the cycle of fashion-forward. Copying allows for lower versions to be created for consumers who cannot afford the original versions. While others are of the view that the lack of copyright will hurt the industry others oppose this assertion which is evident in Shoe designer Stuart Weitzman's claim that copycats forced him to innovate when making his Bowden-Wedge shoe in 2008. It can be argued therefore that the absence or otherwise of design protection has little influence on the vibrancy of the fashion industry as a whole. However, designers who can innovate original designs should gain from their productive efforts. On appropriation, similarly to the requirement of originality and individuality, it has been difficult to have a clearly defined law applicable globally. However, in some countries, the government have protected their cultural heritage. Nonetheless, it appears the public outcry of indigenes whose cultural elements have been misused have been loud enough to get culprits to back off and even withdraw products from the market to safeguard their brands.

May 2021 - Fashion And Textiles Review, ISSN: 2665-0983

With the increased exposure to different cultures through trade and popular culture, Ghanaian designers have the tendencies of borrowing from other cultures. This practice is fueled by the participatory approach to design where customers largely influence the design process by bringing along images from their favourite movies and popular these day fashion bloggers. The tendency of copying cannot be overemphasized. However, the dissimilarities observed in fashion design practice in Ghana and other well-developed fashion nations can be carefully harnessed in the wake of concerns for sustainable fashion practices. With the difficulties faced in copyright clearance leading to the constant introduction of innovative products and the adverse effect on the planet and people, Ghanaian designers could adopt sustainable models that complement current participatory design model so that inspirations or appropriations could be carefully redesigned to reflect individual client aspirations that trigger an emotional response and product longevity. In any case, people must be allowed to borrow ideas to enhance creativity while acknowledging their source material for mutual benefit and sustainable development of the fashion industry in Ghana.

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