UNIVERSITY OF TURKU
Faculty of Law

Moral Rights of Designers are at the Crux of Copyright in Fashion

Intellectual Property and Beyond
Master's thesis

Author:
Heidi Hannula

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This master’s thesis explores the moral rights of fashion designers. Moral rights protect an author's personal connection to their work, preventing it from being used in a derogatory manner that could harm the author's reputation. Moral rights include, for example, the right of attribution and the right to integrity. These rights remain with the author even if they relinquish their economic rights.

Moral rights remain largely overlooked within the fashion industry, where economic factors predominate. They are similarly underexplored in legal scholarship and copyright research. The aim of this thesis is to contribute to the broader discourse on the role and significance of moral rights in the protection of fashion designers' copyrights.

This thesis employs a range of research methods to thoroughly examine the topic of fashion designers' moral rights. The methods include empirical legal research, legalistic research, qualitative research, international and comparative research, theoretical research, and doctrinal research. As part of the qualitative framework, an interview with a fashion designer has been conducted. The interview data deepens the research by bridging theory and practice, exploring both the theoretical concepts and the practical application of moral rights in the everyday practices of fashion designers.

This thesis underlines the critical need to address systemic challenges within the fashion industry, including power imbalances and structural inequalities, to ensure that fashion designers receive the recognition, respect, and legal protection they deserve. It calls for a re-evaluation of the current intellectual property framework to better safeguard the moral rights of fashion designers, ensuring that their work is valued not only economically but also for its cultural and creative significance, thereby protecting them from exploitation by larger corporations. This thesis further advocates for the recognition of fashion design as an art form on par with traditional arts, a shift that has already gained momentum in the European Union. However, significant differences remain between countries in how they protect fashion designers’ rights, with some jurisdictions offering more robust protections than others, underlining the need for a more harmonized approach.

A significant obstacle to the effective implementation of moral rights is the lack of awareness among stakeholders. Therefore, raising awareness about fashion designers' moral rights is crucial for overcoming these challenges and promoting the dialogue needed to establish a more equitable and comprehensive framework for their protection.

Key words: moral rights, fashion law, intellectual property rights

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Tutkielma

Oppiaine: Oikeustiede
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Tämä tutkielma käsittelee muotisuunnittelijoiden moraalisia oikeuksia. Moraaliset oikeudet suojaavat tekijän henkilökohtaista suhdetta luomukseensa. Moraaliset oikeudet kieltävät käyttämästä loukkaavalla tavalla toisen teosta. Moraalisia tekijänoikeuksia ovat muun muassa teoksen isyysoikeus ja kunnioittamisoikeus. Moraaliset oikeudet jäävät tekijälle, vaikka tämä luopuisikin taloudellisista oikeuksistaan.

Moraaliset oikeudet jäävät usein muotialalla huomiotta taloudellisten intressien korostuessa. Moraaliset oikeudet ovat jääneet varsin vähälle huomiolle sekä oikeustieteellisessä tutkimuksessa että tekijänoikeusdiskurssissa. Tämän tutkielman tavoitteena on herättää laajempaa keskustelua moraalisten oikeuksien roolista ja merkityksestä muotisuunnittelijoiden tekijänoikeussuojassa.

Tutkielmassa käytetään monipuolisesti eri tutkimusmenetelmiä, jotta saadaan muodostettua kattava kokonaiskuva käsiteltävästä aiheesta. Tutkimusmenetelminä käytetään soveltuvin osin empiiristä oikeustutkimusta, oikeusdogmaattista tutkimusta, oikeusanalyyttistä tutkimusta, kansainvälistä vertailevaa tutkimusta, teoreettista tutkimusta ja kvalitatiivista tutkimusta. Osana kvalitatiivista viitekehystä on toteutettu haastattelu muotisuunnittelijan kanssa. Haastatteluaineiston avulla on syvennetty tutkimusta tarkastelemalla teorian ohella myös moraalisten oikeuksien käytännön soveltamista muotisuunnittelijoiden arjessa.

Tutkielmassa korostetaan, kuinka tärkeää on puuttua muotiteollisuuden ongelmiin, kuten vääristyneisiin valtarakenteisiin ja rakenteelliseen epätasa-arvoon, jotta muotisuunnittelijat saavat heille kuuluvan tunnustuksen, arvostuksen ja oikeudellisen suojan. Olemassa oleva immateriaalioikeudellinen viitekehys on siinä mielessä uudelleenarvioinnin tarpeessa, että muotisuunnittelijoiden moraaliset oikeudet voitaisiin turvata nykyistä tehokkaammin. Näin taattaisiin, että muotisuunnittelijoiden työ saa ansaitsemansa arvostuksen niin taloudellisessa mielessä kuin kulttuurin ja luovuuden nimissä, suojellen heitä samalla alan suuryritysten hyväksikäytöltä. Lisäksi tutkielmassa korostetaan muotisuunnittelun rinnastettavuutta muihin, perinteisiin, taidemuotoihin. Tämä kehitys on jo saanut jalansijaa Euroopan unionissa. Maakohtaiset erot muotisuunnittelijoiden oikeuksien suojassa ovat kuitenkin huomattavia. Toiset maat tarjoavat vahvempaa suojaa kuin toiset, korostaen tarvetta suojeluverkon yhtenäistämiselle.

Merkittävä este moraalisten oikeuksien tehokkaalle toteutumiselle on muotialalla vaikuttavien tahojen riittämätön tietotaito. Siten on ratkaisevan tärkeää lisätä muotisuunnittelijoiden moraalisten oikeuksien tunnettuutta näiden haasteiden kohtaamiseksi ja vuoropuhelun edistämiseksi. Tämä on askel kohti oikeudenmukaisempaa ja kattavampaa suojelukehystä.

Avainsanat: moraaliset oikeudet, muotioikeus, immateriaalioikeudet

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List of Abbreviations

EU	European Union
CJEU	Court of Justice of the European Union
WIPO	World Intellectual Property Organisation
TFEU	Treaty of the Functioning of the European Union

1 Introduction

1.1 Background

Fashion industry is a global phenomenon that thrives in a massive worldwide market. Many companies have discovered that relocating their manufacturing operations to countries with lower labour costs is highly advantageous. Due to these deliberate measures and strategic efforts to reduce costs, such as by using cheaper materials, optimizing production methods, or leveraging global supply chains, fashion is attractive and accessible to an increasing number of people.

In the modern world, the way we dress is not only a matter of necessity but for many it is also a personal choice. Our style reflects our own aesthetic and even symbolises our own culture, thoughts and ideals. However, while giving us an outlet for showcasing our personalities, beliefs, and cultures, the fashion industry's growth and commercialization have introduced many new challenges to the contemporary fashion world, among others environmental concerns and unethical labour practices. The commercialization trend of today´s fashion world has also impacted the rights and status of individual fashion designers, those who are behind the creative and innovative fashion designs. Without fashion designers and their continuous artistic creativity, fashion would be uninspiring and even lose its commercial appeal. Against this background, I wanted to dive into the world of fashion by exploring and analysing the rights of individual fashion designers in this complex equation of the fashion world.

The legal needs of the fashion industry are diverse, encompassing everything from exclusivity rights and contracts to marketing regulations and consumer sales and more. Fashion has been subject to laws and regulation throughout the history but only in recent decades the concept of fashion law has started to emerge as its own legal specialty. As an artistic work, fashion attracts a copyright protection as fashion relies on designers' originality and creativity. The copyright protection for fashion has traditionally been treated, if not outright dismissively, at least with a great deal of scepticism. It has been argued that fashion may not be original in the way required by copyright, as it belongs to a category of *applied art* as opposed to *pure art*. Designers pour their mind and soul into their work. Yet, the reality of today's commercialized fashion industry is that the IP rights tend to amass within the leading fashion houses,

weakening the position of an individual designers within the fashion system. Except for some rare designer-led companies, it is not common for large fashion companies to attribute a particular garment or accessory to its designer.[1] This decreasing human-centeredness in fashion is further reflected in the exercise of the designers´ moral rights.[2]

Moral rights refer to rights that protect the honour and personality of the author, as well as the uniqueness of his or her work. Whereas in the common law copyright tradition, the focus of copyright lies on the protected work, and moral rights have never been of great significance, in the civil law author's rights tradition, particular emphasis is placed on the author of the work.[3] The latter perception relies on the personalist conception of copyright meaning that by protecting a work, copyright is indirectly protecting the personhood of its author[4]. One could say that the whole purpose of moral rights is to promote and provide protection for individuals' creativity. Moral rights predominantly find their normative foundation in the anthropocentric justification[5] meaning that the designers themselves are at the core of legal protection. The interest in the protection of the authors' moral rights lies among others in the right to integrity and the right of attribution[6].

Moral rights have the potential to provide an extra incentive for designers to better leverage their talent and their full potential. However, despite their apparent importance, it appears that moral rights of the authors are not only largely absent from the standard practice of the fashion sector where economic considerations are the primary focus, but they are also absent from discussions in legal literature and copyright research. With this thesis, I aim to contribute to the discussion about the role and significance of moral rights in terms of fashion designers´ copyright protection.

The discussion of this paper proceeds as follows. Following the introduction, I present my research question, its limitations, and insights into the research methods I have employed. In

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[1] Kahn 2018.
[2] Härkönen 2024, Chapter 36.
[3] Grosheide 2009, p. 243.
[4] Härkönen 2024, p. 408.
[5] *Anthropocentric justification* refers to the ethical belief that humans alone possess intrinsic value while other entities are resources that may justifiably be exploited for the benefit of humankind.
[6] In international law, the foundation for moral rights is established in the Berne Convention for the Protection of Literary and Artistic Works (1886). Article 6bis of the convention grants authors the right of attribution and the right to integrity.

chapter two, I explore copyright protection in the context of fashion, analysing key judgments by the CJEU. This discussion encompasses an in-depth examination of the concepts of originality and authorship. Subsequently, in chapter three, I introduce the concepts of works of applied art and pure art, examining their distinctions while also addressing the notion of the unity of art.

Chapter four provides an overview of the Finnish copyright tradition, underlining its key features and historical context. Chapter five examines the challenges and efforts involved in harmonizing copyright laws within the international legal framework. Chapter six explores the philosophical and legal foundations of moral rights, while chapter seven analyzes their legislative basis, focusing on international frameworks and the Finnish context.

Chapter eight features an interview with Finnish fashion designer and doctoral researcher Elina Määttänen, discussing the legal standing of fashion designers. The research findings reflect her professional experiences in Sweden and Paris, shedding light on how moral rights are perceived and applied in the fashion industry.

Chapter nine investigates the tension between copyright and economic pressures, showing how individual fashion designers are often overshadowed by powerful economic interests. Finally, this thesis analyses how feminist methodologies can critically inform and strengthen the protections afforded by moral rights within copyright law, setting the stage for the concluding remarks.

1.2 Research questions and its limitations

In this thesis I contemplate and analyse the significance of moral rights for individual fashion designers and for fashion industry as a whole. I argue that moral rights could offer a suitable theoretical foundation for considering additional safeguards for fashion designers. Within copyright law, the role of moral rights in safeguarding designers' interests remains relatively underexplored. This gap sparked my motivation to investigate the topic further. My goal is to highlight the deficiencies in the current legal protection for fashion designers, which have arisen from the shift away from individual designers being at the heart of the fashion industry, with commercialism now taking precedence.

Based on the above considerations, my research question is best formulated as follows: Why should the moral rights of fashion designers be better integrated into the IPR reality? The sub-questions supporting my main question are as follows: What are the obstacles that are likely to hinder enforcement of the moral right of designers? Why is the enforcement of moral rights of designers important?

1.3 Research methods, sources and structure

Fashion law remains an emerging field of legal research, and discussions surrounding moral rights have often been underexplored in the context of copyright. While I draw on various articles and publications by fashion law specialists and experts on moral rights as primary sources, it is important to note that literature specifically dedicated to fashion law is still somewhat limited. Fortunately, moral rights have garnered more extensive attention from intellectual property law scholars, providing a solid foundation for further analysis and discussion. Special thanks to Doctor Heidi Härkönen for her invaluable contributions, from which I drew much inspiration for my thesis.

A substantial portion of the available source material comes from foreign jurisdictions. Hence, it was crucial to understand the differences in legal frameworks when addressing this topic, as various legal systems approach moral rights in distinct ways. In civil law countries, moral rights are widely recognized and protected, reflecting a strong emphasis on the personal and non-economic interests of authors. In contrast, common law jurisdictions tend to prioritize economic considerations, often placing less focus on the protection of moral rights. This divergence in legal perspectives underscores the importance of understanding the broader international context when discussing moral rights.

In this thesis, I employ a variety of research methods to comprehensively explore the topic of fashion designers' moral rights. The methods used include empirical legal research, legalistic legal research, qualitative research, international and comparative research, theoretical research, and doctrinal research. Each of these methods contributes uniquely to the understanding and analysis of the subject matter.

Empirical legal research involves the collection and analysis of data from real-world legal practices, helping to understand how moral rights are applied and perceived in the fashion industry. Through a legalistic approach, I focus on interpreting and applying legal texts, statutes, and case law, which is essential for analysing the legal frameworks that govern moral

rights across different jurisdictions. International and comparative research enables me to examine the variations in the legal treatment of moral rights worldwide, highlighting the contrast between civil law jurisdictions, where moral rights are typically recognized, and common law countries, which often prioritize economic justifications over moral considerations. Theoretical research explores the foundational principles and philosophies that shape the concept of moral rights, offering a deeper understanding of their normative underpinnings and significance in protecting the personal interests of fashion designers. Lastly, doctrinal research involves the systematic analysis of legal doctrines, principles, and case law. This approach is critical for identifying the legal standards and precedents that shape the recognition and enforcement of moral rights within the fashion industry.

For my thesis, I conducted an interview with a fashion designer to gather in-depth insights into the challenges and considerations surrounding moral rights in the fashion industry. Interviews are a key method in qualitative legal research, which seeks to understand and interpret social realities through direct interaction. By interviewing a professional in the field, I aimed to capture firsthand perspectives and experiences regarding the application and perception of moral rights in fashion. This qualitative approach complements the other research methods employed in this thesis, providing a richer understanding of the subject.

2 Copyright protection for fashion

2.1 The impact of the *Cofemel* judgement on the copyright status of fashion designers

On the 12 September 2019 the CJEU delivered its highly anticipated decision in the *Cofemel* case[7], which marked a significant turning point for copyright protection of designs within the EU.

The dispute involved two companies in the clothing industry, G-Star Raw CV and Cofemel – Sociedade de Vestuário SA, both engaged in the design, production, and sale of apparel. G-Star accused Cofemel of replicating its designs for jeans, sweatshirts, and t-shirts, asserting that these models were original intellectual creations qualifying as *works* and thus protected under Portuguese copyright law. Cofemel, on the other hand, argued that such designs could not be classified as works and therefore were not eligible for copyright protection. In the course of the national proceedings, the Portuguese Supreme Court referred the case to the CJEU for a preliminary ruling. Specifically, the court sought clarification on the interpretation of Article 2(a) of the Information Society Directive 2001/29/EC[8], which provides that: "Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: … for authors, of their works." The central question was whether the EU law, under Article 2(a) of the Information Society Directive 2001/29/EC, prohibits Member States from imposing additional criteria for copyright protection of designs, such as the aesthetic effect required by Portuguese copyright law, beyond the requirement of originality.

In *Cofemel*, the CJEU confirmed that the concept of work forms an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied. First, the work must consist of original subject matter, defined as the author's own intellectual creation. This criterion is met when the work reflects the author's

[7] Judgement 12.9.2019, Cofemel, C-683/17, ECLI:EU:C:2019:721.
[8] Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society. Adopted 22.5.2001.

personality, showcasing his or her “free and creative choices”, as further demonstrated in the judgments of *Painer*[9] and *Renckhoff*[10].

Second, classification as a work is reserved to the elements that are the expression of such creation, see to that effect also the judgements of *Infopaq*[11] and *Levola, Hengelo*[12]. As provided in the judgement of *Cofemel*, and, for example, in *Levola Hengelo*, this entails that the work in question must be identifiable with sufficient precision and objectivity. This requirement ensures that copyright protection applies only to the concrete and original elements of the work that embody the author's intellectual effort and personal choices. To meet this criterion, the creative aspects of the work must be articulated in a way that they can be clearly recognized and described. For example, a dress design could qualify as a work if it features specific and original patterns, innovative cuts, or unique combinations of materials and colours. However, generic design features, such as a basic T-shirt shape or standard decorative elements commonly used in the industry, would most probably not meet the threshold.

By meeting the above characteristics, designs qualify as works under the Information Society Directive 2001/29/EC. In accordance with the *Cofemel* judgment, the criteria for protection are uniform across all categories of works. As a result, member states are prohibited from imposing additional requirements in their national legislation for a work to be eligible for protection under the Information Society Directive 2001/29/EC.

2.2 The concept of originality

Only an original work can be granted copyright protection, original in the sense that it is the author’s own intellectual creation. Since only original works are eligible for copyright protection, a thorough understanding of the concept of *originality* is crucial in any discussion of copyright, including in the context of fashion.

In the EU copyright law, the concept of originality, the essential requirement for a work to qualify for protection, centres on the "free and creative choices" made by the author during its

[9] Judgement 1.12.2011 Painer, C 145/10, EU:C:2011:798.
[10] Judgement 7.8.2018, Renckhoff, C 161/17, EU:C:2018:634.
[11] Judgment 16.7.2009, Infopaq, C-5/08, EU:C:2009:465.
[12] Judgement 13.11.2018, Levola Hengelo, C-310/17, EU:C:2018:899.

creation. It serves as a as a benchmark to assess whether a particular work qualifies for copyright protection. Essentially, originality means that a work eligible for copyright protection must reflect the distinct creative input of a specific author, demonstrating their unique personality and individuality. It is not enough for the work to be entirely derivative or merely a replication of existing ideas; rather, it must embody the author's personal vision and creative choices.[13] The CJEU emphasizes the importance of "free and creative choices", as seen in its *Painer* judgment, highlighting the close connection between a work and its author's personality. The court states that an intellectual creation can be considered the author's own if it "reflects the author's personality". This occurs when the author demonstrates their creative abilities through "free and creative choices", thereby giving the work a "personal touch". Furthermore, in the *Brompton* judgement[14] the CJEU further reinforces this principle, placing the primacy of "free and creative choices" above all else, including technical considerations. The emphasis on "free and creative choices" in the creation of a work underscores the idea that a product´s ability to meet this criterion is not solely determined by the final result of the creative process, but also by the nature and integrity of the process itself[15].

The challenge lies in the limited understanding of how these "free and creative choices" operate in practice to meet the standard of originality. By emphasizing the decisions made during the creative process, *Painer* and *Brompton* indicate that fulfilling this standard is influenced, at least partially, by subjective factors. This introduces a conflict with the requirement for courts to assess originality through an objective lens.[16] Recent developments have highlighted that the EU copyright regime still lacks a practical and clear framework for courts to assess whether a creation genuinely results from the author's "free and creative choices" during the production process. This lack of guidance is evident, inter alia, in recent requests for preliminary rulings submitted to the CJEU. In its reference of *Mio and Others*[17] the Svea Court of Appeal (Sweden) asks the CJEU, inter alia, on the relevance of factors relating to the creative process in the assessment of originality[18]. In its USM Haller

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[13] Azoro – Agulefo 2021, pp. 29–31.
[14] Judgement 11.6.2020, Brompton, C-833/18, ECLI:EU:C:2020:79.
[15] Mattila 2022, pp. 35, 42, 45.
[16] Härkönen 2024a, p. 1.
[17] Request for a preliminary ruling, lodged on 21.9.2023, Mio and Others, C-580/23.
[18] Question referred for a preliminary ruling: "In the assessment of whether a subject-matter of applied art merits the farreaching protection of copyright as a work within the meaning of Articles 2 to 4 of Directive 2001/29/EC, how should the examination be carried out – and which factors must or should be taken into account – in the

reference[19], then again, the German Federal Supreme Court asked the CJEU whether, when assessing originality under copyright law, the court should also take into account the author's subjective view during the creative process and their consciously made creative decisions[20].

Given the EU standard of originality, which emphasizes the creative choices made during the production process, it is imperative for copyright scholarship and national courts within Member States to undertake a thorough examination of this process[21]. A deeper understanding of the creative process allows us to better determine whether a work genuinely stems from the author's "free and creative choices". Ideally, the CJEU will consider this in its rulings on *Mio and Others* as well as *USM Haller*, bringing much-needed clarity to the legal landscape. However, it is important to recognize that achieving such clarity is far from straightforward. While authors can provide meaningful insights into the various factors influencing their creative works, they are not always the most objective or reliable arbiters of originality. Their connection to their creations is inherently subjective, often coloured by personal interests, emotional attachments, and inherent biases. This duality underscores the challenge of balancing subjective interpretations with the need for an impartial and consistent legal standard for determining originality.[22]

Though the originality standard inherently involves subjective elements that demand thorough examination, the court's evaluation must ultimately remain objective. Striking this balance between subjective nuance and objective assessment is a difficult yet essential task. It requires both precision and a deep understanding of the creative process itself.

2.3 Assessing originality in fashion

Applied art, which refers to products that blend artistic qualities with practical functionality, has traditionally faced scepticism from courts and copyright law scholars regarding its

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question of whether the subject-matter reflects the author's personality by giving expression to his or her free and creative choices? In that regard, the question is in particular whether the examination of originality should focus on factors surrounding the creative process and the author's explanation of the actual choices that he or she made in the creation of the subject-matter or on factors relating to the subject-matter itself and the end result of the creative process and whether the subject-matter itself gives expression to artistic effect."

[19] Request for a preliminary ruling, lodged on 21.12.2023, USM Haller, C-795/23.

[20] Question referred for a preliminary ruling: "When assessing originality for copyright purposes, is it (also) necessary to consider the author´s subjective view of the creation process and, in particular, does the author have to make the free and creative choices knowingly in order for them to be regarded as free and creative choices within the meaning of the case-law of the Court of Justice of the European Union?"

[21] Mattila 2022, p. 35.

[22] Härkönen 2024a, p. 26.

eligibility for protection. Fashion design is one example of such work categories. The extent to which fashion designers can make "free and creative choices" is often questioned, as it is widely assumed that external factors like functionality and trends heavily influence their creative process.[23] Then again, without clear insight into how designers navigate constraints and make artistic decisions, it is difficult to accurately assess the balance between creative expression and external pressures, potentially leading to oversimplified or biased evaluations of their work.

Furthermore, in fashion, originality criterion is often assessed by comparing a fashion product A to product B. However, this is an incorrect approach to assess whether the originality threshold is met. As established, assessing the criterion of originality requires at least some level of understanding of the circumstances in which the creation under evaluation was made. Only in this way can it be determined whether the author has genuinely made independent creative choices when producing the work, and how external factors may have influenced the creative process. However, questions of proof in assessing originality can be difficult. Given these complexities, thorough documentation of the design process becomes essential.[24] This might include sketches, mood boards, fabric samples, pattern drafts, and progress photos, all of which provide tangible proof of the evolution of the design from initial inspiration to the final garment. By capturing the author's distinctive approach and creative journey, such records can help validate claims of originality, protect against potential disputes over intellectual property, and showcase the designer's authentic vision.

To add, ordinary elements and details by themselves can still form a whole that sufficiently reflects the author's "free and creative choices", and, when viewed as a whole, can be considered an original work. With its 2012 judgement in *SAS*[25], the CJEU dealt with the issue of originality in computer programs. The court ruled that although keywords, syntax, commands, combinations of commands, options, defaults, and iterations consist of words, figures, or mathematical concepts that, when viewed individually, do not represent an intellectual creation of the computer program's author, it is the choice, sequence, and combination of these elements that allows the author to express their creativity in an original way and produce an intellectual creation. Although the case is not directly comparable to

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[23] Ibid, p. 2.
[24] Hodge – Härkönen 2024, pp. 132–133.
[25] Judgement 2.5.2012, SAS, C-406/10, ECLI:EU:C:2012:259.

fashion, it can be concluded that originality in the context of copyright can be manifested through the selection, arrangement, and combination of otherwise ordinary elements and details. Then again, the number of details or elements does not seem to be crucial when assessing originality. For example, Scandinavian fashion brands are characterized by their relatively minimalist and understated design. Innovation and the combinability of components are at the core, not the abundance of details.[26]

The artistic value or aesthetics of the work and the merits or status of the author play no role when assessing the requirement of originality. Applying for example artistic value as a criterion would be in stark contradiction with the case law of the CJEU, such as the above referenced *Cofemel* judgment in which the court made it clear that member states are precluded from setting additional requirements, such as artistic or aesthetic appeal, beyond the necessity for a work to be original for it to qualify for copyright protection.

2.4 The effects of the *Cofemel* judgement on moral rights

The CJEU ruled in its *Cofemel* judgement that the EU member states may not impose additional requirements for any types of works to qualify for protection under the Information Society Directive 2001/29/EC. The criteria for protection are uniform across all categories of works: the protected subject matter must be clearly and objectively identifiable, and it must be original meaning it reflects the intellectual creation of its author. This criterion applies equally to a painting created by an artist as it does to, for instance, a dress designed by a fashion designer. Discrimination against fashion and design products in assessing their eligibility for protection is no longer permitted.

The Information Society Directive 2001/29/EC, however, does not explicitly harmonize moral rights of authors, which are at least equally important, although a much less frequently addressed aspect of copyright law in the context of applied arts. However, the EU's harmonization of authors' economic rights also has an indirect impact on moral rights, in the sense that when a product is protected by copyright, it becomes challenging to justify why the protection should extend only to economic rights and not to moral rights as well. In other words, now that the CJEU has expanded the possibilities for fashion and design to fall within

[26] Hodge – Härkönen 2024, p. 137.

the scope of copyright protection by harmonizing the criteria for eligibility, such creative works are also subject to moral rights.[27]

Therefore, while the *Cofemel* judgment does not directly address moral rights, its broadening of the scope of copyrightable works indirectly supports the application of moral rights to a wider range of creative works. However, the extent of this impact depends on how individual EU member states implement and enforce moral rights in relation to these newly recognized categories. Moral rights protection varies widely across jurisdictions, with some states offering robust safeguards while others provide more limited or conditional recognition. As a result, while the *Cofemel* judgment creates opportunities for expanding moral rights protections, its practical implications will largely depend on the specific legislative, judicial, and administrative practices adopted within each member state to align with the ruling's broader interpretation of copyrightable works.

2.5 The concept of authorship

The concept of the *authorship* is a fundamental aspect of copyright law, as it shapes and governs the principles of copyright. Ideas of authorship justify the exclusive right of authors to their work and entitle them to corresponding compensation. However, despite the essential character of an author, it is difficult if not impossible to provide an exhaustive legal definition of authorship, as new technologies and cultural phenomena shape the humane possibilities for creative work and our understanding of it.[28] While the EU still lacks express guidelines on what qualifies someone as an author, existing CJEU case law provides some hints of who might be considered one, in the light of the standard of originality[29]. In the EU, originality is closely linked with authorship[30]. Without human authorship, there is no originality, and without originality, the issue of authorship is irrelevant[31].

The EU copyright law considers originality to be a manifestation of the author's personality, reflecting their own intellectual creation. This concept was defined by the CJEU in the landmark *Infopaq* judgment, which established that copyright, as outlined in Article 2(a) of

[27] Härkönen 2024 (Accessed 13.12.2024).
[28] Mattila 2022.
[29] Härkönen – Särmäkari 2023, p. 48.
[30] Mattila 2022, p. 15.
[31] Härkönen – Särmäkari 2023, p. 48.

the Information Society Directive 2001/29, applies exclusively to subject matter that is original in the sense of being the author's own intellectual creation. Hence, it can be observed that originality is not solely related to the final outcome of an artistic or literary work, but it is equally linked to the creative process and the actions of the author. The definition of authorship, and how it is understood, plays a crucial role in the broader framework of copyright protection within the EU.[32]

The concept of authorship in copyright law has gradually evolved from its initial association exclusively with literary works to include authors across diverse fields of art and literature, reflecting shifting cultural views on art and originality. Originally, copyright law primarily protected literary and scholarly works, emphasizing traditional forms of authorship. However, as the concept of creativity expanded, so too did the scope of copyright protections. For fashion designers, this evolution has been crucial as fashion designers have increasingly been recognized for their creative contributions, placing them more on par with authors in other fields. Despite this significant development, the idea of the author as an individual author remains fundamental to copyright law, with the understanding that two or more individuals can share authorship as *joint authorship*.[33]

[32] Ibid, p. 49.
[33] Ibid, p. 47.

3 Distinction between works of pure art and works of applied art

To first clarify, the term *applied art* refers to creative works that merge aesthetic appeal with functionality, such as clothing, jewellery, and furniture. In contrast, *pure art* encompasses more traditional forms of artistic expression, including paintings, sculptures, and musical compositions that exist primarily for aesthetic and intellectual engagement rather than for practical use.[34]

Prior to *Cofemel*, the CJEU held in its judgement *Levola v Smilde* that only something which is the expression of the author's own intellectual creation may be classified as a work within the meaning of the Information Society Directive 2001/29/EC under copyright law. This implies that for objects designed to perform a specific function, the author's creative choices are no longer "free", meaning such objects cannot qualify as works under copyright law (as per Article 2 of the Berne Convention for the Protection of Literary and Artistic Works of 9th of September 1886 (hereinafter referred to as Berne Convention)). Similarly, in its judgment on *Football Dataco*[35], the CJEU held that physical effort and skill, along with time and investment, are irrelevant to the assessment of originality under EU law.

These referenced judgements reinforce the distinction between *pure art* and *applied art* by underlining the stricter originality requirements for the latter, where functional constraints often limit the free creative expression that characterizes pure art. The *Cofemel* judgement removed the distinction between pure and applied art regarding copyright eligibility, focusing solely on originality as the key criterion.

The distinction between pure art and applied art is one of the most contentious issues in copyright law[36]. Fashion designs being considered as applied art, this distinction has directly affected their protection[37]. This is because products of applied art have not always been regarded as something that deserve copyright protection, often labelled as craft rather than real art[38]. Moreover, the feature in copyright law of favouring pure art over applied art reflects art history's elitist distinction between high art and popular art, with fashion often classified

[34] Härkönen 2020, p. 1.
[35] Judgement 1.3.2012, Football Dataco and Others, C-604/10, ECLI:EU:C:2012:115.
[36] Härkönen 2020, pp. 4, 14.
[37] Härkönen 2018, pp. 908–911.
[38] Teilmann-Lock 2016, p. 130.

as the latter[39]. It is the presence of functionally dictated elements in fashion designs, not inherent in for example paintings, music, and sculptures, that can be recognized as one major reason why they have typically been excluded from the scope of copyright protection[40]. Unlike paintings or sculptures, which exist purely as expressions of creativity, fashion designs serve a dual role, they are both artistic and functional, meant to be worn and to serve practical purposes.

Throughout the history of modern copyright, different jurisdictions have taken widely varying approaches to extending copyright protection to works of applied art[41]. This is the case not only among civil law and common law jurisdiction but also among the EU Member States. The reasons behind the different approaches must be manifold, cultural identity being one of them. Fashion has played a greater societal and cultural role in some Member States than in others, which has resulted in significantly higher societal pressure to protect these areas of creativity.[42] For example, France, home to some of the most renowned *haute couture*[43] fashion houses, has a copyright system that has historically safeguarded fashion designs. The French Intellectual Property Code protects original works of the mind whatever their kind, form of expression, merit or purpose under Article L 112-1[44]. Moreover, Article L 112-2 of the French Intellectual Property Code explicitly recognizes works of applied art and creations of seasonal clothing and ornaments as protected intellectual creations[45].

In many European countries, including the Nordics, the copyright threshold of originality has traditionally been set higher for works of applied art than for works of pure art[46]. In the United States, fashion designs are classified as *useful articles*, the concept of which is similar to products of applied art. Clothes are classified as useful articles because they are practical items designed for use, rather than creations like photographs or books, which convey

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[39] Wilson 2003, p. 48.
[40] Härkönen 2020, p. 4.
[41] Härkönen 2020, p. 1.
[42] Härkönen 2021, p. 53.
[43] Haute couture refers to the design, creation, and sale of luxurious, handmade, and exclusive clothing tailored for individual clients. These high-fashion pieces are not sold in regular stores and are crafted with exceptional attention to detail. The term also applies to the clothes themselves.
[44] See Code de la propriété intellectuelle [The French Intellectual Property Code] Article L-112-1.
[45] See Code de la propriété intellectuelle [The French Intellectual Property Code] Article L-112-2.
[46] Härkönen 2021, p.25.

information or serve as works of art[47]. In the United States, useful articles mainly fall outside of the scope of copyright, although there are some exceptions. For example, decorative elements that can be detached from a useful article may be eligible for copyright protection.[48] The Nordic countries, Finland, Sweden, Norway, and Denmark, share relatively similar copyright legal frameworks, owing to their long-standing history of cooperation in related legal reforms[49]. The Nordic approach of intentionally establishing a higher standard of originality for applied art compared to pure art exemplifies the discrimination that works of applied art have historically encountered, and still continue to encounter, when seeking copyright protection[50].

The Berne Convention, in principle, grants Member States the discretion to treat the copyright protection of works of applied art differently from that of works of pure art. According to Article 2(7) of the Berne Convention: "subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected". Although the EU Member States can determine the scope of applying copyright protection to works of applied art, they do not have discretion over the protection itself [51]. This stems from the Information Society Directive 2001/29/EC and the accompanying CJEU case law, which have established a unified and cohesive framework for copyright protection across the EU. The CJEU's judgment in *Cofemel* stands out as a landmark decision concerning the copyright protection of fashion and other works of applied art. The preliminary ruling, as discussed earlier, focused on the interpretation of Article 2(a) of the Information Society Directive 2001/29/EC and its implications for Portuguese national copyright law. At the time, Portuguese law applied distinct criteria for protecting applied art and industrial designs compared to purely artistic works. Following the CJEU's ruling, Member States can no longer differentiate between pure art and applied art in their national

[47] According to U.S. Copyright Act, 17 U.S.C. §§ 101 et seq. (Definitions), "A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article'".
[48] Buccafusco – Fromer 2017, pp. 65-69.
[49] Schovsbo – Rosenmeier 2018, p. 109.
[50] Härkönen 2020, pp. 1–3, 14–15.
[51] Ibid, pp. 8–11.

copyright laws, ensuring a harmonized approach to copyright protection throughout the EU.[52] This is the case at least in principle.

The evolving attitude toward applied art has been a welcome development, especially for fashion designers. The gap between pure art and applied art has significantly narrowed, acknowledging the artistic and creative value of fashion design as equal to that of pure art. This shift validates the efforts of designers who dedicate their time and resources to creating innovative and artistic fashion pieces.

Despite this encouraging progress, it is unlikely that all scepticism regarding the acceptance of applied art as meeting the originality threshold under the same criteria as pure art will disappear overnight. Member States with more rigid or discerning copyright traditions may need to undergo a significant cultural and judicial shift before such views are fully embraced. The pace of change, particularly in countries like Finland, appears frustratingly, and perhaps unnecessarily, slow. Efforts to foster dialogue between authors, consumers, and policymakers highlight the importance of incremental but inclusive progress.

Fashion designers and companies must recognize the importance of understanding intellectual property protections for fashion design not only within the EU but also in countries outside Europe, such as the United States, which has a large fashion market. Understanding these differences is crucial for designers and companies operating across multiple markets, as their intellectual property strategies must be tailored to the legal framework of each jurisdiction. Without this awareness, designers may inadvertently expose their work to exploitation or miss opportunities to leverage protections available in regions like the EU. For example, in the United States, fashion designs receive limited protection, primarily through trademark and patent laws, as fashion designs are not currently eligible for copyright protection. While there have been proposals in Congress to amend the national copyright laws to include apparel as a copyrightable work, the US fashion industry remains unique in that many argue it thrives on rapid, widespread copying. Although bills have been introduced in previous congressional sessions to grant copyright protection for fashion designs, none have passed. As a result, it is unlikely that copyright protection for fashion items will be implemented in the near future.[53]

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[52] Härkönen 2020, p. 10.
[53] Witzburg 2016.

3.1 The theory of the “unity of art”

As mentioned earlier, France is renowned for its rich fashion culture, iconic haute couture houses, and its deep, passionate connection to fashion, both as a cultural phenomenon and an industry[54]. Thus, in France, there is also a cultural identity that justifies a legitimate interest in protecting the fashion industry[55]. The French notion of *unity of art*[56] is grounded in the rejection of any distinction between applied art and pure art. It extends the protection offered by copyright law to all forms of creation, including the simplest ones, even those that exist at the intersection of applied art and what is known as "industrial aesthetics”.[57] As recognized by the WIPO the theory of unity of art acknowledges that art can be expressed in various forms and preserved in any material support. It views art as a unified concept, where artistic creations should not be distinguished or discriminated based on their aesthetic merit or mode of expression. Any work that reflects the personality of its author deserves recognition as art, regardless of whether it is embodied in a functional or utilitarian object.[58]

Although the economic rights of authors are harmonized across the internal market, national laws in Member States do not treat all authors equally in every aspect of copyright. Europe has transitioned from work-category-based discrimination in national laws to the EU-wide concept of *unity of art*, but the idea of a *unity of authors* is yet to be realized. The protection of moral rights presents a particularly intriguing challenge in the realm of applied art. While it is widely recognized that authors of pure art are entitled to moral rights, the issue of whether the same protection extends to authors of applied art is far more complex and uncertain. Although the EU copyright law now places fashion and other forms of applied art on equal footing with pure art, it is primarily corporate rights holders, such as large fashion companies, that appear to benefit from this doctrine of unity of art, rather than the fashion designers themselves, the true authors of the work.[59]

In other words, while the doctrine theoretically extends the same protections to fashion designers, the economic and legal realities of the industry create a scenario where designers,

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[54] Farnault 2014, p. 15.
[55] Härkönen 2021, p. 55.
[56] In French *l’unité de l’art*.
[57] Finniss 1964, p. 615.
[58] WIPO 2002, para. 24.
[59] Härkönen 2024, pp. 2–3.

particularly those working within large companies, have limited control over the use and enforcement of their own creations. This situation reflects a broader issue of how copyright law intersects with commercial power dynamics, often privileging larger entities over individual authors.

4 Finnish copyright tradition

The Finnish Copyright Act leaves the definition of a copyrighted work quite open. According to Section 1 of the Finnish Copyright Act, a person who has created a literary or artistic work shall have copyright therein, whether it be a fictional or descriptive representation in writing or speech, a musical or dramatic work, a cinematographic work, a photographic work or other work of pure art, a product of architecture, artistic handicraft, industrial art, or expressed in some other manner. Furthermore, the moral rights of the author are outlined in Section 3 of the Finnish Copyright Act, which provides that when copies of a work are produced or the work is made available to the public, whether in whole or in part, the author's name must be presented in a manner consistent with proper practice.

In the Finnish legal literature and practice, the *threshold of originality*[60] for applied art products have been set high. Notably, in international discussions, the term originality is understood in the same way as the concept of threshold of originality in the Finnish discourse. According to the Finnish Copyright Council[61] a literary or artistic work is protected by copyright if it can be regarded as the original result of the author´s independent creative effort whereby it exceeds the so-called threshold of originality[62]. The Finnish Copyright Council has emphasized that a key factor in determining whether a work demonstrates the independence and originality required for copyright protection is whether another person, starting from the same premise, could arrive at a similar outcome. Furthermore, the Council has stated that if the intended purpose of the work largely determines its final form, the work lacks the necessary independence and originality to qualify for copyright protection.[63] This is because the design of an applied art product is then shaped not only by the author's artistic input but also by considerations related to the product's intended use[64].

The high threshold of originality for applied art has also been justified by the coexistence of design protection, which is arguably more suited to products of applied art. Design protection,

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[60] In Finnish *teoskynnys*.
[61] "The Government shall appoint a Copyright Council to assist the Ministry of Education in the handling of copyright matters and to issue statements regarding the application of this Act" (Section 15.1 of the Copyright Act (TOL, 404/1961)). See to that effect also Sections 18-23 of the Copyright Decree (574/1995).
[62] *Threshold of originality* refers to the minimum level of creativity required for a work to be considered eligible for copyright protection.
[63] Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2007:7, p. 3.
[64] Ibid, p. 2.

which is closely related to copyright protection, is based on the Registered Designs Act (221/1971). The report of the Finnish design protection committee has stated that design protection typically involves safeguarding a form of design that represents a new creation but does not reach the artistic level required to qualify for copyright protection[65]. The Finnish Copyright Council has based its statements on this idea, stating that products of applied art, such as furniture, are typically defined by their form, which is largely influenced by the product's intended use. For this reason, granting of copyright protection for products of applied art has often been approached with great caution, and for many products of applied art, design protection, as regulated by the Registered Designs Act, is a more natural form of protection, according to the Council.[66]

The committee report on the Finnish Copyright Act clarifies that although Section 1 of the Finnish Copyright Act explicitly includes applied art in its list of example work categories, such as artistic handicrafts and industrial art, this does not mean that all products commonly referred to as artistic works of applied art automatically qualify for protection under the proposed law. Instead, a product of artistic handicraft and industrial art would be eligible for protection under the law only under the general condition that, despite its practical purpose, it can be considered an artistic work. The committee report also emphasizes that, given the nature of the subject, the standards for independence and originality should be set relatively high in such cases.[67] This report has been instrumental in shaping the originality threshold within Finnish copyright tradition. For example, the Finnish Copyright Council has frequently cited it in its statements on works of applied art.[68] Although the statements of the Council are merely advisory and lack legal binding force, they have nonetheless been highly influential in shaping the Finnish copyright tradition[69].

Over the past 30 years, the Finnish Copyright Council has issued numerous statements regarding the threshold for copyright protection of applied art. While fewer of these statements pertain specifically to fashion products such as clothing or accessories, the content of statements concerning other types of applied art (such as furniture and decorative objects)

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[65] Mallisuojakomitea (*The Finnish Design Protection Committee*), Committee Report 1966: A, p. 13.
[66] For example, Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statements 2003:8, p. 9 and 2003:16, p. 7.
[67] Committee Report 1953:5, p. 45.
[68] Härkönen 2018, p. 913.
[69] Mylly 2016, s. 918.

can be analogously applied when assessing the copyright eligibility of fashion designs.[70] In its statement 2009:20, the Finnish Copyright Council specifically addressed the copyright protection of fashion products, stating that wedding and evening gowns can indeed be subject to copyright. However, it noted that the threshold for such protection is relatively high.[71] According to the Council, the determination of whether the threshold for copyright protection is met primarily depends on the extent to which the fashion designer has made, and had the opportunity to make, creative choices during the design process. The Council considers that when evaluating the copyright eligibility of works of artistic craftwork and applied arts, factors such as the product's patterns, colouring, and choice of materials can be considered. Additionally, the product must not be a copy of a pre-existing work.[72]

In its statement 2003:4, the Finnish Copyright Council addressed copyright issues related to textile works. The products in question were men's knitted sweaters. The salmon sweater was mostly grey, featuring a front design with six beige-brown fish and stylized aquatic plants, along with other elements above and below the fish. In addition to grey, the pattern incorporated various shades of brown, violet, and blue. The moose sweater was primarily blue, with a front design depicting moose, spruce trees, and sky. Below this main motif, there were brown, white, and blue patterns arranged into shapes resembling pyramids and the letter "L," forming stripes across the sweater's front. The Copyright Council concluded in its statement that the creative contribution of the designer was particularly evident in the artistic composition of the patterns on the sweaters. This included the design and arrangement of the salmon and moose motifs, as well as the overall patterns and colour schemes, which were integrated into cohesive artistic compositions on the front of each sweater. As such, the sweaters were deemed sufficiently independent and original in form to qualify as artistic works, thereby receiving copyright protection under Section 1 of the Finnish Copyright Act.[73]

The copyright protection of minimalist design was examined in detail in Statement 2013:15, which concerned the Kilta, Teema, and Kartio tableware series, designed by Kaj Franck for Arabia, and considered as complete collections. In this statement, the Finnish Copyright Council noted that the tableware items were designed in relation to other pieces in their

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[70] Ibid.
[71] Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2009:20, p. 5.
[72] Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2003:1, p. 2.
[73] Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2003:4, pp. 5-6.

respective series, such that their appearance creatively complemented the series as a whole and made them identifiable as part of it. It was therefore reasonable to assume that no one else would have arrived at the same result if tasked with creating a similar tableware series. As such, the tableware series were considered original products and qualified as works under the Finnish Copyright Act. The Council concluded that the original Kilta, Teema, and Kartio series were the results of their author's intellectual efforts, reflecting the designer's personality and demonstrating their free and creative choices in the process of crafting the works.[74]

Sometimes, a product of applied art as a whole has been deemed insufficiently original to qualify for copyright protection, but a distinguishable part of it, such as its decoration, has met the criteria for a protected work. For example, in Statement 1991:1, the Finnish Copyright Council held that potholders, oven mitts, aprons, and nightgowns were not considered sufficiently original, but the combinations of images and text printed on them were, as they were regarded as sufficiently independent and original[75]. In contrast, in statement 2003:1, various handicrafts and their dog-themed decorations were deemed entirely outside the scope of copyright protection. According to the Copyright Council, the dog head design in question was fairly conventional and closely resembled the animal figures commonly used in children's products.[76]

Although the Finnish copyright system takes a rather critical stance toward applied art, it does not directly exclude any specific form of work from copyright protection, as long as the creation meets the requirements of independence and originality. The Finnish Copyright Act itself does not define the threshold of originality, and therefore it is of little help in assessing originality. In this assessment, one must primarily rely on copyright tradition and case law. The Finnish Supreme Court has addressed the threshold of originality for applied art in some of its decisions. Although these rulings are dated, their legal principles remain valid and have historically set guidelines for the level of originality required in applied art.[77] While it is important to note that the Council has analysed the threshold of originality in applied art much more extensively[78].

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[74] Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2013:15, p. 5.
[75] Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 1991:1, p. 4.
[76] Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2003:1, p. 8.
[77] Ibid, p. 913.
[78] Ibid, p. 914.

e Finnish Supreme Court has not specifically addressed the originality of fashion items or the threshold of originality within the fashion industry in its case law. However, it has examined the artistic merit of certain accessories, such as jewellery and belt buckles. In its decision in KKO 1962 II 60, the Supreme Court ruled that a bracelet designed by an artist, due to its artistic design, met the criteria for being considered an original work of art under the Finnish Copyright Act. Similarly, in KKO 1971 II 4, the Court determined that a tapestry created by a textile artist qualified as an artistic work under the law. In a subsequent case concerning jewellery and buckle designs, the Court upheld the protection of jewellery designs as works of art under the law, while the buckle designs were found to fall short of the required threshold for copyright protection (KKO 1980 II 3). These rulings indicate the Court's acknowledgment of copyright protection for applied art; however, the exclusion of buckle designs from such protection was based on their form being largely dictated by functional considerations. Furthermore, the decorative elements of the buckles were not deemed sufficiently original to merit individual copyright protection. These decisions highlight the Court's effort to strike a balance between safeguarding artistic creativity and recognizing the practical constraints inherent in certain objects.

The Supreme Court has also considered the copyright protection of applied art in cases involving various products, including bedroom furniture (KKO 1932 II 267), ceiling lights (KKO 1948 II 464), living room furniture (KKO 1975 II 25), and decorative lighting (KKO 1976 II 48). In these instances, copyright protection was denied on the grounds that the designs lacked sufficient originality.

As discussed above, while Finnish copyright law does not explicitly recognize fashion as a protected form of art, it does not provide an exhaustive list of works eligible for copyright protection. Fashion can be considered within the scope of copyright law as long as it meets the threshold of originality outlined earlier. It is reasonable to conclude that fashion, along with applied art more broadly, holds a relatively marginal position within the Finnish copyright system, despite the fact that applied art has been acknowledged as a form of creative work eligible for copyright protection for several decades.

Fashion inevitably remains in the shadow of pure art. As noted in the previously mentioned committee report, products in artistic handicrafts and industrial art can receive copyright

protection only if they can be considered artistic works. Therefore, fashion is granted copyright protection when it can be defined in the same way as an artwork and meets the originality requirement, which is particularly high in the case of fashion. It must be demonstrated that the work is independent, a product of the designer's original intellectual creation, and not a reproduction of another designer's work. The originality standard established by copyright law often contrasts with the way fashion is defined and understood within the market. Fashion that satisfies the legal criteria for copyright protection tends to be more conceptual or artistic in nature. Consequently, such works are more commonly showcased in museums or on runways than found in retail stores or worn by the general public.[79]

For an individual designer, this situation can create a challenging environment as the high originality standard required for copyright protection may make it difficult for fashion designers to secure such protection for their creations. The high standard of originality required for such protection often makes it difficult for fashion creations to qualify. This challenge is further compounded by the fact that fashion is an industry defined by rapidly shifting trends and overlapping ideas. Driven primarily by commercial interests, fashion does not always align with the purely artistic or intellectual intentions typically associated with pure art. Instead, its primary drivers are consumer demand, market forces, and the constant push to remain relevant in an increasingly fast-paced and globalized world. Yet, despite these commercial pressures, fashion holds the unique ability to serve as a powerful platform for storytelling, personal identity, and cultural dialogue, blurring the lines between functionality and artistry.

[79] Härkönen 2018, p. 918.

5 Harmonizing copyright law: efforts and challenges

5.1 The emergence of the harmonization process in the EU

It is somewhat contentious that, although the fashion industry is largely international, copyright remains a territorial right, despite a certain degree of international harmonization. What constitutes infringing copying in terms of copyright elsewhere may not necessarily be considered as such in Finland, and vice versa.[80] However, recent developments, such as the CJEU's *Cofemel* judgement, have contributed to greater harmonization of copyright law among EU member states. This precedent underscores an evolving trend towards uniformity, potentially narrowing the gaps between national interpretations of copyright law within the EU. Nevertheless, full harmonization remains an ongoing challenge, leaving room for divergence in specific cases.

When the process of harmonizing intellectual property rights began in Europe, copyright was not the central focus. To the extent that copyright was harmonized, the emphasis was on those areas deemed important for the internal market.[81] Among the first directives related to copyright were those concerning databases (Database Directive 96/9/EC[82]) and computer programs (Computer Programs Directive 2009/24/EC[83]). The drive to harmonize the protection of computer programs was largely shaped by economic priorities and the needs of industry. This harmonization primarily addressed exclusive economic rights, leaving moral rights notably absent from the directive. Bridging this omission would necessitate a broader re-evaluation of how moral rights, rooted in the personal and creative dimensions of authorship, can effectively coexist alongside economic rights, thereby better reflecting the dual nature of copyright as both a commercial and a personal framework for protecting authors' contributions.

The originality criterion was first examined by the CJEU in the *Infopaq* judgment. The case concerned whether an excerpt of eleven words from a newspaper article could qualify as a protected work. While the case did not directly pertain to any of the specific areas of copyright for which originality had been harmonized through a dedicated directive, the Court

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[80] Härkönen 2018, p. 921.
[81] Lucas-Schloetter 2021.
[82] Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases. Adopted of 11.3.1996.
[83] Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs. Adopted 23.4.2009.

referenced several recitals in the Information Society Directive 2001/29/EC, which addresses the broader harmonization of copyright protection. The Court's reasoning was grounded in these recitals, which, among other points, emphasize that disparities in copyright law contribute to fragmentation within the internal market and hinder the development of new copyright-driven products that could leverage economies of scale. By highlighting this, the Court made it clear that differences in copyright protection between Member States, as well as across various types of works, are undesirable. The Court ruled that works such as computer programs, databases, and photographs are eligible for copyright protection only if they are original, in the sense that they are the author's own intellectual creations, thereby aiming to reduce fragmentation and promote a more unified copyright framework.

The concept of originality has been understood rather differently across various countries and legal cultures, but in international discussions, it has been used to encompass the diverse qualitative variations necessary for the establishment of copyright protection[84]. However, in the *Infopaq* judgment, the application of originality takes a relatively neutral stance. It does not strongly align with the natural rights tradition nor with the traditional Anglo-American approach, serving as a compromise that bridges these two distinct frameworks and reflects the evolving nature of copyright law in a globalized context.[85] I guess the time will tell how CJEU´s position ultimately settles as a compromise between different traditions. Is originality inherently a cultural concept, or can it be neutralized, detached from the background theories and objectives of various copyright cultures?

[84] Mylly 2016, p. 908.
[85] Ibid, p. 922.

5.2 Varying copyright attitudes towards fashion

The differences in copyright attitudes toward fashion are substantial. As fashion trade increasingly crosses borders, designers often find themselves navigating very different legal systems. For example, in the United States, fashion products typically fall outside the scope of copyright protection, as the law does not cover items in the useful articles category except to the extent that artistic creation can be separated from the product's design. Historically, the US copyright law was based on the *sweat of the brow* doctrine, but it now requires at least a minimal expression of creativity, often described as a *minimum spark of creativity*. Thus, the amount of effort, investment or the originality of the work alone is no longer sufficient to guarantee copyright protection. In contrast, the traditional English standard of *skill and labour*[86] has been considered to reflect the lowest threshold for originality. Meanwhile, in countries such as Finland, the skills of the author and the effort involved in creating the work are deemed irrelevant for determining copyright protection.

If we look at the deeper justificatory structures underlying legislation and its fundamental concepts, the difficulties involved in harmonizing copyright law seem evident. As illustrated by the above examples, the emphasis of the justifications for copyright varies from one legal culture to another. Despite these differences, significant efforts have been made, particularly at the EU level, to harmonize aspects of copyright law, such as the core concept of originality, through directives and case law from the CJEU. Notably, cases like *Infopaq* and *Cofemel* have been pivotal in this process. This push for harmonization has occurred despite the fundamental contrasts between the continental European tradition and the common law tradition.[87] A key milestone was the *Cofemel* judgment, which played a crucial role in aligning the originality requirement across the EU. By doing so, it established a clearer and more consistent framework for determining copyright eligibility, fostering a more unified interpretation among national courts and legal systems.

[86] *Skill and labour* refer to a criterion for determining whether a work is considered 'original' for copyright purposes, requiring that it stems from the author's own skill, effort, judgment, and labour.
[87] Mylly 2016, p. 912.

5.3 The CJEU's *Kwantum v. Vitra* judgement: Expanded EU protection for applied art

On 24 October 2024 the CJEU delivered its ruling in *Kwantum v. Vitra*[88]. This ruling reflects a significant shift regarding EU protection of the works of applied art originating outside of the EU. In this case, the Dutch Supreme Court (*Hoge Raad*) referred preliminary questions concerning the interpretation of Article 2(7) of the Berne Convention.

The case revolved around the iconic Dining Sidechair Wood (DSW chair), designed by renowned American designers Charles and Ray Eames. Vitra Collections AG, a Swiss company that owns the intellectual property rights to the DSW chair, is also its exclusive distributor in the EU. Vitra claimed that Kwantum Nederland B.V. and Kwantum België B.V. had infringed its copyright by selling the "Paris chair," a product resembling the DSW chair, within the EU without permission. In 2015, Vitra initiated legal action against Kwantum in the Netherlands. While a lower court ruled in Kwantum's favor, the court of appeal found that the Paris chair infringed the DSW design. Kwantum subsequently appealed to the Supreme Court of the Netherlands, contesting the court of appeal's application of the so-called *material reciprocity test* under Article 2(7) of the Berne Convention.

The Berne Convention stipulates that authors who are citizens of any signatory country are entitled to the same intellectual property rights in other signatory countries as those granted to local authors. However, an exception applies to works of applied art, which are subject to a *material reciprocity clause*. According to Article 2(7) of the Berne Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.

[88] Judgement 24.10.2024, Kwantum Nederland and Kwantum België, C-227/23, EC ECLI:EU:C:2024:914.

In its judgment, the CJEU confirmed that the dispute fell within the scope of EU law, as it concerned a claim for copyright protection for a work of applied art sold within an EU Member State. The Court emphasized that, to qualify for copyright protection under EU law, the work must meet the definition of a work as outlined in the Information Society Directive 2001/29/EC.

The CJEU further ruled that EU law prohibits Member States from applying the Berne Convention's material reciprocity test to works of applied art originating from non-EU countries. The Court clarified that the responsibility for granting copyright protection under EU law lies with the EU legislature, not individual Member States, and that the Information Society Directive 2001/29/EC imposes no restrictions based on the work's origin or the author's nationality. The Court also emphasized that the legislative intent behind the Information Society Directive 2001/29/EC is to ensure copyright protection for all works within the EU, irrespective of their origin or the nationality of their authors, reflecting the Directive's broader goal of harmonizing copyright protection across the internal market.

Furthermore, the CJEU clarified that Article 351 of the TFEU[89] does not allow the EU member states to deviate from EU law to apply the Berne Convention's material reciprocity test. While Article 351(1) TFEU preserves rights and obligations from agreements made between EU member states and third countries before 1958, this preservation is limited to situations where those agreements do not conflict with EU law. In this context, the CJEU further clarified that Article 2(7) of the Berne Convention does not prevent a state party from extending copyright protection to a work of applied art that is only protected as a design under a special regime in its country of origin. The Court emphasized that such a restriction would undermine the core objectives of the Berne Convention, particularly the principles of national treatment and minimum protection standards, which are designed to ensure that authors receive protection beyond their country of origin. The CJEU also noted that Article 19 of the Berne Convention explicitly permits states to offer greater protection than the Berne Convention's minimum requirements.

[89] As per Article 351 TFEU "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."

The CJEU's ruling in *Kwantum v. Vitra* underscores the extensive scope of EU copyright law, confirming that all works receive uniform protection across EU member states, regardless of their country of origin or the nature of protection granted domestically. The decision strengthens the harmonisation objectives of the Information Society Directive 2001/29/EC.

5.4 Integration of the CJEU case law into the Finnish legal practice

In Finland, the adoption of case law established by the CJEU has been notably slow. Since the CJEU's landmark rulings, the Finnish Supreme Court has not yet issued any decisions regarding the originality requirement in copyright law. The *Infopaq* judgment, for instance, was first cited in the Finnish Copyright Council's statement 2010:5,[90] but it was conspicuously absent from statement 2009:16,[91] which addressed the copyright protection of an article, a topic directly related to the *Infopaq* ruling. Instead, the Council began referencing the CJEU's *Painer* judgment shortly after its issuance, highlighting a quicker integration of that case law into domestic practice. This can partly be explained by the fact that the case involved a natural law-based personality requirement, which is part of Finnish copyright tradition and a key aspect of our cultural understanding of the fundamental concept of copyright.[92] Thus, the message of the *Cofemel* judgment aligns closely with the Finnish domestic approach, which emphasizes the requirement of the author's personality: “It follows from the Court’s settled case-law that, if a subject matter is to be capable of being regarded as original, it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices”. Despite this, the practice is still waiting for its guiding example.

In light of the *Cofemel* case, it is unlikely that Finland’s copyright legislation itself will require amendments to fully embrace its principles. Instead, what is required is an update to the interpretation and application of the Finnish Copyright Act to ensure it reflects the legal framework established by the *Cofemel* ruling. Finland’s traditional understanding of originality can be adapted to align with the approach of the CJEU. While the practice of the CJEU may ultimately be closer to our tradition than, for example, to English or US approaches, it is not necessarily identical to either the continental European or the traditional Finnish perspective.

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[90] Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2010:5.
[91] Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2009:16.
[92] Mylly 2016, pp. 927–928.

Therefore, it is anticipated that Finland's reasoning and interpretative methods will need to be refined to better accommodate the evolving legal landscape shaped by the EU case law.[93]

[93] Mylly 2016, p. 929.

6 Normative basis for moral rights

The exclusive rights granted by copyright are divided into the author's economic rights and moral rights. Unlike economic rights, moral rights are cantered around the author, reflecting a personalist conception of copyright. Moral rights regard personality as the fundamental notion, aiming to protect the author´s non-pecuniary personal interests.[94] This notion is apparent in the CJEU *Painer* judgement according to which "an intellectual creation is an author's own if it reflects the author's personality" and this is the case "if the author was able to express his creative abilities in the production of the work by making free and creative choice". By emphasizing personality, this approach elevates intellectual works as distinctly human endeavours, highlighting the intrinsic dignity of authorship. Creativity is deeply intertwined with human expression and individuality, forming the foundation of the moral rights framework and reinforcing the value of the author's personal connection to their work.

Moral rights are aimed to prohibit derogatory use of a work created by another person, including the right to claim authorship, and the right to the integrity of the work. As opposed to economic rights, moral rights cannot be transferred meaning that for example a large fashion brand can never take away the designer´s moral rights. Moral rights ensure that fashion designers continue to be recognized as the authors and give them the authority to prevent changes to their work even after the sale of their respective works.[95] In contrast, the economic rights typically conclude with the sale and in accordance with the principle of freedom of contract, the parties may freely agree on their transfer in any manner they choose, without restrictions.

The original fashion designs include a high level of creativity and personhood. Hence, the authors of these designs deserve protection. They are the ones that certainly benefit from moral rights. Moral rights have the potential to incentivize talented fashion designers, encouraging them to fully utilize their talent, vision and progressive ideas.[96] There are academics and legal commentators who are eager to question the strong intellectual property protections and rather argue that the fashion industry particularly benefits from the so-called

[94] Härkönen 2024, p. 408.
[95] Monseau 2023, p. 35.
[96] Härkönen 2021, p. 65.

piracy paradox[97]. Undoubtedly, this is indeed true from a purely economic perspective. The business model of the most widely renowned fast fashion retailers is based on the offering of inexpensive, line-for-line replicas of original designs at a lower quality. They make great profit thanks to low productions costs and avoided expense of design.[98] Copying makes overexposed trends, and trends sell fashion. But fashion is not merely about passing trends. It is about self-expression and personality being integral to one´s own identity. Trends are not at the heart of fashion, the authors are. Their individuality and innovation.

One could argue that designers are driven solely by economic motivations. Economic rights are certainly one side of the copyright coin, however, where is the incentive to create if you can simply benefit from the outputs and creativity of others? Hence, moral rights should not be perceived or treated as some empty, discretionary principles but rather as forming the basis for economic rights to function. Creative expression is what copyright is supposed to protect. A few examples I found illustrative from the world of music and art: envision a copyright system that allows artists to create songs loved by the audience, but which are wrongly claimed and appropriated by third parties who falsely claim authorship; or in the art world, a masterpiece to which third parties add doodles without acquiring consent from the artist itself. Beyond the injustice of not being recognized as the author for something you have created, what would be the motivating factor to continue if others could simply exploit your work for their own benefit, leaving you, as the designer, with no rewards?[99]

However, the moral rights of fashion designers, while primarily rooted in the recognition of their creative contributions, can also have far-reaching economic implications. The right to be credited for their work increases the designer's visibility, which plays a key role in building their personal brand in this increasingly competitive industry. This enhanced visibility, in turn, brings financial advantages, such as more appealing job opportunities and a stronger bargaining position in business negotiations, enabling fashion designers to command higher fees, secure favourable contracts, and maintain greater control over their creative output.[100] In this way, the intersection of moral rights and economic benefits underscores the pivotal role

[97] Monseau 2023, p. 36.
[98] Hemphill – Suk 2009, p. 1172.
[99] WIPO Magazine (Accessed 18.11.2024).
[100] Hodge – Härkönen 2024, p. 140.

that recognition plays in sustaining the careers and livelihoods of fashion designers, while also encouraging a culture of authenticity and respect within the fashion industry.

7 Legislative foundation of moral rights

7.1 Moral rights in the internation copyright scheme

In international law, the basis for moral rights is in the Berne Convention. As prescribed under Art. 6bis (1) of the Berne Convention: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [their] honor or reputation." Article 6bis of the Berne Convention outlines two key moral rights for authors: *the right of attribution* and *the right of integrity*. The right of attribution allows authors to claim authorship of their work, ensuring they are properly credited for their creations. The right of integrity protects the work from any derogatory treatment that may harm the author's reputation, including distortions or mutilations. While the Berne Convention sets out these fundamental rights, the implementation and enforcement of these provisions are subject to the domestic laws of each country, meaning that individual nations may have specific regulations or interpretations governing how these moral rights are protected in practice.[101] It outlines the minimum standards without imposing any precise scope of moral rights. Parties to the Berne Convention may as well, in their sole discretion, grant greater protection for authors[102].

Unlike the economic rights, the moral rights in copyright have not been harmonised in the EU. As per to the Recital 19 of the Information Society Directive 2001/29/EC, in the EU, moral rights of fashion designers should be exercised according to the legislation of the Member States and the Berne Convention, the WIPO Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (1996). The latter two agreements are briefly described as follows: According to Article 1 of the WIPO Copyright Treaty, it is a special agreement under Article 20 of the Berne Convention[103]. It builds upon the Berne Convention by expanding the protection of works and the rights of authors in the digital environment. In contrast, the WIPO Performances and Phonograms Treaty was adopted to enhance and

[101] Härkönen 2025.
[102] Ricketson & Ginsburg 2022, p. 595.
[103] Article 20 of the Berne Convention: "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable."

preserve the rights of performers and phonogram producers. These treaties will not be further discussed in this thesis.

7.2 Moral rights in civil law and common law systems

Given my Nordic background, my research primarily centres on legal cultures and systems rooted in the continental, civil law, tradition. However, it is essential to also examine in this thesis the key distinctions between civil law and common law systems, particularly in their treatment and conceptualization of moral rights. Exploring these differences will provide a more comprehensive understanding of the subject and highlight how varying legal frameworks influence the interpretation and application of moral rights.

Whereas in the civil law tradition, copyright protection serves as a means to acknowledge and safeguard the profound bond between authors and their creations, common law countries tend to view moral rights rather grudgingly[104]. The different conception of moral rights in civil law and common law is related to the philosophy of law. As civil law traditions rely more on the personalist conception of copyright, they regard protection of moral rights to be pivotal whereas under the common law copyright tradition, exhibiting a utilitarian rationale for safeguarding copyright[105], moral rights have never played of such significant role.[106] Civil law focuses on the person while common law puts emphasis on the fruits of his or her endeavour.

Generally, the greater the system´s priorities and focus is on the author, the more protective the copyright regime is[107]. Civil law countries´ copyright laws are generally greatly influenced by natural rights approach, which regards property to be derived from labour. As an author´s creative work is considered intellectual labour, granting authors exclusive rights to the fruits of their work is justified.[108] Hence, in civil law, great emphasis is placed on the interests, creative contribution and intellectual work of a natural person. Copyright is, as it were, tied to the protection of the person of author and the creativity of natural person, for example a fashion designer. Due to this strong tie, civil law countries are also referred to as the so-called

[104] Ginsburg, 1990, p. 992.
[105] Derclaye 2010.
[106] Grosheide 2009, p. 251.
[107] Ginsburg 1990, p. 992–993.
[108] Ginsburg 2017, pp. 487, 489.

author´s right countries[109], known also as “continental” or alternatively, “continental European” view on copyright law[110].

In contrast, under the utilitarian model, familiar in common law jurisdictions, public interests are prioritised over those of individuals. The productivity of authors is advantageous as long as the society gains the rewards from this individual creativity. The focus is on the protected work, including for example the image, expenses and brand reputation, as opposed to the author of the work. Under the utilitarian rationale, the purpose of copyright is to incentivize authors through the societal benefits. Commercial gains are considered the greatest profit. Rewarding an author with copyright is not the primary goal in itself but rather a means to promote continued productivity.[111]

The natural rights and utilitarian justifications for copyright are fundamentally different, even opposing in nature. The natural rights approach emphasizes the protection of the individual’s personality, while the utilitarian perspective focuses on the overall public benefit. The natural rights justification is typically invoked when strong protection is emphasized, whereas the utilitarian approach values the widespread dissemination of works.[112] From an individual fashion designer's perspective, it is clear that civil law jurisdictions, grounded in natural rights justification, offer stronger legislative tools to protect the unique relationship between an author and their work. This fundamental divide between civil law and common law countries over moral rights creates a barrier to the effective harmonization of international copyright laws, negatively impacting authors' rights on a global scale. The conceptual differences between these two legal traditions are so profound that it is challenging to even consider them within the same arena of discussion.

From my perspective, which is inherently subjective, much of copyright only makes sense when the author is placed at its core. In fact, the parties to the Berne Convention should recognize and embrace the concept of author centrality as fundamental to the framework of copyright law. According to article 2, paragraph (6) thereof provides that “The works mentioned in this article shall enjoy protection in all countries of the Union. This protection

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[109] Ginsburg 1990, p. 993.
[110] Härkönen 2018, p. 919.
[111] Baldwin 2014, p. 16.
[112] Goldstein 2001 s. 3–4.

shall operate for the benefit of the author and his successors in title". Most countries, from the civil law and common law origin, have signed the Berne Convention.

7.3 Moral rights framework in Finland

In Finland, an author's moral right to be recognized as the author of their work is rooted in two key sources. First, it derives from article 6bis (1) of the Berne Convention, which is binding on Finland. Second, it is enshrined in Chapter 1, section 3, subsection 1 of the Finnish Copyright Act. This provision stipulates that whenever copies of a work are produced or the work is made available to the public, whether in whole or in part, the author's name must be acknowledged in a manner consistent with proper usage. Thus, while the Berne Convention distinguishes an author's right to attribution from their economic rights by stating that an author has the right to demand recognition of their copyright throughout their lifetime, the Finnish Copyright Act further specifies that the author must be identified in an appropriate manner when either a copy of the work or the work itself is made, in whole or in part, available to the public.

The Finnish Copyright Act further stipulates that a work may not be altered in a way that is detrimental to the author's literary or artistic reputation or individuality. Similarly, it cannot be made available to the public in a form or context that would cause such prejudice (Chapter 1, Section 3, Subsection 2). Additionally, the author's moral rights can only be waived with binding effect if the waiver pertains to a use that is limited in both character and scope (Chapter 1, Section 3, Subsection 3). More on this in the following section.

7.4 Finnish permissive approach to waivers of moral rights

Unlike in some jurisdictions (just as in France), in Finland, and also in other Nordic countries, the author can, to a limited extent, refrain from invoking their moral rights, but still no one else will become the new holder of those rights as a result[113]. As outlined in Section 6.3 of this thesis, this principle stems from Section 3(3) of the Finnish Copyright Act, which states the following: "The right conferred to the author by this section may be waived by him or her with binding effect only in regard of use limited in character and extent". This essentially

[113] Hodge – Härkönen 2024, p. 141. Note the difference between the terms *transfer* and *waive*. Moral rights cannot be transferred, i.e., assigned to another party, such as a fashion company. However, in Finland, an author can *waive* their right to invoke their moral rights in a limited manner, i.e., commit to not exercising these rights that they are entitled to by law. Even in the latter case, no one else becomes the holder of these moral rights.

means that the designer's moral rights do not disappear entirely; rather, the designer has merely agreed not to exercise certain legal rights, such as by demanding that a fashion company credit them as the author of a particular design. Additionally, it means that the designer cannot make a *blanket waiver* to never invoke their moral rights in the future.[114] In short, designers cannot give up their moral rights entirely or agree in advance to never use them in the future.

For instance, a contractual clause cannot be deemed reasonable if it effectively prevents a designer from ever exercising their moral rights over works created during the course of their employment or contractual relationship. Such a provision would conflict with the normative foundations of copyright law and, in practice, deny the author the ability to fully exercise the exclusive rights granted to them under copyright law.[115]

I do agree that the possibility of waiving moral rights contributes to the very problematic labour conditions in the fashion industry by depriving designers of compensation for their work[116]. Although some may claim that such waivers could sometimes even benefit authors, especially in the industries where works are primarily produced for commercial purposes. However, I take a highly critical view of the perspective that de facto waivers of attribution rights would actually result in an increased financial compensation for fashion designers. The potential benefits, higher pecuniary compensation, seem rather theoretical. Although such waivers might appear to provide designers with greater flexibility, the limited bargaining power of fashion designers and the industry's prioritization of commercial interests make it unlikely that these concessions will lead to fair financial rewards.[117]

Hence, contractual agreements that incorporate the waiver of moral rights should be treated with extreme caution, if not outright prohibited. Although it must also be acknowledged that banning of such waivers is unlikely to be a shortcut to happiness, so to say. Unfortunately, even without explicit waivers of moral rights, the structural inequalities and strong hierarchies are so visibly present in the contemporary fashion sector that authors frequently end up waiving their moral rights in practice, even when it is explicitly prohibited.[118] However, we

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[114] Ibid, p. 146.
[115] Ibid, pp. 146–147.
[116] Härkönen 2024, p. 419.
[117] Härkönen 2024, p. 419.
[118] Härkönen 2024, p. 419.

can reasonably question the true freedom of designers to negotiate in a situation where they are faced with demands from fashion houses to waive their moral rights[119]. I dare to argue that this cannot be considered truly voluntary consent but rather a form of coerced compliance under the pressures of power dynamics and economic necessity. The dominant position of major fashion houses in the market gives them significant bargaining power, leaving individual designers with little to no influence over contractual terms. This imbalance raises important ethical and legal questions about the fairness of requiring designers to waive their moral rights. Rights that are an essential part of their artistic integrity and professional worth.

Furthermore, if these rights are relinquished, designers lose the ability to oversee how their work is used or altered, potentially undermining their reputation and creative legacy. Such practices not only diminish the autonomy of designers but also threaten the authenticity and cultural value of the designs themselves, turning unique creative expressions into mere commodities under corporate control.

In Finland, companies are not legally allowed to use contractual terms that are unfair to consumers. A contractual term may be considered unfair if it favours the company to such an extent that the rights and obligations of the parties are not balanced. Section 29 of the Finnish Copyright Act governs the adjustment of unreasonable terms in agreements concerning the transfer of copyright. It provides that if a condition in an agreement on a transfer of copyright is unreasonable based on industry standards or in other respects, or if its enforcement would result in an unreasonable situation, the condition may be adjusted or ignored. The assessment of unreasonability of a condition shall take into consideration the entire agreement, the circumstances prevalent at the time, the parties' positions, the mode of use and the number of uses of the work, the commercial value of the work and the way of determining the remuneration, the creative contribution of the author to the overall work as well as other possibly relevant factors. In other Nordic countries, however, there is no provision comparable to Section 29 of the Finnish Copyright Act. This is unless one takes into account the general provision in Section 36 of the Finnish Contracts Act (228/1929), which is based on the joint Nordic preparation.[120]

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[119] Härkönen 2024, p. 419.
[120] GP 43/2022 Is.

Furthermore, it may be pertinent to assess the fairness of such terms under alternative legal frameworks, including Chapter 10, Section 2 of the Finnish Employment Contracts Act (55/2001). This provision stipulates that if the application of a term or condition in an employment contract is deemed contrary to good practice or otherwise unreasonable, the term or condition may be subject to adjustment or disregarded entirely.

8 Moral rights and their implementation from the designer´s perspective

8.1 From theory to practice

Next to theory, I wanted to also incorporate a practical perspective into my thesis about how moral rights are reflected in a fashion designer´s daily life. I hoped to dive into the world of fashion design through the perspective of an expert by experience. I wanted to discuss how university education, its course content, could be improved to help designers better understand the scope of their rights, and how designers´ rights are realized in the professional realm. What is it like to work as a designer in a large fashion house, and how are designers' rights upheld there?

To gain deeper insights into the designer's perspective on these matters, I had the opportunity to interview Elina Määttänen, a successful Finnish fashion designer and doctoral researcher. Currently a researcher at Aalto University, Elina has an impressive background, having previously served as the Head of Design for Womenswear at Tiger of Sweden in Sweden and worked as a fashion designer at Maison Margiela in Paris. She holds a Master of Arts in Fashion/Apparel Design. As Elina shared, she is grateful to have found a career that allows her to fully express her creativity. However, I was eager to uncover the true cost of this professional journey.

8.2 Limited awareness of moral rights

Perhaps somewhat to my own surprise, moral rights are not a very familiar theme among fashion designers. Then again, they are probably to some extent an unfamiliar aspect of copyright even for many legal scholars, those that are less familiar with intellectual property rights. I asked Elina how well she knows moral rights and indeed, not very. Yet, the importance of understanding fashion law has undeniably grown in significance for all stakeholders in the fashion industry, and not least for the fashion designers themselves. Navigating both the risks and opportunities inherent in the business increasingly requires a solid grasp of relevant legal principles.

Part of the reason for the limited awareness of moral rights and fashion law in general among fashion designers may be that such topics are rarely, if ever, included in their university

curricula. Increasing legal knowledge would therefore be essential for fashion designers, so that, as they enter the workforce, they would be aware of their rights and able to address the legal issues in the fashion industry. A solid understanding of the relevant laws would enable them to make more informed, deliberate, and strategic decisions regarding their rights and professional interests.

On the other hand, the issue also pertains to advocacy. At its best, active advocacy can promote designers' rights, raise awareness, enhance designers' visibility, and strengthen their status and bargaining power in the labor market. Moreover, as previously noted, moral rights are often eclipsed by economic rights, a trend evident not only in copyright discussions but also in copyright research. During our discussion with Elina, we noted that while fashion designers can certainly contribute to advancing this conversation, significant progress is more likely to be achieved at a broader level by fostering public dialogue and pressuring major fashion houses to enact change. There is no legally valid justification for fashion houses to disregard designers' rights, yet this remains an entrenched reality in the contemporary fashion industry.

8.3 Right of attribution

If a fashion designer creates an original design, they have the right to claim authorship to their work. The right to attribution ensures that emerging designers have the opportunity to be credited for their creative work, thereby building their own reputation. Nevertheless, it is usually the one after whom the fashion brand is named who claims this right for themselves.[121] This is again due to the distorted hierarchic structures of fashion whereby someone wrongly gains the honour and reputation that actually belongs to someone else, the true author of the design. The fashion houses ride on the reputation and the high status of their top designers. Therefore, large fashion houses often credit their founder or head designer as the author of all their products, overlooking the fact that many of these designs are actually designed by employed or freelance designers who remain unnamed.[122]

This is also a topic which we discussed with Elina. I asked her what significance does it have for an individual designer to receive recognition and be credited for his or her creation? Elina

[121] Härkönen – Särmäkari 2023, p. 50.
[122] Ibid, p. 14.

did acknowledge its significance, but at the same time emphasized that the lack of credit is a somewhat generally accepted practice in the industry. Must say, it feels deeply frustrating to think that designers are like pawns in their own game, with no control or influence. But is it so? Fashion companies are facing growing scrutiny as regards the environmental and social impact of fashion. Consumers and other stakeholders keep demanding transparency and accountability. While it is great that transparency is increasingly being called for in these areas, we should also push for greater clarity and openness regarding individual fashion designers' rights. The lack of transparency and lack of awareness regarding designers´ rights actively maintain unfair practices and unequal industry standards. These makes the designers vulnerable to exploitation. The *Cofemel* judgment raised hopes that the recognition of fashion designs as eligible for copyright protection under the same conditions as traditional works of art would encourage fashion companies to revisit and enhance their policies on moral rights. While the legislative and judicial advancements in this area represent significant progress for the copyright system, it remains strikingly uncommon for fashion companies to publicly acknowledge the designer responsible for a particular fashion creation. This gap suggests that, despite the legal developments, there is still a disconnect between theory and practice. It is imperative that fashion industry leaders bridge this divide and begin to actively implement these legal principles, ensuring that designers receive the recognition they are due.

While I acknowledge that taking legal action against a large fashion house is challenging due to the significant power imbalance within the fashion industry, particularly since enforcing intellectual property rights demands substantial investment in legal assistance and financial resources, I would also emphasize the individual’s responsibility in this context. Designers must take ownership of advocating for and protecting their rights as a crucial part of the equation. The effectiveness of copyright law largely relies on the willingness of rights holders to enforce their right. If fashion designers choose not to challenge those who infringe on their rights, even when legal tools are available, copyright protection will have minimal impact on them.

Furthermore, presenting a portfolio during a job search allows designers to highlight their creativity and skills, showcasing the unique value they bring to potential employers, Elina noted. This is important; however, it brings us back to the issue of how economic interests often override the moral ones. The creativity of individual designers frequently remains in the shadows, hidden behind closed doors during job interviews and negotiations. While in job

searching, a portfolio is undoubtedly an important part of it, however, increased visibility would certainly further enhance the designer's career prospects. In a fast-paced, trend-driven industry, reputation and recognition are crucial.[123] The issue is that new designers do not possess the same level of brand recognition as established designers. Invisibility makes it difficult for new designers to compete effectively, limiting their ability to reach a broader audience and to establish a stronger market presence for themselves and their business.

8.4 Agreements – the wild west of fashion business

Elina and I further explored the agreements between fashion houses and individual designers, with a particular focus on the imbalance often present in their contractual relationships. Although our discussion remained fairly general, it highlighted the challenges of establishing a fair and equitable balance in these agreements.

Fashion designers practice their profession out of love towards the field. While they are driven by their passion, financial realities are always part of the equation. Many aspiring designers dream of building a career at a prestigious fashion house, but under what contractual terms? While bringing benefits to the company, the employment agreement between an individual designer and a fashion house should also reflect the rights of the fashion designers, including moral rights. Achieving this balance can be particularly difficult in the fashion industry, where fashion houses often claim ownership of the designs, copyrights, the rights to use subject images, and more. This appears to be a common practice, as many fashion houses, rather than acknowledging the personal rights of fashion designers, treat their work solely as an asset that directly contributes to the company's brand and financial success. Understanding, however, that there can be notable variations between different jurisdictions when it comes to an employer´s ability to claim ownership over his or her design[124].

I am further aware of the challenge regarding how rights are distributed between the parties in such an employer-employee relationship. However, any agreements that do not recognize the intellectual property rights of designers, or those that reflect these rights only to a limited extent, weaken both the rights of individual fashion designers and the practices of the fashion

[123] Wade 2011, p. 365.
[124] Härkönen – Särmäkari 2023, p. 50.

industry in general. Moral rights are crucial for preserving the personal interests of fashion designers. Imbalanced contracts that favour the rights of fashion houses result in the neglect of designers' rights prioritizing the commercial interests of fashion houses instead. They distort the personalist concept of moral rights by undermining the authors´ ability to exercise control over their work and safeguard the connection between their creations and their identity. This is not purely an ethical issue but raises also legal concerns. It highlights potential conflicts between established legal frameworks and prevailing practices within the fashion industry. Designers, especially freelancers or those early in their careers, often find themselves compelled to sign agreements that transfer their intellectual property rights to the brand in exchange for employment or exposure. While this is common in industries with *work-for-hire*[125] models, it directly conflicts with the personalist concept of moral rights, which views an author´s work as an extension of their personality.

I believe designers are becoming increasingly aware of and better educated of their rights thereby starting to push for a more just environment and improved protection of their work, including fairer agreements. However, as my interviewee Elina and I discussed, one major issue is that there is rarely room for designers' demands in contract negotiations unless one is already a well-known designer, having already gained a reputation, and with it, negotiation leverage. For most individual designers, there is little opportunity to challenge the pre-established frameworks of contracts, processes, or standards. If, as an aspiring designer, you start setting conditions during contract negotiations, the company can simply set you aside and hire someone else in your place. These frameworks, processes and standards, shaped over decades by larger players on the field, are designed to serve the interests of major fashion houses and corporations. Large fashion houses simply dictate contractual terms, leaving little room for concrete negotiation.

You could argue that contractual agreements, such as employment agreements, could legitimize the fashion industry´s entrenched practices, especially the absence of attribution. Framing the issue of designer-authors' moral rights solely as a matter of contract law would be overly simplistic. The complexity of moral rights as personality rights, combined with systemic injustices and power imbalances in the fashion industry, makes this issue far more

[125] *Works for hire* refer to works created during employment that are legally attributed to the employer as the author, rather than to the designer themselves.

intricate than contract law alone can address.[126] The protection of authors´ core personal and intellectual interests, moral rights, should take precedence, regardless of any contractual arrangements[127].

[126] Härkönen 2024, p. 418.
[127] Walter 2019, p. 326.

9 The sacrifice of copyright for economic gains

9.1 Individual fashion designers overdriven by strong economic considerations

In the copyright debate in general, but especially in the fashion law context, moral rights have remained in the shadow[128]. They are overdriven by the strong economic considerations that dominate the hierarchic contemporary fashion market. A hierarchic in a way that large fashion houses are largely taking the credit for the creative work of individual designers. The concept of right of attribution takes on a different, rather unjust, meaning in a situation where a brand is attributed as an author of the work instead of the one who created it. This can hardly be justified by the purpose of the Berne Convention, which is to protect the rights of authors. As earlier discussed, under author´s rights copyright regime humans´ interests are prioritized over those of public, reflecting an anthropocentric perspective. Then again, fashion industry seems to be an exception to this as in the field of fashion, it is rather the lack of anthropocentrism that stands out, than its fullness. This reduced focus on anthropocentrism is evident in how moral rights are exercised, or rather, how they are not, to the detriment of individual fashion designers.[129] Even if some authors might believe they do not need moral rights, it does not justify denying these rights to all authors.

As established, moral rights are often overlooked in the fashion industry, despite offering a fascinating counterpoint to the powerful economic forces that dominate modern copyright and fashion[130]. Economic pressures and the dominance of large fashion brands are affecting the creative freedom and values of individual designers, contributing to a kind of declining anthropocentrism where designers themselves are less centered in the creative process. Large fashion brands are increasingly profit-driven, often valuing what sell over what's artistically innovative. This economic pressure forces individual designers, especially those working within or for these big brands, to prioritize marketability over personal creative vision. This shift represents a decline in the traditional, designer-centric approach to fashion where creative expression was prioritized.

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[128] Sundara Rajan 2019, p. 257.
[129] Härkönen 2023.
[130] Wilson 2003, p. 13.

The most prominent example of the erosion of moral rights in fashion concerns fashion designers' right of attribution. Although the Berne Convention clearly emphasizes the moral rights of authors, the fashion industry does not effectively uphold these rights in practice. To secure the right of attribution, one must first attain fame and recognition.[131] In many large fashion houses, designers are part of a team and often work under creative directors who have the final say. This system can marginalize individual voices, as the designer's role may be limited to executing someone else's vision rather than creating their own. Some designers even work as "ghost designers," creating pieces that will be credited to a brand or a famous creative director, erasing their individual impact. In these scenarios, the designer's identity is almost absent from the final product, making them more of a cog in the brand's machinery. The dominance of economic considerations and large brands in the fashion industry diminishes the central role of the designer, turning them more into executors of market-driven concepts rather than independent authors. This declining anthropocentrism can result in a more standardized, less expressive fashion landscape where individual creativity takes a backseat to financial imperatives and brand image.

The disregard for the right of attribution is pervasive across nearly all levels of the fashion industry, encompassing everything from luxury designer labels and high-end fashion to mid-range brands and budget-oriented fast fashion. This widespread neglect highlights a systemic issue wherein designers often go unacknowledged for their creative contributions, with their work being subsumed under the brand's name or identity.

This systematic ignorance towards designers' moral rights may be more comprehensible in common law copyright systems, especially in nations that follow the work-for-hire principle. The Berne Convention does not establish rules regarding whether or how employee authors should be credited, leaving this decision to the country of origin[132]. Therefore, many common law jurisdictions have adopted the view that the right to be recognized as the author does not extend to works created during the course of employment[133]. Then again, to the author's right regime, this so-called work-for-hire doctrine is rather unfamiliar[134]. Consequently, the work-

[131] Härkönen – Särmäkari 2023, 52.
[132] Ginsburg 2016, pp. 50–51.
[133] Ricketson 1991, p. 28.
[134] Härkönen 2023.

for-hire doctrine does not really explain the lack of respect towards designers' right of attribution in the European fashion industry. This is also something we discussed with my interviewee, Elina Määttänen. Of course, designers can use their work in their own portfolios, but it is otherwise a somewhat tacitly accepted fact in the industry that designers and their work are in many places overshadowed by their employer and its star designers. Therefore, even under the civil law jurisdiction, we cannot be misled into thinking that the problems are only affecting Anglo-American societies. The problem is also very much visible here under author´s right regime.

One perspective is that fashion designers are hired or commissioned to utilize their creativity simply for the benefit of fashion companies. However, this argument is neither legally nor practically sound. Moral rights of fashion designers cannot be taken away from them simply by handing over an employment contract. As discussed above, what distinguishes moral rights from economic rights is precisely that they cannot validly be completely surrendered. Yet, in fashion, while economic rights to works are typically assigned to legal persons upon their creation, moral rights are often overlooked or bypassed. Of course, a work and the monetary compensation received for it are important for fashion designers, such like for any of us. This topic was also touched upon by me and my interviewee Elina Määttänen. Monetary compensation enables designers to practice their profession in the first place. It provides designers the necessary financial stability that is crucial for fostering creativity and innovation. It ensures that designers are rewarded for their originality and unique contributions to the fashion industry. However, pecuniary interests are certainly not a unique feature of the fashion sector. Undoubtedly, in all creative fields, professionals seek to earn a living from their talent, aiming to monetize their creativity. It is worth noting that in some other sectors that depend on the creativity of employed or freelance workers, such as journalists, receiving credit for their work is considered standard practice.[135] Their names, possibly even accompanied by their profile pictures, are attached to their articles. People get to know who is behind those stories. Why is fashion an exception to this? The validity of the personality theory as a justification for copyright protection is significantly undermined when the primary beneficiaries are corporations rather than individual authors.

[135] Härkönen 2023.

9.2 Concerns about the impact of strong copyright protection on competition

Additionally, there has been concern that if works of applied art were granted copyright protection on too lenient grounds, it could unnecessarily restrict competition[136]. For example, it has been suggested in the decision-making practices of the Finnish Copyright Council that lowering the threshold for copyright protection could potentially limit competition, an issue that is not considered to arise in the context of pure art[137]. The concern about the potential competition-restricting effect of copyright protection for applied art is understandable, which explains why this has been used to justify the high originality threshold for works of applied art, as exemplified by the *Cofemel* judgment. However, the EU copyright system, as clarified in the *Cofemel* judgment, rejects this approach, affirming that applied art should receive the same copyright protection as pure art, based on the intellectual creativity of its authors.

The above-mentioned issue should be distinguished from the often-discussed separation between idea and expression in copyright literature, which is perhaps one of the most challenging and enduring questions in copyright law, alongside the division between applied art and pure art[138]. The distinction between idea and expression is critical because it determines what must remain unprotected. Allowing ideas to be monopolized would hinder competition, as ideas themselves must remain free for others to build upon. Monopolizing ideas would pose challenges to competition, not just in pure art but also in applied art. Copyright, therefore, aims to strike a balance by protecting expressions of ideas while ensuring that certain elements remain reusable in new works to foster creativity and competition. Without this balance, creativity would be stifled, as works would merely reflect unprotected ideas.[139]

When creative freedom has been used to achieve the end result, protecting such an outcome does not create any competitive issues. No one's ability to use essential operational elements is restricted when the protected elements are those that can be chosen arbitrarily and

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[136] Haarmann 1992, p.87.
[137] See for example, Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 1997:4, p. 3; Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2010:13, p. 3; Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2011:5, p. 3; Tekijänoikeusneuvosto (*The Finnish Copyright Council*), Statement 2012:7, p. 4.
[138] Härkönen 2020, p. 151.
[139] Mylly 2016, p. 923.

completely freely.[140] In simpler terms, if the result stems from genuine creativity and includes freely chosen, arbitrary elements, protecting it doesn't hinder competition, as others remain free to use the essential resources needed for their own work. If originality were required to involve the possibility of making entirely random and unfounded creative choices, the standard for achieving originality would become unrealistically high. Such a definition would set an impractical expectation, as originality is not about arbitrary or unfounded choices, but rather about thoughtful, innovative, and meaningful contributions within a given context. Fortunately, the case law of the CJEU does not seem to impose such an extreme standard for creativity, which is a reasonable and practical approach. Also, the extent of the copyright protection does not depend on the degree of creative freedom exercised by its author and the protection is therefore not inferior to that to which any work falling within the scope of the Information Society Directive 2001/29/EC is entitled.[141]

It must be taken into account that not all works of applied art are intended for industrial mass production. Rather, some are designed as unique, one-of-a-kind pieces that embody the author's artistic vision and expertise. For such works, opposing copyright protection on the grounds that it may have a competition-restricting effect becomes particularly problematic.[142]. Unlike mass-produced designs, these unique creations are not designed to dominate a commercial market but to contribute to cultural and artistic diversity. Denying copyright protection for such works risks devaluing their creative and cultural significance, undermining the intellectual rights of their authors and placing them at a disadvantage compared to authors of pure art, who benefit from copyright safeguards.[143]

9.3 Copying in fashion

Fashion designs have traditionally faced challenges in securing copyright protection. This has enabled widespread copying, which in turn has fuelled the phenomenon of so-called fast fashion. As you walk past stores such as H&M, Zara, New Yorker, etc., in a shopping mall, the shop windows often look quite similar, each with their own twist, of course. Before Christmas, the windows are decorated with glitter pants and tops, while in the summer, various trendy skirts are displayed, depending on what happens to be in fashion at the time.

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[140] Quaedvlieg 2014, pp. 1105–1106.
[141] Mylly 2016, p. 924.
[142] Härkönen 2020, p. 151.
[143] Härkönen 2020, p. 12.

The common thread connecting them all is their similarity. They are copies of each other. Traditionally, trends are set by the runway, with the fashion industry drawing inspiration from both haute couture and ready-to-wear collections. These designs are then introduced to a broader audience, in a simplified, more affordable and mass-produced versions sold at increasingly lower prices.

In today's fashion industry, copying has become widespread, as fast fashion brands often recreate popular designer styles at a fraction of the price. This approach allows consumers to quickly access the latest trends but also raises questions about originality and the value of true design. As independent designers invest significant time, creativity, and resources into their designs, seeing their work being replicated to masses for minimal, if any, profit is discouraging, to say the least. Designers do not gain the credit they deserve for their work, nor the financial benefits. By prioritizing speed and affordability over authenticity, fast fashion perpetuates a system where creativity is undervalued, and exploitative production processes thrive.

Critics argue that protecting fashion designs is unnecessary because the fashion industry is flourishing and copying drives innovation. They claim that copying actually has minimal negative impact on original authors and may even foster innovation and benefit designers.[144] They simply assert that the dynamic exchange of ideas, where designs influence and build upon one another, ultimately strengthens the fashion ecosystem as a whole. I am hesitant to disagree with this perspective and am confident to say that I am not the only one. For designers' rights to be upheld, strong legal protection of property rights is required on the ground. Insufficient protection results in widespread copying, which weakens both the incentive to innovate, and the financial investment needed for creativity. Not forgetting the loss in revenue when customers are opting for cheaper plagiarised copies undermining the designer´s ability to profit from their original creations. What is the incentive for aspiring designers enter such an uneven playing field where large fashion houses can freely copy their work? In a way, the competitive environment driven by widespread copying pushes brands to constantly create new innovations. However, the entire purpose of copyright law, moral rights included, is to protect individuals' rights to their own innovations and creations, giving them exclusive control over their work. Unauthorized copying seriously violates these rights.

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[144] Raustiala – Sprigman 2006, pp. 1687, 1691–1692.

Therefore, while it is true that the fashion industry continues to exist and produce new designs even in the absence of protection, one must ask, at what cost?

The impact goes beyond the rights of individual designers, affecting ethical and environmental issues as well. The rapid production cycles and the demand for cheap clothing contribute to overconsumption and the growing pressure on brands to keep consumer prices low. The phenomenon results not only in low-quality clothing but also, for example, in extremely poor production conditions. While fast fashion makes high-end styles more accessible, it also raises serious ethical concerns and threatens the long-term sustainability of the industry.

In terms of sustainability, in fashion research greater focus should be placed on the cultural aspects of it[145]. Fashion as a cultural phenomenon and fashion designs as cultural expressions play a vital role in promoting cultural sustainability[146]. Neglecting cultural sustainability in fashion comes in the form of cultural appropriation, raising concerns about the exploitation of marginalised groups and indigenous cultures for profit. Here, ironically, those who strongly support IP protection for fashion designs are often equally responsible for appropriating the cultural property of minorities as the fast fashion companies themselves[147]. The creativity of these marginalized cultures is often viewed as free, open material for the fashion industry to exploit[148]. Moral rights, such as the right to attribution and the right to integrity, align with the need to respect these cultural expressions as more than mere resources to be appropriated.

Considering the above there is a demand for strong copyright protection as it would make copying legally more difficult. It is important to curb copying, as its effects on sustainable development are mainly negative. When a fashion creation is protected by copyright, the low-cost clothing industry is unable to freely replicate it. Making copying more difficult legally would help slow down the rapid cycle of trends.[149] This, in turn, could significantly enhance the standing of individual fashion designers within the industry by, for instance, enabling them to preserve their competitive edge, secure a fair and equitable income, and actively contribute to the sustainable and innovative growth of the fashion sector. Enhanced

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[145] Mora – Rocamora – Volonté 2014, pp. 144–145.
[146] Härkönen 2021, p. 24.
[147] Härkönen 2021, pp. 86–87.
[148] Ballardini – Härkönen – Kestilä 2021, Subsection 4.3.
[149] Härkönen 2021.

protections would enable designers to dedicate themselves to their creative endeavours without the risk of exploitation, promoting a more equitable and innovative industry.

10 Feminist methodologies and moral rights

Here I will examine and explore the insights that feminist methods can bring to the study and development of moral rights protections in copyright law. Feminist inquiry serves a crucial purpose of examining how power and moral rights, such as authorship and reputation, are traditionally framed and reserved within privileged legal discourse. By reinterpreting these rights through a feminist lens, this approach aims to challenge the assumed neutrality of moral rights in conventional law. It seeks to repurpose these rights to also support feminist goals, by using them as instruments to promote greater equality.[150]

Throughout the years feminism has served as a significant paradigm for critiquing modernity. Feminism allows us to view social actions and policymaking from a new perspective and to reveal the underlying assumptions that shape them.[151] Feminist methods advocate a more inclusive and equitable approach to intellectual property law. The feminist approach seeks to break down gendered structures and power relations. Structural inequality is reflected in the intellectual property law system by favouring male-dominated fields such as technology.[152] By contrast, the system systematically ignores many female-dominated fields such as fashion. Women are statistically significantly under-represented in all areas of intellectual property law. Empirical studies show that there are significantly fewer women than men, for example, as patent holders, patent agents or patent lawyers.[153]

The gender imbalance applies not only to patents but also to copyright. This is even though there are a significant number of women working in the creative industries. Men's statistical dominance is probably due to the fact that they outnumber women at management levels and have the most commercial and critical success, which in turn is a consequence of gender discrimination and gender bias. Many of the crafts and skills that are socially associated with women are largely beyond copyright protection. Traditionally, this includes for example food preparation, applying make-up, hairstyling and interior design.[154] Clothing, which is relevant to my own thesis, was also generally considered a copyright-free field for a long time. While the situation has evolved today, there remain significant shortcomings in how copyright protection is enforced. The reality is that copyright protection is essential for supporting

[150] Craig – Dhonchak 2023, p. 2.
[151] Halbert 2006, p. 431.
[152] Bartow 2021, p. 765.
[153] Ibid, p. 766.
[154] Ibid, p. 767-768.

business and income in creative industries. Excluding so many authors from this protection is fundamentally unjust.

The foundation of feminism lies in the pursuit of social justice. This should also be reflected in the implementation of intellectual property rights. Feminist theory can expose the underlying masculine assumptions embedded in the way we construct intellectual property, while also shedding light on a political economy of intellectual property that has historically favoured men over women[155]. By acknowledging that many fields are gendered and that intellectual property rights favour innovations developed by men rather than, for example, women's creative work, feminist methods aim to level the playing field and promote the visibility of underrepresented groups, such as women.

Moral rights are enacted to protect the personality of the author. In accordance with good practice, an author, such as a fashion designer, has the right to be named in connection with their creation. As previously discussed, a key issue with major fashion houses is that recognition for creative work often goes to the company's reputation rather than the actual author, whether that be a star designer or the business owner. Thus, the author himself/herself is left in the shadows, without credit for his or her work. Fashion is female-oriented, yet a prime example of an industry that has taken a back seat in the context of intellectual property rights. Gender discrimination runs deep throughout the fashion world.

If we categorically exclude certain groups, such as women or minorities, from the opportunities offered by intellectual property protection, we will lose many important inventions, innovations and creative works that could have come about as a result of their success. Moral rights have traditionally focused on safeguarding authors' personal connection to their work; however, these frameworks often mirror established power structures. In a way, feminist methods could broaden the examination of moral rights by incorporating perspectives that address power imbalances, gender dynamics, and social equity. In this context, and taken the feminist discourse, next to author´s rights, moral rights should also reflect principles of justice, diversity and the dismantling of exclusionary structures. This broader understanding enriches their application and relevance. When viewed through a feminist lens, moral rights transcend mere legal protections for authors and become powerful tools for social transformation. They provide a means to address historical imbalances of power and actively promote justice, diversity, and

[155] Halbert 2006, p. 433.

the dismantling of exclusionary practices within cultural production and intellectual property law.

11 Conclusion

The increasing recognition of copyright protection for applied art within the EU highlights the pressing need to safeguard the moral rights of its authors, including fashion designers. These rights are not merely legal constructs but also embody an author's deep, personal connection to their creative works, going beyond economic considerations and affirming a fundamental aspect of human rights. However, incorporating these rights into the intellectual property rights framework of industries like fashion continues to pose significant challenges. The structural inequalities, entrenched power imbalances, and rigid hierarchies that dominate the modern fashion world create significant barriers to the recognition and enforcement of these rights. Fashion is a classic example where the real threat is that corporate giants are the only ones reaping the rewards of the unity of art. This ties into a broader issue of how copyright law intertwines with commercial power dynamics, often prioritizing large organizations over individual authors. Addressing these systemic issues is critical to ensuring that fashion designers receive the respect, acknowledgment, and protection they deserve for their creative contributions.

In the highly commercialized fashion industry, fashion designs are often reduced to mass-market products. Prioritizing moral rights could foster a greater appreciation for the artistic and cultural significance of fashion, promoting a balance between commercial interests and authentic creative expression. Nevertheless, the acknowledgment and enforcement of moral rights within global intellectual property frameworks remain inconsistent. While some jurisdictions provide robust protections, others offer limited or no safeguards, leaving many designers vulnerable to exploitation and misappropriation of their creative efforts. Significant differences still exist between countries in how highly they value the need for protection of fashion designers.

The EU's copyright framework increasingly reflects a move toward equal treatment in originality assessments across different art forms, whether classified as pure art or applied art. The distinction between the two has, at least in theory, become largely irrelevant. Under the Information Society Directive 2001/29/EC, Member States are prohibited from imposing additional criteria for the protection of applied art. With the EU now extending broader copyright protection to applied art, its authors are generally entitled to moral rights, even though the Information Society Directive 2001/29/EC primarily addresses economic rights.

While CJEU rulings have, in principle, placed applied art on equal legal footing with pure art, it remains unclear whether the scope, level, and function of moral rights protection for applied art will fully align with those of pure art in practice. Additionally, differences in how Member States interpret and implement these rights could lead to significant disparities across the EU.

Legal scholarship plays a vital role in recognizing and affirming the rights of marginalized groups, such as fashion designers, even when systemic barriers often hinder the practical enforcement of those rights. This is especially true in the context of moral rights, which, at their core, are deeply intertwined with fundamental human rights. However, as this thesis has demonstrated, the responsibility for ensuring the practical implementation of moral rights does not rest solely on legal scholars. It is equally shared by the various stakeholders in the fashion industry, from major fashion houses to academic institutions and individual designers. Creating a culture of respect for moral rights requires a collective effort. Legal scholars contribute by analysing and shaping frameworks that protect these rights, but their work must be supported by the responsive practices of the industry itself. Fashion houses should strive to prioritize transparency and fairness, ensuring that the authors behind their designs are acknowledged and respected. Similarly, individual designers have a role in advocating for their rights and challenging exploitative practices within the industry. Bridging the gap between legal theory and industry practice is essential to fostering an environment where moral rights are not only recognized in principle but also upheld in reality.

I wanted to address this topic because I believe that the limited awareness of moral rights is one of the key reasons why their practical implementation remains so insufficient. As the fashion business becomes more complex, understanding intellectual property law has become increasingly important. Therefore, it is crucial for also fashion designers themselves to be equipped with the knowledge needed to protect their rights and make informed decisions. Legal education should be prioritized in fashion curricula, empowering designers to navigate both the opportunities and risks of their profession. In addition, fostering a stronger public dialogue and advocating for change at higher levels can help the fashion industry move toward a more balanced and respectful approach to intellectual property, one that acknowledges and protects designers' contributions. Ultimately, fashion houses must recognize the importance of moral rights, as ignoring them only perpetuates an unjust status quo that stifles the growth and recognition of the industry's creative professionals.

I hope that this thesis will inspire further discussion and critical reflection on the moral rights of fashion designers and serves as a continuation for broader efforts to bridge the gap between intellectual property law and the lived realities of those working in the fashion industry. This calls for a deeper appreciation of the creative and human essence of fashion design, moving beyond a purely commercial outlook to honour the intrinsic value of the individuals and creativity that bring fashion to life.