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Article

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Fashion and Authors' Moral Rights

Due to the judgments *Cofemel* and *Brompton* from the Court of Justice of the European Union (CJEU), it is certain that the standard of copyright protection for works of applied art is the same as for any other work categories. However, the harmonising effect of these judgments only extends to the author's economic rights, and not their moral interests. The moral rights of authors have not been popular topics in legal literature concerning copyright and works of applied art. This raises the question of to what extent moral rights apply to these works, which many national copyright laws used to discriminate against prior to the guidance from the CJEU. This multidisciplinary article delves into the complex relationship between moral rights and works of applied art in the specific context of fashion design. It appears that moral rights are absent from the standard practice in the fashion sector. This is evident, *inter alia*, in the fact that typically only renowned designers are attributed as authors. The article notes that there is no legally valid reason for fashion houses to overlook designers' right of attribution. The right of integrity, however, has much less practical significance in the fashion sector. This article suggests the correct approach to moral rights in the fashion sector. The focus is on the European author's rights tradition. The moral rights tradition of the Nordic states is used as a reference point because it allows for the consideration of the realities in different creative sectors without disrespecting authors' personal interests.

I. Introduction

The distinction between works of pure art and works of applied art is one of the most sensitive issues of copyright law.[1] Applied art – i.e. works that combine artistic character and utilitarian purpose – is the most disputed category of works in the history of the Berne Convention for the Protection of Literary and Artistic Works[2] (BC).[3] Works of applied art, such as clothing, accessories, jewellery, home décor, furniture and other creative but functional objects have not always been accepted in the scope of protection under the same conditions as fine art, literature, music, and other works of 'pure art'.

Although the BC allows national laws to discriminate against works of applied art (Art. 2(7)),[4] European Union (EU) copyright law seems to have now settled on the unity of art (*unité de l'art*) approach,[5] at least when it comes to those works whose country of origin is an EU Member State or are created by a national of a Member State.[6] According to the unity of art theory, a work is protected regardless of its purpose, whether it is purely aesthetic or utilitarian.[7] In practice, the unity of art means that the requirements for protection are the same for all categories of works. The Court of Justice of the European Union (CJEU) judgments *Cofemel* (2019)[8] and *Brompton* (2020)[9] made it clear that the 'author's own intellectual creation'[10] standard of originality also applies to works of applied art and industrial designs, and Member States are not permitted to set additional criteria for protection. This means that they must grant authors of works of applied art the

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1 Annette Kur, '*Unité de l'art* is here to stay – *Cofemel* and its consequences' (2019) Max Planck Institute for Innovation and Competition Research Paper No 19-16 4, 14.

2 As amended on 28 September 1979.

3 Sam Ricketson, 'The 1992 Horace S. Manges Lecture – People or Machines: The Bern Convention and the Changing Concept of Authorship' (1991) 16 Columbia-VLA Journal of Law & the Arts 14.

4 ibid.

5 Kur (n 1); cf Marianne Levin, 'The Cofemel revolution – originality, equality and neutrality' in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (Routledge, Taylor & Francis Group 2021).

6 It is not yet clear whether Member States are allowed to discriminate against works of applied art that originate from third countries. The Dutch Supreme Court has referred to the CJEU the question whether Member States can apply the material reciprocity test provided in art 2(7) of the BC to rightsholders from third countries (Case C-227/23 *Kwantum Nederland and Kwantum België*, 11 April 2023).

7 Nicolas Bouche, *Intellectual Property Law in France* (Kluwer Law International 2011) 66.

8 Case C-683/17 *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* ECLI:EU:C:2019:721.

9 Case C-833/18 *SI, Brompton Bicycle Ltd v Chedech/Get2Get* ECLI:EU:C:2020:461.

10 This standard is codified in the Software Directive (2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs) [2009] OJ L111/16-22, art 1(3)) for computer programs, Database Directive (96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases) [1996] OJ L7720-28, art 3(1)) for databases, and Term Directive (Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version)) [2006] OJ L372/12-18, art 6) for photographs. In its judgment C-5/08 *Infopaq International A/S v Danske Dagblades Forening* ECLI:EU:C:2009:465, para 37, the CJEU expanded this standard to all work categories.

economic rights[11] set out in Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive).[12] However, the InfoSoc Directive only applies to author's economic rights. An equally important part of authors' rights, their *moral rights*, have in principle remained largely within the exclusive jurisdiction of the Member States.[13]

In international law, the basis for moral rights is found in the BC. Its Art. 6[bis] gives authors *the right of attribution* and *the right of integrity*. The countries of the union have versatile approaches to the interpretation of these rights, and even EU Member States have divergent traditions.[14] Thus, although the economic rights of authors rights are harmonised in the internal market, it cannot be said that the national laws of Member States would treat authors equally in all aspects of copyright. Europe has moved from the work-category based discrimination in national laws to the EU-wide 'unity of art',[15] but 'unity of authors' remains unseen.[16] The diversity of moral rights' protection appears particularly interesting in the field of applied art. Although it is almost universally accepted that authors of works of pure art are entitled to moral rights, the question whether authors of works of applied art also enjoy de facto moral rights protection is far from simple.

As noted by Giorgio Spedicato, it is difficult to provide a single answer to the question of the most appropriate level of moral rights' protection of *all* works of applied art, because the conceptual category of design is very heterogenous.[17] Therefore, this article focuses on one particularly fascinating sector of applied art: fashion design. The European fashion sector provides an interesting context for moral rights analysis, because it seems that the moral rights of fashion designers are rarely respected or enforced.[18] For instance, the customs in the sector suggest that – albeit with some exceptions – the right of attribution of designers is widely ignored.[19] While EU copyright law now aligns fashion and other applied art with pure art, it is mostly the corporate rightsholders – i.e. fashion companies – that seem to benefit from the unity of art, not fashion designers as authors.

Research on moral rights in applied art – and specifically in fashion – is currently scarce, even though fashion has always had an important economic and cultural value in Europe. This research aims to fill that gap by answering the following questions: (i) is there a valid justification for the status quo where fashion companies tend to refrain from attributing designers as authors? and (ii) how should the scope of moral rights protection – including both the attribution and integrity rights – be understood in the fashion sector, and how would their implementation work in practice?

Within the many subgenres of fashion, the analysis in this article applies first and foremost to design that is particularly creative – i.e. high fashion, haute couture, quirky indie labels, and other fashion creations that are not mundane pieces of nearly everyone's wardrobe. These tend to have the highest chances to fulfil the requirements for copyright protection and hence have relevance in terms of moral rights. The analysis does not apply to high street fashion, fast fashion, or mundane apparel. As fashion design's possibilities to qualify for copyright protection is extensively discussed in recent research,[20] this article does not delve into that theme more than the moral rights perspective requires.

The analysis is influenced by the continental *droit d'auteur* (author's right) tradition, as it is the dominant copyright tradition in the EU jurisdictions. Although the focus of the article is on Europe, it does not cover the question of whether moral rights should be harmonised within the EU. Within the EU Member States' national traditions particular attention is given to the 'Nordic' interpretation of moral rights, which is used to illustrate how these rights could be viewed in the fashion context. The focus is mostly on the Finnish and Swedish legislative texts and case law. The copyright laws of Finland, Sweden, Norway, and Denmark provide an interesting perspective on moral rights in works of applied art due to their requirement of 'proper usage'. This requirement guides the *manner* in which attribution must be done. It provides flexibility for the execution of the attribution right by allowing consideration of the specific characteristics of the sector in question, without compromising the author's fundamental interest to be credited. As for the right of integrity, the Nordic copyright acts include de facto balancing mechanisms that limit the scope of this right in utilitarian works in a reasonable manner. These factors make the Nordic approach to moral rights – at least in theory – rather uncomplicated to apply to the fashion and design sectors,[21] and could thus provide inspiration for other jurisdictions that must consider how to apply moral rights to applied art.

The doctrinal study of law in this article is enriched with *fashion research,* a branch of art history. This multidisciplinary approach provides the European fashion sector's internal perspective to the reasons why its customs tend to conflict with designers' moral rights. The

11 The reproduction right, right of communication to the public, and distribution right.

12 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10-19.

13 Daniël Jongsma, 'Parody After Deckmyn – A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and The Netherlands' (2017) 48 IIC 677.

14 See Section II.3. on the effect of art 9(1) TRIPS Agreement.

15 Kur (n 1).

16 See also Heidi Härkönen, 'Fashion and Copyright. Protection as a Tool to Foster Sustainable Development' (doctoral thesis, Acta electronica Universitatis Lapponiensis 311, University of Lapland Faculty of Law 2021) 64; *Kwantum* (n 6).

17 Giorgio Spedicato, 'Moral rights and industrial design' in Ysolde Gendreau (ed), *Research Handbook on Intellectual Property and Moral Rights* (Edward Elgar 2023) 114.

18 Fashion is not the only creative sector tarnished with practices that are far from the ideals of the author's right tradition; eg, photographers and architects may have similar difficulties.

19 Heidi Härkönen and Natalia Särmäkari, 'Copyright and digital fashion designers: the democratization of authorship?' (2023) 18 JIPLP 50; Spyros Sipetas, 'Authorship and re-equilibration of the dynamics in the fashion industry: can the DSM Directive be the leader of a new regime for designers?' (2024) JIPLP (forthcoming); Härkönen, 'Fashion and Copyright' (n 16) 85; Yuniya Kawamura, *Fashion-ology: An Introduction to Fashion Studies* (2nd edn, Bloomsbury Visual Arts 2018) 64.

20 eg Härkönen, 'Fashion and Copyright' (n 16).

21 While bearing in mind that the Nordic legislators did not particularly have applied art in mind when drafting their moral rights' provisions.

sources from this discipline also reveal why the absence of attribution is a major issue for fashion designers. Although the article makes several references to the copyright laws of Finland, Sweden, and occasionally to Norway and Denmark as well, this is done for illustrative purposes and does not entail a full-fledged comparative study.

The article is structured as follows. Section II outlines the international and EU frameworks for the protection of moral rights. The Nordic states are used as an example on how certain European jurisdictions interpret moral rights in applied art. Section III sheds light on the fashion sector's moral rights related customs. Section IV suggests how the moral rights of attribution and integrity should be interpreted in fashion design. Section V analyses whether the fashion sector's moral rights related problems could – or *should* – be avoided through contractual agreements. Section VI presents conclusions.

II. The normative basis for moral rights

1. The nature of moral rights

Moral rights have special importance in the continental (civil law) author's right tradition. While the common law copyright tradition has focused on the protected *work*, the continental tradition has paid more attention to the *author* of the work.[22] According to the *personalist conception of a copyright*, a work is seen to *reflect its author's personality*.[23] Hence, by protecting a work, copyright is indirectly protecting the personhood of its author. The personalist conception of copyright is particularly visible in moral rights which aim to protect the author's name, reputation, and other non-pecuniary personal interests. Due to the personalist conception of copyright, continental jurisdictions have found the protection of moral rights to be vital, while such rights have never been of great significance in the common law copyright tradition.[24]

It is widely recognised in continental jurisdictions that copyright has a two-fold task to protect both economic and moral interests. However, theoretical interpretations of this dual function differ.[25] The *monistic theory* views copyright as a whole, including both economic and moral rights. Moral rights may serve economic interests, and economic rights in turn serve moral interests as well. In practice, the monistic understanding of moral rights is often evident in a permissive approach to (limited) waivers of moral rights, and the duration of moral rights' protection following the term of protection of economic rights. Germany, for instance, adheres to the monistic tradition. The *dualistic theory* perceives moral and economic rights as representing two separate objectives, which are independent of each other and can be exploited separately. In France, adherence to the dualistic theory has resulted in moral rights being perpetual and inalienable.[26]

Although it is not their main function, it is accepted that moral rights may have significant economic impact.[27] In applied art, they can give authors bargaining power in relation to their employers and commissioners. Moral rights' indirect economic impact and potential to elevate the position of authors give them additional importance in precarious creative sectors. They translate into reputational advantage for creators, and in the best case allow them to exploit their creations at higher prices and provide better opportunities in the labour market.[28]

The right of attribution and the right of integrity are the two most generally accepted moral rights and are granted protection under the BC. *The right of attribution* – i.e. the author's right to be recognised as the creator of their work – has been described by Jane Ginsburg as the as 'the most moral and intuitive author's right'.[29] It includes the right to decide upon the crediting of the author, as well as the right to claim authorship, if disputed.[30] It also includes the right to stay anonymous.[31] *The right of integrity* protects the author's interest in maintaining their intellectual creation in the form and context they intended it to be. The right relates to three different acts: (i) altering a work when it is copied; (ii) making changes to the original copy of a work; and (iii) using a copy of a work in its original condition in an unworthy context.[32]

Moral rights are inalienable from the author, i.e. they are not assignable like economic rights. In most continental jurisdictions the possibilities for an author to waive these rights are either non-existent (e.g. France) or very limited (e.g. the Nordic states, Germany).

2. International basis

The dominant copyright law doctrine generally perceives moral rights as human rights.[33] The human rights' aspect of the author's non-pecuniary interest in their work is recognised in the Universal Declaration of Human Rights 1948 (UDHR) Art. 27(2), according to which:

> 'Everyone has the right to the protection of the moral and material interests resulting from any

22 Willem Grosheide, 'Moral rights' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing 2009) 243.

23 This notion is apparent in the CJEU judgment C-145/10 *Eva-Maria Painer v Standard VerlagsGmb et al.* ECLI:EU:C:2011:798, para 88.

24 Grosheide in Derclaye (n 22) 251.

25 Elizabeth Adeney, *The Moral Rights of Authors and Performers. An International and Comparative Analysis* (OUP 2006) 23-24.

26 ibid 24-25.

27 Jacques De Werra, 'The Moral Right of Integrity' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing 2009) 268; Grosheide in Derclaye (n 22) 260.

28 Spedicato (n 17) 114.

29 Jane C Ginsburg, 'The Most Moral of Rights: The Right to be Recognized as the Author of One's Work' (2016) 44(8) Geo. Mason. J. Int'l Comm. L 45.

30 Michel M Walter, 'Dualistic aspects in monistic systems of moral rights' (2019) 14 JIPLP 319.

31 Exercising of the right to remain anonymous may have the same effect as a waiver of the attribution right (Adeney (n 25) 274).

32 Jan Rosén, 'Moral Right in Nordic Law' (2014) ALAI, Brussels, September 2014, p 5 <https://silo.tips/download/countries-quite-a-number-of-cases-on-moral-right-have-been-brought-before-the-co> accessed 6 October 2023.

33 Grosheide in Derclaye (n 22) 248, 265; Adolf Dietz, 'Elements of moral right protection in the Universal Copyright Convention' (1987) XXI(3) Copyright bulletin 19.

> scientific, literary or artistic production of which [they are] the author.'[34]

In international law, the basis for moral rights is found in the Berne Convention.[35] Its Art. 6bis(1) defines the right of attribution and the right of integrity in the following way:

> 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [their] honor or reputation.'

How the terms of this convention are complied with in the countries of the union depends on those states' domestic laws.[36] Article 6bis sets a floor, not a ceiling: countries of the union may grant greater protection for authors.[37] In some jurisdictions the right of integrity allows the author to object to *any* changes to their work irrespective of their nature, i.e. prejudice to their honour or reputation is not a prerequisite.[38]

When it comes to works of applied art, it is unclear whether those countries that have chosen to protect these works may only grant economic rights to them and disregard moral rights. As Art. 6bis only mentions 'works' without making a reference to different categories of works, the article must be interpreted to apply to all protected work genres. If a country of the union chooses to protect works of applied art by copyright, their authors must also be entitled to moral rights.[39]

Works of applied art tend to be industrially mass-produced, meaning that they are typically created by employed or commissioned designers. The BC remains silent on works created by employees. It does not dictate how employees must be credited as authors, if at all. Nor does it explicitly prohibit authors from waiving their moral rights.[40] It is therefore up to the countries of the union to determine whether employed authors must be attributed.[41] In general, the continental jurisdictions are favourable towards employee-authors, whereas the common law systems tend to prioritise the needs of employers. Common law jurisdictions typically follow the work-for-hire doctrine, which deprives employed/commissioned authors of their moral rights.[42]

3. European Union

Moral rights have, to a large extent, remained outside of the EU harmonisation radar. The InfoSoc Directive takes a passive approach to moral rights by stating that they should be exercised according to the legislation of the Member States and the provisions of the BC, the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty.[43] However, the EU is also a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It follows from TRIPS that the moral rights provisions in the BC are not an integral part of EU law. According to Art. 9(1) TRIPS, contracting parties shall not have rights or obligations in respect of the rights conferred under Art. 6bis BC, or of the rights derived from it.

Regardless of EU copyright law's seemingly passive approach to moral rights, certain interests of authors that are typically protected by moral rights have been recognised in legislative text and case law. For instance, the quotation exception provided in the InfoSoc Directive Art. 5(3)(d) requires the name of the author of the cited work to be indicated in accordance with fair practice.[44] This grants authors a certain type of attribution right in respect of quotations. It is also possible to argue that in the *Deckmyn* case the CJEU might have undertaken the de facto harmonisation of certain interests that are typically protected by moral rights.[45] In *Deckmyn,* which harmonised the concept of parody (Art. 5(3)(k) InfoSoc Directive), the CJEU noted that rightsholders have, in principle, a legitimate interest in ensuring that the protected work is not associated with a discriminatory/racist message.[46] This notion bears resemblance to the core interests that the integrity right protects, i.e. the author's interest in maintaining their intellectual creation in the form and context they intended it to be.[47]

Moral rights of authors are recognised in all Member States, but the level and scope of protection is not always the same.[48] The French influence on the development of moral rights cannot be ignored. Of all Member States, France has the strongest '*droit moral de l'auteur*' tradition

34 See also International Covenant on Economic, Social and Cultural Rights 1966, art 15(1)(c).

35 Of other international IP treaties, the WTO's TRIPS Agreement (1994) expressly excludes moral rights from its application (art 9). The Universal Copyright Convention (UCC) (1952) does not contain a comparable provision to art 6bis BC, but sees moral rights to have *some* importance (Dietz (n 33) 17).

36 eg, USA does not grant moral rights to authors in all work categories (Ginsburg (n 29)).

37 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (3rd edn, OUP 2022) 595.

38 Gillian Davies and Kevin M Garnett, 'Introduction' in Gillian Davies and Kevin M Garnett (eds), *Moral rights* (Sweet & Maxwell 2010) 7.

39 However, an issue concerning the term of protection of moral rights in applied art remains. Ricketson and Ginsburg (n 37) 607 interpret art 6bis(2) to mean that authors' moral rights last at least until their deaths. See also Véronique Pouillard, 'Intellectual Property Rights and Country-of-Origin Labels in the Luxury Industry' in Pierre-Yves Donzé, Véronique Pouillard and Joanne Roberts (eds), *The Oxford Handbook of Luxury Business* (OUP 2021) 405.

40 Gillian Davies and Kevin M Garnett, 'Moral rights in international instruments' in Davies and Garnett (n 38) 64.

41 Ginsburg (n 29) 51.

42 Henry Hansmann and Marina Santilli, 'Authors' and Artists' Moral Rights: Comparative Legal and Economic Analysis' (1997) 26(1) Journal of Legal Studies 134.

43 Preamble to the InfoSoc Directive, recital 19.

44 This exception is not mandatory for Member States.

45 Eleonora Rosati, 'Just a Laughing Matter? Why the CJEU Decision in Deckmyn is Broader than Parody' (2015) 52(2) Common Market Law Review 527.

46 Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen et al* ECLI:EU:C:2014:2132, paras 30-31.

47 See also in Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen et al.* ECLI:EU:C:2014:458, Opinion of AG Cruz Villalón, para 28: strictly speaking the case was not about moral rights, nor was it intended to be.

48 Gillian Davies and Kevin M Garnett, 'Moral rights in the European Union' in Davies and Garnett (n 38) 73.

as the first jurisdiction to recognise moral rights.[49] While other jurisdictions have followed France, the French provisions on moral rights remain among the most protective in Europe. It is interesting that although the *unité de l'art* theory originates from France,[50] this theory does not seem to entirely extend to the area of moral rights. According to Elizabeth Adeney, French courts will often (but not always) consider the utilitarian nature of a work, and moral rights protection of works of applied art in a predominantly commercial domain is narrower than for works of pure art.[51]

In its design protection regime, the EU seemingly grants an 'attribution right' to industrial designers in its Art. 18 Community Design Regulation (6/2002),[52] according to which a designer has the right to be cited as such before the Office and in the register. However, this 'right' in EU design law does not compare to moral rights in the copyright regime. In design law, citation is not mandatory, and this 'right' can be waived in its entirety.[53]

4. The 'Nordic' interpretation of moral rights

The Nordic countries offer an interesting example of regional harmonisation of moral rights in Europe. The copyright laws of Finland, Sweden, Denmark and Norway are the result of 'Nordic harmonisation' from the mid-20th century.[54] They still display great homogeneity in their moral rights provisions,[55] which are generally found in the third Sections of Nordic copyright acts.[56] These sections include provisions on the same moral rights as the BC, namely the right of attribution and the right of integrity.[57] Although the duration of moral rights is tied to the duration of economic rights (70 years *post mortem auctoris*),[58] this is not an indication of the Nordic states following the monistic school. As noted by Per Jonas Nordell, the Nordic countries have settled for something that may be called the middle ground between the monistic and dualistic traditions. While the Nordic states are influenced by the dualistic school, considering how the personalist conception of copyright is visible in the Nordic tradition, certain features point towards the monistic school. For example, the continental 'third moral right', *droit de divulgation* (i.e. the right of disclosure) is not explicitly provided for authors but generally interpreted to be included in the economic right of reproduction.[59]

Regardless of their personalist conception of copyright, the Nordic copyright acts are not as author centric as, for example, the French law. This can be seen in the fact that limited waivers of moral rights are accepted, and in the lack of an express *droit de divulgation*.

The Nordic copyright acts' provisions are seemingly neutral in terms of different work categories, also regarding moral rights. However, the legislators did not have works of applied art in mind when developing these provisions in the mid-20th century. As described by Jens Schovsbo and Morten Rosenmeier, applied art was treated as the 'foster child' of copyright in Nordic copyright law,[60] especially pre-*Cofemel*. Legal praxis aimed at keeping design products outside of the scope of copyright protection by, for example, setting a higher threshold of protection (Sweden, Norway), granting only a narrow scope of protection (Denmark) or doing both (Finland).[61] Thus, the traditional Nordic approach to moral rights was not developed with a 'unity of art mentality'.

Although the legislative text does not indicate that works of applied art would be excluded from moral rights protection, there are provisions that may de facto narrow down the scope of those rights in this work category. As for the right of attribution, Nordic copyright law ties the manner of attribution to *proper usage*, which determines the correct way of giving author credits. This may be different in different fields, and applied art has often been used as an example of situations where 'proper usage' might not always require attribution. 'Proper usage' is a fluid concept and is very much based on the circumstances of each case, which limits the value of court decisions as precedents and can make the scope of the attribution right uncertain.[62] As for the right of integrity, there are exceptions regarding utilitarian objects and works of architecture.[63] Generally, there are different standards for different genres of works in different fields of use.[64] In practice, this can make the scope of the moral rights in works of applied art narrower than in works of 'pure' art.

49 Gillian Davies and Kevin M Garnett, 'Introduction' in Davies and Garnett (n 38) 3.

50 Bouche (n 7) 66.

51 Adeney (n 25) 190.

52 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1-24.

53 See Anna Tischner, 'Design rights and designer's rights in the EU' in Henning Hartwig (ed), *Research Handbook on Design Law* (Edward Elgar 2021) 172.

54 Since then, Norway and Denmark have carried out copyright law reforms and their current copyright acts are from 2018 and 1995, whereas the acts of Finland and Sweden date back to the 1960s.

55 Johan Axhamn, 'Nordic countries' in Gillian Davies and Kevin M Garnett (eds), *Moral rights* (Sweet & Maxwell 2010) 505-07.

56 Finland: Tekijänoikeuslaki (404/1961) (FCA), s 3; Sweden: Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (SCA), s 3; Denmark: Bekendtgørelse af lov om ophavsret (consolidated version No 1144 of 23 October 2014) (DCA), s 3; Norway: LOV-2018-06-15-40: Lov om opphavsrett til åndsverk m.v. (åndsverkloven) (consolidated version of 20 December 2018) (NCA), s 5.

57 There is versatility between different Nordic jurisdictions regarding other moral rights; eg, Finland and Norway provide certain authors the right to access (*droit d'accès*) (Axhamn in Davies and Garnett (n 55) 507).

58 Except for 'protection of classics' (DCA, s 75; FCA, s 53; SCE, s 51; NCA, s 108), which is kind of a 'public' moral right that lasts until perpetuity and can be enforced by certain authorities. It prohibits making public domain works available to the public in ways that violates cultural interests. It is rarely used and seems to lack practical importance (see Stig Strömholm, 'Droit Moral – The International and Comparative Scene from a Scandinavian Viewpoint' [2002] Scandinavian studies in Law 249).

59 Per Jonas Nordell, 'Den ideella rättens tvingande natur och oöverlåtbarhet' in Mads Bryde Andersen, Caroline Heide-Jørgensen and Jens Schovsbo (eds), *Festskrift til Mogens Koktvedgaard* (Jurist- og Økonomforbundets Forlag 2003) 385-86; Axhamn in Davies and Garnett (n 55) 507.

60 Jens Schovsbo and Morten Rosenmeier, 'The Copyright/Design Interface in Scandinavia' in Estelle Derclaye (ed), *The Copyright/Design Interface, Past, Present and Future* (CUP 2018) 125.

61 ibid 125-26; Härkönen, 'Fashion and Copyright' (n 16) 53-54.

62 Rosén (n 32) 4-5.

63 Axhamn in Davies and Garnett (n 55) 512.

64 Rosén (n 32) 5.

When it comes to the interpretation of moral rights, Nordic law aims to balance moral and economic interests. Although there is no explicit doctrine of balancing of interests (such as in German law, for example),[65] the text of the Nordic provisions on moral rights, as well as their interpretation by courts, suggest that some kind of balance ought to be struck between the author's interests and the interests of whoever is (legally) exploiting the work.[66]

a) The right of attribution and the requirement of 'proper usage'

The right of attribution in principle applies to all types of authors and works, including applied art. However, a certain peculiarity in Nordic law can define the way the author must be credited, which might result in this right manifesting itself differently in different work genres. According to, e.g. Sec. 3(1) Finnish Copyright Act (FCA):

> 'When copies of a work are made or when the work is made available to the public in whole or in part, the name of the author shall be stated in a *manner required by proper usage*.'[67] (emphasis added)

The equivalent provisions in the Swedish Copyright Act (SCA), Norwegian Copyright Act (NCA) and Danish Copyright Act (DCA) are basically identical: the requirement of 'proper usage' defines the way the author must be credited. A somewhat equivalent term – and more familiar for readers outside Scandinavia – is 'fair practice', which is used e.g. in the context of quotation right in Art. 5(3)(d) InfoSoc Directive. In some English language legal literature, the relevant term – '*god sed*' (SE), '*god skik*' (DK), '*god skikk*' (NO), '*hyvä tapa*' (FI) – has been translated as 'good practice'.[68] As the translation 'proper usage' is consistently used in the unofficial English translations of Nordic copyright acts[69] and in most of the English language legal literature cited, it has been chosen for this article as well.

The requirement of proper usage allows consideration of the qualities of a specific usage in a particular creative sector.[70] This may provide flexibility for the commercial use of works, but also bears a risk of leading to situations that authors find undesirable. The assessment is based on an objective evaluation, not the author's own opinion.[71] It has been suggested that despite the right of attribution in principle applying to all types of works, the obligation to attribute an author is not absolute, because the requirement of proper usage must be determined by the *custom* of the relevant sector of creativity.[72] This interpretation could permit forgoing author credits in certain situations in fields where the norm is *not* to mention authors in the context of their works.[73] This is the prevailing practice in the global fashion industry. In particular, Finnish commentators seem to sometimes equate 'proper usage' to the industry custom,[74] whereas Swedish commentators make a distinction between the two.[75] The custom-based interpretation of 'proper usage' is problematic, as it allows the exploitation of authors in sectors where they are in a vulnerable position. If 'proper usage' were to be equated with industry customs, this would mean that in certain sectors established practices could de facto, if not de jure, eliminate authors' right of attribution. Thus, a more desirable interpretation of 'proper usage' is that of Johan Axhamn, who notes that this term is not a synonym for mere custom or usage.[76] Similarly, according to Norwegian legal doctrine, 'poor customs can never be converted into proper usage'.[77] Based on the contemplations above, 'proper usage' ought not to be interpreted to mean that fashion houses are excused from attributing designers merely because it is customary.[78]

Unless it is totally unreasonable (i.e. difficult, or impossible), proper usage requires that an author's name must be stated in accordance with good practice.[79] Axhamn mentions works of applied art as an example where technical reasons might make it too difficult to affix the author's name on the copies of their works.[80] 'Proper usage' may limit the extent in which an author of a work of applied art can demand their name being credited, because it does not necessarily require that the author must be credited in the way and to the extent that *they* wish. It may permit attribution that is not as prominent as the authors' desires.

The Finnish Supreme Court (FSC) has analysed 'proper usage' in the context of jewellery design in its judgment *Kalevala Koru*.[81] The case was, *inter alia*, about the proper way of attributing the plaintiff as the author of the jewelleries he had designed for Kalevala Koru. The FSC found that although the plaintiff had the right of attribution in accordance with the FCA Sec. 3, proper usage did not require the manufacturer Kalevala Koru to credit him in the context of each distributed copy. The author was credited in the sales catalogues and brochures sent to retailers, as well as in other marketing and sales material of Kalevala Koru and its products. It appears that the court gave at least *some* relevance to the industry custom when assessing proper usage, because it stated that:

65 See De Werra (n 27) 269; Elizabeth Adeney, 'A matter of respect: the moral rights of the entertainer' in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainmen*t (Edward Elgar Publishing 2017) 235-36.

66 Rosén (n 32) 12.

67 Unofficial translation from Finlex <https://www.finlex.fi/fi/laki/kaannokset/1961/en19610404.pdf> accessed 13 February 2024. There is no official English translation.

68 eg Strömholm (n 58).

69 eg, unofficial translations by Finlex and WIPO.

70 Rosén (n 32) 4.

71 Axhamn in Davies and Garnett (n 55) 518.

72 Kristiina Harenko, Valtteri Niiranen and Pekka Tarkela, *Tekijänoikeus* [Copyright] (Talentum Pro 2016) 68.

73 ibid.

74 eg, ibid; Mikko Hoikka, 'Moraaliset oikeudet ovat moraalittomia' [Moral rights are immoral] (2024) 122 Lakimies 152. See also Finnish Copyright Council (FCC) statement 2017:10 *esittävän taiteilijan isyysoikeus* para 28. The FCC statements are non-binding but have significant relevance for the development of the Finnish copyright tradition.

75 eg, Axhamn in Davies and Garnett (n 55) 518; Rosén (n 32) 4.

76 Axhamn in Davies and Garnett (n 55) 518.

77 Ole-Andreas Rognstad, *Opphavsrett* [*Copyright*] (2nd edn, Universitetsforlaget 2019) 262.

78 See also Rosén (n 32) 4: courts may find long-established practices improper.

79 Axhamn in Davies and Garnett (n 55) 518.

80 ibid 519.

81 KKO:1992:63, 20 May 1992.

> 'The evidence in the case shows that in the jewellery sector the way to attribute artists varies. The name of a very well-known artist is often affixed to each piece of jewellery, or at least mentioned in its sales packaging. In some stores, this might be the custom when it comes to all artists. On the other hand, the evidence in the case does not indicate that this would be the exclusive nor even a common practice.'[82]

The agreement between the author and the company did not require attribution in the context of each copy of their work either. Thus, the author's claim for compensation of damages failed. *Kalevala Koru* illustrates that although authors of works of applied art *are* indeed entitled to the right of attribution, the practical consequence of 'proper usage' can be that an author has only limited possibilities to dictate the exact way they are be credited, unless they have made contractual agreements regarding it. This is reflective of the BC, which also does not specify *how* attribution must be done in practice. The right of attribution is contextual and can be fulfilled in various ways. It might follow from 'proper usage' that there are *situations* and *contexts* where attribution is not required.[83]

b) The right of integrity

In Nordic law, the right of integrity does not permit the author to object to *any* changes to their work. However, the right is broader than the minimum requirement of the BC. According to Sec. 3(2) FCA:

> 'A work may not be altered in a manner which is prejudicial to the author's literary or artistic reputation, or to [their] *individuality*; nor may it be made available to the public in such a form or context as to prejudice the author in the manner stated.'[84] (emphasis added)

Again, the rest of the Nordic copyright acts include similar provisions.[85] What is remarkable is that it is not only the author's artistic reputation that is protected, but also their *individuality.* In practice, the protection of individuality means that an infringement of the right of integrity can be constituted by changes that most people would regard as enhancing the artistic quality of the work, if the author's intentions or authentic experience are thereby changed.[86]

The type of work has relevance in the Nordic interpretation of the integrity right.[87] For authors of works of applied art, this right is weaker than that of their colleagues in the field of pure art. Even minor adjustments to works of fine art can have important consequences, whereas in 'less artistic' creations, there is more room to make alterations. Due to the Nordic legal tradition, Courts are more likely to place fashion designs and other works of applied art in the latter category.

For works with utilitarian purposes, the interests of their users are taken into consideration. Buildings, garments, handbags, and other utilitarian works may be altered without the author's consent (Sec. 25e FCA, Sec. 26c SCA, Sec. 39 NCA, Sec. 29 DCA). In Finnish and Norwegian law, the prerequisite for alterations is that they are required by technical or practical reasons.[88]

III. Moral rights in the practices of the fashion sector

1. Background

The previous Section gave a doctrinal viewpoint on authors' moral rights in applied art. However, when it comes to the implementation of these rights, the fashion sector's practices and the ideals of the author's right tradition are in an obvious conflict. This is particularly true for the right of attribution.

Attribution of designs to their authors is not unheard of in the history of fashion. However, attribution customs have changed, following the other changes that the sector has undergone. Crediting designers as authors started during the evolution of the occupation of fashion designers, caused by the technological, societal, and economic changes of the First Industrial Revolution. The fashion designer then became an *artist* instead of a tailor who just fulfils their customer's wishes.[89] During the interwar period, the French haute couture firms increasingly concentrated on naming designers in the context of their designs. Two haute couture designers were pioneers in this practice: Madeleine Vionnet and Jeanne Lanvin.[90] By fiercely attributing their designs to their names, they used author credits to prove authenticity. Gradually these practices developed into something that (rather than exercising the moral right of attribution) resembles the use of trademarks for brand protection purposes.[91]

Starting from the 1970s, neoliberal globalisation and changes in the scale of fashion production demoted employed designers from the true fashion elite to insecure positions.[92] Today, fashion is an industry that generates vast profits, which are distributed in an astonishingly unequal way. The anthropologist Giulia Mensitieri's research reveals the dreadful reality of the contemporary European high fashion sector. The people who literally make fashion do so in precarious situations, even working for free.[93] Artistic work in fashion tends to be low-paid or

82 Translation by the author.

83 See also Rosén (n 32) 4: Rosén argues that 'proper usage' in different fields may vary from a very dominant exposure of the author's name even to *total lack* of attribution. However, legal praxis and the case law Rosén discusses seem to indicate that authors in all creative fields *are* generally entitled to attribution. Rosén also notes that as a rule of thumb, attribution should always be done unless obvious ethical or practical reasons prevent it.

84 Finlex (n 67).

85 SCE 3(2), DCA 3(2), NCA 5(2). The NCA's phrasing differs slightly: it also refers to the *work's* uniqueness, not just the author's individuality.

86 Strömholm (n 58) 241.

87 Axhamn in Davies and Garnett (n 55) 523.

88 DCA requires technical or practical reasons for alterations to buildings (if made without the author's consent), but not for alterations made to articles for everyday use. The SCA makes no reference to technical or practical reasons.

89 Kawamura (n 19) 55-70; Phyllis G Tortora, *Dress, Fashion and Technology. From Prehistory to the Present* (Bloomsbury 2015) 136.

90 Pouillard (n 39) 406-07.

91 See more ibid.

92 Giulia Mensitieri, *The most beautiful job in the world: lifting the veil on the fashion industry* (Natasha Lehrer tr, Bloomsbury 2020) 144.

93 ibid 118. See also an example from the Finnish fashion sector: Sofia Tawast and Miika Koskela, 'Paolan palveluksessa' [in Paola's service] (*YLE*, 31 March 2022) <https://yle.fi/a/3-12383572> accessed 21 February 2024. The article interviews 15 former employees and interns of the indie fashion brand Ivana Helsinki. The interviewees discuss the enormous workload and receiving clothing as payment for overtime hours. One of the interviewees was a minor during her internship, and yet assigned 16-hour shifts that ended at 4 am. According to Finnish labour laws, minors cannot work for longer than 8 hours per shift or during the night.

unpaid. Rather, the currencies used are visibility,[94] prestige and elevated social status, even though this leads to structural uncertainty.[95] Converting prestige and visibility to economic capital is not automatic.[96] However, such jobs in high fashion allow designers a wide margin of experimentation and creativity, which in copyright terms means that they are more likely to come up with original works compared to their colleagues in other subsectors of the fashion industry. The freedom of creativity is the reason why many wish to stay in the field.[97] On the other hand, commercial designing of mundane garments – i.e. garments that are unlikely to be copyright-protected – is a much more secure position, and decently paid. However, such positions are at the bottom of the fashion hierarchy, inter alia, due to the lack of artistic possibilities. Thus, it is typical that many designers do not include the items they produced while working in these positions in their portfolios and wish to remain anonymous rather than be credited.[98] To summarise, high fashion designers who tend to create original – i.e. copyright-protected – works, are not properly compensated for their creativity, whereas designers who develop mundane, non-protected garments are better off.

2. Legal perspective to the industry custom

The above-described poor labour conditions are reflected in the way author's moral rights are exercised (or rather, *not* exercised) in the European fashion sector. As for the right of attribution, the industry's disregard is flagrant. Although the BC – and most EU Member States – seemingly grant this right to authors of all protected works, the fashion sector's custom appears to require a designer to 'earn' their right of attribution by gaining fame and merit.[99] Those nameless, employed, or freelance designers, who are paid very little if they are paid at all, are rarely compensated in author credits either. 'Attributions' are made, but not truthfully. It is common for prestigious fashion houses to name their founders or head designers as authors of all of their products, even when these persons have not been involved in the creative processes, or have died a long time ago, leaving the de facto designers' names unmentioned.[100] The industry maintains the illusion of the designer as a creative genius by elevating some designers above others as 'stars', because it is commercially beneficial.[101] Such practice reflects the industry's notion of authorship, which differs from that of copyright. As has been explained by sociologist Yuniya Kawamura, the fashion sector 'legitimises' certain (but not *all*) designers' work as 'creative' by including them to the hierarchical system. In fashion, becoming an 'author', an artist who 'deserves' attribution, is a social process which includes multiple gatekeepers.[102] It most often has nothing to do with the 'free and creative choices in the production of a work'[103] that copyright lawyers associate with authorship. Instead, the fashion sector elevates certain individuals to the mythical status of a 'great designer', whose names are linked to products (i.e. who are attributed). Most designers are not admitted to this system, and they work in subordinate positions. The system has not 'legitimised' their creativity and they are seldom credited as authors.[104] Many work as 'ghost designers' for famous names in the fashion industry, and are forced to remain in the shadows.[105] These established practises are rarely questioned. In fashion, non-attribution of designers who are not elevated as 'stars' appears to be 'business as usual'. Instead, in the situations described above, trademarks are commonly used in ways that may *seem* like attribution.

It is not as simple to make observations about the right of integrity in the fashion sector. Harmful mutilation of original designs is not as easy to spot as the lack of attribution. And due to the lack of attribution, authorship in fashion is usually not 'traceable', so it is often impossible to know who the author of the original design is, and who made alterations to it (and what kind of alterations). This makes it extremely difficult for an outsider to spot potential infringements of the right of integrity. There is hardly any known case law concerning this right in fashion. Perhaps the most well-known case is the French *Salvador Dalí* judgment from 1968. It concerned the Spanish surrealist painter and printmaker Dalí's costume designs for a play.[106] Although the right of integrity under French law is far stronger than the BC minimum in requiring the author to merely show that the spirit of the integrity of their work has been violated (i.e. no need to show that such alteration has led to any prejudice),[107] the *Cour de Cassation* found the defendant's mutilating actions in relation to Dalí's works to be non-infringing. Dalí had opposed the act of adding accessories to the costumes he had created. The court, however, considered that the costumes were themselves accessories to the main work, i.e. the production of the play. Thus, the director had certain freedom to carry out modifications.[108] Although this case can be seen as a demonstration of the difficulty of applying the right of integrity to fashion design, its value as a precedent is low as it is tied to such specific and unconventional circumstances.

The conflict between moral rights and industry customs can be traced back to at least four factors that

94 'Visibility' does not mean attribution, but access to certain social circles and the elevated status that follows from working for a prestigious brand.

95 Mensitieri (n 92) 112-15, 156.

96 ibid.

97 ibid 162-63.

98 ibid 81, 111, 156.

99 Härkönen and Särmäkari (n 19) 52.

100 ibid 50; Mensitieri (n 92) 153; Sipetas (n 19).

101 Kawamura (n 19) 55, 63, 69.

102 ibid 58-60. The gatekeepers are, eg, elite designers, strong brands, institutions, fashion journalists, and media.

103 See *Painer* (n 23).

104 Kawamura (n 19) 64, 68.

105 Mensitieri (n 92) 139-41, 150. See also an example from the Swedish design sector: Prince Carl Philip of Sweden was credited as the author of a design product, which turned out to be created by the designer-sculptor-writer Eric Ericson. Ericson and the prince disagree whether Ericson created the product completely himself, or whether the prince helped him (Sindra Grahn and Anders Silvergren Blåder, 'Ericson: Prinsen tycker det är skitjobbigt' [The prince thinks it sucks] (*SVT Nyheter*, 16 October 2013) <https://www.svt.se/kultur/ericson-prinsen-tycker-det-ar-skitjobbigt> accessed 21 February 2024).

106 Cour de Cassation, Chambre civile 1, 5 March 1968.

107 Maria Mercedes Frabboni, 'France' in Gillian Davies and Kevin M Garnett (eds), *Moral rights* (Sweet & Maxwell 2010) 373.

108 ibid 382.

characterise the contemporary fashion sector. The first, and perhaps the most important reason is that the fashion sector's own notion of 'authorship' significantly diverges from that of copyright law. While in copyright, any human being can be an author if they produce their own intellectual creation, the fashion sector generally reserves the position to designers with fame and merit.[109] This is connected to the second reason, i.e. an individual designer's low and vulnerable position in the highly hierarchical fashion industry.[110] Various types of exploitation are normalised and institutionalised within the sector. Even fashion degree courses prepare students for the rhythm of the large fashion houses, where unpaid 14-hour days and working through the night are the norm, despite of EU labour law provisions.[111] Mensitieri explains how European fashion education produces workers who will 'never demand their social rights, because they don't even know what they are'.[112] The third reason is that throughout their existence, the fashion sectors in most jurisdictions have not been able to confidently assume that copyright even applies to the items they produce. Only recently has the EU settled for the unity of art, and this is still not the case for other significant fashion markets, e.g. the USA.[113] As undertakings in the fashion sector have not been accustomed to view their products as copyright-protected, it is no wonder that they have not really paid attention to respecting authors' moral rights. The fourth cause is that fashion is an ultra-capitalist sector of creativity,[114] whereas moral rights are personal rights of authorship and as such, generally involve only indirect commercial consequences. It can be assumed that all these reasons have contributed to the status quo.

Considering the virtual lack of case law and the fact that designers' moral rights seem to be generally bypassed by fashion companies, one might wonder whether designers even care about their moral rights. It would, however, be too simplistic to assume that the status quo would indicate that fashion designers do not *want* to be credited as authors, nor have the integrity of their works untouched. In addition to the long-standing practices within the fashion sector, the absence of execution of moral rights in the field is likely to relate to the power imbalance between designers and fashion companies.[115] When something becomes a social norm in the fashion industry, it is difficult for an individual designer to contest it. In particular, the enforcement of rights against brands at the top of the fashion pyramid (i.e. haute couture and luxury brands) is socially unacceptable.[116] Considering how highly competitive the field is, and how precarious the fashion designer's profession can be, it can be assumed that the threshold for designers to invoke their moral rights is high. The de facto access to justice within the fashion sector is poor.[117] However, as noted by Mira Sundara Rajan, difficulties in enforcing moral rights do not necessarily mean that they should be dispensed with.[118] Thus, it would be incorrect to assume that due to the lack of enforcement, fashion designers do not generally enjoy moral rights protection.

To conclude, there is no apparent reason that legally justifies the fashion sector's general neglect of moral rights. Instead, there is a need to carefully investigate how to tailor a perfect fit between fashion and law in the context of moral rights. The following Section analyses how the rights of attribution and integrity should be applied in fashion design.

IV. Tailoring moral rights for the fashion sector

1. Fashion and the right of attribution

a) How to attribute

In the continental copyright regime, there seems to be no legally valid reason why the right of attribution would be denied from authors of works of applied art. However, this right has been opposed for several reasons.

First of all, the right of attribution has been resisted because its implementation is said to be too difficult in practice.[119] Difficulties in affixing the author's name in certain works of applied art have also been mentioned as a valid reason to refrain from crediting.[120] Moreover, it has been argued that if the artistic impression of a product could be disturbed by the application of the author's name, attribution might not be mandatory. It has been suggested that this could be the case particularly in the context of applied art,[121] for example, some glassware products.[122]

Although various reasons have been given to justify forgoing author credits in applied art, at least the ones mentioned above can be revoked when taking a look on some examples in the Finnish and Swedish industrial design sectors. As for the alleged difficulty in affixing the authors name in their works, it seems that if there is a will, there is a way to attribute. Although the companies below are not necessarily comparable to the European high fashion sector when it comes to the creativity in their products, they illustrate how authors of utilitarian works *can* be credited by affixing their names on products. For instance, the Finnish glassware brand Iittala affixes the name of Kaj Franck to the minimalist 'Kartio'

109 Härkönen and Särmäkari (n 19) 49-52; Kawamura (n 19) 64, 68.

110 ibid 50-51, 55; Mensitieri (n 92) 135-36, 166.

111 ibid 7-8.

112 ibid 7-8, 165. See also Tawast and Koskela (n 93): some of the interviewees' statements show how they had internalised the idea that to make it in fashion, one needs to 'work a lot for free'.

113 See, eg, Susanna Monseau, *Protecting Creativity in Fashion Design: US Laws, EU Design Rights, and Other Dimensions of Protection* (Routledge 2023) 61.

114 See Elizabeth Wilson, *Adorned in Dreams: Fashion and Modernity* (Revised and updated edn, Bloomsbury 2003) 13.

115 Härkönen and Särmäkari (n 19) 50-51, 55.

116 Guido Noto La Diega, 'Can the law fix the problems of fashion? An empirical study on social norms and power imbalance in the fashion industry' (2019) 14 JIPLP 22-24.

117 The same can probably be said about any creative industry, particularly those where employees do not have strong trade unions to support them.

118 Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (OUP 2011) 6.

119 See generally Ginsburg (n 29) 48.

120 Axhamn in Davies and Garnett (n 55) 519; Swedish Government Official Report (SOU) 1956:25 116.

121 Finland: Komiteanmietintö (Committee memorandum) 1953:5, 48.

122 Rosén (n 32) 4; SOU 1956:25 (n 120) 116.

glasses.[123] In this case, the famous designer's strong personal brand generates additional value for the producer, giving an extra incentive to credit him in each copy of his work.[124] The Swedish furniture giant IKEA, on the other hand, credits all designers regardless of their status. Also, the Finnish fashion house Marimekko credits the authors of their textile prints on their website, fabric selvedges, and the washing instruction labels on textile products. At the same time, Marimekko generally does not provide information about designers of the garments that are made from those textiles.[125] These examples, however, are exceptions and they are not representative of the industry custom, nor should they be interpreted to mean that the attribution practices in the Finnish and Swedish fashion/design sectors differ from the above-described practices of the European fashion industry, at least significantly. Rather, they are just a few positive examples that illustrate how attribution is possible even in fields where this right has been resisted.

When it comes to the alleged difficulty or disturbance of artistic impression when affixing a designer's name in each copy of their work, it is hard to see how fashion houses could convincingly use this as an excuse.[126] In practice, the name(s) of the author-designer(s) could easily be affixed on a garment's washing instructions label or price tag, or included in a digital product passport (DPP).[127] Other relevant information about a fashion product, such as the country of manufacture, care instructions and the composition of the fabric, is already communicated to its user in this manner. When a copyright-protected design is featured in an online store, for example, the designer-author could be credited in the product information.

However, there are some situations in the fashion sector where attribution might be unreasonably difficult, or even impossible. Fashion shows are one example. In these shows, works are made available to the public, but requiring their attribution might be unreasonable due to their fast pace.[128] It might be impossible to credit each designer when a model wearing their creation is walking down the runway, especially if the show features works from different designers, combined in different looks. The practice could even disturb the artistic impression of the fashion show, which might be a protected work itself.[129]

Crediting designers in the aforementioned ways would not be impractical, nor much to ask from garment producers. At the same time, such attribution would be a significant improvement for designers. Crediting designer(s) in this manner would not change the artistic/aesthetic impression that the fashion design generates, but the information would be available for anyone interested in it. The next logical question would then be: *is* anyone interested the name of the designer of the garment they are wearing?

b) Attribution as a source of information

In mass-market garments, fast fashion, and mundane apparel, the identity of the designer may not matter much to the consumer. However, such garments are typically not those that pass the threshold of originality,[130] so the right of attribution is not relevant anyway. In designer garments, (haute) couture, luxury fashion, and companies that ride with the personal brands of 'star designers',[131] and other more prestigious garments, transparency regarding authorship suddenly becomes important to the user. As rightfully noted by fashion researcher Natalia Särmäkari, '[f]ashion design is […] a socially legitimised practice where humans decide *whom* they want to wear.'[132] Consequently, if a consumer pays a premium price for a design that is marketed under the name of a certain person, they deserve to know whether that information is accurate. Did this person truly create the design, or was it created by someone else, e.g. an employed designer without similar fame and merits? These considerations illustrate how the right of attribution in fashion overlaps with consumer protection. Attributing a design to its author improves transparency,[133] and helps consumers to make informed purchasing decisions.

For many consumers, information about the true authors of designs might not make a difference in their purchase decision if the brand is 'right' (in other words, it might be the trademark that matters the most). However, (some) consumers' potential lack of interest does not justify forgoing the designer's right of attribution.[134] Although the right of attribution has an indirect function in providing accurate information about the source of works to the public, its primary function is to protect the author's personal, non-pecuniary interests in being identified with their intellectual creation.[135] These two reasons to attribute designs to their authors are, however, not competing. Rather, they complement each other

123 The FCC has found the Iittala Kartio glasses to pass the threshold of originality, ie to be copyright-protected (statement 2013:15 *astioiden tekijänoikeussuoja*).

124 See also Spedicato (n 17) 119.

125 This may be plausible, considering that the shapes of Marimekko's garments tend to be rather simple and mundane, ie they probably would not pass the threshold of originality. It appears that those fashion brands who focus on fabric prints as essential elements of their products tend to credit the designers of their textiles, whereas it is not as common to see designers being credited in products where the key design element is, eg, the shape, cut, fit, etc.

126 The BC does not specify how attribution must be done in practice. Ricketson and Ginsburg (n 37) suggest that the earnest way of doing this is to identify the author(s) in each copy of the work (596).

127 DPP is a product-specific data set, which can be electronically accessed through a data carrier to electronically register, process, and share product-related information amongst supply chain businesses, authorities and consumers (Pantxika Ospital and others, 'Digital Product Passport to Support Product Transparency and Circularity' (proceedings of the Global Fashion Conference, November 2022) 7 <https://gfc-conference.eu/wp-content/uploads/2023/05/OSPITAL-ET-AL_Digital-Product-Passport-to-Support-Product-Transparency-and-Circularity.pdf> accessed 16 May 2023).

128 See also Axhamn in Davies and Garnett (n 55) 519.

129 Estelle Derclaye, 'French Supreme Court rules fashion shows protected by copyright – what about the UK?' (2008) 3 JIPLP 286.

130 Heidi Härkönen, 'Muoti tekijänoikeudellisena teoksena: näkökulmia käyttötaiteen teoskynnykseen ja kopiointiin Suomessa' [Fashion as a copyright-protected work: Perspectives on the copyright threshold and copying of applied art in Finland] (2018) 99(6) Defensor Legis 919.

131 *Kawamura* (n 19).

132 Natalia Särmäkari, 'From a Tool to a Culture. Authorship and Professionalism of Fashion 4.0 Designers in Contemporary Digital Environments' (doctoral thesis, Aalto University School of Arts, Design and Architecture 2022) 103.

133 Transparency is one of the biggest trends of the contemporary fashion industry (Ospital and others (n 127) 2-3).

134 See also Ginsburg (n 29) 48.

135 See Adeney (n 25) 225: moral rights do not exist to protect or enhance the public good, though they might have this indirect effect.

when arguing for accurate recognition of authorship in the fashion and design sectors. Although the primary reasoning for the right of attribution in the fashion sector derives from the protection of designers' personality, the consumer-protection/transparency reasoning is built *on top* of such reasoning, adding weight to the importance of crediting designers as authors. Failing to credit an author means, *inter alia*, that their work does not get to be a part of their artistic oeuvre and hampers their possibilities to build their professional reputation. Thus, when assessing the significance of attribution in the fashion sector, the most relevant perspective is the protection of the author and their personhood. For the same reason, the need of the designer's employer/commissioner to have flexibility in the use of their work ought not to outweigh the designer's subjective and reputational interests in relation to the right of attribution.[136] It is difficult to argue *why* it would be necessary for a fashion house *not* to credit the de facto designer of a garment/accessory, especially when affixing the name of the author in each copy of a work is easy. Considering the personalist conception of copyright, a fashion house's commercial urge to make their clients believe that all their products come from the same creative source is not an excuse to refrain from attributing authors.

As the world of fashion is crowded with strong brands, the attribution right may overlap with the use of trademark. These two rights are not conflicting, though. It can be difficult to establish whether mentioning a designer's name is a use of a trademark, or an execution of the right of attribution. In a way, these rights serve the same cause, namely identifying the origin of a design product. However, attribution identifies the creative source of the *work*, while trademark identifies the source of the *copy* of the work. It is possible for these two rights to coexist in harmony. While the marketing and sales of the product could be done under the trademark, the product information could still include author credits in the ways suggested above.

c) Conclusions regarding attribution

The previous Subsections show that there are no valid practical or ethical reasons that speak against crediting fashion designers as authors. This is illustrated by the examples on how attribution could be easily made. It is perfectly possible to respect a designer's right of attribution without any effect on the appearance of a garment, i.e. its typically most important sales asset. Implementing the right of attribution in the fashion sector is far from impossible, difficult, or impractical, regardless of how uncommon it is.

Truthful attribution is, however, clearly something that the fashion sector is not used to. One might hence contemplate that due to the industry practice, designers do not need to be credited. For instance, in the Nordic jurisdictions, one *could* argue that because crediting (other than famous) fashion designers is exceptional in the field, 'proper usage' does not oblige fashion houses to credit designers. However, this would be an incorrect conclusion. As mentioned, the requirement of 'proper usage' should not be equated with established practices. Also, when assessing the different standards of attributing in different genres of works, what must not go unnoticed is their background: which factors have led to the evolution of such attribution customs? The international fashion industry's custom has developed during the decades of no- or low-protection of fashion design works. This is still the reality in many jurisdictions outside the EU. It is likely that the practices have been influenced by the long-standing discrimination against works of applied art.[137] Hence, one should refrain from giving considerable weight to the existing custom of disregarding author credits. There is no fairness in discriminating against authors of works of applied art merely because their works were historically not considered as protected subject matter.

Finally, it is necessary to touch upon the relationship between the fashion sector's custom of non-attribution and the author's right to remain anonymous. T. M. Kivimäki has noted that it is illegal both to attribute a work to a non-author and to refrain from attributing a work to its author, unless an author has *refused* to be credited.[138] Although Kivimäki probably did not have the fashion and design sectors in mind,[139] his statement can be viewed as a fair starting point: authors of works of applied art must be credited (in most, if not all contexts), unless they have explicitly forbidden such action (i.e. they have enforced their right to remain anonymous). It is possible that some fashion authors choose to remain anonymous. However, considering the prestige that designers attach to high fashion houses as employers, it would not be plausible to assume that most employed and commissioned designers are just exercising their right to remain anonymous and that is the reason why we so seldomly see any other designers than 'stars' being credited. Also, one must recognise that there is a danger that contractual terms, whereby a designer asserts their right to remain anonymous, are imposed on the designer by the stronger contracting party, i.e. the fashion house. This can mean a de facto waiver of the right of attribution and thus be illegal in jurisdictions like France.[140]

2. Fashion and the right of integrity

To begin with, the right of integrity has less importance in the fashion sector compared to the right of attribution. However, it cannot be said that this right does not *exist* in relation to fashion designs.[141] And because this right is not non-existent, it is worth analysing *how* it functions in the fashion context.

There are various practical obstacles and codified limitations in national laws that make invoking the

136 The need for flexibility has been considered important by, eg, Hansmann and Santilli (n 42) 134. See also Tischner (n 53) 173-74.

137 For examples of European jurisdictions with discriminatory traditions, see Härkönen, 'Fashion and Copyright' (n 16) 52-54.

138 TM Kivimäki, *Tekijänoikeus. Tutkimus kirjailijan, taiteilijan ja tiedemiehen oikeudesta teokseensa* [*Copyright. A Study on an author's, artist's and scientist's right to their work*] (Werner Söderström Osakeyhtiö 1948) 242.

139 ibid 74.

140 Frabboni in Davies and Garnett (n 107) 393.

141 Spedicato (n 17) 127-28.

right of integrity a rather theoretical possibility in the design sectors. Codified limitations exist, for instance, in Nordic copyright laws: buildings and utilitarian articles may be altered by the owner without the author's consent.[142] This approach to the right of integrity in utilitarian objects is reasonable. Any other approach for fashion designs would make little sense and lead to ridiculous outcomes. If modifying a garment (for example by taking it in from the seams or customising it in accordance with the user's preferences) were to infringe the right of integrity, this right would extend too far into the garment owner's private life. It would also be difficult to imagine how such modifications could threaten the author's honour or reputation. Although the BC permits the countries of the union to go way further in protection than just alterations that are prejudicial to the author's honour or reputation, permitting authors to object to *any* changes to copies of utilitarian works would be overprotective.[143]

It is important that owners of copies of utilitarian works can actually use these items, which is why it makes sense to have limitations on the integrity right. However, there is a need to discuss *who* should have the right to alter utilitarian works: should it be only the *owner of a copy* of a work, or also the *owner of the economic rights* to the work? Does only the owner of a protected fashion product have this right, or also the fashion house producing it? Perhaps the most sensible way to approach this issue is that if the need to make alterations derives from valid technical or practical reasons, the rightsholder could also have the right to make those changes. However, in these situations more attention should be paid to the potential harm to the author's reputation and honour compared to situations where the owner of a copy makes alterations. This is because when alterations are committed by a corporate rightsholder, the altered work or its copies would probably be made available to the public, unlike in situations where the altered copy remains in the use of its owner. In the latter case, any potential harm to the author's honour or reputation that may follow from altering the work from what the author intended it to be receives a much smaller audience.

At this point, one might wonder what kind of alterations to a fashion design could be so prejudicial to its author's honour or reputation that the right of integrity permits the designer to object to them? Some have argued that it would be impractical to apply this right to fashion design because consumers alter and tailor clothing to achieve a good fit.[144] Such amendments, however, would never have realistic possibilities to be considered as infringements of the right of integrity. Firstly, it is difficult to see how modifying a garment to achieve a better fit could have any effect on the author-designer's honour or reputation. Secondly, it would be practically impossible for a designer to find out about consumer-made alterations to copies of their works. Also, the designer is unlikely to enforce their right of integrity against their clients, so it is not the consumers and their modifications to fashion designs that designers need to be protected from.

Instead, we must turn our heads towards the rightsholders and producers of fashion designs, i.e. fashion companies. They typically have the possibilities (and sometimes, the interests) to treat a work in a manner that is prejudicial to its author. What plays a role in the assessment is whether the jurisdiction in question only protects the BC minimum (i.e. author's honour and reputation) or gives wider protection (e.g. the Nordic states, where artistic individuality is also protected). Clearly, minor alterations to, for instance, the construction of the garment, should not be considered infringing of honour, reputation, nor artistic individuality. However, removing several seams or details that are complicated or costly to manufacture could be prejudicial to the designer's artistic individuality, but not to their honour or reputation.

It is not totally impossible to imagine scenarios where alterations to a fashion design work could be prejudicial to its author's honour or reputation. In some cases, manufacturing of a fashion design against its author's wishes and values could be considered as prejudicial to their honour or reputation.[145] For instance, disrespecting a designer's material choices could in certain cases infringe their right of integrity. If an eco-conscious fashion designer creates a design that ought to be manufactured from biodegradable or recycled materials, it cannot be produced from virgin polyester (for example) without their consent. Disrespecting the author's choice of material in this manner would modify the work in a way that could be detrimental to their honour and reputation and cause significant resentment in their clientele. Similarly, if a designer highly values social justice, manufacturing their creation in a sweatshop can infringe their right of integrity by changing the work's character from ethical to exploitative.

Sloppy sewing work and poor quality in production of fashion designs could also have a damaging effect to the honour or reputation of a designer who emphasizes high quality and superb craftsmanship. However, it should matter whether the designer *should have known to expect* such inferior sewing work, or whether they could have reasonably expected the superior quality that they are accustomed to. Manufacturing that does not comply with the designer's own standards could happen, for example, in a collaboration between a high-end designer and a fast fashion company. Such collaborations are quite common. For instance, the Swedish fast fashion brand H&M has collaborated with, among others, Karl Lagerfeld, Stella McCartney, Sonia Rykiel, Isabel Marant and Alexander Wang.[146] One could argue that a designer entering into a

142 FCA s 25e, SCA s 26c, NCA s 39, and DCA s 29.

143 It would also hamper the sustainable reuse of copies of works, eg, upcycling. Moreover, Axhamn in Davies and Garnett (n 55) notes that restorations are typically permitted in Nordic law, even if they would result into the work losing its original character (522-23). Allowing restorations of protected fashion products is vital because it lengthens their lifecycle and fosters sustainable development.

144 Margaret Wade, 'The sartorial dilemma of knockoffs: protecting moral rights without disturbing the fashion dynamic' (2011) 96 Minnesota Law Review 365.

145 Considering the author's values in assessment of their right of integrity is not unheard of (Hansmann and Santilli (n 42) 114).

146 Steve Yotka, 'Every H&M Fashion Collaboration, Ranked' (*Vogue*, 19 October 2016) <https://www.vogue.com/article/hm-designer-collaborations-ranked> accessed 30 June 2023.

collaboration with a fast fashion company should know what to expect: cheap garments are never well-made, and poor quality is an essential part of fast fashion companies' business model. Would it thus be reasonable if the collaborating designer could invoke their right of integrity against the fast fashion manufacturer? This question can be analysed by drawing analogy from a judgment by the Swedish Supreme Court (SSC).

The SSC has analysed a similar issue in its judgment *Claes Eriksson et al v. TV 4*[147] by assessing whether the insertion of commercial breaks in TV broadcasting of films infringed their directors' right of integrity. The defendant – a TV channel – had argued that the directors must have known that the channel generally interrupts films by showing commercials, and thus accepted that their works would be interrupted in this way. Thus, the directors must be said to have waived their right of integrity in relation to the TV channel. SSC disagreed with the defendant and did not consider it relevant that the directors were fully aware of the TV channel's practice of showing commercials in the middle of broadcasts. By interrupting the films' atmosphere the commercial breaks caused changes to the films in a manner which was prejudicial to their directors' artistic individuality.[148]

Accordingly, one *could* argue that a designer's awareness of the bad quality of their fast fashion partner's products should not be considered as waiving their right of integrity in the collaboration. However, if the type of the work *does* affect the scope of the right of integrity and the work's artistic value should be considered,[149] it should matter if a work is created to be produced by a fast fashion company. In the fast fashion collaboration example above, the high-end designer *must have already known* when designing a collection for a fast fashion brand that the quality and labour standards in this category of fashion are extremely low, and not compatible with the high-end production they are accustomed to. This makes the imaginary case very different from the above-analysed SSC judgment: the film directors had not created their works *solely* for the purpose of them to be broadcasted on a commercial TV channel. Although it cannot be said that the designer in the scenario above would *not* enjoy the moral right of integrity, they should not be able to invoke this right based on the poor quality of their fast fashion collaboration products. Moreover, a high-end designer who partners with a fast fashion brand probably has very different motives for the collaboration than channelling their artistic views, or appreciation for quality and garment workers' fair working conditions to broader audiences. Instead, their motives are most likely to be purely commercial and financial.

In theory, a designer's right of integrity could also be infringed if their work was used in a *context* prejudicial to their honour or reputation, but it is difficult to imagine many such scenarios.[150] Perhaps a broadcaster who dresses a racist, misogynist, or homophobic TV show character with a design by an author who is known to be a fierce supporter of human rights could infringe the designer's right of integrity. However, one might also need to consider the broadcaster's freedom of expression.[151] In addition, one cannot ignore the obvious danger for misuse of the right of integrity when discussing copyright-protected fashion designs being used in contexts that the author finds prejudicial. To give an example, the late German designer Karl Lagerfeld was famous for his disparaging opinions on 'fat' women and explanations of why, in his opinion, high fashion should not feature women larger than the typical catwalk model size.[152] However, it should be out of the question for Lagerfeld or his like-minded living peers to be able to use their right of integrity to object to 'fat' people dressing in their designs. Thus, context-based infringements of the right of integrity in the fashion sector remain mostly at a theoretical level.

The examples above illustrate that although the right of integrity *could* be invoked in relation to fashion designs, the possibilities for this are rare. The most realistic scenarios where this right could be infringed relate to fashion creations that convey a deeper message than just their aesthetic appeal. Alterations to (haute) couture or unique, artisan-made fashion designs may have more importance when compared with alterations to mass-market fashion designs. Although attention should be paid to designs that express their author's artistic individuality and the integrity of those designs deserves to be protected, they form a small portion of all fashion designs produced, even of the ones that pass the threshold of originality.

V. Contractual agreements and enforcement

When assessing the function and scope of moral rights in the fashion sector, the final issue to consider is whether contractual agreements – including employment contracts – could justify the industry's deep-rooted customs, especially the absence of attribution that is so blatant in the most creative sector of the European fashion industry. It could be possible to frame the whole issue of designer-authors' moral rights merely as an issue of contract law, but that would be too simplistic and naïve. The nuances related to the role of moral rights as personality rights, along with the system-level injustice and power dynamics of the fashion sector, make the issue much more complicated than a matter of contracts.

While some EU jurisdictions, such as France, view any agreement in which the author agrees to waive

147 Högsta domstolen (Supreme Court of Sweden), 18 March 2008, judgment No T2117-06.

148 ibid 5-6; Jan Rosén, 'Commercial break as a violation of moral rights' (ALAI Executive Committee meeting Dubrovnik, October 2008. Report from the Swedish group) 3-4 <https://www.alai.org/assets/files/infos-nationales/sweden-2008.pdf> accessed 6 October 2023.

149 Högsta domstolen, T2117-06 (n 147) 5, 7; Rosén (n 32) 5. See also Spedicato (n 17) 128.

150 For scenarios from other sectors, see Adeney in Richardson and Ricketson (n 65) 229-30.

151 On the relationship between moral rights and the freedom of expression, see Christophe Geiger and Elena Izyumenko, 'Designing a Freedom of Expression-Compliant Framework for Moral Rights in the EU: Challenges and Proposals' in Ysolde Gendreau (ed), *Research Handbook on Intellectual Property and Moral Rights* (Edward Elgar 2023).

152 Rebecca Jennings, 'Karl Lagerfeld's long history of disparaging fat women' (*Vox*, 19 February 2019) <https://www.vox.com/the-goods/2019/2/19/18231624/karl-lagerfeld-death-controversy-fat-comments-adele> accessed 14 February 2024.

their moral rights as null and void,[153] some Member States (like the Nordic countries) have a more permissive approach to waivers.[154] It must be stressed that the possibility of waiving moral rights contributes to the precarious labour conditions in the fashion sector, as it is yet another way of depriving designer-authors of compensation for their work.[155] For the same reason, work-for-hire provisions that set employers as the default rightsholders of works created and deprive employee-authors their moral rights, are extremely problematic. Sam Ricketson has even argued that the work-for-hire doctrine runs counter to the basic premises of authorship under the BC by alienating a work from its actual creator.[156]

The fairest starting point would be that contractual agreements where moral rights are waived should not be permitted. At the very least they should be treated with extreme caution. However, it is acknowledged that this is not how the contemporary fashion sector works. It would be naïve to assume that a total ban of waivers would be a magic formula that would elevate designers from their precarious positions. It is not only written agreements, but also silent contracts, as well as the hierarchies and social norms in the fashion sector that tend to lead authors de facto waiving their moral rights, even when copyright norms expressly prohibit waivers. Moreover, confidentiality agreements may have the effect of silencing designers and preventing them from raising not only issues regarding moral rights, but also other forms of exploitation.[157] We can see this in the French high fashion sector. Although French law deems contractual agreements where authors waive their moral rights as null and void, this has not really helped the position of designers in the French high fashion sector. Mensitieri has even argued that the French fashion industry seems to be more powerful than the French law.[158]

Regardless of its many problems in relation to the fashion sector's realities, the French approach is the best option. To protect authors from exploitation, it is important to limit their possibilities to waive their personal rights. The hard core of author's personal and intellectual interests – moral rights – must always be protected, irrespective of whatever contractual agreements.[159] It must also be noted that the fashion sector, like many other creative sectors, is characterized by a flagrant imbalance of bargaining power between the employer and employee sides.[160] Designers are unlikely to have the true *freedom to negotiate* when a fashion house asks them to waive their moral rights. Their 'consent' to waive their rights can hence be questioned,[161] which is why it is necessary to limit even the possibility of giving such consent. For the same reasons, the practices of fashion industry cannot be considered generally accepted by the parties concerned, and such practices would not involve the setting aside of legitimate interests.[162]

One could argue that fashion designers do not want or need moral rights, because they tend not to enforce them. This argument, however, is too simplistic because it fails to consider the above-described reality in which designs are created. The weak position of the designers in the most creative segments of the fashion sector probably explains the lack of enforcement. The world of fashion is very small and powerful.[163] One cannot expect a designer – who works in an extremely competitive field, is unlikely to have the security of a stable employment, steady income (in actual money, not in prestige or visibility), or support from a trade union – to rise against their employers or commissioners by suing them for infringement of moral rights. Such actions could risk their entire future in the field. As explained by Mensitieri, even fashion education programmes teach future designers to accept the industry's exploitative customs, contributing to the lack of enforcement of their legal rights. Designers might even

153 Frabboni in Davies and Garnett (n 107) 393.

154 In the Nordic states, moral rights can be waived with binding effect only in regard of use limited in character and extent (FCA, SCA and DCA, s 3(3); NCA, s 5(3)). Rosén argues that it is possible for an author to waive these rights completely *ex post* when they are fully aware of the extent and nature of the acts to be committed to their work. An author cannot *ex ante* agree that they will not make use of their moral rights. General and unspecified waivers given *ex ante* are invalid ('Moral Right in Nordic Law' (n 32) 9). Such limitations can be interpreted to mean that waivers regarding future works would be invalid. Rosén argues that the principle of limited waivability concerns all work genres from valuable artistic works to those with more technical or mundane character, though the standards of different work genres, artistic values and fields of use must be considered (ibid 3, 10). Also Kivimäki suggests that an agreement where an author of a work which is predominantly in the commercial domain agrees to waive their moral rights is less likely to be considered as void than an agreement concerning works with more artistic value (Kivimäki (n 138) 238). Regardless of what suggested by Rosén and Kivimäki, too much attention to the standards of different fields should be avoided, especially in the context of attribution. They carry the risk of making author's moral rights de facto meaningless. In creative sectors that are characterised by precarious labour, such as fashion (Mensitieri (n 92) 33-34, 40-41, 118, 151-57; Härkönen and Särmäkari (n 19) 55), it is important that authors have at least *some* rights that cannot be deployed for corporate greed and elevate the author's position vis-à-vis their employer/commissioner. Thus, the possibility to waive moral rights *ex ante* and without specifying the character and scope of such waiver cannot be recommended.

155 cf Nordell in Bryde Andersen, Heide-Jørgensen and Schovsbo (n 59) 406-07: Nordell contemplates that although express waivers in contractual agreements are not particularly common, de facto waivers of moral rights occur in many cases, and may even have benefits for authors. Although this may be the case in many creative sectors where works are mostly produced for the commercial domain, the same cannot be said about fashion; eg, Mensitieri's (n 92) research clearly shows to a lawyer-reader that due to the structural inequalities and strong hierarchies of the fashion sector, possible de facto waivers of attribution rights have not led to higher pecuniary compensation for author-designers in the most creative sector of the European fashion industry.

156 Ricketson (n 3) 28.

157 Mensitieri (n 92) 169.

158 ibid.

159 Walter (n 30) 326.

160 Strömholm (n 58) 231 mentions 'slave agreements' of economically dependent authors as characteristic in art; however, he also argues that contractual agreements concerning future works can be beneficial to authors. According to him, if contracts on future works were entirely forbidden, authors would be worse off. While it is true that permitting agreements regarding rights to future works creates incentives for companies to hire designers, it is important that such agreements are only permitted to apply to the directly commercial aspects of copyright, i.e. economic rights. It is impossible to anticipate a work's deeper meaning to its author before it even exists. The potentially very intimate bond between an author and their work must be protected by moral rights even when the author has *ex ante* assigned their economic rights to that work.

161 The concept of consent relates to the issue whether individuals have real power to determine or even affect the terms of the contract. See Daniela Alaattinoğlu, 'Rethinking Explicit Consent and Intimate Data: The Case of Menstruapps' vol 30 Feminist Legal Studies (Springer 2022) 157-79.

162 cf Strömholm (n 58) 246-47.

163 Mensitieri (n 92) 164-65.

be unaware of their legal rights.[164] Therefore, one should refrain from drawing many conclusions from the lack of enforcement of moral rights in fashion.

Lastly, it is necessary to consider the possible conflict between moral and economic rights. If it is settled that an employed/freelance designer cannot waive their moral rights (at least completely), the unavoidable consequence is that the rights to a copyright-protected fashion design are split between two different rightsholders.[165] Some could view this as problematic and hampering the commercial use of works. However, because crediting designers can be done without complications (as illustrated in Subsection IV 1), it is difficult to see how the attribution right could really damage the legitimate commercial interests of the holder of the economic rights. The right of integrity is also unlikely to cause problems, as the true scope of this right in fashion design is narrow.[166] As noted by Spedicato, moral rights in design sectors can be harmonised with the exercise of economic rights.[167]

It is extremely difficult, if not impossible, for legal scholarship to try to change the internal norms, customs, and hierarchies of powerful industries. But that does not mean that lawyers should settle for the status quo. It is important that the rights of oppressed people are recognised in legal scholarship, even if circumstances too often prevent those people from enforcing their rights. In the sphere of moral rights, this has special importance when considering that they are essentially *human* rights. This adds weight to the argument that contractual agreements should not be able to supersede them.

VI. Conclusions

In the era of European *unité de l'art*, the moral rights of authors of works of applied art is a discussion that must be had. Now that these works are increasingly copyright-protected in the EU, it follows that their authors are generally entitled to moral rights. However, it is not certain that the level, scope, and function of moral rights protection in applied art would be the same as in pure art, nor can it be assumed that there would not be any divergence between Member States' interpretation of those rights.

Perhaps the greatest challenge for the application of moral rights to applied art is posed by the varying standards of different creative industries. There are sectors that are accustomed to operating as if authors' moral rights did not exist, regardless of advocating for stronger copyright protection of their products.[168] Fashion is a textbook example of such an industry. One should be critical of those customs: the danger is that the corporate rightsholders remain as the sole beneficiaries of *unité de l'art*. Continental copyright has not been designed to mainly serve commercial interests, but to foster the authors' special connection with their work. It is thus important that authors in precarious creative sectors are not forgotten. After all, these sectors are founded and thrive on the creativity of authors.[169] They deserve fair compensation for their intellectual creation, not just financially but also in the form of non-pecuniary rights, such as the right to be credited for their creative labour. And as Ginsburg has noted, a total lack of attribution could be seen as conflicting with the Berne Convention.[170]

This article has shown how particularly the moral right of attribution has plenty of relevance in the fashion sector, though it is rare to see anyone other than renowned designers being credited. The article has also illustrated how implementing this right in the fashion sector is far from complicated. It would not require much from fashion houses to credit their designers, whereas for the designers, such credit would be a noteworthy improvement of their position. As for the right of integrity, it has little practical significance in the fashion and design, and so should not be expected to cause disruption in the exploitation of works of applied art.

It is recognised that the moral rights of authors can clash with the commercial interests of rightsholders. However, the scope of moral rights protection should not depend on the interests of the holder of the economic rights. Instead, in such conflicts the author's non-pecuniary interests in their works should outweigh the commercial interests of their employer/commissioner. Furthermore, in sectors that are tarnished with precarious creative labour, the remarkable differences in bargaining power between authors and their employers/commissioners mean that to protect authors, it is necessary to limit the possibilities to make contractual agreements that de facto circumvent moral rights.

By utilising a multidisciplinary approach, this article has suggested how moral rights of authors should be understood in the European fashion sector. There remains a need for further doctrinal research on the interpretation of both the attribution and the integrity right in fashion design, especially from the perspective of different Member States' national laws. Hopefully, this article will spark further discussion on the topic.

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164 ibid 7-8, 165.

165 See Monseau (n 113) 115, 126. See also Nordell in Bryde Andersen, Heide-Jørgensen and Schovsbo (n 59) 385.

166 Rosén (n 32) 12 notes that the limited possibility to waive moral rights has not caused significant difficulties in the commercial exploitation of works.

167 Spedicato (n 17) 115.

168 Härkönen and Särmäkari (n 19) 57.

169 See Mensitieri (n 92) 118.

170 Ginsburg (n 29) 48.