## LATIN AMERICA IPR SME HELPDESK



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# IP in the fashion industry



#### 1. The fashion industry and Latin America

The fashion sector is constantly growing; clothing, footwear, eyewear, watches and other fashion accessories amounted to 2% of global exports in 2018 (Source: worldstopexports.com).

The fashion sector has become a true global industry: European designed products are commercialized all over the world and Latin America is a key market. Major European fashion retail groups such as Inditex, Mango or Benetton are actively present in the region.

The annual growth rate of the fashion industry in Latin America between 2017 and 2021 is estimated to be 7.2%, reaching a total of EUR 196,000 million. In addition, the retail e-commerce sales are expected to grow from EUR 44,337 million in 2016 to EUR 71,000 million by 2019. (Source: <u>FashionUnited</u>).

## 2. Why are Intellectual Property Rights (IPRs) important in the fashion sector?

The fashion sector is a highly competitive environment where differentiating your products from your competitors' ones may make the difference between success and failure. In addition, e-commerce allows your products to enter the Latin American markets even before you have decided to start distributing in these territories. Therefore, in some cases, you will be able to transfer your reputation and goodwill in Europe to Latin America thanks to a consistent branding and Trade mark protection strategy.

In addition, IP-based business models have been shown to be an effective internationalization tool in Latin America. This was the case of the Brazilian company Havaianas, which expanded across Brazil, thanks to a franchising business model based on a strong Trade mark and Designs strategy. If you want to know more about how to expand your company in Brazil by

franchising, we recommend you read our Factsheet on <u>Franchising</u> in <u>Brazil</u>.

On the other hand, it cannot be ignored that counterfeiting remains a huge concern in the fashion sector both in Europe and abroad. IPRs are the most effective way to prevent third parties from benefiting from your efforts.

#### 3. Benefiting from IPRs in the fashion industry

Although Intellectual Property tends to be associated with technological sectors, fashion is also an IP intensive sector. Obtaining exclusive rights over your brands and creations is crucial from a competitive and strategic point of view.

For example, Trade mark rights in the fashion industry are useful not only to indicate the business origin of your goods, but also as a reference of their quality or exclusiveness. Consumers in the fashion sector tend to be brand-driven and Trade marks are the best way to guide their buying decision.

Design rights, on the other hand, protect the external appearance of the products and may be a suitable protection for handbags, jewellery or sunglasses, among others. Furthermore, certain creations have been deemed original enough to be protected by copyright.

In addition, the protection of inventions in the field of fashion is far from being a recent topic, in fact, the first Patent for a zipper system was filed in 1851 – the "modern" system was patented in 1917 – other areas that have been protected by Patents are technical textiles, such as Goretex, and you can bet that your running shoes include a few dozen Patents

#### A. Protecting your brand: Trade marks

Registering your Trade mark must be the first step, even before you start distributing your products in Latin America. Once registered, it will be easier to build your reputation in the region and it will provide you with more legal certainty when signing distribution or license agreements. In addition, you should bear in mind that Trade marks are the most commonly infringed IPR in the fashion sector.

#### **BAD FAITH REGISTRATION**

Entering a Latin American country without a registered Trade mark might give rise to bad faith registrations. One of the most typical cases is when a local distributor files the EU company Trade mark in his own country (agent's mark). In other cases, companies with no links to the EU holder apply for a reputed EU Trade mark in Latin America to benefit from its reputation or to sell it to its legitimate owner at a higher price.

All Latin American countries – directly or indirectly – have provisions for legal action against bad faith registrations; however, in most cases, such action entails lengthy and costly proceedings.

Generally speaking, it is possible to register conventional Trade

marks (i.e. word, colour, combined, or figurative marks) in all Latin American countries, whereas non-conventional Trade marks (e.g. smell, sound or three-dimensional marks) are only accepted by few of the Latin American countries.

For example, Chile and Venezuela do not accept three-dimensional Trade marks. On the contrary, Ecuador and the other countries in the Andean Community (i.e. Peru, Colombia and Bolivia) are more open and flexible to non-conventional Trade marks, such as positional Trade marks (widespread in the fashion sector).

Other countries, like Uruguay or Argentina, provide for the registration of slogans as Trade marks. Slogans are short phrases that are associated with a Trade mark, as for instance, "Just do it." (Nike).

Nevertheless, it must be recalled that *non-conventional* Trade marks must comply with all Trade mark requirements, and particularly with distinctiveness and graphical representation. Bear in mind that unlike EUIPO, many National IP Offices in Latin America still require the graphical representation of the sign to protect it as a Trade mark.

The registration proceedings tend to be longer than in Europe, ranging from a few months -which is the case of e.g. Colombia or Peru- to three years or more -e.g. Brazil. Venezuela or Argentina-.

#### **RELATIVE GROUNDS EXAMINATION**

Generally speaking, National IP Offices in Latin America usually examine whether or not a Trade mark application may conflict with prior registered rights (relative grounds). In Europe, on the other hand, third parties' rights are only considered to refuse a Trade mark application only if the prior rightful owner opposes the application.



As is the case in the European Union, once the Trade marks are registered, the registration duration is 10 years extendable for equal periods of 10 years; however, in some countries, the 10-year period starts from the filing date - like in Europe -, whereas in others is from the date of grant, as for instance in Argentina, Brazil or Chile. Should you have any query regarding the renewal of your Trade mark in Latin America, please contact our helpline.

#### WELL-KNOWN Trade markS

Well-known Trade marks enjoy a higher degree of protection thanks to their reputation in a given country.

All countries in Latin America belong to the Paris Convention, which grants protection to well-known Trade marks under article 6 bis. However, you have to bear in mind that the scope of protection and the proceedings for obtaining such protection vary from country to country.

Usually, the "extra" protection consists of the possibility of opposing non-registered well-known Trade marks against Trade mark applications in a given country. Other countries, additionally, entitle the holder to extend the Trade mark 's scope of protection beyond the scope of the specialty principle (See glossary).

The requirements for its protection may involve applying for registration of the non-registered Trade mark, which is the case of, for example, Brazil or Chile. In Argentina, it is not clear whether or not a Trade mark that has not been used in the country could benefit from well-known Trade mark protection, while in the Andean Community (composed of Colombia, Peru, Bolivia and Ecuador), well-known Trade marks that have been used in any of the member countries benefit from additional protection, if not, the Trade mark holder bears the burden of proving that it is well-known in the relevant sector. (Source: INTA)

For more information on how to register your Trade mark in a given Latin American country, we strongly suggest you to take a look at our video IPRs as an internationalisation tool: Trade marks, check our "Trade mark Registration Guides" in Argentina, Brazil, Chile and Uruguay and our "Country Factsheets" on Bolivia, Central America, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Mexico, Paraguay, Peru and Venezuela.

#### B. Protecting the shape of your product

Product design, together with quality and reputation, is one of the main purchase decision factors for consumers. Hence, owing an exclusive right over the external appearance or the configuration of your product is indeed a competitive advantage and will allow you to fully benefit from your creative efforts. By doing so, you could protect your intangible assets thanks to Industrial Designs, Copyrights, or, in some cases by a combination of them.

#### Industrial Design

Industrial Design, or Design, protects the external appearance of a product, including its shape, configuration, colour, materials or texture. As in the case of Spain, Latin American countries usually refer to "dibujo" when talking about 2D Designs (such as textile prints) and to "modelo" when they talk about 3D Designs (for example, belts, eyewear, garments or handbags).

2D "Dibujo"



3D "Modelo"



#### **CLOTHING PROTECTION**

Be careful! Countries such as Chile and Venezuela explicitly exclude clothing from Design protection. However, in Chile you are entitled to register your textile prints.

In general, all countries in Latin America require novelty as a minimum requirement for Design protection. The <u>Novelty</u> requirement implies that no identical or closely similar Design has been applied for, commercialized or otherwise disclosed in any part of the world.

Some countries in the region, like Argentina or Venezuela, also require <u>singularity or originality</u> of the Design to grant the protection, whereas other countries, such as Honduras or Mexico, also require <u>industrial applicability</u>. Should you need additional support on which requirements your Design must meet prior to registering it in a given Latin American country, please contact our <u>Helpline</u>.

The maximum duration of the registered Design is not harmonised in Latin America. It is 10 years in Colombia, Peru, Chile or Ecuador and 15 years in Honduras, Panama, Argentina or Uruguay. In Brazil and Mexico, however, protection can be obtained up to 25 years from the application date (a first period of 10 years with three subsequent renewals of 5 years each one).

The great majority of the countries established a *grace period* by law. Upon certain limited conditions, it is possible to register the Design after its disclosure or commercialization by the owner without harming its novelty, provided that the lapse between the disclosure date and the application date is no longer than 6 or 12 months, depending on the country. Such a possibility is indeed useful in the fashion sector, as it offers the option of testing the products in the market before deciding to register them.

#### **NON-REGISTERED DESIGNS**

Only Panama (two years), Nicaragua and Guatemala (three years) grant protection to Non-Registered Designs in a similar way to the European Union. Therefore, it is not advisable to rely on unregistered protection of your Designs in Latin America.

INDUSTRIAL DESIGNS											
	Registered design	Non-registered design	Grace period after the first disclosure*	Maximum duration	Registration proceedings*						
Argentina	<b>✓</b>	×	6 months**	15 years	4 days						
Brazil	<b>✓</b>	×	180 days	25 years	8-12 months						
Bolivia	<b>✓</b>	×	×	10 years	120 days						
Chile	<b>✓</b>	×	12 months	10 years	18-24 months						
Colombia	<b>✓</b>	×	12 months	10 years	15-20 months						
Costa Rica	<b>✓</b>	×	×	10 years	-						
Cuba	<b>✓</b>	×	6 months	10 years	-						
Dominican Republic	<b>✓</b>	×	12 months	15 years	-						
Ecuador	<b>✓</b>	×	12 months	10 years	8-12 months						
El Salvador	<b>✓</b>	×	2 years	10 years	-						
Guatemala	<b>✓</b>	<b>✓</b>	6 months	15 years	24-36 months						
Honduras	<b>✓</b>	×	12 months	15 years	8 months						
Mexico	<b>✓</b>	×	12 months	25 years	3 years						
Nicaragua	<b>✓</b>	<b>✓</b>	12 months	15 years	-						
Panama	<b>✓</b>	<b>✓</b>	12 months	15 years	7 months						
Paraguay	<b>✓</b>	×	6 months	15 years	6-12 months						
Peru	<b>✓</b>	×	12 months	10 years	5-7 months						
Uruguay	<b>✓</b>	×	6 months	15 years	3 years						
Venezuela	<b>✓</b>	×	×	10 years	-						

<sup>\*</sup> The terms herein are estimations based on local practitioners' experience

Depending of the country, Latin American National IP Offices perform a mandatory substantive examination (e.g. Mexico or Uruguay), a merely formal one (e.g. Argentina) unless there are oppositions (e.g. Ecuador), or a voluntary substantive examination if the applicant requests it (e.g. Brazil).

Should you need more information on Designs, take a look to our Factsheets on <u>Designs in Uruguay</u> and <u>Designs in Brazil</u>, read our "Country Factsheets" on <u>Argentina</u>, <u>Bolivia</u>, <u>Central America</u>, <u>Chile</u>, <u>Colombia</u>, <u>Costa Rica</u>, <u>Cuba</u>, <u>Dominican Republic</u>, <u>Ecuador</u>, <u>Mexico</u>, <u>Paraguay</u>, <u>Peru</u>, and <u>Venezuela</u> or contact our <u>Helpline</u>.

#### **DESIGN PROTECTION**

In some cases, the length of granting procedures together with the short life cycle of the products reduce the relevance of Design protection for the fashion sector in Latin America. Nevertheless, it is strongly advisable to consider the registration of your flagship products as well as those whose life in the market might extend for more than a couple of years.

#### Copyright

Copyright refers to the rights of creators over their literary, artistic or scientific works. In the fashion industry, works that can benefit from Copyright protection range from original textile prints to shoes as well as accessories such as gloves, scarves, hats or jewellery.

#### **FASHION INDUSTRY RELATED WORKS**

Aside from clothing and accessories items, the majority of countries in the region are likely to protect under Copyright other business-related creations such as clients and providers' databases, software, website content and fashion brochures.

For more detailed information about software and Website protection, please check <u>Software protection in Brazil, How to protect your IPR online</u> and <u>How to protect your Website</u>. To get advice tailored to your specific case, do not hesitate to contact our <u>Helpline</u>. It is free, fast and confidential.

<sup>\*\*</sup> Applicable under certain limited conditions

Broadly speaking, Latin American countries grant protection to fashion creations that are <u>original</u> and <u>fixed</u> intangible means of expression, for instance a necklace, a dress or the sketches made by a designer.

Latin American legislations do not share a common concept of "originality". As a general rule, an author's own creation, which is not a mere copy from other works, could be deemed original. However, every country has its own definition. For example, in the Dominican Republic, originality is understood in the sense of being a unique, ingenious and/ or creative work, while in Peru originality is defined as a reflection of the personality of the author. Hence, works that can be protected by Copyright in Latin America differ from country to country and the originality assessment should be conducted on a case-by-case basis.

	Economic rights duration	Countries					
	Author's life + 50 years after author's death	Uruguay, Bolivia, Cuba					
*	Author's life + 60 years after author's death	Venezuela					
COPYRIGHT TERM*	Author's life + 70 years after author's death	Argentina, Peru, Brazil, Chile, Paraguay, Costa Rica, Dominican Republic, Ecua- dor, Panama					
OPYR	Author's life + 75 years after author's death	Honduras, Guatemala					
	Author's life + 80 years after author's death	Colombia					
	Author's life + 100 years after author's death	Mexico					

The above table shows the general term of protection. Duration may vary depending on the type of work (e.g. software, audio-visual works, anonymous works, collective works, among others) or the legal status of the owner (whether is a physical or a legal person). Moreover, be aware that the starting date of the term may also vary.

Some Latin American countries consider fashion products as works of "applied art", which means that they are considered artistic works with industrial applicability.

Colombia and Ecuador give protection to works of "applied art" provided those works are original and the artistic value can be dissociated from the industrial character of the object into which they are incorporated (in the sense that the protected product does not have industrial functions, just aesthetic ones). In contrast, Peru does not require that dissociation, understanding that clothing pursues utilitarian functions, and it expressly recognizes its protection.



#### **COPYRIGHT: THE LAST FRONTIER**

All Latin American countries are members of the Berne Convention. Hence, the right over the work arises automatically upon creation without the need of registration. This fact makes Copyright a useful tool for defending any creation that has not been properly protected by Design or Trade mark.

Nevertheless, your chances of succeeding in this scenario are rather low, so we strongly advise you not to rely on Copyright protection and to duly register your Trade marks and Designs in Latin America.

In addition, it is strongly advisable to register your works at the national Copyright Office in order to have evidence of authorship and date of creation, among others.

Finally, you should remember that most Latin American countries accept the accumulation of IPR protection. Consequently, a product could be protected, at the same time, by Industrial Design and Copyright – or even by 3D Trade marks, if applicable-. Both protections are usually independent and cumulative between them, with certain exceptions –such as Argentina, where protection by Design and Copyright are cumulative but cannot be invoked simultaneously.

For further information regarding Copyright duration, requirements and institutions in charge of registration, see our guides on Copyright in a nutshell II. Check also our "Country Factsheets": Argentina, Bolivia, Brazil, Central America, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela or contact our Helpline.

#### C. Protecting technical solutions: Patents and Utility Models

As previously explained, Patent protection is also relevant in the fashion sector. Do your sunglasses include a new feature for fixation? Does your handbag have an innovative mechanism to close it? If your R&D efforts have led you to innovative results maybe you could consider protecting them as a Patent or Utility Model.

The requirements usually applied to understand that an invention is patentable or protectable by Utility Model are novelty, inventive step and industrial application:

**Novelty**: An invention shall be considered new when it is not included in the state of the art. The state of the art comprises everything that has been made available to the public by written or oral description, by use or marketing or by any other means prior to the filing date of the Patent application or, where appropriate, the recognised priority date.

**Inventive step**: An invention shall be regarded as involving an inventive step if, for an expert with average skills in the technical field concerned, the invention is neither obvious nor obviously derived from the state of the art.

Industrial applicability: An invention is deemed industrially

applicable when its subject matter may be produced or used in any type of industry. In this context, industry includes all productive activity, including services.

The difference between Patents and Utility Models lies in the severity of these requirements: the inventive step needed for the Patents is higher than in the case of Utility Models, which are the suitable IPRs for the protection of minor inventions.

Most Latin American countries establish a 12-months grace period. Thanks to this, applicants' – or third parties' – disclosures of the inventions may not jeopardize the Patent application novelty, subject to certain conditions. The scope and requirements of the grace period vary slightly from country to country. Therefore, it is

advisable to check in advance if the disclosure you plan to do may be covered by such a grace period.

#### **PRIOR RIGHTS**

Conducting a prior Patent search is the best way to know if conflicting rights have already been registered that would impede the exploitation of your technology and reach an agreement if needed.

Our guide <u>How to conduct a patent search: the basics</u> will help you to know more about it.

PATENTS AND UTILITY MODELS																			
	AR	BR	во	CL	со	CR	CU	DO	EC	S۷	GT	HN	мх	NI	PA	PY	PE	UY	VE
Maximum duration of patents	20 years																		
Maximum duration of utility models	10	15	10	10	10	10	10	15	10	10	10	15	10	10	10	10	10	15	10
	years	years	years	years	years	years	years	years	years	years	years	years	years	years	years	years	years	years	years
Grace period	12 months																		
Patent Registration proceedings*	5	+8	20 - 22	3 - 4	20 - 22	3 - 4	4	3 - 4	+7	3	5	2 - 3	4	3 - 4	24	6 - 7	4 - 6	+7	7
	years	years	months	years	months	years	years	years	years	years	years	years	years	years	months	years	years	years	years
* The terms herein are estimations based on local practitioners' experience																			

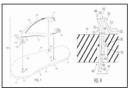
Like in Europe, the life of a Patent or a Utility Model is subject to the

payment of maintenance fees. Generally speaking, maintenance fees in Latin America are due on a yearly basis, although some countries include the first annual payments as part of the application fees.

#### **FASHION PATENTS EXAMPLES**



Ecuadorian Patent No. 16099934 for a power loom for the collection and control of the knotted textile design (macramé).



Mexican Patent MX 344374 B for footwear with straps.

Specialized IP advice is strongly recommended. The support of an IP expert is very useful to adapt to each country's specificities and will allow you to choose the most cost-efficient registration strategy.

Should you need more information on Patents and Utility Models, take a look at our video <u>IPR as a tool for internationalization:</u> <u>Patents</u>, read our "Country Factsheets" on <u>Argentina</u>, <u>Bolivia</u>, <u>Brazil</u>, <u>Central America</u>, <u>Chile</u>, <u>Colombia</u>, <u>Costa Rica</u>, <u>Cuba</u>, <u>Dominican Republic</u>, <u>Ecuador</u>, <u>Mexico</u>, <u>Paraguay</u>, <u>Peru</u>, <u>Uruguay</u> and <u>Venezuela</u> or contact our <u>Helpline</u>.

#### D. Other means of protection to be taken into account

#### Protecting the way you display your products: Trade Dress

In the fashion sector the way you display your products is, sometimes, as relevant as the products. Some retailers devote huge efforts and investment to creating environments that enrich the purchasing experience and are easily identifiable by consumers, from large shops in some of the most emblematic areas of cities to

small corners in shopping centres.

Such commercial displays are protectable by Trade Dress protection. Trade Dress is not an IPR but a mean to protect a product or service image or experience. The combination of colours, smells, commercial stands, packaging or furniture in shops can lead to a singular commercial display that consumers link to a given commercial origin.

Trade Dress protection has its origin in Common Law systems and in Latin America, as in most Continental European countries, it is usually protected by means of Designs, Trade marks, Unfair Competition rules or a combination thereof.

Depending on the country, your Trade Dress protection strategy may differ. For example, in countries that provide for three-dimensional Trade marks registration, such as Cuba or Colombia, it is feasible to register your shops' Trade Dress as a Trade mark, subject to the fulfilment of distinctiveness (i.e. the public perceives it as an indication of origin).

Other countries, such as Uruguay, protect Trade Dress without the need for registration and entitles its rights holder to license it by means of franchising contracts. Brazilian protection, on the other hand, is based on Unfair competition, whereas in Mexico it is advisable to combine Trade marks, Designs and Unfair Competition.

Are you considering protecting your Trade Dress in Latin America? Contact the Latin America IPR SME Helpdesk <u>Helpline</u> and our experts will provide you with a free and confidential answer in three working days.

#### Handcrafted products: Appellations of Origin and cultural heritage

Finally, you have to bear in mind that some countries in Latin America protect some of their traditional handcrafted textile products as part of their cultural heritage or through Appellations of Origin. The commercial exploitation of such products may be subject to authorisation or/and certain requirements referred to materials or production areas.

We strongly advise you to contact an IP expert prior to commercialising fashion products inspired by or containing such textiles in order to avoid infringing some of these rights.

#### 4. Glossary

**Specialty principle:** refers to the scope of Trade mark protection, which is limited to all products that are identical or similar to those protected by the Trade mark registration. For example, identical Trade marks could coexist in the market if one of them protects combs and the other protects cars.

#### 5. Related links & additional information:

Latin America IPR SME Helpdesk www.latinamerica-ipr-helpdesk.eu

#### Latin America IPR SME Helpdesk Country Factsheets:

- Argentina
- <u>Bolivia</u>
- <u>Brazil</u>
- Central America
- <u>Chile</u>
- <u>Colombia</u>
- Costa Rica
- Cuba
- <u>Dominican Republic</u>
- <u>Ecuador</u>
- Mexico
- <u>Paraguay</u>
- <u>Peru</u>
- <u>Uruguay</u>
- <u>Venezuela</u>

#### Other materials:

IP and Business: Intellectual Property in the Fashion Industry <a href="http://www.wipo.int/wipo">http://www.wipo.int/wipo</a> magazine/en/2005/03/article 0009.html

Intellectual Property: in the Fashion Design Industry http://fashion-enterprise.com/wp-content/uploads/2019/02/CFE-IP-DesignRights-Download1.pdf

From Runway to Replica: Intellectual Property Strategies for Protecting Fashion Designs

http://www.Trade markandcopyrightlawblog.com/2016/02/from-runway-to-replica-intellectual-property-strategies-for-protecting-fashion-designs/

Fashion and Intellectual Property – An Overview <a href="https://learcenter.org/pdf/RTSJenkinsCox.pdf">https://learcenter.org/pdf/RTSJenkinsCox.pdf</a>

# LATIN AMERICA IPR SME HELPDESK



IP in the fashion industry

Download Guide



The Latin America IPR SME Helpdesk offers multilingual services (English, French, German, Spanish and Portuguese<sup>1</sup>), with free information and first-line legal advice on IP related subjects, as well as training, webinars and publications, especially designed for EU SMEs.















**HELPLINE** First-line advisory service on IP protection and enforcement for EU SMEs working or planning to operate in Latin America.

**TRAINING** Targeted trainings and webinars on IPR protection and enforcement for EU SMEs (including sector- specific approaches).

**IP CONTENT** State-of-the-art publications (factsheets, learning modules, videos, IP glossary, info graphics, case studies and newsletters) on the protection and enforcement of IPR in Latin America – specifically addressing IP matters from the SME business needs point of view.

**AWARENESS RAISING EVENTS** Participation in events attended by EU SMEs to increase the awareness of IP and of the visibility of the services provided by the Helpdesk.

IP ANALYSIS Analysis of IP challenges faced by EU SMEs in the target markets.

**IP DIAGNOSTIC TOOLKIT** Toolkit for self-evaluation of the IP-status of the user in terms of IP knowledge and management.

**IP COST TOOL** Online tool that allows the user to pre evaluate the costs related to IP management in every Latin American country covered by the Helpdesk.

<sup>1</sup>The language offer will depend on the specific service and experts' availability.

If you have any queries on how to protect your Intellectual Property in Latinamerica contact our Helpdesk service: helpline@latinamerica-ipr-helpdesk.eu +34 96 590 9684 Working Hours: Monday - Friday 9:00 -16:30 (CEST)

If you want more information on additional free services offered by the Helpdesk contact the coordination team:

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