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Copy or copyright fashion? Swedish design protection law in historical and comparative perspective

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While fashion piracy has been practised on an industrial scale for at least a century, the levels of intellectual property protection for fashion design have been low in most nations. This article gives a summary of the context of the lack of design protection for the Swedish textile and fashion industries, broadly defined, in the twentieth century, with comparisons to contemporary debates on fashion and creativity and to the historical French and US context. France, the US and Sweden have followed different paths in their approaches to intellectual property protection for fashion design. A study of the Swedish legislative debates 1916–70 shows that the different legislative approaches are connected to the local contexts of production. It is proposed that one way of understanding the levels of protection for fashion design is in terms of the differences in logic between 'fashion' and 'clothing'.

Keywords: fashion; intellectual property rights; copyright; design protection; alternative intellectual property strategies; Swedish textile and garment sector

In 1966 the Kink's classic song 'Dedicated follower of fashion' was released. It came in the golden days of Swinging London, the capital of pop culture and fashion, with fashion icons such as Mary Quant, Twiggy and the invention of the mini-skirt. The shops at Carnaby Street and at Chelsea's King's Road made great profits on people who wished to be 'in'. The lyrics epitomise the fickle nature of fashion,[1] and how people eagerly pursue the latest 'fads and trends', flitting between shops like butterflies and finally ending up pulling 'frilly nylon panties right up tight'[2] (Breward, Gilbert, & Lister, 2006). This 'fickleness' of fashion, and people's efforts to pursue it, is central to understanding fashionable clothing, past and present, in relation to intellectual property rights and it is the subject of this article.

Fashion is presently at the centre of attention because of the widespread distribution of imitations and fakes. The global trade of counterfeit apparel, bags, shoes and sunglasses is highly profitable. According to recent statistics from the European Union Customs and Taxation Union, the majority of knock-offs are made in China. According to a report from 2008 on EU customs enforcement of

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intellectual property law, depending on product category, 50% to 93% of the detentions for pirated goods at the European borders that year were for trying to smuggle in Chinese products. Concerning shoes they represent 93.42%.[3] However, copying seems to be an accepted part of the trade. Depending on the market segment, the business models of fashion labels and retailers are based on varying degrees of innovation – and imitation – from highly original designs to fast fashion's 'close copying', whereby high-end designs are copied, but some of the details are changed to avoid accusations of plagiarism. The Internet has of course come to play a central role in copying through the instantaneous communication of new trends and designs all over the globe and through the large-scale marketing and distribution of knock-offs. Within weeks after the runway shows in the fashion capitals of the world – Milan, Paris, New York, Rome, Tokyo and London – consumers are offered similar apparel at significantly lower prices at their local retailers. Fashion piracy and copying have been practised on an industrial scale during at least the last 100 years using similar methods, with the US, not China, in the leading role (Marcketti & Parsons, 2006, p. 216; Meiklejohn, 1938, p. 303; Scafidi, 2007, pp. 117–118). For at least a half-century famous Paris couturiers and couturières were main suppliers of original models – and copied. Not only the US but also European countries 'depended' on French models, and Sweden was one of those countries.[4]

In spite of the blatant copying, the levels of legal protection for fashion design have generally been low compared to other forms of intellectual property. In this context it is puzzling that the fashion industry is not only surviving, but seems to be flourishing. This goes against the classical justification for intellectual property law – that creative content is difficult to create but easy to copy, and if it is not protected by exclusive economic and moral rights the creative incentive will be lost to the detriment of the creator and, more importantly, of society at large (Raustialla & Sprigman, 2006). But does the one-size-fits-all intellectual property rights solution fit all forms of creativity today? Why has fashion in clothing, together with hairstyles, food recipes, sports and perfumes, remained on the outskirts of the protective system? Are there unique characteristics in the creation, production and distribution processes involved in fashion that can offer some explanations? Fashion may also present examples of interesting alternative strategies to the standard forms of legal protection for creative work.

A small number of authors have already considered the issue of copyright in the history of fashion business, mainly with a focus on Paris – the uncontested fashion capital of the world – and the French legislation which has offered relatively high levels of protection compared to all other countries. A main reference in this field is the work of M.L. Stewart. Her extensive research on copying and copyrighting French *haute couture* from 1900 to the beginning of World War II investigates copying practices and the legal and extra-legal strategies adopted by the most prestigious French designers to protect their designs against piracy and highlights the role of publicity (Stewart, 2005, 2008). An important contribution concerning fashion and intellectual property in the US is Marcketti and Parsons' (2006) study on self-regulation and legislative debates in the US during the 1930s in connection with the Fashion Originators' Guild of America (FOGA).

In this article, I will discuss some general aspects of intellectual property and fashion and the critique of the intellectual property system as outdated and unfit to meet present forms and notions of creativity and innovation. I will then direct

attention to the Swedish context. In contrast to the French fashion and intellectual property context, Sweden can offer an example of an opposite logic. Up until the 1970s, the Swedish textile and garment sector was exclusively directed towards industrial production of textiles and garments. Swedish design was non-existent until the 1950s and the industry relied on 'foreign models'.[5] Important Swedish legislative debates took place from 1916 to 1970 in connection with reform proposals regarding design protection, and created the legal environment for innovation – or 'borrowing' – in the fashion and garment industry. These discussions illuminate some of the major differences and similarities with the French and American lines of development.

Fashion . . .

Fashion is all about change. Shakespeare noted that 'the fashion wears out more apparel than the man'.[6] Gabrielle 'Coco' Chanel caught the entire economic and cultural mechanisms of fashion in a one-liner: 'Fashion is made to become unfashionable.'[7] And about imitation: copying, 'appropriation', 'derivative reworking', 'referencing' and 'remix' are essential elements of fashion. As fashion designer Elsa Schiaparelli remarked in the 1930s, copyrighting models was 'vain and useless. The moment that people stop copying you, it means that you are no longer any good' (cited in Stewart, 2005, p. 130). Fashion (like any other creative work) is not made in a vacuum, but is created as a reflection of contemporary and historical phenomena such as art, film, architecture, popular culture and, not least, other fashion designers' work. The inner logic of fashion is exactly this tension between originality and imitation of styles. If you wish to be fashionable, you will have to move in the direction of the ('in') crowd, and simultaneously distinguish yourself from the ('out') crowd. In other words, fashion is both about distinction and conformity (Troy, 2003, p. 2). If you wish to be fashionable, you will have to move in the direction of the crowd, but simultaneously distinguish yourself and your group from that crowd. Fashion is as much about conformism as it is about originality.

Academically, fashion is a hybrid issue that has been the subject of study in a number of disciplines during the past 100 years: sociology, psychology, art history, economics, semiotics and anthropology. It is a subject with several inbuilt dualities: it is a 'cultural phenomenon' as much as it is an 'economic phenomenon', and its 'cultural' and 'economic' parts are interdependent (Entwistle, 2000). The English economist Caroline A. Foley[8] problematised fashion's tension between distinction and equalisation as early as 1893. Foley defined how fashion 'follows the cosmic law of rhythm, which seems to affect consumption generally, and manifests itself in the individual through the law of variety in wants: and a nexus of social factors; – love of distinction, imitation, and the effort after equalisation [. . . and] the effort to express the spirit of age' (Foley, 1893, p. 461). She discussed fashion in terms of mass-consumption and highlighted the fact that working-class people had become recognised as consumers with taste and desire for change and renewal – and as an increasing power to influence the oscillations of fashion. In social theory fashion has been a fruitful object for the study of social change and social class. The classical sociological theorists focused on imitation and how fashion is disseminated downwards between the social classes; these ideas were later dubbed 'trickle-down theories' (Bourdieu, 1980, 1984; Bourdieu & Delsaut, 1975; Simmel, 1957; Veblen,

1899). The trickle-down approach has been criticised for being overly simplistic. Both sideways and upwards movements of dissemination – 'trickle-across' and 'trickle-up' or 'bubble-up' – have been identified (Blumer, 1969; Foley, 1893; Polhemus, 1994; Spencer, 1885).

Cultural theorists have instead focused on the reflection and production of symbolic value in fashion (Barthes, 1983; Craik, 1993). In more recent fashion theory, the body has been a major focus (Wilson, 2003). Dress is understood as 'a practice of the body' which is being negotiated between (1) the structural 'fashion system', (2) social factors such as gender, class and ethnicity, and (3) norms about particular social situations. Consequently, fashion can be situated at the intersection of agents, institutions and practices in which it is produced (Entwistle, 2000, p. 208).

In *Fashion-ology*, Kawamura (2005) addresses how the *institutional structure* – originating in late nineteenth century Paris and now including the globalised production–consumption–networking of fashion – has shaped a 'fashion system' which defines what designs and which designers are going to be successful. Kawamura (2004, p. 11) develops a line of thought that separates the concept of 'fashion' from the concept of 'clothing' which is important for the understanding of fashion and intellectual property. She argues that fashion in fact has little to do with clothing, as 'clothing' is about material production, while 'fashion' is about symbolic production. 'Clothing' is tangible while 'fashion' is intangible. The symbolic production of 'fashion' is immaterial and intellectual, and it is this creation of symbolic value that is the object of intellectual property rights. The material production of clothing or apparel in itself is actually not related to intellectual property rights at all.

. . . and intellectual property rights

An illustrative example how the conflict lines run in intellectual property rights and fashion is the following story with a Swedish twist. The story also neatly illustrates the differences between the objects of comparison of this article: the US, France and Sweden. Some time ago newspapers and bloggers reported that one of the top American designers, Marc Jacobs, launched a scarf celebrating 'Marc Jacobs since 1984'. As it turned out the scarf was identical to a scarf designed in the late 1950s by Gösta Olofsson, a small-scale entrepreneur and owner of a combined petrol station and tourist shop and also amateur painter living in the Swedish mountain village Linsell (Scafidi, 2008). The original text on the scarf was 'Linsell'. The copy, which was identical to the original Linsell-scarf except for the text, was accidentally discovered by a Swedish journalist who recognised the motif when she saw the scarf displayed in a New York shop window. When Gösta's son Göran learned about the copy in his local newspaper, he turned to Marc Jacobs for clarification. 'I was very surprised when I saw the new scarf. It looks like a clear case of plagiarism. I guess my father was ahead of his time', Göran Olofsson stated to the press. The happy ending of the story is that Marc Jacobs admitted the copying was a mistake and paid the Olofsson family an unknown amount of money in compensation. Göran Olofsson was grateful and saw the whole thing as excellent marketing for Linsell, which is part of a tourist region (Lungström, 2008).[9]

The scarf story shows many of the complexities of intellectual property rights and turns the 'ideal types' for design piracy upside down. We generally like to think of the exclusive fashion houses as the 'victims' of design piracy, not the 'perpetrators'.

It also highlights some typical problems in intellectual property law: should Swedish or American law apply? Is copyright law, design law or trade-mark law relevant? The answers to these questions lead to quite different levels and terms of protection – or no protection at all. First of all, the possibilities of protecting fashion design were small or non-existent in the US and in Sweden in the 1950s. The scarf design may have fallen under copyright according to Swedish law, provided it met the criteria for 'applied art', in which case it could have been subject to a 10-year protection. However, as will be developed below, until 1970 the protection for textiles and clothing was exempted from that provision. On the other hand, there is a small possibility that the present term of protection – 70 years *post mortem auctoris* – would apply to the scarf design, as according to the provisional regulations of the Swedish Copyright Act of 1960 (Swedish Copyright Act (1969:729)), copyright can 'resurrect' under certain circumstances. It is however unclear whether it is applicable to the Linsell scarf case (Chapter 2 a, Swedish Copyright Act 1960). What about the US then, where the scarf was distributed? Protection is very unlikely, as US copyright law before 1990 required registration, and it can be assumed that the scarf design had not been registered. However, there is a possibility in US law of restoration of copyright for foreign artists who failed to comply with the formalities of the pre-1990 US copyright law. Under these circumstances, there is a chance that the scarf design could be protected by US copyright law.[10] Furthermore, the scarf design could be protected under international law. The Bern Convention for the Protection of Literary and Artistic Work provides that member states offer the same protection to artists from other member states as to their own citizens. The US, however, was not a member to the Convention until 1989.[11] If Marc Jacobs had 'designed' the scarf in France, or sold it there, French law, which offer several possibilities to protect fashion design, would apply. But then again, as far as we know, France was never involved here. Only one thing is clear though: applying intellectual property law to fashion is a tricky affair with uncertain outcome. At the end of the day, the Linsell scarf design had most probably fallen into the 'public domain' long ago, if not right from start. Nonetheless, Marc Jacobs did pay compensation for the design – it can be assumed that the company was happy to pay a sum for the sake of the reputation of the brand.

Theoretically, there are a number of ways to protect fashion by intellectual property law. Fashion protection sits at the crossroads of the classical categories of intellectual property law: copyright, designs and patent law. Drawings usually fall under copyright, as well as particularly 'artistic' models in some countries, as for instance in Sweden (§ 1, Chapter 1, Swedish Copyright Act 1960) and in France (Code de la propriété intellectuelle, Titre Ier, Chapitre II, Article 112 (14)). Technical aspects, such as bra constructions and Gore-Tex fabrics, usually fall under patent law, and many brands protect their trademarks very strictly – with eternal terms of protection. Sometimes a model is so distinct and well-known that it is protected as a trademark, as the signature 'Chanel Suit' – a knitted wool jacket with a matching skirt originally designed in 1925 – and the Hermès 'Kelly' handbag from 1956, which became famous when it was seen on the arm of princess Grace Kelly of Monaco ('Intellectual property in the fashion industry', 2005).

In the European Union, fashion design is presently protected by domestic and EU law. Since 2002 the EU Design Regulation offers protection for registered (RCD) and unregistered Community designs (UCD).[12] The registered Community design offers a five-year term of protection with a renewal possibility up to 25 years.

The unregistered Community design protection – which was conceived with a view to industrial sectors with short intervals, such as fashion – offers a formless three-year term of protection from the day of disclosure. National laws on design protection are still in force in the member states, but harmonised by a EU Directive from 1998 on the protection of designs. It took the EU Commission 10 years to carry through the regulation, as the wheels were set in motion in 1991 as part of the creation of a single community market in 1993. The Commission considered the differences in national design protection laws as contributory to the fragmentation into different national markets in the EU member states (European Commission, Green Paper on the legal protection of industrial design, 1991, p. 2). The EU Design Regulation is intended to offer a more tailored protection for design, yet fashion designers so far have made less use of it than expected (Fisher, 2008). This is all the more peculiar as the fashion industries in France and Belgium used to band together into trade associations created largely as vehicles to prevent design piracy – by both legal and extra-legal strategies (Blaszczyk, 2007, 2012; Pouillard, 2007; Stewart, 2005). One explanation may be that only 'new' designs with 'individual character' are protected, and that fashion per se is so much about conforming to uniform dress codes. To this we may add the 'ephemeral' character of fashion – as commented upon in the lyrics to the Kinks' song that introduces this article. A three- or five-year term of protection is just not suited for fashion, and designers prefer to spend their time creating new designs rather than preparing applications for registrations or lawsuits (Fisher, 2008).

In contrast, fashion design (except drawings which are covered by copyright) in the US has remained outside the scope of copyright law because it is regarded as relating to 'useful articles' which are not protected as intellectual property.[13] A proposed Design and Piracy Protection Act is presently pending in the US Senate, creating great controversy among proponents and adversaries in academia and in the fashion business (Hemphill & Suk, 2009, p. 1150). In conclusion, in fashion the levels of protection are low. In the US it follows directly from the lack of legislation in the field, while in Europe fashion designers seem reluctant to make use of existing laws that provide protection.

In connection to the debates over the Design Piracy Protection Act in the US, the idea of the 'piracy paradox' as an explanation of why the fashion industry seems to do so well in spite of the low levels of intellectual property protection has received a great deal of attention (Raustialla & Sprigman, 2006). Building on the classical 'trickle-down' theory, the fashion business is described as a pyramid. At the narrow top segment is fashion with a 'high' content of innovation and design, where fashion changes very quickly and with big differences between seasons. Here we find haute couture, very highly priced exclusive and tailored prêt-a-porter for women, such as Chanel, Dior, Giorgio Armani and Dolce & Gabbana, with an extremely small market. Right beneath the haute couture is a layer of exclusive ready-to-wear for both women and men, which includes 'prestige' collections as well as the less expensive and larger 'bridge lines', such as DKNY, CK Calvin Klein, Emporio Armani, D&G and Marc by Marc Jacobs, still with a high design content. Under that level is 'better fashion', with a larger market, lower prices, less original designs and slower changes in designs, such as Mexx, Gap with its 'basics' and 'fast fashion' retailers as Zara and H&M with edgier designs. At the base of the pyramid is the 'basic' or 'commodity' wear at cheap prices, with low fashion and design content and a very large market, such as Wal-Mart in the US, Tesco in the UK and Lindex in Sweden.

The traditional pyramid model suggests that the fashion 'trickles down' from the top to the base, but this is no longer completely true – if it ever was. Designers at the different levels of the pyramid borrow or copy from – and make designs for – each other in all directions.[14] H&M was the first to launch limited collections by haute couture designers such as Lagerfeld, Sonia Rykiel and Rei Kawakubo. Nor does the pyramid include all fashionable clothing. Jeans and sportswear, for example, are difficult to position within the pyramid model (Tungate, 2008).

Among producers there are 'innovators' and 'imitators', while among consumers there are 'early adopters' and the 'followers of fashion' (Hauge, 2007). According to the idea of the 'piracy paradox', when the latest fashion – in the form of copies and knock-offs – has trickled down to consumers at the lower strata of the fashion pyramid, the 'early adopters' need something else to keep up their status as consumers at the top. When 'anybody' can wear the latest trends, the 'early adopters' will go hunting for new and different trends – thereby creating a market for new models. In so doing they speed up the fashion cycle, ultimately augmenting the designers', manufacturers' and retailers' profits. Therefore, fashion designers 'anchor' certain models to their extravagant runway shows in Paris or New York, so they may be copied on a large scale and create 'induced obsolescence'. The debate goes on and the 'piracy paradox' has been contested for being over-simplistic and for not taking note of the fact that the consequences of copying affect innovation depending on market position, level of innovation and the form of copying, among other factors (Hemphill & Suk, 2009, p. 1184). But regardless of which standpoint is taken, the fact that fashion exists in 'copyright's negative space' challenges the classical justifications for intellectual property protection.

The changing landscape of intellectual property law

At present, intellectual property rights in general are under heavy debate, in public media as well as in academia, particularly on the US scene (Boyle, 1996, 2008; Coombe, 1998; Lessig, 2004). The possibilities of disseminating content on the Internet have led to a situation where a majority of the younger population infringe copyright on a daily basis by downloading and uploading music, films and other types of creative content from sites like the Pirate Bay and MiniNova. There is a strong divide between the 'anti-piracy movement' and the 'open-source' or 'public domain' movement for the free dissemination of content. The advocates of free culture claim that the strong emphasis on intellectual property rights today is counter-productive to its own objective – to promote creativity (Boyle, 2008; Lessig, 2004). The content industry, represented by big companies and trade associations such as the Universal Music Group, the Viacom and the Motion Picture Association of America, is deeply concerned and advocates strengthened copyright protection.[15] This situation has wider implications than striking a balance between vital societal interests such as incentive for creativity on the one hand and freedom of expression and information on the other: the legitimacy of the legal system is challenged. The Canadian intellectual law professor Rosemary J. Coombe (1998) has pointed to the need for intellectual property rights scholarship to pay more attention to the cultural, historical and social context of intellectual property rights, and the political consequences of expanding them in a democratic society.

Intellectual property law builds on the historical concepts of property and personality, with roots in the French and American revolutions (Coombe, 1998, p. 7).

The construction relies on the eighteenth century historical construct of the author as 'creative genius', who receives inspiration from the inner parts of himself (the ideal type is a 'he') (Foucault, 1984; Strömholm, 1966, p. 35 f.; Woodmansee & Jaszi, 1994). Today 'creativity' is generally seen as a wider concept, including collaborative and collective creative processes such as wikis, user-generated content, fan-fiction, remixes and mash-ups, taking place in cyber media such as Wikipedia, Facebook and YouTube.[16] The classical distinctions between the 'author' and the 'reader' feel obsolete in this connection (Lessig, 2008; Scafidi, 2005). Furthermore, the binary system with 'intellectual property' (copyright) on the one hand and 'industrial property' (trade mark, patent and design) on the other is not in line with the logic of the modern network, information and communication society. Fashion design is a good example of how the legal costume no longer fits: as it falls between 'intellectual property' and 'industrial property', as mentioned earlier, it can be protected both by copyright law, design law, trade mark law and in some cases even by patent law. The division into the two categories is a result of the two fundamental conventions on intellectual property law that were adopted by the end of the nineteenth century, based on existing laws in the industrialised world and establishing minimum standards and rules for equal treatment of foreign citizens and nationals of the member states: the Paris Convention for the protection of industrial property from 1883[17] and the Bern Convention on the protection of literary and artistic works from 1886.[18] In the Paris Convention, 'industrial property' is defined as 'patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition' (Article 1). In the Bern Convention, intellectual property – literary and artistic works – include: 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science' (Article 2).

Today the categories of intellectual property – industrial property and copyright – overlap to a great extent, and new phenomena do not fit in. Since the early days of the two Conventions intellectual property law has, however, significantly expanded by partial reform. Not only have new creative forms been included, but the terms of protection have become significantly longer. Intellectual property rights have also become increasingly disconnected from the product. The shift is particularly significant for trademarks, which originally had the single purpose of indicating the commercial origin of a product, but which now often represent substantial independent economic value. In some cases the trademark and the brand – as in the case of Coca-Cola and Yves St. Laurent, or the Swedish fashion label Acne Jeans for that matter – are more 'profitable', or intended to be, than the product itself.[19] This development is significant not least in the case of the new Swedish fashion labels discussed below. In this way, we are in a situation where the 'public domain' – creative content intended for free public use – is constantly shrinking (Boyle, 2008; Hemmungs Wirtén, 2008).

The fear of over-protective intellectual property is not new. Already in 1948 the American legal scholar and intellectual property law pioneer Ralph S. Brown Jr stated that: 'In an acquisitive society, the drive for monopoly advantage is a very powerful pressure. Unchecked, it would no doubt patent the wheel, copyright the alphabet, and register the sun and the moon as exclusive trade-marks' (Brown, 1948, p. 1206). Brown was decades ahead of his time (Gorman, 1999; Litman, 1999). However, also in Sweden, as far back as 1884, in the discussions in connection to the adoption of the first Swedish trademark act, the judges of the Supreme Court warned of trademarks becoming too powerful, and cautioned against expanding their functions to more than being mere indicators of origin.[20]

The Swedish textile and garment sector: from crisis to 'fashion miracle'

To understand the development of design protection in Sweden, a brief retrospective look at the domestic textile and garment industry is necessary. The industrial breakthrough took place later in Sweden compared to England and Continental Europe, from around 1850 to World War I. In contrast to England, where industries producing consumer goods, such as the textile industry, were dominant in the earlier phases of industrialisation, in Sweden the export industry – iron, steel, timber and mining – played the dominant role. The Swedish textile industry, however, developed first in the south-west of Sweden, in an area around the town Borås, which remained the most important textile centre until the 1970s. Imported cotton replaced the earlier 'domestic' materials – wool and linen. By the beginning of the twentieth century combined factories (spinning and weaving) with 1000 workers were not unusual. Towards the end of the nineteenth century textile manufactures were started around the towns of Norrköping, Gothenburg, Malmö and Stockholm (Erlandsson, 1985; Magnusson, 2010). From the late nineteenth century to the 1950s, the Swedish textile industry grew constantly in size and capacity, and at an increasing rate in the years after World War II.

Since the 1950s, the development took a different direction as the whole sector underwent a total structural transformation. At the beginning of the 1950s, the textile and garment industry employed around 120,000 persons. Today, only 6000 persons are employed in the textile sector, and around 1300 persons work in what remains of the garment industry. During a 30-year period, an entire Swedish industry was practically wiped out, while the domestic market for ready-made apparel increased considerably. The consumption of apparel per individual has gone up by 60% since the 1950s (in fixed prices). After import restrictions were liberalised during the 1970s, these Swedish industries, like their counterparts in the US, were challenged and eventually undermined by low-price imports from Asia (Erlandsson, 1985; Gråbacke & Jörnmark, 2008).[21] These economic realities paved the way for the transformation of the retail sector and the rise of vertically integrated enterprises such as H&M, which was the first mover in mass-market fashion and is the current Swedish market leader in profitability and in new business concepts (Pettersson, 2001). Figure 1 is an example of the mass-market fashion from an early H&M collection.

After a long period of protectionism, subsidies and nationalisation, in the 1980s it became obvious that these strategies were no longer an option for Sweden. By the time Sweden joined the European Union in 1995, the trade in textiles was completely free of quotas or tariffs.

Figure 1. *Eva*, dotty dress in the 1960 HM spring catalogue. By courtesy of the Historical Archives of H&M at the Centre for Business History, Stockholm.

In the 1970s Sweden started the transition to more knowledge-intensive production centred on design, product development, logistics, branding and trademarks. During this last decade the development has sometimes been described in terms of 'the Swedish fashion miracle' – at least if the H&M 'retail miracle' is

included – with a number of successful ready-to-wear labels with manufacturing located abroad such as Filippa K., Acne Jeans, Wesc, Whyred, Cheap Monday and Odd Molly (Hauge, 2007; Marcus, 2010). These companies operate on the global market, and defy a Swedish identity. Many of them are conceived as 'conceptual fashion' and see the making of clothes as one of many ways of making themselves known. The branding is crucial: presently they are making clothes, but the idea is to create a brand 'that could do a lot of things' (Marcus, 2010). Still, it is Gudrun Sjödén, a label that was established in the mid-1970s, with high quality but a lower fashion content and therefore absent in the 'fashion miracle' debate, which has actually been most successful internationally, with a turnover that exceeds the other Swedish labels put together.[22]

The gradual liberalisation of trade changed the fundamental conditions for the textile and fashion industry in the developed world. Low-price imports have made domestic production non-profitable in high-wage countries such as Great Britain, the US and Sweden. When it became impossible to compete with low prices, companies concerned with creative production – design, marketing, distribution and branding – entered the fray. More value is now added in the knowledge-intensive parts of the production process than in the actual manufacturing of fabric and apparel (Klein, 2010 [2009]). The immaterial assets in the fashion company – the intellectual property, particularly design and trademarks – are increasingly important for the fashion industry. There has been a general shift from 'clothing' to 'fashion'. Fashion is no longer the exclusive purview of haute couture but is found everywhere in the mass market.

The Cobin Brown case and the Swedish legislative debates

In an article in a 1950 issue of the Swedish textile and garment trade periodical *Textil och Konfektion* (*Textile and Garment*), a case of American fashion piracy in Paris was reported under the heading 'Fashion thieves make millions' (1950, no. 5, p. 24). It is the story of French haute couture being imitated by a professional gang led by an elderly lady from the US, Mrs Cobin Brown, owner of an elegant fashion boutique in New York. The article describes how Mrs Cobin Brown was arrested for design piracy by the French *gendarmes* in the lobby of a distinguished Paris hotel.

As it turned out, over the course of many years, Mrs Cobin Brown had run a flourishing fashion business based on design piracy. All of her models were in fact imitations; with the help of a 'specialised gang' of fashion experts and a network with many branches, she copied French models and collections that had not yet been shown to the public in the Paris openings. The protagonists were 'exceptionally talented', 'fast-sketching' persons and 'mnemonic artists' able to reconstruct the models in detail after seeing them only for a few moments. In some cases a camera had been used. The article describes how an entire business had grown up around these operations, able to produce dozens of copies of models that were not yet for sale in the French fashion houses. The Swedish editor took note that it was only because of French intellectual property law, which had a long tradition of protecting designs, that Mrs Cobin Brown could be arrested and her criminal business brought to an end.[23]

The French circumstances were unusual. In the US Cobin Brown's business could not have been stopped because of the exceptions provided for 'useful articles' in American copyright law. In Sweden, the story would have been much the same, as the

textile and garment industry had long opposed all attempts to protect design and patterns. The fact that a textile trade periodical covered the incident may indicate that there was a beginning of a shift in the Swedish view on copying 'foreign models'.

The Cobin Brown example spoke to the existence of a large copycat business in Paris. Copyists lurked around the French fashion houses and used numerous methods to gain advance access to models, sketch them and produce them elsewhere from cheaper material and manufacture. M.L. Stewart has described how a number of the French couturières and couturiers adopted strategies to avoid being copied (Stewart, 2005, 2008). On one front they invented strategies to render copying more difficult. Licensing models to domestic and renowned foreign manufacturers was one important way of eliminating piracy, along with signatures, 'secret seals' and finger prints. Other methods included only allowing in-house alterations, carefully documenting models by photographs from four sides, re-dying clothes at the last minute and adding elaborate decorations (Kirke, 1998, pp. 221–223; Scafidi, 2007, p. 117; Stewart, 2005, pp. 119–123). On another front they conducted 'a legal battle against copying', taking action in a series of court cases against the 'copy houses'. In a number of cases it was confirmed that fashion design could be protected both under the 1793 copyright law (amended in 1902) and the 1806 industrial design law (amended in 1909) (Scafidi, 2007, p. 117).

A leading name on both fronts was couturière Madeleine Vionnet, known for her highly innovative and elegant cuts – the bias cut in particular – and for fighting a hard battle against imitations. Other renowned fashion houses also took part in the battle (Scafidi, 2007; Stewart, 2005). Vionnet lodged a large number of complaints against the copy houses during the 1920s and 1930s and in successful cases she was awarded large sums in damages. Chanel joined Vionnet in one famous case, but on other occasions she was reluctant to take part. Chanel saw that copies did not decrease sales of her models, because the copies could not compete with the same exclusive quality in fabric, fit and finishing details (Stewart, 2005, pp. 123, 129–130).

In the US fashion designers adopted strategies to fight counterfeiters. In their study of the Fashion Originator's Guild of America, which started in 1930 and ended in 1939 when it was declared to violate the anti-trust laws, Marcketti and Parsons (2006) describe the same kind of copying practices as in France, including bribing fashion-house employees and spying. Pirated collections could be delivered as rapidly as 24 hours after the original collection arrived at the retailers. During the 1930s FOGA was an organisation of American designers created to fight piracy by self-regulatory measures. FOGA made agreements with a large number of retailers to sell only dresses with the organisation's signature label in their shops, to guarantee that no copies were offered for sale. Marcketti and Parsons found that in the legislative debates that took place in connection to the FOGA initiative, there was great uncertainty as to whether fashion piracy affected producers and consumers negatively or positively. Nonetheless, the researchers noticed that the arguments for or against intellectual property control was divided along price lines. However, the FOGA initiative by American designers and the legislative debates that followed did not lead to the adoption of design protection laws.

As described in the previous section, the Swedish context was different. Unlike the French fashion industry, the Swedish textile sector was all about industrial – material – production. Sweden got its first law protecting designs in 1899, a Law on Certain Patterns and Models in 1899.[24] Although originally intended to include all kinds of patterns, the scope of the law was narrower than comparable legislation in

many of the other European countries. Protection was granted only for decorative patterns in the metal industry (Mönsterskyddsutredningen, 1965, p. 87). In many countries some branches of industry were excluded from the scope of design protection legislation, but it was unique that the protection was limited in this way to only one branch of industry (Mönsterskyddsutredningen, p. 85). In the government bill, it was stated that the law should above all comply with the wishes of the manufacturers, and the only sector that had clearly expressed a need for intellectual property protection was the metal industry. In the ensuing decades, the legislative debates over protection for other industrial sectors reflects the concerns of the Swedish textile and garment industry. The 1916 report of the Government Patent Law Committee (Patentlagstiftningskommittén) recommended an extension of the protection for patterns and designs to other categories. However, the committee suggested an exception for the textile industry, with the motivation that:

> For the production of articles which are required to follow the changes of fashion, Swedish industry has not by far the same possibilities of creating new patterns as the foreign industry. The laws of fashion are dictated in foreign countries, and the Swedish manufacturers are constrained to follow after. In the textile trades where fashion- and seasonal articles are manufactured, design is not developed to any extent worth considering. Accordingly, a legal protection for design is hardly to the benefit of Swedish draftsmen of patterns, but can be detrimental to Swedish manufacturers who are constrained to rely on foreign designs. (Cited in Mönsterskyddsutredningen, 1965, p. 88; my translation)

Accordingly, the Patent Law Committee declared that the Swedish textile industry's need to freely use foreign models and patterns had to be met by the legislature. The exception was explicitly outlined in accordance with the needs of the Swedish textile manufacturers. Copying 'foreign' fashion designs quite frankly was recognised as a fully legitimate activity for reasons of competitiveness.

Exactly the same considerations were expressed in connection with the introduction of a parallel way of protecting design as 'arts and crafts' (brukskonst) under the copyright law. 'A small copyright', introduced in Sweden in 1926, had a term of protection of 10 years, shorter than the copyright term for artistic and literary works. The inclusion of design was preceded by lobbying on the part of the Swedish association for handicraft (Slöjdföreningen). In the bill to the Swedish Parliament, the acting secretary of justice stated that the protection 'in principle' should cover all categories of arts and crafts. Only in cases where 'significant inconvenience' would result from copyright protection should that category be exempted. More precisely, only sectors 'dependent on foreign models' could come into question to ensure they were not deprived of access to the imported models that gave them knowledge of the 'variations dictated in foreign countries' (Mönsterskyddsutredningen, 1965, p. 88). Lawmakers believed there was 'scarcely any view to call forth' new patterns and models for the clothing industry, and that woven articles and clothing should be left outside the scope of the law.[25]

But it was not until the adoption of a new copyright law in 1960 that textile and garment designs 'aimed at production' were included under the 'arts and crafts' article of 1926. The main justification for the inclusion was that Sweden had to comply with the revised text of the Bern Convention. Already in 1956 the Government Copyright Law Committee (Auktorrättskommittén; Authors' Rights

Committee) had declared that an exemption for textiles and garments was no longer justifiable because in principle, it was 'not appealing' to 'adopt such a narrow nationalistic perspective' (*Upphovsmannarätt till litterära och konstnärliga verk*, 1956). At the same time the responsible minister argued that the question had 'no real practical significance', as there 'evidently only seldom existed such levels of creativity in the textile field that would qualify for protection'.[26]

Concerning the question of extending the design protection law to all sectors, in 1954, a few years after the publication of the story about Mrs Cobin Brown and her gang, two bills were introduced to the Swedish Parliament suggesting an extension of the law to all sectors. It was now believed that the opposition from the textile sector was 'non-existent or essentially modified'.[27] In a reply from the Federation of Swedish Industries (Sveriges Industriförbund) – which was an umbrella organisation representing the owners in the different industrial sectors in Sweden – it was indicated that an extension of the protection would be welcomed in a majority of industrial sectors (cited in Mönsterskyddsutredningen, 1965, pp. 89–90). A quick survey performed by way of questionnaires sent out by the Federation to the different industrial sectors showed that only one sector expressed some doubt: the textile and garment industry. Once again, the 'necessity' to 'get impulses and ideas from the great textile nations and fashion centres' was the justification for the hesitation. The textile and garment industry also feared that the required registration procedure – which was the legal basis for the exclusive rights to a pattern – would be an obstacle, because it would be too time-consuming to work out registration applications. But the Federation also stated that 'at the same time it has, however, been emphasised that the Swedish textile industry as a matter of course also produces patterns of a more independent character'. Here was a small step towards the idea that Sweden could produce some of its own original designs, and that design protection would be an impetus for innovation. In the end, however, none of the reform bills were adopted, and design protection remained limited to the metal industry (Mönsterskyddsutredningen, 1965, p. 87).

The Government Committee Report on design protection in 1965 contained a thorough assessment of design protection laws with reference to the textile and garment industry. Companies surveyed for the report again responded negatively to the prospect of design protection, but they no longer cited the need to copy foreign models. Instead the need for flexibility was stressed, together with lack of time for bureaucratic paperwork. For the first time, the 'fashion industry' was specifically mentioned, along with a discussion of the importance of quick design changes around a small number of themes (Mönsterskyddsutredningen, 1965, p. 95). Not until 1970 were all categories of design covered with the passage of the Swedish Design Protection Act (Mönsterskydslagen 1970:485, Swedish Collection of Laws, SFS). Nonetheless, it was relatively difficult to obtain legal protection for clothing designs.

From the 1950s onward, the new laws guarding intellectual property in the 'arts and crafts' combined with subsequent revision of the main copyright laws indicate a shift in the view of design in the textile and garment industry. Regarding the introduction of a copyright for 'arts and crafts' the legislature could no longer justify the exception of the evolving 'fashion industry'. In the case of the design law, there was a shift on the part of the industry, which finally declared that Sweden was capable of creating original design. Perhaps it is not a coincidence that by the end of the 1940s Sweden had its first internationally renowned fashion designer, Katja Geiger, who started her career selling her collections under the label 'Katja of Sweden' in Lord &

Figure 2. Knitted winter dress, Katja of Sweden 1965–70.
Source: Photograph by Claes Lewenhaupt. By courtesy of the Historical archives of the Swedish Society for Crafts and Design (Svensk Form) at the Centre for Business History, Stockholm.

Taylors and Bloomingdales, and received the 'Designer of the Year in Sportswear' award in 1950 (Geiger & Åhlander, 2000, pp. 48–51). See Figure 2.

Conclusion

Contrary to the classical justifications of intellectual property law – that without legal protection the levels of invention and creativity in society will drop – the Swedish fashion industry has survived harsh structural transformations, competition from low-priced imports, and fashion piracy and counterfeiting on an industrial level. Fashion is therefore an interesting counter-example that challenges the dominant business models in other creative industries (Cox & Jenkins, 2005). Raustialla and Sprigman (2006, p. 1762) call it 'IP's negative space'. Intellectual property's negative space covers creative activities that could be protected as intellectual property but which, for one reason or another, have eluded the legal system.

The relationship of fashion to intellectual property law is a complex issue. Creative concepts, business models and protection logics vary substantially within the fashion and clothing businesses. A basic condition for creativity is the inspiration of other people's work. This is not exclusive to fashion design, but traditional intellectual property solutions may be ill-suited to the type of short-life-cycle and reference-intensive creative work that characterises fashion. Fashion

highlights the fundamental tensions in intellectual property between 'original' and 'imitation'.

A historical perspective illustrates that the evolution of intellectual property rights in fashion can be understood as an outgrowth of the different logics of Kawamura's (2005) categories 'fashion' as symbolic – and immaterial – production, and 'clothing' as material production in the different local contexts. France, the US and Sweden have followed three different paths that are contingent on whether the local context of production follows the logic of 'fashion' or the logic of 'clothing'.

In France, Paris has been the fashion capital of the world since the early days of the 'fashion system'. The symbolic production of fashion has relied on a system of intellectual property law. Early on, France adopted intellectual property laws which created ways to protect the haute couture during the first half of the nineteenth century, and the French courts did not hesitate to apply those laws. M.L. Stewart (2005, 2008) has described how French fashion designers took action to protect their models in the courtrooms and by other means.

The US was a huge market for imitation French fashion. The material production of the American textile and clothing industry depended on imported French designs, both legitimate and otherwise. However, during the 1930s native design talent appeared on the scene, taking up the fight against copying in the FOGA. In the legislative debates in connection to the FOGA initiative, Marcketti and Parsons (2006) saw that there was great uncertainty among the key players as to the effects of the copying – *and* that opinions were divided along price points, thus depending on the degree of 'fashion' involved in the 'clothes'. However, so far, fashion has remained unprotected by intellectual property law in the US.

In the *Swedish* attempts to introduce intellectual property protection for patterns, design and 'arts and crafts' between 1916 and 1970 – all with a potential to protect original fashion creations – the Swedish legislature was very sensitive to the material production of 'clothing' of the Swedish textile and garment industries. These industries remained firmly committed to the idea of freely available content – from abroad. The government's attempts to include textiles and garments under intellectual property law were constantly rejected until the 'arts and crafts' received protection in the new Copyright law 1960, and in 1970 when design in general got its own intellectual property protection in the Design Protection Act. Before that time, the only way to handle 'the constraint' of fashion changes 'dictated abroad' was to copy foreign models. During the 1950s there was however a shift towards a recognition of the existence, and importance, of domestic Swedish design. The shift corresponded with the achievements of Katja of Sweden, the reporting in *Textile and Garment* on design piracy and the declaration by the Government Copyright Law Committee that the exemption for textiles and garments was no longer justifiable.

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Notes

1. 'Fashion' often refers directly to clothing styles, which also is the focus of this article, but 'fashion' can refer to other areas of intellectual and social life as well. There is no single definition of fashion; it has varied with time and academic perspective (Kawamura, 2005, p. 87).
2. Ray Davies, 'Dedicated follower of fashion' (The Kinks).
3. European Commission (2008), Annex 4. Overview per product sector of countries of origin, p. 24.
4. For the case of Sweden, see Mönsterskyddsutredningen (1965).
5. See below in the section on the Swedish textile and garment sector.
6. William Shakespeare, *Much ado about nothing* (The Literature Network), Act 3, Scene III. Retrieved March 30, 2011, from http://www.online-literature.com/shakespeare/muchado/9/
7. Retrieved March 30, 2010, from http://quotationsbook.com/quote/14468/
8. Foley is better known in her subsequent career as a pali language scholar and translator.
9. The scarf story has also been commented on the fashion blog Sassybella by Helen Lee, 20 February 2008: 'Marc Jacobs takes inspiration from Swedish villagers', retrieved March 30, 2011, from http://www.sassybella.com/2008/02/marc-jacobs-takes-inspiration-from-swedish-villagers/
10. Section 104 (A), US Copyright Act.
11. Retrieved March 14, 2011, from http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1045C
12. Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs.
13. '... the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article', § 101 US Copyright Law, Title 17, US Code.
14. See for example the story of the Marc Jacobs' design theft referred to above.
15. Also the European Union is concerned, see Proposal for a European Parliament and Commisssion Directive Amending Directive 2006/116/EC of the European Parliament and of the Council on the Term of Protection of Copyright and Related Rights.
16. Collective creative practices were commonly used before the nineteenth century (see Bengtsson, 2008).
17. Adopted on 20 March 1883 (http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf).
18. Adopted on 9 September 1886 (http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf).
19. On the relevance of trademarks in earlier periods from a business history perspective, see Lopes and Duguid (2010). For a general critique, see Klein (2010 [2009]).
20. Minutes from the Swedish Supreme Court (Högsta domstolens protokoll), October 12, 1881 (cited in Hasselrot, 1932, p. 25). Not only did the justices warn of the alienation of the trade mark from the product, they also warned of misleading consumers.
21. The source of the employment figures I cite from Gråbacke and Jörnmark (2008) is *Statistics Sweden* (SCB).
22. Interview with Gudrun Sjödén in Dagens Nyheter (Lindholm, 2011).
23. The Industrial Design Law of 1806 (amended in 1909), which had a deposition procedure. France adopted a special law for protection of fashion in 1957, Law No. 52-300 of 1952 against the Unlawful Reproduction of Creations of Seasonal Industries of Dress and Other Articles of Fashion (amended by Law No. 57-296, March 11, 1957).
24. As qualified in the Law on Certain Patterns and Models (*lagen (1899:59) om skydd för vissa mönster och modeller*).
25. Proposition (Government Bill) No. 2/1926, pp. 29–30.
26. Government Bill, 1960:17, p. 50 (cited in Mönsterskyddsutredningen, 1965, p. 91).

27. Bill No. 351/1954, the First Chamber, Bill No. 461/1954, the Second Chamber (Swedish Parliament).

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