

ГОСПОДАРСЬКЕ ПРАВО, ГОСПОДАРСЬКО-ПРОЦЕСУАЛЬНЕ ПРАВО

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INTELLECTUAL PROPERTY AND THE FASHION INDUSTRY: PECULIARITIES OF LEGAL REGULATION

The article examines the issues of development of legal regulation of intellectual property through the prism of the use of intellectual property in the fashion industry.

The author identifies the main body of legal acts regulating the enforcement of intellectual property rights. Attention is paid to the issues of intellectual property rights enforcement in the fashion industry, as well as to the specifics of international legal protection of the rights of fashion industry entities. It is emphasized that harmonization of EU and Ukrainian legislation is a key step towards the regulation of intellectual property rights in the fashion industry. The issue of bringing both Ukrainian fashion industry legislation and intellectual property legislation in line with EU legislation is relevant.

The author analyzes the retrospective of the development of legislation and relations in the fashion industry, as well as the system of regulations in the field of intellectual property. The author makes a comparative legal analysis of these areas with due regard for changes in the legislator's position.

The protection of intellectual property rights in the industry is undoubtedly related to historical, political, economic, legal, social and cultural factors. Applying a retrospective approach to this issue, it is possible to characterize the history of the formation and development of intellectual property rights protection in the fashion industry.

The rather active development of the fashion industry after Ukraine gained independence led to a corresponding change in the legislative field. Relations in the fashion industry developed particularly rapidly after the 2000s. This necessitated the legalization of a number of legal relations. Today, this area is changing dramatically, gaining momentum not only in Ukraine but also in the world as a whole. This situation requires the development of more and more effective mechanisms for the legal regulation of intellectual property in the fashion industry.

The current state of the copyright system differs from country to country, but there are certain general principles that are ensured in all countries. In particular,

the main feature of copyright in all countries is that copyright arises from the moment of creation of a work and does not depend on the fact of registration of intellectual property rights to a work (in our case, a fashion product) or any other special registration thereof, as well as on the fulfillment of any other formalities.

The author identifies the main legal acts that affect the development and distribution of the fashion industry. The author also analyzes in detail certain court cases in the fashion industry. A comparative legal analysis of Ukrainian legislation and European regulations in the field of protection of the rights of fashion market participants is made. The author also identifies the main challenges and obstacles to the development of the fashion industry in Ukraine.

Keywords: *fashion, fashion law, fashion industry, intellectual property, industrial design, copyright.*

Problem statement. The Ukrainian fashion industry is a complex, interesting and very dynamic phenomenon. This is not surprising, as it has been developing for almost 30 years in a rapidly changing country, making its way from a colony of the former USSR to a modern democratic state, and this generally very rapid progress is further accelerated by periods of particular turbulence. So the fashion industry, which exists in such circumstances, has absorbed all the contradictions, flaws, advantages and peculiarities of life in constant motion, a life where the only constant is constant change. First of all, it is an industry of opportunities.

The main task of Ukrainian fashion brands at the beginning of the large-scale invasion was to survive and keep their teams as much as possible. To do this, we need to create an appropriate legal framework that would allow us to legally level certain wartime challenges. Unfortunately, such norms have not yet been implemented.

Analysis of the latest research and publications. The scientific and theoretical basis of the study is based on comprehensive scientific works of such national scientists as I. Venediktova, A. Kodynets, O. Kulinich,

I. Kryvosheina, N. Kuznetsova, V. Makoda, O. Kohanoska, O. P. Orlyuk, V. V. Luts, R. O. Stefanchuk, S. O. Slipchenko, G. O. Ulyanova, O. I. Kharitonova, O. E. Kharitonov, A. S. Stefan, I. E. Yakubivskyi, N. O. Halaim and other scholars. Certain legal aspects in the field of intellectual property rights protection in the fashion the fashion industry were partially touched upon in publications on related topics by such domestic and foreign authors as R. G. Frankel, S. Beltrametti, M. E. Bychkovska, N. V. Chuprina, M. T. Melnyk and others. However, this topic still requires a thorough study.

Task statement. The purpose of this article is to identify the main features of the development of legislation in the fashion industry and in the field of intellectual property as part of the fashion industry.

Presentation of the main material. For most of the 20th century, Ukraine was part of the Union of Soviet Socialist Republics (hereinafter - the USSR), under the influence of the policy, which shaped the national legislation in the field of intellectual property.

The fashion industry as an independent sector of the economy was formed in Ukraine only after the coun-

try's independence was recognized in 1991. Despite such a short period of time short period of time, the Ukrainian fashion industry is one of the few industries that has been developing quite dynamically in recent years, as evidenced by the high demand for Ukrainian designers' products among consumers from all over the world.

Increased attention to Ukrainian fashion necessitates the creation of an effective system of intellectual property rights protection in this area. It should be noted that the subjects of the industry under study rely on general activities are based on the general legal acts of Ukraine in the field of intellectual property rights protection. At the same time, unlike in France, the current legislation in this area does not contain special provisions on intellectual property protection in the fashion industry.

The development of this area of legislation in Ukraine at the initial stage was carried out through the adoption of separate laws that became the main sources of law and still form the basis of special legislation on intellectual property. These are the Laws of Ukraine «On Copyright and Related Rights» [1], «On Protection of Rights to Inventions and Utility Models» [2], «On Protection of Rights to Industrial Designs» [3], «On Protection of Rights to Trademarks and Service Marks» [4], which entered into force on December 15, 1993.

At the same time, the Laws of Ukraine «On Restriction of Monopoly and Prevention of Unfair Competition in Business Activities» [5], «On Protection against Unfair Competition» [6], «On Protection of Rights to Topographies of Integrated Circuits» [7].

The Constitution of Ukraine adopted in 1996 proclaimed the right of

everyone to own, use and dispose of their property and the results of intellectual and creative activity [8]. In addition, Ukraine is a party to such international treaties, such as the Berne Convention [9], the TRIPS Agreement and the GATS [10], which are also recognized as part of national legislation.

The next logical step, which met the country's urgent economic needs, was the codification of existing legislation, which not only streamlined the current legislation but also improved it qualitatively and methodologically, and became evidence of the next level of development of legal science and legislative technique in Ukraine and, at the same time, a powerful impetus for further scientific research. Adopted in 2003 by the Verkhovna Rada of Ukraine, the Civil Code of Ukraine already contained a separate Book IV entitled «Intellectual Property Rights» [11]. A separate Chapter 16 of the Economic Code of Ukraine is also devoted to the regulation of legal relations related to intellectual property [12].

It is worth noting that in 2004 the Verkhovna Rada of Ukraine adopted the Resolution «On Approval of the State Program for Development of Innovative Directions of the Fashion Industry until 2010» [13], which remains the only specialized act on the fashion industry since Ukraine's independence.

Over time, the historical limitations of some of the views of experts and lawmakers of the early 2000s on the prospects for the development of the fashion industry in Ukraine have become apparent. Thus, due to the narrow approach to the interpretation of the concept of "fashion industry", the said Resolution of the Verkhovna Rada of Ukraine uses this term only in relation to the sphere of hairdressing and

decorative cosmetics, thus not mentioning other fashion objects.

Of course, such an attitude demonstrates the existence of an undeniably insufficient level of legal awareness of the content of such categories as “fashion” and “fashion industry”, which leads to their erroneous interpretation at the legislative level. Due to this state of affairs, we consider it necessary in the future, when adopting regulatory legal acts by the government of the country designed to provide assistance to the development of the fashion industry, to use this term in relation to all groups of objects of the fashion industry, namely: clothing and footwear; accessories; perfumes and cosmetics; home accessories and decorations for decorating the space; services in the field of the fashion industry. This interpretation will allow not only to correctly define the range of objects and subjects of the fashion industry, but also to identify ways to ensure the protection of the latter's rights.

Currently, Ukrainian legislation provides for a system of protection of such objects similar to the EU through the application of copyright and unregistered industrial design rules.

Thus, in accordance with the provisions of Article 437 of the Civil Code of Ukraine and Article 11 of the Law of Ukraine “On Copyright and Related Rights”, copyright arises from the moment of creation of a work and do not depend on the fact of registration of intellectual property rights to a work or any other special registration of it, as well as fulfillment of any other formalities [11].

However, despite the direct indication of the law, there are cases in Ukrainian court practice in which courts have repeatedly mistakenly de-

termined the moment of publication of a work or issuance of a certificate of registration of copyright in a work as the moment when copyright in the work arises.

In particular, this logic was followed by the Sviatoshynskyi District Court of Kyiv in its decision in case 759/3784/20 of 27.05.2021 [14], which states that at the time of the defendants' publication of the textbook, there was no evidence of the plaintiff's existing, legally protected copyright in the book from which certain fragments were taken, since as of the time of the publication of the textbook, the copyright certificate for the plaintiff's work did not regulate the relationship of authorship, as it was registered later.

Due to such differences in the interpretation of the provisions of Art. 437 of the Civil Code of Ukraine and Art. 11 of the Law of Ukraine «On Copyright and Related Rights», the Supreme Court in its decision in case No. 760/20855/16-ц of 16.06.2021 recognized that it is well established in civil law doctrine that copyright in a work arises from the moment of objectification of the work. The acquisition of copyright does not require registration of a work or any special registration, as well as the fulfillment of any other formalities. In other words, one of the principles in the field of copyright is the principle of automatic protection: protection is granted to a work automatically (by the fact of creation of the work) and does not depend on its registration, deposit, examination and other actions.

It should be recognized that, unlike the UK law, Ukraine does not require categorization of copyrighted works, thus the non-exhaustive list of copyrighted works enshrined in the

legislation provides for the protection of any works that meet the conditions necessary to obtain the relevant legal protection. However, the inclusion of fashion designs in the list specified in Article 433 of the Civil Code of Ukraine and Article 8 of the Law of Ukraine «On Copyright and Related Rights» would lead to the regulatory recognition of the possibility and necessity of protecting such objects at the legislative level, thereby allowing the Ukrainian copyright legislation to come closer to ensuring effective legal protection of fashion products.

It is important to note that in Ukraine, only the criterion of the need to provide an objective form of expression of a work is enshrined in law. At the same time, copyright protection does not apply to any ideas, theories, principles, methods, procedures, processes, systems, methods, concepts, discoveries, even if they are expressed, described, explained, illustrated in a work [1].

The Law of Ukraine “On Copyright and Related Rights” also contains provisions on the criterion of originality. Thus, Art. 9 of the above law provides that a part of a work that can be used independently, including the original title of the work, is considered a work and protected by law [1]. At the same time, Article 10 of the same law denies the possibility of protecting traffic schedules, TV and radio schedules, telephone directories and other similar databases that do not meet the criteria of originality and are subject to *sui generis* (peculiar right, right of a special kind) [1].

Thus, it can be seen that Ukrainian legislation uses the condition of originality of a work only in certain provisions relating to certain types of works, without explicitly stating that all copy-

right works must meet this criterion. This is due to the fact that at the legislative level there is still no single generally accepted approach to determining the conditions for the protection of copyright works. For this reason, doctrinal texts of copyright experts also contain disagreements on this issue.

It is recognized that it is necessary to enshrine in the legislation the definition of the term “original work”. Considering the experience of foreign countries, it can be concluded that usually the decision on interpretation of the condition of originality of copyright works is usually left to the discretion of the court. However, given the existing discrepancies in the enforcement of provisions of the law by national courts and the fact that the legal system of Ukraine belongs to the zone of continental law, and therefore, to the unlike in the UK and the USA, court decisions of national courts in the judgments of national courts in specific cases are not recognized as a source of law, we believe that the solution of this issue should be entrusted to the legislator. Thus, a correct and clearly formulated definition of the term “original work” in Ukrainian legislation will lead to unity in the perception, understanding and interpretation of the condition of originality in the practical implementation of civil law in the law enforcement activities of both judicial authorities state bodies and officials, as well as representatives of the scientific community in this area.

At the same time, considering Ukraine's European integration policy, we propose to take as a basis for the definition of the condition of originality the judgment of the European Court of Justice in the *Infopaq* case [15]. There-

fore, we consider the scientist's proposal to define the term "original work" to be apt and to state it as follows: an original work is yours, which is an independent result of the author's intellectual activity, the creation of which is due to the author's free and creative choice [16, p. 165].

Of course, it is impossible to ignore the fact that for the proper interpretation of certain provisions of the Agreement for Ukraine, the decision of the European Court of Justice is important for Ukraine. After all, the definition and interpretation of the criterion of originality, determining the conditions for securing copyright in functional forms of objects, etc. are enshrined in the case law of the relevant of the relevant authority.

Conclusions. Finally, it is worth mentioning the main problems and

challenges that arise on the way to the development of intellectual property rights in the fashion industry. Firstly, it is the underdevelopment of the system of legal regulation of these relations, the lack of clear definitions and categorization of types of intellectual property in the fashion industry, and the criteria for granting them legal protection. Second, a significant obstacle today is the inconsistency of Ukrainian legislation with EU legislation in this area. The third reason for the slowdown in the development of the fashion industry in Ukraine is the difficulty of delivery to the end consumer due to the war in Ukraine. This leads to a number of violations of intellectual property rights and definitely does not encourage designers to expand their activities in Ukraine.

List of cited sources

1. Про авторське право і суміжні права : Закон України від 23.12.1993 р. № 3792-XII. URL: <https://zakon.rada.gov.ua/laws/show/3792-12#Text> (дата звернення: 10.02.2024).
2. Про охорону прав на винаходи і корисні моделі : Закон України від 15.12.1993 р. № 3687-XII. URL: <https://zakon.rada.gov.ua/laws/show/3687-12#Text> (дата звернення: 10.02.2024).
3. Про охорону прав на знаки для товарів і послуг: Закон України від 15.12.1993 р. № 3689-XII. URL: <https://zakon.rada.gov.ua/laws/show/3689-12#Text> (дата звернення: 10.02.2024).
4. Про охорону прав на промислові зразки : Закон України від 15.12.1993 р. № 3688-XII. URL: <https://zakon.rada.gov.ua/laws/show/3688-2#Text> (дата звернення: 10.02.2024).
5. Про обмеження монополізму та недопущення недобросовісної конкуренції у підприємницькій діяльності : Закон України від 18.02.1992 р. № 2132-XII. URL: <https://zakon.rada.gov.ua/laws/show/2132-12#Text> (дата звернення: 10.02.2024).
6. Про захист від недобросовісної конкуренції : Закон України від 07.06.1996 р. № 236/96-ВР. URL: <https://zakon.rada.gov.ua/laws/show/2210-14#Text> (дата звернення: 10.02.2024).
7. Про охорону прав на компонування напівпровідникових виробів: Закон України від 05.11.1997 р. № 621/97-ВР. URL: <https://zakon.rada.gov.ua/laws/show/621/97-%D0%B2%D1%80#Text> (дата звернення: 10.02.2024).

8. Конституція України : Закон України від 28.06.1996 р. № 254к/96-ВР. URL : <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> (дата звернення: 10.02.2024).

9. Бернська конвенція про охорону літературних і художніх творів: Паризький Акт від 24.07.1971 року, змінений 2.10.1979 року. URL: https://zakon.rada.gov.ua/laws/show/995_051#Text (дата звернення: 10.02.2024).

10. Договір Всесвітньої організації інтелектуальної власності про авторське право, прийнятий Дипломатичною конференцією 20.12.1996 та положення Бернської конвенції (1971 р.), на які містяться посилання у Договорі (Договір ВОІВ про авторське право) від 20.12.1996. URL: https://zakon.rada.gov.ua/laws/show/995_770#Text (дата звернення: 10.02.2024).

11. Цивільний кодекс України : Закон України від 16.01.2003 р. № 435-15. URL : <https://zakon.rada.gov.ua/laws/show/435-15#Text> (дата звернення: 10.02.2024).

12. Господарський кодекс України : Закон України від 16.01.2003 р. № 436-VI. URL : <https://zakon.rada.gov.ua/laws/show/436-15#Text> (дата звернення: 10.02.2024).

13. Про затвердження Державної програми розвитку інноваційних напрямів індустрії моди до 2010 року : постанова Верховної Ради України від 19.02.2004 р. № 1530-15. URL: <https://zakon.rada.gov.ua/laws/show/1530-IV#Text> (дата звернення: 10.02.2024).

14. Рішення Святошинського районного суду міста Києва у провадженні 2/759/4459/21 від 27.05.2021 р. URL: <https://reyestr.court.gov.ua/Review/97335620> (дата звернення: 10.02.2024).

15. Case C-5/08 - Infopaq International A/S v Danske Dagblades Forening, 2009. URL : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0005> (дата звернення: 10.02.2024).

16. Бичковська М. Є. Охорона прав інтелектуальної власності на незареєстровані дизайни у сфері індустрії моди : дис. ... д-ра філософії в галузі права : 081. Київ, 2021. 223 с.

Новіков О. Ю., аспірант кафедри цивільного судочинства, арбітражу та міжнародного приватного права, Національний юридичний університет імені Ярослава Мудрого

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Інтелектуальна власність та індустрія моди: особливості правового регулювання

У науковій статті розглядаються питання розвитку правового регулювання інтелектуальної власності крізь призму використання об'єктів інтелектуальної власності в індустрії моди. Автором визначено основний масив нормативно-правових актів, що регулюють питання забезпечення прав інтелектуальної власності. Приділено увагу проблематиці дотримання прав інтелектуальної власності у сфері моди, а також специфіці міжнародно-правового забезпечення прав суб'єктів модної індустрії. Наголошується, що саме гармонізація законодавства ЄС та України є ключовим кроком на шляху упорядкування прав на об'єкти інтелектуальної власності у сфері модної індустрії. Актуальним є проблематика приведення у відповідність до законодавства ЄС і законодавства

України у сфері модної індустрії, і законодавства у сфері інтелектуальної власності одномоментно.

Автором проаналізовано ретроспективу розвитку законодавства та відносин у сфері модної індустрії, а також систему нормативно-правових актів у сфері інтелектуальної власності. Здійснено порівняльно-правовий аналіз цих сфер з урахуванням зміни позицій законодавця.

Захист прав інтелектуальної власності в галузі, безсумнівно, пов'язаний з історичними, політичними, економічними, правовими, соціальними та культурними факторами. Застосовуючи ретроспективний підхід до цього питання, можна охарактеризувати історію становлення та розвитку захисту прав інтелектуальної власності в індустрії моди.

Досить активний розвиток модної індустрії саме після набуття незалежності Україною зумовив і відповідну зміну у законодавчому полі. Особливо стрімко розвивались відносини у сфері модної індустрії після 2000-х років. Це викликало необхідність юридичного оформлення цілої низки правовідносин. Сьогодні ця сфера змінюється кардинально, набуваючи широких обертів не тільки в Україні, але і в світі в цілому. Така ситуація потребує вироблення все нових і нових ефективних механізмів правового регулювання об'єктів інтелектуальної власності у сфері індустрії моди.

Сучасний стан системи авторських прав в різних країнах відрізняється, однак існують певні загальні принципи, які забезпечуються в усіх країнах. Зокрема, головною особливістю авторського права в усіх країнах є те, що авторські права виникають з моменту створення твору та не залежать від факту реєстрації прав інтелектуальної власності на твір (у нашому випадку виріб в індустрії моди) чи будь-якого іншого спеціального його оформлення, а також виконання будь-яких інших формальностей.

Автором виокремлено основні нормативно-правові акти, які впливають на розвиток та розповсюдження модної індустрії. Також детально проаналізовано окремі судові справи у сфері індустрії моди. Проведено порівняльно-правовий аналіз законодавства України, європейських нормативно-правових актів у сфері захисту прав учасників ринку модної продукції. Також автором виокремлено основні виклики та перепони для розвитку індустрії моди в Україні.

Ключові слова: мода, право моди, модна індустрія, інтелектуальна власність, промисловий дизайн, авторські права.