

The Protection of the Viktor & Rolf Fashion-Art Trademark

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We know that each age establishes a definition of art and also a definition of fashion. But each time, both art and fashion have something to say about people's culture, history and their feelings. Fashion builds parameters of visibility and any kind of art, thus constructing a visual world. Instead of the painter's personal way of thinking, creation shows others a particular vision that generally expresses the situation of society. Because of that, this art helps us to understand the history as Plato once explained in chapter ten of the Republic.

Nowadays, art refers not only to beauty and the aesthetical concept of change between traditional paradigms. The entire fashion system barter along the years and nowadays fashion is the closest thing to Art Museums.

The first National Museum of Art was the Louvre opened in 1793. Around two hundred years later in 1994, Viktor Horsting and Rolf Snoeren (Viktor & Rolf) presented their work in a contemporary art exposition at the Modern Art Museum in Paris. Since then, they have been building a Fashion Art trademark based on the free experiment of ideas. Consequently, they belong to an exclusive group of creative people who give life to new ways of understanding fashion design.

As a contribution to contemporary fashion history, Viktor & Rolf showed their creations in 2000, in the exhibitions curated by José Teunissen and Ida van Zijl called “Droog & Dutch Design” at Utrecht’s Central Museum of Dutch modernism, and in 2003 they participated in their retrospective named “Fashion in Colours” at the Galliera Palace Fashion & Textile Museum in Paris. Within the same year, in “Woman by”, they expressed their own vision of the feminine ideal in fashion and their idea of femininity. In 2004, in an exposition they focused on the history of fashion at Kyoto Customs Institute. Some of Viktor & Rolf’s pieces in recent Haute Couture Collections, such as Wearable Art and Van Gogh Girls, have been purchased by Art Collector Han Nefkens to be donated to the Museum Boijmans Van Beuningen. For both Dutch designers, there are no differences between art and fashion as a way of personal expression and creativity. Fashion is art and art is fashion. There is no division between them. Art is Wearable.

The movement that puts fashion into the Museums is not only about museology but also anthropology, indicating that something happens with regards to our the way we dress. It has an important symbolism to share and it also invites reflection. It is part of the question of who we are.

At this point we need to consider the value of both Viktor Horsting and Rolf Snoeren’s contribution and conclude that they are very important when it comes to improving creations in order to elevate their trademark to art standard.

For this reason there is an economic aspect of art and fashion that we want to defend. In order to do that, and as we are lawyers, we must analyse some legal issues within intellectual property law.

The relationship between art and intellectual property has existed from the beginning of time. Throughout copyright law, it has been widely accepted that the works of an artist seek and obtain protection against infringements. But what happens in trademark law? Is art protectable through the trademark system?

In order to answer this question, we have to think and analyse the concept of the trademark itself. Within trademark law, protection for its distinctiveness is obtained. Its goal is to protect both owners and consumers by granting the trademark owner an exclusive right to using their sign. When it is used by a competitor, this action would be likely to cause consumer confusion as to the source or origin of goods.

When thinking about signs or brands for instance, it is easy to discover the relationship between the concepts and rights that are protected. But what is not clear is when what needs to be protected is a design or a work of art, represented in any way of its kind.

We are familiarised with the discussion about whether there is or not a connection between fashion and art. Depending on which side we find ourselves, we may uncover there is one. But when studying if fashion can be considered art and even more, thinking about the possibility of protecting its creation through a trademark system, a lot of thought must be taken into account.

When reflecting about this, we may find that designs of this type are not considered 'inherently distinctive'. As a consequence, they cannot be trademarked. Its lack of distinctiveness does not allow them to be protected by this system *per se*. And the concept of acquired distinctiveness or secondary meaning must be demonstrated before protection can be claimed.

If the design has not acquired distinctiveness, it will be considered 'merely ornamental' and not capable of functioning and being protected as a source identifier.

Moreover, the design must not be 'functional' or essential to the use or purpose of the article and cannot affect the cost or quality of it.

In that spirit, where there is no doubt: no trademark protection shall be granted.

But, are we that sure? Is it that simple? Are those concepts as sure as they were before? Can we deny trademark protection to a work of art when by purely staring at it you can relate it directly to its source? What happens when we contemplate the work of Viktor & Rolf?

Within the universe of those fashion artists, clothes have gained a new meaning well beyond the 'the merely ornamental' and 'functional'. Clothes are not limited by these functions. Wearable Art cannot only be related to a single couture Viktor & Rolf collection where clothes are studies of how painting becomes a dress and a dress becomes a painting, but to a brand whose design pieces are fine or a form of expressive art and is intended to be accepted as a serious and unique creation or statement.

By looking at the Vagabonds Collection we can identify pieces of previous Viktor & Rolf creations. This 2016/2017 haute couture collection was made of fabrics from previous collections, even with scraps of their first collection dating back to 1993. For instance, stripes from the Van Gogh Girls dress fabrics are incorporated into new dresses, revealing us the source of their product.

The way fashion is being presented has changed. Fashion shows and collections are being turned into works of art. And professionals that were exclusive to the art world are now being turned into fashion professionals as well. Many curators are now curating fashion shows. The way it is conceived has also changed. The way we must seek for protection needs to change too. In that knowledge, and when acquiring secondary meaning, some fashion pieces considered as works of art must be analysed across the trademark system in order to establish whether it is suitable for its protection or not.