

FASHION AND INTELLECTUAL PROPERTY

Fashion is a multi-billion-dollar global business, which is not surprising because of our basic need to wear clothes and shoes. The fashion system thrives on ephemerality, novelty, seduction and hedonism. There are countless books on intellectual property law, numerous books on fashion theory and a few books on fashion law but hardly any on fashion *and* intellectual property. This book assembles a constellation of some of the best-known intellectual property scholars around the world to present their analysis of how different aspects of intellectual property laws interact with and regulate the fashion industry.

It presents a meticulously curated collection of how intellectual property laws interact with contemporary fashion and culture studies in protecting fashion creations that range from clothing and footwear to textiles. It covers key features of intellectual property rights regimes in the United States, United Kingdom, Europe, Australia and Asia that include copyright, trademarks, patents and geographical indications. This title is also available as open access on Cambridge Core.

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FASHION AND INTELLECTUAL PROPERTY

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FASHION AND INTELLECTUAL PROPERTY

In this concise and immensely readable volume, the editors have (in addition to contributing three wonderful, and very different, chapters of their own) assembled a first-rate collection of authors. Fashion provides a superb vehicle for analysis of the full range of intellectual property regimes, and contributors here touch on them all. The result is a 360-degree examination of how intellectual property law protects fashion and how IP's treatment of fashion shines a light on many challenges confronting intellectual property law.

**Graeme B. Dinwoodie, University Distinguished Professor,
Global Professor of Intellectual Property Law, IIT Chicago-Kent
College of Law**

This book brings together the latest research findings from many world-renowned intellectual property scholars. It covers cutting-edge topics at the intersection of fashion and intellectual property, such as postmodern interpretations of intellectual property, the use of IP to regulate signs of social distinction, the nuanced meanings of functionality in fashion design, the distinctiveness of non-traditional trademarks, challenges in intellectual property faced by fashion upcycling, and the interplay between identity politics and fashion intellectual property. This collection offers a valuable opportunity to reassess the foundational theories and policy objectives of existing intellectual property systems and gain numerous profound insights. Its relevance extends far beyond the fashion industry, making it essential reading for all intellectual property professionals.

**Guobin Cui, Professor of Law, Director of the Center for
Intellectual Property, Tsinghua University School of Law**

This book makes an exceptional contribution to the study of fashion and intellectual property. It offers a comprehensive examination of cutting-edge legal issues while also delving into various perspectives in culture, politics, and economics. It is an essential read for anyone seeking a deeper understanding of the intricate relationship between fashion and intellectual property.

**Haochen Sun, Professor of Law, University of Hong Kong
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This is a terrific collection of papers exploring a wide range of legal issues relating to fashion. It's an A-list group of contributors, and the topics are timely and important, especially in the global context. A must read for anyone interested in the area.

**Mark P. McKenna, Professor and Faculty Co-Director
of the UCLA Institute for Technology, Law & Policy,
UCLA School of Law**

This is an essential volume for anyone interested in fashion law and a must-read for those pushing the boundaries of law and fashion.

**Jeannie Suk Gersen, John H. Watson, Jr. Professor
of Law, Harvard Law School**

Anyone interested in fashion or intellectual property law will benefit from considering the use of trademark law to reinstate scarcity and hierarchy in a high-tech post-scarcity world; the legal implications of fashion's function of making bodies look better; the potential environmental sustainability benefits of stronger protection for geographic indications of origin; the similar potential for upcycling to contribute to sustainability if not choked off by trademark law; and other topics in this wide-ranging collection of essays at the intersection of fashion and law.

**Rebecca Tushnet, Frank Stanton Professor of the
First Amendment, Harvard Law School**

From brands and designs to copyright, patents and geographical indications, passing through upcycling and cultural appropriation. Fashion IP law could not be better presented and explained to us. David Tan, Jeanne C. Fromer and Dev S. Gangjee have put together a stellar line up of academics with a clear, critical and environmentally-focused perspective of Fashion IP.

**Enrico Bonadio, Reader in Intellectual Property Law,
The City Law School, City, University of London;
editor of *The Cambridge Handbook of Copyright
in Street Art and Graffiti* (2019)**

The editors have done a wonderful job assembling a group of leading intellectual property scholars from the USA, Europe, Australia, Hong Kong and Singapore for this impressive and timely collection. Collectively, the eleven essays explore the complex, evolving, and largely under-theorised relationship between domestic intellectual property laws and the creation, protection and reuse of fashion, and the cultural impact of this relationship. Each chapter is meticulously researched, engagingly written, and illuminating.

**Michael Handler, Professor, School of Private and Commercial Law,
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This book includes a fascinating, diverse range of theoretical, doctrinal and political insights into how fashion and IP laws interact. Leading scholars provoke us to consider what role fashion plays in society, how fashion exposes tensions in designs, trade mark and copyright doctrines, and to what extent IP laws facilitate upcycling or enable cultural appropriation.

**Tanya Aplin, Professor of Intellectual Property Law, Dickson
Poon School of Law, King's College London**

Not just for fashionistas! Like a delicately woven fabric, this book offers a complex pattern of legal, economic and sociological aspects of fashion law, vividly detailed and rich in background information, presented by a panel of eminent scholars. A real page-turner!

**Annette Kur, Professor and Affiliated Research Fellow, Department
of Intellectual Property and Competition Law, Max Planck
Institute for Innovation and Competition**

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EDITORS' PREFACE

Miuccia Prada said in an interview: 'The job is to do something interesting with ideas . . . and if it is copied I couldn't care less.'¹ Gabrielle 'Coco' Chanel was reported to have declared that imitation was the highest form of flattery.² It would seem that there is little that is completely new or original in the world of fashion. Over a decade ago, at the awards ceremony of the Council of Fashion Designers of America, author Fran Lebowitz quipped that 'homage is French for stealing'.³ In music, we call it sampling. In other cultural circles, it is known as appropriation. Many fashion brands today, however, do not simply sit back and enjoy the copying or referencing of their creations by another designer. They are more likely to assert their intellectual property rights that span the spectrum of trademarks, copyright, patents, registered designs and geographical indications in order to protect their brand investments and businesses.

This book is long overdue. There are countless books on intellectual property law, numerous books on fashion theory and a few books on fashion law but hardly any on fashion *and* intellectual property. This book assembles a constellation of some of the best-known intellectual property scholars around the world to present their analysis of how different aspects of intellectual property laws interact with and regulate the fashion industry. Some of the chapters also feature an interdisciplinary analysis of

¹ Andrew O'Hagan, 'Power of One | Miuccia Prada's Circle of Influence', *The New York Times Style Magazine* (May 27, 2013) <<https://www.nytimes.com/2013/05/27/t-magazine/power-of-one-miuccia-pradas-circle-of-influence.html>>.

² Fridolin Fischer, 'Design Law in the European Fashion Sector', *WIPO Magazine* (February 2008) (citing Paul Morand, *L'allure de Chanel* [Hermann, 1996]) <https://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html>.

³ Guy Trebay, 'Ideas & Trends: Fashion Replay; Imitation Is the Mother of Invention', *The New York Times* (July 7, 2002) <<https://www.nytimes.com/2002/07/07/weekinreview/ideas-trends-fashion-replay-imitation-is-the-mother-of-invention.html>>.

fashion and intellectual property, drawing from key classical and contemporary writings in cultural studies.

Trends in the Fashion Industry

Fashion is a multi-billion-dollar global business, which is not surprising because of our basic need to wear clothes and shoes. The fashion system thrives on ephemerality, novelty, seduction and hedonism. In 2019, McKinsey reported that research showed that the average person today buys 60% more items of clothing than they did 15 years ago. In a survey done in Britain, one in seven consider it a fashion faux pas to be photographed in an outfit twice.⁴

For the fashion industry around the world, 2020 was the year in which everything changed. At the start of 2020, the luxury fashion industry was enjoying a boom and then the pandemic hit. When COVID-19 ravaged the world in 2020, the fashion industry suffered its worst year on record with almost 75% of listed companies losing money. According to the McKinsey Global Fashion Index analysis, fashion companies posted approximately a 90% decline in economic profit in 2020, after a 4% rise in 2019.⁵ In *The State of Fashion 2021* report, it was observed that 'the pandemic will accelerate trends that were in motion prior to the crisis, as shopping shifts to digital and consumers continue to champion fairness and social justice'.⁶ With diminished demand for fashion, the trendsetters at the apex of the fashion industry have been rethinking their business models. A full recovery of global fashion sales to pre-pandemic levels was expected to come around the third quarter of 2022 at the earliest.⁷ However, things are not that rosy. Eighty-four per cent of industry leaders said they expect market conditions to decline or stay the same in 2023, with the global slowdown, rising inflation, geopolitical instability and supply chain disruptions brought about by the war in Ukraine and further outbreaks of the new COVID-19 variants⁸ and, more recently, the Israel-Hamas war. In *The State of Fashion 2024* report released at the end of November 2023, 'uncertainty' was the word most

⁴ The Business of Fashion and McKinsey & Company, *The State of Fashion 2019* (2018) 39.

⁵ The Business of Fashion and McKinsey & Company, *The State of Fashion 2021* (2020) 10.

⁶ *Ibid.*, 11.

⁷ The Business of Fashion and McKinsey & Company, *The State of Fashion 2021* (2020) 25.

⁸ The Business of Fashion and McKinsey & Company, *The State of Fashion 2023* (2022) 12.

often mentioned by executives surveyed;⁹ the top-line year-on-year growth is expected to be lacklustre as consumers restrain spending after a post-pandemic shopping surge.¹⁰ That being said, the LVMH group nonetheless outperformed Nike in terms of economic profit.¹¹ Last but not least, sustainability is a buzzword in the fashion industry as new regulations in the European Union and the United States will require brands and manufacturers to reduce greenhouse gas emissions and waste; fast fashion houses such as Shein and Temu have already come under scrutiny.¹² According to McKinsey, of the fashion executives survey, '12 percent cite sustainability as a principal opportunity for 2024, placing it at the top of the C-suite agenda'.¹³ By 2025, it appears that the non-luxury sector will be driving the increase in economic profit. In *The State of Fashion 2025* report, fashion executives shared that they will be shifting their focus to 'finding ways to differentiate, whether through new designs, customer experiences or finding new customer niches'.¹⁴

Just a few years ago, fashion leaders were anticipating a continuation of the post-COVID chic casualisation trend that took hold during the pandemic with casualwear, followed by sportswear and sneakers, being the highest-ranking categories in terms of where executives see the greatest growth potential.¹⁵ According to *The State of Fashion 2021* report, this form of casualisation is a trend that 'is likely to emerge as a dominant force across many fashion categories in 2021' as more flexible work-from-home arrangements are entrenched around the world.¹⁶ This has evolved into the 'gorpcore' trend at the time of writing – functional, outdoors-inspired fashion – which luxury fashion players such as Dior, Prada and Burberry have established as part of their permanent collections.¹⁷

⁹ The Business of Fashion and McKinsey & Company, *The State of Fashion 2024* (2023) 10.

¹⁰ Ibid, 14.

¹¹ Ibid, 112.

¹² Ibid, 11.

¹³ Ibid, 17.

¹⁴ The Business of Fashion and McKinsey & Company, *The State of Fashion 2025* (2024) 13.

¹⁵ The Business of Fashion and McKinsey & Company, *The State of Fashion 2023* (2022) 16.

¹⁶ The Business of Fashion and McKinsey & Company, *The State of Fashion 2021* (n 5) 27. See also Patricia Marx, 'The Slob-Chic Style of the Coronavirus Pandemic', *The New Yorker* (July 13, 2020) <<https://www.newyorker.com/magazine/2020/07/20/the-slob-chic-style-of-the-coronavirus-pandemic>>.

¹⁷ The Business of Fashion and McKinsey & Company, *The State of Fashion 2024* (2023) 52–55.

At the same time, gender-fluid fashion is 'gaining traction amid changing consumer attitudes towards gender identity and expression ... [with] the blurring of lines between menswear and womenswear'.¹⁸ Resale revenue is also expected to grow to US\$47 billion by 2025, from US\$15 billion in 2022¹⁹ – 11 times faster than apparel retail overall – and these upcycling and resale businesses are likely to attract the attention of luxury brands such as Chanel and Rolex, which will want to enforce their intellectual rights.²⁰

Last but not least, fashion brands are making forays to explore the nascent opportunities associated with technologies like the metaverse and non-fungible tokens (NFTs). Brands are expected to embrace creative campaigns, new media channels and the metaverse,²¹ as NFTs are strategically deployed to build communities and stronger affinity for the brand.²² The metaverse conjures up possibilities of a space without limits where our physical selves move seamlessly into virtual worlds as digital avatars in altered realities to play, work, learn, create, shop, socialise and trade. Even though things are looking less rosy at the time of writing as the metaverse is looking more and more like a collage of virtual games and social networking sites that lack interconnectedness and interoperability, fashion brands are nonetheless making inroads into this new digital environment. In particular, luxury fashion brands such as Louis Vuitton, Gucci, Balenciaga, Dolce & Gabbana and Burberry, as well as sporting apparel titan Nike, are actively exploiting the metaverse with a proliferation of online collaborations, digital experiences and NFT sales.

Scope of This Book

This book is divided into four parts. The Part I comprises two chapters that adopt different theoretical perspectives in an attempt to understand

¹⁸ The Business of Fashion and McKinsey & Company, *The State of Fashion 2023* (2022) 18. See also *ibid.*, 55–58.

¹⁹ *Ibid.*, 44.

²⁰ E.g., *Chanel, Inc. v. Shiver and Duke, LLC, et al.*, 1:21-cv-01277 (SDNY); *Copad SA v Christian Dior Couture SA*, Case C-59/08, ECLI:EU:C:2009:260 (ECJ, April 23, 2009). See also 'Chanel Settles Trademark Suit against Resaler; Site Crepslocker Over its Use of Chanel Name, Logo' (The Fashion Law, July 7, 2021) <<https://www.thefashionlaw.com/chanel-settles-trademark-suit-against-crepslocker-over-resale-offerings/>>.

²¹ The Business of Fashion and McKinsey & Company, *The State of Fashion 2023* (2022) 19.

²² *Ibid.*, 101, 103–106.

the meaning of fashion, its role in contemporary society and how intellectual property laws may respond to this phenomenon. The Part II has five chapters that address how the kaleidoscope of established intellectual property doctrines – more specifically the laws relating to trademarks, copyright, patents and design rights – are and can be applied to fashion. Part III presents two chapters that interrogate two successful business models that skirt on the fringes of intellectual property infringement: fashion upcycling and *shanzhai* fashion. Part IV concludes with two chapters that evaluate emerging issues regarding the protection of traditional knowledge, culture, heritage and craftsmanship.

Part I

In 'Fashion, Post-postmodernism and Intellectual Property', David Tan discusses how fashion – the way we dress – is often an important reflection of the zeitgeist or the spirit of a given point and place in time. He contends that the fashion phenomena of recent years, such as self-disruption, upcycling and phygital experiences, can be studied as characteristics of a post-postmodern condition where a new cultural paradigm has emerged. The term *post-postmodern* has appeared in an increasing number of scholarly works that address a new cultural milieu – one that faces shifting global political centres and geopolitical boundaries, threats of climate change and an endangered ecosystem, destabilisation from armed conflicts and pandemics, obsessions with autonomous individuality, accelerating advances in artificial intelligence and the pervasiveness of information and communications technology in our daily lives. This chapter explores how such theories may be relevant to understanding contemporary fashion trends and their implications for intellectual property laws.

Barton Beebe, in 'Intellectual Property Law and the Dream of Post-scarcity Society', explains that luxury fashion seeks to aestheticize scarcity and transform its possession into a sign of social distinction. Intellectual property law plays a crucial role in this process. In this chapter, he considers the social function that intellectual property law may continue to play in a purportedly 'post-scarcity' society of the future, asserting that though intellectual property law has long played a technologically progressive role in modern societies, its social function in such societies has been and will continue to be largely reactionary. Even in an otherwise post-scarcity society, intellectual property law will be used, as it is already being used, to preserve 'social scarcity' and regulate signs of social distinction.

Part II

In 'Fashion's Function in Intellectual Property Law', Christopher Buccafusco and Jeanne C Fromer make the point that clothing designs can be beautiful, but they are also functional. Indeed, fashion's dual nature sits uneasily in intellectual property law, and its treatment by copyright, trademark and design patent laws has often been perplexing. Much of this difficulty arises from an unclear understanding of the nature of functionality in fashion design. This chapter argues that aspects of garment designs are functional not only when they affect the physical or technological performance of a garment but also when they affect the perception of the wearer's body. Generally, clothes are not designed or chosen simply to look good. They are also characteristically designed or chosen to look good on. This approach clarifies the appropriate treatment of fashion design in intellectual property, and it exposes the conceptual limitations of the US Supreme Court's copyright decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*

Vicki Huang, in her chapter 'Shape Trademarks Are in Fashion: A Study of Footwear and Sneakers in Australia', confronts one of the most significant sartorial transformations in recent history – the evolution of the sneaker from sports equipment to high-end fashion. Expanding demand and competition in the sneaker market (primarily driven by renewed interest in fashion by men) has meant designers are seeking more ways to protect the overall appearance of their shoe designs. This chapter demonstrates that empirically, the sneaker revolution has increased demand for Australian 3D shape trademarks as an adjunct to, or replacement for, registered design rights. It presents this trend as a cautionary tale for those who might call for a sui generis design right for fashion. Ultimately, the failed demand for Australian design rights appears to stem from failing to consider aspects of culture, commerce and the matrix of related rights, particularly trademark rights.

In 'Non-traditional Trademarks, Distinctiveness and the Fashion Industry', Susanna Leong and Irene Calboli analyse the use of non-traditional trademarks (NTTMs) in the fashion industry. With reference to selected cases in the United States, the European Union and Singapore, the authors study the arguments for and against the protection of these signs as trademarks, as well as the appropriate test for the evaluation of distinctiveness. Although some fashion designers and enterprises have celebrated victories in court, it has been widely noted that the registration and protection of these NTTMs can be problematic and potentially

detrimental to innovation in the fashion industry. The authors also critically examine the different tests of 'association' and 'reliance' as discussed in recent court decisions on acquired distinctiveness of NTTMs and conclude with a recommendation that the 'reliance' test is the preferred test.

Roger Allan Ford in 'Utility Patents and the Fashion Industry' reviews the fashion industry's uses of utility patents. The chapter first provides an overview of the fashion industry's patenting activities, looking at how many patents are granted for fashion-related inventions and how large apparel companies obtain those patents. It then examines companies' use of patents, looking at how patent litigation in the fashion industry compares to other industries. Finally, it turns to the uneasy tension in fashion between function and aesthetics, examining the specific technologies and inventions being claimed in fashion patents to see what can be inferred about the relationship between fashion and intellectual property.

Working from the premises that fashion designers ought to enjoy some form of intellectual property protection over their creations and that they benefit from such protection, Robert Burrell and Emily Hudson in 'Barriers to Enforcing Design Rights over Fashion in the United Kingdom' explore the problems that fashion designers are likely to face when seeking to enforce their rights in the United Kingdom. Like other commentators, they conclude that design laws in the United Kingdom are in need of reform. They also demonstrate that Brexit has made the problems faced by designers worse, without necessarily creating the policy space for meaningful national reform. The consequence is that designers are likely to rely even more heavily on the copyright system, but this merely shifts the tensions of Brexit from the legislative and political realms to the judicial realm.

Part III

Fashion upcycling offers unprecedented opportunities for the sustainable reuse of clothing: using second-hand garments as raw materials for new creations, upcyclers can transform used pieces of clothing into new fashion products that may become even more sought-after than the source material. Martin Senftleben, in his chapter 'Fashion Upcycling and Trademark Infringement: A Circular Economy/Freedom of the Arts Approach', tackles how upcycling may trigger allegations of consumer confusion and unfair freeriding when fashion elements bearing third-party brand insignia become components of the upcycled product.

Considering the overarching policy objective to ensure a circular economy, the use of trademark-protected fashion elements for upcycling purpose can be qualified as a particularly important form of artistic expression. The chapter concludes that the referential use defence in the European Union can be invoked successfully to rebut infringement arguments – regardless of whether these arguments are based on confusion, blurring, tarnishment or unfair freeriding.

Since the 2000s, Chinese factories have been notorious for imitating and copying luxury fashion designs, a phenomenon known as *shanzhai*. In their chapter '*Shanzhai* Fashion and Intellectual Property in China', Jyh-An Lee and Jingwen Liu explain that within the fashion industry, two primary categories of *shanzhai* practices exist: the imitation or copying of a brand's name or trademarks, referred to as 'counterfeits', and the imitation or copying of a brand's designs, referred to as 'knockoffs'. While brand owners can easily enforce their legal rights against the trademark-infringing counterfeits, knockoffs remain a significant concern for international brand owners, since these design features are frequently denied trademark protection. The authors contend that recent judicial practices suggest that fashion designs and design features in China can be protected under the Anti-Unfair Competition Law. Moreover, Chinese courts are increasingly open to the registration of signature design patterns NTMs, including three-dimensional trademarks and colour trademarks. This chapter provides a comprehensive exploration of China's evolving approach to these issues and provides a detailed comparison of copyright, trademark, design patent and unfair competition protections against fashion copycats.

Part IV

Dev S Gangjee, in 'Threads That Last: Geographical Indications for Textiles', investigates the potential use of geographical indications (GIs) for both increased visibility and as an effective legal regime to protect a hard-earned reputation for traditional crafts and textiles. He argues that supporting traditional textiles through this form of IP has additional synergies with the shift towards more sustainable production and consumption in the global fashion industry. By utilising natural fibres, organic dyes, artisanal modes of production and fabrics intended to be worn multiple times, GIs can be positioned as the polar opposite of fast fashion; as 'threads that last'. However, the methods for legally 'locking in' sustainability commitments are still being developed, while there are

countervailing economic pressures to 'backslide' on sustainable modes of production.

In 'Culture and Cosmopolitanism in the Global Fashion Industry', Kal Raustiala and Christopher Jon Sprigman posit that the global fashion industry is increasingly subject to accusations of cultural appropriation. Their chapter analyses why the fashion industry's practices – in particular, its mashup-magpie mode of creativity and its rapid innovation cycle – make it a frequent target of these claims. They explain the challenges to legal protection for cultural designs, explore and critique the normative case for property claims in traditional cultural designs and offer a qualified defence of the industry's practice of re-interpreting those designs. The authors suggest that many designs seen as originating in a particular culture have roots that extend outward to other cultures; this network of cultural interchange often undermines any particular ownership claim. And while appropriation can signal disrespect for source cultures and be objectionable for that reason, appropriation is not disrespectful per se, as there are strong normative arguments supporting many instances of appropriation.

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We hope you will enjoy this meticulously curated collection of essays and, even as fashions change and new styles emerge, we trust that they will remain a fashionable read in the years to come.

ABBREVIATIONS

ACIP	Australian Council for Intellectual Property
ATMO	Australian Trade Marks Office
AUCL	Anti-Unfair Competition Law
CDPA	Copyright, Designs and Patents Act 1988 (UK)
CFR	European Union Charter of Fundamental Rights
CIP	crafts and industrial products
CJEU	Court of Justice of the European Union
CNIPA	China National Intellectual Property Administration
CPC	Cooperative Patent Classification
DMCA	Digital Millennium Copyright Act
EUGC	European Union General Court
EUIPO	European Union Intellectual Property Office
EUTMDR	European Union Trade Mark Delegated Regulation
EUTMIR	European Union Trade Mark Implementing Regulation
EUTMR	European Union Trade Mark Regulation
GI	geographical indication
IP	intellectual property
ISD	Information Society Directive
LV	Louis Vuitton
MMORPG	multiplayer online role-playing game
MSME	micro, small and medium enterprise
NFT	non-fungible token
NGO	non-governmental organisation
NTTM	non-traditional trade mark
OHIM	Office of Harmonization in the Internal Market
oriGIn	Organization for an International Geographical Indications Network
PSCP	parody, satire, caricature and pastiche
RCD	registered community design
RMB	Renminbi
SPC	Supreme People’s Court
SUD	supplementary unregistered design right
TMD	Trade Mark Directive

LIST OF ABBREVIATIONS xxxi

TRAB	Trademark Review and Adjudication Board
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UCD	unregistered community design right
UKIPO	United Kingdom Intellectual Property Office
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
USPTO	United States Patent and Trademark Office
VCA	Van Cleef & Arpels
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WOAC	works of artistic craftsmanship
WTO	World Trade Organization
XR	extended reality
YSL	Yves Saint Laurent