

## SAFEGUARDING FASHION BRANDS IN INDIA: A DOCTRINAL STUDY OF ANTI-COUNTERFEITING LAW

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### ABSTRACT

*India's fashion industry has become a thriving sector that merges traditional craftsmanship with contemporary design innovations, positioning itself as both an economic driver and a global cultural ambassador. However, this progress has been severely undermined by the surge in counterfeit goods, which threaten brand revenues, diminish consumer trust, and disrupt market integrity. Counterfeiting in fashion is not only a matter of economic concern but also an issue of consumer safety and intellectual property rights (IPR) enforcement. This paper undertakes a doctrinal analysis of India's anti-counterfeiting laws, focusing on the adequacy of the Trademarks Act, 1999, the doctrine of passing off, and related provisions under copyright and consumer protection regimes.*

*The research expands upon existing scholarship by analyzing how Indian courts interpret doctrines such as goodwill and misrepresentation within the fashion context, and by assessing the implications of exhaustion of rights in the era of globalization and e-commerce. Through comparative insights from the United Kingdom, United States, and emerging Asian jurisdictions, the paper evaluates India's current framework against international best practices. The findings reveal that while India's legal regime contains essential remedies, weak enforcement, ambiguous legal doctrines, and insufficient consumer awareness limit its effectiveness.*

*The study concludes by recommending reforms including clearer statutory recognition of counterfeiting, stronger border controls, broader protection for fashion design elements, enhanced judicial and administrative enforcement, and consumer awareness initiatives. Ultimately, the paper argues for a holistic, multi-pronged strategy that integrates legal,*

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*technological, and educational approaches to safeguard brands and sustain the growth of India's fashion industry in an increasingly interconnected global marketplace.*

**Keywords:** counterfeiting, fashion law, trademarks, passing off, e-commerce.

## INTRODUCTION

### Background

The Indian fashion industry has experienced extraordinary growth in the last two decades, propelled by globalization, rising consumer incomes, and increased international exposure. This sector is unique in its ability to blend centuries-old textile traditions—such as Banarasi weaves, Kanchipuram silks, and chikankari embroidery—with contemporary design sensibilities that appeal to global markets. As a result, India has emerged as a vibrant hub for both domestic consumption and international fashion exports.

Despite this success, the industry faces a persistent threat from counterfeiting. The rise of counterfeit fashion goods in India reflects broader global trends where fake luxury items, knock-offs, and imitations have infiltrated legitimate markets. Counterfeiting in fashion is not merely an economic issue; it undermines brand equity, endangers consumers (through substandard products such as harmful fabrics or unsafe dyes), and damages the credibility of India's creative industries.

### Problem Statement

Counterfeit goods in fashion exploit consumer demand for affordable luxury while capitalizing on weak enforcement of intellectual property rights (IPR). Studies reveal that the counterfeit market in India is expanding rapidly, fueled by urbanization, aspirational consumerism, and the proliferation of e-commerce platforms that make distribution of fake products easier than ever. The existing legal framework, including the **Trademarks Act, 1999**, the **Copyright Act, 1957**, and the **Consumer Protection (E-commerce) Rules, 2020**, provides mechanisms for protection. Yet, practical enforcement remains inadequate. Weak border control, judicial delays, limited consumer awareness, and evolving methods of digital counterfeiting create loopholes that counterfeiters exploit.

### Research Significance

Fashion as a sector depends heavily on **intangible assets** such as reputation, goodwill, and innovation. In a competitive global marketplace, effective brand protection is essential not only

for economic sustainability but also for safeguarding cultural identity. A doctrinal study of anti-counterfeiting laws is therefore crucial in assessing whether Indian law is equipped to address these challenges and in identifying gaps that hinder enforcement.

### **Objectives of the Study**

This research pursues the following objectives:

- To analyse India's legal framework governing anti-counterfeiting in fashion, with particular emphasis on the doctrines of **passing off** and **exhaustion of rights**.
- To examine how Indian courts interpret critical legal concepts such as goodwill, misrepresentation, and deceptive similarity in the context of fashion brands
- To evaluate the effectiveness of enforcement mechanisms, particularly in the digital age.
- To compare India's approach with jurisdictions such as the UK, USA, and other global leaders in anti-counterfeiting law.
- To propose legal, institutional, and policy reforms aimed at strengthening brand protection in India's fashion industry.

### **Structure of the Paper**

The paper is divided into six key sections. Following this introduction, **Section II** provides a comprehensive literature review analyzing consumer behavior, intellectual property rights, and legal scholarship on counterfeiting. **Section III** discusses the research methodology. **Section IV** undertakes the doctrinal discussion, focusing on passing off, exhaustion of rights, and comparative perspectives. **Section V** presents recommendations, offering practical and legislative reforms. **Section VI** concludes with reflections on the way forward for India's fashion industry.

## **LITERATURE REVIEW**

### **Consumer Behaviour and The Psychology of Counterfeit Demand**

A significant body of research indicates that **consumer demand** is the driving force behind the proliferation of counterfeit goods, especially in the fashion sector. Counterfeiting thrives not only because of supply-side opportunism but also because of persistent demand for low-cost imitations of luxury brands. Scholars argue that counterfeit purchases often stem from **status-seeking behavior**, where consumers desire to signal prestige without incurring the

financial burden of authentic luxury goods.<sup>3</sup> This “status signaling” has become particularly pronounced in societies with widening income disparities, where aspirational buyers seek to emulate wealthier peers.

Other psychological factors also explain consumer preference for counterfeit goods. Phau, Ian and Min Teah highlight the role of **social influence**, especially among younger demographics<sup>4</sup> Young consumers, often exposed to celebrity culture and social media influencers, purchase fake fashion items to imitate desired lifestyles. The visibility of counterfeit luxury items on social platforms normalizes the practice, reducing moral stigma. Similarly, study shows that while consumers may recognize ethical concerns surrounding counterfeits, they frequently dismiss these concerns in favor of immediate gratification and cost savings<sup>5</sup>.

The **aesthetic appeal** of counterfeit products further complicates the issue. In some cases, consumers purchase counterfeit goods not because they are deceived but because they admire the design elements—such as stitching, patterns, or logos—that mimic high-end brands<sup>6</sup>. This phenomenon illustrates how the allure of fashion as an artistic and cultural product fuels counterfeit demand.

Adding to this, Page explores the psychological paradox where consumers with financial constraints still engage in luxury consumption—authentic or otherwise—because they associate luxury with **self-esteem, success, and personal identity**<sup>7</sup>. Counterfeit goods become a substitute for consumers who wish to maintain social belonging and personal validation. Thus, demand for counterfeit fashion is not merely economic but deeply embedded in psychological, cultural, and social constructs.

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<sup>3</sup> Keith Wilcox, Hyeong Min Kim & Sankar Sen, Why Do Consumers Buy Counterfeit Luxury Brands? 46 *J. Marketing Res.* 247 (2009).

<sup>4</sup> Ian Phau & Min Teah, Devil Wears (Counterfeit) Prada: A Study of Antecedents and Outcomes of Attitudes Towards Counterfeits of Luxury Brands, 63 *J. Consumer Marketing* 15 (2009).

<sup>5</sup> Ellen Murphy Aycock, Ethics and Aesthetics: Consumer Choices in Counterfeit Fashion, 12 *Int'l J. Consumer Stud.* 201 (2019).

<sup>6</sup> Phau & Teah, *supra* note 4.

<sup>7</sup> Lucy Page, The Psychology of Luxury: Status Signaling and Counterfeit Demand, 28 *J. Consumer Behav.* 102 (2023).

### **Economic And Social Impacts of Counterfeiting**

Counterfeiting imposes serious economic costs on legitimate businesses, governments, and consumers. Luxury and fashion brands rely heavily on intellectual property rights (IPR) to protect their creative investments. As Cannon and Rucker observe, counterfeiting erodes exclusivity, which is the essence of luxury<sup>8</sup> When counterfeit goods flood the market, the value of originality diminishes, leading to reduced brand loyalty and declining revenues for genuine businesses.

At the macroeconomic level, counterfeiting undermines **tax revenues** and contributes to the informal economy, depriving governments of legitimate income. It also fuels organized crime, as counterfeit distribution networks are often linked to smuggling, money laundering, and other illicit activities. The Organisation for Economic Co-operation and Development (OECD) estimates that counterfeit and pirated goods account for over **3% of global trade**, with fashion products being among the most counterfeited categories<sup>9</sup>

From a **social perspective**, counterfeit fashion poses risks to consumer safety. Substandard fabrics, toxic dyes, and poor-quality stitching not only reduce product durability but also create health hazards. For instance, fake leather goods may contain harmful levels of chromium, while counterfeit cosmetics often contain unregulated chemicals. The damage extends beyond health, the normalization of counterfeiting fosters **tolerance of unlawful behavior**, weakening societal respect for intellectual property<sup>10</sup>.

Moreover, counterfeiting discourages **innovation**. Designers who see their work immediately replicated in counterfeit markets lose incentive to invest in creativity. This chilling effect on innovation is particularly damaging in fashion, where constant reinvention is crucial to brand survival.

### **Intellectual Property Doctrines and Legal Scholarship**

Academic literature has paid particular attention to the **intersection of intellectual property law and fashion**. Unlike pharmaceuticals or technology, where patents play a dominant role, fashion law is heavily reliant on **trademarks, copyrights, and passing off**.

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<sup>8</sup> Christopher Cannon & Derek Rucker, Losing the Lustre: How Counterfeits Erode Luxury Brand Value, 41 *J. Consumer Res.* 119 (2019).

<sup>9</sup> Organisation for Economic Co-operation and Development (OECD), *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact* (2019).

<sup>10</sup> Cannon & Rucker, *supra* note 8.

- **Trademarks:** Trademarks protect brand identifiers such as names, logos, and trade dress. The **Trademarks Act, 1999** in India recognizes infringement where marks are identical or deceptively similar. Scholars argue, however, that the Act’s enforcement mechanisms remain underutilized due to judicial delays and lack of specialized training among enforcement officers.<sup>11</sup>
- **Passing Off:** The doctrine of passing off is critical for fashion brands, especially those with unregistered marks<sup>12</sup>. Courts must assess *goodwill* and *misrepresentation*, concepts that are difficult to establish in the fast-paced fashion industry where trends change rapidly. Case law illustrates both the potential and limitations of passing off actions in fashion disputes.
- **Exhaustion of Rights:** The **doctrine of exhaustion**, which limits trademark control after the first sale, has been debated extensively in Indian and international literature. While it promotes free trade, it also complicates enforcement against parallel imports, which counterfeiters exploit<sup>13</sup>.
- **Copyright:** Indian copyright law protects “artistic works” but does not extend adequately to functional clothing designs. Scholars argue that introducing a “**conceptual separability**” **test**—as in the U.S. case *Star Athletica v. Varsity Brands*—could significantly improve design protection in India<sup>14</sup>.

Overall, doctrinal scholarship underscores the need for more tailored legal instruments for fashion, which currently remains under-protected compared to other industries.

### Comparative Literature Across Jurisdictions

The comparative dimension of anti-counterfeiting law has been widely studied. Literature reveals that jurisdictions with robust enforcement—such as the United Kingdom and the United States— demonstrate greater deterrence against counterfeiting.

- **United Kingdom:** Scholars note that the UK’s **Trade Marks Act, 1994** criminalizes counterfeiting more explicitly than India’s 1999 Act<sup>15</sup>. Additionally, border enforcement

<sup>11</sup> Federation of Indian Chambers of Commerce and Industry (FICCI), *Invisible Enemy: A Study of Counterfeit and Smuggled Goods in India* (2021).

<sup>12</sup> Rajiv Malhotra & Ananya Gupta, *Passing Off in Indian Fashion Law: Protecting Unregistered Marks*, 34 *Nat’l L. Sch. India Rev.* 89 (2019).

<sup>13</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

<sup>14</sup> *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405 (2017).

<sup>15</sup> *Trade Marks Act 1994*, c. 26 (UK).

rules empower customs officers to seize counterfeit goods, an area where India struggles due to resource constraints.

- **United States:** The U.S. framework combines civil and criminal remedies under the **Lanham Act**, with severe penalties including imprisonment and asset forfeiture. Public awareness campaigns also play a critical role<sup>16</sup>. Furthermore, copyright law’s “conceptual separability” principle allows for more comprehensive protection of fashion designs.
- **European Union:** EU literature emphasizes the role of the **EUIPO** and customs cooperation across member states. A 2020 EUIPO study revealed that counterfeit clothing and footwear account for **over €26 billion in lost sales annually**, highlighting the scale of the problem<sup>17</sup>.
- **China:** While often criticized as a hub for counterfeit manufacturing, China has undertaken significant reforms, particularly through specialized IP courts. Scholars debate whether these reforms are motivated by international pressure or domestic industrial policy<sup>18</sup>.
- **ASEAN Jurisdictions:** Countries such as Singapore and Malaysia have introduced stricter IP enforcement, partly to position themselves as global fashion hubs. Comparative literature highlights the importance of regional cooperation in tackling cross-border counterfeit flows<sup>19</sup>.

### Emerging Themes in Literature

Across these diverse perspectives, several themes emerge:

- Counterfeiting is both a **legal and socio-cultural phenomenon**, shaped by consumer psychology, economic incentives, and enforcement gaps.
- **Doctrinal gaps** in Indian IP law, especially regarding design protection and exhaustion of rights, leave fashion brands vulnerable.
- Comparative studies show that countries with **criminal liability, strong border enforcement, and consumer education** achieve greater success in reducing counterfeit trade.
- The rapid growth of **e-commerce** introduces new challenges that traditional legal

<sup>16</sup> *Lanham Act*, 15 U.S.C. §§ 1051–1141n (1946).

<sup>17</sup> European Union Intellectual Property Office (EUIPO), *Intellectual Property Rights Infringement: Clothing, Footwear and Accessories Sector* (2020).

<sup>18</sup> World Intellectual Property Organization (WIPO), *Enforcement of Intellectual Property Rights: WIPO Advisory Committee Reports*.

<sup>19</sup> Interpol, *Illicit Trade Report* (2020).

frameworks struggle to address, requiring innovative regulatory solutions.

## RESEARCH METHODOLOGY

### Research Approach

This study adopts a **doctrinal research methodology**, which is widely used in legal scholarship to examine statutes, case law, judicial interpretations, and scholarly writings. Unlike empirical research that collects primary data through surveys or interviews, doctrinal research relies on **secondary sources of law**—legislation, judgments, commentaries, and international treaties. The choice of this method stems from the fact that counterfeiting in the fashion industry is primarily a **legal problem** rooted in the adequacy and enforcement of intellectual property rights (IPR).

By focusing on legal doctrines, this study aims to clarify whether existing provisions in India—such as the **Trademarks Act, 1999**, the **Copyright Act, 1957**, and related consumer protection and customs laws—are sufficiently robust to combat counterfeiting in the fashion sector. At the same time, doctrinal analysis helps identify **gaps and ambiguities** in the legal framework that undermine enforcement.

### Objectives Of the Methodology

The methodology seeks to achieve the following objectives:

- **Examine key doctrines** such as passing off, misrepresentation, and exhaustion of rights in the context of counterfeit fashion goods.
- **Analyse judicial interpretations** by Indian courts, with reference to landmark cases involving trademark and design protection in fashion.
- **Compare India's legal framework** with jurisdictions like the UK, USA, EU, and China to understand best practices.
- **Evaluate enforcement challenges**, including border control, judicial capacity, and e-commerce regulation.
- **Propose doctrinal and policy reforms** tailored to India's unique socio-economic and cultural context.

### Scope Of Research

The scope of this study is deliberately **interdisciplinary within law** but bounded by its focus on the fashion industry. It includes:

- **Statutory Analysis:** A close reading of relevant statutes, including the Trademarks Act,

1999; Copyright Act, 1957; Designs Act, 2000; and the Consumer Protection (E-Commerce) Rules, 2020.

- **Case Law Review:** Landmark judgments such as *Louis Vuitton Malletier v. Atul Jaggi*<sup>20</sup>, *Kapil Wadhwa v. Samsung Electronics*<sup>21</sup>, and others that illuminate judicial approaches to brand protection.
- **International Treaties:** TRIPS Agreement provisions, especially Article 6 on exhaustion of rights, and WIPO frameworks on IP protection.
- **Comparative Jurisdictions:** Doctrinal analysis of the UK's Trade Marks Act, 1994; the U.S. Lanham Act; EUIPO regulations; and reforms in Asian jurisdictions.
- **Scholarly Writings:** Peer-reviewed journals, law review articles, and policy reports that provide doctrinal and policy perspectives.

The research does not conduct consumer surveys or empirical interviews, but it incorporates **secondary empirical data** such as OECD reports, EUIPO studies, and consumer behavior research to contextualize the legal analysis.

### Research Design

The design of this study is **analytical and comparative**, combining three dimensions:

- i. **Doctrinal Analysis:** Examining statutes and case law within India's legal system to assess the adequacy of protections against counterfeiting.
- ii. **Comparative Perspective:** Juxtaposing India's doctrines with those of advanced jurisdictions to highlight strengths and weaknesses.
- iii. **Critical Evaluation:** Identifying enforcement gaps, institutional weaknesses, and socio-cultural factors that complicate legal protection.

This three-dimensional design ensures that the research does not remain purely descriptive but develops **normative arguments** for reform.

### Sources Of Data

The sources of data are primarily **secondary** and include:

- i. **Primary Legal Sources:**
  - Indian statutes (Trademarks Act, Copyright Act, Designs Act, Consumer Protection Act).
  - Judicial decisions of Indian courts.

<sup>20</sup> *Louis Vuitton Malletier v. Atul Jaggi*, 2009 (40) PTC 689 (Del. HC) (India).

<sup>21</sup> *Kapil Wadhwa v. Samsung Elecs. Co.*, 2012 (50) PTC 501 (Del. HC) (India).

- International treaties (TRIPS, WIPO agreements).
- ii. **Secondary Legal Sources:**
  - Commentaries on Indian IP law.
  - Law review articles on counterfeiting and fashion law.
  - Reports by WIPO, OECD, EUIPO, and industry associations such as FICCI.
- iii. **Comparative Sources:**
  - UK Trade Marks Act, 1994, and related judicial decisions.
  - U.S. Lanham Act, case law such as *Star Athletica v. Varsity Brands*.
  - EU directives and enforcement mechanisms.
  - Reforms in Asian jurisdictions (China's specialized IP courts, Singapore's strict customs laws).

By triangulating these diverse sources, the study ensures **depth, accuracy, and cross-jurisdictional validity**.

### **Research Questions Revisited**

The research is guided by the following central questions:

- To what extent do India's legal doctrines support fashion brands in protecting their intellectual property rights against counterfeit goods?
- What doctrinal gaps exist in India's anti-counterfeiting framework, especially in relation to passing off, exhaustion of rights, and design protection?
- How does India's approach compare with jurisdictions that have stronger enforcement mechanisms?
- What reforms are necessary to strengthen India's legal and institutional framework to address the counterfeit fashion trade effectively?

### **Limitations Of the Methodology**

Every research method has limitations, and this study acknowledges the following:

- **Non-empirical Nature:** As doctrinal research, the study does not involve interviews or field surveys of consumers, enforcement officials, or brand owners. While this allows for focused legal analysis, it limits the ability to capture real-world enforcement dynamics.
- **Case Law Constraints:** Indian jurisprudence on fashion counterfeiting is relatively limited compared to Western jurisdictions, which restricts the number of precedents available for analysis.

- **Dynamic E-commerce Environment:** The rapid evolution of digital marketplaces makes it difficult for doctrinal research to fully capture new forms of online counterfeiting such as crypto-based transactions or dark web sales.
- **Comparative Challenges:** While comparisons with foreign jurisdictions provide valuable insights, socio-economic differences limit the extent to which these models can be directly transplanted into India.

Acknowledging these limitations ensures transparency and contextual accuracy in interpreting findings.

### **Rationale For Doctrinal Methodology**

The choice of a doctrinal approach is deliberate for several reasons:

- **Legal Nature of Counterfeiting:** Counterfeiting is first and foremost a **violation of intellectual property rights**. Its regulation and enforcement are defined by legal doctrines and statutory provisions.
- **Doctrinal Gaps in India:** Existing literature reveals insufficient exploration of how doctrines like passing off and exhaustion of rights operate in practice within India's fashion industry.
- **Need for Normative Reform:** By analysing doctrinal adequacy, this methodology allows the research to propose **normative reforms**—legislative amendments, stronger enforcement mechanisms, and judicial interpretations—that can better address the problem.

### **Contribution Of Methodology**

This methodological framework enables the study to contribute to three areas:

- **Doctrinal Scholarship:** Expands the academic literature on intellectual property law in India by applying doctrines to the unique challenges of the fashion industry.
- **Comparative Law:** Provides insights into how India can adapt international best practices while preserving its socio-economic context.
- **Policy Development:** Offers practical recommendations for policymakers, industry stakeholders, and enforcement agencies to develop a holistic anti-counterfeiting strategy.

## **DISCUSSION**

### **The Doctrine of Passing Off in The Fashion Industry**

- *Conceptual Foundations of Passing Off*

The doctrine of **passing off** originates in common law as a remedy against unfair

competition. Its essence lies in preventing one party from misrepresenting its goods or services as those of another, thereby protecting the **goodwill** associated with a brand. In India, passing off remains relevant under both common law and the **Trademarks Act, 1999**, which recognizes passing off actions alongside statutory infringement claims.

Passing off is particularly important for fashion because many emerging brands do not register all elements of their brand identity—such as trade dress, logos, or design features—leaving them

reliant on common law remedies. In the absence of statutory registration, passing off ensures that the **value of reputation and distinctiveness** can still be safeguarded.

#### ○ **Judicial Interpretation in India**

Indian courts have historically been receptive to passing off claims, though their interpretation varies. In *Colgate Palmolive v. Anchor Health and Beauty Care*, the Delhi High Court recognized that trade dress—colors, packaging, and overall presentation—could constitute protectable elements, emphasizing the importance of **visual similarity** in consumer perception<sup>22</sup>.

In the fashion context, *Louis Vuitton Malletier v. Atul Jaggi* (2009) is a significant case where the Delhi High Court restrained counterfeiters from using identical marks<sup>23</sup>. The judgment affirmed that the doctrine of passing off extends to **luxury fashion goods**, protecting brand reputation from dilution through imitation.

#### ○ **Challenges in Proving Goodwill**

The first element of passing off is **goodwill**, defined as the reputation a brand holds in the minds of consumers. For established fashion houses like Louis Vuitton or Gucci, goodwill is readily demonstrable. However, for smaller or regional Indian fashion brands, proving goodwill is more difficult.

- **Geographic limitations:** A brand popular in one region may lack national recognition, weakening its case.
- **Digital complexities:** Online-only brands face challenges proving widespread consumer association, as website traffic or social media following may not be considered sufficient evidence by courts.

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<sup>22</sup> *Colgate Palmolive Co. v. Anchor Health & Beauty Care Pvt. Ltd.*, 2003 (27) PTC 478 (Del. HC) (India).

<sup>23</sup> *Louis Vuitton Malletier v. Atul Jaggi*, supra note 20.

- **Temporal constraints:** Emerging brands may not have operated long enough to establish durable goodwill.

The threshold for proving goodwill is therefore disproportionately burdensome for **new entrants and smaller designers**, leaving them vulnerable to counterfeit exploitation.

○ **Misrepresentation in the Fashion Context**

The second element is **misrepresentation**. In theory, misrepresentation occurs when a defendant presents their goods as those of the plaintiff. However, in practice, counterfeiters rarely replicate products identically. Instead, they alter logos, patterns, or brand names slightly (e.g., “Adibas” instead of Adidas). These **subtle deviations** make it harder for courts to find direct misrepresentation.

Moreover, the **pricing gap** complicates the issue. Some consumers knowingly purchase fakes, fully aware they are not genuine. In such cases, courts must grapple with whether misrepresentation has occurred if consumers themselves are not deceived. Indian jurisprudence remains unsettled on this point, leaving a doctrinal gap.

○ **Implications for Fashion Brands**

Passing off provides protection but is limited by evidentiary hurdles. While established luxury houses succeed in asserting goodwill, **emerging Indian designers struggle to meet the threshold**, creating an uneven landscape where counterfeiting disproportionately harms those least able to defend themselves.

**Exhaustion Of Rights and Parallel Imports**

*i. The Exhaustion Doctrine Explained*

The **doctrine of exhaustion**, also known as the “first sale doctrine,” limits the control of intellectual property owners after the first legitimate sale of a product. Once goods enter the market with the authorization of the rights holder, the IP owner cannot prevent their resale. This principle supports free trade and prevents perpetual monopolies, but it complicates **anti-counterfeiting enforcement**, especially in fashion.

*ii. Indian Jurisprudence*

In *Kapil Wadhwa v. Samsung Electronics*, the Delhi High Court ruled that parallel imports of Samsung printers did not infringe trademarks, provided the goods were unaltered<sup>24</sup>. The case confirmed the principle of **international exhaustion**—once a product is sold anywhere with the

<sup>24</sup> *Kapil Wadhwa v. Samsung Elecs. Co.*, supra note 21.

rights holder's consent, the trademark rights are considered exhausted.

While this interpretation promotes consumer access to cheaper goods, it also opens the door for counterfeiters to **misrepresent counterfeit imports as parallel imports**, exploiting enforcement gaps at borders. Customs authorities often lack the technical expertise to distinguish genuine parallel imports from counterfeits.

### ***iii. Global Debates under TRIPS***

Article 6 of the **TRIPS Agreement** leaves exhaustion of rights to national discretion, resulting in varying practices:

- **National exhaustion** (e.g., USA): Rights are exhausted only within the domestic market.
- **Regional exhaustion** (e.g., EU/UK): Rights are exhausted within the regional bloc.
- **International exhaustion** (e.g., India, post-Wadhwa): Rights are exhausted globally.

Scholars argue that India's preference for international exhaustion reflects a consumer-welfare approach but undermines brand protection<sup>25</sup>. For fashion, where branding is central, international exhaustion significantly weakens enforcement.

### ***iv. Implications for Fashion Brands***

Parallel imports blur the line between legitimate resale and counterfeit infiltration. Without stronger **customs mechanisms** and clearer statutory provisions, counterfeiters can exploit exhaustion principles to legitimize their goods. For fashion brands, this creates an uneven playing field, diluting exclusivity and undermining investment in innovation.

## **COPYRIGHT LOOPHOLES AND FASHION DESIGN PROTECTION**

### **1- Current Position in India**

Indian copyright law, governed by the **Copyright Act, 1957**, protects "artistic works" but does not extend to functional clothing designs. Section 15 excludes designs capable of being registered under the **Designs Act, 2000** once reproduced more than fifty times<sup>26</sup>. This creates a **protection gap** for fashion, where designs often straddle the line between artistic and functional.

### **2- Comparative Perspective**

In the United States, the **Star Athletica v. Varsity Brands** case introduced the principle of **conceptual separability**, allowing decorative elements of clothing (e.g., chevron stripes on cheerleading uniforms) to be protected under copyright if they can be separated from the

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<sup>25</sup> Id.

<sup>26</sup> *The Copyright Act*, No. 14 of 1957, INDIA CODE.

garment's utilitarian purpose<sup>27</sup>. Scholars argue that adopting a similar standard in India could significantly enhance design protection.

The **European Union** provides protection under unregistered Community design rights, which safeguard designs for three years without formal registration<sup>28</sup>. This system offers practical protection for fashion, where trends change rapidly.

### 3- Implications for India

The absence of adequate design protection in India leaves fashion brands vulnerable to imitation. Counterfeiters exploit this gap by replicating garments with minor variations, avoiding liability under both copyright and design law. A more **flexible doctrinal approach**, recognizing the artistic value of fashion designs, is necessary to close this loophole.

## COMPARATIVE PERSPECTIVES

### United Kingdom

The UK's Trade Marks Act, 1994 explicitly criminalizes counterfeiting, allowing for imprisonment and fines. Customs authorities are empowered to seize suspected counterfeit goods under border enforcement regulations<sup>29</sup>. This proactive stance contrasts with India's Trademarks Act, 1999, where criminal penalties exist but are inconsistently enforced.

### United States

The Lanham Act provides both civil and criminal remedies, including asset forfeiture. Public awareness campaigns—such as those run by the U.S. Customs and Border Protection—highlight the dangers of counterfeit goods<sup>30</sup>. The U.S. system emphasizes deterrence through harsh penalties, a model that India could adapt by strengthening sentencing guidelines.

### European Union

The EU's enforcement relies heavily on **customs cooperation**. EUIPO data shows that counterfeit clothing and footwear cause billions in annual losses<sup>31</sup>. Importantly, the EU protects **unregistered designs**, giving fast-moving industries like fashion stronger safeguards.

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<sup>27</sup> *Star Athletica*, supra note 14.

<sup>28</sup> Council Regulation 6/2002, on Community Designs, 2002 O.J. (L 3) 1.

<sup>29</sup> *Trade Marks Act 1994*, c. 26 (UK).

<sup>30</sup> *Lanham Act*, 15 U.S.C. §§ 1051–1141n (1946); U.S. Customs & Border Protection, *Intellectual Property Rights Seizure Statistics* (2021).

<sup>31</sup> EUIPO, supra note 17.

### China

Despite its reputation as a major source of counterfeits, China has invested in **specialized IP courts** and harsher penalties for repeat offenders<sup>32</sup>. However, scholars debate whether enforcement is consistent or primarily symbolic. Nonetheless, China's institutional investment offers lessons for India, particularly the value of specialized IP benches.

### ASEAN Jurisdictions

Countries like Singapore and Malaysia enforce stricter border controls and have invested in **regional cooperation** against counterfeit trade<sup>33</sup>. For India, regional collaboration within SAARC or BIMSTEC could strengthen enforcement against cross-border counterfeit flows.

### EMERGING CHALLENGES: E-COMMERCE AND DIGITAL COUNTERFEITING

#### *1- Online Marketplaces as Hotspots*

With the growth of e-commerce, counterfeit sales have shifted from street markets to online platforms. Studies reveal that a significant share of counterfeit fashion is sold through platforms like Amazon, Flipkart, and social media marketplaces<sup>34</sup>.

#### *2- Enforcement Difficulties*

Online counterfeiting presents unique challenges:

- **Anonymity of sellers** makes prosecution difficult.
- **Volume of listings** overwhelms brand enforcement teams.
- **Jurisdictional complexities** arise when sellers, buyers, and servers are located in different countries.

#### *3- Regulatory Responses*

India introduced the **Consumer Protection (E-Commerce) Rules, 2020**, requiring platforms to provide accurate product information and disclose seller details<sup>35</sup>. However, enforcement remains patchy, and platforms often evade accountability.

### SYNTHESIS OF FINDINGS

From the analysis above, several key findings emerge:

- 1- **Passing off** provides essential protection but remains evidentially burdensome for small and emerging brands.

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<sup>32</sup> OECD, supra note 9.

<sup>33</sup> Interpol, supra note 19.

<sup>34</sup> FICCI, supra note 11.

<sup>35</sup> *Consumer Protection (E-Commerce) Rules, 2020*, Gazette of India, G.S.R. 462(E).

- 2- **Exhaustion of rights** under Indian law favours consumers but undermines brand exclusivity, creating loopholes exploited by counterfeiters.
- 3- **Copyright law** fails to adequately protect fashion designs, leaving India behind jurisdictions like the U.S. and EU.
- 4- **Comparative jurisdictions** demonstrate that criminal liability, strong border enforcement, and consumer education are critical to effective anti-counterfeiting regimes. The **digital economy** introduces new challenges that require updated legal and regulatory strategies.

### RECOMMENDATIONS

Counterfeiting in the fashion industry is a multi-dimensional challenge, requiring reforms that extend beyond doctrinal clarification. Based on the doctrinal, comparative, and critical analysis presented in Section IV, this paper recommends a comprehensive anti-counterfeiting strategy for India that integrates legal reform, institutional strengthening, technological innovation, and consumer engagement.

#### Legislative Reforms

##### 1- *Explicit Recognition of Counterfeiting in the Trademarks Act, 1999*

While the **Trademarks Act, 1999** criminalizes infringement, it does not provide a clear statutory definition of “counterfeiting.” Introducing a **separate, explicit offense** would:

- Distinguish counterfeiting from ordinary infringement.
- Allow for enhanced penalties, particularly in cases of large-scale or repeat violations.
- Signal to courts and enforcement agencies that counterfeiting is a grave economic and social crime, not merely a private dispute.

##### 2- *Strengthening Design Protection*

The **Copyright Act, 1957** and **Designs Act, 2000** create overlapping but inadequate protection for fashion designs. Reforms could include:

- Adopting a “**conceptual separability**” test, similar to the U.S. *Star Athletica* doctrine, to protect decorative aspects of clothing.
- Introducing **short-term unregistered design rights** (3–5 years), as in the European Union, to safeguard fast-changing fashion trends without imposing registration burdens.
- Clarifying Section 15 of the Copyright Act to ensure that artistic elements of fashion

retain protection even when mass-produced.

### **3- Revisiting Exhaustion of Rights**

India's current preference for **international exhaustion** under *Kapil Wadhwa v. Samsung Electronics*<sup>36</sup> facilitates consumer access but weakens brand control. Legislative clarification is necessary to:

- Adopt a **national or regional exhaustion model**, balancing consumer welfare with brand protection.
- Provide **statutory guidance to customs authorities** to distinguish genuine parallel imports from counterfeit goods.

### **4- Harmonization with International Standards**

India is a member of WTO and WIPO, but domestic law lags behind international best practices. Incorporating elements of the EUIPO's enforcement model or the U.S. Lanham Act could help modernize India's anti-counterfeiting regime.

## **JUDICIAL AND DOCTRINAL REFORMS**

### **Specialized IP Benches and Fast-Track Courts**

Judicial delays undermine enforcement. Establishing specialized IP benches in High Courts or creating fast-track courts for counterfeiting disputes would:

- Provide quicker relief to brand owners.
- Develop judicial expertise in fashion-specific IPR issues.
- Encourage consistent interpretation of doctrines like goodwill, misrepresentation, and deceptive similarity.

### **Lowering Evidentiary Burdens for Emerging Brands**

Current jurisprudence requires extensive proof of goodwill, disadvantaging smaller designers. Courts should adopt a **flexible standard**, recognizing indicators such as:

- Online presence and social media following.
- Media coverage or participation in fashion weeks.
- Customer testimonials and local recognition.

This would democratize access to passing off remedies and protect India's growing base of

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<sup>36</sup> *Kapil Wadhwa v. Samsung Elecs. Co.*, supra note 21.

independent designers.

**i. Strengthening Remedies**

Courts should expand beyond injunctions to grant:

- Punitive damages against counterfeiters.
- Account of profits to disgorge unlawful gains.
- Exemplary costs to deter frivolous defences.

**INSTITUTIONAL AND ENFORCEMENT REFORMS**

**1- Customs and Border Protection**

Border enforcement is India’s weakest link. Recommendations include:

- Creating a specialized IPR cell within customs, staffed by experts trained in distinguishing genuine from counterfeit fashion goods.
- Developing brand–customs partnerships, where rights holders share databases of product identifiers with customs officers.
- Introducing risk-based profiling systems to flag suspicious consignments based on trade routes, volume, and importer history.

**2- Police and Investigative Agencies**

- Counterfeiting is often treated as a civil wrong, leading to lackluster enforcement. Training modules should be developed to:
  - Educate police officers on recognizing counterfeit fashion goods.
  - Clarify that counterfeiting is a **criminal offense** with serious economic and social harms.
  - Encourage coordinated raids with brand owners and investigative agencies.

**3- Public Prosecutors and Judicial Officers**

Workshops and continuing legal education programs can sensitize judicial officers and prosecutors to the complexities of counterfeit fashion litigation, ensuring consistent and informed decision- making.

**TECHNOLOGICAL INTERVENTIONS**

**1- Digital Tracking Systems-** Brands and regulators can deploy technologies such as:

- Blockchain-based authentication, where each genuine product is tagged with a verifiable digital certificate.
- QR code and NFC tags embedded in clothing labels to allow consumers to instantly

verify authenticity.

- AI-driven monitoring tools that scan e-commerce platforms for counterfeit listings.

**2- Platform Accountability-** E-commerce platforms should be legally required to:

- Proactively monitor and remove counterfeit listings.
- Disclose seller details to both consumers and enforcement agencies.
- Provide a “**verified authenticity**” badge for products sourced directly from brand owners.

The **Consumer Protection (E-Commerce) Rules, 2020** already impose some obligations, but stronger penalties for non-compliance are necessary.

### **3- Collaborative Databases**

India could establish a **national counterfeit monitoring system**, pooling information from brands, enforcement agencies, and consumers. This would improve intelligence-sharing and support targeted interventions.

## **CONSUMER AWARENESS AND SOCIAL RESPONSIBILITY**

### **1. Public Awareness Campaigns**

Counterfeiting thrives because consumers underestimate its harms. Government agencies, industry associations, and fashion councils should launch campaigns emphasizing that counterfeit goods:

- Endanger consumer health and safety.
- Fund organized crime networks.
- Undermine local designers and artisans.

### **2. Educational Interventions**

Incorporating IPR awareness into school and university curricula can create long-term cultural respect for intellectual property. Fashion schools, in particular, should educate students about the legal dimensions of design protection.

### **3. Incentivizing Ethical Consumption**

Brands can adopt positive reinforcement strategies, such as:

- Rewarding consumers who report counterfeit sellers.
- Offering discounts or loyalty points for recycling counterfeit items surrendered to brand outlets.
- Promoting sustainable, ethically produced fashion as alternatives to cheap counterfeits.

## INTERNATIONAL AND REGIONAL COOPERATION

**1- Bilateral and Multilateral Engagement-** India should strengthen its participation in:

- WIPO's Advisory Committee on Enforcement, sharing best practices and accessing global resources.
- OECD and Interpol initiatives against transnational counterfeiting.
- Regional cooperation within SAARC and BIMSTEC, focusing on cross-border counterfeit flows from neighbouring countries.

## **2- Learning from Comparative Models**

India can adapt lessons from:

- The EU's unregistered design rights, providing flexible protection for short-lived fashion trends.
- The U.S. punitive damages regime, which deters counterfeiters through severe financial consequences.
- China's specialized IP courts, which, despite criticisms, show the effectiveness of institutional specialization.

### **A MULTI-PRONGED STRATEGY FOR INDIA**

The fight against counterfeit fashion cannot be won through legislation alone. A successful anti-counterfeiting regime must combine:

- 1- **Clear laws** that define counterfeiting and provide tailored remedies.
- 2- **Efficient courts and enforcement agencies** equipped with the expertise and resources to act swiftly.
- 3- **Technological innovations** that empower both regulators and consumers to distinguish genuine from fake.
- 4- **Public engagement**, ensuring that consumers understand the harms of counterfeiting and make informed choices.
- 5- **International cooperation**, recognizing that counterfeiting is a global trade issue that transcends borders.

## CONCLUSION

The Indian fashion industry stands at a crossroads. On one hand, it is a thriving sector that blends cultural heritage with modern innovation, contributing significantly to both domestic

growth and global recognition. On the other hand, it is deeply vulnerable to the rising tide of counterfeit goods, which threaten not only the economic sustainability of brands but also the integrity of India's creative ecosystem.

This paper has sought to address this tension through a **doctrinal and comparative analysis of anti-counterfeiting law in India**, focusing on the adequacy of existing legal doctrines, the gaps in enforcement, and the lessons to be drawn from international best practices. The findings reveal both strengths and weaknesses in the current system, underscoring the urgent need for reform.

### **Key Doctrinal Insights**

The analysis of **passing off** demonstrates that while the doctrine remains a vital common law remedy for unregistered marks, it disproportionately favors well-established brands. Smaller and emerging designers, who lack extensive consumer recognition, struggle to prove goodwill and misrepresentation, leaving them unprotected against counterfeiters. This imbalance undermines innovation and discourages entrepreneurship in the Indian fashion sector.

The doctrine of **exhaustion of rights** further complicates brand protection. India's embrace of international exhaustion, following the *Kapil Wadhwa v. Samsung Electronics*<sup>37</sup> decision, prioritizes consumer access to cheaper goods but weakens brand exclusivity. Parallel imports, often indistinguishable from counterfeits at the border, blur the line between legitimate and illegitimate trade. Without stronger customs mechanisms and legislative clarity, counterfeiters will continue to exploit these ambiguities.

In the realm of **copyright and design protection**, the gaps are particularly glaring. Section 15 of the Copyright Act, 1957, effectively excludes fashion designs from copyright protection once mass-produced, while the Designs Act, 2000, imposes registration burdens ill-suited to fast-moving fashion cycles. Comparative jurisdictions, such as the United States with its *Star Athletica*<sup>38</sup> ruling and the European Union with its unregistered design rights, demonstrate more adaptive frameworks. India's failure to provide equivalent protection leaves its designers exposed to imitation and discourages long-term investment in creativity.

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<sup>37</sup> Id.

<sup>38</sup> *Star Athletica*, supra note 14.

### **Enforcement And Institutional Weaknesses**

Doctrinal protections are only as strong as their enforcement. The Indian enforcement landscape is marred by judicial delays, limited border control, inadequate police training, and inconsistent penalties. Counterfeiting is too often treated as a minor civil dispute rather than a serious criminal offense with significant social and economic harms.

The challenge is compounded by the rise of **e-commerce and digital platforms**, which provide counterfeiters with new avenues to reach consumers anonymously and at scale. While the Consumer Protection (E-Commerce) Rules, 2020, impose some obligations on online platforms, weak compliance and limited penalties reduce their effectiveness. Without stronger regulatory oversight and technological solutions, digital counterfeiting will continue to outpace traditional enforcement mechanisms.

### **Comparative Lessons**

The comparative analysis highlights valuable lessons for India:

- The **United Kingdom** criminalizes counterfeiting explicitly and empowers customs authorities with broad seizure powers.
- The **United States** enforces severe civil and criminal penalties under the Lanham Act, reinforced by strong consumer awareness campaigns.
- The **European Union** combines customs cooperation with flexible design rights tailored to fast-changing industries like fashion.
- **China**—despite its reputation as a counterfeiting hub—has demonstrated the potential of specialized IP courts in strengthening enforcement.

These jurisdictions show that successful anti-counterfeiting regimes require a multi-pronged approach, integrating doctrinal clarity, institutional specialization, and consumer engagement.

### **Towards A Holistic Indian Strategy**

The recommendations advanced in this paper collectively form a blueprint for reform:

- 1- **Legislative Reforms:** Explicit recognition of counterfeiting as a distinct offense, stronger design protection, recalibration of exhaustion rules, and harmonization with international best practices.
- 2- **Judicial Innovations:** Specialized IP benches, flexible evidentiary standards for goodwill, and expanded remedies including punitive damages and account of profits.

- 3- **Institutional Strengthening:** Enhanced customs capacity, better-trained police forces, and continuous judicial education on counterfeit litigation.
- 4- **Technological Integration:** Deployment of blockchain, QR codes, and AI-driven monitoring systems, coupled with stricter obligations for e-commerce platforms.
- 5- **Consumer Awareness:** Campaigns to highlight the dangers of counterfeiting, educational initiatives to foster respect for IPR, and incentives for ethical consumption.
- 6- **International Cooperation:** Active participation in WIPO, OECD, and regional platforms to strengthen cross-border enforcement and intelligence-sharing.

By pursuing these reforms, India can transition from a reactive system that struggles against counterfeiters to a **proactive, deterrence-based framework** that protects both consumers and creators.

### **Broader Implications**

The stakes of this debate extend beyond legal technicalities. Counterfeiting undermines not only brand revenues but also cultural heritage. India's fashion industry draws heavily on artisanal crafts and traditional textiles. When these are counterfeited, it is not just a matter of lost sales but of eroded cultural identity. Effective legal protection is thus essential to preserving India's intangible heritage and ensuring that artisans and designers receive fair recognition for their contributions.

Moreover, counterfeiting has implications for public health, consumer safety, and organized crime. Fake products often use hazardous materials, posing health risks. The illicit profits fund criminal networks, creating broader security concerns. Addressing counterfeiting is therefore a matter of both economic policy and social justice.

### **Final Reflections**

India's fashion industry is poised to be a global leader, but its growth will remain fragile if counterfeit markets continue to flourish unchecked. The doctrinal tools exist, but they require **clarification, expansion, and consistent enforcement**. Comparative lessons demonstrate that there is no single solution; rather, the most effective systems combine legal reform, institutional investment, and public engagement.

Ultimately, the fight against counterfeit fashion is not solely about protecting profits. It is

## LEX MENTE

about safeguarding **creativity, innovation, and cultural integrity**. By adopting a holistic strategy that balances consumer welfare with brand protection, India can chart a path that not only secures its place in the global fashion landscape but also reinforces its identity as a nation of creativity and craftsmanship.

