

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

**Abstract.** The fashion industry is affected by an imbalance of power that goes beyond the outsourcing of part of the manufacture to developing countries. Said imbalance characterises the whole supply chain and hinders freedom of expression, freedom to conduct business and, hence, creativity and innovation. In order to understand fashion, IP lawyers and lawmakers need to take into account that the law is not the main device the regulating the relevant relationships. Indeed, fashion is a closed community, a family where complaining is rather frowned upon and where contracts do not reflect the actual relationships between the parties. In order to rebalance power, this article explores the possibility to treat good faith and inequality of bargaining power as unifying principles of contract law. However, in light of the evidence collected during a number of in-depth interviews with fashion stakeholders, it seems clear that social norms are the main source of regulation of relationships and, therefore, intervening at the level of the contracts may not be helpful. Competition law, in turn, may be of more help in rebalancing power; however, cases such as *Coty v Parfümerie Akzente* do not augur well. Moreover, competition law is useful when the relationship is over, but it is in all the stakeholders' interest to keep the relationship alive while fixing its imbalance. This study confirms recent findings that social norms do not only have a positive impact on fields with low IP-equilibrium and it sheds light on the broader consequences of the reliance on social norms and on its relationship to power imbalance. This work makes a twofold recommendation. First, IP lawyers should engage more with the unfamiliar field of social norms. Second, advocates of a reform of IP aimed at transforming the industry in an IP-intensive one should be mindful that the effort may prove useless, in light of the role of social norms, especially if power is not distributed.

## 1. Scope of the study and research methods.

It does not seem controversial that intellectual property law is not fit for the fashion industry.<sup>1</sup> From this consideration, it usually follows the call on lawmakers to amend existing laws<sup>2</sup> or current jurisprudential approaches<sup>3</sup> in order to ensure that creativity be rewarded. Conversely, some argue that there is no need for reforms, because fashion is regulated by social norms,<sup>4</sup> and the industry ‘benefits from widespread copying.’<sup>5</sup> There is a resurgence of studies showing how innovation thrives without the need for legal monopolies.<sup>6</sup> Researchers,<sup>7</sup> however, recently have shown how the regulation of creativity by social norms is not necessarily only 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 power imbalance 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. A low-IP equilibrium can be negative if some stakeholders can leverage their power to get away with unfair practices, like big brands’ custom to copy clothing designs from young designers and

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<sup>1</sup> 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.

<sup>2</sup> AT Briggs, ‘Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law’ (2012) 24 *Hastings Comm & Ent LJ* 169, 194, 213. 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 edn Fairchild Books 2014) 69.

<sup>3</sup> KK Terakura, ‘Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry’ (2000) 22 *U Haw L Rev* 569, 619.

<sup>4</sup> K Raustiala and C Sprigman, ‘The Piracy Paradox: Innovation and Intellectual Property in Fashion Design’ (2006) 92 *Va L Rev* 1687.

<sup>5</sup> 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.

<sup>6</sup> For a notable recent example see Kate Darling and Aaron Perzanowski, *Creativity without Law. Challenging the Assumptions of Intellectual Property* (NYU Press 2017).

<sup>7</sup> S Plamondon Bair and LG Pedraza-Fariña, ‘Anti-Innovation Norms’ (2018) 112(5) *Northwestern University Law Review* 1069.

small apparel companies.<sup>8</sup> Power imbalance reduces freedom of expression, thus hindering creativity. Rebalancing the fashion supply chain could, therefore, ensure fairer relationships, as well as more diverse and creative expressions.

In an editorial on this Journal, Neil Wilkof<sup>9</sup> invited IP lawyers to better identify and understand systems based on social norms, suggesting that they do not lie outside the scope of the IP practice. This work intends to take up this challenge, because IP law may not be fit for fashion, but IP lawyers must be.

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,<sup>10</sup> ten on the legal one.<sup>11</sup> Snowball sampling was followed to reflect the quasi-sectary features of the fashion industry.<sup>12</sup> The difficulty to find fashion creatives willing to be interviewed may be regarded as a confirmation of such depiction of the fashion community as a closed world, as a family, if not a sect. 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.<sup>13</sup> Therefore, despite the relatively low number of interviews, the findings are worth of presentation because clear threads have been emerging during the

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<sup>8</sup> When designer Carrie Ann Roberts discovered Old Navy was selling an exact replica of one of her t-shirts and accepted that she had no legal recourse, lamented that '(b)ig businesses think us small businesses are just here to pull ideas from, and they think we are weak' (C Lieber, 'Fashion brands steal design ideas all the time. And it's completely legal' (*Vox*, 27 April 2018) <[www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m](http://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m)> accessed 12 May 2018, who reports how common the practice is.

<sup>9</sup> N Wilkof, 'IP: It's also about trust and French chefs' (2007) 2(11) *JIPLP* 706.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> IM Dragan and A Isaac-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).

<sup>13</sup> See e.g. BL Berg and H Lune, *Qualitative research methods for the social sciences* (8th edn Pearson Boston 2011).

collection and analysis of the 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: mapping inequalities beyond outsourcing and human rights violations**

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 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.<sup>14</sup> The unwillingness of talking about such sensitive issues may have contributed to some potential interviewees deciding not to take part in this research.

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.<sup>15</sup> The issue is worsened by tax avoidance practices that do not make possible a redistribution of wealth.<sup>16</sup> 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.<sup>17</sup> While the sustainability is increasingly on many companies'

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<sup>14</sup> 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.

<sup>15</sup> S Nayeem Emran and Joy Kyriacou, *What she makes. Power and poverty in the fashion industry* (Oxfam Australia 2017) 3.

<sup>16</sup> '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/](http://www.huckmagazine.com/perspectives/reportage-2/vile-excess-inequality-global-fashion-industry/)> accessed 10 May 2018.

<sup>17</sup> 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.

radar,<sup>18</sup> the commitment is still overall low and not growing fast enough.<sup>19</sup> However, the blockchain could be an important tool to achieve an ethical fashion by making the supply transparent, and distributing power.<sup>20</sup> This said, the sustainability movement is no panacea, being ‘yet another band of privileged white women essentially focused on first world problems.’<sup>21</sup> This may be put in relation with the fact, analysed below, that the prevalence of social norms can lead to the exclusion of intersectional problems, approaches, and methodologies.

Even though human rights are a primary concern, this research moved from the conviction that power inequality was a much more pervasive phenomenon in the fashion industry<sup>22</sup> and, therefore, aimed at mapping it throughout the supply chain. The examples are countless. Just to name a few, first, a study found that there is an imbalance of power between Western original brand manufacturers’ buyers and Chinese original equipment manufacturers’ suppliers.<sup>23</sup> However, more recent trends seem to suggest that the balance of power is shifting in favour of Asian companies.<sup>24</sup> Moving along the supply chain, 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 by photographers.<sup>25</sup> Edie Campbell, in particular, denounced a huge power imbalance that is at the basis of an ‘unspoken

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<sup>18</sup> Sustainability credibility is one of the trends identified by Business of Fashion and McKinsey & Company, *The State of Fashion 2018* (BoF and McKinsey 2018).

<sup>19</sup> 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).

<sup>20</sup> 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](https://medium.com/@anicalis/supply-chain-blockchain-fashion-transparency-41e1c49b3108)> accessed 10 May 2018.

<sup>21</sup> D Drakeford, ‘Privilege and power imbalances in ethical fashion’ (*Adimay*, 30 June 2017) <[www.adimay.com/2017/07/when-peace-becomes-pretentious-privilege-and-power-imbalances-in-ethical-fashion/](http://www.adimay.com/2017/07/when-peace-becomes-pretentious-privilege-and-power-imbalances-in-ethical-fashion/)> accessed 13 May 2018.

<sup>22</sup> 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.’

<sup>23</sup> Zhao (n 22) 151.

<sup>24</sup> R Young, ‘In depth: Globalisation reboot – Fashion’s new centre of gravity’ in Business of Fashion (n 18) 34.

<sup>25</sup> 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](http://www.independent.co.uk/life-style/fashion/edie-campbell-fashion-industry-model-sexual-abuse-open-letter-a8047591.html)> accessed 10 May 2018.

contract'<sup>26</sup> according to which models give up ownership of their body. This may be read in the context of the more general problem of 'gender power imbalance throughout the industry.'<sup>27</sup> However, it cannot be reduced to a gender issue. For example, 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.<sup>28</sup> In 2018, similar episodes were reported<sup>29</sup> and the public outrage that followed led to Vogue terminating the accused photographers' contracts<sup>30</sup> and Condé Nast adopting a code of conduct to prevent power abuses.<sup>31</sup> More recently, some have denounced the dominance of so-called influencers, although brands are expected to 'right the power imbalance'<sup>32</sup> 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 LVMH<sup>33</sup> and Kering<sup>34</sup> joining forces to end the use of 'size zero' models is a step forward,<sup>35</sup> even though much still needs to be done to re-balance the relevant relationship. Sometimes, competition law has been used to address power imbalance. For example, a number of modelling agencies were fined for colluding on prices thus harming high-street chains, online fashion retailers and

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<sup>26</sup> 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](http://www.bustle.com/p/edie-campbells-comments-on-sexual-assault-in-the-fashion-industry-sheds-light-on-important-issue-3345750)> accessed 10 May 2018.

<sup>27</sup> 'Women. Fashion. Power' (*Centre for Sustainable Fashion*, 8 March 2018) <[sustainable-fashion.com/blog/womenfashionpower/](http://sustainable-fashion.com/blog/womenfashionpower/)> accessed 10 May 2018.

<sup>28</sup> 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/](http://wwd.com/fashion-news/fashion-features/edie-campbell-pens-open-letter-on-model-abuse-11044720/)> accessed 10 May 2018.

<sup>29</sup> 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](http://www.nytimes.com/2018/01/13/style/mario-testino-bruce-weber-harassment.html)> accessed 10 May 2018.

<sup>30</sup> '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](http://www.vogue.com/article/anna-wintour-responds-mario-testino-bruce-weber-sexual-misconduct-allegations)> accessed 10 May 2018.

<sup>31</sup> 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](http://www.nytimes.com/2018/01/13/fashion/conde-nast-new-code-of-conduct-sexual-harassment-models.html)> accessed 10 May 2018.

<sup>32</sup> 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/](http://digiday.com/marketing/fashion-brands-2018-will-year-influencer-roster/)> accessed 10 May 2018.

<sup>33</sup> Brands owned by LVMH include Dior, Fendi, Givenchy, Louis Vuitton, Bulgari, Marc Jacobs, Loro Piana, Guerlain, and Kenzo.

<sup>34</sup> Brands owned by Kering include Gucci, Yves Saint Laurent, Bottega Veneta, Balenciaga, Stella McCartney, and Alexander McQueen.

<sup>35</sup> LVMH, *The Charter on the working relations with fashion models and their well-being* (LVMH 2017).

consumer goods brands.<sup>36</sup> However, this route is not always viable, as shown by the Court of Justice in *Coty v Parfümerie Akzente*,<sup>37</sup> where a luxury brand was allowed to impose restrictive distribution agreements excluding third-party ecommerce platforms.

### **3. Can ‘inequality of bargaining power’ and good faith as general principles address the imbalance of power in the fashion industry?**

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.<sup>38</sup> 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 characterise more often business-to-business (B2B) relationships, rather than B2C ones. Therefore, it is crucial to assess if there are corrective mechanisms in place and if they are sufficient.

This work’s initial thesis was that an answer to the problem could have been considering the imbalance of bargaining power and good faith as unifying principles in contract law, hence overcoming the rigidities of the established categories of vitiation, and ultimately rebalancing power throughout the fashion supply chain.

Lord Denning MR, in *Lloyds Bank Ltd. v Bundy*<sup>39</sup> suggested that there is in English law a general principle of inequality of bargaining power, by which agreements are voidable if resulting from said inequality. In particular,

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<sup>36</sup> Decision of the Competition & Markets Authority, ‘Conduct in the modelling sector’ (case CE/9859-14).

<sup>37</sup> 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.

<sup>38</sup> See *eg* the Consumer Rights Act 2015

<sup>39</sup> [1975] Q.B. 326.

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.<sup>40</sup>

The existence of the principle has not been accepted by most scholars<sup>41</sup> and subsequent case law.<sup>42</sup> However, recently it has been suggested that a ‘unifying principle is discernible, but that it should be formulated alternatively as “exploitation of constrained autonomy”.’<sup>43</sup> As convincing as this interpretive proposal is, the prevailing idea<sup>44</sup> would still appear to be that a contract can be voided at common law or in equity only for duress, undue influence, and unconscionable bargains. To said categories of vitiation, one has to add to this the statutory restrictions to freedom of contract introduced by Parliament to protect certain categories, such as consumers,<sup>45</sup> employees,<sup>46</sup> and tenants.<sup>47</sup>

The argument could be put forward that 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

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<sup>40</sup> *ibid* 328.

<sup>41</sup> 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).

<sup>42</sup> *National Westminster Bank Plc v Morgan; Pao On v Lau Yiu Long* [1985] AC 686, 708, HL

<sup>43</sup> 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.

<sup>44</sup> J Beatson, A Burrows, and J Cartwright, *Anson’s Law of Contracts* (30<sup>th</sup> edn OUP 2016)

<sup>45</sup> Consumer Rights Act 2015.

<sup>46</sup> Employment Rights Act 1996.

<sup>47</sup> Landlord and Tenant Act 1985.



regimes.<sup>48</sup> As per Sir Thomas Bingham in *Timeload Ltd v British Telecommunications plc*,<sup>49</sup> the common law could use protective statutes also beyond their scope ‘as a platform for invalidating or restricting the operation of an oppressive clause.’<sup>50</sup> 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 industry might have contributed to the acceptance of the inequality of bargaining power as a unifying principle.

Another route that this author envisaged as a way to rebalance the relationships throughout the fashion supply chain was good faith. Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd*<sup>51</sup> innovatively argued that a general term of good faith may be implied under certain conditions. This concept is still far from being accepted,<sup>52</sup> but courts seem increasingly inclined to imply good faith terms, especially in relational and long-term contracts,<sup>53</sup> which raised the hopes of many as to its potential as a general organising principle.<sup>54</sup> 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 the 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 could have been a piece of the good-faith puzzle. Whilst there is certainly potential

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<sup>48</sup> J Beatson, ‘Duress, Restitution, and Contract Renegotiation’, in *The use and abuse of unjust enrichment. Essays on the Law of Restitution* (Clarendon 1991); H Collins, ‘Harmonisation by example: European laws against unfair commercial practices’ (2010) 73(1) MLR 89, 113-114.

<sup>49</sup> (1995) 3 EMLR 459.

<sup>50</sup> *ibid* 468.

<sup>51</sup> [2013] EWHC 111 (QB), [2013] 1 C.L.C. 662.

<sup>52</sup> 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*

<sup>53</sup> *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent (aka John Kent)* [2018] EWHC 333 (Comm) (22 February 2018) [174]

<sup>54</sup> For example, KP Berger and T Arntz, ‘Good faith as a “general organising principle” of the common law’ (2016) 32(1) *Arbitration Int* 167.

for the development of these lines of thought, they do not seem useful to resolve the problems of fashion.

#### **4. Shifting power in communities regulated by social norms.**

Even in the event that inequality of bargaining power and good faith rose as general principles, they could fix the problems of fashion only if the relationship between the players of the industry were regulated by the law and, in particular, contract law. The interviews conducted for this research suggest that this is not the case. In fact, they indicate that either there is a fair contract between the parts, but this is never applied, or the contract is unfair, but no one dares to complain about it because of the imbalance of power. This happens also because fashion is a closed community, a ‘family’, based on personal contacts and courteous exchanges, where enforcing the law, especially against the big luxury brands, is socially unacceptable. In the same veins, some copyright law scholars suggest that some communities are regulated by social norms, rather than traditional laws. This would be the case not only for the world of fashion,<sup>55</sup> but also for that of chefs,<sup>56</sup> stand-up comedians,<sup>57</sup> and all the professions occupying

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<sup>55</sup> Raustiala (n 4).

<sup>56</sup>E Fauchart and E von Hippel, ‘Norms-Based Intellectual Property Systems: The Case of French Chefs’ (2008) 19(2) *Organization Science* 187. For a recent instance of how social norms regulate cuisine, see L Markham, ‘The meringue war. Claiming Culinary Turf on Instagram’ (2015) 91(2) *Virginia Quarterly Review* 56.

<sup>57</sup> D Oliar and C Sprigman, ‘There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy’ (2008) 94 *Va L Rev* 1787. Note the disagreement expressed by E Moranian Bolles, *Stand-Up Comedy, Joke Theft, and Copyright Law* (2011) 14 *Tul J Tech & Intell Prop* 237.

the ‘negative space’<sup>58</sup> of IP, *i.e.* tattoo artistry,<sup>59</sup> magic,<sup>60</sup> and sports.<sup>61</sup> Social norms are not the only explanation of the phenomenon; this is sometimes due (also) to the following factors or a combination thereof: market incentives, psychological factors, first-mover advantages, path-dependency, and happenstance.<sup>62</sup> Social norms often prevail on the enforcement of copyright, even when there is no doubt that copyright laws apply: graffiti is a very clear example of this.<sup>63</sup> Another interesting field of research on copyright and social norms, then, unveiled how authors, publishers, and translators in Israel were slow in the reception of colonial copyright and ‘developed an alternative set of norms, adding to an overall scheme of private ordering. It included literary norms, contractual norms, business and industry practices.’<sup>64</sup> While the reception of copyright law led to a decline of social norms,<sup>65</sup> this does not seem to be the case with fashion, where social norms thrive even in a context of increasing IP protection, such as the European one.

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<sup>58</sup> K Raustiala and C Sprigman, ‘When are IP Rights Necessary? Evidence from Innovation in IP’s Negative Space’, in P Menell and B Depoorter eds, *Research Handbook on the Economics of Intellectual Property Law I* (Elgar 2016). On the negative space, *cf* M Richardson and S Ricketson eds, *Research Handbook on Intellectual Property in Media and Entertainment* (Elgar 2017).

<sup>59</sup> On the social norms regulating free-riding see Aaron Perzanowski, ‘Tattoos & IP Norms’ (2013) 98 *Minn L Rev* 511, 515. The copyright protection of tattoos may advance significantly as a consequence of *Solid Oak Sketches, LLC v. Visual Concepts, LLC et al*, No. 1:2016cv00724 - Document 117 (S.D.N.Y. 2018). This could lead to distinguishing from *Merchandising Corp of America v Harpbond* [1983] FSR 32, where Adam Ant’s makeup were deemed non-copyrightable for lack of fixation.

<sup>60</sup> *Teller v Dogge*, 8 F. Supp. 3d 1228 - Dist. Court, D. Nevada 2014 confirmed that magic tricks are not copyrightable, but magicians have an exclusive right to publicly perform their dramatic works and pantomimes. In commenting on the case, A Scheder, ‘Teller v. Dogge: Copyright Protections against Copycat Illusions’ (*JETlaw*, 21 March 2014) <[www.jetlaw.org/2014/03/28/teller-v-dogge-copyright-protections-against-copycat-illusions/](http://www.jetlaw.org/2014/03/28/teller-v-dogge-copyright-protections-against-copycat-illusions/)> accessed 13 May 2018, underlines the importance of social norms in the protection of the magicians’ works. P Fleury-Le Gros, ‘Protecting the secret of magic work with French copyright legislation’ (2014) 37(1) *Thomas Jefferson Law Review* 115, argues that French copyright law would protect said works.

<sup>61</sup> *cf* P Mezei, ‘Copyright Protection of Sport Moves’, in E Bonadio and N Lucchi, *Non-Conventional Copyright. Do New and Atypical Works Deserve Protection?* (Elgar 2018). Sport events are no one’s property (*Sports & General Press Agency Ltd v Our Dogs Publishing Co Ltd* [1917] 2 K.B. 125), but the broadcast can be protected under the Copyright, Designs and Patents Act 1988, s 6. However, see the judgement in *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199.

<sup>62</sup> Raustiala (n 59) 1.

<sup>63</sup> For example, E Bonadio, ‘Copyright protection of street art and graffiti under UK law’ (2017) 2 *IPQ* 187, 220, after showing how copyright protects graffiti, accepts that ‘several street and graffiti artists eventually decide not to rely on copyright to extract added value out of their art or to object to violations of their moral rights or unauthorised exploitations of their work’ which reflects sharing-based cultural and social norms.

<sup>64</sup> Michael D Birnhack, ‘Copyright law and social norms’ in *Colonial Copyright* (OUP 2014) 139.

<sup>65</sup> However, ‘(a)s the commercial norms stabilized, the use of social norms in the form of public shaming declined’ (*ibid* 154).

In fashion, the role of social norms would explain the famous ‘piracy paradox’ whereby imitation sparks innovation and infringement is good for creativity,<sup>66</sup> to the point that IP protection may be counterproductive, because it would inhibit more innovation than it promotes.<sup>67</sup> It must be said, nonetheless, that while there is a growing body of evidence that proves that infringement can benefit all the stakeholders involved,<sup>68</sup> more data is needed to ascertain the harm of IP protection. It seems clear, however, that even when not harmful, IP has been long unnecessary in fields such as fashion. Raustiala and Sprigman explain that creativity and innovation benefit from copying because of the key role played by social and economic status (fashion items are ‘positional’)<sup>69</sup> and because fashion is cyclical.<sup>70</sup> These characteristics of fashion would not be possible if the behaviour of the relevant community were not regulated by social norms treating copying as ordinary behaviour, which is neither punished nor encouraged.<sup>71</sup> Since the choice of buying a fashion item depends on what others buy, it can be said that ‘the value of a positional good arises in part from *social context*.’<sup>72</sup> A related important social rule is the so-called ‘induced obsolescence,’ *i.e.* the need for the fashion industry to make things go out-of-date rapidly. It is crucial that an increasing number of people wears a certain item, for it to lose the status of trendy. The weak IP protection of fashion facilitates this process; indeed, if ‘copying were illegal, the fashion cycle would occur very slowly.’<sup>73</sup> Copying seems a socially acceptable norm in its own right. Indeed, even if copying may harm some designers, they are not ‘strongly incentivized to break free of the low-

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<sup>66</sup> K Raustiala and C Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (OUP 2012).

<sup>67</sup> Raustiala (n 59).

<sup>68</sup> In 2017, the European Commission published only after a leak a report it commissioned in 2014 proving that piracy is not harmful and in some instances is positive, for instance when it comes to videogames, where ‘illegal consumption leads to increased legal consumption’ (M van der Ende, J Poort, R Haffner, P de Bas, A Yagafarova, S Rohlf, and H van Til, *Estimating displacement rates of copyrighted content in the EU* (European Commission 2014) 15..

<sup>69</sup> F Hirsch, *The Social Limits to Growth* (HUP 1976) 27.

<sup>70</sup> Raustiala (n 4) 1692.

<sup>71</sup> Raustiala (n 59).

<sup>72</sup> *ibid* 1719, italics added.

<sup>73</sup> *ibid* 1722, who quote Miuccia Prada saying ‘We let others copy us. And when they do, we drop it.’ (‘The Look of Prada’ (*In Style Magazine*, September 2006) 213.

IP equilibrium because, often, *they are also copyists*.<sup>74</sup> Copying is also important in the so-called anchoring, *i.e.* the process of establishing trends and communicating them effectively ‘through an *undirected process of copying*, referencing, receiving input from consultants, testing design themes via observation of rivals’ designs at runway shows, communication with buyers for key retailers, and coverage and commentary in the press.’<sup>75</sup> A strong IP protection of fashion may hinder anchoring.

The qualitative research carried out by this researcher confirms that the fashion community is profoundly regulated by social norms, but argues that this can have very negative effects, especially when the imbalance of power is significant and widespread. This idea is broadly related to a recent American work<sup>76</sup> that for the first time<sup>77</sup> challenged the assumption that the prominent role of social norms in certain creative communities is by definition a positive phenomenon. Whereas social norms may in some contexts resolve the free-riding problem, they could nonetheless hinder innovation in other ways, especially if over-enforced. First, there are the ‘research priority’ norms. They can be problematic when strongly enforced within a community ‘so that members—and in particular marginal members—are discouraged from focusing on intersectional problems.’<sup>78</sup> Second, when a community identifies itself by endorsing a single methodology, alternative, nonconforming methodologies are excluded, and since ‘intersectional problems are often best addressed by a combination of methodologies, the kinds of exclusion described above can have important negative social consequences.’<sup>79</sup> Exclusion of methodologies equals exclusion of people and of their visions. For instance,

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<sup>74</sup> *ibid* 1727, italics added.

<sup>75</sup> *ibid* 1728, italics added.

<sup>76</sup> Plamondon Bair (n 7).

<sup>77</sup> Critiques to single aspects of this stream of copyright literature on social norms were already present. For instance, JA Schachter, ‘That’s my joke ... art ... trick! How the internal norms of IP communities are ineffective against extra-community misappropriation’ (2012) 12(1) Virginia Sports and Entertainment Law Journal 63, pointed out how social norms do not provide any solution to the violations coming from outside the relevant community.

<sup>78</sup> Plamondon Bair (n 7) 1097.

<sup>79</sup> *ibid* 1100.

mainstream abstract expressionists' methodologies silenced young artists and particularly those who 'resisted what they saw as Abstract Expressionists' narcissistic tendencies and overfocus on art as a therapeutic tool.'<sup>80</sup> Third, the way a community evaluates the worth of the work of their members can constitute an anti-innovation norm. When over-enforced, said evaluation norms maintain 'research priority and methodological blinders that prevent boundary-crossing innovations.'<sup>81</sup> For instance, important research on the impact of chemotherapeutic drugs on fertility was impeded by its not falling precisely under the remit of just one funding institution.<sup>82</sup>

Whilst the above considerations appear accurate, social norms can be harmful not only when over-enforced and not only from an innovation perspective. They can be when they regulate communities in which power imbalance is substantial and pervasive; this is the case of fashion.

The interviews conducted for this study evidenced the imbalance of power throughout the fashion supply chain. The findings presented here regard in particular the power exercised by the top luxury brands on buyers and retailers. Leveraging the imbalance, said brands impose non-negotiable contracts that do not reflect the actual relationship with buyers and retailers. This means *inter alia* that although between the parties there is often a long-term relationship, the contracts are designed as if a new agreement were to be agreed every season, thus not allowing buyers and retailers are never sure if they can count on the luxury items' provision or not. Let us imagine, for instance, that Valentino last minute decreases the quantities that can be ordered and/or the mark-ups (how much a seller "marks up" a product from its previous cost). Apart from a direct impact on the revenues, there is an uncertainty that makes planning

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<sup>80</sup> *ibid* 1101.

<sup>81</sup> *ibid* 1102.

<sup>82</sup> LG Pedraza-Fariña, 'Constructing Interdisciplinary Collaboration: The Oncofertility Consortium as an Emerging Knowledge Commons', in KJ Strandburg, BM Frischmann, and MJ Madison eds, *Governing medical knowledge commons* (CUP 2017) 267.

impossible. Sometimes the contractual provisions reflect the reality of the relationship, that is a 'significant imbalance in the parties' rights and obligations arising under the contract,'<sup>83</sup> which would be unenforceable if it referred to a B2C relationship, whereas there is no redress in a B2B context.<sup>84</sup>

The weak contractual party does not call into question the contracts, manage to negotiate them, nor enforces breaches because if they disagree with the top brands, they feel that they will be excluded by the latter the following season and they risk the interruption of any commercial relationship. Hence, the law – and contractual law in particular – is not the device that practically regulates the relationships in the fashion supply chain. Interviewees confirm that what matters is the factual relationship, which is very tight and is related to a situation of economic dependence because if a retailer is no longer allowed to sell, say, Gucci items, this could have permanent consequences on the sustainability of the retailer's business model.

It seems related to the imbalance of power also the regulation of third-party ecommerce, which is controlled one-sidedly by luxury brands. There may be a rational justification for restricting the resale on online retail platforms such as Amazon for image and reputation reasons or at least this was the position taken by the Court of Justice in *Coty*.<sup>85</sup> This ruling is problematic for a number of reasons, including the undue restriction of the principle of exhaustion,<sup>86</sup> but this is beyond the scope of this paper. The unilateral regulation of third-party ecommerce goes beyond this. For instance, many luxury brands do not allow their authorised

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<sup>83</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29, art 3(1).

<sup>84</sup> Much depends on the jurisdiction. In Italy, for instance, there is a tool at the crossroads of competition law and contracts, the so-called abuse of economic dependence, that may address power imbalance in B2B relationships. *Legge* 18 June 1998, No 192 *Disciplina della subfornitura nelle attività produttive*, art 9. See V Falce, 'Vendite on e off line dei prodotti di lusso: nuovi rilievi concorrenziali' (2013) 4 *Dir ind* 377.

<sup>85</sup> (n 38).

<sup>86</sup> 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 38) does not comply with the principle of exhaustion, which applies to all intellectual property rights.

retailers to put in place keyword advertising. If a retailer is authorised to sell ‘offline’ it means that it meets the image requirements imposed by the luxury brand and, arguably, that there has been exhaustion. Therefore, there is no rational justification for said restriction.<sup>87</sup>

## 5. Conclusions

In light of the collected evidence, this researcher’s initial thesis of fixing the power imbalance of the fashion industry using inequality of bargaining power and good faith as unifying principles does not seem tenable. One cannot resolve said imbalance using contract law, since contracts do not reflect the actual relationship between the parties and when they do, their unfairness is not acted upon because in the fashion community it would be socially unacceptable to go against those who hold the power. Nonetheless, the development of said unifying principles may be viable and prove fertile in other sectors.

Competition law may be of some assistance, but the trend in the recent European case law does not augur well. Interviewees confirmed that competition law is sometimes of help after the relationship is over, but it is in everybody’s interest to find tools to keep the relationship alive, while fixing its imbalance.

This study aimed at contributing to the exploration of ‘social norms’ potential dark side.<sup>88</sup> The fashion community represents itself as a family where fights are rather frowned upon. In said community, law and contracts are not the devices actually regulating the relationships throughout the supply chain. A twofold recommendation follows. First, IP

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<sup>87</sup> First, under *Interflora Inc v Marks & Spencer Plc* [2014] EWCA Civ 1403 [99], keyword advertising is not inherently objectionable. In the analysed scenario, said practice seems lawful under the Trade Marks Act 1994, s 10(6) (use of a registered trade mark by for the purpose of identifying goods or services as those of the proprietor), s 11(2)(b) (use of indications about characteristics of goods or services), s 11(2)(c) (necessity to indicate the intended purpose of a product or service), and s 12 (exhaustion). The judgement in *Portakabin Ltd and Portakabin BV v Primakabin BV*, C-558/08, EU:C:2010:416, preventing third-party keyword advertising, does not apply here because consumers do not assume that luxury items originate from multi-brand retailers. Moreover, an *argument a contrario* can be construed to apply *Aktiebolaget Volvo v Heritage (Leicester) Ltd* [2000] F.S.R. 253: the Volvo’s dealer could have availed themselves of a defence under s 11(2)(c) if they were still an authorised seller.

<sup>88</sup> *Plamondon Bair* (n 7) 1135.



lawyers should engage more with the unfamiliar field of social norms. Since the over-enforcement of social norms prevents the full understanding of intersectional issues, only a genuinely multidisciplinary methodology can put professionals in a good position to grasp the intricacies a fashion. Second, advocates of a reform of IP aimed at transforming the industry in an IP-intensive one should be mindful that the effort may prove useless, in light of the role of social norms, especially if power is not distributed or, at least, rebalanced.