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A fashion brand caught in the crossfire. A tale of the US Fashion Act, sustainability, consumer trends and their legal implications¹

Marka modowa w krzyżowym ogniu zmian. Refleksje o amerykańskiej ustawie o modzie, zrównoważonym rozwoju, trendach konsumenckich i ich prawnych implikacjach

Abstract

The fashion industry has for some years been undergoing a slow evolution towards more sustainable practices. In recent times both law and technology, in particular, connected technology have been acting as catalysts towards this goal. These shifts are widely embraced by many of today's key consumers. But a paradigm shift in any industry, especially one that mixes technology and sustainability, triggers inevitable legal consequences which must be examined and resolved. The aim of this article is to examine the impact of consumer trends, sustainability and the various pieces of legislation identified in the text on the business strategies of fashion brands in the post-COVID fashion revolution era, in order to identify effective adaptation of legislative measures that will allow them to maintain their position in the market and improve their financial performance. It has been claimed that customers crave fashion, but they have ecological concerns and a conscientious approach to consumption. Reportedly, they are prepared to buy fewer, better-quality and environmentally friendly products at the higher price these priorities imply. This paper will shed light on the legal externalities, concerns and stimuli towards building a sustainable fashion brand.

Keywords: Fashion Tech, fashion technology, sustainable fashion, fashion trends, intellectual property, COVID-19

Streszczenie

Przemysł modowy od kilku lat przechodzi powolną ewolucję w kierunku bardziej zrównoważonych praktyk. W ostatnich czasach zarówno prawo, jak i technologia, przede wszystkim technologia cyfrowa, działały jak katalizator w rozwijaniu tego celu. Te rewolucyjne zmiany są powszechnie widoczne w zachowaniach dzisiejszych konsumentów. Ale zmiana paradygmatu w każdej branży, zwłaszcza takiej, która łączy technologię i zrównoważony rozwój, wywołuje nieuniknione problemy prawne, które muszą być zbadane i rozwiązane. Celem artykułu jest zbadanie wpływu trendów konsumenckich, zrównoważonego rozwoju oraz poszczególnych aktów prawnych wskazanych w tekście na strategię biznesowe marek modowych w dobie postcovidowej rewolucji modowej w celu zidentyfikowania skutecznych legislacyjnych działań dostosowawczych, które pozwolą im na utrzymanie pozycji na rynku i poprawienie wyników finansowych. Badania naukowe pokazują, że konsumenci, mimo swego uzależnienia od mody, mają także obawy związane z ekologią i zrównoważonym podejściem do konsumpcji. Badania dowodzą, że są skłonni kupić mniejszą liczbę produktów za wyższą cenę, ale o lepszej jakości i przyjaznych środowisku, traktując te cechy priorytetowo. Autorzy niniejszego artykułu omawiają prawne implikacje oraz obawy i bodźce dotyczące budowania zrównoważonej marki modowej.

Słowa kluczowe: Fashion Tech, technologia mody, zrównoważona moda, trendy w modzie, własność intelektualna, COVID-19

JEL: K12, K15

Introduction. Slow fashion

For one or two decades, there has been an emerging problem related to 'fast fashion' and its impact on the environment and on climate change. Many attempts were made to draw attention to the resulting irreparable damage to our planet and, accordingly, to stimulate a trend of 'slow fashion' (Orendorff, 2019; Kowalski, 2019; Kexin, 2019). Fast fashion became extremely popular in the early 2000s led by Zara and H&M and, in 2017, a new concept arrived – 'ultra-fast fashion' (Weinswig, 2017) with such retailers as Boohoo, ASOS and Misguided. To put this into a broader context, the ultra-fast fashion retailers are able to add between 100 and 45,000 products daily in their online stores. It is in the context of their activities that the above-mentioned term was coined (Schiro, 1989). The term 'slow fashion' was coined by K. Fletcher, who defined it as "designing, producing, consuming and living better. Slow fashion is not time-based but quality-based (which has some time components). Slow is not the opposite of fast – there is no dualism – but a different approach in which designers, buyers, retailers and consumers are more aware of the impacts of products on workers, communities and ecosystems" (Fletcher, 2007; Staniforth, 2010).

We claim with confidence that, whereas shoppers seek a new sustainable direction in shopping, a behaviour shift we see across all groups of consumers, entrepreneurs will not be quite as quick to move in this direction without strong encouragement by law. This paper will advocate that the fashion industry's role after the pandemic is to invest brands, apparel and accoutrements with deeper meaning.

The first part of this paper will address in detail the negative ecological impact of fashion, which can be overcome through a change in social attitude and by allowing sustainable themes to set the pace of fashion cycles and trends. It will also examine the science-based futuristic visions of the world of fashion and technology, which will be the starting point of a discussion about changes to law. Then, we will address fashion, defining it and placing it in the context of future technologies and consumer trends which, in the current COVID-19 setting, are receiving more and more attention. Later, we will consider the role of law in the creation of a new concept of sustainable development and will summarise the legal threats involved in using some of this otherwise promising technology. Finally, we will uncover details of the Bill for the US Fashion Act, which, if signed into law, may prove revolutionary for the retail sector.

Sustainability movement perspectives – science-based futuristic visions

Both the fast and ultra-fast fashion movements encountered strong critique from those branches of social and legal scholarship that have recently given a lot of attention to sustainable development perspectives. It has been emphasised that the clothing industry cannot move on without providing compelling answers to challenging

environmental questions. Recent scholarship has provided somewhat audacious visions of the future (Bennie et al., 2010) that, to many, may seem like science fiction movie plots, but any suggestions of hyperbole can be refuted.

That is to say that, in 2010, Levi Strauss & Co. partnered with the Forum for the Future initiative Action for a Sustainable World, as a result of which four scenarios for the clothing business were developed:

1) 'slow is beautiful' – in a low-carbon-emission world, lifestyle is more sustainable, meaning that it is *a la mode* for consumers to buy more expensive, but higher-quality clothes; the fabrics are made of organic natural fibres; 'smart clothes' are able to monitor one's health; on the other hand there is also a strong trend towards acquiring handcrafted, vintage and second-hand clothes; apparel is bought from small or online stores; as to tracking – there is SustainGrade labelling and digital tagging that provide extensive information as to the supply chain and carbon footprint;

2) 'community couture' – climate change leads to self-sufficiency; DIY garment-making skills are taught in schools; fashion is expensive due to drastically rising raw material costs; new fabrics, that is, luxurious synthetics and virgin raw materials, are certified; other than couture clothing, items are acquired second-hand (possibly with the need for tailors to adapt them), from retail stores (heavily secured), clothing libraries or the black market;

3) 'techno-chic' – the world is wealthy and ultra-high-tech-oriented; fabrics are made of new high-tech, nano-tech and bio-tech, ecologically-friendly fibres; clothes are biodegradable and programmable, allowing fashion to be fast and cheap; 3D body scanners allow people to try on clothes in virtual mirrors or interactive screens and to personalize them; nanotechnology reduces the need for washing;

4) 'patchwork planet' – the world is broken into cultural 'blocks' with regional trends exerting strong influence; fabrics are mostly manufactured locally, so supply chains are short; nanotechnology is developed; consumers purchase their clothes online; apparel can be personalised at the point of online purchase.

In 2014, it was noted in the literature that an effective move towards sustainable fashion would be difficult to achieve without an effective legal framework, customs and norms supporting the required pro-environment agenda (Godart & Seong, 2014). When these futuristic horizons were being created in 2010 and 2014, the authors could not predict which technologies would be most important in 2025. One of the lingering questions was whether consumers would gain an interest in the sustainable growth of humankind. Today, however, as we gauge these problems a decade later, further motivated by new COVID-19 challenges, it is possible to present a more rounded picture of the immediate future of clothes.

It was noted in 2018 that the fashion industry, as one of the most resource intensive and polluting, should embrace technology to become more environmentally friendly. It is said that about 90% of all clothing could be reused or recycled, whereas only 15% actually is (Accenture, 2018).

Consumers of the future – how to revive fashion through technology

Fashion as an 'elusive fad'

Fashion itself comes with a mixed reputation. Can such a famously superficial industry really be expected to face up to its responsibility as a major source of world pollution? If money makes the world go round, it has same impact on fashion, but fashion change has historically also always been driven by technology and by consumers' resources. Fashion per se, gauged from the consumer's perspective, tends to be reduced to an 'elusive fad', which, once acquired, evokes ennui and triggers new wants and desires. Undeniably, the pattern of ever-changing styles and trends is deeply embedded in fashion's DNA, and is constantly reinforced by the fashion industry.

On 26th August 2019, 32 companies (from sportswear, mass fashion, pret-a-porter to luxury) signed the G7 Fashion Pact (G7, 2019), which was followed by recognition of the United Nations' Sustainable Development Goals (UN, 2015). One of the commitments made by the signatories was to support innovations in low-impact materials, traceability, measurement and monitoring of impact and outcomes, including assuring the means to scale the financing of investment in these innovations. In order to assure progress towards that change, it was agreed that both designers and consumers should be educated and that their awareness should be raised as to how they can engage with these global commitments. The initiative goes in hand with the elimination of single-use plastics.

Fashion as a statement

Will it be possible, in the immediate future, to claim to be fashionable without engaging with sustainable textiles and tech-derived accoutrements? Purchasing decisions today are influenced by many factors, such as personal and demographic, social, cultural, economic and psychological. Social media with their increasing number of users are shown to have a sweeping influence on consumer preferences. Many recent accounts report that social media is not only a sprawling source of information, but also a game changer in consumer choices (Stachowiak-Krzyżan, 2019). The recent survey conducted by the Polish Chamber of E-commerce (Izba Gospodarki Elektronicznej) in 2016 proved that: 61% of users share information about purchased products online; 76% declare that information shared by their friends influences their views on products and brands, 44% actually bought a product they had not intended to and that 40% changed their preferences or choices about particular products based on the online opinions of their friends (Izba Gospodarki Elektronicznej, 2016).

The social slowdown triggered by COVID-19 has shown us some significant signposts towards a 'new look' for fashion that will arise with the help of fledging technologies. COVID-19 has created an imperative for personal

protection and has also provided us with the time and situation to discuss how new technology can make fashion more sustainable.

Legal perspective on sustainable fashion

EU perspective

According to The Fashion Transparency Index 2021 report: "only 47% of brands disclose their manufacturing and about 1 in 4 brands (27%) disclose the wet processing facilities and spinning mills deeper in their supply chains" (Fashion Revolution CIC, 2021). This, in turn, means that consumers themselves do not know the exact source of a given fashion product. As remarked by B. Stauffer: "A T-shirt label might say 'Made in China', but in which of the country's thousands of factories was this garment made?" (Stauffer, 2021). Among the complex causes of this phenomenon, the most frequently mentioned are: prevalence of overseas outsourcing and production in the same factories by several companies at the same time (Suraci, 2021). An unresolved difficulty is the lack of a standard for uniform data for the three pillars: environment, social, and economic, that make up the principle of sustainable development (Capitani & Comazzetto, 2019). These concerns were expressed by Commissioner A. H. Lee, who said that: "It has never been more clear that investors need information regarding, for example, how companies treat and value their workers, how they prioritize diversity in the face of profound racial injustice, and how their assets and business models are exposed to climate risk as the frequency and intensity of climate events increase" (Lee, 2020). Solutions to this problem are mainly seen in external pressures, i.e. stakeholder and legal pressure (Freise & Seuring, 2015). Therefore, official regulations are necessary (Wilkinson, 2021), although there are also voices that prioritise the issue of self-regulation (Teibel, 2019). Adoption is discussed at European Union level, and in individual countries (such as Germany, France, UK, Norway, Netherlands), there are regulations dealing *in genere* with environmental due diligence in global supply chains. So far, however, no legal solutions have directly defined the principles of sustainable development for the fashion industry. An "example of a practice that is harmful, yet normalized in the context of neoliberal capitalism" (Simončič, 2021).

It was noted in the literature that an effective move towards sustainable fashion would be difficult to achieve without an effective legal framework, customs and norms supporting the required pro-environment agenda (Godart & Seong, 2014). Therefore, it is important to assess the development and determine the impact of pre-legislative actions and regulations initiated by the EU and the national governments of the EU Member States as well as currently binding global legal regulations concerning, inter alia, sustainable development, the circular economy, the sharing

economy, waste policy and the recycling of sustainable fashion products (Gazzola, 2020). Sustainable development has already been in operation in the EU for a long time. In addition to many European Commission Communications (European Commission, 2015; 2017a; 2017b, 2018) and European Parliament Resolutions (European Parliament, 2013; 2017), a package of directives on the circular economy should be noted. These include the Directive of the European Parliament and of the Council (EU) 2018/851 of May 30, 2018 amending Directive 2008/98/EC on waste and the Directive of the European Parliament and of the Council (EU) 2018/852 of 30 May 2018 amending Directive 94/62/EC on packaging and packaging waste. For the first time, Member States will be required to guarantee the segregation of textiles for disposal.

On 27th April 2017, the European Parliament enacted a resolution on the EU flagship initiative on the garment sector (2016/2140(INI)) and on 14th March 2013 a resolution on sustainability in the global cotton value chain (2012/2841 (RSP)). The parliament took similar action in the fields of the sharing economy and sustainable development. Therefore, there is a need to analyze the above-mentioned regulations in the context of their impact on sustainable fashion.

US perspective

The research undertaken so far on the legal regulations operational in the clothing industry in the United States shows that, despite many initiatives at the state level, federal law has not kept pace with the revolutionary changes in this industry. These conclusions are useful when undertaking a comparative analysis of the legal systems of the USA, the European Union and Poland, as they demonstrate that laws relating to this industry should focus not only on the international or national level, but also on the local or regional government levels.

In the US, due to the fact that government agencies do not take decisive steps at the federal level and because the only leading piece of legislation is the United States Environmental Protection Agency Resource Conservation and Recovery Act (RCRA), companies must 'regulate' themselves by introducing their own sustainable development solutions. They make decisions based on the Higg Index, created by the Sustainable Apparel Coalition, a non-governmental organization. Preliminary research has established that many US companies are reluctant to change in the area of Corporate Social Responsibility (CSR) due to the lack of a clear legal framework in the apparel industry.

Nevertheless, the US has certain legal norms to facilitate the development of sustainable fashion and the circular economy. US residents, for example, under Publication 526 of the Internal Revenue Service, can benefit from tax relief on the value of donated second-hand clothes. In addition, Levi's began working with the Goodwill non-profit in the

US to encourage consumers to extend the lifecycle of jeans by donating them for second hand use (Levi Strauss & Goodwill, 2009), while also participating in pilot projects where worn jeans are reused as building materials. In the US, State projects include plans to set up garment recycling facilities or to implement filters to detect micro-plastics in laundries. Changes in legal norms in this industry are initiated rather locally – the Apparel Industry Task Force (AITF) was established in New York to monitor factories. The AITF's competences are likely to be expanded in the future.

French perspective

In France, the Grenelle II regulation (loi n° 2010–788 of 12 July 2010 portant engagement national pour l'environnement) requires that every garment sold in France be labelled with a specific 'carbon footprint'.

Moreover, legal barriers emerged in the areas of recycling and upcycling, or the collection of used clothing. Clothing companies found themselves constrained from such activity, which would have required special registration. Such obstacles should be identified and solutions considered. One of the solutions that will be examined is the French Bill on the fight against waste and on the circular economy, which encourages luxury apparel producers to give surplus clothes to charity or to recycle them (Projet de loi relatif à la lutte contre le gaspillage et à l'économie circulaire, JORF n° 0035 of 11th February 2020). The new regulations are to take effect in 2023 (Amed et al., 2020; Matthams, 2019).

Polish perspective

In Poland, on February 14, 2017, the Council of Ministers adopted the Strategy for Responsible Development until 2020, that introduces New Industrial Policy. This is to be achieved by adopting the 2030 Productivity Strategy, which references the concept of 'eco-design', which, according to the project: "should become an element of the strategy of Polish enterprises (not only due to legal regulations), in order to increase their competitive advantages on the European and global markets. On the one hand, we are talking about the products themselves, which should be designed and then manufactured in such a way that their use has the lowest possible impact on the environment, i.e. that the products can be repaired, modified and reused. However, if they become waste, they should be recoverable or recyclable, with the possibility of obtaining good-quality secondary raw materials for re-manufacture. On the other hand, we are talking about the production process itself and the organization of the company, whose impact on the environment should be related to the implementation of the sustainable development goals" (Ministerstwo Rozwoju i Technologii, 2020).

New approach. US bill for Fashion Sustainability and Social Accountability Act

At the time of writing (current bill status: in Assembly Committee), New York State is working on the act called Fashion Sustainability and Social Accountability Act also referred to as Fashion Act or Act). If the above-mentioned law passes the entire legislative procedure and finally comes into force, it will be the first, and therefore a historic, law regulating the issue of sustainable development in the supply chain for the entire TCLF sector (New York Senate, 2021). The Act was introduced into the New York Senate in October 2021, and its chief sponsor is Assembly member Dr. A. Kelles. The fashion industry representatives themselves, including designer S. McCartney, who said: "The Fashion Act is an example of a step towards a better, more regulated future. Our duty is clear, and now more than ever, we need to make changes to the way in which we do business" (Pointing, no data).

The main objective of the draft act is: "To require fashion retailers to map their supply chains, disclose the environmental and social impact of their activities, and set targets to improve those impacts" (New York State Assembly, 2021). In the justification, the sense of introducing new legal solutions was argued as follows: "Fashion retailers and manufacturers operate in a mostly regulatory free vacuum. Currently there are no legally binding environmental standards placed on the apparel and footwear industries. As a result, 'fast fashion' retailers and manufacturers may ramp up production and operations without taking environmental sustainability into account. Apparel and footwear are responsible for a massive part of the climate crisis causing greenhouse gas emissions, between 4–8.6% of the world's global greenhouse gas footprint" (New York State Assembly, 2021).

Accordingly, the draft law has been divided into four sections, of which sections 2 and 3 are of fundamental importance. Section 2, which amends state business law regulations, has an extensive statutory glossary. According to § 2 point 2 Fashion Act: every fashion retail seller and fashion manufacturer doing business in New York State and having annual worldwide gross receipts that exceed one hundred million dollars will be required to disclose its environmental and social due diligence policies, processes and outcomes, including significant real or potential adverse environmental and social impacts, and to disclose targets for prevention and improvement. Only in passing, it should be noted that the individual expressions used in the cited provision are explained in the Act itself. This was certainly aimed at pinpointing the content or scope of unfocused names such as fashion manufacturer or fashion retail seller. The information referred to above must be posted clearly on the fashion retailer's or manufacturer's website within 12 months of enacting such policies, or provided to consumers in writing if they do not have a website (§2 point 3 Fashion Act). This obligation is burdened with a specific sanction, specified in § 2 point 5

Fashion Act. Law enforcement is the responsibility of the Attorney General, or the Attorney General's designated administrator. The gradation of penalties has been provided, from publishing the data of those fashion retail sellers and fashion manufacturers who are known to be out of compliance with the provisions of the Fashion Act to sanctions of a financial nature, which, according to the drafters' intention, act on entrepreneurs in the most mobilizing way. In addition, the Act provides the possibility of bringing a civil action against any citizen that has breached the provisions of the Act, or an order by the Attorney General, or the Attorney General's designated administrator (§2 point 5 (b)). This only shows that the proposed standards are twofold. They belong partly to public law (especially administrative) and partly to private law. In addition § 3 of the Fashion Act provides for the creation of a Community Benefit Fund, which is to create funds from financial sanctions imposed on fashion retail sellers and fashion manufacturers who fail to meet statutory obligations. The funds thus raised can be spent by the department of environmental conservation for the purpose of implementing one or more environmental benefit projects that directly and verifiably benefit environmental justice communities (§ 3 point 3 Fashion Act).

However, as long as the Act is not adopted and signed, it is difficult to predict both the method of implementation of the provisions and, consequently, the manner of their application. The proposed solutions may become a verifier of actions already taken by entities covered by the Act in order to verify their truthfulness, i.e. whether the principles of sustainable development are part of the philosophy of action or only constitute so-called greenwashing.

Conclusions

The economic crisis caused by the pandemic has exposed the negative aspects of the existing fast fashion purchasing habit and strengthened the emerging resolve of consumers to behave more sustainably. Even before the pandemic, consumers were increasingly turning to sustainable fashion and agitating for supply chain transparency.

Most likely, with no indication that consumers are budging from their new sustainable priorities, this trend will continue. In order to survive, fashion brands will have to consider their opportunities for sustainability-related innovation. A post-pandemic consumer is a person who values the quality of a product manufactured in an innovative and less environmentally harmful way than before, who will be prepared to buy less, but willing to pay more. This means that, more and more often, when choosing a product, ecological issues are at stake. Even before the COVID-19 pandemic, social research was conducted to verify the attitudes and purchasing behaviour of consumers in the TCLF market. It was found that the new generation of buyers attach great importance to

sustainability issues, which translates into demand for improved product quality as well as environmentally friendly marketing and sales techniques.

The need to take "corrective measures" to minimize the negative environmental impact of the clothing industry is apparent, not only to consumers, but to all market participants, including clothing manufacturers, non-profit organizations and government authorities. It was noted in the literature that an effective move towards sustainable fashion would be difficult to achieve without an effective legal framework, customs and norms supporting the required pro-environment agenda. The development of sustainable fashion depends heavily on the legal environment facing the introduced innovations.

To date, any legislative action has been based on the regulation of individual sectoral aspects that relate to fashion law. The solutions presented above in the Fashion Act are the first to address the three pillars of sustainability:

environmental, economic and social aspects. The proposed solutions have also already sparked discussion in the US at the federal level and the introduction of the Fashioning Accountability and Building Real Institutional Change (FABRIC) Act in the US Senate (SquareSpace, 2022) which could further strengthen the US position as a leader in responsible apparel manufacturing by extending some of the solutions proposed by New York State to the entire country.

In summary, sustainable development in the fashion industry largely depends on the adaptation of legal norms to the prevailing conditions and trends. Sustainable development is possible only through the synthesis of technical and legal solutions. The latter should, in turn, be subject to extensive analysis, from intellectual property law through the protection of personal data to administrative law, which will allow for the creation of a complete legal model for the sustainable TCLF sector.

Notes/Przypisy

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