HEIDI HÄRKÖNEN

FASHION AND COPYRIGHT

PROTECTION AS A TOOL TO FOSTER SUSTAINABLE DEVELOPMENT

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Fashion and Copyright: Protection as a Tool to Foster Sustainable Development

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In memory of my grandmother Kyllikki.

ABSTRACT

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This doctoral dissertation investigates the applicability of the copyright framework to fashion designs from the perspective of sustainable development. The dissertation is based on five (5) peer-reviewed articles and an integrative chapter. In addition to legal research methods, this multidisciplinary thesis utilizes fashion research.

The research systematises the European Union copyright framework and analyses its relationship to fashion. It has a special focus on the distinction between 'applied art' and 'pure art'. The effects of this distinction on fashion are being investigated. The research analyses how the copyright framework of fashion relates to sustainable development of the fashion industry and the sustainability-related challenges that the industry is struggling with. Sustainable development is viewed from the perspectives of environmental, social and cultural sustainability.

The research notes that the European copyright equilibrium has included various structures that have discriminated against works of applied art, which has had direct effects on the level of protection of fashion designs. The discriminating structures, however, are now vanishing due to recent judgements from the Court of Justice the European Union. The research argues that this copyright law development fosters sustainable development in fashion. A copyright framework where fashion designs face extra challenges compared to works of pure art when reaching for protection is facilitating the so-called 'fast fashion' phenomenon and -business. Fast fashion in general has negative effects on sustainable development. Moreover, the copyright system includes 'blind spots' that allow activities that are counterproductive to cultural sustainability, such as cultural appropriation copying. However, not all fashion copying has negative effects on sustainable development. The research also points out that some copyright law exceptions, such as those permitting private copying, might even be desirable from the perspective of sustainable development. The research furthermore evaluates what kind of sustainability-related copyright challenges the fashion industry might face in the future due to the development of AI designers. Finally, the research presents how copyright law should tackle

the aforementioned challenges, and what kind of values and arguments should be considered. The research concludes that copyright can be one of the many legal instruments that can promote sustainable development in fashion.

Keywords: intellectual property law, copyright, piracy, fashion, applied art, sustainable development

TIIVISTELMÄ

Heidi Härkönen
Fashion and Copyright: Protection as a Tool to Foster Sustainable Development
[Muoti ja tekijänoikeus: tekijänoikeussuoja kestävän kehityksen edistäjänä]
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Oikeustieteellinen väitöstutkimus tarkastelee muotisuunnittelun tekijänoikeudellista viitekehystä kestävän kehityksen perspektiivistä. Artikkelimuotoinen tutkimus koostuu viidestä (5) vertaisarvioidusta artikkelista sekä yhteenvedosta. Tutkimus hyödyntää perinteisten oikeustieteellisten metodien lisäksi myös muodintutkimusta.

Tutkimus systematisoi EU-oikeudellista tekijänoikeustilaa, keskittyen erityisesti monen eurooppalaisen oikeusjärjestyksen tekijänoikeustraditiossa ilmenevään puhdas taide vs. käyttötaide -jaotteluun ja sen muotia koskeviin vaikutuksiin. Tutkimus analysoi, millainen vaikutus tällä tekijänoikeusympäristöllä on muotiteollisuuden kestävään kehitykseen ja siinä ilmeneviin haasteisiin. Muodin kestävää kehitystä tarkastellaan ympäristöllisen–, sosiaalisen– ja kulttuurisen kestävyyden näkökulmista.

Tutkimus toteaa, että eurooppalaisessa tekijänoikeustraditiossa on aikojen saatossa vallinnut rakenteita, jotka ovat syrjineet käyttötaiteen teoksia ja täten vaikeuttaneet muotiluomusten pääsyä tekijänoikeussuojan piiriin. Syrjivät rakenteet ovat kuitenkin hiljalleen häviämässä EU-tuomioistuimen viimeaikaisen ratkaisukäytännön myötä. Tätä nykyä käyttötaiteen teokset pääsevät tekijänoikeussuojan piiriin samoin edellytyksin kuin puhtaan taiteen teokset. Tutkimus katsoo kyseisen kehityssuunnan olevan optimaalista muodin kestävän kehityksen kannalta. Tutkimus toteaa, että tekijänoikeusympäristö, jossa muotiluomukset kohtaavat puhtaan taiteen teoksiin verrattuna ylimääräisiä haasteita yltääkseen suojan saamisen edellytykseksi vaadittavaan omaperäisyystasoon, on omiaan edesauttamaan ja ylläpitämään kestävälle kehitykselle haitallista ns. pikamuoti-ilmiötä ja -liiketoimintaa. Lisäksi tutkimus toteaa tekijänoikeusjärjestelmän sisältävän aukkoja, jotka mahdollistavat kulttuurisen kestävyyden kannalta haitallista toimintaa, kuten kulttuurista omimista. Kaikki muodin piirissä ilmenevä kopiointi ei kuitenkaan ole automaattisesti haitallista kestävälle kehitykselle. Tutkimus kiinnittää huomiota siihen, että tietyt tekijänoikeusjärjestelmän poikkeukset, kuten yksityisen kopioinnin salliminen, voivat jopa edistää kestävää kehitystä. Tutkimus arvioi myös sitä, millaisiin kestävyys-

liitännäisiin tekijänoikeusongelmiin muotiala voi tulevaisuudessa törmätä, kun muotiluomukset ovat yhä useammin tekoälyn käsialaa. Tutkimus esittää, miten tekijänoikeusjärjestelmän tulisi vastata edellä kuvailtuihin haasteisiin ja millaisia arvoja ja perusteita tulisi ottaa huomioon. Tutkimuksen lopputulema on, että tekijänoikeus voi olla yksi niistä monista juridisista instrumenteista, joiden avulla pystytään edistämään kestävää kehitystä muotiteollisuudessa.

Asiasanat: immateriaalioikeus, tekijänoikeus, piratismi, muoti, käyttötaide, kestävä kehitys

FOREWORD AND ACKNOWLEDGEMENTS

In March 2019, I was in a pub in Cambridge. While enjoying after-seminar drinks with a group of commercial law scholars, I sat across from a British professor of intellectual property law. We were discussing fashion law and my research in fashion and copyright, when the professor said something pertinent that has stayed with me ever since: they were surprised at how critically my research viewed the modern fashion industry. Their preconception of fashion law researchers was that they were usually young legal scholars and lawyers with a 'passion for fashion', who loved to 'shop till they drop', adoring luxury brand items and taking the contemporary fashion system for granted, which was then reflected in their research output. The professor noted that it was refreshing to hear about fashion law research that so critically evaluated the industry and drew attention to its exploitative, polluting and oppressive business practices. This was a very brief conversation and the professor has probably forgotten it by now, but I have not. Although I did not admit it at the time, their words actually quite accurately described me at the start of my research, down to the factors that originally got me interested in fashion law. My critical attitude towards the fashion industry was not always there; far from it, in fact.

Fashion has always fascinated me. I never thought I would go to law school, as from a very young age I had wanted to be a fashion designer. I began pursuing my dreams after high school, enrolling at the University of Lapland's Faculty of Art and Design to major in fashion design. After one year of studies, however, I realised I was only interested in designing garments for myself, not for commercial purposes. For some reason (I still do not know exactly why), I decided to switch to the Faculty of Law. My interest in creating, constructing and sewing garments never stopped, and I kept designing them for myself. When I found out that I could combine my lifelong interest with legal studies in the form of fashion law, I was thrilled.

My journey in fashion law began in January 2013. Back then, my perspective towards the contemporary fashion industry – as a scholar or a consumer – was certainly not critical. I used to love luxury brands, following trends and shopping for new clothes, giving little thought to the environmental, social and cultural consequences of my fashion consumption. I was eager to graduate from law school, obtain a high-paying job as a lawyer and spend all that money on luxury fashion (yes, we can all laugh at that plan now). I wrote an LL.M. thesis that delved into the depths of fashion law and intellectual property law in the context of fashion, without particularly evaluating the contemporary fashion system or questioning the constantly growing global consumption of garments. I am quite sure that anyone

could read between the lines of my early texts on fashion law my worship of luxury brands and designer fashion. I was exactly the kind of fashion law student that the aforementioned British professor had previously encountered: a young lawyer viewing one of their favourite consumption habits from a legal perspective, through rose-tinted glasses. This kind of uncritical approach to a complex phenomenon must inevitably remain rather shallow. Something in my LL.M. thesis project planted a seed of doubt towards the fashion industry, however, making me want to explore the relationship between fashion and IP on a much deeper level.

Embarking on my doctoral research project, I was basically interested in anything that had to do with fashion and IP. Having started with quite diverse themes, after a while I decided to narrow my scope to copyright law because of its intriguing aim to act as an instrument that fosters the genuine creativity of a natural person, and the overall ambiguity of its relationship with fashion. At first, my research interests lay mainly in protecting the rights of fashion designers and brands in the fight against design piracy, but lacked the potential for research with a sufficient level of originality and novelty. I had a feeling something was missing from my research perspective, but what? At this point, my seed of doubt towards the fashion industry began to grow: the more I investigated the contemporary fashion industry, the less I liked it. The short lifespan of products, resulting from accelerated trend circulation; the amount of waste generated by the fashion industry; its general negligence of the human rights of garment workers; and its ignorance of cultural values: these factors were simply impossible to overlook.

Increased awareness of these issues not only made me question my own relationship with fashion consumption but also refined my research perspective. Although at first glance, protection of the environment, human rights and cultural interests seemed to have little in common with IP protection, it turned out that aspects of these problems could be found nearly everywhere I looked over the course of my research. The IP framework surrounding fashion seemed to be malfunctioning – even facilitating murky business practices. Understanding this caused a significant change in the aims of the research. It was here that my research project shifted from mainly safeguarding the interests of creators towards seeking *justice* within the copyright framework that surrounds fashion. I realised that justice in the context of fashion and intellectual property is not only about who gets exclusive rights to what, nor about inexpensive copies of designer items 'democratising' the fashion system by making popular designs accessible for consumers with less purchasing power. Justice means much more than that: it is about infusing the fashion system and its IP law framework with values that are more meaningful for the future of this planet and our civilisation than those of economic growth and consumerism. It is about holistic *fairness* within the system, which includes consideration for various environmental, social and cultural interests, all of which are widely ignored within the modern fashion industry. The pieces of my research project puzzle finally began to fall into

place. My *eureka* moment was realising that the common denominator behind my various copyright-related research interests was the *sustainable development of fashion*.

Given the above, this doctoral thesis not only describes the relationship between copyright and sustainable development in fashion. Beneath its legal analysis, it also reflects the personal development of my relationship with fashion. The person who applied for a doctoral candidate position at the University of Lapland Faculty of Law may have been the young lawyer with the love for luxury brands and carefree attitude towards fashion consumption described by that British professor, but the person defending the eventual doctoral dissertation is a (no-longer-so-young) legal scholar, who still adores *fashion* as a cultural phenomenon and a form of art, but strongly challenges many of the customs and business practices of the mainstream contemporary *fashion industry*. My research project has been an enlightening journey for me, and I hope that this thesis makes similarly eye-opening reading for others. Hopefully, it helps readers question many of the problematic customs of the modern fashion industry and how garments are devalued in our society, and to see how these problems are connected to copyright law. Ultimately, acknowledging the problems of the contemporary fashion industry and system is vital for each of us, because improving the system is a joint responsibility – not just for designers and the industry, but for anyone who wears clothes and thereby participates in the system.

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This research has been an amazing adventure, and I am almost sad that it is over. My years as a doctoral researcher have given me a lot, both career-wise and personally. Some of its best aspects have been the academic freedom and the eye-opening international research trips: visits to the University of Cambridge Squire Law Library, the Max Planck Institute for Innovation and Competition in Munich, and Fudan University Nordic Centre in Shanghai have provided valuable and unforgettable experiences. It would have been much less fun, and perhaps not even possible, to turn these experiences and that academic freedom into a finalised doctoral dissertation without certain institutions and people. Therefore, I wish to thank everyone who took part in this adventure and made my research journey possible.

Firstly, I am grateful for the financial support of the Finnish Cultural Foundation, the Finnish Lawyers' Association, Tex-Inno ry, the Ministry of Education and Culture in Finland, IPR University Center, the University of Lapland's Esko Riepula Grant for finalising dissertations, and the Intimacy in Data-Driven Culture (IDA) research project, which is funded by the Strategic Research Council of the Academy of Finland. These institutions were instrumental to this research.

My research journey can best be described by words once spoken to me by my supervisor, professor Juha Karhu: 'A doctoral thesis is like a symphony. Your

symphony culminates in sustainability.' I was honoured to have Juha as a supervisor, as it is difficult to imagine a more inspirational legal scholar. He opened my eyes to *the art of law* and encouraged me to think outside the box, always believing in my research ideas – even the wildest ones. Moreover, Juha has an amazing talent for constructive criticism in an encouraging form. I was also very lucky to have professor Annamari Vänskä as my second supervisor. She truly made me understand the various ways in which fashion is present in our culture. Without her, this thesis would have remained very shallow when it comes to fashion.

I also owe great thanks to professors Eleonora Rosati and Katja Lindroos, the pre-examiners and opponents of this research, for their valuable comments and suggestions, as well as their valid and constructive criticism. They truly helped me push my dissertation over the finish line by opening my eyes to certain nuances. At the time of writing, I do not know whether I will be lucky enough to have you physically present at my defence, but my sincerest wish is that the pandemic will allow the three of us to meet in person in Lapland in September 2021.

Besides Juha and Annamari, I feel that I have had a de facto third supervisor in professor Rosa Maria Ballardini. Thanks to Rosa's mentoring, guidance and support, my research took a great leap forward after she started working for the University of Lapland. Professor Nari Lee has played a remarkable role in my research career with her genuine efforts to include me in the academic IP community, and I am especially grateful to her for arranging my research visit to Shanghai. I also want to thank professor Sharon Sandeen for acting as my halfway defence opponent and providing insightful comments that really helped me in finalising my thesis.

I am delighted to have made so many friends in academia, all of whom have contributed to making this an unforgettable research journey. Mikko Antikainen can be described as someone who keeps my feet on the ground while also making my life feel like a sitcom. Mikko, Daniël Jongsma and I formed a 'travelling trio', and we had amazing research visit adventures in (at least) Denmark, China, Germany and United Kingdom. Dhanay Cadillo Chandler has been such a cheering colleague and a friend. I also wish to express my thanks for their support to all my colleagues at the University of Lapland's Faculty of Law, as well as at the Aalto University Department of Design (especially Natalia Särmäkari!), where I was a visiting scholar in 2017 and 2019. My new colleagues at the University of Turku Faculty of Law deserve warm thanks for cheering me on at the final stages of this research.

There a few others who have helped me in finishing this colossal project. Thank you, Tiina Leppänen, for guiding me through university bureaucracy regarding my defence. Thank you, Toni Ojakangas, for the stunning cover design – I absolutely love it! And thank you, Annukka Jakkula, for arranging the layout and printing formalities of this book. I am grateful to Eva Malkki for proofreading the summary part of this dissertation.

I have a countless number of friends outside of academia, whose support has been invaluable during my scholarly journey, and I am thankful for each of them. I especially want to thank my 'oldest friend' Tuomas Latola, because he was the one who, back in the day, suggested that I write my LL.M. thesis on fashion law and, subsequently, that I complete a doctoral thesis on the same topic – and here we are.

I feel privileged to belong to a family whose faith in me has been unwavering. I am very grateful to my parents, Lea and Jouki, who have always encouraged me in everything I do and supported me in multiple ways. My sisters, Annika and Johanna, also deserve thanks for their support: their subtle humour ensures I stay on the humble side of pride (and what else are sisters for?). I also want to thank my in-laws, Henk and Jane, for their cheer and interest in my research. One other person's unconditional support and encouragement have been priceless, and that is my grandmother, Kyllikki, who is sadly no longer with us. She gave me the confidence to pursue a doctorate of Law by insisting that a child who reads as much as I did will inevitably get far in her studies. This book is dedicated to her memory.

Finally, there is no question as to the greatest, most remarkable thing that this research has brought me, which goes beyond the degree, the scholarly merit and anything like that. I have gained not only an academic 'family', but also an *actual family*. My deepest gratitude goes to a person who is my colleague, my best friend and my husband: Daniël, meeting you was the highlight of my research project. Thank you for your unconditional support, never-ending proofreading, commenting, brainstorming, and taking care of our household and cooking delicious meals while I was approaching a submission deadline. Finally, I want to thank my child, the sunshine of my life. When my research was at its most hectic, I barely had time to eat or sleep, but your smile gave me pure joy and more energy than my daily triple espressos.

In Helsinki, on a beautiful, sunny evening in May 2021,
Heidi Härkönen

LIST OF ORIGINAL ARTICLES

The thesis is based on the following original articles, which will be referred to in the text by their Roman numerals I–V.

Article I: Härkönen, H. (2018a) Muoti tekijänoikeudellisena teoksena: näkökulmia käyttötaiteen teoskynnykseen ja kopiointiin Suomessa [Fashion as a copyright-protected work: Perspectives on the copyright threshold and copying of applied art in Finland]. 99(6) *Defensor Legis* (6/2018) 908–922.

Article II: Härkönen, H. (2020a) Tekijänoikeus ja käyttötaide: EU-tuomioistuimen C-683/17 Cofemel -ratkaisun vaikutukset suomalaiseen tekijänoikeustraditioon [Copyright and applied art: The effects of CJEU's judgement C-683/17 Cofemel on the Finnish copyright tradition]. 101(1) *Defensor Legis* (1/2020) 1–16.

Article III: Härkönen, H. (2020b) Fashion piracy and artificial intelligence–does the new creative environment come with new copyright issues?. 15(3) *Journal of Intellectual Property Law & Practice* 163–172.

Article IV: Ballardini, R. M., Härkönen, H. & Kestilä, I. (2021) 'Intellectual property rights and indigenous dress heritage: Towards more social planning types of practices via user-centric approaches.' in Marcelo Corrales Compagnucci, Helena Haapio, Margaret Hagan and Michael Doherty (eds) *Legal Design: Integrating Business, Design, & Legal Thinking with Technology*. Edward Elgar Publishing.

Article V: Härkönen, H. (2018b) The new era of home-made fake fashion: the phenomenon of home-sewn copies and the possibilities for fashion houses to take advantage. 13(11) *Journal of Intellectual Property Law & Practice* 860–866.

ABBREVIATIONS

AG	Advocate General
AI	Artificial intelligence
Berne Convention, Berne	The Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979).
Brundtland report	Report of the World Commission on Environment and Development: Our Common Future, 1987.
CJEU, the Court	Court of Justice of the European Union
CSR	Corporate social responsibility
Design Directive, DD	Directive 98/71/EC of The European Parliament and of The Council of 13 October 1998 on the legal protection of designs, OJ L 289, 28 October 1998, p. 28–35.
Design Regulation, CDR	Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5 January 2002, p. 1–24.
EU	European Union
ILO	International Labour Organization
InfoSoc Directive	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, p. 10–19.
IP, IPR	Intellectual property, intellectual property right(s)
Member State	Member State of the European Union
RQ	Research Question
TCE	Traditional cultural expression
Term Directive	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27 December 2006, p. 12–18, as amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 OJ L 265, 11 October 2011, p. 1–5.
Trademark Directive	Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, OJ L 336, 23 December 2015, p. 1–26.
Trademark Regulation	Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16 June 2017, p. 1–99.

TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.
UNDRIP	The United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly on 13 September 2007.
UK	United Kingdom
US	United States
WCED	World Commission on Environment and Development
WIPO	World Intellectual Property Organization

CONTENTS OF THE INTEGRATIVE CHAPTER

SUMMARY

1. INTRODUCTION

Fashion is a legally intriguing phenomenon that operates at the intersection of art and utility, and of innovation and imitation. When considering fashion as a form of art, or just as a creative industry, its connection to intellectual property rights is obvious. In fact, the global fashion business and industry are extremely IP-intensive, although intellectual property law does not cooperate easily with fashion.[1] Fashion involves plenty of creativity, but also borrowing, mixing, matching, differentiating, belonging, continuing and changing,[2] which complicates things, especially the relationship between fashion and copyright.[3] However, fashion is not just art, creativity and beautiful items. Fashion also has a dark side, involving waste, pollution, exploitation and oppression. The lack of sustainability of the global fashion industry is flagrant. This darker side of one of the world's most glamorous industries is also interlinked with IP law. With a focus on copyright law, this doctoral dissertation illuminates how the IP framework in which the fashion industry operates is connected with various sustainability issues. The dissertation's premise is that copyright can be one of the legal instruments used to promote sustainable development in fashion. The research paints a comprehensive picture of the approach to fashion of EU copyright law, and suggests how the law should treat fashion designs in order to foster culturally, environmentally and socially sustainable development.

To fully embrace the connection between fashion, copyright and IP in general, one must first appreciate the concept of fashion and what it is all about. This includes, inter alia, distinguishing between the notions of *fashion*, *trends, fashion designs* and the *fashion industry*. Tying fashion with the concept of sustainable development, furthermore, requires that we define *sustainability* and *sustainable development*.

1.1 Fashion and related concepts

Fashion is a form of visual art.[4] The cultural significance of fashion has not always been appreciated, leading to an inferior status compared to some other artistic

1 Härkönen 2018a, p. 908, Gibson 2015, p. 396, 398, 401, Dahlén 2012, p. 92 and Kur 2014, p. 180.
2 Kaiser 2012, p. 1.
3 Härkönen 2018a, p. 908.
4 Wilsaon 2003, p. 9. See also Troy 2020, p. 66 and Härkönen 2018a, p. 908.

disciplines.[5] Fashion plays a widespread and complex role in our society, which extends beyond the industry of making and selling clothing.[6] Although for most of us, fashion is embodied in the production of clothes, accessories and appearances,[7] fashion and clothing are separate concepts and entities.[8] Fashion crosses various boundaries and changes with each person's visual and material interpretation of who they are.[9] Fashion allows an individual to alter their style and look by providing an instrument of self-expression.[10] Fashion is never completely predictable. It is a continuous system of transformation that has a will of its own.[11] A key feature of fashion is rapid and continual changing of styles: a new fashion begins with a rejection of the old.[12] Fashion involves the entire society. It is more than just a white, Western, heterosexual, upper-middle-class, female consumer affair.[13] Fashion highlights the various intersections and entanglements among social class, ethnicity, national identity, gender, sexuality and other facets of our identities.[14] Moreover, fashion has an ability to cement social solidarity and impose group norms, while deviations in dress can be experienced as odd and disturbing.[15] Hence, fashion is a profoundly cultural phenomenon.[16] At its best, fashion is a significant and magical part of our culture, but in its worst forms, it feeds insecurity, peer pressure, consumerism and homogeneity, and lacks attention to moral and environmental issues.[17]

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5 Wilson 2003, p. 270, 277.

6 Craik 2019, p. 133.

7 See e.g. Kaiser 2012, p. 1, Kawamura 2018, p. 2. See also Barthes 1967, p. 4–5.

8 Kawamura 2018, p. 1–3.

9 Kaiser 2012, p. 1 and Farnault 2014, p. 16.

10 Farnault 2014, p. 16.

11 Polhemus & Proctor 1978, p. 106.

12 Wilson 2003, p. 3, 9. It must be highlighted that although change and rejection of the old are features of fashion, this does not mean that fashion is disposable by nature. Rather, it means a certain circularity. See also Raustiala & Sprigman 2006, p. 1718–1728: rejection of the old can also be described as 'induced obsolescence', which is a key term that Raustiala and Sprigman use in their research concerning fashion and IP protection. See also Vinken, p. 35.

13 Kaiser 2012, p. 4, 34. However, in contemporary civilization, women's fashion does display a greater versatility than men's fashion. Women's fashion changes more rapidly and completely, and the total gamut of 'permitted' forms is greater. This can be explained in terms of the social psychology of our present civilization: a woman is seen as 'the one who pleases by being what she is and looking as she does rather than by doing what she does' (Sapir 2020, p. 63–64). See also Kawamura 2018, p. 9–10 and Kaiser, Hancock & Bernstein 2015, p. 20.

14 Kaiser 2012, p. 4. See also Wilson 2003, p. 8–9 and Simmel 1904, p. 94.

15 Wilson 2003, p. 6.

16 Barnard 2020a, p. 4. Moreover, besides being a cultural phenomenon, fashion is a cultural *industry*. This we can see for instance in the increasing amount of fashion designs being showcased in museums and various fashion exhibitions (see e.g. Calefato 2019, p. 38–39 and Clark 2019, p. 166–167). This cultural industry celebrates individual designers and fosters a 'star culture' (Kawamura 2018, p. 63). An example of the combination of star culture and the role of fashion as a cultural industry is the *Musée Yves Saint Laurent Paris*, a museum dedicated to the creativity of Yves Saint Laurent (1936–2008).

17 Fletcher 2008, p. 178–179. See also Black 2019, p. 114.

Continuously changing *trends* are a key feature of fashion.[18] The term 'trend' refers to a certain style that is popular and considered 'fashionable' at a certain point in time. For example, a silhouette of a dress or a suit, the length of a skirt, the strength of eyeliner, the positioning of a waistline or various colour schemes can be considered as trends.[19] Fashions are born from creativity, while trends mostly spread via imitation and references, which lays a fertile breeding ground for alleged and genuine copyright infringements.[20] Furthermore, fashion has an interesting value as status symbol, which generates consumer demand for cheaper copies or 'knockoffs' of popular fashion designs.[21] Regardless, the creative output of fashion designers ought to stay distinguishable from the works of their rivals. Imitation that comes too close to the source of its inspiration can be harmful for the reputation of the original design and its desirability among consumers.[22]

Fashion designs are embodiments of fashion.[23] This research is particularly interested in and focused on original, creative fashion designs that can (almost) be considered art. For example, unique *haute couture* creations, bespoke garments, catwalk creations and *prêt-à-porter* (ready-to-wear) fashion designs that, regardless

18 Wilson 2003, p. 3, 9.

19 It is important to distinguish between the terms 'fashion design' and 'trend', as monopolizing fashion designs and monopolizing trends are two completely different discussions. And yet, some people are opposed to granting exclusive rights to fashion designs, on the grounds that these rights would give the originator of a successful design an exclusive right to capitalise on a certain trend. For further analysis, see Subsection 4.1. of this Summary.

20 See also Dahlén 2012, p. 88–89: Dahlén argues that imitation, plagiarism, copying and even counterfeiting appear to be an accepted part of the trade.

21 See e.g. Veblen 1899 and Simmel 1904. See also Kaiser, Hancock & Bernstein 2015, p. 15–16, Monseau 2011, p. 34, Raustiala & Sprigman 2012, p. 39 and Härkönen 2018b.

22 Similarly to other fields of art, it is possible in fashion for a designer to be inspired by another designer's work and use that as inspiration for their work without infringing on the other designer's IP rights. Borrowing elements from other designers, and referring to or citing their works are traditions of the fashion industry. These are all forms of participation in a trend (see Hemphill & Suk 2009, p. 1153 and Subsection 4.1 of this Summary). The terms 'snob effect' and 'brand tarnishment' are also related to the desirability of a widely copied fashion design. The former refers to a phenomenon where 'the demand for a consumers' good is decreased owing to the fact that others are also consuming the same commodity (or that others are increasing their consumption of that commodity). This represents the desire of people to be exclusive; to be different; to dissociate themselves from the "common herd".' (Leibenstein 1950, p. 189). A brand is said to be tarnished if it is weakened by unflattering associations (Raustiala & Sprigman 2015, p. 282). Moreover, the universalising of fashion necessarily 'cheapens' its value and forces an abnormally rapid change of fashion (Sapir 2020, p. 63).

23 See e.g. Kawamura 2018, p. 1–2.

of being mass-produced, are their authors' own intellectual creations.[24] These are the most interesting types of fashion designs from the perspective of copyright law because, arguably, copyright law aims to protect genuine creativity. As for the term *copy*, in this research it means an imitation of such an author's (designer's) own intellectual creation.[25] Not all garments and accessories qualify as protection-worthy fashion designs in the context of this research, since a large proportion of the clothing and accessories that the contemporary garment industry produces are completely unoriginal and generic (for example, a plain T-shirt, a classic pair of blue jeans or a basic collared shirt to be worn under a suit jacket – the types of garments that are typical in everyday use and neither creative nor special by nature).[26] For similar reasons, this research excludes fashion designs that are otherwise simple or unoriginal, but have logos or other distinctive signs of fashion labels as eyecatchers. When a logo or other brand identification symbol is a determining factor in the design process, the most interesting legal issues arising in those cases come under trademark law.

It is important to note that fashion is not a synonym for the *fashion industry* or the *fashion business*. The term 'fashion industry' refers to a global supply chain that starts with the production of raw materials, includes commercial design, manufacture, marketing and sales, and concludes with the consumption of garments and accessories. In this research, fashion industry generally refers to the industry as a whole and considers fashion companies of all kinds. One segment of the fashion industry is particularly important from the perspective of IP and sustainable development: *fast fashion*. 'Fast fashion' is a business model where rapidly changing trends are made available to consumers quickly after being seen on catwalks or the

24 'Author's own intellectual creation' is the standard of *originality* in European Union copyright law, and originality is the (only) requirement for a work to be protected by copyright. See CJEU: C-5/08 *Infopaq International A/S v Danske Dagblades Forening,* ECLI:EU:C:2009:465, para. 35–37 and Subsection 4.1 of this Summary. On *Infopaq's* significance for the applicable standard of originality to different subject matters, see Rosati 2019a, p. 88–91. See also Kur 2014 for German scholarly discussion regarding the protection of fashion designs. Kur points out how some German scholars have made a distinction between *haute couture* and *prêt-à-porter* by contending that copyright protection might indeed apply to *haute couture*, but should not cover *prêt-à-porter* garments. Kur argues that this distinction is irrelevant (ibid., p. 182–183). See also Härkönen 2020a, p. 12 and Härkönen 2018a, p. 919.

25 It must be noted that the term 'copy' does not mean the same as 'counterfeit'. 'Copy' refers to an imitation of a copyright-protected work, whereas a counterfeit infringes on a trademark right, as defined in TRIPS. Moreover, 'copy' in legal terms does not necessarily match the understanding of a copy by fashion insiders or the general public (Raustiala & Sprigman 2009, p. 1219). For the purposes of this legal research, the relevant meaning of 'copy' originates from interpretation of the law. The terms 'piracy' and 'pirated copyright goods' are also closely linked to the term 'copy'. The former terms refer to any goods which are copies made without the consent of the rightholder or person duly authorised by the rightholder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright under the law of the country of importation (see TRIPS).

26 These kinds of garments are better described as commodities. See also Härkönen 2018a, p. 908–909.

red carpet and, more importantly, for a price so cheap that the average consumer is able to renew their wardrobe multiple times per year, hence fostering the rapid circulation of trends.[27] Massive fast fashion chains such as H&M, Zara, Primark, Topshop and Forever 21 have specialised in offering consumers inexpensive versions of high fashion styles and designer creations.[28] In fast fashion stores, originality is a rare sight.[29] At the core of fast fashion lie speed, disposability and trendiness.[30] It is important to distinguish between fast fashion and fashion: fast fashion is about disposability, velocity and imitation, whereas creativity and cultural significance are at the heart of fashion.

1.2 Sustainable development and its elements in the fashion context

Some of the contemporary fashion industry's murky business practices have recently come under increasing negative scrutiny. *Sustainability* – or, rather, the lack of it – is no doubt the most pressing challenge of the contemporary fashion industry.[31] It is important to understand that there is no single definition of 'sustainability' that works in all circumstances, and its meaning varies depending on the context.[32] In this research, sustainability in fashion is defined as a holistic way of operating that does not conflict with principles of equality, fairness, humanity, cultural diversity, environmental protection and conservation. On a practical level, sustainability concerns the whole life cycle of a product, from the designer's table and the cultivation of fibres through to weaving, tailoring, sewing, retail practices and the disposal habits that follow use and consumption. Each of these phases is exposed to significant risks, whether it be damage to the environment or to the health and welfare of workers,[33] or even harming the culture(s) to which the design relates.

27 See e.g. Taplin 2014, p. 78.

28 See e.g. Raustiala & Sprigman 2006, p. 1705, 1737, Raustiala & Sprigman 2012, p. 26, Scafidi 2006, p. 117, Rosati 2018b, p. 857, Brewer 2019, p. 3 and Taplin 2014, p. 78. See also Crewe 2017, p. 45–46 and Joy et al, 275–276, 282.

29 See Härkönen 2018a, p. 919.

30 Joy et al. 2012, p. 283.

31 Härkönen 2020b, p. 164.

32 Dessein et al. 2015, p. 24. Since there is no clear and definite, universally accepted meaning of the term 'sustainability' in fashion, and the term is used in a variety of contexts, it might be difficult for consumers to navigate through the jungle of fashion labels that declare to promote sustainability and thereby to make informed purchasing decisions (see Thomas 2020, p. 717–718). See also Cavagnero 2021: the lack of a precise definition of 'sustainable fashion' seems to be working in many companies' favour, because it allows 'discrepancies between public marketing narratives and actual practices and results' (ibid.). These discrepancies are sometimes known as 'greenwashing'.

33 Mora, Rocamora & Volonté 2014, p. 140.

Sustainability and *sustainable development* are not synonyms,[34] although they occasionally overlap. Like sustainability, 'sustainable development' is a term whose meaning depends on the circumstances.[35] Note, for instance, that sustainable development means different things in different parts of the world, and that current meanings are likely to change over time.[36] Perhaps the most well-known definition of sustainable development can be found in the Brundtland report, which defines it as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[37] In the context of fashion, this definition can be supplemented by viewing sustainable development as taking steps *towards* sustainability. This means, for example, reducing production, waste and pollution, increasing recycling and respecting and promoting the human rights of those who are in a disadvantaged position, among them garment workers and marginalised groups.

It should be acknowledged that sustainability and sustainable development are hype words of our time, and are sometimes used in a very misleading way.[38] For instance, some fast fashion companies use them in their marketing without actually stating what is meant by them.[39] Therefore, defining these terms for the research context is particularly important. Moreover, holistic sustainability is, arguably, difficult to achieve for an industry that produces new items. Thus one must be cautious with anything that occurs within the fashion industry being labelled as sustainable. New business practices, policies, innovations, materials and such, which aim to reduce waste and pollution or otherwise to improve the industry might indeed be less *non*-sustainable than old ones. However, the term 'sustainability' implies that no further development is needed, which is most often not the case in the fashion world. This research acknowledges that, and mostly favours the term 'sustainable development' in analysing the effects that IP protection has on fashion. Regardless of the difficulty of reaching it, this research sees sustainability in the fashion industry as the goal towards which companies work through sustainable development works.

This research divides the elements of sustainability and sustainable development into three categories:[40] *environmental*, *social* and *cultural sustainability*. The division

34 Dessein et al. 2015, p. 22.
35 Dessein et al. 2015, p. 24.
36 Dessein et al. 2015, p. 24.
37 Brundtland report 1987.
38 See also Thomas 2020: the term 'sustainable' (and also related terms such as 'eco-friendly' and 'responsible') often appears in the marketing materials and annual reports of major fashion brands and retailers. These terms are used to describe the commitments and initiatives of companies (ibid., p. 717). However, they often tell little about the de facto sustainability of the company in question.
39 See Cavagnero 2021, Subsection 1.4.
40 There are various ways of categorising the elements of sustainability and sustainable development, depending on the context. Some research outputs define more sectors than the environmental, social and cultural sustainability used herein. For example, Dessein et al. divide sustainability into ecological, social, economic and cultural sustainability (ibid. 2015, p. 29).

serves the purposes of this research by helping to distinguish between, clarify and highlight the diversity of the various sustainability-related problems that occur within fashion.

'Environmental sustainability' is related to conserving natural resources and protecting global ecosystems. Due to the continuous acceleration of the fashion cycle, clothing production has approximately doubled over the last two decades.[41] The fact that more clothes are manufactured than ever before and they are disposed of quickly after purchase has exponentially magnified the industry's carbon footprint.[42] Thus, the relationship between fashion and consumption obviously conflicts with environmental sustainability goals.[43]

Besides environmental sustainability, the fashion industry is blamed for disregarding 'social sustainability'. Social sustainability refers to identifying and managing the impacts – positive or negative – of business on people. Companies directly or indirectly affect what happens to employees, workers in the value chain, customers and local communities, and it is important proactively to manage these impacts.[44] In the fashion industry, the lack social sustainability is particularly visible in cases where fashion companies exploit and neglect the rights of garment workers in offshore manufacturing locations.[45] A core element of social sustainability is respecting human rights, especially those of people in a disadvantaged position in the fashion value chain.

The concept of 'cultural sustainability' was developed as part of the UNESCO Universal Declaration on Cultural Diversity (2001), according to which preservation and promotion of cultural diversity is the key to sustainable human development.[46] Previously, cultural sustainability was often incorporated into social sustainability,[47] but it is now recognised as its own segment.[48] Cultural sustainability means, inter alia, that the current generation should only use and adapt cultural heritage to the extent

41 Ellen MacArthur Foundation 2017, p. 18.

42 See e.g. Ellen MacArthur Foundation 2017, p. 21, 36–38.

43 Fletcher 2008, p. 177. See also Brewer 2019, p. 3. According to Thomas, 'The close association between sustainability and ideas of scarcity or limitations makes the term unappealing to some fashion industry executives and managers' (Thomas 2020, p. 725).

44 See United Nations Global Compact: Social Sustainability (available at: https://www.unglobalcompact.org/what-is-gc/our-work/social).

45 Wilson 2003, p. 85, Noto La Diega 2019, p. 19 and Taplin 2014. See also Green & Kaiser 2017: the exploitation of low-paid or unpaid employees is characterised as 'the theft of labour', which occurs in the fashion industry in addition to 'the theft of ideas' (i.e. copying) (ibid., p. 147).

46 UNESCO Universal Declaration on Cultural Diversity, Article 11 and Cultural Intellectual Property Rights Initiative: 'Cultural Sustainability in Fashion' (available at: https://www.culturalintellectualproperty.com/cultural-sustainability-in-fashion).

47 Dessein et al. 2015, p. 24.

48 Dessein et al. 2015, 28–30.

that it does not threaten the availability of this heritage to future generations.[49] One aspect of it, therefore, is to maintain links with the past.[50] Cultural sustainability highlights cultural diversity and supports the coexistence of different ways of life and values, making space for equal participation.[51] In the context of fashion, cultural sustainability concerns e.g. transmitting or supporting the knowledge transfer of traditional textile knowledge and traditional textile cultural expressions to future generations without their being diluted,[52] as well as appreciating fashion's cultural significance. Failures to take cultural sustainability into consideration can be seen, for instance, in frequent accusations of a lack of respect from the fashion industry towards marginalised cultures.[53] It is not uncommon for Western fashion brands to misuse the dress heritage and traditional cultural expressions of cultures that are considered 'exotic'.[54] This copying phenomenon is often referred to as *cultural appropriation,*[55] which has caused heated debates over the past years and arguably conflicts with cultural sustainability. Nor are expressions of the hegemonic and mainstream culture irrelevant from the viewpoint of cultural sustainability. Culture itself has been acknowledged as a value that ought to be protected and considered as a part of sustainability,[56] which indicates that any culture is worth preserving.[57] Therefore, fashion as a cultural phenomenon and fashion designs as expressions of culture are important from the perspective of cultural sustainability. Overall, it has been pointed out in fashion research that more research is needed on the cultural aspects of sustainability.[58]

1.3 Fashion and intellectual property rights

Controversies related to imitation and innovation, rapid trend circulation, art, utility, status and creativity make the intersections between fashion and intellectual property rights particularly fascinating. Overall, fashion operates in

49 Pereira 2007, p. 22 and Cultural Intellectual Property Rights Initiative: 'Cultural Sustainability in Fashion'.
50 Dessein et al. 2015, p. 39.
51 Dessein et al. 2015, p. 39. Regarding equal participation, see also See Ballardini, Härkönen & Kestilä 2021, Section 5.
52 See Cultural Intellectual Property Rights Initiative: 'Cultural Sustainability in Fashion'. See also Ballardini, Härkönen & Kestilä 2021, Subsection 4.1.
53 See e.g. Wilson 2003, p. 258, Kaiser 2012, p. 48, 78, 95–96 and Green & Kaiser 2017, p. 145–146.
54 See e.g. Clancy 1996, p. 89, Pham 2016, p. 51 and Hendrickson 1996, p. 15–16.
55 More on cultural appropriation in Subsections 2.2 and 4.3 of this Summary.
56 See e.g. Dessein et al. 2015.
57 See also Pereira 2007, p. 16, 20. See also Recitals 11 and 12 in the Preamble to the InfoSoc Directive that consider culture and cultural creativity per se as values that ought to be fostered.
58 Mora, Rocamora & Volonté 2014, p. 144–145.

an extremely challenging IP environment, and the applicability of IP protection (copyright protection in particular) to fashion designs has been questioned time after time.[59] In Europe, fashion has had a special role 'on the edges of IP', although fashion designs have, in principle, been considered as worthy of some kind of IP protection.[60]

One of the obstacles to copyright protection is the status of fashion designs as products of *applied art*.[61] This term refers to creative outputs that combine aesthetic character and functionality – such as, for example, garments, accessories, jewellery, furniture, kitchenware and home décor items.[62] In many European countries, the copyright threshold of originality has traditionally been considered higher for works of applied art than for works of *pure art,* which include fine art, music, literature and other more 'classic' fields of creativity.[63] The presence of functionality in fashion design adds further obstacles, as functionally dictated elements have typically (but not always) been excluded from the scope of protection.[64]

> In the United States, fashion designs are considered to be *useful articles*. The concept of 'useful article' is similar to products of applied art. In the US, useful articles mainly fall outside of the scope of copyright, although there are some exceptions to this rule of thumb. For example, decorative elements that can be separated from a useful article can be copyright protected.[65]

This research delves into the complex relationship between fashion and IP, shedding light on the ways in which it has negatively affected the industry's sustainable development. Due to the aforementioned obstacles to copyright protection, fashion

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59 See Härkönen 2018a, p. 908–909 and Härkönen 2020b, p. 164.

60 Kur 2014, p. 180. See also Härkönen 2020b, p. 164–165 and Härkönen 2018a, p. 908–909.

61 Härkönen 2018a, p. 909–910.

62 Härkönen 2020a, p. 1.

63 Härkönen 2020a, p. 1. See also Kivimäki 1966, p. 26–29. Besides 'pure art' and 'applied art', copyright law scholars have used the concepts of 'free art' and 'mercenary art' (see e.g. Teilmann-Lock 2016, p. 130). Some consider 'free art' to merit copyright protection, since there are more limited opportunities for commercialisation given that the works can only be sold by the author once (Inguanez 2020, p. 801). Interestingly, art historians make similar distinctions to copyright law: fashion is considered 'popular art', as opposed to 'high art' (Wilson 2003, p. 48). Pitkänen notes that it can be difficult to draw a line between pure art and applied art because the nature of a work can switch between aesthetic and functional, depending on the context in which the work is placed (Pitkänen 2016, p. 99, 302).

64 See e.g. Härkönen 2020a, p. 14. See also Inguanez 2020, p. 810–812. For a US perspective, see Buccafusco & Fromer 2017, p. 51, 80–81, and Monseau 2011, p. 32–33.

65 See Hemphill & Suk 2014, p. 159–160 and Buccafusco & Fromer 2017, p. 65–69, Beebe 2017, p. 583, Derclaye 2017, p. 629, Ricketson & Suthersanen 2012, p. 179–182 and US Supreme Court: *Star Athletica LLC v. Varsity Brands Inc*. (2017) and its analysis by Kaminski & Rub (2017, p. 1131–1141) and Buccafusco & Fromer (2017, p. 85–93). In *Star Athletica,* the US Supreme Court upheld the arrangement of stripes, chevrons, zigzags and colour-blocking in cheerleader uniform designs as separable and therefore potentially copyrightable features of useful articles.

designs can often be copied much more freely than, for example, paintings, sculptures or music. These obstacles to copyright protection have contributed to fostering the fast fashion phenomenon, because the absence of adequate IP protection has made manufacturing of inexpensive knockoff garments an alluring business model.[66] But it is not just the cheap fast fashion brands that are guilty of copying creative outputs of others. Copies and imitations of certain kinds are seen on runway shows of high fashion and luxury brands, too: even the most prestigious fashion houses frequently borrow creative efforts of marginalised cultures and transform their TCEs into catwalk trends.[67] To this phenomenon the IP system appears to turn a blind eye.[68] Similarly, a copy of a fashion design could be manufactured by one's next-door neighbour, and there is not much that the IP system can do about it.[69] Recently, the fashion industry has encountered yet another issue related to copyright protection and copying: AI fashion designers and their creative output. The rapid development of AI technologies has facilitated an increasing number of AI-generated garments and accessories. However, copyright law does not easily cooperate with non-human creativity, and in the current legal environment, most AI-generated fashion designs would seem to be left without copyright protection.[70]

This doctoral research project was sparked off by considering the aforementioned embodiments of imitation. Copying in its various forms appears to be everywhere within the fashion industry. In trying to unravel the root cause behind all the copying, what came up time after time was the distinction that copyright law makes between pure art and applied art, wherein fashion designs tend to fall under applied art. One might ask whether this distinction and the low-copyright equilibrium it causes for fashion is a fair and ideal situation. And when it comes to copying, are all forms of imitation equally wrongful, or does it depend on *who* copies, *what* they copy and *how* the copying occurs? There are forms of copying that appear to be completely invisible to the IP system, such as cultural appropriation and private copying of fashion designs. Also, fashion designs created by AI designers appear to be particularly vulnerable to copying. Is all this desirable? Moreover, delving into various copying schemes within the fashion industry shows that almost all of them have some link to sustainability, or the lack thereof. This raises the question whether the challenging IP equilibrium in which fashion operates is connected to the absence of sustainability in the modern fashion industry. If this is the case, there would be grounds for re-evaluation of the current IP policies related to fashion. This

66 Härkönen 2020b, p. 164, 168.

67 See e.g. Green & Kaiser 2017, p. 146–147. See also Scafidi 2005, p. 11–12.

68 TCEs are mostly considered as part of the public domain. Sunder points out that our public domain tradition is 'rife with examples of exploitation of the knowledge and creativity of traditionally disadvantaged groups' (Sunder 2012, p. 22).

69 Härkönen 2018b, p. 860, 863.

70 Härkönen 2020b.

research argues that such a re-evaluation should take place in the field of copyright law and, more importantly, in a way that equally encompasses environmental, social and cultural sustainability.

2. RESEARCH QUESTIONS AND STRUCTURE OF THE RESEARCH

The previously described configuration related to fashion, IP and copyright law led this doctoral research to contemplate four (4) related Research Questions. The Research Questions together form a whole that seeks to systematise the relationship between fashion and EU copyright law and to illustrate the complex copyright environment, in order to theorise on the basis of law and to pin down the features of it that are connected to the lack of cultural, environmental and social sustainability. Furthermore, the Research Questions seek to unravel how this complex copyright environment appears in practice, what kinds of foreseeable challenges it causes, and how the law or its interpretation should be amended to promote sustainable development. Subsection 2.1 presents the Research Questions and describes the key hypotheses, as well as highlighting their relevance to the theme of the research.

Subsection 2.2 provides a brief overview of the five research articles that make up this dissertation, describing their content, methods and connection to the overall research theme. Further legal analysis of the research findings of these articles follows in Section 4.

2.1 Research Questions and key hypotheses

Research Question 1:

- What is the current EU copyright environment for fashion designs, and is this environment optimal from the perspective of sustainable development and overall fairness towards creators? Furthermore, is this optimal environment a full-copyright regime with strong protection of fashion designs, a low-copyright regime where almost all copying is legally permitted, or something in between?

Hypothesis 1:

- Fashion has traditionally been the subject of a so-called low-copyright regime. The nature of fashion designs as products of applied art has made their path towards full-copyright protection more difficult than it is for works of pure art. Hence, the contemporary fashion industry has been operating in a low-copyright regime for its entire existence. This has had negative effects on the industry, designers, cultures and the environment.
- More recently, the EU copyright regime has started to consider all works, including works of pure art and works of applied art, as equal. This is a desirable

development, particularly from the perspectives of fairness, creativity and sustainable development.

Research Question 2:

- What are the sustainability-related consequences of the fashion industry working in a low-copyright equilibrium, and what is the optimal copyright law environment that would encourage the fashion industry to embrace more sustainable business practices?

Hypothesis 2:

- Globally, a copyright system in which there are few legal risks involved in copying successful, original fashion designs is one of the factors that incentivises fashion operators to adopt business practices that are extremely harmful to the environment and to garment workers.[71] More garments are manufactured than ever before, and they are disposed of quickly after purchase. Manufacturing is often offshored to locations where the de facto protection of labour rights and human rights is low. Due to the 'need' to keep consumer princes (and hence, production costs) as low as possible, offshoring is 'business as usual', especially for fast fashion companies. The habit of fast fashion operators of providing consumers with huge volumes of cheap imitations of catwalk creations encourages excessive consumption of fashion goods and thus contributes to the unsustainable status quo.
- If the copyright system more readily protected fashion designs, (fast) fashion operators would have lower incentives to respond to consumer demand for cheap copies of designer garments and accessories than they do now. Hampering the fast fashion phenomenon in general would positively affect the overall sustainable development of the fashion industry.

Research Question 3:

- Copyright law – and IP law in general – have two particularly visible blind spots when it comes to copying in the context of fashion: (1) cultural appropriation copying, and (2) private copying of fashion designs. Copyright law ignores these forms of copying because it treats cultural appropriation as a use of the public domain and private copying as a widely accepted exception to an author's exclusive rights. Considering these blind spots, is there something that should be fixed in the law or its interpretation in order to promote sustainable development?

71 It is noted that the copyright equilibrium is not the only factor that encourages the fashion industry's unsustainable business practices. Other factors include the absence of a regulatory framework to controls overproduction and overconsumption of garments. See e.g. Pouillard 2019, p. 141 and Section 5 of this Summary.

Hypothesis 3:

- Not all copying in fashion is equally harmful. Some copies, such as private copies, are relatively harmless to the rightholders. Moreover, private copying does not conflict with sustainable development in fashion. This form of manufacturing[72] could be characterized as the opposite of the unsustainable practice of (fast) fashion companies mass-manufacturing huge volumes of low-quality garments in offshore locations. Therefore, there are strong sustainability-related grounds for copyright law not interfering with private copying of fashion designs.
- Unlike private copying, cultural appropriation as a form of copying has an extremely damaging effect on creator(s), including marginalised social groups and Indigenous peoples. This is the case especially when the source culture – the 'victim' of cultural appropriation – is an endangered, e.g. Indigenous culture. However, copyright law (and other IP laws) does not seem to recognise the unfair situation of these creators. There is a critical blind spot left by the conceptual gap between intellectual property and cultural property.
- If the copyright system were to extend (broader) protection to various creative cultures, fashion operators would not have a free pass to exploit the dress heritage of Indigenous peoples and other marginalised social groups. This kind of exploitation has a negative effect on cultural sustainability, because misuse of TCEs that distinguish a minority group from the hegemonic culture might further dilute the already thin cultural borders preventing the minority from being absorbed into the hegemonic culture. Dilution of these cultural borders might therefore lead to extinction of certain minority groups that are in a vulnerable position – Indigenous groups in particular.[73] Thus, the law should consider the interests of Indigenous peoples and other marginalised cultures as authors.

Research Question 4:

- Inevitably, technological advancements will significantly affect the fashion industry's creative environment. As in other industries, the use of AI is fashion is developing, and we are seeing increasing quantities of AI-generated fashion designs.[74] Fashion already operates in a very complex copyright environment. Will the use of AI cause even further copyright issues? And, particularly, will the increasing use of AI affect the sustainable development of the fashion industry?

72 Known as the 'complete garment method', as opposed to mass-manufacturing. In the complete garment method, each garment is made separately by a single dressmaker. See Wilson 2003, p. 74.
73 Åhren 2010, p. 216–217.
74 See e.g. Luce 2019, p. 125–126.

Hypothesis 4:

- Copyright law is primarily intended to protect the creative outputs of a natural person. For a work to be copyright-protected, it must be original, and the European approach to originality highlights the personhood of the author. Therefore, AI-generated fashion designs might be more vulnerable to copying than human-created designs.
- Adding further copyright-free space in the sphere of fashion would be less than optimal, as it might give even more of a boost to fast fashion copying. This would negatively affect the sustainable development of the industry. Hence, AI-generated fashion designs should not be left in the public domain.

2.2 Structure of the research and detailed problematisation

The present doctoral research is based on four (4) peer-reviewed journal articles and one (1) peer-reviewed book chapter, which at the time of writing have been or will shortly be published. Article-based dissertations (also known as composite dissertations) have some advantages compared to monographic studies, which are the more traditional way of presenting legal research. In an article-based dissertation, parts of the research results can be presented for the benefit of the scientific community during the research process; this allows the doctoral candidate to gain feedback throughout the process. While conducting the research for this dissertation, the author has received comments suggesting an even greater emphasis on the sustainability perspective of copyright protection, as well as consideration of the role of technological development (AI in particular) in this context.

The articles on which this dissertation is based help to answer the Research Questions, firstly by comprehensively inspecting the European copyright regime for works of applied art, viewing it from a fashion perspective; secondly by analysing the pros and cons of such a regime, while shedding light on its complexity, its gaps and blind spots, and revealing its discriminating features; and thirdly, unveiling some of the practical implications of fashion's complex copyright environment.

A common denominator for the articles is that each of them contemplates some form of copying that occurs in the fashion context. The copying phenomena that were chosen for the research articles were all different (although to a certain degree interlinked), in order to highlight the diversity of imitation scenarios in fashion. The inspected forms of copying can be roughly divided into four categories: (i) 'traditional' fashion copying where fashion designers/companies copy each other's creative outputs, (ii) copying of AI-generated fashion designs and AI designers copying the creative outputs of other creators, (iii) cultural appropriation copying, and (iv) private copying of fashion designs.

Another common denominator for the articles is fashion's overall ambiguous and complex role in the copyright regime and the resulting sustainability-related problems, but how evident its bearing is to the aforementioned theme(s) varies from article to article. For example, the first two articles address the fundamental relationship between fashion and copyright, but only Article I, 'Fashion as a copyright-protected work: Perspectives on the copyright threshold and copying of applied art in Finland'[75], has an explicit focus on fashion, whereas Article II, 'Copyright and applied art: The effects of CJEU's judgement C-683/17 Cofemel on the Finnish copyright tradition'[76], has a more subtle connection to fashion. Article II broadens and develops the theme introduced in Article I by analysing the overall EU copyright environment of works of applied art and its recent development. The two articles combined tackle the specific problems that fashion designs and applied art in general may encounter or have encountered due to their treatment by copyright law.[77] The underlying argument is that continental views on the copyright protection of fashion designs that include a very high level of creativity (particularly high fashion and *haute couture*) could help to establish an IP environment that incentivises the promotion of sustainable development, which is something that a low-protection or no-protection regime might not do. The problem at the heart of these articles must be first analysed, before contemplating more detailed issues that relate to the general theme of this research. In other words, to analyse the effects that copyright protection might have on the sustainable development of the fashion industry, one must first thoroughly investigate the copyright environment in which the fashion industry operates. Therefore Articles I and II mostly address Research Question 1, but contribute to Research Question 2, as well.

The more detailed issues, such as copyright problems related to AI fashion designers, cultural appropriation and private copying of fashion designs are discussed in the latter three articles. Article III, 'Fashion piracy and artificial intelligence–does the new creative environment come with new copyright issues?'[78], has perhaps the most apparent connection to both the copyright regime related to fashion designs and the sustainable development of the industry: it analyses the potential copyright-related challenges brought on for the fashion industry by the development of AI designers, viewing these issues from the sustainability perspective. Article III plays a strong role in addressing Research Questions 2 and 4, as well as, to some extent,

75 Härkönen 2018a. Title translated from Finnish.
76 Härkönen 2020a. Title translated from Finnish.
77 These articles (Härkönen 2018a and Härkönen 2020a) are in Finnish. To present their research findings to the international audience of this doctoral dissertation, the articles and their content are thoroughly discussed in Subsection 4.1 of this Summary, as well as Subsection 4.2 to some extent.
78 Härkönen 2020b.

Research Question 1. Article IV, 'Intellectual property rights and indigenous dress heritage: Towards more social planning types of practices via user-centric approaches'[79], has a strong focus on cultural sustainability and contemplates how a user-centric approach to copyright could help to foster cultural diversity, thereby addressing Research Question 3. By focusing on the dress heritage of all kinds of traditional cultural expressions, Article IV connects to the overall research theme of fashion and IP. Finally, Article V, 'The new era of home-made fake fashion: the phenomenon of home-sewn copies and the possibilities for fashion houses to take advantage'[80], contributes to the research theme by spotlighting a very specific issue: non-commercial, homemade copies of fashion designs. In addition to analysing private copying of fashion designs as a 'blind spot' of IP law, Article V sheds light on the sustainability-related reasons behind this activity. Thus, in addition to Research Question 3, Article V contributes to Research Question 2.

The first four articles quite consistently follow the final research plan, as detailed in Research Questions 1–4, serving their purpose rather well. In contrast, at the end of this doctoral research process it was found that the fifth article still had some room for improvement from the perspective of the Research Questions and the overall research theme. This Summary (particularly Subsection 4.3) aims to explain why Article V remains a bit more distant from the research theme. It suggests some possible ways of connecting it to the other research articles and Research Questions, better to serve the purpose of this thesis.

I Muoti tekijänoikeudellisena teoksena: näkökulmia käyttötaiteen teoskynnykseen ja kopiointiin Suomessa [Fashion as a copyright-protected work: Perspectives on the copyright threshold and copying of applied art in Finland]. *Defensor Legis* 6/2018, p. 908–922 ('Article I', Härkönen 2018a). Appendix 1.

Article I addresses one of the central issues of this doctoral research: the requirements for fashion designs to be protected by copyright law. The legal framework for this study is European Union copyright law, with a special focus on Finnish national legislation and case law, as well as the Nordic copyright tradition. Article I contemplates the historical and contemporary difficulties that fashion designs have encountered in being considered as works protected by copyright law. It suggests that EU copyright law will in the future consider works of applied art, such as fashion designs, equally worthy of protection as works of pure art. In terms of concepts of copyright law, Article I focuses on *originality* and *infringement*, viewing them mostly from the perspective of fashion designers as creative individuals. Hence, there are shades of a natural rights approach to copyright law in Article

79 Ballardini, Härkönen & Kestilä 2021.
80 Härkönen 2018b.

I.[81] The Article's conclusion is that fashion designs have historically faced multiple challenges, prejudices and biases when aiming for copyright protection. However, the future of fashion seems brighter in this respect: a further conclusion is that EU copyright law is moving towards the principle of the unity of art.

Article I uses the doctrinal study of law as a research method, delving into legal sources, legislative history, legal praxis and legal literature. It interprets and analyses these sources especially from the viewpoint of Research Question 1, in order to define and evaluate the current EU copyright environment for fashion designs.

II Tekijänoikeus ja käyttötaide: EU-tuomioistuimen C-683/17 Cofemel -ratkaisun vaikutukset suomalaiseen tekijänoikeustraditioon [Copyright and applied art: The effects of CJEU's judgement C-683/17 Cofemel on the Finnish copyright tradition]. *Defensor Legis* 1/2020, p. 1–16 ('Article II', Härkönen 2020a). Appendix 2.

The second article of this dissertation could be characterised as a sequel to Article I. They both provide answers to Research Question 1 and describe the copyright environment in which the fashion industry currently operates in the EU, seeking to define the optimal copyright environment for the industry. The research method of Article II is very similar to that used in Article I.

Article II analyses the most recent copyright law developments in case law from the Court of Justice of the European Union and its consequences for the Finnish national copyright tradition. Article II has a special focus on the concepts of *originality* and *work*, concentrating not only on fashion designs but having the broader viewpoint of works of applied art in general. Article II adopts a rather critical perspective on the Finnish copyright law tradition and demonstrates how Finland as an EU Member State has a rather outdated attitude towards works of applied art. Article II suggests how Finland should take into consideration the recent case law from the CJEU. The intersection and overlap of copyright and design right in works of applied art is also analysed. Article II has a particular focus on the CJEU judgement *Cofemel*,[82] which concerns the requirements that Member States may set for the copyright protection of works of applied art and hence has a remarkable impact on the future European IP environment of fashion designs and other products of applied art. Article II concludes that the *Cofemel* judgement confirms what had been suggested in Article I: henceforth, EU copyright law will offer stronger protection for works of applied

81 It is typical for civil law countries' copyright laws to be influenced by natural rights approach to copyright. The natural rights approach to copyright law sees that property derives from labour. An author's creative work is intellectual labour, and therefore granting authors exclusive rights to the fruits of their intellectual labour is justified. The natural rights approach to copyright law is influenced by John Locke's theories. See Ginsburg 2017, p. 487, 489. See also Mylly 2016, p. 910–911.
82 C-683/17 *Cofemel — Sociedade de Vestuário SA v G-Star Raw CV*, ECLI:EU:C:2019:721.

art by prohibiting Member States from setting discriminatory requirements for works from different creative fields.

After the publication of Article II in February 2020, the CJEU has handed down another judgement regarding the copyright protection of works of applied art. This new judgement, *Brompton*,[83] does not change the conclusions presented in Article I and Article II but rather strengthens them by approaching the copyright protection of works of applied art from a slightly different angle: functionality. In *Brompton,* which was about the copyright protection of a foldable bicycle, the CJEU noted that subject matter can be protected by copyright even when the author's creative process is limited by certain technical constraints. Since *Brompton* is a significant judgement from the perspective of Research Question 1, in particular, this Summary takes it into consideration as a tool for sharpening and deepening some of the arguments presented in Article II.

III Fashion piracy and artificial intelligence–does the new creative environment come with new copyright issues? *Journal of Intellectual Property Law & Practice*, Volume 15, Issue 3, March 2020, p. 163–172 ('Article III', Härkönen 2020b). Appendix 3.

The third article explores the copyright-related challenges that the development of AI fashion designers poses to the fashion industry. The legal framework is European Union copyright law and the research method is the doctrinal study of law.

Article III discusses the different ways in which AI can be used in fashion design and analyses the copyright-related problems linked to such use. It has a particular focus on potential copyright infringements related to the use of AI. Because the lack of human authorship excludes AI-generated works from the scope of copyright protection, AI-generated fashion designs seem to be more vulnerable to copying than human-created designs. Furthermore, Article III demonstrates how this technological development poses challenges to the sustainable development of the fashion industry. It concludes that creating more copyright-free space in the area of fashion would not be ideal, since it might further boost (fast fashion) copying and thus have a negative effect on the sustainable development of the industry. Article III presents various copyright law solutions for the treatment of AI-generated fashion designs, also considering the question of sustainability.

Article III is the only article that concentrates on the role of technological development in the context of the fashion industry. In addition to being the obvious respondent to Research Question 4, which aims to explain what future challenges non-human fashion designers bring to the table, Article III also contributes to Research Question 2, which concerns the role of copyright law in guiding the fashion industry towards sustainable development.

83 C-833/18 *SI, Brompton Bicycle Ltd v Chedech/Get2Get*, ECLI:EU:C:2020:461.

IV Intellectual property rights and indigenous dress heritage: Towards more social planning types of practices via user-centric approaches.[84] Forthcoming in Marcelo Corrales Compagnucci, Helena Haapio, Margaret Hagan and Michael Doherty (eds) *Legal Design: Integrating Business, Design, & Legal Thinking with Technology*. Edward Elgar Publishing, 2021. Co-authored with Professor Rosa Maria Ballardini and Doctoral Candidate Iiris Kestilä ('Article IV', Ballardini, Härkönen & Kestilä 2021).[85] Appendix 4.

Article IV is a book chapter that demonstrates a blind spot of copyright law. It illustrates how copyright and the IP system in general fail to take account of a certain copying phenomenon that occurs within the fashion industry: cultural appropriation. This particularly concerns Indigenous cultures and cultures that – even though they are mainstream in certain parts of the world – are considered 'exotic' by the Western world.[86] Simply put, cultural appropriation can be described as a 'movement of cultural elements from politically weak to politically strong'.[87] Recently, cultural appropriation has been a hot topic in the fashion industry, but although there is rather strong consensus on its harmful effects on Indigenous peoples and other marginalised social groups, intellectual property law seems to be incapable of confronting it. The question of cultural appropriation is linked to post-colonialist critique of the IP system. This refers specifically to the fact that the current global IPR system has mainly spread through colonialism and does not sufficiently account for the traditional forms of creativity of, for example, Indigenous

84 The title of this book chapter was chosen to highlight its legal design method and to suit the legal design-themed volume wherein it will be published. It therefore does not emphasise the Article's connection to fashion.

85 All authors contributed equally to this chapter. Every Section includes at least some level of participation from each author, but each had their specialist field to which they contributed more than the others. My specialist field was connecting the relevant legal phenomenon to the fashion world and explaining how the insufficient protection of TCEs has been present on catwalks. Most of the examples of cultural appropriation within the fashion industry throughout the text were written by me. Moreover, I had a major role in writing the parts that connect the Indigenous right to self-determination to protection of their dress heritage, and describing the cultural hierarchies within the IP system (for example, in Section 1, 'Introduction'). I particularly drafted the text in Section 4 ('Dress heritage and IPR: a case in point') and its Subsections. In Subsection 5.2 ('Making the system better'), the parts that describe how the existing copyright law provisions could be applied to Indigenous dress heritage, and that highlight the legal solutions that other jurisdictions have adopted to protect TCEs are largely written by me. In Section 'Conclusions', the part regarding consideration of values that ought to be protected also involves a strong contribution from me.

86 See e.g. Clancy 1996, p. 89, Pham 2016, p. 51 and Hendrickson 1996, p. 15–16.

87 Brown 2005, p. 44. See also, Scafidi 2005, p. 9 and p. 115–25 on 'permissive appropriation'. See also Asmah 2010, p. 134–135. To clarify, cultural appropriation is separate from *cultural exchange*, where people share culture with each other. Cultural exchange lacks the systematic power dynamic that is present in cultural appropriation. Furthermore, cultural appropriation must be separated from *cultural assimilation*, where marginalised groups of people adopt elements from the dominant culture, often in order to make their lives easier by not standing out from the hegemonic culture.

peoples. This post-colonialist critique is also tied to legal pluralism, which takes into consideration other legal traditions than the two dominant Western legal traditions of common law and civil law.[88]

Article IV calls for cultural sustainability within IP law. It uses legal design thinking as a method, and it has a strong user-centric approach. It concludes that the IPR system should step forward from a purely economics-centric justification of exclusive rights to a more social-planning-type of justification, which would help better to reflect societal values in IP law. The article furthermore argues that applying design thinking to IP law could trigger such a positive development.

Compared to the other articles, Article IV is not as fashion-centric. It does delve into the exploitation of Indigenous dress heritage, but the focus is on the legal design method and how this method could be used to fix the unjust system. It provides information that helps to answer Research Question 3, which concerns the blind spots of copyright law.

V The new era of home-made fake fashion: the phenomenon of home-sewn copies and the possibilities for fashion houses to take advantage. *Journal of Intellectual Property Law & Practice*, Volume 13, Issue 11, August 2018, p. 860–866 ('Article V', Härkönen 2018b). Appendix 5.

This article delves into a phenomenon of fashion design reproduction against which copyright law is almost completely ineffective: private copying. Private copying of fashion designs refers to cases where individuals who possess sewing skills reproduce commercial fashion designs for themselves or their family members. Article V makes IP law observations on the private copying phenomenon. It furthermore makes suggestions for fashion companies based on responses to an empirical survey. The legal framework is European Union copyright law.

Article V analyses the responses to an empirical survey of one hundred anonymous amateur sewers.[89] The purpose of the survey was to shed light on the reasons behind private copying of fashion designs. The survey shows that 'getting the look for less' is not the only reason for home sewers to copy fashion designs; other important reasons include sustainability-related arguments. Many of the respondents expressed worries about the manufacturing conditions of original fashion designs, and pointed out that they found the quality of mass-manufactured garments to be deficient. Many of the respondents noted that because they could not trust fashion companies to manufacture garments ethically and sustainably, they would rather sew reproductions of the desired designs. Besides financial and sustainability-related reasons, home sewers made copies instead of buying

88 See e.g. Glenn 2007.

89 The questions are annexed to Article V. The questionnaire was designed such that it was impossible to fill in more than once from the same IP address.

the genuine item because they needed to alter or customise the original design somehow (e.g. size, fit, colour).

Article V concludes that the phenomenon described above is not something that neither the legislator nor the rightholders should be worried about.[90] There are even ways for fashion companies to benefit from the private copying phenomenon. In contrast, the rightholders should worry about the consumers' distrust of the fashion companies' ability to manufacture garments in a way that stands up to scrutiny. The conclusions of Article V are particularly relevant to Research Question 3. The article demonstrates how copyright law turns a blind eye to homemade copies of fashion designs – and this is a good thing. Moreover, Article V is linked to Research Question 2, since the reasons that lead to private copying are connected to the environmental and social sustainability of the fashion industry.

90 Even though the InfoSoc Directive Article 5(2)(b) sets the condition that rightholders should receive fair compensation for private use of their works, in the case of home-sewn copies of fashion designs, the damage to the rightholder is likely to be minimal. Hence, no obligation for payment may arise (InfoSoc Directive Recital 35 and Härkönen 2018b, p. 865).

3. SCOPE OF RESEARCH AND RESEARCH METHODS

This Section situates this doctoral dissertation on the map of previous scholarly contributions on the theme of the intellectual property protection of fashion designs. Describing what has already been researched, it explains what this dissertation adds to the scholarly discussion, as well as defining the scope and limitations of the research (Subsection 3.1). This Section also sheds light on the research methods used (Subsection 3.2).

3.1 Situating the research in the area of fashion law and intellectual property law

This doctoral dissertation can be considered as a part of the *fashion law* phenomenon that has in the last two decades been a rather visible new research theme, especially among American legal scholars. Susan Scafidi, professor of fashion law, described this research area in 2012 as 'a field that embraces the legal substance of style, including the issues that may arise throughout the life of a garment, starting with the designer's original idea and continuing all the way to the consumer's closet'.[91] Nowadays, it is also necessary to include in the definition the issues that arise *after* the life of a garment: what happens to the garment and where does it end up after completing its 'career' in the consumer's closet?

Most contributions in the area of fashion law concern issues of intellectual property law.[92] The same applies to this doctoral dissertation. In the field of IP law, this dissertation falls under copyright law research. In terms of the segments of copyright law research, it focuses on the themes of *applied art, originality, work* and *infringement*. The perspective and hence the legal framework of this research is European Union copyright law. Due to some overlap between the EU copyright and design law frameworks, this research must also consider certain design law aspects.[93]

Prior research[94] related to fashion and intellectual property has tended to focus on the economic side of applying IP protection to fashion designs, fairness between

91 Scafidi 2012, p. 11.

92 Regarding fashion law's relationship with other traditional fields of law, see Härkönen 2019 p. 161–170, Härkönen 2013 p. 15–24 and Scafidi 2019, p. 430–431.

93 See e.g. Article 17 of the Design Directive and the confusion it has caused within Member States. See Subsection 4.1 of this Summary.

94 See Subsection 3.1.1 of this Summary for a more detailed analysis on previous research.

creators of different fields of art and optimising IP protection such that it creates growth for fashion businesses. The aims of this research, however, are different; it predominantly looks at the best possible copyright solutions from the perspective of culturally, environmentally and socially sustainable development. Therefore this research joins recent scholarly discussion that calls for infusing the IPR regime with sustainability.[95] In the academic debate concerning environmental sustainability, a division has been made between *weak* and *strong* sustainability: 'weak sustainability' means bringing environmental concerns into the framework made up of the structures and systems of business, whereas 'strong sustainability' aims at integrating business into environmental or socio-ecological systems by challenging existing structures, such that industrial activities are within our planet's capacity to sustain.[96] The division between weak and strong sustainability has also been used in IP law research.[97] This dissertation calls for strong sustainability within the IP framework.

3.1.1 Description of previous research

The legal aspects of copying and 'knocking off' fashion designs (including counterfeiting), and extending copyright protection to fashion designs have been topics of academic discussion on the other side of the Atlantic for decades.[98] In this millennium, in particular, an increasing number of fashion and IP-related research papers, book chapters and books have been published, especially in the United States. Legal scholars such as Beebe[99], Scafidi[100], Dreyfuss[101], Zimmerman[102], Monseau[103], Hemphill and Suk[104], Buccafusco and Fromer[105] and many more have explored the relationship between fashion and IP from the American perspective. One cannot discuss the research theme of applying US copyright law to fashion design without mentioning the research duo Raustiala and Sprigman, who have explored it in great detail.[106] In their famous theory of the *Piracy Paradox*, Raustiala and Sprigman

95 See e.g. Brown 2017, p. 958–959 and Pihlajarinne & Ballardini 2020, p. 240. Demands to take environmental sustainability into account in IP policies are rather new, but discussing sustainability from a human rights perspective in the IP context is nothing new (ibid. 239, 241).
96 Roome 2012, p. 620–621.
97 E.g. Pihlajarinne & Ballardini 2020.
98 E.g. Treece 1963, Wasserman 1971, Hagin 1991, Schalestock 1996 and Mencken 1997.
99 Beebe 2010 and 2015a. In addition to US-specific research, Beebe has researched the issue of fashion design copying in the Chinese context (Beebe 2015b). See also Beebe 2017 on design protection.
100 Scafidi 2006, 2012, 2015 & 2019.
101 Dreyfuss 2010 and 2018. Dreyfuss has also pointed out the link between IP protection and environmental sustainability (see Dreyfuss 2018, p. 10).
102 Zimmerman 2015.
103 Monseau 2011 and 2012.
104 Hemphill & Suk 2009, 2014 and Hemphill 2017.
105 Buccafusco & Fromer 2017.
106 Raustiala & Sprigman 2006, 2007, 2009, 2012, 2015 and Sprigman 2017.

argue that the fashion industry benefits from what they call 'IP's negative space'.[107] They base their claim on the phenomenon of 'induced obsolescence', where IP rules providing for free appropriation of fashion designs accelerate the diffusion of designs and styles,[108] therefore arguing that fashion designs should simply be outside of the copyright regime.[109] For this doctoral research, the findings of Raustiala and Sprigman have been remarkably valuable. The Piracy Paradox has been challenged, especially by Hemphill and Suk,[110] who highlight that there are various forms of copying in the fashion industry – ranging from actual imitation, which they find undesirable, to borrowing, remixing, reinterpreting and similar design activity that also includes a fair share of creativity. According to Hemphill and Suk, the latter activities should not be restricted by IP law, while genuine creativity in fashion design deserves IP protection.[111] Even though all of the above research focuses on the US legal framework for fashion designs, they have been significant source materials for this doctoral research. The aforementioned legal scholars have conceptualized fashion in legal terms that are somewhat universal and hence their analysis is also beneficial to European legal research.

Intellectual property rights, including copyright, are to a great extent harmonized in the European Union. Therefore almost all European research regarding copyright and fashion has been relevant source material for this dissertation, since their research results can be rather widely applied to all Member States. In Europe, delving into the relationship between fashion and IP has not been as popular among scholars as on the other side of the Atlantic, but the situation seems to be changing. A remarkable step forward in the development of European fashion and IP law research was the 'Fashion Law Special Issue' of the *Journal of Intellectual Property Law & Practice* (Volume 13, Issue 11, 1 November 2018), which included various contributions on fashion and intellectual property law from legal scholars and practising lawyers. Legal scholars who have conducted research in the area of fashion and IP law in the

107 Raustiala & Sprigman 2006, p. 1775–1777 and Sprigman 2017, p. 251–253. See also Meese 2018, p. 82: Meese argues that a number of creative industries are avoiding copyright.

108 Raustiala & Sprigman 2006, p. 1722.

109 Raustiala & Sprigman 2012, p. 21 and Sprigman 2017, p. 251–258.

110 Hemphill & Suk 2009, esp. p. 1180–1184. I have also challenged the Piracy Paradox in my LL.M. thesis in 2013 (Härkönen 2013, p. 66–71), but I no longer completely agree with my younger self. As I discuss herein, especially in Subsection 4.2 of this Summary, copying *is* the engine of the fashion industry, therefore agreeing with Raustiala and Sprigman. However, I argue that the contemporary fashion industry does not need that kind of engine at all.

111 Hemphill & Suk 2009, p. 1195–1196. Raustiala and Sprigman continued this academic debate in 2009 with a response to Hemphill and Suk (see Raustiala & Sprigman 2009). Dreyfuss has also participated in this discussion (Dreyfuss 2010, esp. p. 1858, 1460 and Dreyfuss 2018, p. 2, 10). From the perspective of this doctoral research, it has been a pleasure to follow this debate.

European context include Calboli[112], Rosati[113], Derclaye[114], Kur[115], Suthersanen[116], Teilmann-Lock[117], Schovsbo[118], Levin[119] and Dahlén[120]. Calboli has had a special focus on trademark law issues,[121] while Rosati and Derclaye have concentrated more on copyright law and design rights. Rosati has carried out a significant amount of research on *originality*,[122] which is a key concept when discussing whether a fashion design is entitled to copyright protection. Derclaye's research on the interface between copyright and design right has provided valuable source material for this research.[123] Kur has also covered the issue of overlapping IP rights, including unfair competition, and, moreover, delved into the German perspective of protection of fashion designs.[124] Suthersanen's research on design law has also been valuable for this dissertation.[125] Teilmann-Lock, Schovsbo, Levin and Dahlén have brought Nordic tones to the scholarly discussion on protecting fashion designs by means of IP law, Teilmann-Lock and Schovsbo having a Danish[126] and Levin and Dahlén a Swedish[127] perspective.

As for Finland – the location of this research – copyright protection of fashion designs and the legal essence of fashion have not been popular research themes among legal scholars, with a few exceptions. Perhaps the most interesting – while outdated – viewpoint is offered by Kivimäki, who briefly viewed the possibility of considering products of applied art as copyright-protected subject matter in the 1940s and 1960s. In those days, Finnish legal scholars were rather sceptical of copyright protection of applied art.[128] Kivimäki divided between works of art that

112 E.g. Calboli 2015, 2018a, 2018b and 2020. Calboli's contribution to the academic fashion and IP discussion stands out because Calboli is one of the few legal scholars drawing attention to the unsustainable business practices of the modern fashion industry. See e.g. Calboli 2020, Calboli 2018b and 2015. More recently, Cavagnero has investigated the intersections between trademarks, fashion and sustainability (see Cavagnero 2021).

113 E.g. Rosati 2018a, 2018b and 2019b. Rosati also edited the aforementioned *Journal of Intellectual Property Law & Practice* Fashion Law Special Issue together with Carina Gommers and Sarah Harris.

114 E.g. Derclaye 2008, 2010, 2019 and 2020.

115 Kur 2014 and 2019.

116 Suthersanen 2010 and 2011.

117 E.g. Teilmann-Lock 2012, 2016, Schovsbo & Teilmann-Lock 2016 and Teilmann-Lock & Petersen 2018.

118 E.g. Schovsbo & Teilmann-Lock 2016, Schovsbo & Rosenmeier 2018 and Schovsbo 2020.

119 E.g. Levin 2021.

120 Dahlén 2012.

121 E.g. Calboli 2015, 2018a and 2020.

122 E.g. Rosati 2013 and 2019a.

123 E.g. Derclaye 2017, 2018, Church, Derclaye & Stupfler 2019 and Derclaye 2020.

124 Kur 2014.

125 Suthersanen 2010 & 2011 and Ricketson & Suthersanen 2012.

126 Teilmann-Lock 2012 & 2016, Schovsbo & Teilmann-Lock 2016, Schovsbo & Rosenmeier 2018 and Schovsbo 2020.

127 Levin 2021 and Dahlén 2012.

128 This scepticism is still evident in some instances, such as the statements of the Finnish Copyright

'represent beauty' (pure art) and works that 'represent the idea of utility' (applied art).[129] This idea of 'beauty' as an essential element of copyright-protected work seems rather odd today. Nothing in copyright law or even in the legal tradition concerning copyright refers to the aesthetic value of a copyright-protected work. Especially in light of the most recent CJEU judgements of *Cofemel* and *Brompton*, it is fair to call this view passé, meaning that more up-to-date legal analysis is needed.[130] More recently, Mylly has conducted research, notably about originality, that has proven to be very valuable.[131]

A noteworthy difference between the American and European scholarly debates regarding copyright protection of fashion designs is that while the American academics seem to focus on the question of whether fashion designs should be entitled to protection at all, their European counterparts appear to take it for granted that fashion designs indeed *can* be protected by copyright, design right or both; the question is *how* and under what conditions. This is unsurprising, considering how differently legislation treats fashion designs in the US compared to the EU.[132]

> Outside of academia, there are a few related legal publications aimed at attorneys, legal counsels, fashion designers and other professionals who work with the fashion industry. Often they are authored by experienced practising lawyers.[133] These practice-based books concentrate more on the day-to-day legal issues that fashion houses and designers typically face (and how they can be avoided).

3.1.2 Contribution to the state of the art

Most of the existing research related to fashion and copyright tend to focus on the economic and moral sides of applying IP protection to fashion designs, on overlaps in IP protection, economic incentives and what level of protection is optimal to create growth for fashion businesses. The aim of this research is different. Instead of the most efficient economic incentives related to fashion and copyright, this research predominantly explores the optimal copyright solutions from the perspective of sustainable development. In other words, instead of asking 'What kind of copyright environment would increase fashion consumption and create growth in the industry?', this research asks 'What kind of copyright environment

Council (*Tekijänoikeusneuvosto*). See Härkönen 2020a, p. 11–15.

129 Kivimäki 1948, p. 73–74 and Kivimäki 1966, p. 19–21.

130 For more detailed descriptions of C-683/17 *Cofemel* and C-833/18 *Brompton*, see Subsection 4.1 of this Summary.

131 Mylly 2016.

132 See Subsection 1.3 of this Summary and Härkönen 2018a, p. 921 for a brief overview on the main differences. See also Monseau 2011.

133 See e.g. Burbidge 2019, Herzeca & Hogan 2013, Kobuss, Bretz & Hassani 2013, Scafidi et al. 2012, Furi-Perry 2013 and Jimenez & Kolsun 2010.

would incentivise the industry to follow a path that leads to more environmentally, culturally and socially sustainable business practices?'

Another notable difference between this research and most of the previous studies concerning fashion and copyright is the legal framework. While the existing academic debate is widely dominated by American legal scholars and accordingly focuses on US copyright law, this research offers a European perspective on some of the same themes. The legal framework is EU copyright law, with occasional references to the copyright traditions of Member States (in particular, the Nordic countries);[134] due to legal praxis in the CJEU and the Member States, the starting point for this research is that fashion designs *can* be protected by copyright. Therefore the evaluation is more about the conditions, scope and effects of such protection. This research focuses less on the question of whether original fashion designs should be entitled to any kind of copyright protection in the first place, positioning itself one step further than the arguably typical American approach. With Subsection 3.1.1 in mind, this research does not claim to be the first to explore the relationship between fashion and copyright law within EU law, but it may be justified in claiming to be more extensive than most of the previous European studies on this topic.

Although this research concentrates on the EU's regulatory framework and interprets copyright law and IP law from the European perspective, many of its findings also apply outside of the EU, on a global level. Particularly Subsection 4.2, which contemplates the link between copyright protection and sustainability, provides findings that can be universally applied.[135] This is important, considering the global nature of the fashion industry, where multinational fashion conglomerates, long supply chains and offshoring garment manufacture to the Global South[136] are business as usual.

This research provides a different answer to *who* or *what* should be protected by copyright law, compared with most of the previous research described in Subsection 3.1.1, which is mostly concerned with protecting the interests of brands, designers and consumers. This research aims to shape copyright protection of fashion designs in a way that prevents unwarranted damage to the environment, human rights and cultural rights. Protecting sustainability appears to go hand in hand with protecting authors of fashion designs. In essence, the answer to the question of *who* should be protected is fashion designers as authors, because that eventually promotes

134 Especially Articles I and II consider the IP traditions of the other Nordic countries in addition to the Finnish approach to protection of works of applied art.

135 Moreover, equality between different categories of works and fixing cultural appropriation as a blind spot of copyright law are worth considering in other jurisdictions as well, to promote holistic sustainable development. See Subsections 4.1 and 4.3 of this Summary.

136 'Global South' is a value-free term used by the World Bank to describe countries that are newly industrialised or in the process of becoming industrialised. It does not refer to a geographical south.

sustainable development of the fashion industry by impeding the damaging business practices of (fast) fashion companies.

3.1.3 Limitations of the research

It is generally acknowledged that the fashion industry does not work in a complete IP protection void. While industrial rights, such as trademark protection and design protection, do play a role in the industry's overall IP equilibrium, this research focuses first and foremost on copyright. This Subsection discusses why trademark protection was excluded from the scope of the research and design protection was relegated to a supporting role, also presenting other general limitations to the study.

Trademark protection and related trademark counterfeiting rules are recognised as relevant legislation in the fashion industry. Trademark protection covers signs that are used in the course of trade, such as particular words (including personal names), designs, letters, numerals, colours, the shape of goods, or the packaging of goods. Accordingly, a fashion house logo, a brand name, a designer's name, a collection name, a fabric print, a marketing slogan, or even the layout of a store[137] can be protected as trademarks, provided that the mark is distinctive. A distinctive design or colour can also be trademarked. Trademark law offers significant protection for many intangible assets to which fashion houses arguably have interests to reserve exclusive rights. Trademarks are critical because they help to maintain a prestige premium for particular brands in an industry that deals with 'positional goods' that have value as status symbols.[138] Indeed, many fashion brands heavily rely on trademarks, which can be seen especially in garments and accessories where logos are used as eyecatchers and determine the whole appearance of the item, or where a trademark is integrated into the design in such a way that it becomes an essential element.[139] For example, Burberry's distinctive plaid pattern is trademarked and incorporated into many Burberry products as a key feature.

When a logo or other trademarked sign is a part of the design, trademark law can offer significant protection against design copying. However, in the vast majority of fashion designs, the trademark is either inside the garment or displayed subtly on small items, such as buttons. When a trademark is not a key element of the design, it does not offer a useful weapon against design copying.[140] Trademark is an effective weapon in tackling *counterfeits*, which aim to cause confusion about the origins of

137 See C-421/13 *Apple Inc. v Deutsches Patent- und Markenamt*, ECLI:EU:C:2014:2070.

138 Raustiala & Sprigman 2012, p. 29, 40. See also Calboli 2015, p. 33.

139 Regarding trademarks as a tool to protect fashion, see e.g. Kur 2014, p. 189 and Calboli 2015. See also Dreyfuss 2018, p. 6. There has been academic discussion in the US context as to whether the fashion industry's reliance on trademark protection results from the uncertainty of fashion designs qualifying as copyright-protected subject matter. See e.g. Scafidi 2006, p. 120 and Hemphill & Suk 2009, p. 1179. See also Härkönen 2013, p. 75.

140 Raustiala & Sprigman 2012, p. 29.

the product.[141] Copyright, on the other hand, is a better tool for tackling copies that imitate the design itself. When considering a fashion design that is its author's own intellectual creation, unless this design involves trademarks in some form, there is very little that trademark law can do if the design is replicated. Therefore, trademark protection cannot be viewed as an effective IP right to hinder most fashion design copying, especially fast fashion copying, which does not necessarily aim to cause confusion about the origin of the copied product. Moreover, as a rule, effective trademark protection requires registration, whereas the enjoyment and exercise of copyright shall not be subject to any formality.[142]

Within the context of this research, the key difference between copyright law and trademark law is that while, especially in civil law jurisdictions, copyright law in principle intends to protect the creativity of an individual fashion designer (a natural person),[143] trademark law focuses on protecting the brand and commercial interests of a fashion company (a legal person).[144] The aim to protect genuine creativity and the personhood of an author is something that should perhaps be valued in the era of throwaway fashion culture. Seeing original garments and accessories as precious works of creativity that deserve to be protected, instead of as commercial commodities that should be regularly replaced, would be an important mind shift.

A rather obvious question in this context is: 'What about design rights? Should design protection not be the primary form of protection of fashion designs and, if so, why is design protection not the primary focus of this research?' Indeed, in many cases design protection provided by the European Union IP framework is a relevant IP right for industrial designs, such as garments and accessories, and for certain designs it is perhaps a more suitable form of IP protection than copyright. However, the protection of fashion designs under design rights has certain shortcomings. To enjoy the maximum term of design protection, 25 years, the design must be registered.[145] Protection of an unregistered design is also possible, but the term of protection is only three years as of the date on which the design was first made available to the public within

141 TRIPS defines counterfeit trademark goods as 'any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.' Luxury designer handbags and other leather goods are examples of goods that are popular among counterfeiters.

142 Berne Convention Article 5(2).

143 See e.g. Härkönen 2018a, p. 918–919. See also Kur 2019, p. 10.

144 However, see also Dahlén 2012, p. 95: Dahlén argues that the IP law's binary system with copyright being 'intellectual property' and trademark, patent and design right being 'industrial property' is not in line with the logic of fashion. According to Dahlén, fashion falls between 'intellectual property' and 'industrial property'.

145 Upon registration, a design is protected for one or more periods of five years. The rightholder may have the term of protection renewed for one or more periods of five years, up to a total term of 25 years (Design Directive Article 10).

the Community.[146] The legislator has considered three years of protection sufficient for industries that 'produce large numbers of designs for products frequently having a short market life'.[147] While short market life is certainly the reality for the majority of garment and apparel designs that the contemporary fashion industry produces,[148] this research views the assumption of fashion designs being by nature short-lived and mass-produced as problematic. Fashion designs can be much more than that: they can be their authors' own intellectual creations, which would undoubtedly benefit from a significantly longer, free-of-formalities protection, such as copyright.

Another reason to focus on copyright law rather than design law was that researching the copyright protection of fashion designs provides results that can be useful in an international context. Global relevance is particularly important because the most significant problems of the fashion industry (such as wasteful and polluting manufacture, overproduction, overconsumption and lack of respect for human rights and cultural rights)[149] are global problems. As opposed to design protection that is an EU-specific right, copyright protection is understood more or less similarly around the world. Analysis of design protection, therefore, does not work as well in an international context. This research does not, however, totally ignore design protection. Due to certain overlaps between the EU copyright and design law regimes,[150] some design law aspects must also be included in the research. Design protection, its shortcomings and benefits compared to copyright protection, as well as the overlap of copyright and design protection, are discussed in Subsection 4.1.

Having a research focus on protecting sustainability goals that require an urgent decrease in fashion production, sales and consumption means that the commercial interests of fashion companies and their profit-making aims are not considered as a priority by this research. Nor is protection of brand value (such as that of luxury fashion companies) the focal point of this research,[151] although copyright law measures to protect fashion designers as authors might indirectly have a positive effect on the brand value of the company that the fashion designer works for, especially if such rights are assigned by the designer to the company. Trademark law research would arguably be a more appropriate IP law measure to explore brand value protection.[152]

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146 Design Regulation Article 11.

147 Design Regulation Recital 16. See also Recital 25.

148 See Subsection 4.2 of this Summary.

149 These are further described and discussed in Subsections 4.2 and 4.3 of this Summary.

150 Especially Design Directive Article 17 and Design Regulation Article 96(2), and their relationship with the harmonised standard of originality in copyright law.

151 For example, Scafidi's research has a particular focus on brand value (see Scafidi 2015). Zerbo has rather similar interests as Scafidi. According to Zerbo, in addition to protecting an individual designer, intellectual property rights should first and foremost protect the brand value of a company, taking into account the quality of the brand's products and even its price group (see Zerbo 2017, esp. p. 621).

152 See e.g. Opinion of AG Szpunar in C-683/17 *Cofemel — Sociedade de Vestuário SA v G-Star Raw CV*, ECLI:EU:C:2019:363, para. 61.

Furthermore, this research does not aim to protect the interests of consumers as users of fashion designs,[153] as those interests are often in conflict with the most important value of this research: the sustainable development of the fashion industry.[154] It appears that today's consumers are generally not very concerned about the waste that their consumption habits produce or where their clothes originate[155] and, ironically, especially among European consumers, 'green' consumption has merely become a new form of conspicuous consumption for those who can afford it.[156] Genuinely conscious consumerism may well become a trend in the future,[157] but lawmakers should not count on it, which is why regulatory measures and research concerning them are urgently needed.[158]

3.2 Theoretical and methodological choices

To serve its purpose, this legal research must also take a look outside of the discipline of law. During the last decades, established disciplinary boundaries have become blurred.[159] When one research method or approach cannot fulfil the aims set for the research – especially in relation to the knowledge the research is supposed to produce – there is a genuine need to use several tools and several methodological approaches. The *research purpose* plays an important role in this matter.[160] Especially in cases where there are several research purposes, the research likely needs to produce and use several forms of knowledge that are suitable and valid for different purposes.[161] This research aims to produce findings that are relevant not only for legal research

153 E.g. Zimmerman's research has the perspective of a consumer and it delves into consumers' interests when it comes to exclusive rights to fashion designs (Zimmerman 2015). See also Teilmann-Lock & Petersen 2018, p. 894. On integrating consumer rights into copyright law, see also Schovsbo 2008.

154 For further remarks on consumers' interests conflicting with sustainable development in the fashion industry, see Section 5 of this Summary and the analysis of how fast fashion has allegedly 'democratised' fashion. See also Cline 2013, p. 61.

155 Sapir 2020, p. 65, Crewe 2017, p. 39 and Joy et al. 2012, p. 280. Despite increased awareness of the plight of vulnerable employees in the fashion value chain and fashion's impact on the environment, it remains to be seen whether consumer attitudes will translate into tangible changes in purchasing behaviour. According to the *State of Fashion 2021* report, 'Clearly, there is often a gap between consumer attitudes on social justice issues and their purchasing decisions' (Business of Fashion & McKinsey & Company 2020, p. 48–49). See also Taplin 2014, P. 80–81.

156 Cervellon and Carey 2020, p. 171, 174.

157 Business of Fashion & McKinsey & Company 2020, p. 49.

158 To clarify, this research does not claim that copyright law is the *only* legislative instrument for combating the unsustainable practices of the fashion industry, but one of the multiple legislative measures that are needed, along with e.g. tax law, environmental law, labour law, competition law and advertising law.

159 Ronkainen 2015, p. 13.

160 Ronkainen 2015, p. 24.

161 Ronkainen 2015, p. 25–26.

but, to some extent, fashion studies as well. Consequently, it must use and produce different forms of knowledge[162] and almost inevitably requires a *multidisciplinary* approach.[163] The term 'multidisciplinary' refers to a research process that combines several existing disciplines to add relevant information and to better serve the research purpose.[164] In multidisciplinary research, two or more disciplines with their framing, methods and theoretical basis contemplate a common research problem.[165] However, the boundaries between the disciplines are left untouched.[166]

Careful investigation of the topic of fashion and copyright as a whole requires a multidisciplinary approach: a legal scholar must understand how the fashion system works in order to fathom the legal solutions that would best suit it.[167] Fashion law in itself is multidisciplinary by nature, since it hardly ever solely focuses on the legal side; the perspective of the fashion industry is always included.

The multidisciplinary nature of this doctoral research is evident in both the knowledge it uses and the knowledge it produces. The *used knowledge* comes from the disciplines of law and fashion studies: besides texts written by legal scholars, this research relies on literature from the field of fashion studies in order to add information.[168] This practice gives a better understanding of fashion as a phenomenon and an industry.[169] Furthermore, the supervision of this doctoral research has been multidisciplinary from the beginning.[170] However, the boundaries between law and fashion research as disciplines are not broken, as is distinctive for multidisciplinary research (as opposed to trans-disciplinary research, which often ignores the disciplinary boundaries).[171] As a result, the main scholarly contribution of this research is in law, regardless of the fact that the analysis on legal rules concerning copying will also undoubtedly be valuable for the field of fashion research.

Most of the research was carried out using the method of doctrinal study of law. This method aims to reveal the structures of incentives in the law and to point out their gaps and nuances, as well as the ways in which these may be used.[172] This

162 Ronkainen 2015, p. 26.

163 See also Kaiser, Hancock & Bernstein 2015, p. 14, 17: in their research delving into luxury fashion, brand protection and their effects on society, the authors also identify a need for multiple methods.

164 Ronkainen 2015, p. 31.

165 Rantala 2019, p. 7. Legal scholars have sometimes criticised multidisciplinary legal studies. For example, Easterbrook claims that 'Put together two fields about which you know little and get the worst of both worlds' (Easterbrook 1996, p. 207). See also Subsection 4.5 of this Summary for more analysis regarding the so-called problems of multidisciplinary approach in the area of fashion law.

166 Ronkainen 2015, p. 31.

167 See e.g. Scafidi 2012, p. 13.

168 See e.g. Ronkainen 2015, p. 31.

169 See e.g. Kawamura 2018, p. 1–3.

170 This doctoral research has had two supervisors: Juha Karhu, Professor of Law (Emeritus) and Annamari Vänskä, Professor of Fashion Research.

171 Ronkainen 2015, p. 31.

172 Davies 2020, p. 9.

dissertation seeks to theorise on the basis of the law that governs the copyright protection of fashion designs. It therefore interprets legislation, legislative history, legal praxis and legal literature and makes policy arguments based on these, analysing how these sources appear in the fashion context. The most important legislation for this research are EU directives and regulations concerning copyright and design law, for instance the InfoSoc Directive, the Design Regulation and the Design Directive. The Berne Convention also plays an important role. Articles I and II analyse the national interpretation tradition of the Finnish Copyright Act, critically reviewing its compliance with recent developments in EU copyright law. As for case law, CJEU legal praxis is a significant source. Additionally, Articles I and II analyse Finnish national case law.

The research also makes use of the legal design method, which is connected to the multidisciplinary approach. Legal design is a rather new research method that challenges conservative legal thinking by striving for approachability of legal systems and services.[173] When it comes to the whole question of copyrights to fashion designs, there is a pressure to challenge the traditional legal thinking.[174] The legal design method can be seen, for example, in the fashion-centred approach that this research adopts to the topic and in the endeavour to figure out the fashion industry's special features. To achieve this, it is important to understand the culture of fashion and to comprehend the various parties of the fashion system (e.g. fashion creators, fashion houses and fashion consumers) as *users* of the IPR system. To come up with the best possible IPR solutions for fashion, it is essential to know how the fashion industry works: its motives, its history and why it works as it does.

Article V is partly based on an empirical survey. Empirical legal study investigates, inter alia, how individuals, institutions and the society respond to and are affected by laws. It furthermore explores how those laws are used by different actors.[175] The empirical survey in Article V seeks to understand the underlying reasons for making private copies of fashion designs, thereby to shed light on how copyright law's private copying exception is manifested in the actual world. Not many judicial conclusions can be drawn from the survey itself, due to the rather limited source data, however.[176] It is also acknowledged that the empirical method in law might lead to oversimplification of complex legal issues,[177] which is something that this

173 For more about legal design as a method, see Article IV (Ballardini, Härkönen, Kestilä 2021) Section 2: Design thinking in law.

174 The pressure can be seen in e.g. CJEU judgement C-683/17 *Cofemel* and Opinion of AG Szpunar in C-683/17 *Cofemel*.

175 Davies 2020, p. 9.

176 And as the title of Article V suggests, the responses to the empirical survey and the interpretation of those might be useful for fashion businesses that aim to profit from private copying. This, however, is not a legal argument per se but rather a suggestion to consider business opportunities connected to copyright law's private copying exception.

177 Davies 2020, p. 7, 8.

research aims to avoid. Therefore, empirical research does not play an essential role as a method in this thesis. The responses to the survey do connect the private copying customs to environmental and social sustainability in an interesting way, which in the end provides fertile ground for analysing private copying as an exception to the rightholder's exclusive reproduction right, promoting sustainable development in garment manufacturing.[178] The resulting analysis allows the author to make related policy arguments. The significance of the empirical survey is therefore to link a real-life phenomenon to a doctrinal issue. In this research, doctrinal study of law and the empirical method can therefore be seen as part of a common endeavour to decide what the law should be.[179]

Although some parts of this research point out differences between Member States' national copyright doctrines and occasionally shed light on the American approach to fashion and IP, this dissertation does not claim to use comparative law as a research method. Comparisons between legal systems and jurisdictions are merely used as a supporting function for the doctrinal method.[180]

178 The level of concern expressed by the respondents to the empirical survey for sustainability in garment manufacturing came as something of a surprise. In hindsight, the questions to the survey could have been formulated such that they had a stronger relation to sustainability, which might have given the empirical method a more significant role. This Summary aims to redress this shortcoming of Article V in Subsection 4.3.

179 See Davies 2020, p. 6, 9–10.

180 See Husa 2013, p. 36.

4. SUMMARY OF THE RESEARCH RESULTS

This Section summarises the research results question by question. Each Research Question is considered in a separate Subsection (4.1–4.4), with an overview at the end of each Subsection of whether the research supports the hypothesis of Research Question at hand.

Besides answering the Research Questions, this Section includes a Subsection (4.5) that briefly analyses the future of fashion law and its nature as an area of research among other fields of law.

4.1 RQ 1: The relationship between fashion and copyright: The past, the present and the optimal state

Distinction between pure art and applied art in Member States

The distinction between pure art and applied art is perhaps one of the most sensitive topics of copyright law.[181] As fashion designs are considered as applied art, this distinction has directly affected their protection.[182] During the existence of modern copyright, various jurisdictions have had highly diverse approaches to applying copyright protection to products of applied art.[183] As one might anticipate, the more author-centred the system, the more protective the copyright regime will be.[184] Correspondingly, civil law countries, where copyright has traditionally been more concerned with protection of the person of author (so-called *author's right* countries),[185] have generally offered better protection for designers than common law countries, which have a utilitarian justification for copyright protection.[186] The 'author's right' approach is also known as the 'continental' or 'continental European' view on copyright law.[187]

181 Härkönen 2020a, p. 1 and Kur 2019, p. 4, 14.
182 Härkönen 2018a, p. 908–911.
183 Härkönen 2020a, p. 1.
184 Ginsburg 1990, p. 993.
185 See Ginsburg 1990, p. 992–993.
186 Derclaye 2010, p. 315–316, 350. See also Härkönen 2018a, p. 919. The author's right approach to copyright law sets the author before all else. The interests of the public are not prioritised. In contrast, the utilitarian approach sees it necessary to protect authors only to the extent that they are kept content and productive, so that the society is able to enjoy the fruits of their creativity. Rewarding an author with copyright is therefore not the goal, but only the means to further productivity (Baldwin 2014, p. 16).
187 See e.g. Baldwin 2014, p. 15, Härkönen 2018a, p. 919 and Mylly 2016, p. 928.

Remarkable differences have existed not only between common law and civil law countries, but also between different civil law countries.[188] EU Member States have demonstrated rather diverse perspectives when it comes to whether works of applied art and industrial designs can be protected by copyright and, if so, to what extent.[189] Most Member States and some other European countries are burdened with a copyright tradition that includes a rigorous separation of the fields of pure art and of applied art.[190] One of the reasons behind the different approaches of various countries' legislators to including applied art in the scope of copyright protection arises from cultural identity: fashion and design industries have played a more remarkable role in some Member States than others. Consequently, these countries' legislators have arguably been under greater pressure to protect these fields of creativity.[191]

The Nordic countries – Finland, Sweden, Norway and Denmark – have fairly similar legal landscapes in terms of copyright, as well as design law. This is due to a history of cooperation in related legal reforms.[192] Schovsbo and Rosenmeier describe how courts in Sweden, Norway and Denmark have, throughout history, applied several strategies to limit the copyright protection of works of applied art.[193] These strategies are very similar to those seen in the Finnish copyright tradition.[194] One of the strategies has been to demand a higher threshold of originality from works with clear functional intentions;[195] similarly, in Finland, the 'copyright threshold'

188 Derclaye 2010, p. 315, Härkönen 2018a, p. 919 and Härkönen 2020a, p. 16.

189 Härkönen 2020a, p. 2–3, Derclaye 2017, p. 629, Church, Derclaye & Stupfler 2019, p. 696, Kur 2014, p. 180, 185, Inguanez 2020, p. 798–799, Mylly 2016, p. 913 and Dahlén 2012, p. 98–102. See also Bently 2012.

190 See e.g. Finniss 1964, p. 628, Härkönen 2020a, p. 1–2, Schovsbo & Rosenmeier 2018, p. 125 and Schovsbo & Riis 2017, p. 95.

191 Härkönen 2018a, p. 921. See also Schovsbo & Rosenmeier 2018, p. 121 about the connection between the Danish cultural identity and IP protection of applied art, and Schovsbo & Teilmann-Lock 2016, p. 420, 423 on the connection between Scandinavian designers gaining international reputation in the mid-20th century and Nordic legislators' intentions at the time. See also Teilmann-Lock 2016, p. 127, where it is pointed out that Denmark as a leading design nation had a good reason to protect the intellectual property of Danish designers. On Sweden, see Dahlén 2012, p. 96–98. On the situation in France, see Kahn 2018 and Derclaye 2010, p. 318–321. On Italy, see Derclaye 2010, p. 321–327. See also Church, Derclaye & Stupfler 2019: Italians are eager to enforce the design rights of fashion designs. This is unsurprising, as fashion forms a major part of Italy's economy (ibid., p. 697–698). On the United Kingdom, see Bently 2012, 2018 and Derclaye 2010, p. 327–331. In the UK, handmade garments have been better protected than mass-manufactured garments (ibid., p. 329), whereas in Germany, the mode of manufacture has no influence (Kur 2014, p. 183). For more on the German approach, see ibid., p. 180–185.

192 Schovsbo & Rosenmeier 2018, p. 109. Schovsbo and Rosenmeier provide a more detailed description of this cooperation. See also Schovsbo & Teilmann-Lock 2016, p. 419–422.

193 Schovsbo & Rosenmeier 2018, p. 125. See also Schovsbo & Teilmann-Lock 2016, p. 429.

194 See Härkönen 2018a and 2020a.

195 Schovsbo & Rosenmeier 2018, p. 125. Schovsbo and Rosenmeier describe how raising the threshold of originality has been seen, especially in Norway and Sweden, whereas Denmark has had a different approach. Danish courts have combined a 'low' (non-discriminatory) threshold of originality with a narrow scope of protection. (Ibid.). On the Danish approach, see also Schovsbo & Teilmann-Lock 2016, p. 430, 433–436.

(*teoskynnys*) for works of applied art has intentionally been set higher than that of works of pure art.[196] Narrowing the scope of protection has been another Nordic strategy.[197]

It is fair to say that works of applied art have been discriminated against, especially when it comes to fashion designs.[198] Overall, works of applied art have historically faced – and still face – multiple challenges when aiming for copyright protection.[199] The aforementioned Nordic strategy of deliberately setting a higher threshold of originality for works of applied art than for pure art is a typical example.[200] Products of applied art have not always been considered worthy of copyright protection, being seen as examples of 'second-rate creativity',[201] or as 'craft' as opposed to 'real art'.[202] Interestingly, the feature in copyright law of favouring pure art at the expense of applied art is reminiscent of art history's tendency to preserve the elitist distinction between *high art* and *popular art*, where fashion belongs to the latter category.[203]

Recently, the legal traditions and national laws concerning copyright protection of works of applied art of many Member States (including the Nordic countries) have been challenged by EU copyright law development and harmonisation of the interface between copyright and design right. With recent CJEU judgements, distinguishing between works of pure art and works of applied art is less significant than ever before. These copyright law developments through CJEU case law will be explained later in this Subsection.

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196 Härkönen 2018a, esp. p. 910, 912–915, Härkönen 2020a, p. 3–4 and Pitkänen 2016, p. 89.

197 On Sweden, Norway and Denmark, see Schovsbo & Rosenmeier 2018, p. 121, 125. On Finland, see Härkönen 2018a, p. 916–917, 919–920. See also Pitkänen 2016, p. 294.

198 Härkönen 2018a, p. 918 and Härkönen 2020a, p. 1–5. See also Schovsbo & Rosenmeier 2018, p. 126.

199 Härkönen 2018a, p. 918, Härkönen 2020a, p. 1–5, Schovsbo & Rosenmeier 2018, p. 126 and Teilmann-Lock 2016, p. 130.

200 Härkönen 2020a, p. 1–3, 14–15. See also Kur 2014, p. 183. It must be noted, however, that the level of the originality threshold is not always defined by copyright *law* itself but in the copyright tradition and case law (see e.g. Härkönen 2020a, p. 3). For example, in the Finnish copyright tradition, the threshold of originality for works of applied art has been remarkably high (ibid., p. 3, 14–15). Moreover, even the tiniest differences in the alleged infringing work have led to the conclusion of no infringement (Härkönen 2018a, p. 919–920). Hence, products of applied art have had difficulties both in being considered as original works *and* in getting protection against copying. The way Finland has treated works of applied art is a good example of discrimination by copyright law.

201 See esp. Härkönen 2020a, p. 1–5. See also Tehranian 2012, p. 1275–1277: the copyright system tends to make an elitist distinction between 'sophisticated' cultural production and 'unsophisticated' creativity, where the former enjoys the benefits of copyright protection while the latter is left out of its scope. Despite considering the fashion industry to be rather well protected, Tehranian argues that copyright law discriminates between different works and creators.

202 Teilmann-Lock 2016, p. 130. See also Monseau 2011, p. 32.

203 Wilson 2003, p. 48. Wilson furthermore notes that fashion has had an inferior status among fields of art (ibid, p. 270, 277).

Unity of art doctrine

The theory of the unity of art (*l'unité de l'art*) refuses to make the aforementioned distinction between pure art and applied art. It considers all fields of creativity equally worthy of copyright protection.[204] A work is protected whatever its purpose, regardless of whether it is purely aesthetic or utilitarian, and the requirements for protection are the same.[205] The roots of the unity of art theory lie in France,[206] where the principle of non-discrimination was also a political choice.[207] This is unsurprising, since France is also famous for its rich fashion culture, *haute couture* houses, fashion artisans with transcendent garment construction skills, and an overall passionate relationship with fashion as both a phenomenon and an industry.[208] Thus, the French arguably have the kind of cultural identity that causes a legitimate interest in protecting the fashion industry.

The unity of art approach to copyright law can be viewed as beneficial for fashion, since it allows fashion designs to qualify as protected subject matter under the same conditions as other works. As it is explained below, the unity of art approach to copyrightability of different categories of works arguably is the optimal copyright environment for fashion.

Main legislative framework

The international 'constitution' of copyright law, the Berne Convention for the Protection of Literary and Artistic Works, in principle allows its member states' copyright laws to discriminate against works of applied art.[209] This has created grounds to withhold copyright protection from fashion designs. According to Article 2(7) of Berne, 'Subject to the provisions of Article 7(4)[210] of this Convention [photographic works and works of applied art], it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected.' European Union

204 Finniss 1964, p. 615.

205 Bouche 2011, p. 66.

206 Kahn 2018, p. 8 and Bouche 2011, p. 66.

207 Kahn 2018, p. 8, 17.

208 Farnault 2014, p. 15. Regarding France's history of attempts to protect fashion creations, see Kahn 2018, esp. p. 15.

209 Härkönen 2020a, p. 8. However, *some* level of protection must be offered, such as design protection. Members of Berne are allowed to choose how copyright and design law protect works of applied art: copyright law only, design law only, or both (Derclaye 2017, p. 628). See also Ricketson & Suthersanen 2012, p. 162–163 and Bently 2012, p. 663.

210 Berne Convention Article 7(4): 'It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.'

Member States, however, do not enjoy the freedom provided by Berne when it comes to applying copyright protection to works of applied art.[211] Simply put, Member States must apply copyright law to works of applied art under the same conditions as any other works. This is due to the InfoSoc Directive and, in particular, its interpretation by the CJEU.

In the European Union, the InfoSoc Directive harmonised perhaps the most important exclusive rights granted to authors for all categories of works. The directive requires, inter alia, that Member States ensure that authors have the exclusive right to authorise or prohibit reproduction of their works (Article 2(a)), the exclusive right to authorise or prohibit the communication of their works to the public (Article 3(1)), and the exclusive right to authorise or prohibit distribution of their works (Article 4(1)). Several CJEU judgements that are relevant to the issue at the heart of this thesis are about the interpretation of these Articles, particularly Article 2(a).[212] Unlike Berne, the InfoSoc Directive does not refer to 'works of applied art', merely to 'works'. The absence of distinction between pure art and applied art permits Member States to consider works of applied art to belong within the scope of subject matter protected by the directive under the same conditions as pure art.

'Work' and 'originality' in CJEU case law

Although the InfoSoc Directive requires Member States to grant authors various exclusive rights to their works, it does not define the concept of *work*,[213] therefore not directly specifying whether a fashion design can be considered a 'work' in copyright terms. The CJEU has held that, because EU law provisions make no express reference to the law of the Member States for the purpose of determining the meaning and scope of the concept of work, this concept must be given an autonomous and uniform interpretation throughout the EU.[214]

According to well-established CJEU case law, subject matter is entitled to copyright protection when it is *original* in the sense that it is its author's own intellectual creation.[215] Moreover, subject matter is entitled to copyright protection *only* if that is true.[216] Hence, 'originality' is another key concept when it comes to protection of fashion designs.[217] In essence, in the EU law context, the question of whether a fashion design can be considered a work protected by copyright pivots on the question of originality.

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211 Härkönen 2020a, p. 8–11. See also Ricketson & Suthersanen 2012, p. 177.

212 E.g. C-683/17 *Cofemel* and C-5/08 *Infopaq*.

213 See also Härkönen 2020a, p. 9 and Rosati 2019a, p. 91–92.

214 See C-5/08 *Infopaq*, para. 27, C-683/17 *Cofemel*, para. 29 and Härkönen 2020a, p. 9.

215 See C-5/08 *Infopaq*, para. 37.

216 C-310/17 *Levola Hengelo BV v Smilde Foods BV,* EU:C:2018:899, para. 37, C-5/08 *Infopaq*, para. 39 and C-683/17 *Cofemel*, para. 29.

217 Härkönen 2020a, p. 9 and Härkönen 2018a, p. 917–918.

In its case law, the CJEU has clarified that a work is a subject matter that is expressed in a manner which makes it 'identifiable with sufficient precision and objectivity'.[218] This should not usually be a problem for fashion designs.[219] The appearance of a fashion design is the same, regardless of the person looking at it.[220] In practice, this means that when a fashion design can be identified, the only condition for copyright protection is originality. There is no distinction between different fields of art, nor between pure art and applied art.[221]

Like the concept of work, 'originality' is an autonomous concept of EU law. According to well-established CJEU case law, a work is original if it is its '*author's own intellectual creation*', as defined in the *Infopaq* judgement from 2009. In *Infopaq,* the Court ruled that copyright within the meaning of Article 2(a) of the InfoSoc Directive is liable to apply only in relation to a subject matter which is original in the sense that it is its author's own intellectual creation.[222] In *Painer*[223] (2011) the CJEU considered that an intellectual creation is an author's own if it reflects the author's personality. That is the case if the author has been able to express their creative abilities in the production of the work by making free and creative choices.[224] In *Painer* the Court also held that extent of copyright protection does not depend on possible differences in the degree of creative freedom in the production of various categories of works.[225] In both *Infopaq* and *Painer*, the Court noted that the protection conferred by Article 2 must be given a broad interpretation.[226] It is important to understand that the EU standard of originality is the same for all types of works.[227] Derclaye insightfully pointed out, already in 2010, that the higher threshold of originality for works of applied art used in some Member States

218 C-683/17 *Cofemel*, para. 32 and C-310/17 *Levola Hengelo*, para. 40. See also Härkönen 2020a, p. 10 and Schovsbo & Riis 2017, p. 96.

219 What also follows from the criteria of 'identifiable with sufficient precision and objectivity' is that, unlike fashion designs, *fashion* itself cannot be regarded as a work, considering that fashion is a phenomenon and not something tangible (as described in Subsection 1.1 of this Summary). See C-310/17 *Levola Hengelo*, para. 41.

220 As opposed to e.g. the taste of a food product, which cannot be pinned down with precision and objectivity (see C-310/17 *Levola Hengelo*, para. 42). On identifying a work, see also Rosati 2019a, p. 92.

221 Härkönen 2020a, p. 10. See also Schovsbo 2020 and Schovsbo & Riis 2017, p. 96–97. On the concept of 'work', see also Rosati 2019a, p. 91–93.

222 C-5/08 *Infopaq*, para. 37. On *Infopaq* and the 'author's own intellectual creation', see also Rosati 2019a, p. 90 and Rosati 2013, p. 98, 102–111.

223 C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH et al*., ECLI:EU:C:2011:798.

224 C-145/10 *Painer*, para. 88–89. See also Rosati 2019a, p. 90.

225 C-145/10 *Painer*, para. 97.

226 C-5/08 *Infopaq*, para. 43 and C-145/10 *Painer*, para. 96.

227 See Rosati 2019a, p. 87 and Rosati 2013, p. 122–125.

is not in line with CJEU case law and particularly with the *Infopaq* judgement.[228] Derclaye was right, and after the CJEU judgement *Cofemel*, handed down in 2019, this should be unambiguous.[229]

Cofemel can be described as a landmark judgement when it comes to fashion designs and other products of applied art being eligible for copyright protection.[230] The case concerned T-shirts and jeans manufactured by G-Star Raw, which were copied by a rival company, Cofemel. The dispute between the parties reached the Portuguese Supreme Court, which then referred to CJEU for a preliminary ruling. The request concerned the interpretation of Article 2(a) of the InfoSoc Directive and whether it forms an obstacle to Portuguese national copyright law, which sets a different criterion for protection of works of applied art and industrial designs compared to works of pure art.[231] Portuguese national law required, inter alia, that in order for works of applied art to be protected by copyright, they had to create their own visual and distinctive effect from an aesthetic point of view, in addition to their practical purpose.[232] In *Cofemel*, the CJEU held that if a design falls within the scope of the InfoSoc Directive, the only requirements for copyright protection are that (i) there is an original subject matter, in the sense of being the author's own intellectual creation, and (ii) the subject matter is identifiable with sufficient precision and objectivity.[233] Copyright protection for works of applied art can therefore no longer be subject to an originality threshold other than that of the *Infopaq* standard.[234] The practical significance of *Cofemel* is that Member States are not allowed to distinguish between pure art and applied art in their national copyright laws.[235] For fashion designers and companies that value creativity and produce innovative designs, this ought to be great news. It follows from *Cofemel*

228 Derclaye 2010, p. 348. For a contradicting view, see Bently 2012, esp. p. 654, 660–672. See also Kur 2014, p. 190: in 2014, Kur argued that instead of expanding the protection granted under the relevant IP laws, it should be accepted that if a fashion design is not registered as a design, after three years (the maximum term of protection for unregistered designs according to CDR Article 11(1)), even plain imitation of the fashion design is allowed, 'as long as the different commercial sources are clearly indicated, and provided that no actual consumer confusion is likely to occur'.

229 Härkönen 2020a, p. 10.

230 *Cofemel* is extensively analysed in Article II.

231 See the exact questions: C-17/683 *Cofemel*, para. 25. See also Härkönen 2020a, p. 8.

232 C-17/683 *Cofemel*, para. 25.

233 C-17/683 *Cofemel*, para. 29–32, 48. See also Härkönen 2020a, p. 10 and Rosati 2019b, p. 91 Kur 2019, p. 4, Schovsbo 2020 and Derclaye 2019.

234 See Rosati 2020.

235 Härkönen 2020a, p. 10. See also Kur 2019, p. 14 and Härkönen 2018a, p. 922. Already in 2017, Schovsbo and Riis suggested that Scandinavian countries would have a hard time adapting their copyright traditions regarding protection of works of applied art to the new copyright environment generated by CJEU judgements (Schovsbo & Riis 2017, p. 107). Regarding the low threshold of originality, see also van Gompel 2014, p. 99–100 and Schovsbo & Riis 2017, p. 106–107.

that the conditions for granting copyright protection for works of applied art must be uniformly interpreted throughout the EU.[236]

Harmonisation of the interface between copyright and design law

A further result of *Cofemel* is that the interface between copyright law and design law requires uniform interpretation throughout the EU.[237] Prior to *Cofemel*, there was some confusion about whether Member States were allowed to maintain differentiating approaches to copyright protection of works of applied art.[238] Similar to Berne Convention Article 2(7), Article 17 of the Design Directive and Article 96(2) of the Design Regulation reserve Member States control over the extent to which and the conditions under which designs are subject to copyright protection, including the level of originality required. In its 2011 *Flos* judgement,[239] the CJEU narrowed this freedom by stating that copyright protection for designs could arise under the InfoSoc Directive, if the conditions for that directive's application are met.[240] EU law appeared to prohibit Member States from denying copyright protection to designs that meet the requirements for it. This caused some confusion, since *Flos* seemed in effect to overrule provisions from EU design legislation.[241] For a few years after *Flos*, it was unclear whether Member States had the right to have national copyright laws treating works of applied art differently than works of pure art, and whether the standard of originality established in *Infopaq* and subsequent judgements also applied to works of applied art.[242] Ultimately, *Cofemel* resolved the issue by confirming that Member States no longer have the freedom to maintain differentiating approaches on copyright protection of works of applied art. *Cofemel* also clarified that there is no conflict between CJEU case law and design legislation. The preambles of DD and CDR refer to the absence of harmonisation of copyright law. This indicates that the solutions adopted in Article 17 of DD and Article 96(2) of CDR were intended to be provisional, pending the harmonisation of copyright.[243] Since adoption of DD and CDR, harmonisation has been achieved.[244]

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236 Kur 2019, p. 5. According to Kur, in *Cofemel*, CJEU pushes harmonisation further than arguably intended by the historical lawmaker (ibid., p. 6).

237 Kur 2019, p. 5.

238 Härkönen 2020a, p. 9. See also Kur 2019, p. 2.

239 C-168/09 *Flos SpA v Semeraro Casa e Famiglia SpA*, ECLI:EU:C:2011:29.

240 C-168/09 *Flos*, para. 34.

241 Bently 2012, esp. p. 654, 660. See also Schovsbo & Teilmann-Lock 2016, p. 435.

242 Schovsbo & Teilmann-Lock 2016, p. 435. See also Rosati 2019a, p. 88–89.

243 Opinion of AG Szpunar in C-683/17 *Cofemel*, para. 33, 37. For a dissenting view, see Kur 2019, p. 4, 14: Kur expresses doubts that the reasoning is fully convincing, considering that the InfoSoc Directive came into force several months earlier than CDR. Further, Kur notes that Article 17 of DD was 'meant to express the European legislature's respect for the diversity of deep-rooted attitudes developed in the Member States in one of the most sensitive issues of copyright law'.

244 Härkönen 2020a, p. 10–11.

Effect of functionality on protection

Copyright has typically treated functionally dictated elements with caution.[245] However, it follows from recent CJEU case law that the fact that garments and accessories typically have functional features is no obstacle to copyright protection per se.[246] In the light of the CJEU judgement *Brompton*[247] (2020), it appears that the mere existence of functionality in fashion designs actually plays a more minor role in terms of copyright protection than one might expect. Functionality might even dictate the creative process to some extent without becoming an obstacle to copyright protection.[248] What matters is whether the designer has, regardless of technical considerations, reflected their personality in the design.[249] In other words, originality and functionality can coexist. The interface between originality and functionality is, however, a delicate issue that requires subtle phrasing to avoid misunderstandings concerning the 'idea versus expression' dichotomy. Copyright protects expressions, but not ideas.[250] The CJEU seems to have acknowledged the sensitive nature of the issue and the danger of misunderstandings related to copyright protection of functional items, as it highlights that the criterion of originality cannot be met by the components of a subject matter which are differentiated *only* by their technical function.[251] In these cases, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and its expression become indissociable.[252] In *Brompton,* the CJEU held that copyright protection indeed applies 'to a product whose shape is, at least in part, necessary to obtain a technical result, where that product is an original work resulting from intellectual creation, in that, through that shape, its author expresses his creative ability in an original manner by making free and creative choices in such a way that

245 Härkönen 2020a, p. 14. See also Inguanez 2020, p. 810–812.

246 Härkönen 2020a, p. 11. For a contradicting view on the effects of functionality on originality in works of applied art, see van Gompel 2014, p. 119–121. See also Kur 2014, p. 182. For dissenting voices from the American perspective, see Buccafusco & Fromer 2017 and Kaminski & Rub 2017, p. 1131–1141.

247 C-833/18 *Brompton*.

248 As a consequence of *Brompton*, it is necessary slightly specify an argument made in Articles II and III (see Härkönen 2020a, p. 14 and Härkönen 2020b, p. 168), which were written and published prior to *Brompton.* Articles II and III argue that if the functional purpose of a work dictates the creative process, the work could not be considered original. This should be clarified with the addition that if technical considerations have not *prevented* the author from reflecting their personality in the work through free and creative choices, the work may satisfy the condition of originality.

249 See C-833/18 *Brompton*, para. 26.

250 See C-406/10 *SAS Institute Inc. v World Programming Ltd*, ECLI:EU:C:2012:259, para. 33, TRIPS Article 9(2) and WIPO Copyright Treaty, Article 2. Neither does copyright protect procedures, methods of operation or mathematical concepts, as such.

251 C-833/18 *Brompton*, para. 27.

252 C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury*, ECLI:EU:C:2010:816, para. 49.

that shape reflects his personality'.[253] It follows from *Brompton* that if considerations regarding functionality affect a fashion designer's creative process, even to the extent that they dictate it at some level, this does not necessarily exclude the design from the scope of copyright protection, if the designer has managed to make free and creative choices and hence reflected their personality in the design.[254] Thus, a fashion design can be protected by copyright even in cases where the designer is facing limitations caused by factors such as how to execute certain style, or how a person should be able to wear the garment while moving around and performing other activities.[255]

The possibility to protect functional elements means that copyright protection may apply to certain fashion designs (or features of theirs) that are excluded from the scope of design or trademark protection. Design protection does not cover features of appearance of a product which are solely dictated by its technical function; this applies to both registered and unregistered designs.[256] A similar restriction can be found in trademark law. A shape or another characteristic of goods, which is necessary to obtain a technical result, shall not be registered as a trademark.[257] If such a trademark is registered, it is liable to be declared invalid.[258] Due to these limitations regarding protection of functional elements, some fashion designs or their features might be excluded from the scope of design or trademark protection, but copyright protection would still remain an option.[259] These considerations highlight how copyright can fill a certain gap that design and trademark protection leave when it comes protection of fashion designs.

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253 C-833/18 *Brompton*, para. 38 and operative part. See also Inguanez 2020, p. 807–808, 813–815 for analysis on *Brompton* and its consequences. See also van Gompel 2014, describing Dutch case law that already prior to *Brompton*, in 2013, held that copyright may extend to technical or functional design if the author had sufficient room for making creative choices. Van Gompel, however, does not necessarily find these Dutch cases satisfactory from a doctrinal viewpoint (ibid., p. 120).

254 See also Kur 2019: Kur interprets the Opinion of AG Szpunar in *Cofemel* (para. 60) as establishing a rule according to which 'the closer an item corresponds in its appearance to the prototypical form of the genus (here: jeans and a t-shirt), the less does it appear to rely on creative choices.' However, Kur notes that this kind of a rule would be problematic, since it would re-establish different standards vis-à-vis other work categories (Kur 2019, p. 8). See also ibid., p. 19.

255 Härkönen 2020a, p. 11, 14. See also C-145/10 *Painer*, para. 97: the extent of copyright protection does not depend on possible differences in the degree of creative freedom in the production of various categories of works. For comparison, see Design Directive Article 5(2) and Design Regulation Article 6(2): in assessing individual character (which is a requirement for protection), the degree of freedom of the designer in developing the design shall be taken into consideration. See also Kahn 2018, p. 22.

256 Design Directive Article 7 and Design Regulation Article 8. On the meaning of 'features of appearance of a product solely dictated by its technical function', see C-395/16 *DOCERAM GmbH v CeramTec GmbH*, ECLI:EU:C:2018:172 and its analysis by Derclaye (2020, p. 3–7) and Endrich (2019).

257 Trademark Regulation Article 7(1)(e)(ii) and Trademark Directive Article 4(1)(e)(ii).

258 Trademark Directive Article 4(1)(e)(ii).

259 See also Derclaye 2020, p. 11.

Importantly, however, functionality in copyright terms is not the same as functionality in design law terms.[260] The fact that copyright and design law have different justifications and objectives supports a view that the exclusion of technical elements from the scope of protection should not be identically applied in copyright and in design law.[261] In design law, the legislator's reluctance to protect features of appearance that are solely dictated by their technical function has been justified on the grounds that such protection could potentially hamper technological innovation.[262] Does this risk also apply to copyright protection? The CJEU has acknowledged the possibility of copyright protection impeding technical progress and industrial development.[263] Hindering technological innovation, however, is generally not a concern when it comes to fashion. Unlike the world of technology, where rapid innovation produces improvements, innovation in fashion just produces arbitrary stylistic changes. In other words, fashion does not *improve*: it only changes.[264]

Concluding remarks on recent CJEU case law

It is fair to say that following the recent CJEU decisions in *Cofemel* and *Brompton*, European Union copyright law finally unambiguously treats applied art largely the same as other subject matters protected by copyright.[265] It seems that the French unity of art philosophy has now reached the whole of the EU, at least in principle.[266] Thus, it is high time for Member States to let go of the nineteenth-century notion of art divorced from function.[267] Industrial art, applied art, mercenary art, useful articles – all the creative fields that might not fit into the traditional concept and conservative understanding of 'art' are equally worthy of

260 Inguanez points out that these different criteria are often confused with each other. In design law, the phrase 'technical considerations' means considerations as to 'the need for that product to fulfil its technical function', whereas in copyright law they mean considerations, rules or constraints which themselves are of technical in nature. They do not mean considerations of the technical function or result that the subject matter is to perform (Inguanez 2020, p. 810–812).

261 Inguanez 2020, p. 806. See also Opinion of the European Copyright Society in relation to the pending reference before the CJEU in *Brompton Bicycle v Chedech / Get2Get,* C-833/18, 2019, para. 5–7.

262 Design Directive Recital 14 and Design Regulation Recital 10. See also Endrich 2019, p. 161, 165. A similar justification lies behind trademark protection excluding signs which are dictated by the need for a technical result (see Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-53/01 to C-55/01 *Linde AG, Winward Industries Inc. and Rado Uhren AG*, ECLI:EU:C:2002:614, para. 29).

263 C-833/18 *Brompton*, para. 27 and C-406/10 *SAS*, para. 33, 40.

264 Cline 2013, p. 111. See also Raustiala & Sprigman 2012, p. 43–44.

265 Härkönen 2020a, p. 15–16 and Härkönen 2018a, p. 921–922.

266 Härkönen 2020a, p. 16, Härkönen 2018a, p. 921 and Schovsbo & Rosenmeier 2018, p. 126–127. Already in the 1960s, Finniss predicted that the rest of the Europe (United Kingdom excepted) would adopt the French perspective on protection of applied art (Finniss 1964, p. 628–629). Levin, however, does not see the unity of art as a consequence of *Cofemel* (Levin 2021).

267 Suthersanen 2011, p. 22.

copyright protection. For some Member States, the recent developments in CJEU case law mean significant changes to their copyright tradition.[268] Note, however, that the end of discrimination of works of applied art in the copyright regime does not automatically mean that *all* fashion designs – even the most successful, praised creations – will receive copyright protection in the EU. As Schovsbo insightfully states, '"originality" is a legal criterion to be applied by judges and [...] copyright is not a prize awarded to good design, but a legal monopoly to be parcelled out only with care and restraint'.[269]

Values and incentives

If the values that we want to protect are *creativity, culture* and *sustainable development*, strong protection of designs is arguably the optimal copyright environment for the fashion industry.[270] In general, the EU legislature has considered that a high level of IP protection fosters creativity and innovation.[271] An adequate level of protection has also been recognised as important from a cultural standpoint.[272] A high level of protection hence ought to apply to fashion as a creative field, as well. The unity of art approach to copyright law is clearly in line with the aim to foster these values. Because the theory of unity of art sees all forms of art as equally worthy of protection, it promotes cultural diversity in copyright law. Bringing diversity to copyright law by removing internalised structures that discriminate between forms of art can therefore be viewed as an act that promotes cultural sustainability. Of the elements of sustainability, especially cultural sustainability is difficult to foster by means of IP rights other than copyright. Because copyright law aims to protect cultural creativity, the copyright system is better suited for fostering the elements of cultural sustainability, such as cultural diversity and heritage protection. In addition to cultural sustainability, the unity of art approach to copyright law also promotes environmentally and socially

268 Härkönen 2020a, esp. p. 1, 5 and 10. See also van Gompel 2014, p. 119. When it comes to the discriminating features of the Finnish copyright law tradition, see Härkönen 2020a p. 2–5, 11–15. See also Härkönen 2018a, p. 909–912, Schovsbo 2020, Rosati 2020 and Derclaye 2010, p. 348.

269 Schovsbo 2020. See also Raustiala & Sprigman 2009, p. 1219: '-- the relevant meaning of "copy" is that of a judge interpreting copyright law, not a fashion designer operating within her very different world.'

270 For another interesting perspective, see Qian 2015, p. 74: Qian suggests that the optimal IPR protection level for (luxury) fashion varies from country to country, sector to sector, brand to brand and even product to product. See also Landers, 2014, p. 507–508: Landers suggests that fashion designs should be offered limited protection, a narrow sui generis right. Hemphill & Suk (2009) also support an industry-specific narrow right that would protect original fashion designs against close copying (ibid. p. 1184–1185).

271 InfoSoc Directive Recitals 4, 9. See also Term Directive Recital 11: a high level of protection of exclusive rights is justified on the grounds that protection 'ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole'.

272 InfoSoc Directive Recital 11.

sustainable development of the fashion industry in a way that is further explained in Subsection 4.2 and Section 5.[273]

Even though unity of art is about equality of work categories, it also indirectly leads to fairness between authors from different creative fields.[274] It would be difficult to justify a copyright environment where, to paraphrase George Orwell, 'All authors are equal, but some authors are more equal than others', if all of these authors create works which are their own intellectual creations that reflect their personality. There is no reason why the creative output of, say, a sculptor should be worthier of protection than that of a fashion designer.[275] This research does, however, acknowledge that the romantic notion of an individual fashion designer as a creative genius is to some extent mythical. Fashion is not usually created by a single individual but by teams of experts and is therefore a collective activity. Regardless, the fashion world likes to keep alive the illusion of the creative genius and foster a 'star culture'.[276] Coincidentally, a similar, romantic myth of creative genius is at the heart of the copyright tradition in civil law countries that follow the author's rights tradition, which is closely linked to the natural law justification of copyright protection.[277] However, whether there is an individual creative genius or a designer team behind a fashion design should hardly affect the design's status as copyright-protected subject matter. A jointly authored

273 My reasoning for favouring the principle of unity of art and strong protection of fashion designs has changed since my initial study on fashion and IP. In my LL.M. thesis (Härkönen 2013), I was against the Piracy Paradox described in Subsection 3.1.1 herein. Much like Hemphill & Suk (2009, p. 1183), I believed that copying overheats the trend circulation to the extent that consumers get tired of it and start buying *fewer* clothes. My 2013 analysis failed to consider the sustainability perspective or the fact that a decrease in fashion consumption might be desirable. Instead, it was rather uncritical of the contemporary fashion industry and almost took its perpetual growth (when it comes to manufacturing new garments) for granted (Härkönen 2013, p. 68, 70, 72–73).

274 Provided that these authors and their creative process somewhat match the idea of authorship within the civil law copyright tradition. In other words, unity of art does not really improve the position of creators in e.g. cultural appropriation cases. See Section 5.

275 Härkönen 2020a, p. 16. There has also been some discussion as to whether fashion designers even want their creativity to be protected by copyright law (see e.g. Raustiala & Sprigman 2009, p. 1222–1224). Some designers publicly claim to be flattered by copying of their creative output, often simultaneously to their own legal teams taking all available actions against copyists (Scafidi 2006, p. 124 and Hemphill & Suk 2014, p. 178). Even if some fashion designers genuinely do not wish to enjoy the benefits of copyright protection, there are undoubtedly others who do. It would be unjustifiable to deny the latter group protection merely due to the former group's disregard for it. Keep in mind also that no one forces rightholders to enforce their copyright if they sincerely do not mind being infringed upon.

276 Kawamura 2018, p. 2, 55, 63, 69. The fashion industry contributes to maintaining the illusion of the fashion designer as a creative genius because it is commercially beneficial. The 'star culture' elevates particular products and helps to build the identities of culture-producing organisations, which is how stars in fashion become brand names (ibid., p. 63). However, the existence of the 'star culture' does not preclude creative individuals or 'geniuses' from existing outside of it: those who work without the support of an established global fashion brand face multiple difficulties in the contemporary fashion industry (see e.g. Cline 2013, p. 113–115).

277 Härkönen 2020a, p. 16 and Mylly 2016, p. 16. However, see Lavik 2014, p. 45, 47–48.

work enjoys equal protection as one created by a sole author, and if a designer team collectively creates an original fashion design, the team members who contribute enough to the creative process will share the copyright.[278]

Accepting fashion designs as subject matter protected by copyright has a certain creativity-incentivising advantage that design right and trademark law lack completely: *moral rights*. Moral rights are independent of the author's economic rights and include the author's right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to the author's honour or reputation.[279] Especially authors of designs that include a very high level of creativity would arguably benefit from moral rights. Moral rights could incentivise e.g. *haute couture* designers or any other designers who truly have the opportunity and desire to make free and creative choices in their work to be even more creative – to utilise their vision, talent and skills to their full potential.[280]

Effects of protection on accessibility of trends

Setting a high originality threshold for works of applied art has occasionally been rationalised on the basis that copyright protection might hinder competition on the market.[281] The assumption that copyright protection of applied art would restrict competition and create monopolies is not as correct as one might think. Even if it is accepted that strong protection is the preferred copyright environment for fashion, it must be noted that it will not lead to fashion designers or fashion houses acquiring exclusive rights to specific styles or trends.[282] It is a distinctive feature of

278 However, see van Gompel 2014: the standard of originality (as defined in the *Infopaq* and *Painer* judgements) might not always apply in cases of joint authorship. An author being able to make 'free and creative choices' implies that the autonomy of the individual creator is a key factor. However, a co-author might not be able to make these choices if a work results from a complex collaborative process. According to van Gompel, the CJEU's originality test de facto implies a higher threshold for joint works than for single-authored works (ibid., p. 97, 138). On joint authorship and its potential problems, see also Bently & Biron 2014.

279 See Berne Convention Article *6bis*. Moral rights remain outside of the scope of the InfoSoc Directive. In the EU, moral rights of fashion designers should be exercised according to the legislation of the Member States and the provisions of the Berne Convention (see InfoSoc Directive Recital 19).

280 Regarding moral rights and copyright ownership in fashion, see also Subsection 4.2 of this Summary. See also Härkönen 2018a, p. 919.

281 See Härkönen 2018a, p. 910, Härkönen 2020a, p. 4 and Opinion of AG Szpunar in C-683/17 *Cofemel*, para. 52–52. See also Derclaye 2020, p. 8, 9, 12, 15 and Kur 2019, p. 12. What also needs to be noted is that not all works of applied art are of a commercial nature: some *haute couture* creations, for example, are fashion designs not intended for mass-production, but made as unique creations. Especially in these cases it is very problematic to withhold copyright protection based on potential hampering of competition (Härkönen 2020a, p. 12).

282 Härkönen 2018a, p. 919. See also van Gompel 2014: '--style, trends and fashion are not copyrightable, but that protection may extend to the author's own individual way of expressing a design in a particular style, trend or fashion' (ibid., p. 122). See also Kahn 2018, p. 23, 26.

fashion that different designers simultaneously introduce collections that include similar-looking (but not necessarily identical) apparel and accessories that reflect a certain style, because they all participate in the same trend.[283] Moreover, there are certain forms of 'copying' that are acceptable and not infringing, such as allusion and quotation.[284] Drawing a line between inspiration and infringement might be very hard to determine, for example in terms of whether a fashion design is merely taking part in the same trend as the source of its inspiration, or is it a copy of the source, thereby infringing on the copyright of its author.[285]

Akin to considerations regarding the effect of functionality on copyright protection, this problematization concerning exclusive rights to trends is linked to the 'idea versus expression' dichotomy in copyright law.[286] Creating monopolies for *ideas* would be problematic from the perspective of competition.[287] Trends assimilate to ideas, whereas fashion designs are expressions of ideas. For trends to be the subject of exclusivity, copyright would in principle need to expand protection to cover ideas.[288] There is little indication of such an expansion taking place: it is nowhere to be seen in the development of EU copyright law. In *Brompton*, for instance, the CJEU notes that protecting ideas by copyright would amount to making it possible to monopolise ideas, which would hinder technical progress and industrial development.[289] Only original expressions of ideas are within the scope of protection, not the ideas themselves.[290] Moreover, it would be unlikely that a trend could be identified with sufficient precision and objectivity. Therefore, a trend would not fulfil the requirement set by the CJEU in *Cofemel* and *Levola Hengelo*.[291]

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283 Härkönen 2020b, p. 167 and Härkönen 2018a, p. 908.

284 Groom 2010, p. 271, 273. See also Drassinower 2015: the wrongfulness of copying is a socio-historical construct and hence, there is nothing inherently wrong with it (ibid., p. 2). See also Shone 2002, p. 353 and Durant 2010, p. 149–150.

285 Härkönen 2020b, p. 167–168. When discussing designers participating in trends, it is necessary to refine a certain notion made in Article I, which suggests that to secure the function of trends, it would not be sensible to set the threshold of originality for fashion designs 'too low' (Härkönen 2018a, p. 919). The wording might be interpreted to imply a slightly higher threshold of originality for fashion designs than for other work categories. However, the point is that originality always requires the author's own intellectual creation and the author must have made free and creative choices. It is not necessary or in accordance with the spirit of EU copyright law to set this threshold lower for fashion designs.

286 Regarding this dichotomy, see e.g. Drassinower 2015, p. 2–3, 66–79. Drassinower argues that the free availability of ideas is not a necessary aspect of copyright law, but rather relates to a calculation of the efficiency of copyright law (ibid., p. 3–4). Hence, there is a utilitarian aspect involved.

287 Härkönen 2020a, p. 11, 12–16 and Mylly 2016, p. 923–924. See also Härkönen 2018a, p. 920–921 and Schovsbo 2020.

288 Härkönen 2020a, p. 12 and Härkönen 2018a, p. 912, 917, 919. It is acknowledged that the boundary between idea and expression is difficult to draw. According to some, nobody has ever been able to fix that boundary, and nobody ever will (Durant 2010, p. 150 and Dinwoodie 2010, p. 202).

289 C-833/18 *Brompton*, para. 27. See also C-406/10 *SAS*, para. 40.

290 See TRIPS Article 9(2) and WIPO Copyright Treaty, Article 2.

291 C-310/17 *Levola Hengelo*, 40–42 and C-683/17 *Cofemel*, para. 32–34.

A trend is not a 'work'. However, a fashion design as an expression of a trend can be considered a work.

It is possible in theory that two or more fashion designers participating in the same trend will create largely identical designs that are each copyright protected without infringing on one another. If these designers have worked independently and have created identical works without knowing about each other's creations, each work in principle generates its own separate copyright. It is irrelevant which designer came up with their work first: in other words, *originality is not novelty*.[292] Moreover, a work does not need to be unique in order to be original.[293] In copyright law, the prior art simply does not matter.[294] Originality is quite literally about *origination*, about the *source* of the work. A work must originate with its author: it must be their own intellectual creation, *ergo* not copied from someone else.[295] Even though the works in such a situation look the same, they are not the same in the eyes of copyright law, because each of them originates from a different act of authorship.[296] Of course, genuine situations where two designers have, by making free and creative choices, come up with identical designs are undoubtedly very rare. Truly independent creation might be difficult if a designer is seeking to fit into a certain trend.[297] In the context of trends, originality is about a designer 'speaking in their own words' and *interpreting trends* in their own intellectual, creative way.[298] Because originality is not about novelty, when defining whether a fashion design is original and hence copyright protected, the right question to ask is not 'Is this something we have previously seen on the runway?' but 'Is this the designer's own intellectual creation?'. This view is supported by *Brompton,* where CJEU states that originality is reviewed by considering all the relevant aspects of the subject matter in question 'as they existed when that subject matter was designed'.[299] Factors that are external and subsequent to the creation of the product do not matter.[300] This is a major difference compared to design law, which has occasionally been considered as

292 Härkönen 2020a, p. 4–5, 13–14, Drassinower 2015, p. 11, 57 and van Gompel 2014, p. 99. See also Fisher 2016: Fisher argues that the originality doctrine should be modified to require a significant degree of novelty as a precondition for copyright protection (ibid., p. 437–438, 464–465).

293 Duboff 1990, p. 305.

294 Derclaye 2020, p. 12.

295 See Drassinower 2015, p. 58–59 and Duboff 1990, p. 305.

296 Drassinower 2015, p. 61. See also Kahn 2018, p. 26–27.

297 Härkönen 2018a, p. 921. See also van Gompel 2014, p. 137. One must also keep in mind that no designer creates in a vacuum. Especially in the era of social media, platforms that specialise in providing a profusion of aesthetic content (such as Instagram and Pinterest) might influence a designer's creative output. This might subconsciously affect the author's ability to make free and creative choices and, hence, their ability to create something original in copyright terms.

298 See e.g. Drassinower 2015, p. 59.

299 C-833/18 *Brompton*, para. 37.

300 C-833/18 *Brompton*, para. 37.

the primary form of IP protection of fashion designs.[301] Design protection requires novelty, which is an objective requirement, unlike originality, which is a subjective requirement.[302]

Considerations regarding design right, trademark and dual protection

The fact that original fashion designs can now enjoy copyright protection in EU Member States does not mean that they cannot – or should not – be protected by other IPRs as well, or instead.[303] Design right and trademark should not be overlooked when considering the overall protection of fashion designs, although the differences between these IPRs (e.g. the aims, scope, limitations and duration of protection) need to be acknowledged.

EU Member States also offer design protection for industrial designs, such as fashion designs, provided that they are new and have individual character.[304] It is important not to confuse copyright and design protection,[305] two forms of IPR that serve different purposes and have fundamentally different functions.[306] Especially in civil law countries, copyright law aims to protect the creativity of a natural person, e.g. a fashion designer, whereas design protection seeks to protect, inter alia, the commercial interests of fashion houses by protecting 'subject matter which, while being new and distinctive, is functional and liable to be mass-produced', as noted by CJEU in *Cofemel*.[307] Since copyright law is very much focused on the author, it protects the moral rights of the fashion design's creator,[308] besides safeguarding their potential economic interests. This is a significant difference compared to design

301 Härkönen 2020a, p. 4, 13 and Härkönen 2018a, p. 910, 920. See also Inguanez 2020: originality should be kept distinct from notions that are often imported from design law (ibid., p. 800, 802–803, 807–808).

302 See also Härkönen 2020a, p. 4–5, 13–14.

303 In addition to IP protection, there is the possibility of protection based on competition law or antitrust law. See e.g. Hemphill 2017 and Schovsbo & Riis 2017, p. 95, 101. On unfair competition regulation as a legal tool to protect fashion designs, see Derclaye 2010, p. 342–347. See also Hemphill & Suk 2014 and Kur 2014.

304 Design Directive Article 3(2).

305 Härkönen 2020a, p. 13.

306 Regarding these purposes and functions, see Härkönen 2020a, p. 16. See also Derclaye 2017: 'The aims of the several IPRs must be respected, as distorting them can create problematic overlaps' (ibid., p. 650). See also Kur 2019, p. 9–10, Ricketson & Suthersanen 2012, p. 184, Inguanez 2020 and C-683/17 *Cofemel*, para. 50, 52, 54.

307 C-683/17 *Cofemel* para. 50. On the aims of copyright (from a fashion perspective), see Härkönen 2018a, p. 919. See also Kur 2019, p. 9–10, Finniss 1964, p. 626 and Zimmerman 2015: Zimmerman adopts a highly sceptical stance on whether design protection actually protects *creativity*. According to Zimmerman, '--the bulk of the benefit of design protection is more likely to flow to corporate management and shareholders than to individual artists.' (ibid., p. 198).

308 Berne Convention, Article *6bis*. See also Kur 2019, p. 18, Derclaye 2020, p. 12 and Inguanez 2020, p. 803.

law.[309] There are other remarkable differences, as well: copyright law admits more exceptions than design law,[310] and according to the Berne Convention, the enjoyment and exercise of an author's exclusive rights shall not be subject to any formality,[311] whereas a design right extending to the maximum 25 years of protection requires registration.[312] Registration provides some advantages, since it offers more legal certainty, especially in terms of identifying the holder of the right and priority.[313] Kur points out that these benefits offered by design right are so significant that accepting works of applied into scope of copyright protection does not create a risk of voiding the EU design regime, which was tailored to accommodate the needs of designers and the design-oriented industries.[314] Although the registration of a design is non-examined, the burden of proof is on those challenging the design's validity.[315] This can be viewed as a notable advantage compared to copyright.[316] On the other hand, the term of copyright protection, 70 years *post mortem auctoris,* is significantly longer than design protection.[317]

To benefit from the maximum duration of design protection, the rightholder in principle needs to register the design prior to its publication.[318] This has particular

309 According to Design Regulation Article 18, the designer has a right to be cited before the Office and in the register. However, as noted by Derclaye, this right is very nominal since it does not attach to each reproduction of the design, unlike with copyright law (Derclaye 2020, p. 12).

310 See InfoSoc Directive Article 5 on exceptions and limitations to copyright. Exceptions may differ among Member States, because most of the exceptions and limitations permitted by InfoSoc Directive Article 5 are optional. For limitations to design right, see Design Directive Article 13 and Design Regulation Article 20. On the differences in exceptions and limitations between copyright and design law, see Derclaye 2017, p. 630.

311 Berne Convention, Article 5(2).

312 Design Directive Article 10.

313 See e.g. Inguanez 2020, p. 802. See also Opinion of the European Copyright Society in relation to the pending reference before the CJEU in *Brompton Bicycle v Chedech / Get2Get*, C-833/18, 2019, para. 16.

314 Kur 2019, p. 11–12. See also Levin 2021. For a dissenting view, see Schovsbo & Teilmann-Lock 2016, p. 435 and Schovsbo & Riis 2017, p.103.

315 Kur 2019, p. 11–12. See also Derclaye 2020, p. 13.

316 Kur 2019, p. 12.

317 The term of protection of copyright according to Berne is the life of the author plus fifty years after their death (Article 7(1)). In many jurisdictions, including EU Member States, the term of protection is as long as 70 years *post mortem auctoris* (Term Directive Article 1(1)). Whether at least 70 years of protection is too long for works of applied art is another question and would surely need separate research. For example, Bently asks whether 'to incentivise optimal levels of design of clocks, tables, lamps, chairs, wallpapers and dresses, it is necessary to confer rights lasting for seventy years after the designer's life?' (Bently 2018, p. 225). Kur points out that copyright and design right could in theory be aligned by limiting the term of protection for works of applied art to 25 years, which would be possible under Berne. She also notes that this kind of limitation would not be likely to attract political support (Kur 2019, p. 15). See also Derclaye 2020, p. 11. However, as Inguanez notes, some vintage designs might benefit from a term of protection of 70 years after the life of the author (Inguanez 2020, p. 802). It is easy to agree with Inguanez. See also Ricketson & Suthersanen 2012, p. 184, 186.

318 Design Directive Articles 4 and 5. For exceptions, see Article 6 and the 12-month grace period.

significance for fashion designs whose success or popularity is so great that they turn into iconic pieces, wardrobe classics. If the rightholder did not foresee the potential success of the design and failed to register it early enough, the only design protection they can benefit from is the unregistered design protection for a period of three years from the date on which the design was first made available to the public within the EU.[319] This is a rather short period, especially for the kinds of fashion designs that prove to be iconic. In contrast, if the design qualifies for copyright protection, it will not become free for rivals to copy for decades.

For some fashion designs, design protection would undoubtedly be a more suitable form of IP protection than copyright.[320] It is also possible for a fashion design simultaneously to enjoy both of these IP rights. Partial cumulation of copyright and design protection is allowed in the EU IP system, and it is relatively easy for a design to attract copyright protection.[321] However, that is not to say that design-protected fashion designs would automatically receive copyright protection as well. The CJEU stated in *Cofemel* that 'concurrent protection can be envisaged only in certain situations'.[322] A fashion design can thus be protected by copyright and a design right at the same time, if it fulfils the requirements of both of these IPRs.[323] In that case, the fashion design seeking dual protection would need to be both original (as required by copyright law) and new and have individual character (as required by design law).[324] The requirement for a subject matter to attract protection under copyright law is hence subjective, whereas under design law the requirement is

319 Design Regulation Article 11.

320 Härkönen 2018a, p. 920. Church, Derclaye and Stupfler (2019) point out that design rights are well utilised by the European fashion industry (ibid., p. 712). However, see Kur 2014, p. 187: 'At least in its registered form, design protection to date is not frequently used by fashion firms or designers, for reasons that remain unclear'.

321 Derclaye 2020, p. 7 and Derclaye 2017, p. 628–629. See also Kahn 2018, p. 34: Kahn suggests that developing partial cumulation is the best way forward so that every industrial design does not automatically fall under the protection of copyright. See also Levin 2021 on 'EU cumulation'.

322 C-683/17 *Cofemel*, para. 52. Kur interprets this to mean that 'while cumulation of design and copyright cannot be excluded, this is not intended to provide the general rule, but rather an exception applying in "certain cases"' (Kur 2019, p. 6). Derclaye points out some problems related to CJEU's vague language in para. 52 and asks what these 'certain situations' are. The phrasing, according to Derclaye, might hint 'applying the AOIC [author's own intellectual creation] in a stricter way for 3D designs' (Derclaye 2020, p. 9).

323 On dual protection, see e.g. Derclaye 2017, p. 627–631. On the problem of protection overlaps, see Schovsbo & Riis 2017: they argue that the large degree of protection overlaps creates a risk of overprotection. Hence, overlaps ought to be minimised (Schovsbo & Riis 2017, p. 102–104. See also Kur 2014, p. 183). Schovsbo and Riis furthermore claim that, when it comes to the overlap between design right and copyright, designers would in practice normally prefer design law (Schovsbo & Riis 2017, p. 103). On the other hand, Kur argues that fashion designers are likely to prefer protection without formalities, such as copyright (Kur 2014, p. 180). See also Church, Derclaye & Stupfler 2019, p. 697 about the fashion industry's reliance on copyright protection. See also Kahn 2018, p. 34 on French companies relying on copyright protection.

324 See also Derclaye 2020, p. 12.

objective. Originality is arguably an easier test to pass than the individual character in design law.[325] The prior art simply does not matter in copyright law; therefore, protection under design law might be harder to achieve.[326] Because the requirements for protection are different in copyright and design law, the rules of infringement differ, as well. Infringement of copyright requires *copying* of a work that is its author's own intellectual creation, whereas infringement of a registered design right does not require actual copying.[327] Derclaye notes that the copyright test of infringement is thus much easier to pass than that of design law.[328] Derclaye furthermore suggests that copyright law having more exceptions than design law might, in cases of infringement of dual protected fashion designs, lead to claimants preferring to sue exclusively for infringement of their design right.[329]

In addition to copyright and design law, there are garments and accessories that are better to protect under rules provided by trademark law.[330] Especially fashion designs where logos or other symbols that are distinctive to a certain brand are used as eyecatchers benefit from trademark protection. In principle, a distinctive fashion design could be registered as a (3D) trademark. Some distinctive fabric prints certainly benefit from trademark protection, as well.[331] However, trademark protection cannot be viewed as a strong alternative to copyright when it comes to protection of fashion designs. Firstly, trademark aims to protect different values than copyright:[332] while the latter aims to protect creativity that originates from the author, the interests of the former are of a more commercial nature. Consequently, there are differences when it comes to what can be protected. A fashion design that is its author's own intellectual creation might not be distinctive in the way that

325 Derclaye 2020, p. 12.

326 Derclaye 2020, p. 12. However, see also European Commission: legal review on industrial design protection in Europe 2016, p. 92 which suggests that originality is more difficult to prove than novelty.

327 See Derclaye 2020, p. 12. See also Design Regulation Article 19(2): infringement of an unregistered design right requires copying.

328 Derclaye 2020, p. 12.

329 Derclaye 2010, p. 350. See also Derclaye 2017, p. 630: 'Most notably, because there are fewer exceptions in the design right regimes, design law will override the public-regarding aspects of copyright law. -- An illustration of the clash is found in a French decision, in which the court refused to apply the copyright parody exception to the parody of a design.' See also Schovsbo & Teilmann-Lock 2016, p. 434: it appears that in Denmark, expansion of copyright protection had the effect of significantly reducing cases litigated on the basis of design law.

330 Moreover, overlap of copyright and trademark protection is possible if the requirements of originality and distinctiveness are met. Derclaye (2017) describes the copyright/trademark overlap as one of the most problematic overlaps in IP law (ibid., p. 632). On overlap between trademark right and copyright, see also Pitkänen 2016.

331 For example, Marimekko has registered some of its fabric prints, such as 'Unikko', 'Lumimarja' and 'Kaivo', as trademarks.

332 On the difference in purposes and related balance of interests, see also Rosati 2020.

trademark law requires.[333] A further possible obstacle to trademark protection is that signs which consist exclusively of the shape or other characteristic that gives substantial value to the goods shall not be registered as a trademark or, if registered, shall be liable to be declared invalid.[334] Copyright law has no such limitation. Moreover, effective trademark protection generally requires registration. The registration process can be viewed as costly, time-consuming and strict when it comes to formalities. Each design would need its own trademark registration, which would naturally add up costs and time spent on formalities. This would probably be doable for established fashion houses, but small brands or independent designers are unlikely to possess the required resources. Plenty of the creative outputs would be left without protection if fashion originators were to rely solely on trademarks.

Although registration of an IP right offers certain benefits (as discussed above), overall, an IP equilibrium that heavily relies on registrations can be considered problematic.[335] Registering and creating effective IP strategies is something that fashion conglomerates and established brands can afford to do in a more effective manner compared to start-up brands, small fashion companies and independent designers. If protection of fashion designs depended on protection methods that require (costly) formalities, this would inevitably place the creative outputs of independent designers and those who work for smaller brands at a disadvantage compared to their more established competitors. Copyright is therefore a more 'democratic' IP right than industrial rights in this sense, because it is born with the work.[336] In order to enjoy copyright protection, a designer needs to do nothing further than to create an original work.

Importantly, the mere existence of design protection and the possibility of fashion designs to be protected by this form of IPR do not justify excluding them from the scope of copyright protection.[337] In Finland, for example, a copyright threshold that is higher for works of applied art than works of pure art has often been justified on the grounds that design right would be a 'better' form of protection for the first

333 See Trademark Directive Article 3(a) and Trademark Regulation Article 4(a): distinctiveness means ability to distinguish 'the goods or services of one undertaking from those of other undertakings.'

334 Trademark Directive Article 4(1)(e)(iii) and Trademark Regulation 7(1)(e)(iii). In the fashion context, the CJEU has analysed this issue in its *Louboutin* judgement (although the case was referred and decided under Directive 2008/95/EC, prior to the 2015 trademark reform) and ruled that a sign consisting of a colour applied to the sole of a high-heeled shoe, such as that at issue in the main proceedings, does not consist exclusively of a 'shape' (C163/16 *Christian Louboutin, Christian Louboutin SAS v Van Haren Schoenen BV*, ECLI:EU:C:2018:423, para. 27). See Teilmann-Lock & Petersen 2018 for an analysis of *Louboutin.* On the substantial value exclusion, see extensive analysis by Rosati (2020) and Gommers, De Pauw and Mariano (2018).

335 On the relationship between formalities and protection, see also Ginsburg 1990, p. 994.

336 Acknowledging the practical limitations that individual designers and small fashion companies may have when it comes to enforcement of copyright. See Subsection 4.2 of this Summary and Härkönen 2020b, p. 172.

337 Härkönen 2020a, p. 13, 16. See also Inguanez 2020, p. 801.

category of works.[338] This kind of reasoning is in obvious conflict with recent CJEU case law and, in particular, *Cofemel*.[339]

Optimally, combining different IPRs to protect a single fashion design can be beneficial to the rightholder. Copyright, design right and trademark can complement each other, and one IPR can fill gaps in protection left by other protection tools.[340] Cumulation strengthens the overall protection of a design, which can be viewed as an effective IP strategy, since it provides multiple tools to tackle copyists, allowing the rightholder to choose the most suitable IPR on which to base their infringement claims on a case-by-case basis. However, it is important not to confuse the different IPRs. The scope of protection of each IPR should match the intention of the IPR in question,[341] so confusion between their qualifications for protection should also be avoided. For example, demanding novelty or uniqueness from a fashion design that is in search of copyright protection confuses design law with an evaluation that ought to be about originality.

Concluding remarks on RQ 1

The findings of Articles I and II offer support for the hypothesis of Research Question 1. The nature of fashion designs as products of applied art has indeed made their path towards full-copyright protection long and winding. Hence, the contemporary fashion industry has been operating in a low-copyright regime almost throughout its existence. This is no longer the case in the European Union, however. The CJEU has confirmed that the same originality requirement applies to all categories of works, without distinguishing between pure art and applied art. This is a positive development from the perspective of fashion.[342] The creative outputs of fashion designers in Europe are now quite comprehensively protected.[343] Despite this positive development, it may not be realistic to assume that all scepticism

338 See Härkönen 2020a, p. 4, 13. This kind of reasoning has been used especially in Finnish legal literature and statements of the Copyright Council.

339 C-683/17 *Cofemel*, para. 48.

340 See Pitkänen 2016, p. 296.

341 Härkönen 2020a, p. 16, Pitkänen 2016, p. 89, C-683/17 *Cofemel* para. 50–51 and Opinion of AG Szpunar in C-683/17 *Cofemel*, para. 51–57.

342 Not everyone agrees that this kind of 'expansion' of copyright or IP protection in general is desirable. See e.g. Drassinower 2015, p. 1. On expansion of IP rights in the context of applied art, see Schovsbo & Riis 2017, p. 104, 115, 117 and Kur 2014, p. 190. See also Boldrin & Levine 2008, p. 186, Schubert 2002, p. 372, Barron 2010, p. 126–127 and Dahlén 2012, p. 96.

343 Härkönen 2020a, p. 16. Due to *Cofemel* confirming that the standard of originality is the same for all categories of works, the difference between EU and US copyright law approaches to fashion designs is even more evident than before. This is mostly due to the CJEU removing barriers between pure art and applied art, but also down to the role of functionality in copyright protection. The judgement by the CJEU in *Brompton* takes a very different approach to the effects of functionality on the copyright protection of a work of applied art compared to the US Supreme Court in *Star Athletica LLC v. Varsity Brands Inc.* (2017). See also Kaminski & Rub 2017, p. 1131–1141.

towards works of applied art passing the threshold of originality under the same conditions as works of pure art will immediately vanish. Especially Member States with discriminating copyright law traditions require a significant change of judicial attitude.[344]

4.2 RQ 2: The role of copyright protection in guiding the fashion industry towards sustainable development

Over the course of the twentieth century, the field of apparel transformed from a mostly small-scale, often homemade, handmade and relatively expensive craft to a huge, global industry producing garments in offshored factories for a global audience that is on the constant hunt for new trends.[345] During the last two decades, clothing production has approximately doubled.[346] Where the fashion world previously had two main seasons per year (spring/summer and autumn/winter), nowadays dozens of collections are introduced to consumers annually.[347] This is due to the growing middle-class population across the globe and increased per capita sales in mature economies, the latter being caused by the rise of fast fashion.[348] Fast fashion chains offer consumers cheap (and largely disposable) interpretations, imitations and copies of high fashion styles and designs.[349] It has been argued that consumers have little incentive to buy a garment or an accessory from a designer label, if they can get a look-alike for a tenth of the price at a fast fashion store.[350] Indeed, the average price of clothing has plummeted in recent decades.[351] Cheaper prices stimulate consumption, and consumers have changed their demands when it comes to fashion.[352] Fast fashion strongly contributes to the throwaway culture,[353] and for consumers in general, waste appears to be of no concern when

344 See e.g. Härkönen 2020a, p. 11–16 on how Finland should reform its interpretation of copyright law. See also Schovsbo & Riis 2017 on the Scandinavian copyright tradition in general, although it is pre-*Cofemel* (ibid., p. 107).

345 Raustiala & Sprigman 2012, p. 26.

346 Ellen MacArthur Foundation 2017, p. 18 and McKinsey & Company 2016, p. 3.

347 See e.g. Pouillard 2019, p. 147, Black 2019, p. 113–114, Crewe 2017, p. 44, 60, McKinsey & Company 2016, p. 2 and Taplin 2014, p. 78.

348 Ellen MacArthur Foundation 2017, p. 18, 21 and McKinsey & Company 2016, p. 3. See also Raustiala & Sprigman 2012, p. 25.

349 See e.g. Raustiala & Sprigman 2006, p. 1705, 1737, Raustiala & Sprigman 2012, p. 26, Scafidi 2006, p. 117, Rosati 2018b, p. 857 and Brewer 2019, p. 3.

350 See e.g. Cline 2013, p. 111. See also Raustiala & Sprigman 2012, p. 20 and Joy et al. 2012, p. 282.

351 McKinsey & Company 2016, p. 2–3 and Cline 2013, p. 2. See also Raustiala & Sprigman 2012, p. 21.

352 McKinsey & Company 2016, p. 2 and Cline 2013, p. 3. See also Craik 2019, p. 134 and Taplin 2014, p. 78.

353 Brewer 2019, p. 1.

considering values.[354] Instead of long-lasting quality items, most consumers now desire decreasing clothing prices, as well as shorter fashion life cycles.[355] For many consumers, shopping for garments has become a hobby, a recreational activity.[356] The majority of today's fashion brands produce nondurable garments, which are worn only a few times before being discarded.[357] It has been estimated that more than half of the fast fashion produced is thrown away within a year.[358] This is due to rapidly changing trends, but also to a lack of quality.[359] To make matters worse, unsold garments are often simply burned instead of being recycled, donated or treated in any other more sustainable manner.[360] All of this consumes enormous amounts of natural resources. In total, global textile production is responsible for annual 1.2 billion tonnes of greenhouse gas emissions, which exceeds the combined emissions of all international flights and maritime shipping.[361] The industry is also identified as a major contributor to plastic microfiber pollution of oceans, which has negative environmental and health implications.[362] The linear system of the global fashion industry leaves economic opportunities untapped, puts pressure on resources, pollutes and degrades the natural environment and its ecosystems, and creates significant negative societal impacts at local, regional, and global levels. It consumes large amounts of non-renewable resources and has negative impacts on the environment and on people. Moreover, hardly any of the material used to produce clothing is recycled into new clothing.[363]

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354 Sapir 2020, p. 65. Even though consumers are generally aware of the unsustainable status quo of the fashion industry, there is often a gap between consumer attitudes and their purchasing decisions (see Business of Fashion & McKinsey & Company 2020, p. 48–49). See also McKinsey & Company 2016, p. 2 and Joy et al. 2012, p. 280.

355 Lueg, Medelby Pedersen & Nørregaard Clemmensen 2013, p. 345 and Pouillard 2019, p. 141. See also Cline 2013, p. 117 and Crewe 2017, p. 60.

356 See e.g. Cline 2013, p. 7, 14–15. See also Härkönen 2018b: historically, people made their own garments. With the rise of cheap ready-made fashion, people generally stopped sewing. However, sewing seems to be making a comeback as a leisure activity (ibid., p. 860).

357 Pouillard 2019, p. 141. See also Joy et al: 'Durability in fast fashion apparel is the kiss of death' (Joy et al 2012, p. 288).

358 McKinsey & Company 2016, p. 5 and Ellen MacArthur Foundation 2017, p. 19. See also Pouillard 2019, p. 141. Interestingly, the lack of quality of industrially manufactured garments is one reason why some people choose to replicate fashion designs at home instead of buying the genuine products (Härkönen 2018b, p. 862–863).

359 On fast fashion garments not being *good quality* but their quality being *good enough* for consumers, who never even expect anything better, see Cline 2013, p. 11–12, 116–117. See also Joy et al. 2012, p. 282–283, 288. See also Dreyfuss 2010: 'Designs can now be copied quickly, but they are not copied well – knock-offs are cheaper because they use inferior materials and less labor' (ibid., p. 1458). As opposed to fast fashion copycats, the makers of home-sewn, private copies aim for superior quality compared to the originals (Härkönen 2018b, p. 862–863).

360 See e.g. Barnard 2020a, p. 157.

361 Ellen MacArthur Foundation 2017, p. 21, 36–38.

362 Ellen MacArthur Foundation 2017, p. 21, 36–38.

363 Ellen MacArthur Foundation 2017, p. 19, 21, 36–38.

In addition to the environmental issues described above, the fashion industry is continuously blamed for neglecting the rights and well-being of the garment workers and for 'the theft of labour'.[364] Garment production is very labour intensive,[365] and during the last decades of the twentieth century, it was largely offshored to the Global South, where the cost of labour is low.[366] It seems that Western fashion brands – and fashion consumers – are unwilling to pay the cost of Western labour. Taplin notes that 'Western consumers have become accustomed to cheap fashion and for the most part appear unwilling to pay more for items that are untainted by exploitative practices.'[367] The effects of this offshoring started to show in the 1970s, when old manufacturing centres of Europe were hit hard by the loss of large numbers of garment manufacturing jobs. Countries that had developed a comprehensive welfare state were unfairly penalised in comparison to ones that had not and could therefore produce garments at a lower cost. This has been, and still is, one of the core problems of the fashion industry.[368] Especially fast fashion companies appear to be running some kind of a 'race to the bottom' for the lowest labour costs in garment production, to maximise corporate profits and sell clothes as cheaply as possible.[369] More often than not, through long and complex supply chains, manufacturing of clothes is offshored to countries where the standards of protection of human rights and employment rights are lower than in Europe.[370]

364 Wilson 2003, p. 85, Green & Kaiser 2017, p. 147 and Noto La Diega 2019, p. 19. Recently, the COVID-19 pandemic has raised even more concerns when it comes to exploitation of garment workers in the Global South. In 2020, millions of garment industry workers in developing countries have been fired or furloughed as fashion companies have cancelled orders due to plunging sales since the beginning of the pandemic (Calboli 2020, p. 489). See also Business of Fashion & McKinsey & Company 2020, p. 48. Regarding the IP-related challenges that the pandemic causes to fashion designers, see also Woolgar 2020.

365 In garment production, not much has changed since the invention of the sewing machine (Kaiser 2012, p. 17, Pouillard 2019, p. 142 and Black 2019, p. 116).

366 Pouillard 2019, p. 141–146 and Taplin 2014, p. 74. In the offshoring phenomenon, the post-colonialist heritage of Western countries is rather visible. Only the forms of exploitation have changed from colonial times, when countries of the Global South were colonised by Western states. In post-colonial times, the natural resources and labour of the Global South are still exploited, regardless of the countries being formally independent. Moreover, there is post-colonialist cultural exploitation, which is discussed further in Subsection 4.3 of this Summary.

367 Taplin 2014, p. 73, 79–81.

368 Pouillard 2019, p. 144–145 and Kaiser 2012, p. 17. See also Cline 2013, p. 5.

369 Kaiser 2012, p. 58, Pouillard, p. 146–148, Taplin 2014, p. 76–77 and Wilson 2003, p. 90. On the legal aspects of the race to the bottom of global corporations (in general, not just fashion companies), see Karhu 2019, p. 419, 427.

370 Noto La Diega 2019, p. 19 and Taplin 2014, p. 73. However, fast fashion is also produced in Europe and United States (see e.g. Pouillard 2019, p. 142, 151). For example, Spanish fast fashion retailer Zara has factories in Europe and aims to keep a significant share of its production close to its headquarters, faster to respond to consumers' demands (Crewe 2017, p. 45). Even though the labour conditions of garment workers in Western countries have improved during the past century, sweatshops have never completely disappeared. It is possible that even a garment made in a Western country comes from a sweatshop that employs people in illegal conditions. When the local labour is 'too expensive', illegal immigrants are hired

The speeds of the fast fashion business model puts pressure on suppliers to meet strict delivery deadlines, as well as strong cost mandates, frequently resulting in work intensification in factories and possible safety shortcuts.[371] Therefore, clothes are often produced in inhumane and dangerous conditions. Child labour and uncertified use of chemicals in production are not unheard of.[372] The fashion industry also appears to see unionisation as a threat.[373] Clearly the real victims of fashion are the garment workers in countries like Bangladesh and Myanmar, who work long hours in substandard facilities without benefits or the option to unionise, and for little compensation. Furthermore, it is common practice for clothing companies to pay garment workers the legal minimum wage,[374] which is not equal to a *living wage*.[375] Several well-known fast fashion retailers, such as H&M, Mango, Benetton, Primark and Walmart are associated with grave labour accidents.[376] The best-known of these might be the collapse of the Rana Plaza factory in Bangladesh in 2013, which killed more than 1,100 people.[377]

Although the negative effects of offshoring are particularly visible in the context of fast fashion, the luxury segment of the fashion industry is by no means innocent. Production of high-end luxury goods can also depend on exploitative, unscrupulous

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(Pouillard 2019, p. 142, 151). For example, the town of Preto in Italy is famous for fast fashion that is 'made in Italy' by Chinese migrant workers (Craik 2019, p. 135).

371 Taplin 2014, p. 73, 77–78.

372 Lueg, Medelby Pedersen & Nørregaard Clemmensen 2013, p. 345, 347, Wilson 2003, p. 67, 85, Crewe 2017, p. 44, McKinsey & Company 2016, p. 4 and Taplin 2014, p. 72.

373 Pouillard 2019, p. 143, 152.

374 Cline 2013, p. 141.

375 A 'living wage' usually refers to a salary high enough to cover the costs of a family's basic needs, such as food and water, housing and energy, clothing, health care, transportation, education and childcare, as well as modest funds for savings, unexpected events and discretionary spending (see Finnwatch 2015, p. 4 and Cline 2013, p. 141–142).

376 See Clean Clothes Campaign: 'Rana Plaza' (available at: https://cleanclothes.org/campaigns/past/rana-plaza), Clean Clothes Campaign: 'Tazreen fire: fight for compensation' (available at: https://cleanclothes.org/campaigns/past/tazreen), Clean Clothes Campaign et al. 2015, WRC Factory Investigation: Garib & Garib (available at: https://www.workersrights.org/factory-investigation/garib-garib/) and Pouillard 2019, p. 147. The retailers whose brand image suffered badwill for their association with Rana Plaza claimed that they had not been fully informed of the conditions of production (ibid., p. 148). However, this sounds implausible, considering that offshoring garment production to low-cost countries almost inevitably means higher risks for garment workers. Companies who were truly carrying out due diligence would at least invest in an external, independent audit of its outsourcing partners. See also Brown, Gervassis & Mukonoweshuro 2018: there have been attempts to motivate and incentivise businesses to respect human rights on the grounds that it is important for a company's reputation and brand value (ibid., p. 332, 334). In addition to grave labour accidents, the fashion industry has recently been accused of involvement with slave labour. See Kelly: '"Virtually entire" fashion industry complicit in Uighur forced labour, say rights groups.' *The Guardian* 23 July 2020 (available at: https://www.theguardian.com/global-development/2020/jul/23/virtually-entire-fashion-industry-complicit-in-uighur-forced-labour-say-rights-groups-china).

377 See Clean Clothes Campaign: 'Rana Plaza'.

and toxic practices.[378] According to Crewe, cheap fast fashion brands use the global division of labour primarily to drive down costs, whereas the aim of luxury firms is more effectively to control the value chain and thus to manage and protect both their reputational capital and, most critically, their most ethically and environmentally damaging activities.[379]

Manufacturing in the Global South keeps costs low and margins high, which is why it is appealing for fashion companies to maintain, disregarding the multiple human rights issues discussed above.[380] It is quite generally agreed that multinational fashion companies should not just 'cut and run' from the Global South, but rather stay and make sure that they work together with local contractors, unions and governments, as well as the ILO, to locally improve labour conditions.[381] These kinds of improvements do not seem to be a priority for offshoring fashion companies. Deadly accidents have continued to occur in the industry and attempts by garment workers to unionise and protest against their working conditions are often met with repression.[382]

To summarise, due to insufficient regulation of the global fashion industry,[383] too many clothes are produced at the expense of the environment, too often these clothes are made in sweatshop conditions that severely violate human rights,[384] and the clothes that already exist are being discarded way too soon. Fashion is suffering from serious overproduction and overconsumption that must be stopped.[385]

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378 Crewe 2017, p. 39, 60. Regarding the unethical practices of luxury fashion brands, see also Calboli's criticism of anti-dilution protection of luxury fashion conglomerates' trademarks in cases where these luxury brands themselves regularly 'whittle away', or self-dilute, the uniqueness of their marks through numerous brand extensions to gain more profits (Calboli 2015, p. 34). See also Kaiser, Hancock and Bernstein's (2015) criticism of luxury companies (ibid., p. 25). However, Joy et al. point out that among luxury fashion brands that invest in maintaining their heritage of superior quality and craftsmanship, 'there is little exploitation of labor, since most ateliers are attached to big fashion houses located in major fashion cities, such as Paris and Milan', yet acknowledging that luxury brands' outsourcing to low-cost manufacturing countries is 'raising the specter of sweatshop operations' (Joy et al. 2012, p. 287).

379 Crewe 2017, p. 60.

380 Corner 2014, p. 21–22, 74–75.

381 Pouillard 2019, p. 151–152. See also Taplin 2014, p. 80.

382 Pouillard 2019, p. 151–152. See also Brown, Gervassis & Mukonoweshuro 2018, p. 331 and Chan, E.: '8 Years After the Rana Plaza Disaster, We Still Aren't Doing Enough to Protect Garment Workers'. *Vogue* 19 April 2021 (available at: https://www.vogue.com/article/garment-worker-rights-protection-eight-years-after-rana-plaza).

383 Pouillard 2019, p. 141. See also Brown, Gervassis & Mukonoweshuro 2018, p. 332 and Business of Fashion & McKinsey & Company 2020, p. 49.

384 Moreover, garment workers and their rights are not the only victims of conspicuous consumption and offshoring of fashion: the fashion industry largely exploits animals and causes them undue suffering. See e.g. Crewe 2017, p. 52–53, 58–59. Production of leather goods (such as handbags, shoes and belts), in particular, tends to exploit animals, even endangered species. Moreover, leather treatments and tinting are highly polluting procedures (ibid.).

385 Härkönen 2020b, p. 170.

Having delved into the catastrophic environmental and human rights impacts of the fashion industry, one might consider it all very interesting, but wonder what it all has to do with copyright law, or IP law in general? This thesis argues that a low-copyright equilibrium fosters the aforementioned unsustainable status quo, and, furthermore, that the unity of art approach to copyright law might play a role in hindering the fashion cycle, which would have a positive effect on the sustainable development of the industry.

The connection of copyright to sustainable development is related to the Piracy Paradox of Raustiala and Sprigman. According to that theory, copying is actually beneficial to the industry and, hence, fashion designs should not be protected by copyright. In essence, the theory claims that more fashion goods are consumed in a low-IP world than would be consumed in a high-IP one. When a design is copied and its cheaper copies hit the market, the early adopters of the design move on to new designs. The copied design becomes obsolete and ends up having a short market life. Eventually, the new designs that the early adopters moved on to are copied, and the early adopters once again need to find something new. The process then begins again and repeats itself in perpetuity.[386] All this copying accelerates the trend circulation and creates more consumption,[387] which has fostered the fast fashion phenomenon that relies on others' creativity.[388] Fast fashion brands do not tend to create trends, but rather rely on imitating the designs of higher-value brands and creating knockoff versions for consumers on a budget. In fast fashion stores, originality is a rare sight,[389] even though sometimes these fast fashion copies reach the markets even before the original design.[390] What is more, technological development has made copying easier than ever.[391]

Raustiala and Sprigman argue that 'if copying were illegal, the fashion cycle would occur very slowly. Instead, the absence of protection for creative designs and the regime of free design appropriation speeds diffusion and induces more rapid obsolescence of fashion designs -- The fashion cycle is driven faster, in other words,

386 Raustiala & Sprigman 2006, p. 1721, 1733, Raustiala & Sprigman 2009, p. 1207 and Sprigman 2017, p. 253, 256. See also Brewer 2019: Brewer points out that also the prevalence of social media fuels the virtually instantaneous movement of trends (ibid., p. 1, 3). See also Berthold et al. 2018: they argue that since fashion operates in a low-IP equilibrium, it has developed induced obsolescence as a 'protection' method (ibid., p. 322).

387 Raustiala & Sprigman 2012, p. 45.

388 See e.g. Kaiser 2012, p. 50–51 and Pouillard 2019, p. 143. Let it be clarified, however, that the fast fashion industry sells more than *just* copies (see Cline 2013, p. 108). See also Crewe 2017, p. 45–46: Crewe describes Zara's strategy as a 'design-led-copy-cat' strategy.

389 See e.g. Härkönen 2018a, p. 919, Härkönen 2020b, p. 170, Cline 2013, p. 107–112, Scafidi 2006, p. 117 and Rosati 2018b, p. 857.

390 Hemphill & Suk 2009, p. 1170, Beebe 2010, p. 835 and Raustiala & Sprigman 2012, p. 37.

391 Cline 2013, p. 109. Technological development itself has accelerated the fashion cycle into a 'see now, buy now' system (Black 2019, p. 113). See also Beebe 2017, p. 593 and Brewer 2019, p. 1.

by widespread design copying.'[392] They describe regulation that permits copying as 'a kind of a turbocharger to the fashion cycle'.[393] Raustiala and Sprigman address the link between the speed of fashion and its level of copyright protection, but they view acceleration as a positive thing. They point out that the American fashion industry in particular is flourishing in a low-IP equilibrium and more and more clothes are consumed due to rapid copying of fashion designs.[394] What is interesting is that Raustiala and Sprigman acknowledge that widespread copying can and does harm the fashion designers who create original designs, but they claim that the industry as a whole benefits from it[395] – and by benefiting they mean more demand and increased sales.[396] Moreover, Raustiala and Sprigman mention that offshored production in search of cheap labour combined with the lack of protection has helped the industry to thrive.[397] What we need to ask is whether this kind of circulation of designs by copying should be supported by the legal system.[398] Acceleration of trend circulation and increased consumption of garments is not something we should aim for as a society. Even if the fashion industry as a whole would benefit from a growth in demand and sales resulting from widespread copying, this growth undeniably has its victims. It is not only the originators of fashion designs that suffer from widespread copying, but also the environment and the garment workers, who must endure the effects of massive production of cheap, low-quality copies. In essence, a legal framework that permits a business model based on copying is a factor that enables certain unsustainable structures of the fashion industry.[399] Thus, the fact that the contemporary fashion industry *is* flourishing in a low-copyright regime – which Raustiala and Sprigman cherish – appears to be the very problem.

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392 Raustiala & Sprigman 2006, p. 1722. See also Raustiala & Sprigman 2012, p. 43–44.

393 Raustiala & Sprigman 2012, p. 45, 49.

394 Raustiala & Sprigman 2006, p. 1722, 1733, Raustiala & Sprigman 2009, p. 1203–1205, 1225, Raustiala & Sprigman 2012, p. 34 and Sprigman 2017, p. 253, 256. See also Härkönen 2020b, p. 171, Beebe 2017, p. 574, Sapir 2020, p. 63, Kaiser 2012, p. 50 and Cline 2013, p. 109–115.

395 Raustiala & Sprigman 2012, p. 21, 45. For a similar view, see also Teilmann-Lock & Petersen 2018, p. 895.

396 Raustiala & Sprigman 2012, p. 21, 45.

397 Raustiala & Sprigman 2012, p. 34.

398 See also Dreyfuss 2018, p. 10: Dreyfuss notes that 'fashion benefits from copying because proliferation initially makes certain styles desirable, but ubiquity later makes them obsolescent, thereby inducing people to buy newer outfits.' Dreyfuss insightfully connects this to sustainable development by asking whether it is socially desirable or environmentally sustainable to discard clothing that is still wearable (ibid.).

399 See also Härkönen 2020b, p. 170. In this context, a follow-up multidisciplinary study on the following topics would be valuable: (i) how much of what fast fashion companies sell infringes copyright by EU standards; (ii) would it be easy for fast fashion companies to just adapt original designs so that they do not copy 'expression' but 'ideas'; (iii) if so, how does this relate to the Piracy Paradox; and (iv) have fast fashion companies historically offered different collections in countries that have followed the principle of unity of art, in order to avoid being held liable for copyright infringement?

Interestingly, the EU legislature also seems to acknowledge the existence of a link between protection and the velocity of trends. Recital 16 in the Preamble to the Design Regulation notes that industries that produce large numbers of designs for products frequently having a short market life (which applies to the fashion industry) benefit from protection without the burden of registration formalities and 'the duration of protection is of lesser significance'.[400] This indicates that after only three years, a design may be so obsolete that it does not need protection against copying.[401] Admittedly, in the era of fast fashion, it might very well be that most fashion designs would after three years be considered too outdated to be of much commercial interest to copy or, therefore, to protect. Sustainable development demands that garments be used a lot longer than they currently are, and a rapid trend circulation conflicts with this. Slower trend circulation correspondingly means that designs would be considered fashionable for a longer period, and the duration of protection would be more significant. A prolonged market life would also mean that the three years of protection without formalities offered by the CDR would not necessarily be considered sufficient even for the sectors of industry that are currently producing large numbers of possibly short-lived designs over short periods of time, which is exactly what the contemporary fashion industry does. The legislature should not take it for granted that designs are short-lived in the first place. The long duration of copyright protection might have potential to incentivise designers to create long-lasting, timeless garments and accessories. Luckily, regardless of the Recitals in the Preamble to the CDR that refer to the short-lived nature of designs in some industries, the door to dual protection is left open.[402]

In the spirit of unity of art, fashion designs that pass the (now neutral) threshold of originality are considered as copyright-protected subject matter.[403] When fashion designs are a part of the copyright regime, fashion designers and fashion companies as copyright holders have more legal measures to tackle copying of their designs. From the perspective of sustainable development, it is particularly important to have legal measures to tackle fast fashion copying, considering that the fast fashion phenomenon is the main cause behind the acceleration of trend circulation, which

400 Design Regulation Recital 16. See also Recital 25: 'Those sectors of industry producing large numbers of possibly short-lived designs over short periods of time of which only some may be eventually commercialised will find advantage in the unregistered Community design. Furthermore, there is also a need for these sectors to have easier recourse to the registered Community design.' See also Schovsbo 2020.

401 This also connects to the induced obsolescence about which Raustiala and Sprigman write: the lower the protection, the more rapid the obsolescence of fashion designs (Raustiala & Sprigman 2006, p. 1722).

402 Design Regulation Article 96(2). Although this Article seems to leave it to Member States to decide to what extent designs can be protected by copyright and what level of originality is required, recent CJEU case law (notably, *Cofemel*) confirms that this is no longer the case. See Subsection 4.1 of this Summary and Härkönen 2020a, p. 10.

403 See Härkönen 2020a, p. 12, 15–16 and Härkönen 2018a, p. 918–922.

has resulted in the unsustainable status quo.[404] Strong protection of fashion designs could hence provide incentives that promote sustainable development in the garment industry in a way that a low-protection zone or a complete lack of protection may not.

Moreover, Rosati points out that successful lawsuits against fast fashion copyists might usher in 'a new enforcement era, in which also contrasting fast fashion phenomena might become easier and worth pursuing'.[405] Accepting fashion designs as copyright-protected subject matter makes it more difficult for companies to operate whose business strategy is based on offering low-quality copies of fashion designs for cheap prices.[406] These companies would no longer easily free-ride on the creativity of others and, in order to stay in business, they would have to come up with their own successful designs.[407] All of this makes producing cheap, low-quality mass-market copies of designer creations a less appealing business model.

Given the above, accepting fashion designs as copyright-protected subject matter has potential in hindering the fashion cycle and slowing down trend circulation. In this matter, this research agrees with Raustiala and Sprigman. However, unlike those authors, this research finds a slower fashion cycle a desirable outcome of copyright law measures. A slower fashion cycle would have a positive impact on environmentally sustainable development in particular. If the circulation of trends slowed down, fashion designs would have a longer market life and garments would not be discarded as quickly as they now are. This would also put pressure on clothing manufacturers to produce garments of a higher quality, which would arguably require paying better attention to the working conditions under which garments are sewn. Consequently, this would have potential positive effects on socially sustainable development.

As discussed earlier, it is not only cheap fast fashion brands that are to blame for extensive offshoring, exploitation of garment workers in the Global South and overlooking environmental values: luxury brands are also culpable.[408] However, sustainability issues related to such business practices differ between fast fashion and luxury brands. The pressure on fast fashion brands to keep consumer prices as low as possible shifts the focus from quality to quantity and, what is more, when the price of clothing has fallen relative to other consumer goods, this has encouraged consumers to treat garments as disposable.[409] Luxury goods, on the other hand, are

404 See McKinsey & Company 2016, p. 2–3 and Ellen MacArthur Foundation 2017, p. 18, 21. See also Raustiala & Sprigman 2012, p. 25.
405 Rosati 2018b, p. 857.
406 See also Härkönen 2020b, p. 170–172.
407 See also Hagin 1991, p. 368.
408 See e.g. Crewe 2017, p. 60.
409 See Brewer 2019, p. 1, Lueg, Medelby Pedersen & Nørregaard Clemmensen 2013, p. 345, Pouillard 2019, p. 141 and McKinsey & Company 2016, p. 2. See also Cline 2013, p. 117 and Crewe 2017, p. 60.

not generally affected by similar incentives to be constantly replaced by new, trendier items due to the inexpensiveness of new equivalent items. Unlike fast fashion, the key in luxury fashion does not lie in disposability.[410] Admittedly there are consumers for whom the price of a fashion design is of no concern and who can afford to renew their luxury brand-filled wardrobe every season, but considering the growth of the global middle class combined with the rise of fast fashion and relative decrease in clothing prices, it is the cheap fast fashion garments that are accountable for the negative effects on sustainability on a larger scale. Joy et al. suggest that since luxury fashion houses have a long-standing concern for quality and craftsmanship, they could actually withstand some of the problems endemic to fast fashion and provide leadership on solving the industry's sustainability problems, especially considering how influential they can be on consumption processes.[411] Indeed, where sustainable development is concerned, some features of high fashion houses, such as creating desire through innovative design, a need to embody artisanship and emphasising authenticity, can be counted to their advantage.[412] Those characteristics arguably incentivise a focus on quality instead of quantity, leading to more durable clothing and accessories.

> By having a focus on the negative effects of fast fashion, this research does not aim to create a confrontation between fast fashion brands and luxury brands per se, when it comes to the downsides of offshoring and other business practices that hamper sustainable development. The unsustainable business practices of luxury brands are most certainly worth their own research, also in the IP context and particularly from the perspective of trademark law. Calboli has conducted insightful research into this issue. Calboli sheds light on how operators in the luxury industry have transformed from companies that offer superior product quality (often based on craftsmanship) to luxury conglomerates of pyramidal luxury and mass-produced 'masstige' products.[413] She notes that the definition of 'luxury' has become very vague and blurred in the mind of the public, which also derives from the luxury brands' own expansion of the use of their trademarks to a wide sector of consumer goods.[414] As luxury trademark owners themselves self-dilute the uniqueness and singularity of their marks with these brand extensions, Calboli argues that 'these marks should not enjoy anti-dilution protection and should be protected only within the general consumer confusion theory, that is, against trademark infringement'.[415] She does not extend this argument to luxury products made

410 See Joy et al. 2012, p. 283.
411 Joy et al. 2012, p. 289, 291–292. They describe combining sustainability and luxury as '"green" and "gold."' (ibid., p. 289)
412 Joy et al. 2012, p. 290. See also Calboli 2015, p. 50.
413 Calboli 2015, p. 35–39.
414 Calboli 2015, p. 45–47.
415 Calboli 2015, p. 47.

> by high-end niche-market *maisons* that continue to meet high production standards.[416] Calboli points out that anti-dilution protection of the trademarks of these high-end niche market *maisons* actually has a link to sustainable development: protection could motivate them to continue to adhere to high manufacturing standards, which are environmentally friendly and respect high standards of labour protection.[417]

All of this being said, this research does not intend to claim copyright protection of fashion designs as the one and only magic formula to fix the whole fashion industry and make it thoroughly sustainable.[418] Protection is only one step towards a more sustainable fashion industry and hence contributes to sustainable *development*. There are still many obstacles to conquer. The effectiveness of copyright protection in this matter is related to *enforcement* and *ownership* of such rights. Firstly, the effectiveness of copyright law depends very much on whether rightholders are willing to enforce their rights. If fashion designers choose to tolerate copies of their designs even when they have the legal measures to fight them, copyright protection will have little effect on fast fashion copycats.[419] The effectiveness of copyright protection is also linked to the ownership of copyright. It might have practical significance whether the copyright holder to a fashion design is an individual designer, a small company or a fashion conglomerate. For an individual designer – the author – or a smaller fashion business the threshold for taking legal action against a copycat may be high,[420] since enforcing of IP rights requires significant investments into legal assistance and financial risk.[421] This might create obstacles for access to justice,

416 Calboli 2015, p. 49–50.

417 Calboli 2015, p. 50. See also Joy et al. 2012, p. 287–290.

418 Härkönen 2020b, p. 171.

419 Härkönen 2020b, p. 171 and Beebe 2015a, p. 6. See also Raustiala & Sprigman 2012: not all designers view copying as something that is undesirable, but rather as a 'badge of honour' (ibid., p. 38). Luckily, it seems that European fashion designers are generally willing to enforce their rights, even copyrights (Church, Derclaye & Stupfler 2019, p. 697, 703). Related to the enforcement of copyright (and design right), Derclaye points out that rules of evidence are not harmonised in the Member States. This might lead to different outcomes in litigations in different Member States, especially due to the issue of whether and to what extent Member States allow evidence of experts in court (Derclaye 2020, p. 5).

420 Härkönen 2020b, p. 172. See also Beebe 2015a, p. 6 and Brewer 2019, p. 4.

421 Hemphill and Suk (2019), however, seem rather optimistic about emerging designers and small fashion companies enforcing their intellectual property rights against copycats (ibid., p. 1192–1193). Church, Derclaye and Stupfler (2019) have researched enforcement of design rights and their findings seem to be in line with Hemphill and Suk's view. Church, Derclaye and Stupfler argue that designers are generally not afraid to sue infringers. They also suggest that the fashion industry relies on copyright (ibid., p. 696, 697, 701, 703). Noto La Diega (2019) points out that when it comes to enforcement of copyright to a fashion design, also the *social norms* that might prevent enforcement in some cases must be considered. Noto La Diega suggests that due to a certain power imbalance in the fashion industry, enforcing laws especially against big luxury brands is 'socially unacceptable' in the fashion world (ibid., p. 22–24). On the existence of social norms regarding copying in the fashion industry, see also Sprigman 2017, p. 255 and Raustiala & Sprigman 2012, p. 50–52.

especially if the rightholder is an individual designer or a small company, and the infringer a corporation with an army of lawyers. However, if the rightholder were a high fashion house, a luxury conglomerate or other established business, the chances for the rightholder to intervene in infringements might be higher due to the availability of resources.

> When it comes to fashion and copyright ownership, a separate issue to consider is the fashion designers' moral rights as authors,[422] e.g. the right of attribution. Apart from some designer-led companies, where the whole brand is actually built on the creativity of an individual designer,[423] it does not seem to be common practice for fashion companies to mention the designer who created a particular garment or accessory.[424] This practice might be related to the hierarchy of designers in the fashion system, as described by Kawamura[425], and to related brand-building, but it raises questions regarding moral rights. According to Berne, the author shall have the right to claim authorship of the work. This right is independent from economic rights and applies even after the transfer of the said rights.[426] It might be that the confirmation of fashion designs being eligible for copyright protection under the same conditions as works of pure art will force some fashion companies to re-evaluate their moral rights' policies. Future research into these customs in the fashion world and related moral rights aspects would certainly be worthwhile.

The findings of this research support the hypothesis of Research Question 2. Fashion has been working in a low-copyright regime, and although this has helped the industry to grow to enormous proportions, the type of growth has been undesirable, being based on the perpetual increase of garment *production* and garment *consumption*. This has led to a situation which is environmentally and socially unsustainable. The low-IP equilibrium to which the fashion industry has been accustomed has played a role in this. Globally, the lack of IP protection has fostered fast fashion copying and made the manufacturing of cheap, low-quality copies a profitable business that has allured consumers.[427] Essentially, fast fashion is a business model that is damaging not only for intellectual property but also for sustainable development. Even though the most obvious sustainability challenges of low-cost, poor-quality, mass-manufactured and largely disposable garments lie in

422 On moral rights regarding alignment of design law and copyright law, see Derclaye 2020, p. 16.
423 Acknowledging that, regardless of a fashion brand being named after an individual, the actual designer of a garment sold under such a brand might be someone entirely different. See Subsection 4.1 of this Summary.
424 On this issue, see also Kahn 2018, p. 28–32.
425 See Kawamura 2018, p. 62–64, 67–69.
426 Berne Convention, Article 6*bis*.
427 See also Brewer 2019, p. 4.

environmental and social sustainability, the fast fashion phenomenon and its side effects are also counterproductive in terms of cultural sustainability. Viewing fashion designs as creative cultural expressions instead of something disposable that quickly loses its value not only promotes cultural diversity but is also a healthier alternative to our throwaway culture. Similarly, viewing fashion designs as protection-worthy subject matter promotes diversity in copyright law. In this regard, the development of EU copyright law has been ideal. Considering fashion designs as worthy of copyright protection hampers fast fashion copying and hence has potential for slowing down the fashion cycle in that it incentivises more sustainable business models – the kind not based on rapid copying of popular designs. Raustiala and Sprigman describe copying as the engine of the fashion industry. Copyright could turn off or at least slow down this engine, because the direction in which it is driving the industry is disastrous.

4.3 RQ 3: Fashion and the blind spots of copyright law

Even with the recent positive development of EU copyright law regarding works of applied art, there are still at least two forms of copying that occur in the context of fashion, to which copyright law – and intellectual property law in general – turns a blind eye: *cultural appropriation* and *private copying* of fashion designs. As for whether something should be fixed in IP law or its interpretation to address these blind spots, the answer is different for each one. For reasons explained below, this research argues that (i) IP law should start to consider dress heritage of marginalised cultures, particularly Indigenous cultures, as a protectable subject matter, preventing cultural appropriation copying;[428] and (ii) conversely, IP law should not be concerned about private copying of fashion designs and there is no reason to try to tackle this phenomenon.[429]

In cultural appropriation, fashion designers and fashion houses themselves are the copycats – even the most prestigious ones, whose designs are usually original.[430] In other words, this copying phenomenon is not restricted to shady counterfeiters or fast fashion companies. Ironically, even those who fiercely advocate IP protection for fashion designs are just as often guilty of appropriating the cultural property

428 Ballardini, Härkönen & Kestilä 2021.

429 Härkönen 2018b.

430 As opposed to e.g. fast fashion brands, which have built their business on copying others. See also Calboli 2018b, p. 360: creative industries in general have frequently been accused of bias against minorities and insensitivity to diversity.

of marginalised and/or Indigenous cultures.[431] The Western fashion industry appears to be very concerned about exclusive rights to their own designs, but when it comes to non-commercial clothing – such as Indigenous dress heritage – they seem disinterested in rights.[432] The creativity of 'othered' cultures[433] is generally seen as open-source, free material for the fashion industry to exploit.[434] This is a direct heritage of colonialism, which in the fashion world has taken the form of cultural colonialism.[435] The same heritage can be seen in IP law, which treats TCEs as a part of the public domain.[436] Pham suggests that there is a 'critical blind spot left by the conceptual gap between intellectual property and cultural property'.[437] This research shares Pham's view.

The modern fashion industry is very Eurocentric, and a 'West versus the rest' sentiment is rather common.[438] Indigenous, Native and 'ethnic' dress heritage is often considered as non-fashion or anti-fashion: the 'other' of fashion. It is viewed as a static form of dressing associated with non-Western cultures.[439] This is not the case, though, because dress heritage also evolves and changes and is influenced by surrounding cultures.[440] Perhaps the idea of dress heritage and traditional dress as

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431 Pham points out that vocal proponents of fashion copyright legislation, such as Diane von Furstenberg and Ralph Lauren (who are both actively involved in the Council of Fashion Designers of America 'You Can't Fake Fashion' campaign) have introduced collections that involve an array of 'Maasai' products – clothing, jewellery, home furnishings, and paint – inspired by but not authorised by or remunerated to the Maasai people. Pham furthermore takes the Feral Childe case as an example of the hypocrisy of the Western fashion industry: in 2011, Feral Childe, a small, independent but popular eco-fashion label was copied by Forever 21, which is an American fast fashion chain. Feral Childe accused Forever 21 of copying one of its hand-designed prints called 'Teepees'. The fashion media and its readers overwhelmingly sided with Feral Childe. What was left unnoticed were the legal and cultural claims of Native Americans on teepee designs. Pham notes that 'The publicness of the teepee, the idea that it existed in the public domain, belonging to no one and so was freely available to be manipulated, refined, and transformed into fashion for the use and profit of the Western author, was a belief that literally went without saying' (Pham 2016, p. 53–56, 64).

432 Pham 2016, p. 55–56.

433 See e.g. Wilson 2003, p. 258 and Kaiser 2012, p. 78, 95–96.

434 Ballardini, Härkönen & Kestilä 2021, Subsection 4.3.

435 See e.g. Barnard 2020b, p. 743.

436 See also Frankel 2018, p. 240: Frankel points out that legal norms are important for catching non-consultative free-riding and misappropriation, and also to 'foster a better understanding of the contours of a fair and just public domain'.

437 Pham 2016, p. 55.

438 See e.g. Kaiser 2012, p. 32–33 and Green & Kaiser 2017, p. 146. See also Barnard 2020b, p. 744.

439 Wilson 2003, p. 258. See also Kaiser 2012, p. 33, 52–54, 90, 95–96, Sapir 2020, p. 62 and Polhemus & Proctor 1978, p. 107.

440 Dress heritage often adapts its aesthetics to align to fashion and decoration trends. The extent to which this can be done at the expense of faithfulness to tradition is viewed differently by different communities (Sabiescu 2018, p. 188). See also Wilson 2003, p. 258, Polhemus & Proctor 1978, p. 104, Kaiser 2012, p. 52–54, 90 and Taylor 2002, p. 209–213. However, there are some cases of minority group disidentification, where the group's distinctive dress has remained essentially unchanged for hundreds of years (see Davis 2020, p. 85).

something completely separate from the fashion industry has convinced mainstream designers that it is free source material that can be exploited when designing new collections. By no means a new phenomenon,[441] cultural appropriation has only become widely frowned upon in recent years.[442] The fashion industry has always been inspired by dress heritage of cultures that are 'exotic' to the Western eye:[443] Orientalism, for example, infused a vision of the East into Western dress and was particularly popular in the 1920s and 1930s.[444] In the 1960s and 1970s, Indigenous Native American-inspired garments and accessories became fashionable among the hippie movement, emphasising an unrefined and organic lifestyle. In the twenty-first century, Nordic fashion brands have been inspired by indigenous Sámi culture and Sámi TCEs in their design and advertising.[445]

The heritage of *legal colonialism* is evident in how intellectual property law views TCEs of colonialised cultures.[446] Indigenous dress heritage is one example. Copyright law does not always see creativity that diverges from the civil law countries' copyright traditions' myth of the individual creative genius. From the perspective of IP law, cultural appropriation has been completely acceptable: Indigenous TCEs, such as dress heritage, have been considered to belong to the public domain.[447] There are plenty of reasons behind this, most importantly lack of authorship, lack of fixed form and the nature of the Western copyright tradition in general.[448] However, communities might have their own customary law systems that govern the use of

441 Kaiser 2012, p. 95–96 and Polhemus & Proctor 1978, p. 107–108.

442 Ballardini, Härkönen & Kestilä 2021, Subsection 4.3 and Green & Kaiser 2017, p. 145–146.

443 Ballardini, Härkönen & Kestilä 2021, Subsection 4.3. See also Wilson 2003, p. 56, Kaiser 2012, p. 94–95 and Green & Kaiser 2017, p. 145–146.

444 See e.g. Kaiser 2012, p. 95–96.

445 See Ballardini, Härkönen & Kestilä 2021, Subsection 4.3. See also Frankel 2017, p. 758–759: the cosmetic industry has a long tradition of appropriating traditional knowledge of Indigenous peoples.

446 See e.g. Glenn 2007, p. 31, 58–60, 260–261, 264. Glenn notes that in this regard, Western sociology and anthropology have over the course of history used disparaging terms, which are not scientifically or intellectually accurate, to describe colonialised cultures. Politically incorrect – racist, even – language can be detected in older fashion research, as well: Simmel, for example, writes about 'primitive races' and 'the savage' (Simmel 1904, p. 95). All of this further underlines the need to rethink the concept of property in the Western IP regime and fashion system, and reshape it to better reflect cultural sustainability.

447 Ballardini, Härkönen & Kestilä 2021, Subsection 4.2. See also Frankel 2017, p. 762, Frankel 2018, p. 240, Brown, Gervassis & Mukonoweshuro 2018, p. 341, Sabiescu 2018, p. 184–189, Sunder 2012, p. 22 and Åhren 2010: Åhren explains that the IP counterpart to the *terra nullius* situation of Indigenous land rights is public domain (ibid., p. 135–136, 143–145). On *terra nullius*, see also Asmah 2010, p. 138.

448 In copyright terms, 'lack of authorship' refers to a lack of single identifiable author or authors, not to a complete absence of a person behind the creativity (see Ballardini, Härkönen & Kestilä 2021, Subsection 4.2). See also Sabiescu 2018, p. 186. On lack of fixed form, see also C-310/17 *Levola Hengelo*: the Court requires that a subject matter protected by copyright must be identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form (para. 40). This requirement is very likely to cause obstacles to dress heritage in general, although individual expressions of such heritage could pass the test.

their dress heritage.[449] The Indigenous customary law-based intellectual property system often conflicts with the IP system of the surrounding society.[450] Because the right to use and reproduce certain elements in dress heritage may be determined by customary laws that are not recognised outside of the community, it is very difficult for traditional communities to use legal means to prevent these elements from being copied and used for commercial purposes by others, if these elements are publicly known.[451]

A major problem in the commercial use of Indigenous dress heritage by outsiders is that the source culture rarely profits in any way.[452] This is particularly striking in cases where the appropriating party is a high-end or luxury brand. In 1999, the American fashion designer Donna Karan sent a representative to the North West Territories of Canada to seek inspiration for the Fall 2000 collection. Soon thereafter, Donna Karan's Inuit-inspired collection was featured on runways. This raised many concerns for the Inuit, who feared misappropriation of their designs, exploitation of the Indigenous people and that the imitation would do more harm than good to their Northern people.[453] A similar cultural appropriation scandal occurred in 2017, when Chanel sold boomerangs – an article belonging to the Australian Aboriginal traditional knowledge and cultural expressions – for approximately USD 2,000. According to Rimmer, the controversy highlighted the need for legal reform, to better protect Indigenous intellectual property.[454]

This research shares Rimmer's concern. One of the biggest problems is that the mainstream IPR system is primarily based on economic incentives, and largely ignores interests like Indigenous peoples' right to self-determination (which has been cited as one of the most central human rights of Indigenous peoples),[455]

449 Ballardini, Härkönen & Kestilä 2021, Subsection 4.1.

450 Dutfield 2003, p. 26, and Ballardini, Härkönen & Kestilä 2021, Subsection 4.2 and Sabiescu 2018, p. 186–187.

451 Dutfield 2003, p. 26, Sabiescu 2018, p. 184, 188, Sunder 2012, p. 23 and Scafidi 2015, p. 109. See also Åhren 2010, p. 3.

452 See e.g. Frankel 2017, p. 758–760, Frankel 2018, p. 240 and Kaiser 2012, p. 48. Moreover, for Indigenous craftspersons, making use of their dress heritage is a revenue-making activity with which cultural appropriation committed by fashion houses interferes (Sabiescu 2018, p. 184, 187).

453 Asmah 2010, p. 213–217. On Donna Karan, see also Scafidi 2005, p. 97. See also Sabiescu 2018: Sabiescu describes the production of Romanian ethnic crafts such as the 'Romanian blouse'. It takes weeks of patient hand-stitching and embroidery to make one blouse, but the maker could earn at most EUR 100–200 for this effort. Blouses that imitate the traditional Romanian blouse can be produced by machine and be sold for several hundreds or even thousands of euros. Sabiescu takes Tom Ford as an example of a fashion brand that has imitated the Romanian dress heritage in their collections (ibid., p. 184). See also Brown, Gervassis & Mukonoweshuro 2018, p. 341, 343.

454 'Chanel boomerang flies in the face of Indigenous intellectual property', *Queensland University of Technology News* 16 May 2017, https://www.qut.edu.au/news/news?news-id=117658).

455 UNDRIP Article 3 and Helfer & Austin 2011, p. 447.

the right to culture, and also societal values such as fairness.[456] The IP framework purely reflects the view of the hegemonic culture,[457] where the interests and views of minorities are largely, if not totally, disregarded. This highlights the hierarchy that the IP system has built between different creative cultures. In order to protect Indigenous cultural heritage, the preservation of these cultures and the cultural development of Indigenous peoples, their right to maintain, control, protect and develop their intellectual property of such cultural heritage, traditional knowledge and TCEs should be respected, as demanded by the United Nations Declaration on the Rights of Indigenous Peoples Article 31.[458] Although UNDRIP is not legally binding for its member states, it should set guidelines for interpreting existing (IPR) legislation.[459] Accordingly, Indigenous communities should have the right to determine the use of their creative output, such as dress heritage, as well as the right to determine whether they want to disseminate elements of their TCEs to non-members, such as the fashion industry.[460]

Placing Indigenous dress heritage in the public domain and ignoring the cultural appropriation phenomenon poses a threat to the preservation of these cultures. Appropriation of Indigenous dress heritage causes a risk of dilution: utilisation of a cultural element that distinguishes a minority group from the hegemonic culture might further dilute the already thin cultural borders preventing the minority from being absorbed into the majority society, leading to extinction.[461] Cultural appropriation is thus not culturally sustainable and threatens the whole existence of Indigenous groups and other marginalised cultures. Therefore it is necessary to consider including Indigenous TCEs, such as dress heritage, within subject matters protected by intellectual property law, to ensure that these cultures continue to exist. This kind of development would reflect cultural sustainability and diversity in IP law.[462]

Although cultural sustainability touches all cultures, special attention is required in the context of Indigenous and other minority cultures, including cultures that are marginalised or otherwise disadvantaged compared to the hegemonic culture, because cultural appropriation in fashion principally concerns these. Especially cultures that face or have faced discrimination and/or racism at different levels are particularly vulnerable to extinction, meaning that their preservation is a pressing issue. Considering means to protect their TCEs, such as dress heritage, is vital.

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456 Ballardini, Härkönen & Kestilä 2021, Section 3, Calboli 2018b, p. 363, Sunder 2012, p. 23, 27 and Sabiescu 2018, p. 193–198.

457 See also Kaiser 2012, p. 48.

458 See Ballardini, Härkönen & Kestilä 2021, Subsection 4.2 and Sabiescu 2018, p. 194.

459 Ballardini, Härkönen & Kestilä 2021, Subsection 4.2.

460 Ballardini, Härkönen & Kestilä 2021, Section 1 and Sabiescu 2018, p. 193.

461 Åhren 2010, p. 216–217. See also Ballardini, Härkönen & Kestilä 2021, Subsections 4.1 and 4.3.

462 See also Calboli 2018b, p. 363–364, Sunder 2012, p. 27 and Green & Kaiser 2017, p. 148.

A user-centric approach to IP law, especially copyright law, would acknowledge the needs of Indigenous and other marginalised cultures whose dress heritage faces unjust appropriation by the fashion industry.[463] One way of implementing a user-centric approach in IP law would be to interpret some of the existing IPR provisions more broadly, so that they could be used to prevent phenomena such as dress heritage misappropriation.[464] An example of such an interpretation of an existing provision would be to apply copyright law's *protection of classics*[465] to TCEs like Indigenous dress heritage.[466] Another way to increase the inclusivity and user-centricity of the IPR system would be to enact provisions outside of the pure IPR framework in a way that would affect the IPR system. For instance, the US Indian Arts and Crafts Act prohibits misrepresentation in marketing of Native American arts and crafts produced within the United States.[467] Legislative measures that strengthen protection of TCEs, such as that described above, are likely to disincentivise fashion brands from treating the TCEs of marginalised cultures as free source material to be exploited.

Much like cultural appropriation copying, homemade copies of fashion designs seem to be an invisible phenomenon in the eyes of IP law. It is common among people for whom sewing is a pastime to knock off popular designs from well-known fashion brands,[468] but there is not much that the current European IP regime can do to tackle this, particularly due to an exception in copyright law. Article 5 of the InfoSoc Directive lists a number of exceptions and limitations that Member States may provide to the author's exclusive rights. One of these exceptions concerns copies made by a natural person for private use and non-commercial purposes (Article 5(2)(b)). In most Member States, home sewers can rely on this private copying

463 Ballardini, Härkönen & Kestilä 2021, Subsection 5.2 and Sabiescu 2018, p. 193–198.

464 Ballardini, Härkönen & Kestilä 2021, Subsection 5.2. See also Calboli 2018b, p. 363 and Sabiescu 2018, p. 183, 188, 194.

465 See Finnish Copyright Act (*Tekijänoikeuslaki*), Section 53: 'If, after the death of the author, a literary or artistic work is publicly treated in a manner which violates cultural interests, the authority to be designated by decree shall have the right to prohibit such an action, notwithstanding that the copyright therein is no longer in force, or that copyright has never existed.' Other Nordic countries have similar provisions in their copyright laws. See e.g. Swedish Copyright Act (*Lag om upphovsrätt till litterära och konstnärliga verk*), Section 51.

466 Ballardini, Härkönen & Kestilä 2021, Subsection 5.2 and Nuorgam & Karhu 2010, p. 181–182.

467 Ballardini, Härkönen & Kestilä 2021, Subsection 5.2 and Scafidi 2005, p. 57. However, this law has its shortcomings: the act problematically only protects US federally recognised tribes, leaving out non-federally recognised Native American tribes, Canadian First Nations and other Indigenous groups around the globe, creating a legal loophole for appropriation by designer brands (Green & Kaiser 2017, p. 147). For ways to design the IPR system in a more inclusive manner that fosters diversity in IP law, see Ballardini, Härkönen & Kestilä 2021, Subsection 5.2 and Sabiescu 2018, p. 188–189. See also Calboli 2018b, p. 361.

468 Härkönen 2018b, p. 861–862.

exception.[469] Therefore, it seems unlikely that rightholders would have much luck enforcing copyrights against home sewers.[470] Design right and trademark protection would be equally ineffective, unless sewers made copies for commercial purposes or used a registered sign in the course of trade.[471] The rightholder could intervene if the individual who is making copies aimed to profit by, for instance, selling at a craft fair or sewing copies to order for acquaintances. Even in these cases, practical problems might hinder successful enforcement: when the infringement occurs on a small scale, by hand and at home, it is unlikely that enforcement would be practicable.[472]

> In retrospect, Article V would have benefited from refining the terms it uses to describe homemade imitations of fashion designs. The term 'copy' and the more informal term 'fake' are used as synonyms therein, although the former term has a clear connection to copyright law, while the latter can be interpreted to refer to counterfeit fashion and, thereby, trademark law issues. Since it is noted in Article V that home sewers mostly imitate features of fashion designs that are protected by copyright or design right, rather than features protected by trademark right,[473] the term 'fake' is rather superfluous and it is acknowledged that it might cause some confusion.

Unlike in the case of cultural appropriation, there seems to be no reason why the IP system should try to tackle homemade copies of fashion designs. Firstly, private copying does not seem to harm or cause any considerable damage to fashion brands and designers as rightholders.[474] Some rightholders could actually profit from the phenomenon by making copying of their designs easier, e.g. by selling sewing patterns of their most popular designs.[475] Viewing the phenomenon of private copying of fashion designs from the sustainability perspective, it actually appears as a method of making garments in a way that is more environmentally and socially sustainable than mass-manufacturing. It is virtually impossible to overproduce garments in

469 Härkönen 2018b, p. 863. See also InfoSoc Directive Article 5(2)(b). This Article sets a condition for the private use exception: rightholders should receive fair compensation for such private use. However, there is no system for collecting compensation from home sewers. Introducing a levy system for fashion design copyright holders would probably not be realistic or reasonable, at least at the moment. Moreover, there would probably be no obligation for compensation where the damage to the rightholder is minimal, and homemade copies of fashion designs would likely fall into this category. See Recital 35 in the Preamble to the InfoSoc Directive and Härkönen 2018b, p. 865. See also Schovsbo 2008, p. 406.
470 Härkönen 2018b, p. 863.
471 Härkönen 2018b, p. 863, Design Directive Article 13(a), Design Regulation Article 20(1)(a), Trademark Regulation Article 9 and Trademark Directive Article 10. See also Trademark Directive Recital 18.
472 Härkönen 2018b, p. 863.
473 Härkönen 2018b, p. 862, 863.
474 Härkönen 2018b, p. 863–864.
475 Härkönen 2018b, p. 864.

home sewing: over-production is a consequence of mass-manufacturing.[476] It is also relevant that homemade fashion involves fewer human rights issues than mass-manufacturing, because it eliminates the sweatshop.[477] The home sewers who produce private copies are very aware of this: according to the empirical research conducted for Article V, one of the reasons for copying fashion designs at home was mistrust of the sustainability of fashion brands. Several respondents mentioned that they wanted to be certain about the origins of the garments they wear, which includes knowing where and how they are manufactured. They want to ensure that they do not wear sweatshop-made apparel, which cannot at the moment be one hundred percent ascertained when it comes to commercial fashion. Home sewers also prefer domestically manufactured fashion, which is not something that a lot of brands have to offer in the era of offshored garment production.[478] A general distrust of the fashion industry is obvious among the respondents – and it is justified, as we learned in Subsection 4.2.[479]

Homemade fashion – whether copied or not – is something that should be incentivised and encouraged in the age of fast fashion and its environmentally, socially and culturally damaging impact.[480] Western society should perhaps look at the ways in which people used to obtain new clothes half a century ago. While sewing was then considered as an economically sound activity and a 'must have' skill, it became devalued and relegated to a hobby once the markets started pushing ever-cheaper clothes to consumers.[481] This development has further contributed to consumers' disassociating garment production from garment consumption.[482] It might be good to increase consumers' awareness of the effort it takes to construct a garment, from measuring to pattern drawing and fabric cutting, all the way to

476 Overproduction of garments in the current linear fashion system consumes massive amounts of natural resources. See Ellen MacArthur Foundation 2017, p. 2017, 21, 36–38 and Subsection 4.2 of this Summary.

477 On sweatshop issues, see Subsection 4.2 of this Summary and e.g. Wilson 2003, Chapter 4. Of course exploitation might still exist at the textile manufacturing stage: even if a garment is sewn at home instead of a sweatshop, the fabric and its fibres might have origins that are not environmentally friendly or that include exploitation of labour or other human rights issues. The media have lately drawn attention to China's exploitation of its Uighur minority in cotton production in Xinjiang, for example. See e.g. Kelly: '"Virtually entire" fashion industry complicit in Uighur forced labour, say rights groups'. *The Guardian,* 23 July 2020.

478 Härkönen 2018b, p. 862.

479 The home sewers' distrust of fashion brands is in line with the research findings of Cervellon and Carey (2020), which indicated that 'lack of knowledge due to the lack of information about brands engendered suspicion'. This was particularly the case for brands that declared themselves 'green' choices (ibid., p. 168).

480 On the environmentally damaging effects, see e.g. Ellen MacArthur Foundation 2017, p. 18, 21 and Lueg, Medelby Pedersen & Nørregaard Clemmensen, 2013, p. 345.

481 Pouillard 2019, p. 147 and Härkönen 2018b, p. 860. See also Raustiala & Sprigman 2012, p. 22–23.

482 Regarding this disassociation, see e.g. Wilson 2003, p. 85 and Kaiser 2012, p. 18.

sewing, fitting and finalising it – not to mention all the seam-ripping that might take place in between. Private copying of fashion designs might very well be more sustainable than manufacturing of the original designs. If copying designer creations incentivises consumers to make their own garments – to manufacture *slow fashion* – then by all means it should be encouraged. IP law should not stand in the way. EU copyright law, which allows Member States to permit such private copying , is therefore an asset in terms of sustainable development.[483]

The described phenomenon of private copying of fashion designs illustrates how there is nothing wrong with copying per se: the wrongfulness of copying is a socio-historical construct.[484] Considering the intersection between fashion, copying and sustainability, it does not matter so much *who* copies or *what* is being copied. What matters is *how* the copying takes place. When copying occurs on a large scale and copies are mass-manufactured in offshored sweatshops from low-quality materials, it is wrongful from the perspective of sustainability and, arguably, from the point of view of copyright law. But when an individual who is skilled at operating a sewing machine produces a replica of a fashion design in the privacy of their home, it is neither wrongful nor causes considerable harm to the rightholder. This juxtaposition highlights what Drassinower has argued: the assumption that copying is inherently wrongful is the wrong way to approach copyright law.[485] Copyright law is not about prohibiting copying: it is a system that distinguishes between lawful and unlawful copying.[486]

To conclude, private copying and cultural appropriation copying as blind spots of copyright law are polar opposites when it comes to their harmfulness and to how copyright law – and intellectual property law in general – should approach them. On the one hand, private copying causes no significant harm to the rightholders and is arguably often a more sustainable method of producing fashion than the mass-manufacturing that dominates the rightholders' garment production.[487] On the other hand, cultural appropriation copying can severely harm the source culture, especially when the source culture is Indigenous.[488] It is genuinely necessary to consider applying IP protection to the dress heritage of marginalised, endangered cultures, such as Indigenous cultures, if we want to secure the survival and existence of these cultures.[489] Taking into account that the EU legislature considers culture and cultural creativity as important values and acknowledges that a high level

483 InfoSoc Directive Article 5(2)(b).
484 Drassinower 2015, p. 2.
485 Drassinower 2015, p. 2.
486 Drassinower 2015, p. 2.
487 Härkönen 2018b, p. 863–864. On private copying, sustainability and CSR, see also Brown, Gervassis & Mukonoweshuro 2018, p. 335.
488 Ballardini, Härkönen & Kestilä 2021, Subsection 4.3.
489 Ballardini, Härkönen & Kestilä 2021, Subsection 4.3.

of protection helps to foster these values,[490] a broader standpoint on the kind of creativity that is accepted as protection-worthy subject matter would be justified. Moreover, in the spirit of legal pluralism, the Indigenous customary law norms that govern the use of their dress heritage should not be pushed aside merely because they do not fit into the Western concept of IP law.[491] Applying IP law to dress heritage and other TCEs is certainly not easy, but as this Subsection and Article IV show, it is not impossible either.[492] Eventually, this is a value choice: should we use the IP system only to protect economic values, or should we also protect the existence and preservation of certain societal groups? This research states that that is not an either-or question: in the IP system, there is room for protecting Indigenous dress heritage if we want to promote the respectful treatment of Native cultures and Indigenous forms of self-expression within mass societies.[493] Applying IP law would be an effective way to promote and respect dress heritage and other TCEs, and to prevent situations where outsiders – such as the fashion industry – commercially exploit this heritage without giving anything back to the source culture.[494] Applying IP law to TCEs would also be in line with UNDRIP Article 31. Private copying, on the other hand, is not something that the rightholders or the IP system should be worried about. Instead, it could even be incentivised.[495] Considering these conclusions, the findings of Articles IV and V support the hypothesis of Research Question 3.

> The hypothesis for Research Question 3 changed during the course of the research. The original hypothesis was that *all* copying in the context of fashion is harmful at some level at least, and that IP law should tackle all copying in one way or another. However, after analysing the responses to the empirical survey committed for Article V, it became clear that private copying of fashion designs should not actually be prohibited by means of IP law or any other legal measure. This caused some confusion, and considerations of whether Article V should even be included in this composite thesis at all. The effect of the modification of the hypothesis might have been to distance the theme of Research Question 3 from Research Questions 1 and 2. However, it was ultimately possible to connect Article V to Article IV by having an even stronger focus on the sustainability perspective of copying, rather than just focusing on the potential harm to rightholders. In hindsight, the empirical survey conducted for Article V should have included detailed questions about the sustainability of home sewing and the unsustainability of the copied brands. This way, the sustainability perspective of Article V would have

490 See InfoSoc Directive Recitals 11 and 12. See also Term Directive Recital 11.
491 On legal pluralism, see e.g. Glenn 2007, p. 31, 49–50. See also Sabiescu 2018, p. 186–187.
492 See also Collins 2018, p. 229 for some examples on national laws around the globe that promote preservation of traditional cultural expressions.
493 Ballardini, Härkönen & Kestilä 2021, Section 5 and Brown 2003, p. 10.
494 Ballardini, Härkönen & Kestilä 2021, Section 5. See also Kaiser 2012, p. 48.
495 Härkönen 2018b, p. 863–865.

been even stronger and its contribution to this composite thesis more significant. This Summary, however, attempts to further process the sustainability issues that Article V evoked. In retrospect, it would also have been intriguing to connect e.g. Drassinower's theories about copying to the phenomenon of private copying of fashion designs.[496] Drassinower's analysis of how there is nothing essentially wrong with copying would have deepened the legal analysis in Article V. Subsection 4.3 herein aims to redress this shortcoming of Article V by briefly connecting some of the points Drassinower makes with the private copying phenomenon.

4.4 RQ 4: Future sustainability challenges in the interconnections between copyright and fashion

Technological advancements and digitalisation have been cited as elements that will help the fashion industry to become more sustainable.[497] One such technological leap is the development of AI fashion designers, which will likely change the creative environment. This research argues that for copyright-related reasons, the increasing use of AI designers has potential negative effects on the sustainable development of the industry, unless the IP system will consider AI-generated creative outputs as a subject matter worthy of protection.[498]

In essence, it appears that due to the absence of human authorship, AI-generated fashion designs automatically fall into the public domain and, therefore, be free for anyone to copy.[499] AI-based creativity does not seem to fit into the traditional concept of copyright, since copyright law was primarily created to protect the creative outputs of a natural person.[500] Especially the European approach to originality as a requirement for copyright protection highlights the personhood of the author.[501] On the international level, originality has also consistently been interpreted in a way that requires the author to be human.[502] With a lack of human authorship and, hence, lack of originality, it appears that AI-generated

496 Drassinower 2015.

497 See e.g. Black 2019, p. 113–116.

498 Härkönen 2020b, p. 163. That is not to say, however, that the development of AI technologies in fashion per se is a negative issue or that AI designers would *only* have negative effects on sustainable development. An AI designer may be capable e.g. of calculating the environmental footprint of the garments it designs more effectively than a human designer, or of optimising pattern placement in a way that minimises cutting waste.

499 Härkönen 2020b, p. 172.

500 Härkönen 2020b, p. 168–169.

501 Härkönen 2018a, p. 918–919, Härkönen 2020a, p. 16 and Härkönen 2020b, p. 168. See also Mylly 2016, p. 118 and Rosati 2013, p. 153. Of the CJEU judgements, especially *Painer* highlights the personhood of author.

502 Härkönen 2020b, p. 169. See also Ginsburg 2018, p. 131 and Rosati 2017, p. 977.

works could not enjoy copyright protection and its benefits against unauthorised reproduction.

This research argues that leaving AI-generated fashion designs outside of the scope of copyright protection would be counterproductive in terms of the sustainable development of the fashion industry. As concluded in Subsection 4.2, placing fashion designs outside of the copyright regime incentivises design copying, which itself accelerates the fashion cycle and thus creates more production, more consumption, more pollution and more waste. Also, putting AI-generated designs automatically within the public domain might be a counterincentive to the development of AI technologies. Excluding AI-generated works from copyright protection would deny the incentive of copyright to an increasingly large set fashion designs that are not that different from designs created by human authors, when it comes to their substance and public value.[503] Thus, the correct place for AI-generated fashion designs in the IP regime would not be the public domain.[504] In general, the creation of more copyright-free space within the fashion industry should be avoided: making the manufacturing of knockoff fashion easier in this way might incentivise fast fashion companies to produce even more replicas, because the risk of being sued for copyright infringements decreases.[505] To foster sustainable development, this is not something that copyright law should encourage.[506]

In line with what was discussed in Subsection 4.2, the effects of including AI-generated fashion designs under copyright-protected subject matter would largely depend on whether rightholders are willing to enforce their rights. If fashion companies that produce AI-generated garments and accessories choose to tolerate copies of their designs, even when provided with the legal means to fight them, copyright protection will have little effect.[507] It might help, however, in pushing the fashion industry towards more sustainable business models by indicating that AI-generated fashion designs are not automatically free for everyone to copy.[508]

This Subsection and Article III have illustrated that even though it is not obvious, the increasing use of AI designers is connected to the issue of sustainable development. The answers to Research Question 4 indeed demonstrate how sustainability aspects can be found almost everywhere in the fashion industry. The legislator, or anyone considering policies related to the fashion industry, should keep this in mind. When adopting any measure that affects the fashion industry – whether copyright, other IP law measures or any other legal instruments – one

503 Denicola 2016, p. 286.
504 Härkönen 2020b, p. 170, 171.
505 Härkönen 2020b, p. 170. See also Easterbrook 1996: 'Lower costs of copying may make violations of the law more attractive' (ibid., p. 210).
506 Härkönen 2020b, p. 171.
507 Härkönen 2020b, p. 171–172.
508 Härkönen 2020b, p. 172.

must first and foremost consider the effects, direct or indirect, that it will have on the sustainable development of the industry. Regulating the copyright protection of AI-generated works is an example where the regulatory result has an indirect effect on the industry's sustainable development.[509]

The findings of Article III offer support for the hypothesis of Research Question 4. Due to the intention of copyright law to protect merely the creative outputs of natural persons, AI-generated fashion designs are currently left out of the scope of copyright protection, making them particularly easy targets for (fast fashion) copying.[510] To a certain degree, non-protection of AI designs could negate some of the positive effects of the recent developments in CJEU case law, which were extensively discussed in Subsections 4.1 and 4.2 – particularly those related to the sustainable development of the fashion industry – as the quantity of AI-generated fashion designs grows. The legislator should therefore carefully consider whether AI creativity should be included in the copyright regime in some way.

> The exploration of challenges brought by the development of AI fashion designers to the sustainable development of the industry was initially supposed to fall under Research Question 2. It was found, however, that the part pertaining to AI would work better as an independent Research Question. Including AI within Research Question 2 would have made that particular theme too broad. In the context of AI, IP, fashion and sustainability, a need for further research remains. For example, the implications of design protection for AI-generated fashion or introducing a separate *sui generis* protection for AI-generated works would be worthwhile research topics.

4.5 The future of fashion law

The idea of conducting legal research on fashion is nothing new, although such scholarly discussion was not labelled 'fashion law' until this millennium.[511] Over the past two decades, fashion law has made its way into legal research and practice, despite the fact that not all academics are excited about calling it a 'field of law'. It was interesting to observe during the course of this research that (with a few exceptions), notable intellectual property law scholars seem less than keen to label their research as fashion law, even if they have published articles and book chapters with a sole

509 Härkönen 2020b, p. 171–172.
510 Härkönen 2020b, p. 170. Moreover, if the law does not extend copyright protection to AI-generated works, rightholders might rely on other protection methods, such as private ordering (Antikainen 2018, p. 23).
511 Scafidi 2012, p. 8–9.

focus on legal issues of the fashion industry.[512] This dissertation does not intend to argue whether fashion law is a 'real' field of law, a research area, a practice area or something else, as it is not relevant in order to answer the Research Questions. However, considering that this is a doctoral thesis related to fashion law, the debate is worth briefly mentioning, especially considering the difficulties that it has faced as a field of research in academia during its existence.

Scafidi conspicuously uses the term 'field of law' in writing about fashion law.[513] She also describes the many hardships and prejudices that her field of expertise has encountered in academia, for example being berated as 'too girly' and 'too frivolous'.[514] This is unsurprising, taking into account fashion's past association with outward appearances and women, causing it to be treated as a vanity issue and devalued as a topic of academic discussion.[515] Scafidi's observations are in line with those of Zimmerman, who brings up the connection between disparaging comments on fashion law and sexism: 'No matter which way one approaches the subject of fashion, one is likely to crash into a wall of sexism. Women's interest in their appearance is so commonly used to trivialize them that one is apt not to notice when it happens.'[516] Zimmerman furthermore notes that many scholars who are interested in fashion as a discipline seem to feel compelled to adopt a defensive tone when explaining the societal relevance of their research, and that, even in academic circles, fashion is sometimes seen as vain and frivolous.[517]

The history behind the belittlement of fashion as a topic of interest, also in the legal discipline, leads back to its inferior status among fields of art. Fashion has been described as the 'most marginalised of all arts' and considered 'not-art' because it deals with surfaces and self-adornment, which makes it 'a direct manifestation of superficiality and vanity'.[518] As a discipline, fashion research has traditionally been a branch of art history, which has tended to preserve the elitist distinction between high art and popular art – much like copyright law has insisted on drawing a line between pure and applied art.[519] Moreover, fashion as an intellectual topic has been

512 For example, the volume *The Luxury Economy and Intellectual Property: Critical Reflections* (Oxford University Press, 2015) has a strong focus on IP law issues related to (luxury) fashion. Of the 20 scholars who contributed a chapter to this volume, only Scafidi mentions the term 'fashion law' in her text.

513 E.g. Scafidi 2012 p. 8–9, 11–13, 17, Scafidi 2015, p. 250 and Scafidi 2019, p. 429.

514 Scafidi 2012 p. 8–9.

515 Kawamura 2018, p. 8–9.

516 Zimmerman 2015, p. 180.

517 Zimmerman 2015, p. 178. See also Scafidi 2015, esp. p. 250, 257 and Raustiala & Sprigman 2009, p. 1224. Furthermore, fashion has also been criticised as 'an attack on modesty', since each new style that is worn calls attention to the human body (Sapir 2020, p. 64).

518 Wilson 2003, p. 270, 277.

519 On the distinction between high art and popular art, see Wilson 2003, p. 48. See also Breward 2003, p. 11.

perceived as too trivial and not worth spending time on.[520] With this constant denigration, the serious study of fashion has repeatedly had to be justified.[521] This may be one of the reasons why so many noteworthy legal scholars seem to hesitate when it comes to using the term 'fashion law' for their research.

Then, of course, one cannot escape the issue of *the Horse* when discussing fashion law. Some legal scholars label industry-specific legal research, such as fashion law, as being caught by 'the Law of the Horse'.[522] This theory, which might contribute to the hesitation among scholars researching law in the context of fashion,[523] criticises 'multidisciplinary dilettantism'[524] and claims that putting together two fields like fashion and law is problematic, since a legal researcher aiming to do this cannot possibly know everything about fashion research. According to the Law of the Horse, this brings out the worst of both law and horse (in this case, fashion) and is doomed to be shallow and to miss unifying principles. Easterbrook, in his famous essay 'Cyberspace and the Law of the Horse' (1996), argues that 'Teaching 100 percent of the cases on people kicked by horses will not convey the law of torts very well.'[525] Indeed it will not. That is not the point of industry-specific legal research, however. A lawyer mastering 100 per cent of the cases of people kicked by horses would undoubtedly be an *expert in cases of people kicked by horses* – and *that* is the point of the Law of the Horse. This can easily be translated into fashion law. Teaching 100 per cent of the cases related to, for example, copyright infringements of fashion designs will convey *how copyright protection appears in the context of fashion,* and this kind of expertise is exactly the aim of fashion law and other industry-specific research areas. Hence, mastering the Law of the Horse is not a bad thing. It just generates a different kind of knowledge than what the legal academy has traditionally favoured. Of course, Easterbrook is right in pointing out that 'Only by putting the law of the horse in the context of broader rules about commercial endeavors could one really understand the law about horses'.[526] Similarly, only by putting the law of fashion in the context of broader rules about, for example, copyright law (particularly, copyright protection of works of applied art), can one really understand the law about fashion.

Besides the aforementioned historical reasons, the resistance to calling fashion law a field of law is probably based on fashion law's relative novelty as a concept[527]

520 Kawamura 2018, p. 3, 7–8.
521 Wilson 2003, p. 47. See also Troy 2020, p. 66 and Lipovetsky 2020, p. 27.
522 Easterbrook 1996, p. 207.
523 Indeed, one of the comments that I received on my first-ever academic presentation about my doctoral research warned me against the dangers of the Law of the Horse.
524 Easterbrook 1996, p. 207.
525 Easterbrook 1996, p. 207–208.
526 Easterbrook 1996, p. 207–208.
527 See e.g. Scafidi 2015, p. 256.

and the fact that it mostly focuses on intellectual property rights, which can already be labelled under IP law. This should not be a problem. Legal research must regularly review its concepts because the society around legal science is continuously changing and creating needs for new fields of research.[528] The fact that fashion law has been a growing area of interest among lawyers and other legal professionals for decades indicates that it is here to stay.[529] After all, we already have sports law, health law, entertainment law, banking law and other industry-specific fields.[530] The question of whether a new topic of legal interest is a 'real' field of law, applied field of law, industry-specific field of law, practice area, research area, the Law of the Horse or something else, is purely semantic – at least in the context of this particular research.

528 Tuori 2007, p. 167. See also Karhu 2019, p. 428: when the world changes, jurisprudence changes.
529 Scafidi 2015, p. 255 and Scafidi 2019, p. 430.
530 Scafidi 2012, p. 10 and Scafidi 2019, p. 432.

5. CONCLUDING REMARKS

Sustainability – or the lack thereof – is undeniably the most pressing challenge of the modern fashion industry.[531] There is an urgent need to consider legal measures that will help to fix the status quo. One of these measures is IP law and, in particular, copyright law. Design and trademark protection help to alleviate some sustainability-related issues to a certain degree, but in the big picture, they are insufficient. This research has demonstrated how the copyright framework for fashion is linked to environmental, social and cultural sustainability, and how copyright has plenty of potential in shaping the fashion industry towards a more just, fair and sustainable future. Even those who do disagree that copyright will foster sustainable development, or who do not view it as the most important legislative instrument to combat the unsustainable practices of the fashion industry, must at the very least recognise that the lack of protection may contribute to, or facilitate, unsustainable practices.

The first step towards sustainability is to abandon the inaccurate idea that fashion is merely a frivolous phenomenon, a vanity that has neither cultural nor artistic importance. Dress – meaning garments and sartorial rules – provides a key to understanding a culture.[532] Fashion designs are visual embodiments of culture, some of them involving such a high degree of creativity that they certainly qualify as works of art. Regardless, fashion is perhaps the most marginalised of all arts.[533] Reflections of this deprecation can be seen in the copyright framework, where over the years, fashion designs have also been marginalised.[534] This ought to be corrected. Recognition of fashion's cultural value, regardless of whether it is 'popular art', promotes cultural diversity per se and, correspondingly, viewing original fashion designs as protection-worthy subject matter promotes cultural diversity in copyright law. Arguably, fostering cultural sustainability in EU copyright law would be in line with the aims and objectives of the InfoSoc Directive. The Preamble of the directive views cultural creativity as an important value and notes that from a cultural standpoint, adequate protection is of great importance.[535] Due to these aims and

531 Härkönen 2020b, p. 164. See also Rosati 2018b, p. 857.
532 Wilson 2003, p. 271.
533 Wilson 2003, p. 277.
534 Härkönen 2018a, p. 918.
535 See InfoSoc Directive Recitals 11 and 12. See also Term Directive Recital 11, according to which the level of protection of copyright should be high, because it is fundamental to intellectual creation, and protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole.

objectives, EU copyright law already promotes cultural sustainability to a certain degree but, in practice, this has not always applied to fashion. This has been the case especially in Member States burdened with a copyright tradition that includes a strict distinction between the fields of pure art and applied art.

Copyright can foster sustainable development in fashion, firstly by acknowledging fashion's cultural significance and thus accepting fashion designs into the scope of protected subject matter. In practice, this is done by removing any regulatory distinctions between works of pure art and applied art, not forgetting that any such discrimination should vanish from court praxis as well. Therefore, copyright law's contribution to sustainability in fashion starts with the unity of art theory, which lays down a fair copyright environment by making the outdated distinction between pure art and applied art unnecessary.[536] This approach to copyright law further validates the idea that (in spite of the fast fashion phenomenon confusing the minds of the public as to what fashion is all about), fashion designs are not something disposable by nature. Rather, they should be viewed as lasting articles. In this sense, the EU copyright law's development has been desirable. To advance the principle of unity of art in copyright law, the InfoSoc Directive – in particular, Article 2(a) – should be interpreted such that it equally protects works of all categories. In this regard, *Cofemel* was a milestone. It showcased how the current, existing legal framework in EU can comply with more modern demands that aim to remove discrimination from the copyright system. The Berne Convention, which distinguishes between pure art and applied art, inevitably looks old-fashioned compared to the InfoSoc Directive.

The effects of the unity of art on culturally sustainable development are more direct than its effects on environmentally and socially sustainable development in fashion. By signalling that in the eyes of copyright law, copying of works of applied art is no longer more 'acceptable' than that of works of pure art, the unity of art approach to copyright law has significant potential in disincentivising (fast) fashion companies from manufacturing cheap, low-quality copies of the latest looks from successful designers. Therefore, unity of art can help to slow down the circulation of trends. The speed of trend circulation, which results from widespread copying, has been identified as a major threat to working conditions in offshored factories in the Global South, and as the underlying reason behind overproduction and overconsumption of garments. A slower trend circulation would therefore be positive in terms of environmental and social sustainability, as well.

Moreover, a copyright regime which does not discriminate against applied art may incentivise rightholders to enforce their copyrights,[537] now that there is no longer uncertainty about whether fashion designs can qualify as copyright-protected subject matter under the same conditions as other works. Even though the recent

536 Härkönen 2020a, p. 15–16.
537 See Kahn 2018, p. 34.

CJEU judgements *Cofemel* and *Brompton* do not consider sustainability issues, they are promising examples, because they verify that works of applied art are indeed equally eligible for protection and not free for anyone to copy. Getting more court decisions that further establish equality between pure art and applied art would be an even more desirable development.[538] Overall, relevant case law would strengthen the entrenchment of sustainability in the copyright framework. Especially lawsuits against fast fashion copyists would set valuable precedents.[539] Additionally, judgements that include sustainability as a value in the decision-making process would be welcome.

Granting works of applied art equally strong copyright protection to that of pure art might, of course, affect the accessibility of certain popular, fashionable designs. A common argument against protection of fashion designs arises from the assumption that (fast fashion) copying 'democratises' fashion.[540] One cannot deny that fashion is linked to class identification.[541] Originally, only the wealthy could afford to be fashionable. Mass-production of fashionably styled clothes has made it possible for virtually anyone to use fashion as a means of self-enhancement and self-expression.[542] Some argue that caution should be exercised in piling extra layers of IP protection on basic needs such as apparel.[543] If manufacturing cheap copies of expensive fashion designs is illegal, consumers with less purchasing power will not be able to afford these designs.[544] One might ask whether this is fair or if it merely protects the tastes

538 However, it might be difficult to achieve case law concerning cultural appropriation copying. The are many procedural challenges to be tackled before getting to a point where a court would evaluate potential infringements, such as identifying the rightholder (i.e. who is entitled to take legal action). Globally, there are some judgements concerning cultural appropriation copying, the most famous probably being *Bulun Bulun and Milpurrurru v. R & T Textiles* (1998, Federal Court of Australia). In this judgement, the court acknowledged that Aboriginal communities have specific fiduciary rights to religious art that must be recognised outside of their communities. However, these rights do not legally qualify as joint authorship. See Frankel 2017, p. 786 and Brown 2005, p. 53. See also Scafidi 2005, p. 10.

539 See also Rosati 2018b, p. 857.

540 See e.g. Raustiala & Sprigman 2006, p. 1732–1733, Hemphill & Suk 2009, p. 1174 and Brewer 2019, p. 3. See also Wilson 2003, p. 12. See also fast fashion giant H&M's 'Vision and Strategy': 'From our very first day in 1947, our business has been about making fashion and the joy it can bring accessible to everyone — democratising what had previously been a privilege of the few.' (available at: https://hmgroup.com/sustainability/leading-the-change/vision-and-strategy.html).

541 Barnard 2020a, p. 4, Kaiser 2012, p. 101 and Calboli 2015, p. 54–55.

542 Wilson 2003, p. 12 and Kawamura 2018, p. 68–69.

543 Zimmerman 2015, p. 195–196.

544 See e.g. Zimmerman 2015, p. 175 and 184. See also Sapir 2020: Instead of referring to any IP law measures, Sapir states that in a case where a certain design has become universal, thus 'cheapening' in value and forcing an abnormally rapid change of fashion, 'the only effective protection possessed by the wealthy in the world of fashion is the insistence on expensive materials in which fashion is to express itself' (ibid, p. 63). See also Barron 2010, p. 104, 127 and Raustiala & Sprigman 2012, p. 44. When discussing whether virtually all consumers, regardless of their purchasing power, should have a universal 'right' to all fashionable styles, it must be noted that unlike the world of technology, where rapid innovation produces improvements, innovation in fashion merely produces arbitrary stylistic changes rather than improvements (Cline 2013, p. 111).

of elites, creating 'modern sumptuary laws'.[545] Perhaps applying copyright protection to fashion designs would indeed de facto protect the tastes of the elites. Perhaps its indirect effect would be that not everyone can afford to buy every style they want. However, the so-called democratisation of fashion is merely an illusion.[546] Its price has been world-wide exploitation of (largely female) labour and environmental damage by wasting natural resources as if there was no tomorrow.[547] The misguided argument of democratisation ignores the workers around the world who are unlikely to afford to buy the garments they make, regardless of their rock-bottom pricing.[548] Therefore it seems rather unreasonable to claim that cheap fast fashion copying has democratised fashion or to claim it as a reason for allowing inexpensive copies of expensive designs. The democratisation debate only seems to concern Western consumers and ignores the high cost paid by garment workers in the Global South for cheap fashion, as well as the environmental damages caused by the fast fashion industry.[549] Hence, the democratisation of fashion is not an argument that justifies why fashion designs should be outside of the scope of copyright protection.[550]

Accepting works of applied art within the scope of copyright protection under the same conditions as works of pure art has occasionally raised concerns on potential

545 See e.g. Beebe 2010, p. 880. Sumptuary laws were legislative measures that attempted to restrict what individuals might wear. Usually, the idea behind them was to prevent different (lower) social classes from wearing garments 'reserved' for other (upper) classes (Wilson 2003, p. 24). In other words, they attempted to maintain visual class distinctions. See also Kaiser, Hancock & Bernstein 2015, p. 27.

546 Kaiser 2012, p. 101.

547 Wilson 2003, p. 12 and Kaiser, Hancock & Bernstein 2015, p. 15. The high cost of cheap fashion is further explained in Subsection 4.2 of this Summary.

548 Kaiser 2012, p. 17 and Taplin 2014, p. 80–81.

549 Crewe comments on the democratisation debate by arguing that '-- value retailing and fast fashion isn't necessarily fashion democracy. It can also be a manifestation of consumer ignorance where we are encouraged not to think about the murky, circuitous supply routes of fashion and the demands this puts on garment workers in cheap–cost off-shore locations.' (Crewe 2017, p. 60). Especially the point about the manifestation of consumer ignorance is insightful: for decades, the fashion industry has attempted to disassociate design, marketing and consumption from manufacturing (see also Wilson 2003, p. 85). Kaiser also writes about the disconnection between production and consumption (Kaiser 2012, p. 18).

550 Trademark law involves a different kind of 'democratization' aspect. Calboli argues that mass-produced and pyramidal luxury that relies on logo-worship and aggressive trademark protection, promoting the idea of luxury based on status, wealth, and images rather than superior product quality, does not deserve special legal protection. Focusing excessively on logos and logo patterns to emphasise status and identification with a brand does not foster creativity and cultural diversity with new products and varying designs (Calboli 2015, p. 54–55). Hence, the relationship between IP protection and the democratisation of fashion appears very different between copyright law and trademark law. Regarding the democratisation discussion, see also an interesting point of view by Gibson 2015, p. 399: fashion creators are no longer excluding the consumers who cannot afford their products. High fashion is nowadays also about building an identity and showing something outstanding and inspiring that is not even supposed to be sellable. There is no longer a price barrier. It is no longer about class and wealth but about participation and creating a community.

overprotection, particularly due to the overlap of copyright and design right.[551] Such protection has also been seen as a threat to freedom of competition.[552] While these concerns are generally understandable, the risk of overprotection is not a reason that justifies *under*protection. Instead, a balance must be struck that appropriately protects fashion with neither over- nor underprotection. This research has shown the kinds of negative effects that underprotection of fashion designs has caused.

Although this dissertation finds that equal access of fashion designs to copyright protection has positive effects on sustainable development, such protection cannot be labelled as a pervasive solution to all copyright-related problems in the fashion industry. One issue that this does not solve is the unequal possibilities for rightholders to de facto enforce their copyrights. Compared to high fashion houses, luxury brands and other established fashion businesses, an individual fashion designer or small fashion company has very different resources for legal action against copyright infringements. However, a copyright environment that views fashion designs as protection-worthy subject matter could still act as a deterrent for those with intentions to steal designs from others.

Despite the CJEU embracing equality between the fields of pure art and applied art, there are still issues that our modern copyright system fails to see. The most pressing of these 'blind spots' is how copyright law relates to creative outputs that do not fit into the traditional concept of creativity in civil law countries.[553] Especially the creative efforts of Indigenous, Native, First Nations and other colonialised and marginalised cultures are almost automatically pushed into the public domain. In the fashion industry, this has fostered the cultural appropriation phenomenon that has had damaging effects on the source cultures. Copyright law indeed does not see everything, and there are 'thefts' of creative outputs that it ignores. The law still does not consider all creativity as worth protecting. Although the principle of unity of art refers to equality between different types of works and not between creators, its underlying idea could be imported into discussions about different forms of authorship and how the IP system sees them. Perhaps we could consider ways to promote *unity of authors* as well: considering Indigenous and other marginalised communities as rightholders to their TCEs would restrain the cultural appropriation phenomenon and therefore promote cultural sustainability in fashion.

551 See e.g. Schovsbo & Riis 2017, p. 102–104.

552 See Derclaye 2020, p. 8, 9 and Opinion of AG Szpunar in C-683/17 *Cofemel*, para. 52. See also Derclaye 2017: overprotection that derives from overlapping IP rights can lead to overcompensation by allowing rightholders to extract double damages for a single infringement. However, Derclaye argues that in some cases overprotection is arguably justified (ibid., p. 622–623). See also Härkönen 2018a, p. 910 and Härkönen 2020a, p. 4, 12.

553 See Sabiescu 2018, p. 184–186.

The issue of cultural appropriation inevitably raises the question of what is the public domain of the fashion industry and what are its limits. The same problematisation is present in AI-generated fashion designs. Although the creative process and authorship in TCEs and AI creativity are very different, their creative outputs have something in common: they are much more likely to be located in the public domain. Overall, a very broad public domain in fashion can be seen as problematic. Creating circumstances where creations – whether TCEs, AI-generated fashion designs or works of human authorship – can be freely copied without much legal risk facilitates fast fashion and other harmful phenomena,[554] such as cultural appropriation.

For the sake of clarity, note that promoting the principle of unity of art in copyright law is not in conflict with allowing – or even encouraging – private copying of fashion designs, since the unity of art does not intervene in the exceptions to copyright protection. Regardless of private copying being invisible in the eyes of copyright law and IP law in general, unlike fast fashion copying and cultural appropriation, private copying does not need to be tackled by regulatory means. Because private copying of fashion designs is in many cases a more sustainable method of making garments than mass-production, from the point of view of sustainability it may *prima facie* be desirable. The private copying example shows that the problem is not *copying itself*:[555] the problem is the way in which the contemporary fashion industry works, and how the low-copyright regime has facilitated its problematic practices.

Most of the suggestions and policy arguments made in this doctoral thesis would not actually require changes to the existing provisions of copyright law. Only including AI-generated fashion designs within the scope of IP-protected subject matter might require either changes to existing provisions or new, tailor-made legislation. Especially when it comes to equality between pure art and applied art and bringing more environmental, cultural and social sustainability into copyright law, what must be fixed are the traditions of applying copyright law to different subject matters, as well as the interpretation of the law. The emphasis must be on a change of mindset and attitudes in legal scholars, judges, attorneys and everyone else involved with copyright law. Adding sustainability aspects to the interpretation of copyright law should not be a problem, since the general aims of copyright law contain room for respecting issues that are of utmost importance in society, such as sustainability.[556] As Pihlajarinne and Ballardini argue, fundamental theories of justification of IPR undoubtedly provide possibilities for incorporating environmental sustainability

554 Härkönen 2020b, p. 170–171.

555 See also Drassinower 2015, p. 1–2: the assumption that copying is inherently wrongful is the incorrect way to approach copyright law. Copyright law is not a prohibition of copying: it is an institutionalised distinction between lawful and unlawful copying.

556 Pihlajarinne & Ballardini 2020, p. 249.

into the IP framework.[557] In line with the aforementioned scholars, this research highlights that sustainable development should be prioritised in the interpretation of copyright law, as in the end, sustainability (particularly environmental sustainability) is a question of the continuation of modern human life.[558]

Previously, market liberal voices have hindered the sustainable development of the fashion industry by claiming that the market fixes itself, because eventually consumer demand for sustainability will make fashion brands change their unsustainable practices without need for regulation and bureaucracy. Consumer freedom is used as an argument for deregulation.[559] However, this notion is naïve. The fashion industry has had decades to change its business practices. Consumers have had decades to change their purchasing habits. They have not done so. This is not about ignorance: despite the ever-present media coverage of the difficult labour conditions and safety hazards of garment factories, and of the environmental effects of fast fashion, the market share of rock-bottom-priced new garments shows no signs of decreasing.[560] So far, no amount of education or soft law measures has helped to fix the fashion industry or make the fast fashion phenomenon disappear.[561] It is therefore high time to consider hard law measures.

Law in general should play a greater role in fashion. Insufficient regulation of the fashion industry is the main reason that it has been able to continue its global race to the bottom. This is particularly obvious in the offshoring phenomenon, where garment manufacturing is outsourced to locations where the de facto protection of human rights and environment is low.[562] Due to insufficient regulation, fashion businesses that dismiss corporate social responsibility have an unfair advantage over their competitors.[563] This should not be the case. The global race to the bottom

557 Pihlajarinne & Ballardini 2020, p. 249. See also Brown 2017, p. 959.

558 Pihlajarinne & Ballardini 2020, p. 250.

559 Pouillard 2019, p. 154. See also Crewe 2017, p. 60: Crewe describes how supporters of the current system have often defended the 'neoliberal' trade regime as one that favours consumers by keeping prices low. Taplin criticises the consumer freedom argument by pointing out that 'with a business model that privileges the consumer (through low prices) over the worker, and in an institutional framework that is largely complicit with such a system, problems such as that at Rana Plaza will persist' (Taplin 2014, p. 80–81). On fashion and capitalism, see Wilson 2003, p. 13–14.

560 Pouillard 2019, p. 148. See also Taplin 2014.

561 On the inefficiency of previous soft law measures and global norms and guidelines regarding corporate social responsibility, see also Karhu 2019, p. 427. See also Business of Fashion & McKinsey & Company 2020: 'Now it is time for fashion companies to adhere to the highest standards of human rights and social justice issues across business operations' (ibid., p. 49).

562 See also Taplin 2014, p. 74–77, Karhu 2019, p. 420 and Brown, Gervassis & Mukonoweshuro 2018, p. 332.

563 This is also acknowledged in European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), para. Y. Regarding CSR, see Brown, Gervassis & Mukonoweshuro 2018, p. 328. See also Karhu 2019, p. 419, 427–428: responsibilities of corporations have traditionally been nationally regulated, while CSR has a global nature.

particularly favours the kinds of fashion companies that ignore sustainability values in order to cut costs, thereby being able to create tremendous consumer interest with rock-bottom-priced garments. Adding regulation and CSR norms might sound like something that blatantly attacks the market economy, but then such regulations and norms are not a new phenomenon.[564] Legal responsibilities have always changed when the world has changed.[565] Today's world is such that legal responsibilities that reflect sustainability goals must be imposed for the fashion industry. The EU legislator finally seems to have acknowledged this, although not just in relation to the fashion industry: in March 2021, the European Parliament voted in favour of a resolution to recommend the drawing up of a directive on corporate due diligence and corporate accountability.[566] The Recitals in the Preamble to the proposed directive note that voluntary due diligence instruments for companies have proved insufficient and therefore mandatory regulation is required.[567]

Although it is indisputably extremely difficult for an industry that uses natural resources in generating new products to be entirely and genuinely sustainable, the direction of the fashion industry can be altered from a race to the bottom to a *race to the top*. This research has shown how copyright law is one of the regulatory measures in the legal toolbox that will help the fashion industry to take steps towards a more sustainable future. Beyond shaping and reinterpreting copyright law, much else can – and should – also be done: most importantly, the idea of garments as something disposable that quickly loses its value must be rethought. Quality should be valued over quantity. The speed of trend circulation ought to be questioned. The fashion industry should aim for holistic sustainable development, which includes environmental, cultural and social sustainability. Legal measures would help in pushing fashion companies towards more sustainable business models and consumers towards healthier consumption habits. To conquer all of the multiple sustainability problems of the industry, besides shaping copyright law, regulatory

564 For example, we now believe that colonialism is wrong, but the 'legal actions' of colonialism, such as the slave trade, used to be completely valid. In a post-colonial spirit, multinational corporations were able to 'enjoy' a completely free market without restrictions for some time. In addition, environmental responsibilities were once considered to restrict property rights, even though we now see environmental responsibility as one element of property rights (Karhu 2019, p. 427–428).

565 Karhu 2019, p. 427–428.

566 European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

567 Annex to the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)): Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability Recital 5.

measures are needed from other fields of law, as well.[568] In conclusion, the sustainable development of fashion requires: (i) a change of attitudes towards the nature of fashion from legislators, companies, consumers, fashion influencers and everyone involved with the industry; and (ii) a combination of legal measures from various fields of law, one of them being copyright law.

568 For example, tax law, environmental law, labour law, competition law, advertising law, and consumer protection and CSR norms could provide useful tools for this. Other legal possibilities to consider in the fight against fast fashion could be mandatory environmental targets for fashion companies and banning the practice of incinerating or landfilling unsold stock that could be reused or recycled. Fashion companies could also be required to allow consumers to return their clothes to the place of purchase for recycling. See also suggestions by Lueg, Medelby Pedersen and Nørregaard Clemmensen (2013, p. 356).

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