

# Copyright and digital fashion designers: the democratization of authorship?

Heidi Härkönen and Natalia Särmäkari\*

## 1. Introduction

Copyright protection of fashion designs has been a popular topic of discussion within IP law, especially over the past two decades. This discussion has primarily focused on physical garments and accessories. However, fashion is now taking a digital leap. An increasing number of garments are designed using fashion-specific 3D software, producing digital 3D prototypes and samples for physical collections or digital-only clothing. Digital-only clothes can be worn in photographs or videos and in various virtual spaces. The rise of 'digital fashion' has been boosted by the global COVID-19 pandemic and the development of blockchain technology for creative industries. Lockdowns and restrictions have virtualized our lives, creating demand and opening new markets for digital(-only) fashion designs.<sup>1</sup>

Although technological change is rapid and disruptive, the current regulatory framework is still somewhat built on the assumption of physical fashion products made by humans using traditional tools.<sup>2</sup> This article explores a few outstanding questions of IP law regarding the regulation of digital fashion designs and builds a bridge between legal research and the research that investigates data-driven fashion design. Generally, the

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- 1 JJ Small, 'How Fashion's Post-Pandemic Future Could Be Digital' (*I-D Magazine*, 2020). Available at [https://i-d.vice.com/en\\_uk/article/g5x9ay/how-fashions-post-pandemic-future-could-be-digital](https://i-d.vice.com/en_uk/article/g5x9ay/how-fashions-post-pandemic-future-could-be-digital) (accessed 14 June 2020); BoF and McKinsey 'The State of Fashion 2020 Coronavirus Update' (2020). Available at <https://mck.co/3KrUJvN> (accessed 9 March 2022); 20–22; N Särmäkari, "Digital Fashion" on Its Way from Niche to the New Norm' in L Aliabieva (ed), *The New Normal: Sartorial and Body Practices of the Quarantine Era* [«НОВАЯ НОРМА»: гардеробные и телесные практики в эпоху пандемии] (*The New Literary Observer* 2021) 133.
- 2 M Antikainen, 'Surviving Technological Change: Towards More Coherent Regulation of Digital Creativity Through EU Copyright and Design Law' (Doctoral Thesis, Publications of the Hanken School of Economics, Nr 353 2021) 6–7.

## The authors

- Heidi Härkönen (LL.D., trained on the bench) is a postdoctoral researcher at the University of Turku Faculty of Law, with a focus on multidisciplinary and sustainable IP law research. Natalia Särmäkari (D.A.) is a postdoctoral researcher in fashion studies and design research at Aalto University School of Arts, Design and Architecture, specifically focused on digital fashion and the profession of fashion designer.

## Abstract

- 'Digital fashion' has been widely recognized by the fashion media and increasingly embraced by companies and institutions. This article gives a multidisciplinary perspective on copyright protection of digital fashion designs. It places particular focus on the concepts of 'authorship' and 'originality'.
- Authorship conventions of the traditional, physical fashion industry differ significantly from those of copyright law. In fashion, generally, authorship is hierarchic and includes many 'gatekeepers'. However, in digital fashion specifically, authorship is more democratic and resembles its legal definition. This democratizes the authorship practices of fashion, bringing the concept of 'author' in fashion closer to the legal meaning of authorship. Moreover, certain practices of digital fashion designers suggest that it might be easier for digital fashion to comply with European Union copyright law.
- The digital leap that the fashion industry is taking deserves to be recognized from an IP law perspective. The diverging meanings of authorship between law and fashion must be inspected to avoid various legal risks related to the ownership of fashion designs.

principal method of protecting digital fashion designs is copyright.<sup>3</sup> This will also form the focal perspective of this article. ‘Digital fashion designers’ and their works are analysed from the following copyright viewpoints: (i) how the concept of ‘authorship’ is formed in fashion, and how it is related to authorship conventions in copyright law; (ii) the extent to which the author practices of digital fashion designers comply with the European Union (EU) standard of originality and (iii) the effects that authorship practices in digital fashion can have on fashion authorship in general and how the democratization discourse impacts fashion designers’ authorship from a copyright perspective.<sup>4</sup>

The above-described viewpoints of ‘authorship’ and ‘originality’ were chosen as the focus of this article for the following reasons. Given that ‘digital fashion’ is not only a tool but also a novel fashion culture linked to digital culture,<sup>5</sup> the open-source attitude that characterizes the values of digital fashion designers<sup>6</sup> impacts their views of themselves as authors. This has an intriguing link to copyright: the research findings suggest that digital fashion designers’ perceptions of authorship are reminiscent of how authorship is understood in copyright, whereas the same cannot be said about authorship conventions in physical fashion design. In this article, the concept of authorship is viewed from two different angles: the terms ‘fashion authorship’ and ‘fashion author’ are used when referring to the understanding of authorship in the fashion industry, and the terms ‘copyright authorship’ and ‘copyright author’ when viewed from a legal perspective.

In addition to the issue of authorship, the emergence of digital fashion requires reconsideration of how the copyright law concept of ‘originality’ is viewed in the context of fashion. This is important, as originality is the only criterion for an identifiable subject matter to be protected under EU copyright, including the InfoSoc Directive.<sup>7</sup> Although, as recently ascertained, fashion designs only require the same level of originality as any other works to be protected under the InfoSoc Directive,<sup>8</sup> one cannot conclude that the door to copyright protection would always be open for (physical) fashion designs. One major reason for this is the functionality of physical fashion designs, which may occasionally undermine their originality. Nonetheless, when the result of a creative process is merely digital, the same copyright law arguments to which we are accustomed in the context of physical fashion may not apply.

This article provides a multidisciplinary approach to digital fashion design, combining the doctrinal study of law with fashion studies and design research. The focus of the doctrinal analysis is EU copyright law. Legal analysis is supported by a qualitative online survey of 42 ‘digital fashion designers’ and three ethnographically researched case studies. First, this article will introduce ‘digital fashion’ from an IP perspective in Section 2. The methods and empirical research material used are outlined in Section 3. Section 4 elaborates on the meaning of fashion design ‘authorship’, in the realms of both physical and digital fashions, and compares fashion authorship to copyright authorship. In Section 5, the manner in which the evolution of authorship practices in (digital) fashion may affect the copyright protection of their creative efforts is assessed. Section 6 concludes the article.

## 2. What is ‘digital fashion’?

Digital apparel has long existed in games and virtual reality (VR) platforms, where fashion choices are as social, expressive and economically vibrant practice as in the real world.<sup>9</sup> Lately, the use of designer-friendly digital 3D software and the design of virtual or ‘digital-only’ garments have increasingly gained ground in the fashion industry.<sup>10</sup> According to the proponents, practitioners

3 M Antikainen, ‘Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs Under EU Design Law’ (2021) 52 Intl Rev IP CL 139. It is recognized that the EU design law regime is important for digital fashion designs as well. However, design law is generally more concerned about commercial interests, rather than artistic (on the differences between the aims of design and copyright laws, see, eg, Case C-683/17 *Cofemel—Sociedade de Vestuário SA v G-Star Raw* Opinion of AG Szpunar (2019), ECLI:EU:C:2019:363 (CV), para 55). The survey findings and interviews show that digital fashion designers embrace freedom of creativity, authority and independence. This suggests that their creative work better aligns with the values of copyright law, such as incentivizing cultural creativity and the protection of the person of the author. Unlike in design law, the role of author is copyright is significant. As this article focuses on the authorial role of digital fashion designers, copyright is the natural research angle.

4 These are a fraction of the IP issues related to digital fashion. For example, the use of digital fashion designs in online platforms, user-generated designs, questions related to piracy, design law and trademark law issues are relevant but excluded from this article due to its limited scope.

5 N Särmäkari, ‘From a Tool to a Culture—Authorship and Professionalism of Fashion 4.0 Designers in Contemporary Digital Environments’ (Doctoral thesis, Aalto University 2022) 36; D Bollier and L Racine *Ready to Share. Creativity in Fashion and Digital Culture* (The Norman Lear Center 2005) 4–5.

6 N Särmäkari ‘Digital 3D Fashion Designers: Cases of Atacac and The Fabricant’ (2021) *Fashion Theory*, 1–30. Available at <https://doi.org/10.1080/1362704X.2021.1981657> (accessed 11 October 2021); Särmäkari, ‘“Digital Fashion” on Its Way from Niche to the New Norm’ (n 1), 119.

7 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, OJ L 167, 22 June 2001, p 10–19 and Case C-683/17 *Cofemel*, ECLI:EU:C:2019:721, paras 30, 49, 53–56.

8 See Case C-683/17 *Cofemel*. ECLI:EU:C:2019:721.

9 T Makryniotis, ‘Fashion and Costume Design in Electronic Entertainment—Bridging the Gap between Character and Fashion Design’ (2018) 10 *Fashion Practice* 100–104.

10 P Volino, F Cordier and N Magneat-Thalman, ‘From Early Virtual Garment Simulation to Interactive Fashion Design’ (2005) 37 *Computer-Aided Design* 593–608; F Renwick ‘In The Future Your Clothes

and researchers of digital fashion, designing in and for the virtual realm, or the 'Metaverse' and 'Web 3.0',<sup>11</sup> enables unlimited creative experimentation, minimization of resources, participation of large communities in fashion production, an inclusive approach to bodies and identities and learning about garment construction as well as global accessibility of digitized archival fashion.<sup>12</sup> Although wearing digital-only clothing today remains a niche phenomenon, the use of the digital fashion paradigm in design and production processes is becoming normalized.<sup>13</sup> It is even anticipated that digital garments will replace perfumes and bags as the main revenue of luxury brands and become a new medium for designers to express their ideas without social limitations or economic boundaries.<sup>14</sup> Furthermore, blockchain technologies can turn virtual garments into unique pieces, investments and collectables.<sup>15</sup> The revolution of digital fashion can be further exemplified in the recent inclusion of digital 3D design in the curricula of numerous fashion schools, including Parsons School of Design.<sup>16</sup>

When designing in and for the virtual space, designers create quantified representations and simulations of garments that are 3D files often containing the same material and shape data as the real garments.<sup>17</sup> Digital fashion

designs are graphically represented and projected, normally through a display unit, such as a smartphone or a computer screen, in 2D form.<sup>18</sup> Digital garments can be worn in VR and augmented reality environments, games, online stores and museums, virtual fitting rooms and smart mirrors, providing 'phygital' experiences, merging physical and digital realms.<sup>19</sup> The physical studio turns into a virtual 3D software working space where avatars can be used as instruments instead of a mannequin or a fitting model. The avatars can also be the ultimate targets, the only bodies wearing the designs in simulations of real or surreal environments. The digital design includes prototyping and sampling phases, and in theory, the products can be sold before physical production, bridging the gap between design and consumption, as well as design and production.

If a digital design passes the threshold of originality, it can be considered an artistic work, warranting protection under the InfoSoc Directive, rather than the Directive on the Legal Protection of Computer Programs (2009/24/EC, Software Directive<sup>20</sup>).<sup>21</sup> It is important to

Will be Made Out of Pixels: Inside the "Wild West" World of Digital Fashion' *Esquire*, 31 December 2019. Available at <https://www.esquire.com/uk/style/fashion/a30150947/digital-fashion-the-fabricant-menswear-future-trends/> (accessed 10 September 2022).

- 11 The 'Metaverse' is a universe beyond the physical world, virtually expanding people's life (JDN Dionisio, WG Burns III and R Gilbert '3D Virtual Worlds and the Metaverse: Current Status and Future Possibilities' (2013) 45 *ACM Computing Surveys*, 1–38). It is linked to 'Web 3.0', the third phase of the internet age, built on blockchain technology and token-based economics (G Edelman 'The Father of Web3 Wants You to Trust Less' *Wired*, 29 November 2021. Available at <https://www.wired.com/story/web3-gavin-wood-interview/> (accessed 18 June 2022). Web 3.0 changes the power dynamics by abandoning centralized models with few actors controlling all resources and moves towards a decentralized organizational model, where users own, develop and maintain the content and digital services.
- 12 Super Bureau, A Kupresanin and B Chen 'Fashion Beyond Physicality' *Medium* (8 December 2019). Available at <https://medium.com/@superbureau/fashion-beyond-physicality-486d71b05dae> (accessed 9 March 2022); Särämäkari, 'Digital 3D Fashion Designers: Cases of Atacac and The Fabricant' (n 6); Särämäkari, "Digital Fashion" on Its Way from Niche to the New Norm' (n 1); Institute of Digital Fashion (2022). Available at <https://institute-digital.fashion> (accessed 9 March 2022).
- 13 Särämäkari, "Digital Fashion" on Its Way from Niche to the New Norm' (n 1).
- 14 Ibid. 6; R Lindqvist, Research interview during fieldwork, 7 March 2019.
- 15 M Hernandez, F Vogelsteller and S Sieler 'Blueprint for the New Creative Economies' Version 2 (LUKSO Blockchain 2020). Available at [https://uploads-ssl.webflow.com/5d9bba6a630f6e14e6677051/5dde60f606fb58bf38d86478\\_Lukso\\_Blueprint\\_digital\\_pages.pdf](https://uploads-ssl.webflow.com/5d9bba6a630f6e14e6677051/5dde60f606fb58bf38d86478_Lukso_Blueprint_digital_pages.pdf) (accessed 2 March 2022), 46–47.
- 16 The New School 'CLO3D: A Partner on Designing for the Future' (2020). Available at <https://www.newschool.edu/parsons/story/rendering-a-new-concept-for-design/> (accessed 2 September 2020).
- 17 LR Santos, G Montagna and MJP Neto 'The Virtualization of the Fashion Product' in DG Bucchianico, C Shin, S Shim, S Fukuda, G Montagna, C

Carvalho (eds) *Advances in Industrial Design. AHFE 2020. Advances in Intelligent Systems and Computing*, vol 1202 (Springer 2020), 820–830.

- 18 Antikainen, 'Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs under EU Design Law' (n 3), 141.
- 19 See, for example, Makryniotis (n 9); Santos, Montagna and Neto (n 17); S Black 'Sustainability and Digitalization' in A Geczy and V Karaminas (eds) *The End of Fashion: Clothing and Dress in the Age of Globalization* (Bloomsbury Visual Arts 2019); Super Bureau, Kupresanin and Chen (n 12); Särämäkari, 'Digital 3D Fashion Designers: Cases of Atacac and The Fabricant' (n 6).
- 20 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs OJ L 111, 5 May 2009, p. 16–22.
- 21 From an IP perspective, it would be tempting to treat digital fashion designs as computer programs, which would be protected as literary works through the Software Directive, partly because digital designs can have functional elements and visual effects. However, the functionality and effects are determined by the code, not by the human designer (Antikainen, 'Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs under EU Design Law' (n 3), 141). Thus, the code and design should be considered separate. Support for this view is found from the case law of the CJEU, drawing analogy from a judgment concerning videogames. In Case C-355/12 *Nintendo v. PC Box* (ECLI:EU:C:2014:25), the CJEU stated that '[...] videogames [...] constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29' (para 23). In the context of videogames, this has been interpreted to mean that digital designs are typically not computer programs even if implemented in videogames (Antikainen, 'Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs under EU Design Law' (n 3), 141. See also D Mendis, 'Clone wars episode ii the next generation: the copyright implications related to 3D printing and computer-aided design (cad) files' (2014) 6 *Law, Innovation and Technology* 271, 274; TW Dange and C Dubeau, '3D Printing and the LAW: Are CAD files Copyright protected?' (2015) 28 *IPJ* 119–120; M Antikainen and D Jongmsa, 'The Art

note that digital fashion designers typically do not create the code themselves, but rather use fashion-specific 3D software, such as CLO3D. The choice of software used for designing a digital garment has minimum, if any, effect on the copyright status of the resulting design. This is because the possibilities for designing generally depend on the designer's skills to use such software, but not from the software itself. Copyright-wise, the situation does not differ much from an event where a designer is choosing tools to create physical garments. Therefore, the authorship/ownership of the code is a rather marginal issue when evaluating copyright protection of digital fashion designs. In the sphere of artificial intelligence (AI)-assisted 'fashion design', however, issues related to the authorship of the code become more relevant, as the designer might write the code and create the method for co-designing with computer and data. For the reasons described previously, assessing authorship of the software or code used for digital fashion design is excluded from this article.

Another factor to highlight in the context of digital fashion and copyright is that although digital fashion designs can be worn in various digital platforms, they are generally not created in these platforms. Instead, digital fashion designs are created by using fashion-specific 3D software, outside of these platforms. Correspondingly, the terms and conditions of digital platforms do not affect the designer's status as an author, nor the protection status of the design.<sup>22</sup> Wearing digital fashion designs in social media platforms does not differ much from a scenario where a physical, copyright-protected garment is worn in a photograph or a video, which is then uploaded to a platform. It is also worth noting that the practitioners of digital fashion pursue 'interoperability', meaning that the same asset can be worn on different platforms, including social media, games and VR spaces.

In digital fashion design, copyright is increasingly relevant, as copyright protects creations (and indirectly, designers) from copying and piracy. Digital fashion significantly raises the possibilities for fashion piracy, as the

copying of digital creations is generally much easier than that of physical fashion designs.

### 3. Methods

#### 3.1 Overview

This article is partly based on a qualitative survey of 42 digital fashion designers and three case studies. The doctrinal study of law is applied to analyse these data, combined with relevant legal sources, from a copyright perspective.

The qualitative online survey was conducted between 30 January and 28 February 2020. A total of 207 digital fashion designers were approached through the online community Clollab<sup>23</sup> (105), Instagram and snowballing. A Google Forms survey included seven broad open questions, one anonymity question and three optional questions. The return rate was rather high, with 42 respondents. The majority (28/42) did not desire anonymity. The detailed information regarding the research project was presented in the introduction at the beginning of the survey, and informed consent was given by answering the survey. The original research material was analysed using reflexive thematic analysis.<sup>24</sup>

The research material on the case studies was collected during 2018–2021. The cases are a Swedish company, Atacac; an Amsterdam-based Dutch-Finnish company, The Fabricant and a New York-based company, Superficial. The empirical research material comprises primary and secondary data. Primary data were collected through semi-structured interviews, ethnographic observation on-site and content produced by the cases, including talks, reports, plans, social media posts, streaming sessions and blog posts. The secondary data comprise media publications on the cases.

#### 3.2 About the qualitative online survey

For many of the respondents, virtual fashion is a path to practice fashion design without physical requirements (studio, storage, machines, production facilities, etc.) and expertise in making clothes. Most have fashion design education, and some have lengthy experience in the fashion industry.

The survey findings reveal that digital fashion designers value the creative and organizational independence of their work. When designing digital-only garments,

of CAD: Copyrightability of Digital Design Files' in RM Ballardini, M Norrgård and J Partanen (eds) *3D Printing, intellectual property and innovation—insights from law and technology* (Wolters Kluwer 2017), 268. Expanding this, it seems that digital fashion designs should not be treated as computer programs either. Instead, they ought to be treated as artistic works, the most relevant regulatory piece being the InfoSoc Directive. Similar discussion has been raised regarding the code and functionality in 3D printing and CAD files (eg, Antikainen and Jongsma (n 21)). See also Case C-393/09 *Bezpečnostní softwarová asociace—Svaz softwarové ochrany v Ministerstvo kultury*, ECLI:EU:C:2010:816, para 51.

22 The platform terms and conditions can govern, eg, the ownership and use of the content uploaded to such platform, but this is a separate issue to authorship and protection requirements.

23 Clollab is an online community, founded and run using a Korean 3D-software CLO3D.

24 V Braun and V Clarke, 'Reflecting on reflexive thematic analysis' (2019) 11 *Qualitative Research in Sport, Exercise and Health* 589–597.

designers are not constrained by functional, material, financial, social or geographical requirements. As it will be illustrated further later, some of the values of digital fashion designers connect to the likelihood of their creations receiving copyright protection. Regardless of the immaterial nature of digital fashion, most designers emphasize the importance of physical fashion design and pattern-making knowledge as forming the basis of their work. Some designers juggle between the workability of the garments in the physical world and the visualization quality in the virtual world, which sometimes conflicts with physical detail requirements. Constituting a diverse group of fashion professionals, computer-generated imagery artists and amateurs, respondents do risk a gimmicky outcome if lacking refined digital craftsmanship and time. Many of the digital designers feel liberated in the digital design environment. As one of the participants described their work:

[...] [I]n my case physical body is completely forgotten. [...] Within a virtual experience I would wear something I would never wear in real life, in digital fields people choose by emotion. In real life we are always constricted and limited in some way by our social environment. Again, the sense of freedom is what drives me.

Much like several other participants of the survey, the above-cited participant highlights the aspect of freedom of such design work. From a copyright perspective, this is interesting, as the creative freedom of the designer—both factual and experienced freedom—is an essential step for fulfilling the originality requirement and thus for protectability.<sup>25</sup> Moreover, the non-hierarchic nature of digital fashion design compared with the physical fashion design contributes not only to the freedom of design but also to the status of digital fashion designers as authors. Lastly, the authorship of digital fashion designers resembles the authorial role of artisans who originate the idea, design the structure and visual elements of the artefact and realize it themselves, using cultural knowledge and hands-on know-how. For example, one digital fashion designer described the authorial process in the following way:

[D]igital design [...] combines imagination with sewing techniques and incorporates the production process into the design. This strengthens the link between design and production.

25 This requirement results from, eg, the CJEU judgment C-145/10 *Painer*, ECLI:EU:C:2011:798.

### 3.3 About the case studies

Atacac developed an upside-down process of designing, presenting, selling and producing garments. Inspired by the possibilities of designer-specific 3D software, Atacac primarily creates and sells their garments virtually, with minimum inventory, producing pre-ordered items on-demand in their in-house micro-factory. As Atacac produces garments for both physical and virtual worlds, their design starts from the pattern and the real human body. From the designer's table, the 3D file takes two directions: either to the pattern-maker for production preparations or to the digital creative for visual and communicative development of images, animations and digital-only garments. Atacac believes that an open-source mindset engages their customers and facilitates growth of the Atacac community. Therefore, they share some of their patterns and 3D files in their online platform Sharewear, encouraging consumers to download them, make and modify their designs.

The Fabricant creates virtual fashion experiences entailing digital-only garments, avatars, environments and films, ranging from the hyperreal to the surreal or a combination of the two. Instead of creating tailored couture in a studio, The Fabricant can practice digital craftsmanship and eliminate waste. The Fabricant also invites their community to co-create by sharing various outfit files online for free, streaming their design processes via the gamer streaming platform Twitch and running a Discord social media group where digital fashion designers can exchange knowledge. The Fabricant has also collaborated with blockchain companies that can tokenize digital assets and thus authenticate the digital garment and ensure exclusivity.<sup>26</sup> This way, a digital garment ceases to be copy-pastable and instead becomes a collectable. Blockchain technology can trace all the layers of making and owning: all the contributors to the garment can be attached to the particular, unique piece,<sup>27</sup> helping to clarify issues related to ownership, authorship and co-creation.

Superficial, also known as Super Bureau, is a design studio that began digitizing the archives of the Museum at FIT in 2019 when the digital 3D fashion phenomenon was in its infancy.<sup>28</sup> Founders Andrew Kupresanin and Belinda Chen are not fashion designers but digital designers and 3D artists who provide digital design services, creating everything from digital humans to environments. Superficial aims to build a virtual fashion archive with

26 Hernandez, Vogelsteller and Sieler (n 15).

27 Ibid.

28 Särämäkari, "Digital Fashion" on Its Way from Niche to the New Norm (n 2), 117.

digital 3D models of historical garments. They seek solutions to ‘bring these garments back into the poetics of motion and give a broader audience access to appreciating their extraordinary design.’<sup>29</sup> The virtualization project began with outfits by Issey Miyake, Thierry Mugler and Claire McCardell, proceeding beyond the Museum at FIT to a *Comme des Garçons* collection. In their words, the archive is ‘a new online space bringing archival fashion garments beyond the constraints of their physical form, and into the added digital dimensions of motion, interaction, and participation.’<sup>30</sup> Superficial founders state that they have developed a new type of process that includes documenting and reconstructing the garments digitally and simulating fabric dynamics.

## 4. ‘Authorship’ in copyright v ‘authorship’ in fashion

### 4.1 About authorship conventions

The concept of ‘author’ is an essential element of copyright law, as authorship disciplines copyright.<sup>31</sup> Ideas of authorship have always affected the development of copyright law and justified the exclusive right of creators to their works. The need to recognize the right to literary and artistic works became crucial following the invention of the printing press, which generated the idea of an author as someone detached from making the work and someone whose original contribution should be compensated.<sup>32</sup> It is therefore no wonder that legal scholars have been eager to define ‘authorship’. However, it is difficult to imagine an exhaustive legal definition of authorship, as new technologies and cultural phenomena shape the humane possibilities for creative work and our understanding of it.<sup>33</sup> Digitalization has repeatedly challenged the traditional view of author in several instances:<sup>34</sup> for example, in online user-generated content<sup>35</sup> and in the development of AI designers and artists.<sup>36</sup>

In the 18th century, the term ‘authorship’ in copyright law was coined solely in the context of literary works. The ‘author’ was an individual creator who was created in solitude. Since then, the concept has been expanded under copyright law and the notion of ‘author’ now includes creators from any field of art or literature. Accordingly, a fashion designer can also be a copyright author.<sup>37</sup> However, regardless of these developments, the idea of ‘author’ as an individual creator remains the cornerstone of copyright,<sup>38</sup> albeit with the caveat that two or more individual authors can share authorship (joint authorship).

Law is not the only discipline interested in authorship.<sup>39</sup> Both the emergence of copyright law and the notion of art as understood today have existed from approximately the mid-18th century.<sup>40</sup> To some extent, the legal literature on authorship discusses with the texts of literary critics.<sup>41</sup> Fashion studies, considered as a branch of cultural studies, art and design research and sociology, have also touched upon the debate around authorship,<sup>42</sup> but this has, until now, never been linked with legal analysis on authorship. The legal conventions surrounding authorship identified in fashion research connect to several doctrinal viewpoints. Perhaps, the most interesting issue is related to the intertwining of authorship with protection requirements. This means *inter alia* assessing whether the perception of ‘authorship’, as viewed by fashion scholars, permits the standard

29 Super Bureau, A Kupresanin and B Chen (n 12).

30 Ibid.

31 A Drassinower, ‘Copyright, authorship and the public domain: a reply to Mark Rose and Niva Elkin-Koren’ (2018) 9 *Jurisprudence* 184.

32 M Woodmansee *The Author, Art, and the Market: Rereading the History of Aesthetics* (Columbia University Press, New York 1994) 36, 39.

33 T Mattila, *Yhteistyö tekijänoikeudessa* Collaboration in copyright law—A study of original copyright holders in creative processes based on cooperation and communality (Doctoral thesis: Suomalainen Lakimiesyhdistys, A-series, No 345, 2022) 6.

34 Ibid., 22.

35 For example, K Sarikakis, C Krug and J R Rodriguez-Amat, ‘Defining authorship in user-generated content: Copyright struggles in *The Game of Thrones*’ (2017) 19 *New Media & Society*, 542–559.

36 For example, E Rosati, ‘The Monkey Selfie case and the concept of authorship: an EU perspective’, (2017) 12 *JIPPL* 973–977; C Craig and I Kerr, ‘The Death of the AI Author’ (2020) 52 *Ottawa L Rev* 31–86.

37 S Teilmann-Lock, ‘The Fashion Designer as Author: The Case of a Danish T-shirt’ (2012) 28 *DesignIssues* 31–33 at 41. See also E Rosati *Originality in EU Copyright. Full Harmonization Through Case Law* (Edward Elgar Publishing 2013), 59.

38 Teilmann-Lock, ‘The Fashion Designer as Author: The Case of a Danish T-shirt’ (n 37), 31–33. See also Rosati *Originality in EU Copyright. Full Harmonization Through Case Law* (n 37), 55–57.

39 For example, M Foucault (1969) ‘What is an Author?’ in JD Faubion (ed.) *Aesthetics, Method and Epistemology*, vol 2, translated by R Hurley et al. (New Press New York 1998), 205–222; R Barthes, ‘The Death of the Author’ (1968) in *Image Music Text. Essays selected and translated by Stephen Heath* (Fontana Press 1977), 142–148.

40 Woodmansee (n 32).

41 For example, L Bently, ‘Copyright and the Death of the Author in Literature and Law’ (1994) 57 *MLR*; Rosati, *Originality in EU Copyright. Full Harmonization Through Case Law* (n 37), 54–56; Craig and Kerr (n 36).

42 N Särämäkari ‘From Worth to Algorithms: The Role and Dimensions of Authorship in the Field(s) of Fashion Design’ in Z Somhegyi and M Ryyänen (eds) *Aesthetics in Dialogue: Applying Philosophy of Art in a Global World* (Peter Lang 2020), 149–167; N Särämäkari and A Vänskä, ‘Open-Source Philosophy in Fashion Design: Contesting Authorship Conventions and Professionalism’, *Synergy—DRS International Conference 2020*, 11–14 August, proceedings edited by S Boess, M Cheung and R Cain, 2410–2426. Seminal works on fashion designers by fashion scholars McRobbie (A McRobbie *British Fashion Design: Rag Trade or Image Industry?* (Routledge 1998)) and Kawamura (Y Kawamura *Fashion-ology: An Introduction to Fashion Studies* (2nd edn Bloomsbury Academic 2018)) have not directly analysed authorship of fashion designers yet discussed the significance of authorship in fashion design profession. Sociologist Pierre Bourdieu’s work also discusses the importance of the status of an artist in gaining capital in the field of fashion.

of originality to be fulfilled and thus for a design to merit copyright protection and whether authorship conventions in fashion follow the rights and privileges that copyright law grants to authors.

There are several differences between the disciplines concerning ideas of authorship. In literary criticism, for example, the author has even been declared 'dead'.<sup>43</sup> However, in law, this is hardly the case, considering how the EU standard of originality highlights the author's choices and personality in the establishment of originality, the fundamental requirement for protection.<sup>44</sup> Nor is the author deceased in fashion, which, due to the emergence of digital fashion designers, appears to be undergoing renegotiation and even 'renaissance of authorship'. In this sense, the post-structuralist philosopher Foucault's notion of an 'author function' resonates with the legal discourse on a meta-level: the context, particular time, place, society and discourse define the function of authorship, namely, for what purpose authorship is required in certain circumstances.<sup>45</sup>

## 4.2 Authorship in EU copyright law: a union with the standard of originality

Resulting from rigorous harmonization efforts from the Court of Justice of the European Union (CJEU), there is now an EU-wide approach to the foundational requirements of copyright law. This is the case even for the requirement of authorship, regardless of the fact that for the time being no referral on this specific issue has reached the CJEU.<sup>46</sup> The EU still lacks express guidance on *what* makes one an author, whereas there are hints provided to the question of *who* may be regarded as an author.<sup>47</sup> Rosati anticipates that when the time comes and the CJEU is asked what constitutes authorship, it will follow the same path as in defining other fundamental concepts of copyright law, such as 'originality' and 'work': 'authorship' must be regarded as an autonomous concept of EU law, requiring uniform interpretation and application across the EU.<sup>48</sup> The current lack of such definition, however, does not prevent us from drawing some conclusions on the role of the author in EU copyright law from

the existing CJEU case law. In particular, judgments concerning the standard of originality are helpful in assessing the significance of authorship in EU copyright law.

In the EU, authorship and originality form a tight union.<sup>49</sup> Without human authorship, there is no originality, and without originality, the issue of authorship is irrelevant. This is because in CJEU case law that establishes the EU standard of originality, the concept is tightly connected to the personality and personhood of the author. Copyright creates a personal relationship between the author and their creation, creating a special bond between the two.<sup>50</sup> Copyright is born as a result of the author seeking to express themselves.<sup>51</sup> The notion of 'author' is consistently repeated in the most significant judgments, especially *Painer*<sup>52</sup> and *Infopaq*,<sup>53</sup> even *Brompton*.<sup>54</sup>

EU copyright law views originality as deriving from the personality of the author. It is intended as the 'display of personality, freedom and creativity of the author'.<sup>55</sup> Originality is thus not 'sweat of the brow', nor is it 'skill, labour and judgement'<sup>56</sup>—it is its 'author's own intellectual creation', as defined by the CJEU in the landmark judgment *Infopaq* (2009). This standard is only codified in the Software Directive (for computer programs), Database Directive (for databases) and Term Directive (for photographs),<sup>57</sup> but *Infopaq* extended it to apply to all work categories.<sup>58</sup> Of the other judgments, *Painer* (2011), in particular, highlights the intimate bond between the work and its author's personality. In this case, the CJEU states that an intellectual creation is an author's own if it 'reflects the author's personality'.<sup>59</sup> That is the case if

43 Barthes (n 39), 142–148.

44 See Case C-145/10 *Painer*, ECLI:EU:C:2011:798, paras 88–89, 92.

45 Foucault (n 39), 306–307.

46 E Rosati 'Copyright at the CJEU: Back to the start (of copyright protection)' in H Boshier and E Rosati (eds) *Developments and Directions in Intellectual Property Law. 20 Years of The IPKat* (Oxford University Press 2023) (forthcoming), Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4097316](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4097316) (accessed 22 August 2022) 9.

47 *Ibid.*, p. 10, 20.

48 *Ibid.*, p. 20.

49 See also Mattila, *Yhteistyö tekijänoikeudessa* (n 33), 15.

50 A Kur, 'Unité de l'art is here to stay—Cofemel and its consequences', Max Planck Institute for Innovation and Competition Research Paper Nr 19–16 (2019), 9–10.

51 Mattila, *Yhteistyö tekijänoikeudessa* (n 33), 27.

52 Case C-145/10 *Painer*, ECLI:EU:C:2011:798.

53 Case C-5/08 *Infopaq*, ECLI:EU:C:2009:465.

54 Case C-833/18 *Brompton*, ECLI:EU:C:2020:461.

55 Rosati, 'The Monkey Selfie case and the concept of authorship: an EU perspective' (n 36), 974.

56 See Case C-604/10 *Football Dataco*, ECLI:EU:C:2012:115, paras 42, 46 and Rosati, 'The Monkey Selfie case and the concept of authorship: an EU perspective' (n 36), 974. The 'skill, labour and judgement' refer to the traditional British view on originality. Although *Infopaq* seemed to challenge the originality tradition of the ex-EU Member State, there is no fundamental conflict between 'author's own intellectual creation' and 'skill, labour and judgement' (A Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 IIC 4–34).

57 Software Directive art 1(3), Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 77, 27.3.1996, p. 20–28, art 3(1), and 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) OJ L 372, 27.12.2006, p. 12–18 ('Term Directive'), art 6.

58 See also Rosati, *Originality in EU Copyright. Full Harmonization Through Case Law* (n 37), 102–110.

59 Case C-145/10 *Painer*, ECLI:EU:C:2011:798, para 88.

the author was able to express their creative abilities in the production of the work by making ‘free and creative choices’<sup>60</sup> and that way stamped the work with their ‘personal touch’.<sup>61</sup> *Brompton* (2020) strengthens this by further highlighting the importance of free and creative choices above anything else, even technical considerations.<sup>62</sup>

When assessing these CJEU judgments that define the standard of originality and possibility for a subject matter to be protected by copyright, one can make the following observation: originality is not merely tied to the outcome and result of the artistic or literary work. It is just as much connected to the *creative process itself* and the *activities of the author*. The key elements of originality all refer to the author of a subject matter, highlighting the connection between originality and the author’s personality. Therefore, it can be concluded that ‘authorship’ and the way in which it is defined are fundamental elements of copyright protection in the EU.

In digital fashion, the issue of authorship is just as important as in physical fashion. Whether a design is digital or physical, it must meet the standard of originality to qualify for protection. However, the authorship practices in digital and physical fashion appear to differ. As presented in [Subsection 4.3](#), different authorship practices affect the likelihood that fashion designs will pass the threshold of originality and receive protection.

### 4.3 A fashion designer as an author: a legal perspective

The occupation of fashion designers was formed by the technological, societal and economic changes of the First Industrial Revolution.<sup>63</sup> A profession of a designer instead of a tailor or a seamstress was needed to locate the design of reproducible garments and separate high-level couture from mass-produced garments for the less wealthy. Furthermore, the guild system of artisans and merchants was disbanded after the French Revolution in 1789, giving new possibilities to practice fashion and establish businesses.<sup>64</sup> The fashion designer then became an artist instead of a tailor merely fulfilling the customer’s wishes,<sup>65</sup> and the hierarchy between front-end creative work and the behind the scenes production of clothes

was established.<sup>66</sup> Authority of the fashion designer defines their social position in the hierarchy of fashion design.<sup>67</sup>

For a long time, the law retained a sceptical attitude towards fashion designers as artists and the hierarchies of the fashion world for several reasons.<sup>68</sup> Garment-making, whether artistic or merely dictated by practical needs, has long been labelled as a ‘craft’, instead of art.<sup>69</sup> This connects with the history of copyright distinguishing between ‘pure art’ (fine art) and ‘applied art’, the latter referring to products, which, in addition to their aesthetics, have a functional purpose.<sup>70</sup> Works of applied art have been discriminated against in the copyright regime. They have not always been considered as worthy of protection on the same grounds as pure art,<sup>71</sup> which has affected the legal status of fashion designs.<sup>72</sup> Even though early fashion designers made efforts to protect their works and labels through, for example, licensing practices and social recognition, the exclusivity of haute couture creations did not convince legal entities to align fashion designers with fine artists. Distinguishing between different ‘levels’ of creativity and categorizing them based on their (alleged) ‘worthiness’ of protection reflect a certain kind of cultural elitism in copyright tradition.<sup>73</sup> However, especially in the contemporary European copyright

60 Ibid., para 89.

61 Ibid., para 92.

62 C-833/18 *Brompton*, ECLI:EU:C:2020:461, paras 34, 38.

63 Y Kawamura, *The Japanese Revolution in Paris Fashion* (Berg 2004), 31–32; P Tortora, *Dress, Fashion and Technology. From Prehistory to the Present* (Bloomsbury Academic London 2015) 136.

64 M Aakko, ‘Fashion In-between: Artisanal Design and Production of Fashion’ (Doctoral thesis, Aalto University 2016), 23.

65 Kawamura, *Fashion-ology: An Introduction to Fashion Studies* (n 42), 55–70.

66 J Entwistle, (2000) ‘Fashion and the Fleishy Body: Dress as Embodied Practice’ 4 *Fashion Theory* 323–347.

67 Särämäkari, ‘From Worth to Algorithms: The Role and Dimensions of Authorship in the Field(s) of Fashion Design’ (n 42), 149–167.

68 See Teilmann-Lock, ‘The Fashion Designer as Author: The Case of a Danish T-shirt’ (n 37), 29–41.

69 Due to technological advancement, some other forms of creativity have also struggled with finding their place in the copyright regime: for example, the invention of a photo camera sparked a discussion on the link among the hand, machine, and the eye, and how this link was perceived by the law to attain copyright protection (see, eg, T Mattila, ‘Tekijän monet elämät. Tekijän käsite kirjallisuudentutkimuksen ja tekijänoikeuden yhdistäjänä’ [The multiple lives of the author. The concept of author connecting literary criticism and copyright] in A Alén-Savikko, V Kurjenmiekka, S Nyqvist and O Oja (eds) *Muuttuva tekijä. Kirjoituksia tekijänoikeudesta ja taiteesta* [The changing author. Perspectives on copyright and art.] (Helda Open Books, University of Helsinki 2020) 25.

70 The same distinction took place in art with the emergence of the concept of art and the whole field of aesthetics and art theory (eg, L Shiner *The Invention of Art. A Cultural History* (The University of Chicago Press 2001)).

71 See, eg, J Schovsbo and M Rosenmeier ‘The Copyright/Design Interface in Scandinavia’ in E Derclaye (ed.) *The Copyright/Design Interface, Past, Present and Future* (Cambridge University Press 2018), 125–126; S Teilmann-Lock *The Objects of Copyright. A Conceptual History of Originals and Copies in Literature, Art and Design* (Taylor & Francis Group 2016), 429.

72 See extensively H Härkönen, ‘Fashion and Copyright: Protection as a Tool to Foster Sustainable Development’ (Doctoral thesis, University of Lapland, Acta electronica Universitatis Laponiensis 311 2021), 52–54.

73 See also K Busse ‘The Return of the Author. Ethos and Identity Politics’ in J Gray and D Johnson (eds) *A Companion to Media Authorship* (Wiley-Blackwell 2013), 61: in the 18th century, craft was associated with the way women created art (which was considered to be ‘wrong’ in several counts).

framework, which appears to be embracing the unity of art,<sup>74</sup> such separation between art and craft, as well as between pure art and applied art, is superfluous. The art *v* craft dichotomy is not only a sensitive issue in copyright scholarship but also an issue that divides fashion practitioners themselves. One respondent to the survey described their artist/designer/craftsperson identity in the following way:<sup>75</sup>

I hope to have a career not as a 3D fashion designer, but as a 3D artist who focuses on fashion. I am more interested in creating fantastical digital worlds than creating real-life samples of my clothes.

In practice, the hierarchic structures of fashion have the potential to lead to situations whereby someone is wrongly promoted to the rank of author merely due to their high status as a star designer in the fashion world. For instance, a fashion house that is named after its founder or head designer may very well name this person as the designer of all of its products, even those designed by nameless, employed or freelance designers. If these designs pass the threshold of originality, they are copyright-protected works, meaning that their authors have moral rights to them in accordance with the Berne Convention<sup>76</sup> Article 6*bis*, such as a right to claim authorship. Specifically, if such moral rights are strictly interpreted, the above-described practice is questionable. If a fashion designer creates an original design, they have the right to claim authorship to their work—not for instance, the person after whom the fashion brand is named. The designer-creator's position in the hierarchy of fashion is irrelevant in this legal assessment. It is also worth noting that unlike the author's economic rights (such as reproduction, communication to the public and distribution rights), moral rights are not transferable. In other words, a fashion brand can never own its designers' moral rights, not even if the author-designer agrees. A fashion designer can, however, choose to waive their moral rights in some jurisdictions.<sup>77</sup> The complex relationship between moral rights and the hierarchic fashion authorship may lead to situations where the law and fashion industry practices fundamentally conflict. When it comes

to authors' economic rights, then conflicts between fashion authorship and copyright authorship can be managed more easily, as it is possible for a designer to surrender such rights to a fashion company. This kind of contractual agreement is typical especially in employment relationships.<sup>78</sup>

Another typical feature of fashion authorship is that designers rarely create in solitude. Instead, they tend to work closely with their team and collections are often outcomes of collective efforts.<sup>79</sup> Small-scale designers might be the team, whereas designers working in big companies might have a narrow task dictated by a planner.<sup>80</sup> The narrower the designer's task and the more this task is dictated by anything other than the designer's free and creative choices, the less likely it is that the designer will be considered as an author under copyright law.<sup>81</sup> The authority of a designer will therefore strongly contribute to the possibility of claiming copyright to their design. Also, the balance between the authority and creative input of a fashion designer and the role of a pattern-maker varies depending on the type of design that is practised: for some, the pattern-making itself is the design, whereas for some, their work is limited to image creation.<sup>82</sup> The fashion industry is in no way the only industry where creative outputs are typically results of teamwork. Specifically, in the field of entertainment, such as the music and film industries, the authorship of a creation is typically divided into separate 'units'. For example, musical compositions with words are overwhelmingly co-written. An opera is often the work of a librettist and a composer. In musical genres such as jazz, rock and pop, the creative process is often collaborative in nature.<sup>83</sup> The songwriter, composer and performer might all be different individuals, and each of them credited as an author. In fashion, however, it is not typical to credit each designer who participated in the creation of a work, regardless of their creative input. Rather, the head designer or another person with fame and merit

74 Härkönen, *Fashion and Copyright: Protection as a Tool to Foster Sustainable Development* (n 72) and A Kur, 'Unité de l'art is here to stay—Cofemel and its consequences' (n 50). See, however, M Levin 'The Cofemel revolution – originality, equality and neutrality' in E Rosati (ed.) *The Routledge Handbook of EU Copyright Law* (Taylor & Francis Group 2021).

75 See also Section 3.3: Andrew Kupresanin and Belinda Chen, the founders of Superficial, are not designers either—they are artists.

76 The Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979).

77 Provided that this is separately agreed on between the fashion house and the designer. There are further complications and limitations related to the possibility of waiving moral rights that are not discussed in this article.

78 Between jurisdictions, there can be significant differences when it comes to the possibility for an employer to claim ownership to a work created by an employee. Due to the limited length of this article, such contractual agreements are not further explored. About the possibilities to designate a legal person as the first owner of copyright, see further eg, A Bridy, 'The Evolution of Authorship: Work Made by Code' (2016) 39 *Columbia Journal of Law & the Arts* 400 and Rosati, 'The Monkey Selfie case and the concept of authorship: an EU perspective' (n 36), 975. See also M Lemley, 'Romantic Authorship and the Rhetoric of Property' (1997) 75 *Texas Law Review* 882–884 and Lemley's criticism of the work-for-hire doctrine and 'corporate authorship'.

79 Kawamura, *Fashion-ology: An Introduction to Fashion Studies* (n 42).

80 E Renfrew and C Renfrew *Basics Fashion Design 04: Developing A Collection* (AVA publishing SA 2009).

81 See also Mattila, *Yhteistyö tekijänoikeudessa* (n 33), 39, 52.

82 T Rissanen 'Types of fashion design and pattern making practice' (2007) 2 *Nordic Design Research Journal*, Available at <https://archive.nordes.org/index.php/n13/article/view/185/168> (accessed 12 January 2021).

83 Preamble to the Term Directive (n 57), recital 18.

tends to be credited as an author, regardless of their *de facto* participation in the creative process of a work.<sup>84</sup> This reflects the ‘star culture’ of the traditional, physical fashion industry: the industry contributes to maintaining the illusion of the fashion designer as a creative genius. The star culture elevates the value of fashion brands’ products and is therefore commercially beneficial. This is how ‘stars’ in fashion become brand names.<sup>85</sup> This practice of elevating a single author above the rest of the authors in co-creation situations appears to conflict with the spirit of copyright in civil law jurisdictions, where the author and their personality are at the centre of everything. Failing to recognize (co)designers as (co)authors merely because of their low position in the fashion hierarchy is a grievance of the fashion world and requires a system-level change within the industry.

From a copyright viewpoint, it is also interesting that fashion designers tend to value artistic integrity over commerciality.<sup>86</sup> In their work, designers are expected to balance between newness and familiarity as well as creativity and branding.<sup>87</sup> Ruppert-Stroescu and Hawley argue that there are two types of creativities in fashion design practice: *leadership creativity* and *adaptive creativity*.<sup>88</sup> Leadership creativity changes the paradigms and direction of fashion, whereas adaptive creativity absorbs existing frameworks and trends.<sup>89</sup> When viewed through the copyright lens, acts of adaptive creativity might be more likely to face challenges in fulfilling the originality requirement than acts of leadership creativity. The more the creativity is based on something that already exists, such as pre-existing garments and trends, the less the room there is for an author to make those copyright-relevant free and creative choices. This, however, does not mean that adaptive creativity would *per se* exclude the possibility of copyright authorship from a designer. Even if factors other than the designer’s personality are the determining factor of the creative process, the standard of originality can be fulfilled, if, regardless of those external factors, the designer has made free and creative choices in

the design process.<sup>90</sup> Leadership creativity has the potential to create new concepts, trends and broader directions by their design work, whereas adaptive creativity focuses on product development within these directions. However, it must be noted that an act of leadership creativity only leads to a copyright-protected result if such an act produces something concrete (eg. an identifiable garment design). This is due to the idea *v* expression dichotomy: copyright protects expressions, but not ideas.<sup>91</sup> Concepts, trends and broader directions would assimilate to ideas, leaving them without protection.<sup>92</sup>

Traditionally, the fashion industry has valued professionalism from authors. In fashion terms, the professionalism of designers relies on creativity and their sensitive and conceptual ‘zeitgeist’ interpretation, combined with technical skills and tacit knowledge as human bodies, cultural beings, wearers and designers.<sup>93</sup> Copyright law, however, makes no distinction between professionals and amateurs, nor does it require any merits from authors. Literally, anyone can become an author, as long as they are a human being.<sup>94</sup> Unlike fashion authorship, copyright authorship is very democratic in nature. In fashion, there are thus two competing definitions of authorship: one may dictate the internal practices of the fashion world and maintain established hierarchies, while the other legally governs the ownership of fashion creations. For fashion practitioners, it is important to be aware of this competing definition of authorship, as it has a certain power that the self-determined authorship conventions in fashion do not have. As the legal definition of authorship is the only significant definition in the eyes of law, ignoring the authorship conventions of copyright while merely interpreting authorship from the perspective of the fashion industry has its risks. For example, if designers who are *de facto* authors but discredited from that position choose to dispute their unfavourable position, the fashion industry’s own authorship conventions are insignificant in legal evaluation.<sup>95</sup>

84 See also Mattila, *Yhteistyö tekijänoikeudessa* (n 33), 204 and the ‘obra colectiva’ authorship in Spanish copyright law.

85 See Kawamura, *Fashion-ology: An Introduction to Fashion Studies* (n 42) 55, 63, 69.

86 McRobbie (n 42), 43.

87 C Eckert and M Stacey ‘Designing in the Context of Fashion – Designing the Fashion Context’ *Designing in Context: Proceedings of the 5th Design Thinking Research Symposium* (Delft: Delft University Press 2001) 113–129. These demands showcase how a fashion designer’s work is often a mixture of different IP rights. The demand of novelty might lead to applicability of design right. However, the demand of familiarity might destroy novelty. The demand of branding often encourages using trademarks.

88 M Ruppert-Stroescu and JM Hawley, ‘A Typology of Creativity in Fashion Design and Development’ (2014) 6 *Fashion Practice* 10.

89 *Ibid.*, p. 30.

90 See C-833/18 *Brompton*, ECLI:EU:C:2020:461, para 38.

91 See C-406/10 *SAS Institute Inc. v World Programming Ltd*, ECLI:EU:C:2012:259, para 33, WIPO Copyright Treaty (adopted in Geneva on 20 December 1996), art 2.

92 Härkönen, *Fashion and Copyright: Protection as a Tool to Foster Sustainable Development* (n 72), 66.

93 Särämäkari, *From a Tool to a Culture—Authorship and Professionalism of Fashion 4.0 Designers in Contemporary Digital Environments* (n 5), 45–51.

94 This is due to the interpretation of the standard of originality, which in the EU is tightly connected to the personality of the author. See Rosati, ‘The Monkey Selfie case and the concept of authorship: an EU perspective’ (n 36), 973–977; J Ginsburg ‘People Not Machines: Authorship and What it Means in the Berne Convention’, (2018) 49 *IIC* 131–135.

95 As mentioned, it is generally possible for authors and their employers or clients to agree on the ownership of their works in manners that diverge from the legal presumption of the author as the first holder of copyright. The possible scope and terms of such agreement depend on the

To conclude, there are remarkable differences between the status of a fashion designer as an author within the fashion field itself, compared to fashion designers' status within the copyright regime and how authorship is established in law. However, it is interesting that in many ways, the above-described view of authorship in physical fashion diverges from the ways that digital fashion designers understand authorship. The most striking differences are related to digital fashion's lack of 'gatekeepers' and digital fashion's tendency to credit the *de facto* author (instead of promoting someone as an author, who in copyright terms would not be an author). While the traditional view of fashion authorship in the realm of physical fashion is very hierarchic, in the sphere of digital fashion, authorship is more democratic, inclusive and within the reach of every digital fashion practitioner.<sup>96</sup> Digital fashion therefore has the potential to shape the conception of fashion authorship in a way that brings it closer to copyright authorship. There is, however, a threat involved: when luxury houses and other traditional fashion brands fully enter the sphere of digital fashion, they might try to push their hierarchic concept of authorship into this field of fashion as well.

## 5. Digital fashion designers, authorship and originality

### 5.1 Digital fashion: from 'applied art' to 'pure art'?

In the qualitative online survey and case study interviews, the practice of digital fashion design was often referred to as 'digital craftsmanship', meaning that the artist status of fashion designer is moving closer to the pre-industrial concept of artisan. According to contemporary artisanal fashion designers, they combine traditional craftsmanship with contemporary fashion.<sup>97</sup> Literally stitching the garments together in virtual form, digital fashion designers translate the tacit knowledge and the physical garment construction skills of a designer as well as the situated embodied experience as a human being<sup>98</sup> into the virtual space.

From a copyright perspective, digital fashion designers taking a step back to craftsmanship might sound

jurisdiction. Specifically, in the civil law jurisdictions, these possibilities might be limited, whereas common law jurisdictions typically have a more favourable attitude towards such agreements.

96 Särämäkari, *From a Tool to a Culture—Authorship and Professionalism of Fashion 4.0 Designers in Contemporary Digital Environments* (n 5), 104–106.

97 M Aakko, 'Unfolding Artisanal Fashion' (2019) 23 *Fashion Theory* 531–552.

98 Särämäkari, 'Digital 3D Fashion Designers: Cases of Atacac and The Fabricant' (n 6); J Harris, 'Digital practice in material hands: How craft and computing practices are advancing digital aesthetic and conceptual methods' (2012) 3 *Craft Research* 91–112.

alarming considering the 'art v crafts' dichotomy in copyright scholarship.<sup>99</sup> For some, associating digital fashion design with crafts (instead of art) could suggest that they may be less likely to reach the standard of originality. However, as mentioned, the distinction between art and craft reflects a certain kind of elitism from (copyright) scholarship and can be seen as a fundamental failure in the copyright tradition. The methods and tools of manufacturing—whether they are a brush and a canvas, a needle and some fabric, or virtual tools—are not direct indications of originality and thus worthiness of protection.<sup>100</sup> Instead, what we must focus on is how the designer has expressed their creative vision with their chosen methods, whether digital or physical. The concerns regarding digital 'craft' being able to reach the standard of originality are significantly mitigated by how digital designers value their freedom of creativity, as described by this survey respondent:

I ended up doing 3D fashion looking for a sense of freedom. [...] I put myself in the condition to be able to create anything I can think of.

When compared to physical garment design, digital fashion provides greater freedom: the laws of physics and requirements of functionality vanish, expanding the creative freedom of designers.<sup>101</sup> The only constraint is the pattern and the digital 'sewing' order, which must be equal to what they would be in the physical world: otherwise, the garment would fall off from the avatar. Nevertheless, the authors of digital fashion have more possibilities to make free and creative choices in design production. A digital garment is no longer a physical, functional object—the kind that copyright law has typically treated with caution.<sup>102</sup> It is presented in a 2D form, just like paintings, illustrations and many other works of 'pure art', which have never been treated with similar

99 See, eg, Teilmann-Lock, 'The Fashion Designer as Author: The Case of a Danish T-shirt' (n 37), 29–30.

100 Antikainen, *Surviving Technological Change: Towards More Coherent Regulation of Digital Creativity Through EU Copyright and Design Law* (n 2), 70.

101 The absence of functional requirements is the case for digital-only fashion designs, but the same does not apply for a digital design that is merely a path towards a physical garment. Functionality in digital fashion has two elements: on the one hand, it might bear resemblance to the definition of functionality in physical fashion if the digital design is merely a prototype for a physical garment and technical considerations play a role almost equally dominating as in physical fashion design. On the other hand, we have digital-only fashion design where the need for functionality is absent, or at most, an illusion.

102 See, eg, D Inguanez, 'A refined approach to originality in EU copyright law in light of the ECJ's recent copyright/design cumulation case law' (2020) 5 *IIC* 810–812 and A Tischner, 'Copyright Protection for a Functional Shape in so far as It Is Original. Comment on CJEU decision of 11 June 2020 in Case C-833/18 Brompton Bicycle' (2020) 69 *GRUR International* 9.

scepticism as products of applied art. Hence, there is no need to apply the same caution to digital fashion designs as physical fashion designs. It can even be found that (i) as digital-only fashion designs lack the element of functionality in the 'real' world and (ii) their design process can be guided solely by the artistic vision of their authors, these creations cannot be labelled as 'applied art'. Instead, there seems to be no reason not to accept digital fashion among the sphere of 'pure art'.

Although the absent need for functionality in digital fashion design somewhat diminishes some of the problems connected to protection of physical fashion designs and other works of applied art, one cannot conclude that digital designs would automatically pass the threshold of originality. Digitally depicting a fashion design that is purely utilitarian or mundane does not automatically make the design original and result in copyright protection.<sup>103</sup> When considering dimensional conversion, it is also worth noting that digitizing a functional 3D object does not 'remove' its functionality in a copyright-relevant manner: its appearance would still be determined by technical considerations, and protection could be denied on this basis.<sup>104</sup> If an unoriginal design is depicted digitally, it can be protected if original elements have been added during the digitization process.<sup>105</sup> One of the case studies provides an example in this context: Superficial is building a virtual fashion archive with digital 3D models of historical garments, featuring a new type of process that includes documenting and reconstructing the garments digitally and simulating the fabric dynamics. It might be, however, hard to view these digitized versions as protected works, if they merely duplicate a physical garment in a digital form. The digitally archived version of a physical, historical garment may be subject to copyright protection only if original elements are added during the digitization process. Digitizing a physical fashion design does not add originality to a design. The garment design might of course be protected if it is original; however, its digitalized version would not be its own independent work, but the same work in a different dimension. In that case, reproducing it in the digital realm generally

requires a permission from its rightsholder.<sup>106</sup> Copying a design from the physical world to the digital world does not differ from a situation where someone makes a drawing of an existing painting. Changing the dimension from a physical object (3D) to a digital object (2D) does not change the situation<sup>107</sup> and can even be found as an infringement of copyright, as copyright's scope of protection covers derivative use and dimensional conversion.<sup>108</sup> Thus, copying other designers' work is equally risky for physical and digital fashion designers. Granting the same design equal protection in the physical and digital realms can be seen as ideal, since this promotes coherence and technological neutrality in copyright law: it would be problematic if the same work would be protected in the digital but not in the physical world.<sup>109</sup>

The practice of digitizing historical garments also brings forth the issue of the public domain. A copyright-protected fashion design will fall into the public domain 70 years *postmortem auctoris*,<sup>110</sup> and digitizing it does not bring it back to the scope of protection. However, a digital design that builds 'on top' of a historical garment can be protected if some new, originality-establishing free and creative choices are made during the digitization process. The whole design would not be protected, although only the new parts of the design would receive protection, whereas the historical part would remain in the public domain. In this event, authorship of such design would be 'layered' and divided between the long-deceased designer and the designer adding new, original elements to the historical design. Authorship could hence be fragmented in a complex manner. However, it must be noted that such layering of authorship also occurs in the realm of physical fashion design that is inspired by earlier works. The legal reality for physical/digital fashion is thus not different, even though their customs of building 'on top' of earlier designs might vary.

Finally, the *practices* of digital fashion design appear to better coincide with some of the more traditional legal views of garments that can be considered original and worthy of protection. While the possibility to protect commercial, mass-produced fashion designs under the

103 See also Antikainen, *Surviving Technological Change: Towards More Coherent Regulation of Digital Creativity Through EU Copyright and Design Law* (n 2), 56.

104 See Case C-833/18 *Brompton*, ECLI:EU:C:2020:461, para 33; L Osborn, *3D printing and intellectual property* (Cambridge, Cambridge University Press 2019), 177; Antikainen, *Surviving Technological Change: Towards More Coherent Regulation of Digital Creativity Through EU Copyright and Design Law* (n 2), 43.

105 Antikainen, 'Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs Under EU Design Law' (n 3), 145, 156.

106 Provided that an exception or limitation of copyright (such as reproductions made by a natural person for private use) does not apply.

107 Bearing in mind that although we see a design as a 2D representation through a screen, the computer is storing and depicting 3D data or information. Many digital designers see themselves working in digital 3D environments or spaces.

108 Antikainen, 'Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs Under EU Design Law' (n 3), 145.

109 Antikainen, *Surviving Technological Change: Towards More Coherent Regulation of Digital Creativity Through EU Copyright and Design Law* (n 2), 73.

110 Term Directive (n 57), art 1(1).

same requirements as other work categories has been frequently questioned (especially pre-*Cofemel*),<sup>111</sup> the suggestion of unique, handmade or couture fashion designs to receive protection has never been met with such scepticism.<sup>112</sup> As digital designers highlight artistic craftsmanship and artisan skills in their work (instead of, eg, the commercial and functional aspects of their designs), their creations appear to better match this conservative school's idea of the fashion that can be protected by copyright. In that sense, advocating for copyright protection for digital fashion designs is less rebellious than demanding the same for physical fashion designs.

## 5.2 'Free and creative choices' in digital fashion

For some of the interviewed designers, designing for the virtual sphere is liberating as a creative activity. Freedom of creativity was also highlighted by digital fashion designers in response to the survey:

[I]t leaves enormous room to try out spontaneous ideas or even work with 'digital mistakes' that happen along the way.

For apparel, it is the fastest and cheapest way to put out ideas but more importantly to be able to create designs and let technology guide me into ideas and iterations I otherwise wouldn't have even thought of. That creative process was mind blowing to me. I'm more exploratory by nature, so if I have an idea, there's no way in hell that it's going to look in the end exactly how I wanted it to in the beginning.

Software is an affordance for quick experimentation, and unlike with physical fashion, digital designers do not have to juggle between their creativity and the economic, social, functional and material constraints. The technical and software skills of the designer might limit the freedom of designer: the wider and deeper the skills, the better chances there are to play with design. This also leaves more room for the 'free and creative choices' required by the EU standard of originality. As one interviewee described:

[...] [A]t some point I'll just start, and I kind of have an idea in my head what I want. And then I just throw it on the [virtual] doll and I just start working and sometimes it ends up

being completely different from what I intended. But I like that as well because it's so free. And they save like 10 different versions of the same thing. Just to be able to go back to the original, you know. And the thing is, in digital, when you cut, there's nothing wrong because you can always click Control-Z. So, if you ever do something wrong, there's always a way to go back into to see and try it out. It's super playful. Well, you also have to say no sometimes just to stop because it's also never finished.

Here, the freedom and playfulness of the process are highlighted. Another survey respondent noted that '[i]t is possible to explore more design ideas virtually than physically'. Furthermore, digital fashion designers also tend to design the surroundings and the whole concept of the video or image in which the outfit is presented, in the same way as fashion photographers, stylists, journalists and directors create magazine editorials and fashion films.

Many digital designs are made and used only in a digital setting, which allows designers to execute ideas that would never work physically. For example, the structure of a dress could be too fragile to exist as a physical garment or defy gravity in ways that are impossible to carry out in reality. As noted by the following survey respondent, almost anything is possible in digital fashion:

In digital, I can change colors, fabrics and patterns so easily. There is ctrl+z function and it helps me to think more creative [...] We can really do almost everything in digital.

Another freedom-increasing factor is related to the basically unlimited quantities of digital 'materials'. When designing physical products, the designer needs to consider, for example, material strength, cost, availability and sustainability thereof.<sup>113</sup> Digital fashion design allows ignorance of physical scarcity.<sup>114</sup> A digital fashion designer can, for example, use leopard fur without having to consider issues such as animal welfare, endangerment and the ethics of using such fur or consider replacing real fur with a polyester alternative, commonly also made of oil and therefore unsustainable.<sup>115</sup> However, it cannot be concluded that nothing would ever restrict the free and creative choices made by digital fashion designers. The creative freedom of the designer can be restricted to a certain extent by the subject matter

111 Case C-683/17 *Cofemel*, ECLI:EU:C:2019:721 and analysis in Härkönen, *Fashion and Copyright: Protection as a Tool to Foster Sustainable Development* (n 72), 58–59, 62–63. See also Teilmann-Lock, 'The Fashion Designer as Author: The Case of a Danish T-shirt' (n 37), 29–41.

112 For example, on the traditional UK approach, see E Derclaye, 'Are fashion designers better protected in continental Europe than in the United Kingdom: comparative analysis of the recent case law in France, Italy and the United Kingdom' (2010) 13 *Journal of World Intellectual Property* 329–329. (On German views, see A Kur, 'Protection for Fashion: the European Experience' in R Cooper Dreyfuss and JC Ginsburg (eds) *Intellectual Property at the Edge: The Contested Contours of IP* (Cambridge University Press 2014), 183).

113 As noted by one respondent: 'There is no waste of the material cost of making samples.'

114 See also M Lemley, 'IP in a world without scarcity' (2015) 90 *NY Univ Law Rev* 460–515.

115 This theme connects to a deeper issue: even the use of fake fur can be seen as unjustified, as it normalizes the decorative use of fur-like materials and thus as supporting the structures that exploit animals for the sake of appearance and style.

they are depicting.<sup>116</sup> The restricting factors can also connect to presenting fabrics digitally. One digital fashion designer described challenges to their creative freedom in the following manner:

What affects the designs the most are the technical restrictions: Some materials and movements are impossible to render and simulate, for example [...] I could not use sheer, flowy or fuzzy materials on characters. Certain types of capes, skirts or wide pants didn't work with the tech.

The designer's freedom could also face minor restrictions due to factors like size, contrast or the need to make the digital garment visually clear.<sup>117</sup> These kinds of limitations, however, are so minor that they do not pose a remarkable threat to free and creative choices. Perhaps, one of the most significant threats to designers' free and creative choices is commercial ambition. Digital fashion that seeks wide popularity might be vulnerable to the same threats as physical fashion. The aim to be appealing to as many consumers as possible often compromises choices that are truly free and creative, leading to products that are more conventional and follow trends, ultimately often threatening originality.<sup>118</sup>

### 5.3 The future of fashion and equality of authors?

From the perspective of the occupation of fashion designers, the survey findings and case studies suggest that digital fashion designers are 'newcomers' in the field of fashion design,<sup>119</sup> contesting and expanding the dominant fashion field. Digital fashion designers might be fashion professionals, or alternatively computer-generated image professionals, 3D artists, digital creatives, animators, costume designers or altogether amateurs in the arts. Equally, fashion designers might be floating between the fields and industries, depending on the clients and brief. Although the fashion world might give digital fashion designers multiple titles or roles, copyright law gives only two: an author or a non-author—there is no middle ground.

Digital fashion practice is easy to begin, but it is difficult to stand out. Instead of traditional gatekeepers and institutional legitimization, digital fashion designers are legitimized by their networks and communities. As in digital fashion, there are fewer gatekeepers preventing

designers from being recognized as fashion authors, the hierarchic structures typical of the traditional fashion industry are dismissed,<sup>120</sup> and authorship conventions in digital fashion are much closer to copyright law's idea of authorship. Furthermore, digital fashion designers and companies tend to emphasize open-source philosophy in their activities, explicitly contesting singular authorship, professionalism and hierarchies of the fashion world.

What further speaks for the democratization of fashion authorship within this novel practice of fashion is that it is rather common for digital fashion designers to share authorship with communities and laypeople. For example, the garment may also be an intentionally open and modifiable object: its user is invited to participate in the creative process. In some cases, in open-source fashion practices, the author function retreats on the meta-level of distributed creation, which sometimes produces uncontrollable open-ended objects as well as action and interaction spaces.<sup>121</sup> This may lead to the modifying user being recognized as a (co)author, if they also make free and creative choices and reflect their personality in the end result. For example, in 2022, The Fabricant launched The Fabricant Studio, a platform for laypeople to participate in design processes, not only for their own pleasure: any user is allowed to mint their design on the block chain, based on the options provided by The Fabricant, to use the digital outfit in various platforms and games and to sell their designs. In such a process, the co-designer's authorship is explicitly recognized and written into the block chain.<sup>122</sup> The block chain makes the joint authorship more transparent and reveals the layers of creation. Therefore, blockchain technology can help to clarify some of the problems and conflicts related to co-authorship in fashion that were described in [Subsection 4.3](#).

Democratization of authorship is not the only change to the fashion industry that digital fashion entails. First, it nurtures the gig economy, in which designers have always been working, characterized by low-paid or even unpaid precarious labour and struggling entrepreneurs.<sup>123</sup> Collaboration with freelancers may expand new possibilities professionally and geographically; however, it may also leave contributors poorly compensated and unprotected. Second, in terms of scale, digital fashion design takes

116 Antikainen, 'Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs Under EU Design Law' (n 3), 155.

117 Ibid.

118 H Härkönen, 'Muoti tekijänoikeudellisenä 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 *Defensor Legis* 6, 921.

119 P Bourdieu, *Sociology in Question*, translated by R Nice (SAGE Publications 1993).

120 See also Antikainen, *Surviving Technological Change: Towards More Coherent Regulation of Digital Creativity Through EU Copyright and Design Law* (n 2), 38; Osborn (n 104), 18.

121 cf. Särämäkari and Vänskä (n 42).

122 The Fabricant, 'Igniting a Fashion Revolution Through Co-creation. RIP the Status Quo.' Available at <https://www.thefabricant.studio/> (accessed 23 September 2022).

123 McRobbie (n 42); A Wood, M Graham and V Lehdonvirta, 'Networked but commodified: the (dis)embeddedness of digital labor in the gig economy' (2019) 53 *Sociology* 931–950.

two directions and reverses the ratio between designers and the quantity of clothing produced: on the one hand, the number of designers is not limited to professionals and the ones employed, neither the nature nor number of designs is limited to the commercial collection requirements and functional needs. On the other hand, the physically produced garments are close to zero, which contributes to building a less wasteful fashion industry.<sup>124</sup> Respectively, the forerunners of digital fashion, such as The Fabricant and Atacac, have placed sustainability at their core. Furthermore, digital fashion designers are mostly driven by ethical motivation, such as transparency and sustainability. They fiercely seek 'change' in the fashion industry on a systemic level, as described by the following survey respondents:

I want to help make the design process of garments more sustainable and have less waste and also show how to use all the options in the softwares and how they are leading to more creative and thought through design ideas in fashion, as there are no barriers.

Profession-wise I want to use 3D digital fashion as a tool to help fashion houses save materials in in-house fitting. And in my personal time I want to keep doing it as self-expressive art. If the technology gets further developed and accepted I'd also love to help fashion houses build virtual fashion shows [...] I feel like it's a niche but it's rising especially with people's rising awareness of fashion sustainability.

I will collaborate with fashion industry giants who largely are not successful in sustainability goals.

Searching for change and democracy in fashion is not limited to environmental considerations: digital fashion designers also care about inclusivity and social justice. For example, representation of non-binary and diverse body types and the blurring of gender boundaries are seen as important.<sup>125</sup> The inclusivity of digital fashion design and its connection to creative freedom was described by one survey respondent in the following way:

3D is democratizing in that the virtual space allows the designer to use a limitless range of body types and shapes in contrast to traditional design that focused on one dress form. The rapid prototyping capability of 3D design opens up creativity in shape and pattern creation.

124 See, however, S Benson, 'Is digital fashion really the industry's eco-friendly saviour?' *Dazed* (25 August 2021). Available at <https://www.dazeddigital.com/fashion/article/53877/1/digital-fashion-clothing-industry-saviour-climate-sustainability-the-sims-avatar> (accessed 23 September 2022).

125 Särämäkari, "'Digital Fashion' on Its Way from Niche to the New Norm' (n 1), 10; this finding came through in all of the research material, including the online survey and, eg, an interview with the creative director of The Fabricant, Amber Jae Slooten, Amsterdam, 19 November 2019.

Moreover, the case studies show how digital fashion companies highlight the sustainability of work, contrasting the burnout culture of fashion and self-exploitation of designers<sup>126</sup> by creating pleasant working environments and encouraging relaxed communication.<sup>127</sup>

Although this article has presented digital fashion largely in a positive light, it must be noted that this part of the digital revolution in fashion is not unanimously celebrated. Digitalization has encountered resistance among designers and companies for several reasons, such as a feeling of threat by the transformation of their professionalism and traditions as well as being suspicious of dematerialization. Concern has been addressed towards the ever-diminishing garment craft skills, already suffered in the fragmented production systems of the post-industrial society.<sup>128</sup> Another concern is the use of energy associated with blockchain and digital platforms. Furthermore, learning to use new technological tools requires time and acquiring these tools requires financial resources. Adoption and utilization of novel technologies tend to serve mainly those who are already privileged. Inclusivity optimism might fall short also in terms of representations: how could the fragmented community of digital fashion designers make sure that they do not transfer our biases, racism, unhealthy beauty ideals and narrow body norms to the digital sphere? Only time shows how these aspects will unfold in reality.

## 6. Conclusions

This article presented observations of the development of fashion authorship, emerging from a qualitative online survey and empirical case studies. Analysing these observations from a copyright perspective has shown that especially in physical fashion, the concept of authorship differs significantly from the legal meaning of author. Authorship in fashion has traditionally been difficult to achieve and a status primarily given to designers with fame and accolades. However, copyright law grants any human being who produces an identifiable subject matter by making free and creative choices the position of 'author'. Copyright authorship pays no attention to fame and merits. There is therefore a striking conflict between these two ideas of authorship. Instead, copyright authorship bears resemblance to how authorship is defined in the field of digital fashion, where designers highlight equal access

126 Ibid. On designers' self-exploitation, cf. McRobbie (n 42).

127 Särämäkari, "'Digital Fashion' on Its Way from Niche to the New Norm' (n 1), 10.

128 D Atkinson 'Post-industrial Fashion and the Digital Body' in S Broadhurst and S Price (eds) *Digital Bodies: Creativity and Technology in the Arts and Humanities* (Palgrave Macmillan Limited 2017), 147–160.

to design authority and a lack of authorial hierarchies. As digital fashion practitioners challenge the prevailing authorship conventions of fashion, the emergence of digital fashion has the potential to bring the concept of fashion authorship closer to copyright authorship. This is a positive change: if fashion authorship is defined in a way that resembles the legal definition of authorship, this brings legal certainty to the field and equality between authors who create fashion.

In a broader context, fashion authorship approaching copyright authorship connects to a more general trend, whereby the built-in conflicts between fashion and copyright are becoming less severe. Since *Cofemel* confirmed that the standard of originality is the same for all work categories (ie, fashion can no longer be discriminated in the copyright laws of EU Member States), fashion companies can more confidently enforce copyrights. However, brands that rely on copyright protection must also accept all the other dimensions of this IP right in their business practices—not just the neutral standard of originality. If a fashion house expects its rivals to respect its copyrights, the company must also ensure that they respect one of the most important values on which the civil law countries' copyright regime is based: protecting the author, ie, designer. In practice, this means, eg, that the moral rights of designers can no longer be ignored for the purposes of brand-building. The traditional (physical) fashion industry's internal conventions of authorship must be renegotiated to align with copyright law.

It might be more common for digital fashion designs to pass the standard of originality compared to physical fashion designs, regardless of the threshold of originality being the same for both. This, however, has not as much to do with their 2D and non-functional nature as it has with digital fashion designers' habits of making use of their almost unlimited possibilities to make free and creative choices. When considering the conservative 'pure art *v* applied art' distinction within copyright, it is difficult to label digital fashion as belonging to the latter category alongside physical fashion designs. Regardless of fashion having a history of 'applied art' status within the copyright regime, there has always been a tight union between art and fashion, as well as between craft and fashion, which are now embraced by digital fashion designers in their practices. Although the field of fashion is now becoming increasingly decentralized, this tight union remains. From a copyright perspective, we need to recognize the value of digital works: it is in no way less significant than the value of physical works.<sup>129</sup>

129 See also J Ginsburg, 'The Role of Author in Copyright' in RL Okediji (ed.) *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017), 61.

The emergence of digital fashion is a welcome step that can foster sustainable development within the industry, obviating the need for the physical production process notorious for wastefulness.<sup>130</sup> At best, digital fashion '[...] should waste nothing but data and exploit nothing but the imagination'.<sup>131</sup> This new field of fashion is increasingly important also due to the EU Strategy for Sustainable and Circular Textiles (2022), which proposes actions to support the industry in 'green and digital transitions' and examines sustainable 'technological solutions and innovative business models'.<sup>132</sup> One such technological solution and business model could be digital fashion, however, bearing in mind that the environmental impact of energy use of blockchain technologies has been brought forth and addressed by the digital fashion companies.<sup>133</sup> Furthermore, as long as society prefers ever-changing trends and continuous renewal of wardrobes, we have a long way to go towards genuinely sustainable fashion. Even though digital fashion designs are better for the environment than overproduction of physical garments, if they are also treated as disposable items and extensively minted on blockchain, digital fashion is merely a stopgap solution to a major problem.

This article has shed light on some of the most pressing copyright law issues related to the emergence of digital fashion, which is still a relatively unexplored theme in the legal academia. Further research of especially the following issues presented in this article would be worthwhile: (i) questions regarding joint authorship, including user-generated digital fashion in (social media) platforms and videogames; (ii) the impact of copyright-related contractual agreements between fashion companies and designers, especially from the perspective of fairness and compliance with the normative justification of copyright and (iii) the environmental impact of digital fashion, especially in comparison with the physical (fast) fashion industry.

130 See, eg, Ellen MacArthur Foundation, 'A New Textiles Economy: Redesigning Fashion's Future' (2017). Available at <https://ellenmacarthurfoundation.org/a-new-textiles-economy> (accessed 1 November 2022).

131 The Fabricant, 'Making Facts Fashionable Again' (2021). Available at <https://thefabricant.medium.com/making-facts-fashionable-again-32951b13d9a5> (accessed 2 January 2023).

132 European Commission, 'Questions and Answers on EU Strategy for Sustainable and Circular Textiles'. Available at [https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_22\\_2015](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_2015) (accessed 24 October 2022).

133 Benson (n 124).