

Can the law fix the problems of fashion? An empirical study on social norms and imbalance of power in the fashion industry.

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1. Scope of the study and research methods.

It does not seem controversial that intellectual property laws are not fit for the fashion industry.¹ It usually follows the call on lawmakers to amend existing laws in order to ensure that creativity be rewarded.² Some have argued that there would be no need for reforms, because fashion is regulated by social norms,³ and the industry ‘benefits from widespread copying.’⁴ This would mean, for instance, that generally designers would refrain from copying in compliance with the fashion community’s norms, regardless of whether said copying is

¹ See, e.g. Violet Atkinson, Viviane Azard, Julien Canlorbe and William van Caenegem, ‘A comparative study of fashion and IP: trade marks in Europe and Australia’ (2018) 13(3) *JIPLP* 194.

² In the US, see the Innovative Design Protection Act of 2012, S.3523, 112th Cong. (2012). On its withdrawal see G Jimenez and B Kolsun, *Fashion Law: A Guide for Designers, Fashion Executives & Attorneys* (2nd Edition, Fairchild Books 2014) 69.

³ K Raustiala and C Sprigman, ‘The Piracy and Paradox: Innovation and Intellectual Property in Fashion Design’ (2006) 92 *Va L Rev* 1687.

⁴ F Montalvo Wirtzburg, ‘Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the United States and the European Union’ (2017) 107(6) *The Trademark Reporter* 1131, 1149.

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lawful or not. Researchers⁵ recently have shown how the regulation of creativity by social norms is not necessarily a positive fact. In the same vein, this author has been carrying out empirical qualitative research to map social norms and how these are interwoven with the imbalance of power throughout the fashion’s supply chain. If the law, including intellectual property law, is not a primary concern for the players of the industry, potential reforms risk being useless, if not accompanied by broader interventions that address said imbalance. Fashion is a reminder that economic rewards are not the only incentive to creativity. However, one should not take for granted that alternative incentives be better than intellectual property rights.

In terms of research methods, alongside a EU- and UK-based legal analysis, this author in-depth interviewed eighteen fashion stakeholders, eight of which working on the creative side of fashion,⁶ ten on the legal one.⁷ Snowball sampling was followed to reflect the quasi-sectary features of the fashion industry.⁸ The difficulty to find fashion creatives willing to be interviewed may confirm such depiction of the fashion community. Unlike quantitative research, qualitative methods do not aim to be representative of the entire relevant population, nor to present results that could be universally generalised.⁹ Therefore, despite the relatively low number of interviews, clear threads have been emerging, hence this author decided to present the results based on the collected data. Future research should attempt to broaden the sample including representatives of all the professional categories involved in the industry.

2. Imbalance of power in the fashion industry

When this author approached some fashion stakeholders saying that he wanted to interview them about power inequalities, most of them made the assumption that the focus

⁵ S Plamondon Bair and LG Pedraza-Fariña, ‘Anti-Innovation Norms’ (2018) 112(5) *Northwestern University Law Review* 1069.

⁶ These included representative of different professions, such as buyers, models, fashion communication lecturers, designers, social media managers, and independent brands. Three of the interviewees were the legal representatives of important organisations representing the interests of their profession. All participants asked to remain anonymous.

⁷ These were Fashion Law lecturers, PhD students in Fashion Law, IP practitioners in the UK, Italy, and Greece, IP lecturers and professors, and employment lawyers.

⁸ IM Dragan and A Isaic-Maniu, ‘Snowball sampling completion’ (2013) 5(2) *Journal of Studies in Social Sciences* 160 underline how snowball sampling is ideal for closed groups and hidden populations, but they admit that there is a major disadvantage, i.e. “the absence of objective, quantitative criteria in taking a decision to conclude the investigation” (ibid 160).

⁹ See e.g. BL Berg and H Lune, *Qualitative research methods for the social sciences* (8th edn Pearson Boston 2011).

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would have been on the outsourcing of part of the manufacture to factories in developing countries where the standard of protection of human rights and employment rights is often lower than the European one.¹⁰ In 2017, Oxfam denounced how powerful brands are responsible for the poverty of workers in countries like Bangladesh, where only 2% of the price paid for an item of clothing goes towards factory wages.¹¹ The issue is worsened by tax avoidance practices that do not make possible a redistribution of wealth.¹² The problem is closely related to the lack of transparency in the supply chain; most of the biggest global fashion and apparel brands and retailers do not disclose sufficient (if at all) information about their suppliers, their practices, and socio-environmental impact.¹³ While the sustainability is increasingly on many companies' agenda,¹⁴ the commitment is still overall low and not growing fast enough.¹⁵ However, the blockchain could be an important tool to achieve an ethical fashion by making the supply transparent.¹⁶

Even though human rights are a primary concern, this research project moved from the intuition that power inequalities was a much more pervasive phenomenon in the fashion industry¹⁷ and, therefore, aimed at mapping it throughout the supply chain. For instance, a study found that there is an imbalance of power between Western original brand manufacturers' buyers and Chinese original equipment manufacturers' suppliers.¹⁸ However, more recent trends seem to suggest that the balance of power is shifting in favour of Asian companies.¹⁹ Said imbalance can have devastating consequences when it leads to sexual harassment, as uncovered in November 2017 by some British models with regards to the abuses perpetrated

¹⁰ See, for instance, Landon Peoples, 'How to tell if a child made your clothes' (*Refinery29*, 21 April 2018) <<https://www.refinery29.uk/2018/04/197022/child-labor-fashion-checklist>> accessed 10 May 2018.

¹¹ S Nayeem Emran and Joy Kyriacou, *What she makes. Power and poverty in the fashion industry* (Oxfam Australia 2017) 3.

¹² 'The vile excess and inequality of the global fashion industry' (*Huck*, 28 April 2016) <www.huckmagazine.com/perspectives/reportage-2/vile-excess-inequality-global-fashion-industry/> accessed 10 May 2018.

¹³ Fashion Revolution, *Fashion Transparency Index* (Fashion Revolution 2018). cf CHRB, *Corporate Human Rights Benchmark* (CHRB 2017). Costco Wholesale is the worst performer in terms of human rights.

¹⁴ Sustainability credibility is one of the trends identified by Business of Fashion and McKinsey & Company, *The State of Fashion 2018* (BoF and McKinsey 2018). That study predicts that sustainability 'will evolve to be an integral part of the planning system where circular economy principles are embedded throughout the value chain' (ibid 12).

¹⁵ Morten Lehmann, Sofia Tärneberg, Thomas Tochtermann, Caroline Chalmer, Jonas Eder-Hansen, Dr. Javier F. Seara, Sebastian Boger, Catharina Hase, Viola Von Berlepsch, and Samuel Deichmann, *Pulse of the fashion industry 2018* (Global Fashion Agenda and The Boston Consulting Group 2018).

¹⁶ A Calis, 'Blockchain is to bring the fashion supply chain to its right way!' (*Medium*, 17 March 2017) <medium.com/@anicalis/supply-chain-blockchain-fashion-transparency-41e1c49b3108> accessed 10 May 2018.

¹⁷ According to J Zhao, *The Chinese Fashion Industry: An Ethnographic Approach* (Bloomsbury 2013) 151, uneven power is 'vested with various parties connected to the network of clothing.'

¹⁸ Zhao (n) 151.

¹⁹ R Young, 'In depth: Globalisation reboot – Fashion's new centre of gravity' in *Business of Fashion* (n) 34.

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 by photographers.²⁰ Edie Campbell, in particular, denounces a huge power imbalance that is at the basis of an ‘unspoken contract’²¹ according to which models give up ownership of their body. Similarly, male model Cory Bond, in talking about him being sexually assaulted and drugged, pointed out that he never spoke out because the assailants were powerful and he did not want to lose his job.²² This may be read in the context of the more general problem of ‘gender power imbalance throughout the industry.’²³ In 2018, similar episodes were reported²⁴ and the public outrage that followed led to *Vogue* terminating the accused photographers’ contracts²⁵ and Condé Nast adopting a code of conduct to prevent power abuses.²⁶ More recently, some have denounced the dominance of so-called influencers, although brands are expected to ‘right the power imbalance’²⁷ in growing influencer marketing industry. Some positive changes must be acknowledged. The power imbalance between designers and models allowed the imposition of very unhealthy lifestyle, but LVMH²⁸ and Kering²⁹ joining forces to end the use of size zero models is a step forward,³⁰ even though much still needs to be done to re-balance the relevant relationship.³¹ Sometimes, competition law has been used to address

²⁰ O Petter ‘Edie Campbell slams fashion industry for model abuse in open letter’ (*Independent*, 10 November 2017) <www.independent.co.uk/life-style/fashion/edie-campbell-fashion-industry-model-sexual-abuse-open-letter-a8047591.html> accessed 10 May 2018.

²¹ K Borovic, ‘Edie Campbell’s Comments On Sexual Assault In The Fashion Industry Sheds Light On An Important Issue’ (*Bustle*, 10 November 2017) <www.bustle.com/p/edie-campbells-comments-on-sexual-assault-in-the-fashion-industry-sheds-light-on-important-issue-3345750> accessed 10 May 2018.

²² S Conti, ‘Edie Campbell pens open letter on model abuse’ (*WWD*, 9 November 2017) <wwd.com/fashion-news/fashion-features/edie-campbell-pens-open-letter-on-model-abuse-11044720/> accessed 10 May 2018.

²³ ‘Women. Fashion. Power’ (*Centre for Sustainable Fashion*, 8 March 2018) <sustainable-fashion.com/blog/womenfashionpower/> accessed 10 May 2018.

²⁴ J Bernstein, M Schneier, and V Friedman, ‘<https://www.nytimes.com/2018/01/13/style/mario-testino-bruce-weber-harassment.html>’ (*The New York Times*, 13 January 2018) <www.nytimes.com/2018/01/13/style/mario-testino-bruce-weber-harassment.html> accessed 10 May 2018.

²⁵ ‘Anna Wintour Responds to Mario Testino and Bruce Weber Sexual Misconduct Allegations’ (*Vogue*, 13 January 2018) <www.vogue.com/article/anna-wintour-responds-mario-testino-bruce-weber-sexual-misconduct-allegations> accessed 10 May 2018. On a more jocose note, it would seem that this is the reason why Mario Testino will not be the photographer of the wedding of Prince Harry and Meghan Markle, according to R Mendick, ‘Photographer Mario Testino will not take official Royal wedding portraits after accusations of sexual exploitation’ (*Telegraph*, 14 January 2018) <www.telegraph.co.uk/news/2018/01/14/photographer-mario-testino-will-not-take-official-royal-wedding/> accessed 10 May 2018.

²⁶ V Friedman, ‘Condé Nast Crafts Rules to Protect Models from Harassment’ (*The New York Times*, 13 January 2018) <www.nytimes.com/2018/01/13/fashion/conde-nast-new-code-of-conduct-sexual-harassment-models.html> accessed 10 May 2018.

²⁷ H Milnes, ‘For fashion brands, 2018 will be the year of the “influencer roster”’ (*Digiday UK*, 5 January 2018) <digiday.com/marketing/fashion-brands-2018-will-year-influencer-roster/> accessed 10 May 2018.

²⁸ Brands owned by LVMH include Dior, Fendi, Givenchy, Louis Vuitton, Bulgari, Marc Jacobs, Loro Piana, Guerlain, and Kenzo.

²⁹ Brands owned by Kering include Gucci, Yves Saint Laurent, Bottega Veneta, Balenciaga, Stella McCartney, and Alexander McQueen.

³⁰ LVMH, *The Charter on the working relations with fashion models and their well-being* (LVMH 2017).

³¹ Very enthusiastically, this has been seen as a wake-up call from which radical changes will follow: ‘(t)he tectonic plates of power imbalance are shifting; now it’s time to work as a collective to ensure that awareness results in positive action’ (E Alexander, ‘Why does the fashion industry accept sexual harassment?’ (*Bazaar*, 21

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power imbalance. For example, a number of modelling agencies were fined for colluding on prices thus harming high-street chains, online fashion retailers and consumer goods brands.³² However, this route is not always viable, as shown by the Court of Justice in *Coty v Akzente*,³³ where a luxury brand was allowed to impose restrictive distribution agreements excluding third-party ecommerce platforms.³⁴

2.1. Initial thesis. Inequality of bargaining power as a unifying principle and good faith.

Traditional contract law is based on the assumption that transactions occur between parties that are on the same level in terms of power. One of the theoretical merits of EU consumer law has been to reverse the assumption and build a legal sub-system that is protective of vulnerable parties, whose weakness depends primarily on information asymmetries.³⁵ Imbalance of power is addressed by consumer protection laws that render a number of contractual clauses unenforceable and by giving judges the power to change the content of business-to-consumer (B2C) contracts. However, fashion inequalities are more often in business-to-business (B2B) relationships, rather than in B2C ones. Therefore, it is crucial to assess if there are corrective mechanisms in place and if they are sufficient.

This researcher's thesis was that an answer to the problem could have been considering the imbalance of bargaining power as a unifying principle in contract law, hence overcoming the rigidities of the established categories of vitiating.

January 2018) <www.harpersbazaar.com/uk/fashion/fashion-news/a15174585/fashion-sexual-harassment-testino-richardson/> accessed 10 May 2018.

³² Decision of the Competition & Markets Authority, 'Conduct in the modelling sector' (case CE/9859-14).

³³ Judgement in *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, EU:C:2017:941. See Stephen Barratt, 'Aiming to preserve luxury image can justify restricting competition, rules CJEU as it approves prohibition of discernible third-party online sales platforms' (2018) 13(5) *JIPLP* 354.

³⁴ The preliminary ruling regarded only competition law matters, i.e. the TFEU, art 101(1), and the Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102/1, art 4. However, arguably *Coty* (n) does not seem to comply with the principle of exhaustion, which applies to all intellectual property rights. See Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, OJ L 336/1, art 15; judgement in *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, 78-70, EU:C:1971:59; judgement in *Musik-Vertrieb membran GmbH and K-tel International v GEMA*, 55/80 and 57/80, EU:C:1981:10; judgement in *EMI Electrola GmbH v Patricia Im- und Export and others*, 341/87, EU:C:1989:30.

³⁵ See eg the Consumer Rights Act 2015

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Lord Denning MR, in *Lloyds Bank Ltd. v Bundy*³⁶ suggested that there is in English law a general principle of inequality of power, by which agreements are voidable if resulting from said inequality. In particular,

English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair (...) when his bargaining power is grievously impaired by reason of his own needs or desires, or by his ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.³⁷

The existence of the principle has not been accepted by most scholars³⁸ and subsequent case law,³⁹ but recently it has been suggested that a ‘unifying principle is discernible, but that it should be formulated alternatively as “exploitation of constrained autonomy”.’⁴⁰ However, the prevailing idea⁴¹ is that a contract can be voided at common law or in equity only for duress, undue influence, and unconscionable bargains. One has to add to this the statutory restrictions to freedom of contract introduced by Parliament to protect certain categories, such as consumers, employees, tenants, and investors.

The doctrines of duress, undue influence, and unconscionable bargains could be unified under the principle of inequality of bargaining power, since principles at common law can be developed building on policies expressed by statutory regimes.⁴² As per Sir Thomas Bingham in *Timeload Ltd v British Telecommunications plc*,⁴³ the common law could use protective statutes also beyond their scope ‘as a platform for invalidating or restricting the operation of an oppressive clause.’⁴⁴ The initial hope of this study was to provide evidence that the phenomenon of inequality of bargaining power is becoming a structural element of contemporary transactions. New protective policies to address the inequalities in the fashion

³⁶ [1975] Q.B. 326.

³⁷ *ibid* 328.

³⁸ Neil Andrews, *Contract Law* (2nd edn CUP 2015) 316, refers to it as ‘Lord Denning’s leading balloon.’ See also the less trenchant J Cartwright, *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Clarendon 1991).

³⁹ *National Westminster Bank Plc v Morgan; Pao On v Lau Yiu Long* [1985] AC 686, 708, HL

⁴⁰ M Moore, ‘Why does Lord Denning’s lead balloon intrigue us still? The prospects of finding a unifying principle for duress, undue influence and unconscionability’ (2018) 134(Apr) *LQR* 257.

⁴¹ J Beatson, A Burrows, and J Cartwright, *Anson’s Law of Contracts* (30th edn OUP 2016)

⁴² J Beatson, ‘Duress, Restitution, and Contract Renegotiation’, in *The use and abuse of unjust enrichment* (Clarendon 2001); H Collins, ‘Harmonisation by example: European laws against unfair commercial practices’ (2010) 73(1) *MLR* 89, 113-114.

⁴³ (1995) 3 *EMLR* 459.

⁴⁴ *ibid* 468.

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industry might have contributed to the acceptance on the inequality of bargaining power as a unifying principle.

Another route that this author envisaged as a way to re-balance the relationship throughout the fashion supply chain was good faith. Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd*⁴⁵ innovatively argued that a general term of good faith may be implied under certain conditions. This concept is still far from being accepted,⁴⁶ but courts seem increasingly inclined to imply good faith terms, especially in relational and long-term contracts,⁴⁷ which raised the hopes of many as to its potential as a general organising principle.⁴⁸ This study aimed to explain several doctrines as expressions of the duty of good faith (e.g. duress and inequality of bargaining power), which in turn could have rectified some of inequalities in the fashion industry. Thus, in a cross-fertilisation process, good faith could have been an argument for the recognition of the unifying principle of inequality and, in turn, the latter will be a piece of the good-faith puzzle.

⁴⁵ [2013] EWHC 111 (QB), [2013] 1 C.L.C. 662.

⁴⁶ JW Carter and W Courtney, 'Good faith in contracts: is there an implied promise to act honestly?' (2016) 75(3) *The Cambridge Law Journal* 608; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland LTS*

⁴⁷ In *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent (aka John Kent)* [2018] EWHC 333 (Comm) (22 February 2018) [174], it was held that a joint venture 'the contract made between these parties seems to me to be a classic instance of a relational contract. In my view, the implication of a duty of good faith in the contract is essential to give effect to the parties' reasonable expectations and satisfies the business necessity test which Lord Neuberger in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd (...)* reiterated as the relevant standard for the implication of a term into a contract.' For the recognition of implied good faith terms, see also *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396; *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB); *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch).

⁴⁸ For example KP Berger and T Arntz, 'Good faith as a "general organising principle" of the common law' (2016) 32(1) *Arbitration Int* 167; S Brookes and C Davies, 'Duty of good faith moves step closer' (2018) 160(1497) *Accountancy* 48.