

# DOES FASHION LAW EXIST? A REFLECTION OF CHRISTIAN LOUBOUTIN V. YVES SAINT LAURENT ON INDIA

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## INTRODUCTION

'Fashion is not something that exists in dresses only. Fashion is in the sky, in the street, fashion has to do with ideas, the way we live, what is happening.'<sup>1</sup>

From being called "a lady of the strangest inconstant constitution who changes in the twinkle of an eye"<sup>2</sup> to "a futile matter in itself but an essential part of luxury and of no interest to commerce,"<sup>3</sup> fashion, today, truly has come a long way. Keeping the fashion industry's superficiality in mind, many argue that it concerns itself only with pretentiousness and is unhealthy<sup>4</sup>; therefore a separate field of law emerging out of it would be absurd. While on the other hand, it is said that if fashion industry sales fall then the whole economy would come crumbling down.<sup>5</sup> The fashion industry in India which is currently worth Rs. 270 crore compels one to think, can fashion ever find itself within the realms of law? More importantly, can the designers in India hope for the same level of protection for their creations as their counterparts in the west?

Fashion because of its distinctly creative and non-generic nature finds itself in the midst of trademark protection.<sup>6</sup> The case of *Christian Louboutin v. YSL*<sup>7</sup> revolving around the issue of the trademark of a colour finds itself in the spotlight not just because of the involvement of the big fashion establishments but due to its relevancy in the realm of intellectual property rights. Because of this interplay between these two

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<sup>1</sup>Coco Chanel, as quoted in Karen Karbo, *The Gospel According to Coco Chanel* (Globe Pequot 2011) 221

<sup>2</sup>Herman Freudenberger, 'Fashion, Sumptuary Laws, and Business' (1963) 37(1/2) *The Business History Review* 37, 38

<sup>3</sup>Catherine MSama, 'Liberty, Equality, Frivolity! An Italian Critique of Fashion Periodicals' (2004) 37(3) *Eighteenth-Century Studies* 389, 393

<sup>4</sup>'Size zero and the dark side of the model world' *Mirror* (London, 23 February 2011) <<http://www.mirror.co.uk/news/uk-news/size-zero-and-the-dark-side-of-the-model-112297>> accessed 9 September 2012

<sup>5</sup>Lee Simonson, 'Fashion and Democracy' (1944) 3(3) *The Metropolitan Museum of Art Bulletin* 65, 65

<sup>6</sup>'Meet the Man who Upholds the Laws of Fashion' *Forbes* (New York City, 10 April 2011) <<http://www.forbes.com/sites/jmaureenhenderson/2011/10/04/meet-the-man-who-upholds-the-laws-of-fashion/>> accessed 9 September 2012

<sup>7</sup>778 F Supp 2d 445 (District Court, Second Circuit 2011) [Hereinafter mentioned as "Louboutin"]

separate spheres, does fashion have a future without law? Evidently, law does find itself involved with protection of ideas, symbols, etc. particularly in this industry of which this case is clearly a perfect example of but the question remains as to whether India could ever have a field of law solely devoted to fashion. It would indeed be juvenile to expect an Indian court to quote Jennifer Lopez<sup>8</sup> in acknowledgment of the popularity of a product in its decision; nevertheless it is undeniably fitting when juxtaposed with the American courts.

This is where this paper fundamentally finds itself. Not limiting to mere analogizing, the issue of colour as a trademark has been discussed in the background of the judgement in *Louboutin*. Both the District Court as well as the Court of Appeal decisions have been examined. While Part I puts forward the possibility of fashion law in India, Part II brings forward what sort of law involved in this case. Part III critically analyses the legal and logical verisimilitude of this case followed by conclusion which summarises the entire issue, briefly discussing the consequences of the decision and putting forth suggestions for the future of the concept of fashion law in India.

## PART I

### FASHION INDUSTRY IN INDIA: NOT DIGNIFIED ENOUGH?

Christian Louboutin, a French footwear designer, known for producing high fashion shoes with trademarked signature lacquered red soles awarded by the United States Patent and Trademark Office (colour red claimed as a feature of the mark) brought action against another fashion house Yves Saint Laurent for violating Lanham Act<sup>9</sup> by using red outsoles in its Cruise 2011 collection. The Trademark Act 1999 in India defines Trade Mark and is inclusive of issues relating to trademark of colour or combination of colours.<sup>10</sup> However, cases tackling such subjects have been said to have only a limited application<sup>11</sup> indicating that in India there is a limited protection creative arts. Designers in India have often expressed lack of dignity assigned to their profession by society and the law.<sup>12</sup> *Louboutin*, on the other hand, has glorified

<sup>8</sup>ibid 448

<sup>9</sup>The Lanham Act 1946 (US) contains the federal statutes governing trademark law in the United States.

<sup>10</sup>Trademark Act 1999, s 10 reads

10. Limitation as to colour

(1) A trade mark may be limited wholly or in part to any combination of colours and any such limitation shall be taken into consideration by the tribunal having to decide on the distinctive character of the trade mark.

(2) So far as a trade mark is registered without limitation of colour, it shall be deemed to be registered for all colours.

<sup>11</sup>KC Kailasam and RamuVedaraman, *Law of Trade Marks* (Wadhwa and Company Nagpur 2003) 120.

<sup>12</sup>For example, fashion shows being taxed by the government resulted in huge uproar among the people involved in fashion industry pointing out that in international platform their profession



innovators and has believed in the realness of “non-conformists who march to the beat of their own drums.”<sup>13</sup>

Is fashion design merely a first world concern<sup>14</sup>? Costume professionals in India would probably throw a fit at this proposition because unknowingly or knowingly people do tend to follow it,<sup>15</sup> but are the laws adequately incentivised to comply with international standards? Globally, the answer to this would be in negative. When compared to the other countries, India in intellectual property rights is far behind. According to International Property Rights Index 2012, India ranks 55<sup>th</sup> out of 130 countries in terms of intellectual property rights and their protection for economic well-being.<sup>16</sup> The *Louboutin* case gathers a different symbolization for equating fashion with art and fashion designers as men of commerce. Interestingly, Judge Victor Marrero on the bench of the District Court for the Southern District, New York traced the designer Christian Louboutin’s innovation of vivid red outsoles for woman’s shoes and points out his boldness in stepping away from conforming to the usual fashion. Looking at the industry as a dignified profession goes a long way to show intelligent and sedulous dealing of the court with such issues.

A girl walking on the street with a 7 inch high Manolo Blahnik heels and Ralph Lauren gloves, Hermes scarf wrapped tightly around her waist, Prada handbag hanging from her shoulders and a blue silk Oscar de la Renta dress endorsing her body. Of course, a fashion conscious person would wait no time in reciting the labels and the year in which they came out, some passer-by would admire, some would be envious but is this girl just another girl? Fashion labels are just aren’t fashion labels anymore. The industry is moving towards imaginative and resourceful society and imitative of divergent possibilities.<sup>17</sup> Law throughout its existence has very much been known for its diversity and its reach to every field. Is the impossibility of it concerning itself with fashion so severe? Surely, no one could really control what one would wear but many legislations did come up in the past to the same effect.<sup>18</sup> Defining fashion design would unmistakably be very difficult due to its very fluidity but the same cannot be said for its protection. The Innovative Design Protection and Piracy Prevention Act attempts to define the term ‘fashion design’<sup>19</sup> keeping it very open-

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is recognized in par with others. See ‘Designers upset with entertainment tax on shows’ *Fashion United* (22 May 2012) <<http://www.fashionunited.in/news/fashion/fashion-fraternity-upset-with-entertainment-tax-on-ramp-shows-220520123639>> accessed 9 September 2012.

<sup>13</sup>*Louboutin* (n 8) 448.

<sup>14</sup>Susan Scafidi, ‘F.I.T.: Fashion as Information Technology’ (2008) 59 *Syracuse Law Review* 69, 80.

<sup>15</sup>C Scott Hemphill and Jeannie Suk, ‘The Law, Culture, and Economics of Fashion’ (2009) 61(5) *Stanford Law Review* 1147, 1155.

<sup>16</sup>2012 Report’ (*International Property Rights Index*) <<http://internationalpropertyrightsindex.org/ranking>> accessed 9 September 2012.

<sup>17</sup>Herbert Blumer, ‘Fashion: From Class Differentiation to Collective Selection’ (1969) 10(3) *The Sociological Quarterly* 275, 289.

<sup>18</sup>*Freudenberger* (n 3) 43.

<sup>19</sup>Innovative Design Protection and Piracy Prevention Act Congress Bill (2011-2012) [H.R.2511], s 2(2).

ended. Noticably, India does not have any legislation defining fashion design but its study in law is definitely not a far-fetched apperception. Furthering the discussion, it would be most appropriate to delve intricately into the *Louboutin* case and canvass pressing legal issues.

## PART II

### COLOUR AS TRADEMARK - THE 'SOLE' SEARCHING JOURNEY

'Whether there is something unique about the fashion world that militates against extending protection to a single colour.'<sup>20</sup>

The factual awakening resulting in germination of this suit was that Christian Louboutin who had previously obtained the "Red Sole Mark" trademark and who has become famous in the fashion industry for his close association with red sole which he regarded as "engaging, flirtatious, memorable and the colour of passion and well as sexy"<sup>21</sup> filed an action on 7 April, 2011 asserting claims for trademark infringement and counterfeiting, false designation of origin and unfair competition, trademark dilution, unlawful deceptive acts and practices against Yves Saint Laurent, America for using the same or similar shade of red as that protected by the Red Sole Mark. Christian Louboutin also sought preliminary injunction preventing YSL from marketing its products. YSL claimed that red outsoles had appeared occasionally in its collections dating back to 1970s. The shoe models in contention bore a bright red outsole as part of a monochromatic design in which the shoe is entirely red.

The domain of colour as explained by J. Van Brakel in *The Plasticity of Categories: The Case of Colour* overlaps with many other domains and has numerous similar characteristics.<sup>22</sup> Thus, defining colour would be a formidable undertaking both artistically as well as legally. Can a single colour be entitled to trademark protection? There has been a legal evolution in deciding the aforesaid question and a difference of opinion among various courts; therefore, it is necessary to look at the judiciary tackling this question because of its very inherently combative nature. The possibility of colour along with shape and size being capable of constituting a trade mark was held to be implicitly weak in *Navopharm Ltd. v. Bayer Inc.*<sup>23</sup> The application of register mark for blue coloured water bottle was refused in *TY Nant Spring Water Ltd.'s trade*

<sup>20</sup>*Louboutin*(n 8)451.

<sup>21</sup>*Louboutin* (n 8) 447.

<sup>22</sup>J Van Brakel, 'The Plasticity of Categories: The Case of Colour' (1993) 44(1) *The British Journal for the Philosophy of Science* 103, 114.

<sup>23</sup>[2000] 2 F C 553.



*mark Application*.<sup>24</sup> On the other hand *Dyson Ld'strade mark Application*<sup>25</sup> said that if a single colour unusual and peculiar to a particular trade has come to be known to signify a particular class of goods, then it could be registered. The third board of appeal recognized that in exceptional cases the link between colour and trademark can be made because of its distinctive character in *Wrigley Jr. Company's Application (light green)*.<sup>26</sup>

Looking at the cases with reference to this issue in India, again different courts have given different interpretation. With no particular history of precedents available for trademark of a single colour, reliance on foreign judgements is common. Besides the colour being similar on the product, the court in *J. & P. Coats Ltd. v. Chadha & Company*<sup>27</sup> rejected the plea for injunction because the similarity of colour was held not to be of a conclusive, dominating or leading characteristic. Taking the contention of the colour scheme adopted by the plaintiffs had come to be associated in the market exclusively with their product, the court in *Vicco Laboratories; Bombay v. Hindustan Rimmer, Delhi*<sup>28</sup> restrained the defendants from using colour scheme deceptively similar to the one in question. An ad interim injunction was vacated in *Surya Roshini Ltd. v. Metalman Industries Ltd.*<sup>29</sup> on the grounds that use of a particular colour which is functional in its nature whether in single or double band would not cause any confusion. Keeping clear of the question of similarity or dissimilarity between trade names, the court in *Colgate Palmolive Company v. Anchor Health and Beauty Care Pvt. Ltd.*<sup>30</sup> looked into the likelihood of causing "confusion or deceptiveness in the minds of unwary customers irrespective of dissimilarities in the trade name."<sup>31</sup> Acknowledging the fact that a single colour can be registered as a trade mark, the defendants by way of ad interim injunction were restrained from using the colour combination of red and white in that order on their product cover.

Among all these cases, *Qualitex Co. v. Jacobson Products Co., Inc.*<sup>32</sup> stands out. The United States Supreme Court held in this case that colour alone might be protected as a trademark provided that the colour has reached a secondary meaning and is identified and distinguished with a particular brand. This case reversed a decision of the Ninth Circuit which had declared colour *per se* ineligible for trademark protection. It observed that "it is difficult to find, in basic trademark objectives, a reason to disqualify absolutely the use of a colour as a mark."<sup>33</sup> The functionality of the colour will be looked at further in this paper but here, the issue of colour acquiring

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<sup>24</sup>[2000] RPC 55.

<sup>25</sup>[2003] RPC 47.

<sup>26</sup>[1999] ETMR 214.

<sup>27</sup>[1967] AIR 141 Delhi

<sup>28</sup>[1979] AIR 114 Delhi.

<sup>29</sup>2001 (21) PTC 777 (Del) (HC).

<sup>30</sup>108 (2003) DLT 51 (HC).

<sup>31</sup>*ibid* 59.

<sup>32</sup>514 U.S. 159 (1995).

<sup>33</sup>*ibid* 164.

trademark by the virtue of attaining secondary meaning becomes relevant. Several evidentiary factors such as advertising expenses, sales volume, unsolicited media coverage, requests for licenses, and the duration of exclusive use and consumer surveys<sup>34</sup> establish the secondary meaning of a product.

The District Court in *Louboutin* said that because colour in the fashion industry serves "ornamental and aesthetic functions vital to robust competition,"<sup>35</sup> Christian Louboutin's red outsole was unlikely to be proven to be entitled for trademark protection even though it had gained enough public recognition in the market to acquire secondary meaning. It held that a single colour can never serve as a trademark in the fashion industry. Extracting the symbolization of 'secondary meaning' and applicability of the doctrine of secondary meaning becomes questionable. In *re Owens-Corning Fiberglass Corp.*,<sup>36</sup> while looking at whether the product established secondary meaning or not, the court said that the sheer size of the budget alone cannot be sufficient, the degree to which the promotional efforts attribute as a mark is important. Although consumer surveys form part of assessment of secondary meaning, yet according to *International Kennel Club, Inc. v. Mighty Star, Inc.*,<sup>37</sup> it can be demonstrated without consumer surveys at all. But when surveys become essential, *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*<sup>38</sup> said that the survey designs become a crucial aspect. The Allahabad High court in *Chemical Industrial and Pharmaceutical Laboratories Ltd. v. Prasanta Rotan Dhan*<sup>39</sup> discussing 'secondary' meaning illustrated that it meant "the name had become distinctive of a particular manufacturer rather than descriptive of the goods"<sup>40</sup> Further in *Kanungo Media (P) Ltd. v. Rgv Film Factory And Ors.*,<sup>41</sup> in explaining secondary meaning of a literary work, the assumption by the consumers that goods and works were controlled by a particular source rather than the trade name of that source was considered important.

Would this be applicable to fashion designs in Indian markets too? Taking a hypothetical example, if RohitBal wants to create a cosmos space effect on his designs when his aim is to create colour compatibility or a specific shade of purple, there is no alternative but to use the colour purple. The question is not whether other designers can compete with RohitBal by offering black cosmos effect to the consumers. The question is whether Bal's competitors can make purple cosmos effect for consumers who want purple cosmos effect for its aesthetic appeal. By the same token, the question should be whether a colour works better or looks better than

<sup>34</sup>Jay Dratler, 'Intellectual Property Law: Commercial, Creative and Industrial Property'(1991)9.02 [3] Law Journal Press.

<sup>35</sup>*Louboutin*(n 8) 449.

<sup>36</sup>774 F2d 1116 (US Court of Appeals, Federal Circuit 1985).

<sup>37</sup>846 F2d 1079 (US Court of Appeals, Seventh Circuit 1988).

<sup>38</sup>716 F2d 854 (US Court of Appeals, Eleventh Circuit 1983).

<sup>39</sup>AIR 1950 All 258 (HC).

<sup>40</sup>*ibid*20.

<sup>41</sup>138 (2007) DLT 312 (HC).



potential alternatives for the product in question.<sup>42</sup> Here, it would be difficult for the court to decide who decides the relevant aim of a colour. A consumer who equates a particular colour effect with a particular source would inevitably contribute to the establishment of secondary meaning of that product. Would RohitBal be then entitled to trademark protection for that shade of purple? The computation of secondary meaning here would create a problem because restriction of a particular colour to one designer could lead to monopoly in the market where creativity and artistic elements of design define people's career.

Taking a departure from the District Court, the United States Court of Appeals in *Louboutin*<sup>43</sup> said that the District Court's holding that a single colour in fashion industry can never serve as a trademark was inconsistent with the Supreme Court's decision in *Qualitex Co. v. Jacobson Products Co.* and his signature red lacquered outsole was concluded to have acquired a limited "secondary meaning" as a distinctive symbol identifying the brand. Christian Louboutin's red outsole was deemed to merit protection in accordance with principles laid down in *Louis Vuitton Malletier v. Dooney & Bourke Inc.*<sup>44</sup> Thus, the trademark was entitled to trademark protection. The court traced the history of trademark protection of single colour marks<sup>45</sup> to answer the question whether a single colour is protectable as a trademark, both generally and in the specific context of the fashion industry. This judgement can without any hesitation be referred to as a landmark judgment in the realm of intellectual property rights and trademark protection laws since it might encourage designers and innovators to trademark their signature colours.

### PART III

## AESTHETIC FUNCTIONALITY V. UTILITARIAN FUNCTIONALITY

The Functionality doctrine forbids the use of a product's feature as a trademark where doing so will put a competitor at a significant disadvantage because the feature is essential to the use or purpose of the article or affects its cost or quality.<sup>46</sup> The colour should only distinguish a product's identity without ministering to any other purpose. The two forms of functionality are relevant in this case; 'traditional' or 'utilitarian' functionality and 'aesthetic' functionality. A product feature according to *Inwood Laboratories v. Ives Laboratories*<sup>47</sup> is considered to be

<sup>42</sup>Lee Burgunder, 'Trademark Registration of Product Colors: Issues and Answers' (1986) 26(3) Santa Clara Law Review 581, 613.

<sup>43</sup>*Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, Docket No. 11-3303-cv (US Court of Appeals, Second Circuit 2012). [Hereinafter mentioned as "Louboutin S.A."]

<sup>44</sup>454 F 3d 108 (US Court of Appeals, Second Circuit 2006).

<sup>45</sup>*Louboutin S.A.* (n 44) 10.

<sup>46</sup>*Qualitex* (n 35) 169.

<sup>47</sup>456 US 844 (1982).

functional in a utilitarian sense if it is (1) "essential to the use or purpose of the article," or (2) "affects the cost or quality of the article."<sup>48</sup> The doctrine of aesthetic functionality bars protection of a mark that is "necessary to compete in the relevant market."<sup>49</sup> *Knitwaves, Inc. v. Lollytogs Ltd.*<sup>50</sup> held that a mark is aesthetically functional when the mark significantly undermines competitor's ability to compete in the relevant market. The District Court in *Louboutin* while deciding whether the red lacquered sole would significantly hinder competition and be aesthetically functional said that Christian Louboutin's ownership claim to a red outsole would hinder competition not only in high fashion shoes but potentially in the markets for other women's wear articles as well. Therefore, the claim to the colour red would be overly broad and inconsistent with the scheme of trademark registration. The court also said that allowing Christian Louboutin's claim "would cast a red cloud over the whole industry, cramping what other designers could do, while allowing Louboutin to paint with a full palette"<sup>51</sup> To answer the legal predicament of registration of the red colour, the plaintiff challenged that the court should simply draw a designated range above and below the borderlines of Pantone No. 18-1663 TP or "Chinese Red" and declare all other stripes of red within that zone forbidden to competitors. The other perplexity which the court considered was the outcome of fashion wars<sup>52</sup> a registration of a colour might result to. Any designer may come forward to claim an exclusive right to any shade of any colour.

The Appeal Court went intricately into explaining the two doctrines but considered it axiomatic to address the question whether there would be likelihood of consumer confusion or whether the modified red sole mark is functional. Rather it said that the courts should not jump to the conclusion that an "aesthetic feature is functional merely because it denotes the product's desirable source."<sup>53</sup> Holding the Red Sole Mark trademark valid, the court labelled aesthetic functionality analysis highly fact-specific.

An apprehension of fashion wars as hinted by the District Court does seem valid not just to the extent of fashion industry but beyond it. As pointed out in *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*,<sup>54</sup> Ethical Relativism approach to intellectual property rights uses "comparison based" reasoning. Based on the similar circumstances, this approach arrives at a result on the estimation of already settled laws. As pointed out before that trademark laws

<sup>48</sup>*ibid* 850.

<sup>49</sup>*Villeroy & Boch Keramische Werke K.G. v. THC Sys., Inc.*, 999 F2d 619 (US Court of Appeals, Second Circuit 1993) 622.

<sup>50</sup>71 F3d 996 (US Court of Appeals, Second Circuit 1995).

<sup>51</sup>*ibid* 454.

<sup>52</sup>*ibid* 457.

<sup>53</sup>*Louboutin S.A.* (n 44) 21.

<sup>54</sup>Brian Hilton and others, 'The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues' (2004) 55(4) *Journal of Business Ethics* 345, 348.



have a limited application,<sup>55</sup> India would definitely come under the ethical relativism approach. Combining this approach with aesthetic functionality can prove harmful to India because commodifying goods can very well be seen as a hindrance to an individual's liberty.<sup>56</sup> Applying the laws which suit the international corporate fashion houses in the domestic economy would trigger distrust of the judiciary for trying to protect the producer in the consumer oriented market. This runs parallel to the utilitarian functionality which aims at the greater good for the larger number of people. Looking at this case as the one showcasing the snob effect where additional consumers outside the elite consumers 'exert a negative consumption externality on existing users,'<sup>57</sup> the artistic freedom and consumer freedom is somewhere lost. In fact some have argued that providing intellectual property rights and trademark protection to the fashion industry would be damaging and should be avoided and despite the protection, the fashion industry would continue to thrive.<sup>58</sup> Another view suggests that copyright laws would protect designs better than trademark laws because it might give the creators too much protection.<sup>59</sup> It has also been suggested that choosing different rationales apart from strictly utilitarian ones may assist with social utility and social justice outcomes.<sup>60</sup> Viewings helping an individual achieve economic independence and personal empowerment as an aim<sup>61</sup> for intellectual property would again be an embarkation from the utilitarian approach. It would be beyond the scope of this paper to conclude whether the Indian scenario would be more suitable for aesthetic functionality or utilitarian functionality because the development of Indian judiciary in this regard is yet to be seen.

## CONCLUSION

Surprisingly, the fashion industry which is heralded as the industry where art meets clothes and accessories can be seen through quite a different lens through this case. A scene from the movie *The Devil Wears Prada* comes into mind where a character sarcastically points out "That's really what this *multi-billion* industry is about isn't it? The inner beauty?" The industry is not just about glitz and glamour anymore. A colossal marketplace for consumers, fashion cannot be ignored, no matter how much one tries. The purpose of this paper of connecting the realm of fashion design with trademark law was to show how these two elements create a homogeneous mixture and dissolve into each other creating a perfect harmony of law and fashion.

<sup>55</sup>Kailasam (n 12).

<sup>56</sup>Rita Heimes, 'Trademarks, Identity and Justice' (2011) 11 J. Marshall Rev. Intell. Prop. L. 133, 163.

<sup>57</sup>Jonathan M Barnett, 'Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis' (2005) 91(6) Virginia Law Review 1381, 1390.

<sup>58</sup>Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) Virginia Law Review 1687, 1775.

<sup>59</sup>Emma Yao Xiao, 'The New Trend: Protecting American Fashion Designs through National Copyright Measures' (2010) 28 Cardozo Arts & Ent LJ 405, 418.

<sup>60</sup>Madhavi Sunder, 'IP' (2006) 59(2) Stanford Law Review 257, 313.

<sup>61</sup>Lateef Mtima, 'Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship', (2009) 112 West Virginia Law Review 97, 99.

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One of the functions of trademark law being stimulation of further purchases by the consuming public<sup>62</sup> and not just recognizing the product but also selling it, the industry which is solely dependent on sales, a symbiotic relationship is created. Conspicuously, the industry is being protected as well as the legal doctrines evolve with its help and further the jurisprudence surrounding those doctrines.

The *Louboutin* case can be seen as a victory for both the parties because the plaintiff's trademark was held to be valid though limiting it to only those situations in which the red lacquered outsole contrasts in colour with the adjoining "upper" of the shoe and the defendant's shoe models were held to be nowhere close or confusingly similar to the Red Sole Mark. The obvious questions which emerge from the *Louboutin* case in India are how are designers protected in this country? Rampant illegal copying, piracy and counterfeiting being quite common, the International Anti-Counterfeiting Coalition Report has declared the counterfeit market to be worth \$600 billion<sup>63</sup> and an industry whose sales are more than \$180 billion<sup>64</sup>, clearly innovators, inventors, designers and producers alike need serious legal protection.

Free competition and trademark laws incite another question: can we really put a price tag on innovation? Which leads to the next question of what really is innovation? In granting a trademark protection, the absolute certainty of the assessment of the worth of the product would definitely pose a problem for the courts. Nevertheless, the *Louboutin* case has definitely widened the scope of colour as an entity of trademark protection and opened a new door to interpretation of fashion law. India with its ever expanding textile industry will undeniably need greater intervention of law into the fashion industry in the coming years.

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<sup>62</sup>Frank I. Schechter, 'The Rational Basis of Trademark Protection' (1927) 40(6) Harvard Law Review 813, 818.

<sup>63</sup>Dana Thomas, 'The Cost of Counterfeiting' *Lost* (January 2009) <<http://www.lostmag.com/issue29/counterfeiting.php>> accessed 9 September 2012

<sup>64</sup>Xiao (n 60) 405.