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PROTECTION OF FASHION DESIGN: A COMPARATIVE CASE STUDY BETWEEN INTELLECTUAL PROPERTY CODE (CODE DE LA PROPRIÉTÉ INTELLECTUELLE) AND UNITED STATES CODE TITLE 35 – PATENTS ACT

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Abstract

The purpose of this research is to study legal protection for fashion design in Thailand and a comparative Case Study between Intellectual Property Code (Code de la propriété intellectuelle) and the United States Code Title 35 – Patents Act. It is to say that fashion design is considered an industrial design that has been protected as a product design under the patent law and at the same time, it is considered as the work of applied art in accordance with Thai copyright law. The copyright law did not stipulate the explicit fashion design section but it only stipulated the listed protected work as the type of artistic works. Based on my study of fashion design protection in foreign countries, especially France, the law clearly states the protection for fashion design and listed protected works stipulating the type of protected works, and includes clear rules for what action constitutes the infringement. As a result of this strong protection of the law, innovation was created and progression for the fashion design industry was supported. In the United States of America, several ways of

fashion design are protectable. Under the patent law, designers can apply for a design that qualifies as a new, unique and ornamental design and shall be eligible for protection under copyright law.

Keywords

Design, Fashion, Intellectual Property, Protection

1. Introduction

Presently intellectual property plays an important and major role in the business and economy of many countries. As we can see, many countries are trying to protect the equality of their intellectual property. Therefore, there are mutual rules and regulations on intellectual property protection, such as the Paris Convention for the Protection of Industrial Property 1883, Berne Convention for the Protection of Literary and Artistic Works 1886, and Rome Convention for the Protection of Performers, Producers, of Phonograms and Broadcasting Organization 1961, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) (Berne Convention for the Protection of Literary and Artistic Works, 1886) Thailand still faces legal challenges regarding the protection of fashion design, that is, fashion design is an industrial design that has been protected as a product design according to patent law and at the same time, it can be considered as the work of applied art in accordance with copyright law. However, copyright law does not clearly specify the protection of industrial design and there is no provision stipulating to prohibit the protection in the case of double law.

As for the designers, there is a group of designers' organizations to join forces against counterfeit products and make suggestions that they request the government to focus more on copyright infringement for the benefit of consumers. As for the sellers, if some sellers do it because they are unaware or commit an act without knowing the laws, they should do some research on the design works and know the laws for their protection. In addition, the inadequacy of protection for intellectual property caused the limit of innovation and creativity by designers. The individual producer lost their inspiration and creativity. Moreover, it caused reputable damage to the country where there are many cases of intellectual property infringement on dress design. The fashionable design in Thailand that is continuously popular includes the design of the leather, jewelry, and dress design industry, resulting in huge income for the country (Hemmaratchatra, 2017). However, if we compare fashion design in Thailand and Europe, the fashion design in Thailand is still new which was first introduced in the country 25 years ago. Therefore, this research is significant to study the laws of foreign countries, such as France where is the country with a long evolution of fashion design and is the country of the fashion design center in the world. France imposed copyright laws on the

protection of fashion design and prescribes the nature of copyright infringement. This research is also studying the patent laws on protectable fashion design as per US patent law. Recently 10-20 years, the reputable brand products have been registered under US patent which clearly described the protectable dress design as "new", "original" and "ornamental design".

1.1 Literature Review

Lawyers opined that Fashion Design may fall under applied art which defines as a work applying any one or a combination of the works mentioned in the (1) to (6) previously listed categories for other uses other than the enjoyment of the merit of the work, such as for functional use, decoration of materials or appliances, or for commercial gain according to article 7 of section 4 of Copyright Act. On the other hand, Fashion Design may be considered to be protectable as a new product design for industrial and handicraft use as per section 56 under the Thai Patent Act on which may be interpreted and extended to fashion design. Nevertheless, the Department of Intellectual Property and the Intellectual Property Court are still debating as to the interpretation of section 56 whether it covers fashion design or not. Fashion design is an expression of ideas through media or thought expressed in material form for the benefit of use and is considered to be one of the artistic arts on which is regarded as intellectual property (Emel, 2016). It has a significant effect on the production process in many industries, such as clothing, bags, shoes, accessories, etc. Failure to enact laws has resulted in actions that severely infringe copyrighted work. I would like to cite the case of the infamous Kloset clothing brand which has been imitated and sells its imitated brand products nationwide. The brand owner lost huge income due to intellectual property infringement. The imitation of fabric patterns under Kloset's brand became headlines around 2-3 years ago. The owner filed an official complaint and arrested the offender in the charge of the production of counterfeit goods. There were civil and criminal lawsuits against the manufacturers and distributors. The production of counterfeit goods may be cheaper and allow sellers to sell products cheaper than the genuine brand but the long-term effects of patronizing counterfeit products may cause brand owners or designers or teams unmotivated to do creative works, discourage and stop developing Thai brands. In addition to the piracy of Kloset brand apparel, based on the data of the aforementioned case study, it is concluded the two types of copyright infringement are as follows: "Direct infringement": 1. When the genuine brand's product was purchased, it was sent to reproduce counterfeit bulk products in China by modifying materials to reduce costs and then reimporting infringing products to sell in the lower market. 2. Another imitation is when the sellers or the middleman sell infringing products from item 1 through an online platform without having the physical infringing products in their stock. Both of these actions are considered to be direct copyright infringement because it is a form of reproduction, adaptation, and distribution to

the public and as result to be punished with a fine of 20,000 baht to 200,000 baht. If it is committed for a commercial purpose, the imprisonment term is from 6 months to 4 years or a fine of 100,000 baht to 800,000 baht or both. "Indirect infringement" when the sellers supply their counterfeit products in bulk to the lower market and may not check the source of the products, or the sellers are intent to obtain infringe products and sell products right away. This is considered an indirect infringement. The penalties for such actions may not be as severe as the direct infringement. Therefore, indirect infringement is an act committed for a commercial purpose or an act that has contributed to copyright infringement. When the infringers know that those are the infringing works and commit in such manner to gain benefits from the infringing works, such as sales, possession for sale, rent, hire purchase, communication to the public, etc. The penalties shall be liable to a fine of 10,000 baht to 100,000 baht. If such an act is committed for commercial purposes, imprisonment is from 3 months to 2 years or fined from 50,000 baht to 400,000 baht or both shall be applied. Additionally, the offender who has been sentenced and subsequently commits the same offense within five years after being discharged from the penalty shall be liable to twice the penalty prescribed for the offense (Meelap, 1991).

2. Research Methodology

This research and analysis data was based on laws, textbooks, books, thesis, articles, journals, legal opinions, judgments, online public information, documents, and foreign laws. These data were collected, analyzed, and draw to conclusion and suggestion about a guideline for protecting of capability in legal defense by accused in correspond with the spirit of the laws

2.1. Documentary Research

This research and analysis data were based on laws, textbooks, books, thesis, articles, journals, legal opinions, judgments, online public information, documents, and foreign laws. These data were collected, analyzed, and draw to conclusions and suggestions about a guideline for protecting capability in legal defense by the accused in correspond with the spirit of the laws.

2.2. In-depth Interview

The In-depth interview was conducted by asking questions and responding to their answers with additional comments, including suggestions by qualified experts.

3. Discussion of Comparative Legal Protection

In order to find the best solution to improve the intellectual property on fashion design, a discussion on a comparative case study will indicate the clear point of view as well as the strengths

and weaknesses of legal principles.

3.1. The Inadequacy of Patent and Copyright Protection under Thai Laws

Thailand and the United States of America have the same Patent Law system. Theoretically, Patent Law may be an option for protectable works in both countries. However, both countries imposed a high standard for protectable works, that is to say, the eligible work must be new, involves an inventive step, and industrially applicable. The application of industrial work is small and inefficient. Protection of design works in Thailand can be considered into 2 categories as follows: (1) the protection of artistic works under copyright law and (2) The protection of product design under the patent law. Section 4, Paragraph 6 of the Copyright Act B.E. year 2537(A.D.1994), stipulated the artistic works are painting and drawing, sculpture, lithography, architecture, photographic work, work of illustration, map, structure, sketch or three-dimension design relating to geography, topography or science, and applied art, regardless of whether the artistic work has its artistic value or not. Therefore, if the nature of fashion design falls into one of said artistic works category, the author or designer will entitle to have the protection right under copyright law (Poungnat, 1999).

As for the protection of design work under the Patent Act B.E. year 2522 (Amendment 1999), design work may be protected under this law. In accordance with section 3, paragraph 5 of the Patent Act B.E. year 2522 (Amendment 1999), product design means a form or composition of lines or colors of a product that gives a product a special characteristic that can be used as a pattern for industrial products and handicraft. The aspect of the product design is an external aspect of the product which is unrelated to the mechanism, function, utility of the product. The nature of the product design may be patentable as characterized and specified by the laws, that is to say, a product design must be a new design for industrial and handicraft use as per section 56 of the Act or a product design has not previously disclosed substantial part or detailed description in a document or printed publication as per section 57 of the Act (Lertthamtewee, 2016). In the Supreme Court decision number 19305/2555 (2012), the Court held that in order to be eligible for copyright protection, the copyright creator needed to utilize enough effort to create his or her work and such work should be originated by such author, not be copied, reproduce, or adapt from other copyrighted work. In this case, the copyright creator designed and produced a miniature silk elephant doll. The doll had become popular a popular souvenir among tourists. Shortly after, the defendant made and distributed a very similar silk elephant doll. The plaintiff then sued the defendant for copyright infringement. In its decision, the Supreme Court held that the plaintiff's elephant doll was not eligible for copyright. *Journal of Legal, Ethical and Regulatory Issues* Volume 20, Issue 2, 2017 7 1544-0044-20-2-126 The Supreme

Court compared the plaintiff’s elephant doll to the Royal Navy flag (also known as “Thong Ratchanawi”) with a white elephant in regalia centered on the national flag shown in Figure 2. Then, the Supreme Court reasoned that the designs of elephants in regalia of both works were similar and concluded that the plaintiff copied the elephant from the Royal Navy flag with only insignificant changes. The design did not show that the plaintiff put enough effort into such a design in order to claim copyright. Therefore, the Supreme Court concluded that the plaintiff was not the “author” under the Copyright Act and therefore no infringement existed (Narumon, 2017).



Figure 1: *Elephant Doll*



Figure 2: *The Royal Navy Flag*

3.2. A Comparative Analysis of the Protection of Designs on Patent Right and Copyright in France

The French intellectual property laws have clear rules as to what constitutes and is considered to be a copyright infringement on fashion design. This makes the French laws easy to impose. It explicitly provides examples of copyright infringement, for example, reproduction, performance, dissemination, translation, adaptation, transformation, or arrangement, by any means whatsoever, of a work of art without consent of its author constitutes copyright infringement, including trafficking, exporting, or importing infringed works in France (Mastudillo, 2010). Comparing to Thai copyright law, France provides wider protection extend to dissemination, transformation, and arrangement when There is none of the protected work on fashion products integrated into the Thai Copyright Act. In France, the provisions of law stipulated the protection of fashion design which covers the original work of the mind. French laws protect original creative works of the mind, whatever their kind or form of expression. This is different from US laws which require the works is “an original work fixed in a tangible medium of expression”. Moreover, the United States of America does not include clothing garments or fashion designs in its list of copyrightable subject matter. The protection period of works under the French intellectual property laws is for the lifetime of the author and lasts until the end of the 70th year after the death of the author. However, fashion designers are facing the challenge of showing the original character of their work, because of fashion designs (Dumme, 1995).

3.3. A Comparative Case Study between Intellectual Property Code and the United States Code Title 35 – Patents Act

To enhance a clear view of comparative Case Study, the difference will deliver an insight perspective of law in each country.

Table 1: *Comparative Study of Intellectual Property Law*

Patent and Copyright Protection under Thai Laws	Intellectual Property in France	Intellectual Property Protection in the United States of America
1. The protection of artistic works under the copyright law	1. It explicitly provides examples of copyright infringement, for example, reproduction, performance, dissemination, translation, adaptation, transformation, or arrangement, by any means	1. Utility patents A utility patent is available for an invention or discovery of a new and the user machine, manufacture, composition of matter, or process. This patent

<p>2. The protection of product design under the patent law</p> <p>2.1 section 3, paragraph 5 of the Patent Act B.E. year 2522 (Amendment 1999), product design means a form or composition of lines or colors of a product which gives a product</p> <p>2.2 a product design must be a new design for industrial and handicraft use as per section 56 of the Act,</p> <p>2.3 A product design has not previously disclosed substantial part or detailed description in a document or printed publication as per section 57 of the Act.</p>	<p>whatsoever, of a work of art without consent of its author constitutes copyright infringement, including trafficking, exporting, or importing infringed works in France</p> <p>2. French laws protect original creative works of the mind, whatever their kind or form of expression (L-112-1).</p> <p>2.1The French IPC provides a list of works afforded copyright protection including any literary, artistic, or scientific writings, conferences, speeches, pleadings, dramatic works, and musical comedies, choreographic works, fashion shows, musical compositions with or without words, movies, motion pictures, audiovisual works, designs, paintings, sculpture, engravings, lithographs, and photographic works, among others (L 112-2 to L 112-4).</p> <p>2.2 Article L. 112-2 of the French Intellectual Property</p>	<p>is also available for improvements to a machine, manufacture, composition, or process that are considered new and useful.</p> <p>2. Design Patent</p> <p>title 35 of the United States Code, and includes 35 USC 171</p> <p>The first part of section 171 imposes four requirements for design patentability: novelty, originality, ornamentality, and the subject matter must be an article of manufacture (Edward, Mark, David 2017).</p>
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	<p>Code specifically lists works including “creations of the fashion industries of clothing and accessories,” which it defines as those which, “because of the demands of fashion, frequently renew the form of their products</p> <p>2.3. The protection period of works under the French intellectual property laws is for the lifetime of the author and last until the end of the 70th year after the death of the author</p>	
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4. Conclusion

Due to differences in cultures and the evolution of a country, it is not a guarantee that national French Law will be fine because the French fashion industry seems to be a country where fashion is centered, and fashion is the core of society. Since the 16th century, France has been a center of high fashion. Clothing design, Shoes, and accessories show elegance and sophistication. Paris is home to the largest textile industry in the world. Working with manufacturing plants and design sources, so French designers continue to experiment with fashion by adopting different and varied styles of gold things while starting a new trend that has influenced the next generation in the fashion industry. Compared to French history, Thai fashion creations are still considered new, Thailand is an agricultural country, and the main export is agricultural products, it does not have a long history of influence from the fashion industry, while other countries such as the European Union have a term design protection. 3 years for unregistered designs and 25 years for registered designs that may be suitable for Thailand since 2002. EU law regulates the protection of unregistered designs for a period of 3 years and the registered design protection is 5 years and the protection can be renewed at a time. 5 years and combined, the maximum must not exceed 25 years under the Council Regulations (EC) No. 6/2002 dated December 12, 2544 on the design of the community. The European Union has found

a way to establish protection principles. The same kind of design Design means “All or part of the appearance of the product is due to properties. In particular, the lines, shapes, colors, shapes, textures or materials of the product itself and/or the finish” are suitable. Thai society in adopting the EU system on creating fashion (Kittitachasuk, 2015)

However, the French system proposals were chosen and designed to suit Thai society. The protection of the stated works consists of products based on the needs of the Thai market. Some products such as lingerie, which are specified in the French Intellectual Property Law, have been removed and replaced by leather goods, shoes. Thailand is now becoming a fashion hub and new designers and all local Thai brands are growing. Thus, it is sufficient to apply the copyright protection of new fashion designs in the coming new year, although the provisions of the European Union provide a period of protection for fashion works, it is not as clear as France in terms of what is deserved. In the study of fashion design protection under the laws of foreign countries such as America was found that there was no protection in fashion design work. Copyright law provided protection in various parts of clothing such as patterns on fabrics and materials. But in the clothing and accessories when considering the performance that is a condition of copyright that still receiving secondary value.

Therefore, to prevent imitation of the brand of clothing. Trademark laws will play a protective role, such as small clothing stores that selling their clothes by copying famous De Shiner brands without permission, etc. Section 17, Chapter 13 of the US Copyright Law provides copyright protection for original designs, so unique designs are covered in this provision. However, Section 1302 confirm that the design is not protected. Fashion design works are not protected by copyright laws If published in the country or abroad for more than 3 months before the patent application date Under Section 1309, an infringement of copyright under the law in fashion design works is that fashion designs must not be copied from the copyrighted designs. The work is unique and does not resemble all or part of the entire image of the copyrighted work. The text brings up a question and debate as to what is copyright infringement in fashion design, when compared, the French law in fashion design, which is more explicit, is: Under French law Copyright infringement is caused by reproduction, modification, translation, fashion design. Including other circumstances, the disadvantage of America's law is Standards for similarity or similarity to indicate whether a fashion design is plagiarized or not, that standard leaves pirates room for debate over whether the design is plagiarized up (Marett, 1996).

Therefore, lawmakers should consider that they should Whether or not to specifically state what is the similarity or similarity of a design that is a copyright infringement in fashion design. For

patent law in fashion design, design patents are protected in decorative appearance. And is specific that the US patent law is different from the law of other countries. Products with an average shelf life of 3-6 years will benefit from a design patent. Unlike exploitation patents, which can last for years and may be rejected multiple times. Design patents are subject to a 21-month filing process. Objections to designs often arise from inaccurate drafts that can be corrected by redrawing, with a protection period of 15 years. The biggest mistake for designers is the long waiting time for a patent. Which is essential for fashion design work and it was revealed before the fashion design event was filed for a patent.

When considering French law with a copyright protection system that extends to creative works that are unique, the French legal system provides the protection of creative works regardless of the type or form of expression of the creative work. According to French law, any creative and unique work is protected by copyright. According to the French Code of Intellectual Property, it also enacted the types of events that are covered, including fashion design and fashion shows, where the terms of protection of French law differ from that of the United States. That must be the expression of the creative work as well by the western law specifying the type of fashion to cover what work, including the duration of protection and any act that is legal is considered imitation resulting When France had a law for explicit protection in fashion design, the fashion design industry has made great progress as designers have legal protection.

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