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Beyond the label: Non-traditional trademarks in the luxury fashion industry

The Dior's Cannage pattern and the challenge of trademark protection

Supervisor
Prof. Carlo Meo

Graduand
Viviana Alessia Celmanti
Matriculation Number 905821

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INTRODUCTION

In today’s luxury fashion industry, brand identity extends far beyond traditional words and figurative trademarks; visual elements such as patterns, shapes, and textures have become essential instruments of brand differentiation and consumer recognition. The Burberry check, the Louis Vuitton monogram, and the Hermès Birkin shape are a clear example of how non-traditional design elements can reach the “iconic status”, and act as a symbol of brand origin and its quality. The emergence of “quiet luxury” as a dominant trend in contemporary fashion has further amplified the strategic importance of non-traditional trademarks; quiet luxury emphasises elegance, superior craftsmanship, and subtle design codes that communicate exclusivity to informed consumers. In this context, geometric patterns, distinctive textures, and recognisable shapes become the primary, and often sole, mean of brand identification. As consumers increasingly favour discretion over visible branding, luxury houses must rely on these subtle visual signatures to maintain brand recognition and market position; this shift elevates non-traditional trademarks from supplementary brand assets to core elements of competitive strategy, making their legal protection increasingly critical for business success. The challenge is the legal protection of such elements through trademark registration; for a design to qualify for trademark protection and registration, it must meet tough distinctiveness requirements that can frequently conflict with their functional and aesthetic character.

The rise of non-traditional trademarks represents a significant change in intellectual property law, particularly within industries where design and aesthetics are a core value proposition. Unlike conventional word or logo marks, geometric patterns and three-dimensional shapes end in an uncertain space between functional design, aesthetic ornamentation, and source indication; this ambiguity creates disparities in registration outcomes across jurisdictions, challenging global luxury brands that seek comprehensive IP protection.

Within this evolving landscape, the fashion and luxury goods sector faces challenges in securing non-traditional trademark protection. Geometric patterns, which often serve both ornamental and brand-identifying functions, are questioned regarding their inherent distinctiveness; the crucial point is distinguishing between design elements that are merely decorative or commonplace within an industry and those that have acquired distinctiveness through extensive use and consumer recognition. This distinction becomes even more complex when considering that luxury brands carefully create design elements that, while iconic to those in the sector, may appear as simple geometric arrangements to trademark examiners.

The case of Christian Dior’s Cannage pattern is a clear example of these challenges. Originally, it was inspired by the cane weaving of Napoleon III chairs shown at Dior’s first fashion show in 1947; today the Cannage has transformed from a subtle design reference into a recognisable brand signature, visible on the iconic and classic Lady Dior bag and many other products. Despite its general public recognition among fashion consumers and its decades-long association with the Dior brand, the Cannage pattern has faced inconsistent legal outcomes across jurisdictions: while it has been registered as a trademark for fashion goods in both the European Union and Switzerland, the attempt to extend protection beyond the fashion core produced divergent outcomes: the genuine divergence concerns cosmetics (Class 3) and cosmetic accessories (Class 21), which the EU accepted but Switzerland refused, whereas furniture (Class 20) was refused in both jurisdictions and the related services were accepted in both.

This divergence in legal outcomes raises questions about the context-dependency of distinctiveness assessments for non-traditional signs in the luxury sector; while extensive research exists on trademark distinctiveness in general, there is limited research specifically examining how geometric patterns navigate the registration process across different jurisdictions, and what factors have determined success or failure in the process. In addition, previous research rarely bridges the gap between legal standards of distinctiveness and actual consumer perception, which proves problematic when courts determine whether a design element functions as a source identifier in the market. The Cannage case provides an opportunity to address this issue, as it includes both successful and unsuccessful attempts at registration for the same design element, allowing a comparative analysis of how different legal systems interpret and apply the distinctiveness requirement.

This thesis addresses the following primary research question: How do non-traditional trademarks function as distinctive signs in the luxury fashion industry, and what legal requirements and consumer perception determine their eligibility for trademark protection? This central question addresses three key aspects: First, how do different legal frameworks (EU, Switzerland, France and Italy) define and apply distinctiveness requirements for pattern trademarks. Second, the reasons why the Dior Cannage pattern achieved trademark protection for fashion goods across jurisdictions while being denied protection for non-fashion product categories in Switzerland, and what this divergence reveals about how legal systems assess distinctiveness in relation to specific market contexts. Third, to what extent consumers actually recognise and associate patterns with specific luxury brands, and how does the consumer's actual perception align with legal assessments of distinctiveness.

This thesis aims to achieve three main objectives: (1) to offer a comprehensive analysis of the legal framework that applies to non-traditional trademarks, with a focus on pattern marks in the fashion industry; (2) to provide a comparative legal analysis of the reasoning behind different registration outcomes across jurisdictions in the Dior Cannage case; and (3) to examine consumer perception and recognition of non-traditional trademarks by conducting quantitative questionnaire research.

This research adopts a mixed-methods approach that integrates the legal analysis along with the empirical study to build a complete understanding of non-traditional trademark protection in the luxury fashion sector; the legal analysis examines primary.

sources including international treaties [1], regional legislation [2], national laws [3], and relevant case studies.

The research component consists of a quantitative survey designed to measure consumer recognition and perception of non-traditional trademarks in the luxury fashion industry. A structured questionnaire will be administered to a sample of 200+ respondents, including visual recognition assessments of different brand patterns and questions about perceived distinctiveness and demographics. The survey data will be analysed to identify patterns of brand recognition and consumer perception, using statistical methods to examine correlations and trends. This approach allows the thesis to integrate legal doctrine with market reality and understand if legal standards align and reflect actual consumer behaviour.

This thesis is structured in four chapters, each addressing a different dimension of the research question. Chapter 1 provides the theoretical and legal background, which traces the evolution of trademark law from traditional to non-traditional trademarks, with an analysis of international frameworks and a comparison of the distinctiveness requirements across the European Union, France and Switzerland. A particular focus is given to the registrability criteria for pattern trademarks, including the concepts of inherent distinctiveness, acquired distinctiveness through use, and the so-called "significant departure" test.

Chapter 2 examines pattern trademarks within the luxury fashion industry, analysing the economics of pattern protection, the strategic choices between trademark, design, and copyright regimes, and the landmark case law that has shaped non-traditional trademark protection in Europe.

Chapter 3 presents the comparative legal analysis, examining the EU registration of the Cannage pattern as an inherently distinctive trademark for fashion goods; the Swiss Federal Administrative Court's rejection of the same pattern for non-fashion product categories, and the factors that explain this divergence, including the role of product context, the definition of the relevant public, and the treatment of historical design traditions in the distinctiveness assessment.

Chapter 4 presents the results of the empirical research; it describes the methodology, a statistical analysis of consumer recognition and perception, and discusses the findings in relation to the legal standards of distinctiveness.

Ultimately the thesis offers a contribution to the understanding of non-traditional trademark protection, in both a theoretical and a practical perspective. It offers an

[1] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Annex 1C to the Marrakesh Agreement Establishing the World Trade Organisation (15 April 1994) 1869 UNTS 299; Paris Convention for the Protection of Industrial Property (20 March 1883, revised at Stockholm 14 July 1967) 828 UNTS 305

[2] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark [2017] OJ L 154/1

[3] Code de la propriété intellectuelle (France, consolidated version as of October 2025); Federal Act on the Protection of Trade Marks and Indications of Source (Trade Marks Protection Act, TmPA) (Switzerland, 28 August 1992, status as of 1 April 2017); Decreto Legislativo 10 febbraio 2005, n 30 - Codice della proprietà industriale (Italy), as amended.

academic contribution by combining legal analysis with empirical consumer research, and by demonstrating how consumer perception relates to the legal standards of distinctiveness. The cross-jurisdictional comparative analysis of the Cannage case demonstrates how similar legal standards can yield different results.

By considering both successful and unsuccessful trademark applications for the same design element, and by measuring actual recognition by consumers, this research provides evidence regarding whether the current legal tests accurately reflect the reality of the marketplace.

CHAPTER I

TRADEMARKS - LEGAL FRAMEWORK AND EVOLUTION

SUMMARY: 1.1. Historical Origins: From guild marks to modern trademark law – 1.2. Trademarks in modern law – 1.3. The Evolution toward non-traditional trademarks – 1.4. The international framework and gaps – 1.5. Regional and National Approaches – 1.6. Registrability requirements for non-traditional trademarks

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This chapter establishes the legal framework necessary to understand the protection of non-traditional trademarks in the luxury fashion industry. The central argument that the chapter develops is that the legal recognition of non-traditional marks has emerged in response to, rather than in anticipation of, the commercial practices that have driven their use. Trademark law was conceived in the nineteenth century as a system for protecting names and logos against fraud and deception; the recognition that geometric patterns, three-dimensional shapes, and colours, can also function as source indicators required a slow doctrinal evolution that, even today, produces inconsistent outcomes across jurisdictions.

The analysis develops in six sections that move from the historical foundations of the discipline to the specific tests through which pattern marks are evaluated today. Sections 1.1 and 1.2 trace the origins of trademark law from medieval guild marks to modern legislation, establishing the conceptual basis for what trademarks are and what functions they serve. Section 1.3 documents the evolution toward non-traditional marks and the commercial pressures that drove their gradual recognition. Sections 1.4 and 1.5 examine the international and regional frameworks within which pattern marks are currently registered, with particular attention to the divergences between the EU, France, Switzerland, and Italy, that prove central to the comparative analysis later in the thesis. Finally, Section 1.6 analyses the doctrinal tests that pattern marks must satisfy to achieve registration.

Throughout the chapter, the analysis maintains focus on a central question: how does trademark law distinguish between design elements that are merely decorative or commonplace within an industry, and those that have become distinctive source indicators? This question is especially critical for luxury fashion patterns, which are intentionally designed to appeal aesthetically while simultaneously functioning as brand identifiers, a duality that the legal frameworks examined here struggle to accommodate.

1.1. Historical origins: From guild marks to modern trademark law

The concept of making goods in a way that indicates their origin predates modern trademark law by many centuries; trademarks did not emerge from abstract legal theory, but they evolved in response to commercial necessity.

Before the emergence of modern international treaties, the historical foundations of trademark law can be traced back to the medieval period and the rise of the guild system in Europe. During this period, marks were not conceived as valuable marketing assets, but rather as regulatory tools imposed by trade guilds, which controlled key industries such as textiles, masonry, and silverware. These “production marks” or “guild marks” functioned in a significantly different way than modern branding: first, "merchants would affix marks on their goods so they would be able to identify and retrieve their own goods after shipping" [4]; second, they were used for quality control and regulation, guilds maintained internal standards and operated under local chambers of commerce, requiring members to affix a specific mark to their goods to ensure they met the standards required for the crafts. Lastly, they represented a liability more than an asset; the marks were used to fix the responsibility upon the artisan in case of poor craftsmanship or fraud; if a product were defective, it would allow the guild to identify and punish the responsible member protecting the guild's reputation.

This origin is revealing: marks served both as identification tools and as quality-control mechanisms, the same two functions that modern trademark law continues to recognise as primary. The key distinction, however, is that these early marks were mandatory, imposed by guild regulation, rather than voluntary indicators of commercial origin in the modern sense; the notion of trademarks as a voluntary commercial asset, something a merchant might invest in and protect, came later.

The transition from medieval guild system to modern international protection was driven by the industrial revolution; as production capacity increased and markets expanded, consumers could no longer rely on their personal knowledge of producers because goods travelled greater distances and passed through more intermediaries. In this way, the function of trademarks evolved from a "strict source theory" [5] where the mark identified the physical maker to fix liability, to an indicator of commercial origin and a guarantee of consistent quality. This shift created economic conditions that made trademark protection commercially valuable turning trademarks into intangible assets that formed the basis of a firm's "goodwill" [6].

Once the trademarks became assets, it was important to find a way to protect them and national trademark legislation emerged during this period. France adopted trademark protection laws in 1857, the United Kingdom enacted the Trade Marks Registration Act 1875 (that is the first trademark registration system), and lastly the United States followed with Trademark Act of 1881, later replaced by the more comprehensive Lanham Act of 1946. These statutes reflected a collective understanding that trademarks were primarily source identifiers, protecting consumers from deception and producers from unfair competition [7].

The first major step toward international coordination came with the Paris Convention for the Protection of Industrial Property of 1883, prior to this "the only international protection for such rights arose in a piecemeal way through a network of bilateral treaties

[4] Jeanne C Fromer, *The Role of Creativity in Trademark Law* (2011) Vol. 86 Notre Dame Law Review; Frank I Schechter, *The Rational Basis of Trademark Protection* (1927) Vol. 40 Harvard Law Review

[5] William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (9th edn, Sweet & Maxwell 2019) 600

[6] Cornish, Llewelyn and Aplin (n 5) 603–604

[7] Mark P McKenna, *The Normative Foundations of Trademark Law* (2007) Vol. 82 Notre Dame Law Review 1839, cited in *The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment* (2014) Vol. 127 Harvard Law Review 995, 1000

and agreements" [8]. The Paris Convention establishes the foundational principle of national treatment, that nationals of any member state must receive the same trademark protection as domestic applicants in any other member state; priority rights were also introduced, that allow applicants to claim the filing date of their first application when filing in another member countries [9]. Crucially, however, the Paris Convention offered no definition of "trademark" leaving this to national law; the "lack of definition may not have been a problem, as "trademark" was generally understood as referring to some kind of visible sign used in relation to goods so as to indicate their source" [10] but this definitional gap would become increasingly significant as commercial practice evolved to include and cover a wider range of source-indicating signs. The twentieth century brought further international harmonisation but also an increasing pressure to expand the range of protectable signs.

This historical backdrop provides the necessary context for understanding the rise of non-traditional trademark protection in the luxury fashion industry. This industry has long relied on visual design elements as brand identifiers, but for most of the twentieth century those elements received little legal protection outside of traditional logo and word marks. The historical path from guild marks to the TRIPS Agreement represents a gradual expansion of what the law recognises as worthy of protection, an expansion driven not by legal theory but by commercial practice. Trademark law evolved "from a system primarily concerned with preventing fraud and consumer deception to one that recognises the significant commercial value of brands as marketing tools and business assets" [11]. Pattern marks like the Dior Cannage occupy the frontier of this expansion, testing the limits of a legal system that has always struggled to keep pace with the commercial reality it seeks to regulate.

1.2. Trademarks in modern law

The 1994 TRIPS Agreement represented a turning point, establishing for the first time a broadly inclusive definition of trademarks that explicitly contemplated non-traditional signs. Article 15.1 of the TRIPS Agreement (1994) provides that "any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark" [12], with the phrase "any sign" deliberately opening the door to marks beyond traditional words and logos. This expansive language reflected the commercial reality that businesses had begun investing heavily in design elements such as colours, shapes, sounds, and patterns, which functioned as source indicators in the consumer perception just as effectively as word marks, yet fell outside the narrow categories that earlier trademark law had

[8] Sam Ricketson, *The Paris Convention for the Protection of Industrial Property* in Irene Calboli and Jane C Ginsburg (eds), *The Cambridge Handbook of International and Comparative Trademark Law* (CUP 2020) 17

[9] Ricketson (n 8) 19–21

[10] Ricketson (n 8) 21

[11] Irene Calboli and Jane C Ginsburg (eds), *The Cambridge Handbook of International and Comparative Trademark Law* (CUP 2020) 15

[12] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Annex 1C to the Marrakesh Agreement Establishing the World Trade Organisation (15 April 1994) 1869 UNTS 299, art 15(1).

recognised. The European Union Trademark Regulation (EUTMR) uses similar language, requiring that signs must be "capable of distinguishing the goods or services of one undertaking from those of other undertakings" [13] and must be represented clearly enough so that both the authorities and the public can understand what is being protected.

Trademarks fulfil three interconnected functions in the marketplace. The primary function is indicating the commercial origin, consumers do not need to know the manufacturer's identity; what matters is recognising that the products that have the same mark come from the same source. The second function of a trademark is to communicate quality expectations. "In sectors where consumers cannot easily assess product quality before purchase, trademarks serve as information-economizing devices that reduce search costs and enable repeat purchases based on accumulated brand reputation" [14]. When consumers associate a mark with a particular source, they develop assumptions about product characteristics and standards, creating strong incentives for trademark owners to maintain quality to prevent damage to the brand's reputation; in luxury fashion, this quality function proves to be particularly important because consumers' purchases often depend heavily or mainly on brand reputation. Third, trademarks function as tools for brand investment and marketing communication; they build a brand through advertising and market presence, creating associations that extend beyond just indicating the origin but also communicate brand values and aspirational messages.

Understanding the different nature of trademarks from other intellectual property rights clarifies their unique role. Patents protect innovations that have a functional capacity, but only for limited periods, copyright protects a creative expression while trademark law protects an indication of the source of goods and services. Design rights protect aesthetic appearance, but trademarks specifically require distinctiveness and use as source indicators in commerce. The relationship between trademark protection and other IP rights deserves particular attention in the fashion context also for the protection duration. Design rights, protected under Regulation (EC) 6/2002 in the EU, protect the appearance of a product for a maximum of 25 years [15], while copyright may protect an original creative work for the author's lifetime plus 70 years.

Trademark protection, by contrast, is potentially perpetual as long as the mark remains in use and distinctive. This duration asymmetry makes trademark registration strategically attractive for luxury fashion houses: once design protection expires, a successfully registered trademark continues to exclude competitors from using the same pattern indefinitely. However, this strategic advantage creates significant doctrinal tension; trademark law was not designed to function as a perpetual monopoly over aesthetic design choices, and courts are increasingly alert to attempts to use trademark registration as a mechanism for extending protection that has already expired under design or copyright law. The Cannage pattern itself exemplifies this dynamic: having been used by Dior since 1947, any design right protection for the original configuration would have long expired, making trademark registration the only viable route to ongoing legal protection. This context partially explains why Dior pursued trademark registration so actively across

[13] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L 154/1, art 4
[14] Calboli and Ginsburg (n 11) 23
[15] Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs [2002] OJ L 3/1, art 12

jurisdictions, and why the legal stakes of each registration outcome extend well beyond any single market.

In contemporary business, trademarks represent some of the most valuable intangible assets a company can hold, and this is especially evident in the luxury fashion sector, where the portfolios of leading houses are valued in billions of euros. The economic logic differs fundamentally from that of ordinary consumer goods: consumers purchasing a Hermès handbag or a Louis Vuitton scarf are not primarily seeking to reduce uncertainty about product quality, they are acquiring the social meaning, prestige, and aspirational identity that the brand communicates. Trademarks in this context function less as quality guarantors and more as vessels of symbolic value: they condense decades of brand heritage, creative vision, and cultural positioning into a recognisable sign. The legal protection therefore serves a purpose that extends well beyond preventing consumer confusion, it protects the capital that luxury houses have built through sustained creative investment and deliberate brand-building. Free riding in this context is particularly damaging precisely because competitors exploit established brand reputations without bearing the costs of building their own, and brand value often constitutes the primary difference between functionally comparable products.

It is worth understanding the difference between "brand" and "trademark". In marketing, a brand encompasses everything consumers think and feel about a company [16], from design aesthetics to customer service, and to store experience. Trademark law, by contrast, focuses specifically on signs that help consumers identify where products come from, and even if many elements contribute to a brand, not all of them can be registered as trademarks. The key question is whether a design element functions as a source identifier in consumers' minds, and if it does, it may qualify for trademark protection even if it also makes products look more attractive.

Traditional trademarks fall into three main categories. Word marks: these are typewritten marks consisting of letters, words, numbers, keyboard signs, and punctuation; so, it can be the name of a brand or a company, and the trademark holder has exclusive rights to the use of the name for business purposes. Figurative marks: these include logos, symbols, graphic designs or words in a non-standard font or colour but also brand symbols like the "Nike swoosh" and the "Adidas three stripes", therefore protecting specific visual designs. Combined marks: These merge word and figurative components to create integrated presentations protecting both text and graphics together like the "Starbucks logo". These categories provide sufficient protection for their intended purposes: word marks strongly protect brand names; figurative marks protect distinctive logos, and combined marks provide comprehensive protection for integrated presentations.

However, in industries highly focused on design like fashion, these traditional categories often prove insufficient; fashion brands invest considerable time and resources in creating distinctive patterns, shapes, and textures that serve as brand identifiers, but do not fit into traditional categories. A geometric pattern repeated across handbags, a unique product shape, or a characteristic texture may become just as recognisable as any logo, yet traditional trademark categories were not designed to protect such elements.

[16] Philip Kotler and Kevin Lane Keller, *Marketing Management* (15th edn, Pearson 2016) 312

1.3. The evolution toward non-traditional trademarks

For most of the twentieth century, trademark law had a narrow view of what could receive such protection beyond words and logos. The view on trademarks was restrictive, primarily only offering protection to denominative and figurative marks under the assumption that only traditional signs could reliably indicate the origin of commercial goods. This began to change in the 1990s, driven by two converging forces: businesses were increasingly investing in design features as brand identifiers, and international trade agreements pushed for broader definitions of trademarks to accommodate the evolving commercial practices. Article 15.1 of the 1994 TRIPS Agreement was a turning point as it uses in the article phrasings like "any sign, or combination of signs" or the "in particular" before the list of examples; this expansive language signals the non-exhaustiveness of the list creating legal space for non-traditional trademarks and this formulation reflects a compromise between countries favouring broad trademark definitions and those preferring more restrictive approaches, essentially delegating the difficult definitional questions to national implementing legislation and case law.

The rationale behind this expansion was primarily economic, businesses had begun investing significant resources in developing distinctive design elements that consumers came to recognise as brand identifiers, the red sole on Christian Louboutin shoes, the quilted pattern on Chanel bags, the distinctive shape of the Coca-Cola bottle. These elements functioned as source indicators in consumer perception just as effectively as traditional word marks or logos. Denying trademark protection to such signs created a gap between legal doctrine and market reality [17] as consumers relied on these design elements to identify brands, yet competitors could freely copy them without legal consequence. This situation seemed inconsistent with trademark law's fundamental purpose of preventing consumer confusion and protecting investments in brand building.

The fashion and luxury goods industries have become particularly important drivers of non-traditional trademark expansion, unlike industries where functional innovation or price competition dominate, luxury fashion competes primarily on brand identity and design distinctiveness. For brands like Louis Vuitton, Hermès, Bottega Veneta or Dior, recognisable design elements are a critical asset of the brand identity, for example, the iconic Louis Vuitton monogram logo and pattern appear across countless products and has come to represent the brand itself. With the globalisation of commerce, it has become increasingly important for these businesses to protect their iconic patterns with trademarks, as counterfeiting and imitation have intensified; a counterfeiter could avoid using the "Louis Vuitton" name or logo while still copying the recognisable monogram pattern that consumers most strongly associate with the brand.

As established in Section 1.1, trademark law's evolution toward protecting brand investment, rather than merely preventing deception, created the commercial rationale that drove the expansion to non-traditional marks that now include many distinct categories, each presenting unique legal challenges. Shape marks protect three-dimensional forms, such as the Toblerone package shape or product configurations like the Hermès Birkin bag silhouette. Colour marks protect single colours or colour combinations when they have acquired distinctiveness through use and successful examples include the Tiffany blue box or the Christian Louboutin red sole. Pattern marks,

[17] Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 Virginia Law Review 1687, 1699–1704

the focus of this thesis, protect repeating designs such as the Louis Vuitton monogram, the Burberry check, or the Dior Cannage. Sound marks protect audio signatures like the MGM lion roar or distinctive advertising jingles. Texture marks protect tactile surface qualities that consumers come to associate with specific brands.

The principal categories of non-traditional trademarks, with examples drawn from the luxury fashion and consumer goods sectors, can be summarised as follows (Table 1).

CATEGORY	DESCRIPTION	NOTABLE EXAMPLES
Shape marks	Three-dimensional product forms or packaging	Toblerone bar shape; Hermès Birkin bag silhouette; Coca-Cola bottle
Colours marks	Single colours or colour combinations	Tiffany blue (Pantone 1837); Louboutin red sole (Pantone 18-1663TP); Cadbury purple
Pattern marks	Repeating design elements covering surfaces	Louis Vuitton monogram; Burberry check; Dior Cannage; LV Damier
Sound marks	Audio signatures	MGM lion roar; Intel jingle; Nokia tune
Position marks	Design elements in a fixed location on the product	Levi's pocket tab; Adidas three stripes on shoe side
Motion marks	Animated or moving signs	20th Century Fox intro; Microsoft Windows startup animation
Texture marks	Tactile surface qualities	textured leather (limited examples in practice)
Multimedia marks	Combinations of audiovisual elements	Available since 2017 EUTMR reform; few registered examples

Table 1

Non-traditional trademark categories and notable examples in the luxury and consumer goods sectors

Each category faces specific registrability challenges, but pattern marks present particularly complex issues; unlike sounds or single colours, which clearly depart from traditional trademark forms, geometric patterns occupy an ambiguous space. They serve obvious aesthetic and decorative functions, as making products more attractive is often their primary purpose, yet they can simultaneously function as source indicators when consumers learn to associate specific patterns with a brand. This dual nature creates tension within trademark doctrine, which traditionally distinguishes between functional or aesthetic elements, which are not protectable, and source-identifying elements, which can be protected; pattern trademarks challenge this distinction by being simultaneously both.

When brand identity relies heavily on visual design elements rather than technological innovation or functional features, a brand must protect those elements to sustain its competitive edge, due to the shortcomings of traditional word and logo marks that leave significant gaps in protection. A competitor can create knockoff products while not using the brand names or logos but includes design clues in terms of recognisable design motifs, shapes or colour schemes that consumers use to identify brands in retail environments.

The emergence of "quiet luxury" [18] as a dominant consumer trend has further intensified this dynamic; consumers increasingly signal status through restraint rather than visible logos, fashion houses can no longer rely only on word marks or figurative logos as their primary brand identifiers. In this context, subtle design codes like geometric patterns, distinctive textures and characteristic stitching, become the primary, and often sole, vehicle through which brand identity is communicated. This shift has elevated non-traditional trademarks from peripheral brand assets to core elements of competitive strategy, transforming their legal protection from a strategic option into a commercial necessity.

The mobility of global supply chains intensified this issue, making it possible for imitators to develop goods that are visually similar to an established brand, at a lower cost, while relying on omitting the brand name to avoid traditional trademark infringement. Non-traditional trademark protection fills this gap by allowing a trademark owner to get legal protection for the design elements that consumers rely on for brand identification, even if the design elements also serve aesthetic purposes.

1.4. The international framework and gaps

International trademark law functions using a layered system of treaties and agreements that establish minimum standards while allowing a significant amount of space for national variation; this framework governs how non-traditional trademarks are handled around the world, but there are still significant differences when it comes to how they interpret and apply these international norms. This system is necessary for understanding why identical design aspects such as the Dior Cannage pattern receive trademark protection in one jurisdiction and yet be denied in others.

The TRIPS Agreement, the international foundation for trademark protection, administered by the World Trade Organisation since 1994, establishes the basic international standards for trademark protection. Article 15.1 provides the crucial definition and the provision explicitly establish that such signs may include "words, including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs" [19], the phrase "any sign" opens the door to non-traditional marks. However, this openness comes with an important qualification: signs must be "capable of distinguishing" goods or services, and member states may require that signs be "visually perceptible" as a condition of registration.

The TRIPS does not contain an explicit exclusion for shape marks equivalent to what is indicated in EU law, Article 7(1)(e) EUTMR codifies the functionality doctrine by excluding from registration signs consisting exclusively of: the shape resulting from the nature of the goods, the shape necessary to obtain a technical result, and the shape giving substantial value to the goods [20]. The functionality doctrine is designed to prevent

[18] Kapferer, J.N. and Bastien, V., *The Luxury Strategy* (2nd edn, Kogan Page 2012)
[19] TRIPS Agreement (n 12) art 15(1)
[20] EUTMR (n 13) art 7(1)(e)

trademark law from granting perpetual monopolies over functional or primarily aesthetic product features that should be protected through time-limited patents or design rights instead. While this provision applies specifically to shapes, its underlying logic would equally apply to pattern marks: if a pattern is purely decorative or merely serves primarily aesthetic rather than source-indicating functions, it may fall outside of the proper scope of trademark protection.

Importantly, TRIPS only establishes minimum standards, and so member states have considerable discretion in how they implement those provisions, which account for much of the jurisdictional discrepancy in non-traditional trademark protection. While TRIPS provides that marks are "capable of distinguishing" are eligible for protection, it is silent about how a country shall determine the capability to distinguish. Therefore, trademark offices and courts have taken divergent approaches in assessing distinctiveness for marks that are made of design elements, such as a pattern that serves an aesthetic and source-indicating function.

The World Intellectual Property Organisation has a coordinating role in the international trademark administration and harmonisation process. WIPO also administers multiple instruments in relation to several trademark-related treaties, including the Paris Convention for the Protection of Industrial Property and the Madrid System for international trademark registration. The Paris Convention, originally adopted in 1883 and revised multiple times since then, establishes fundamental principles such as national treatment [21] and priority rights [22]; nevertheless, the Paris Convention predates the emergence of non-traditional trademarks and offers limited specific guidance on their treatment.

The Madrid System consists of the Madrid Agreement and the Madrid Protocol and enables a trademark applicant to obtain protection in nearly 120 countries with only one application, one language, and one set of fees. This allows applicants to try to protect their trademark in many countries through a single international application, but it is not a true international trademark. Instead, it operates as an administrative convenience: the international application is examined separately by each designated country's trademark office according to that country's national law, this means that an international application for a non-traditional trademark like a pattern mark may succeed in some designated countries while failing in others, depending on how each country's law addresses distinctiveness requirements for such marks.

This fragmented international landscape creates significant strategic challenges for global brands, luxury fashion house seeking to protect a distinctive pattern across its key markets must navigate different legal standards, evidentiary requirements, and examination practices in each jurisdiction, and what constitutes sufficient proof of acquired distinctiveness in one country may be inadequate in another. Design elements considered inherently distinctive in some jurisdictions may be deemed common or purely decorative elsewhere.

This lack of harmonisation means that brands cannot rely on success in one jurisdiction to predict outcomes in others, even when seeking protection for identical design elements;

[21] Paris Convention for the Protection of Industrial Property (20 March 1883, revised at Stockholm 14 July 1967) 828 UNTS 305, art 2.
[22] ibid art 4

the result is a complex, costly, and uncertain process of seeking non-traditional trademark protection globally, which may result in different levels of protection across jurisdictions for the very same design element, depending on the product categories for which protection is sought and the standards each jurisdiction applies.

1.5. Regional and National Approaches

Although international treaties establish broad principles for trademark protection, the registration and enforcement of non-traditional trademarks heavily rely on regional and national legislation, which present significant differences in the approaches taken to interpret and apply distinctiveness requirements. Understanding these differences is key to explaining why the Dior Cannage pattern achieved protection in some jurisdictions but not in others; this section examines the approaches of the European Union, France, Switzerland, and Italy while identifying shared principles and the distinctive features of each jurisdiction's approach.

1.5.1. The European Union: EUTMR and EUIPO

The European Union has a dual system of trademarks where applicants can choose to seek either national trademarks in individual member states or a unitary EU trademark that provides protection across all member states through a single registration process. The EU Trademark Regulation 2017/1001 [23] governs EU-wide trademarks and establishes certain standards that influence the national trademark laws of the member states. The European Union Intellectual Property Office (EUIPO) reviews the EU trademark applications and maintains a comprehensive database of registered trademarks.

Article 4 of the EUTMR, examined in Section 1.2, defines what may qualify as an EU trademark in deliberately open-ended terms: any sign capable of distinguishing goods or services of one undertaking from those of others, provided that the sign can be represented on the register in a clear and precise manner [24]. The inclusion of the phrase "in particular" demonstrates that the list is not exhaustive, and within this broad definition pattern marks can surely qualify as "designs" capable of distinguishing goods. The list of explicitly mentioned categories (words, designs, letters, numerals, colours, shapes, sounds), accommodates the wide range of non-traditional marks examined in this thesis.

The CJEU has developed a substantial body of case law that shapes how this broad definition is applied to non-traditional marks in practice. In Philips Electronics NV v Remington Consumer Products Ltd [25], the Court held that design elements are excluded from registration under the functionality doctrine when competitors need to use them to achieve a technical result, irrespective of whether other configurations could achieve the same result; a principle with direct analogical relevance to pattern marks that serve primarily functional or decorative purposes. In Linde AG [26], the Court confirmed that the distinctiveness assessment for non-traditional marks must apply the same legal standard as for word marks, though it acknowledged that consumers may be less accustomed to perceiving design elements as source indicators in the absence of any verbal or figurative

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[23] EUTMR (n 13)

[24] EUTMR (n 13) art 4

[25] Case C-299/99*, Koninklijke Philips Electronics NV v Remington Consumer Products Ltd* [2002] ECR I-5475, para 78

[26] Cases C-53/01, C-54/01 and C-55/01, *Linde AG and others v Deutsches Patent- und Markenamt* [2003] ECR I-3161, para 48

component. This recognition effectively makes the distinctiveness threshold harder to meet in practice for non-traditional marks even when the formal standard is nominally identical. More recently, the CJEU's ruling in Nestlé v Cadbury [27] clarified that acquired distinctiveness must be proven across the entire relevant EU territory, not merely in a substantial part of it, a particularly demanding standard for pattern marks seeking EU-wide registration; since evidence of consumer recognition may vary significantly across member states with different levels of exposure to a brand's commercial activity.

However, this open-ended scope is substantially restricted by Article 7 EUTMR, which lists absolute grounds for refusal, some of which prove to be particularly relevant for non-traditional marks. First, Article 7(1)(b) excludes "trademarks which are devoid of any distinctive character" [28], and this exclusion poses the principal barrier to pattern marks because trademark examiners may consider them to be merely decorative rather than source-identifying. Second, Article 7(1)(e) addresses shape marks specifically by excluding shapes that result from the nature of goods themselves, shapes that are necessary to obtain a technical result, and shapes that give substantial value to goods. Although this provision targets three-dimensional shapes rather than two-dimensional patterns, the underlying logic is preventing trademark law from monopolising functional or primarily aesthetic features, a logic that extends to pattern marks that serve mainly decorative purposes.

Article 7(3) provides a significant escape route by indicating that objections to distinctiveness under Article 7(1)(b) can be overcome through proof of acquired distinctiveness through use, stating that "A trade mark shall not be refused registration or, if registered, shall not be liable to be declared invalid if, before the date of application for registration and following the use which has been made of it, it has acquired a distinctive character" [29]. This provision is essential for non-traditional marks that lack inherent distinctiveness but have become distinctive through extensive use and commercial exploitation; yet proving acquired distinctiveness does require evidence and it can be expensive and time-consuming.

The EUIPO has developed detailed guidelines [30] that specify how examiners practically assess and evaluate pattern marks. When examining a pattern trademark application, EUIPO examiners ask a key question: will consumers perceive this pattern as a brand identifier, or will they simply consider it as piece of decoration? To answer this question, examiners consider several factors including how complex the pattern is, whether it differs from patterns commonly used in the industry, how the applicant has used it commercially, and whether consumer surveys show that people recognise it as belonging to a specific brand. The EUIPO has approved pattern marks for fashion brands, but generally only after extensive review, and they often still require the applicant to submit extensive documentation showing the connection between the patterns and consumer association developed after years of intentional use. This careful approach reflects the effort to find middle ground between two opposing goals: protecting the legitimate investments that companies make in design elements that are original and distinctive,

[27] Case C-215/14, *Société des Produits Nestlé SA v Cadbury UK Ltd* [2015] ECLI:EU:C:2015:604, para 66
[28] EUTMR (n 13) art 7(1)(b)
[29] EUTMR (n 13) art 7(3)
[30] EUIPO, *Guidelines for Examination of European Union Trade Marks*, Part B, Section 4 (2024) <https://guidelines.euipo.europa.eu> accessed 25 March 2026

while at the same time, ensuring that no single company can monopolise the use of basic patterns that other businesses might reasonably want to use.

1.5.2. France: national trademark law and IP Code

As an EU member state, France must align its national trademark law with EU standards while maintaining its own national trademark system. French trademark law is codified in the “Code de la propriété intellectuelle”, specifically in Articles L711-1 through L711-4. Article L711-1 defines protectable signs in language that mirrors EU law, covering signs capable of graphic representation that distinguish goods or services, including denominative, figurative, or combined signs, as well as sonorous signs, shapes, and colours, thus accommodating non-traditional marks within its definition of protectable signs [31].

Article L711-2 establishes grounds for invalidity that correspond closely to EU absolute grounds for refusal, excluding signs that do not have the distinctive character as well as shapes that result from the nature of goods, that are necessary for technical results, or that give substantial value to goods, while also allowing marks initially lacking distinctiveness to be registered if they acquire it through use. This alignment reflects France’s obligations under EU law and the practical reality that French businesses often seek both French national and EU-wide protection for their trademarks, creating a unified approach across both systems.

French courts and the Institut National de la Propriété Industrielle, France’s national IP office, have examined various non-traditional trademark applications with an approach that generally aligns with EUIPO practice, though French doctrine places particular emphasis on the concept of arbitrariness, the idea that valid trademarks should be somewhat arbitrary in relation to the goods they identify [32]. Pattern marks face scrutiny regarding whether they appear sufficiently arbitrary or whether they seem like natural decorative choices that any competitor in the industry might adopt. French jurisprudence recognises that luxury fashion patterns can function as trademarks when they achieve sufficient distinctiveness through use, though courts remain cautious about granting protection to patterns that seem primarily decorative.

1.5.3. Switzerland: Federal Act on Trademarks

Switzerland, as a non-EU member state, takes a quite different approach, while being part of the European Free Trade Association with various bilateral agreements with the EU, operates its trademark law independently of EU standards. The Federal Act on the Protection of Trade Marks and Indications of Source, commonly called the Trade Marks Protection Act or TmPA, governs Swiss trademark law, with Article 1 stating that trademarks are signs capable of distinguishing the goods or services of one undertaking from those of other undertakings [33], while Article 2 specifies that signs include words, letters, numerals, figurative representations, three-dimensional forms, and any combination of these [34].

[31] Code de la propriété intellectuelle (France, consolidated version as of October 2025) art L711-1
[32] Institut National de la Propriété Industrielle (INPI), ‘Directives relatives aux marques’ (2023) pt 3.2; see also Calboli and Ginsburg (n 11) 187–189.
[33] Federal Act on the Protection of Trade Marks and Indications of Source (Trade Marks Protection Act, TmPA) (Switzerland, 28 August 1992, status as of 1 April 2017) art 1
[34] TmPA (n 33) art 2

While this definition theoretically accommodates non-traditional marks, Swiss law and practice have proven to be significantly more restrictive than EU standards; Swiss examination practice applies the exclusions more stringently, particularly for design elements. The Swiss Federal Institute of Intellectual Property and Swiss courts emphasise inherent distinctiveness and show greater scepticism toward claims of acquired distinctiveness, meaning that evidence of extensive use and consumer recognition that might suffice in the EU often proves insufficient in Switzerland.

Swiss doctrine particularly emphasises that trademarks must be significantly different from what is common or expected in the relevant industry [35], meaning that a pattern mark may be considered too common or too obviously decorative to function as a trademark. This more restrictive approach reflects a policy concern about allowing single companies to monopolise design elements that competitors might wish to use, aiming to preserve competitive freedom in design choices while still protecting genuinely distinctive source indicators.

The Swiss Federal Administrative Court serves as the appellate body for trademark registration decisions and has issued numerous rulings on non-traditional marks that demonstrate this restrictive approach, rejecting pattern marks on grounds that they constitute pure and simple geometric combinations lacking inherent distinctiveness, even when applicants presented evidence of commercial use and consumer recognition. This approach put Switzerland among the most difficult jurisdictions in which to obtain protection for pattern marks, creating a significant challenge for luxury fashion brands seeking comprehensive international protection for their design elements.

1.5.4. Italy: Codice della Proprietà Industriale

Italy completes this comparative survey as the fourth jurisdiction, offering an intermediate perspective between EU harmonisation and distinctive national traditions. Italy's trademark law is governed by the "Codice della Proprietà Industriale" (Legislative Decree No. 30 of 10 February 2005, as amended), which implements EU directives while preserving features rooted in Italian legal tradition and commercial practice.

Article 7 CPI defines registrable trademarks as "all signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, sounds, the shape of goods or their packaging, colour combinations or shades, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings" [36]. This formulation closely mirrors Article 4 EUTMR and explicitly accommodates non-traditional marks within the Italian system. Article 9 CPI establishes grounds for refusal that correspond to the EU absolute grounds: signs lacking distinctive character, signs consisting exclusively of customary trade indications, and shapes that result from the nature of the goods, that are necessary for a technical result, or that give substantial value to the goods [37]. The Italian doctrine has traditionally emphasised the concept of "capacità distintiva", understood as the sign's ability to function as a badge of origin in the perception of the relevant consumer, an approach that

[35] Swiss Federal Administrative Court, Case B-2655/2013, Parfums Christian Dior v Eidgenössisches Institut für Geistiges Eigentum (17 February 2014) para 3.6
[36] Decreto Legislativo 10 febbraio 2005, n. 30 – Codice della proprietà industriale (CPI), art 7
[37] CPI, art 9

Italian scholarship traces to the broader principle that trademark protection must serve the interest of both producers and the consuming public [38].

The institutional framework for trademark registration in Italy centres in the "Ufficio Italiano Brevetti e Marchi" (UIBM), which operates within the Ministry of Enterprises and Made in Italy. Compared to the EUIPO, Italian examination practice at the registration stage has traditionally been less rigorous in its assessment of absolute grounds for refusal: the UIBM conducts a primarily formal examination, and substantive distinctiveness disputes are typically resolved through opposition proceedings or, more frequently, through court litigation rather than at the registration stage [39]. This procedural characteristic means that the Italian system tends to allow more marks to be registered, leaving the question of validity to be determined in proceedings with the competition before the "Sezioni Specializzate in materia di Impresa", the specialised IP sections of Italian courts.

The relationship between trademark and design protection assumes particular importance in Italy where the fashion and luxury goods industry constitutes a significant share of national GDP and exports. Italy's industrial sector is characterised by a concentration of fashion houses, from global luxury conglomerates such as Gucci, Prada, Bottega Veneta, and Valentino to a dense network of smaller artisanal producers whose output collectively sustains the international reputation of Italian design. Design protection under Legislative Decree No. 95/2001, which implements the EU Design Directive, provides an alternative or complementary route for safeguarding aesthetic elements [40]. However, the Italian copyright system deserves particular attention: before a 2001 reform, Italian law required a high threshold of "scindibilità" (separability) for copyright protection of applied art, effectively preventing most functional or industrial designs from receiving copyright protection. The 2001 reform aligned Italian law more closely with the EU principle of cumulation, lowering this threshold and allowing greater overlap between copyright, design, and trademark protection for fashion elements [41]. This cumulative protection framework gives Italian fashion houses more options of legal tools than some other jurisdictions; at the same time it also creates doctrinal complexity regarding the proper scope of each regime.

Italian courts have engaged with non-traditional trademark issues in the fashion context and the Sezioni Specializzate have generally followed CJEU guidance on the assessment of distinctiveness, applying the average consumer standard while showing particular sensitivity to the significance of design in Italian commercial culture. Italian scholars observe that the deep familiarity of Italian examiners and courts with fashion industry norms and consumer expectations may create a more receptive environment for luxury

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[38] Adriano Vanzetti and Vincenzo Di Cataldo, *Manuale di Diritto Industriale* (9th edn, Giuffrè 2021) 156–158

[39] Marco Ricolfi, 'The Italian Trademark System' in Irene Calboli and Jane C Ginsburg (eds), *The Cambridge Handbook of International and Comparative Trademark Law* (CUP 2020) 298–301

[40] Decreto Legislativo 2 febbraio 2001, n. 95 (attuazione della Direttiva 98/71/CE sulla protezione giuridica dei disegni e modelli) abrogato da Decreto Legislativo 10 febbraio 2005, n. 30

[41] See *The Cambridge Handbook of International and Comparative Trademark Law* (CUP 2020), noting that Italy, before it changed its copyright law in 2001, required a high threshold of separability for applied art. The reform aligned Italian practice with the broader EU principle of cumulation. See also Gustavo Ghidini, *Intellectual Property and Competition Law: The Innovation Nexus* (Edward Elgar 2006) 89–92

brand protection claims than jurisdictions where fashion occupies a less prominent economic position [42].

For pattern marks specifically, the Italian approach generally aligns with broader EU practice: registration requires either inherent distinctiveness or proof of acquired distinctiveness through use. However, Italian fashion houses headquartered in Italy face strategic choices between seeking national Italian trademarks, EU-wide protection through EUIPO, or a combination of both, depending on the nature of the design element and the evidentiary burden that each route requires [43]. A national Italian registration may prove easier to obtain given the UIBM's examination, but it provides protection only within Italy. An EU trademark offers broader geographical coverage but demands evidence of acquired distinctiveness across all member states, a more demanding standard. In practice, major luxury houses pursue both routes simultaneously, creating overlapping layers of protection that maximise their enforcement options.

1.5.5. Comparative analysis: common grounds and critical differences

These four jurisdictions share fundamental principles inherited from international treaties like TRIPS: all require trademarks to be distinctive, and all allow several types of signs to function as trademarks, at least in theory. All apply functionality doctrines that prevent trademark protection for features that are necessary for technical purposes or that constitute the product itself, and all recognise that marks lacking inherent distinctiveness may still be registered if they acquire distinctiveness through use, creating a common foundation despite their different legal traditions.

However, significant divergences emerge in how these principles are interpreted and applied, with the most notable difference being the greater stringency with which Switzerland applies distinctiveness requirements compared to other EU member states. Switzerland applies these requirements more rigorously, showing greater scepticism toward design elements that could reasonably serve aesthetic purposes; meaning that evidence of commercial use and consumer recognition that satisfies EU examiners often proves insufficient in Switzerland. This reflects different policy balances: the EU seeks to accommodate commercial reality while Switzerland emphasises preserving competitive freedom to use design elements.

Evidentiary standards for proving acquired distinctiveness also vary considerably across jurisdictions. The EU developed relatively clear guidelines about what evidence is sufficient, including consumer surveys showing elevated levels of brand recognition, substantial market share over extended periods, significant advertising expenditures, and evidence of consistent exclusive use. France generally follows similar standards due to its EU membership and harmonisation obligations, while Switzerland appears to require stronger evidence and does not really accept that commercial success proves that consumers perceive a design element as a source indicator rather than as decoration, creating a higher bar for non-traditional trademark registration. Italy occupies an intermediate position: while its substantive law closely mirrors EU standards due to harmonisation obligations, its examination practice and judicial approach reflect the

[42] Cesare Galli, 'La protezione del design tra diritto d'autore, disegni e modelli e marchi' (2020) Rivista di Diritto Industriale 215, 228–230

[43] See also the discussion in *Fashion and Intellectual Property* (CUP 2024/2026) ch 9, The Hermès litigation in Italy, examined in Section 2.3.6 below, illustrates the complexities of enforcing EU-registered three-dimensional trademarks within the Italian procedural framework.

particular importance of fashion and design industries to the Italian economy, potentially offering a more sympathetic environment for luxury brand protection claims than stricter jurisdictions like Switzerland.

The interpretation of what constitutes a “significant departure” from industry norms also varies between jurisdictions. The EU practices acknowledge that even relatively simple patterns may be distinctive if they are unusual in the specific market context and have been used consistently as brand identifiers; Swiss practice seems to require more dramatic departures from common design practices before accepting that a pattern is inherently distinctive, and this difference proves particularly important for geometric patterns, which by their nature consist of arrangements of basic shapes, meaning that what the EU might accept as a distinctive arrangement, Switzerland might view as an ordinary geometric combination lacking sufficient originality or departure from industry norms.

These divergences create substantial strategic challenges for luxury fashion brands seeking international protection for their design elements, as a pattern that successfully registers as an EU trademark for fashion goods may face rejection in Switzerland when protection is sought for non-fashion product categories, demonstrating that the outcome depends not only on the jurisdiction but also on the market context in which the pattern is assessed. Brands must therefore carefully consider which product classes to include in their applications across different jurisdictions.

The differences between the four jurisdictions examined in this section can be summarised as follows.

ASPECT	EU	FRANCE	SWITZERLAND	ITALY
Legal Source	EUTMR Examined by EUIPO	CPI Arts L711-1 ff Examined by INPI	TmPA Examined by IGE	CPI (Dlgs 30/2005) Examined by UIBM
Approach to non-traditional trademarks	Permissive in principle, restrictive in practice	Aligned with EU	Strict; high bar for inherent distinctiveness	Aligned with EU; favourable for luxury sector
Acquired distinctiveness-territorial scope	Entire EU territory (Nestlé v Cadbury)	National territory	National territory	National territory
Evidentiary standard	High surveys + sales + advertising	Comparable to EU	Notably high; scepticism toward recognition	Broad; presumption of validity post-registration
Historical design elements	Limited weight	Limited weight	Strong weight; barrier to protection	Limited weight

Table 2
Comparative overview of trademark frameworks across the four jurisdictions

1.6. Registrability requirements for non-traditional trademarks

Having examined how different jurisdictions approach non-traditional trademarks generally, we introduce this section that focuses on the specific legal requirements that pattern marks must satisfy to achieve registration, exploring the doctrinal tests and evidentiary standards that determine if a geometric pattern can function as a trademark. The requirements of distinctiveness, the significant departure test, graphical representation, functionality, and proof of acquired distinctiveness, are the analytical framework through which trademark authorities evaluate pattern mark applications; understanding them is essential for comprehending why some pattern marks succeed while others fail.

1.6.1. Distinctiveness: inherent versus acquired through use

Distinctiveness constitutes the central requirement for all trademarks, traditional or non-traditional, but its application to pattern marks presents particular complexities because patterns typically serve aesthetic purposes that may overshadow or obscure their source-indicating potential. The concept of distinctiveness is divided into two categories [44]: inherent distinctiveness, where a sign is by its nature capable of indicating commercial origin, and acquired distinctiveness (also called secondary meaning), where a sign that initially lacks inherent distinctiveness becomes distinctive through extensive commercial use that teaches consumers to associate it with a particular source.

For traditional word marks, assessing inherent distinctiveness follows relatively predictable patterns, with completely invented words like "KODAK" or "ROLEX" considered highly distinctive, suggestive terms that hint at product characteristics deemed moderately distinctive, and descriptive terms that directly describe products considered non-distinctive unless they acquire distinctiveness through use. Pattern marks, however, do not fit neatly into these categories because they operate primarily in visual rather than verbal registers and because they serve dual purposes, both decorative and potentially source-indicating, which create ambiguity about their primary function in consumer perception.

Trademark authorities examining pattern marks typically begin with a presumption that geometric patterns lack inherent distinctiveness because consumers generally perceive such patterns as decorative embellishments rather than as indicators of commercial origin. This presumption reflects a fundamental tension in trademark doctrine: the law seeks to protect source indicators but not to grant monopolies over aesthetic choices that serve primarily decorative functions and that competitors might legitimately wish to employ in their own designs. A simple geometric pattern consisting of circles, squares, or diagonal lines arranged in regular formations will almost certainly be deemed non-distinctive because consumers are unlikely to perceive such common geometric arrangements as brand identifiers rather than as generic decorative motifs.

Crucially, this assessment of distinctiveness is not conducted in the abstract but always from the perspective of the average consumer of the goods in question, defined by the CJEU as a consumer who is reasonably well-informed and reasonably observant and circumspect [45]. For luxury fashion goods, determining who constitutes the relevant public raises particular challenges: trademark authorities must decide whether to assess distinctiveness from the perspective of general consumers, occasional luxury purchasers,

[44] For comprehensive doctrinal analysis of the distinctiveness requirement, see Graeme B Dinwoodie and Mark D Janis, *Trademarks and Unfair Competition: Law and Policy* (5th edn, Wolters Kluwer 2018) 217–245; see also Robert Burrell and Michael Handler, *Australian Trade Mark Law* (2nd edn, OUP 2016) 78–95

[45] Case C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657, para 31

or fashion-aware consumers who are more likely to perceive subtle design elements as source indicators. This determination significantly affects the outcome of distinctiveness assessments for pattern marks in the luxury sector, as a pattern perceived as generic decoration by the general public may function as a clear source identifier for regular luxury consumers. The Swiss Federal Administrative Court's rejection of the Cannage pattern for non-fashion goods, examined in Chapter 3, illustrates how a broad definition of the relevant public, one that includes general consumers rather than informed luxury purchasers, combined with the assessment of distinctiveness in product categories where geometric patterns are common decorative elements, can determine the outcome independently of the pattern's recognition in the fashion market.

However, pattern marks can overcome this presumption through two possible routes: demonstrating that the pattern is sufficiently unusual or creative that it possesses inherent distinctiveness despite being geometric in nature or proving that even if the pattern initially lacked distinctiveness, it has acquired distinctiveness through extensive use. The first route proves extremely difficult for geometric patterns because trademark law distinguishes between creativity or aesthetic appeal (which does not establish distinctiveness) and capacity to indicate source (which does). A pattern may be beautifully designed and visually striking yet still fail to qualify as inherently distinctive if it appears to serve primarily decorative purposes. The invalidation of the Louis Vuitton Damier pattern illustrates this difficulty: despite decades of use and substantial brand recognition, the European General Court concluded that the checkerboard pattern lacked inherent distinctiveness because it showed "no notable variations" from traditional checkerboard forms [46], and Louis Vuitton failed to demonstrate acquired distinctiveness across all EU member states.

Acquired distinctiveness provides an alternative path to registration for patterns that initially lack inherent distinctiveness but have become associated with particular brands through long and intensive commercial use. Article 7(3) of the EUTMR explicitly provides for this possibility, stating that marks initially devoid of distinctive character may be registered if they have acquired distinctiveness through use before the application date. The concept reflects a pragmatic accommodation of market reality: regardless of whether a design element was originally distinctive, if consumers have learned through experience to associate it with a particular source, it functions as a trademark in fact and arguably deserves legal recognition and protection as such. However, proving acquired distinctiveness requires substantial evidence and imposes significant burdens on applicants, as the following subsection explores in detail.

1.6.2. The significant departure test

Trademark authorities apply what is commonly called the "significant departure test" [47] when evaluating whether shapes or patterns possess inherent distinctiveness, asking whether the design element departs significantly from industry norms and common practices in the relevant product category. This test emerged from case law addressing shape marks but extends logically to pattern marks because both involve design elements that could plausibly serve either source-indicating or purely aesthetic functions. The underlying question is whether the design element is sufficiently unusual or unexpected

[46] Case T-359/12, Louis Vuitton Malletier v OHIM [2015] ECLI:EU: T:2015:215, paras 30-32, 36-40

[47] The significant departure test was articulated by the CJEU in Joined Cases C-53/01 to C-55/01, *Linde AG and Others* [2003] ECR I-3161, paras 48–49; see also Case C-136/02 P, *Mag Instrument Inc v OHIM* [2004] ECR I-9165, para-31

that consumers would likely perceive it as a brand identifier rather than as a conventional decorative choice.

For pattern marks in the fashion industry, this test poses particular difficulties because fashion inherently involves aesthetic variation and the creative use of geometric and decorative elements, meaning that what might seem unusual in other industries may appear relatively conventional within fashion contexts where decorative patterns are ubiquitous. A diagonal stripe pattern might seem distinctive in the context of industrial products but appear commonplace on clothing or handbags where stripes constitute a traditional design element. The significant departure test thus requires analysis of industry-specific norms: does this particular pattern depart sufficiently from patterns commonly used in this specific market sector to suggest source identification rather than mere decoration?

The application of this test to fashion and consumer goods has produced instructive precedents. In the KitKat case [48], the CJEU examined whether the four-fingered chocolate bar shape departed sufficiently from industry norms to possess inherent distinctiveness; the Court emphasised that shapes commonly used in a given market sector are unlikely to be perceived as source indicators, and that acquired distinctiveness must be demonstrated throughout the entire EU territory, a demanding evidentiary standard that Nestlé ultimately failed to meet in several member states. Similarly, Adidas's three-stripe mark has faced challenges under the significant departure test [49]. While the mark succeeded in opposition proceedings against Shoe Branding Europe's two-stripe design, where the CJEU found that "the difference between two and three stripes placed on a shoe is not sufficient to affect the similarities", one of Adidas's own three-stripe registrations was subsequently invalidated for lacking distinctive character, demonstrating that even well-established pattern marks remain vulnerable when the evidence of acquired distinctiveness proves insufficient [50].

These cases reveal a recurring tension: the more a design element becomes common within an industry, whether through the original brand's success or through competitors' adoption of similar motifs, the harder it becomes to argue that it departs significantly from industry norms. This paradox proves particularly challenging for geometric patterns, which by their nature consist of arrangements of basic shapes.

This test creates a paradox for luxury fashion brands: the more successful a design element becomes as a brand identifier through commercial use, the more likely it is that similar geometric patterns will appear in the broader design landscape [51], potentially undermining claims that the pattern constitutes a significant departure from industry norms. Louis Vuitton's monogram pattern, for instance, has inspired countless imitations and variations, meaning that monogram-style patterns are now common in the fashion industry. Does this undermine the distinctiveness of the original Louis Vuitton pattern, or does it instead demonstrate the pattern's success as a source identifier that competitors

[48] Joined Cases C-84/17 P, C-85/17 P and C-95/17 P, Société des produits Nestlé SA and Others v Mondelez UK Holdings & Services Ltd [2018] ECLI:EU:C:2018:596, paras 67-68, 87-88.
[49] Case C-396/15 P, Shoe Branding Europe BVBA v Adidas AG [2016] ECLI:EU:C:2016:95, para 26
[50] EUIPO Cancellation Division, Decision of 19 June 2019 in Cancellation No 14448 C (Adidas three-stripe mark)
[51] This paradox is analysed in Christine Haight Farley, 'Protecting the Famous: Confusion Versus Dilution' (2015) 45 Intellectual Property Journal 1, 18–22; see also Jeremy Phillips, *Trade Mark Law: A Practical Anatomy* (OUP 2003) 312–318

seek to emulate? Trademark doctrine struggles with this question, particularly when applying the significant departure test to patterns that have become both iconic and, through their very success, influential on broader design trends.

1.6.3. Graphical representation and modern registration formats

Historically, trademark law required that all signs be capable of graphical representation, meaning they could be depicted visually in a clear and precise manner that allows trademark offices and the public to understand exactly what is being protected. This requirement posed minimal difficulties for pattern marks, which are inherently visual and can be easily represented through drawings, photographs, or digital images. However, the graphical representation requirement generated substantial difficulties for other non-traditional marks, particularly sounds, smells, and abstract concepts, leading to reforms that relaxed this requirement.

The landmark European Court of Justice decision in Sieckmann v. Deutsches Patent- und Markenamt [52] established strict criteria for graphical representation. While this decision primarily addressed the representation of olfactory marks (smells), its principles extended to all non-traditional marks and emphasised that trademark registration requires sufficient clarity to define the scope of protection. For pattern marks, meeting these requirements typically involves submitting precise visual depictions, often with specifications about colours, dimensions, and the way the pattern repeats or is applied to products.

The 2015 EU Trademark Directive and 2017 EUTMR reform eliminated the strict requirement that marks be capable of graphical representation, instead requiring that marks be represented “in any appropriate form using generally available technology” [53] provided the representation is “clear, precise, self-contained, easily accessible, intelligible, durable and objective” [54].

For pattern marks specifically, the practical implications of this reform were codified in Article 3(e) of Implementing Regulation 2018/626, which introduced the formal category of “pattern mark” into the EU registration system. The provision states that where a trademark consists exclusively of a set of elements which are repeated regularly, the mark shall be represented by submitting a reproduction showing the pattern of repetition, and that the representation may be accompanied by a description detailing how its elements are repeated regularly. This provision addresses only the formal requirements of representation; it does not specify how the distinctiveness of pattern marks should be assessed, leaving this question to the general principles examined in Sections 1.6.1 and 1.6.2. [55].

This reform aimed to accommodate new types of marks, particularly multimedia and motion marks, which are better represented through video or digital formats than through static images. For pattern marks, this change made little practical difference since patterns

[52] Case C-273/00, *Ralf Sieckmann v Deutsches Patent- und Markenamt* [2002] ECR I-11737, para 55

[53] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1, art 3; EUTMR (n 13) art 4.

[54] These criteria, originally established in *Sieckmann* (n 52), have been incorporated into Article 4 EUTMR; see EUIPO Guidelines for Examination, Part B, Section 2, Chapter 2

[55] Commission Implementing Regulation (EU) 2018/626 of 5 March 2018 laying down detailed rules for implementing certain provisions of Regulation (EU) 2017/1001 [2018] OJ L 104/37, art 3(e).

were always easily represented graphically, but it reflects broader efforts to modernise trademark law to accommodate technological evolution and new forms of branding.

1.6.4. Functionality doctrine

The functionality doctrine prevents trademark protection for features that are necessary for products to function properly or that constitute the product itself [56], reflecting the principle that trademark law should not grant perpetual monopolies over functional innovations that would be more appropriately protected through time-limited patent rights or left in the public domain for competitors to use freely. Article 7(1)(e) of the EUTMR codifies this doctrine for shape marks, excluding registration of shapes that "result from the nature of the goods themselves," shapes that are "necessary to obtain a technical result", or shapes that "give substantial value to the goods" [57].

While this provision specifically addresses three-dimensional shapes rather than two-dimensional patterns, its underlying logic extends to pattern marks when patterns serve functional rather than purely source-indicating purposes. In most cases, however, geometric patterns on fashion products do not raise functionality concerns because they serve primarily aesthetic and source-indicating rather than functional purposes. A pattern stitched onto a handbag or printed on fabric does not typically make the product function better or worse; it simply makes it look different and potentially signals brand origin. The functionality doctrine therefore rarely blocks pattern mark registration in fashion contexts, though it might apply if a pattern serves some technical purpose such as camouflage, grip enhancement, or structural reinforcement.

The third category in Article 7(1)(e), shapes that give substantial value to goods, proves more conceptually challenging for pattern marks because aesthetic value is precisely what patterns provide, yet this provision aims to prevent trademark monopolies over purely aesthetic features. Courts and trademark offices interpret this provision to exclude designs where the aesthetic appeal itself constitutes the primary reason consumers purchase the product, rather than designs that indicate source while also being aesthetically pleasing. This distinction proves difficult to apply because luxury fashion products are purchased partly for aesthetic reasons and partly for brand associations that may be inseparable from aesthetic characteristics. The Cannage pattern, for instance, clearly gives aesthetic value to Dior products, but this fact alone did not prevent its registration in the EU, suggesting that providing aesthetic value does not automatically disqualify a pattern from trademark protection as long as it also functions as a source indicator.

1.6.5. Secondary meaning and proof of acquired distinctiveness

When pattern marks lack inherent distinctiveness, as trademark authorities often conclude regarding geometric patterns, registration becomes possible only through proof of acquired distinctiveness, also called secondary meaning, demonstrating that consumers have learned through experience to associate the pattern with a particular brand. This concept reflects trademark law's realistic recognition that market reality may transform initially non-distinctive signs into effective source indicators through extensive

[56] On the functionality doctrine in European trademark law, see Ansgar Ohly, 'The Freedom to Compete' in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and New Perspectives* (Edward Elgar 2013) 306–325; for US comparative perspective, see Mark P McKenna, 'An Alternate Approach to Channeling and the Functionality of Product Design Trade Dress' (2008) 21 Harvard Journal of Law & Technology 353

[57] EUTMR (n 13) art 7(1)(e)

commercial use, and that legal protection should extend to signs that actually function as trademarks in consumer perception regardless of whether they possessed inherent distinctiveness at the beginning.

Proving acquired distinctiveness requires substantial evidence showing that relevant consumers recognise the pattern as indicating a specific brand rather than merely as decoration and different jurisdictions impose different evidentiary standards. Typical requirements include consumer surveys demonstrating high levels of brand recognition, where consumers are shown the pattern without accompanying word marks or logos and also evidence of long and intensive use of the pattern exclusively by the applicant, substantial market share in relevant product categories over extended periods, significant advertising expenditures featuring the pattern, and evidence that competitors have not used similar patterns; evidence with the aim of supporting the claim that the pattern has become exclusively associated with the applicant's brand.

The burden of proving acquired distinctiveness rests entirely on the trademark applicant [58], and its territorial scope is particularly demanding in the EU context. The CJEU clarified in Audi AG v OHIM [59] that acquired distinctiveness must be demonstrated throughout the entire EU territory covered by the application, not merely in a substantial part of it or in the member states where the brand enjoys the greatest market presence. For luxury fashion brands seeking EU-wide protection for a pattern mark, this means that consumer recognition surveys must be conducted across multiple member states, including markets where the brand's commercial activity may be more limited and where the pattern may therefore be less well known. The practical consequence is significant: assembling a complete acquired distinctiveness dossier for an EU trademark application typically requires consumer surveys in at least the five largest member states by market size, supported by sales figures, advertising expenditure data, and evidence of exclusive use across the same territory; all documented for the period preceding the application filing date. The total cost of such a dossier can reach hundreds of thousands of euros, effectively reserving this registration route to well-resourced luxury brands with the financial capacity to invest in comprehensive market research. Smaller designers with equally distinctive patterns but more limited resources face a structural disadvantage that trademark law does not formally acknowledge but that shapes registration outcomes in practice.

Consumer surveys constitute particularly important evidence because they directly measure whether consumers actually perceive the pattern as a source indicator. Properly conducted surveys show respondents the pattern in question, typically without any accompanying brand names or logos, and ask whether they recognise it as belonging to a particular company and, if so, which company. High recognition rates support claims of acquired distinctiveness, though what qualifies as "high" varies by jurisdiction. The EU generally requires evidence that a significant portion of relevant consumers recognise the mark, with some guidance suggesting that recognition levels above 50% in relevant

[58] On evidentiary standards for acquired distinctiveness, see Ilanah Simon Fhima, *Trade Mark Dilution in Europe and the United States* (OUP 2011) 67–82

[59] Case C-398/08P, *Audi AG v Office for Harmonisation in the Internal Market (OHIM)* [2010] ECR I-535, para 61

markets provide strong evidence of acquired distinctiveness [60], though lower percentages may suffice if supported by other evidence of intensive use and market prominence.

The temporal dimension of acquired distinctiveness creates particular challenges for pattern marks because distinctiveness must have been acquired before the application filing date, meaning that evidence of recognition must cover the period up to that date rather than subsequent periods. Applicants must therefore document their historical use of the pattern, advertising expenditures over time, and evolution of consumer recognition, which may require extensive market research and archival work. The cost and complexity of assembling such evidence can be substantial, particularly for international applications requiring proof of acquired distinctiveness in multiple jurisdictions with varying evidentiary standards and consumer markets.

The distinction between recognition and reliance represents one of the most challenging and important aspects of proving acquired distinctiveness for non-traditional marks. Not all consumer recognition constitutes distinctiveness in the legal sense: the fact that consumers associate a geometric pattern with a luxury brand does not automatically mean that they treat the pattern as a source indicator, meaning, as a sign upon which they rely to identify commercial origin. This distinction has generated divergent judicial approaches. On one side, the "mere association" test, as advanced by Nestlé in litigation over the KitKat shape mark, holds that it suffices for a finding of acquired distinctiveness to show that consumers, if asked who marketed goods bearing the mark, would identify the trademark proprietor; no evidence of actual reliance on the mark in purchasing decisions is required [61].

On the other side, the "reliance" test, endorsed by the Singapore Court of Appeal in *Société des Produits Nestlé SA v Petra Foods Ltd* and by the English Court of Appeal in *Société des Produits Nestlé SA v Cadbury UK Ltd*, sets a higher threshold: the inquiry is whether, by reason alone of the mark, consumers perceive the goods as originating from a particular trader [62]. The CJEU's own approach in *Nestlé v Cadbury (C-215/14)* is similar but not identical: the Court required that the relevant public "perceive the goods designated exclusively by the mark, as opposed to any other trade mark which may also be present, as originating from a particular company", expressly rejecting the sufficiency of mere recognition or association.

Under this test, the relevant question is not merely whether consumers can connect a pattern to a brand when prompted, but whether they treat the pattern itself as functioning as a trademark in the marketplace.

This distinction carries direct implications for the luxury fashion sector. Fashion houses typically use their signature patterns alongside prominent word marks and logos: a Lady Dior bag displays both the Cannage quilting and the D.I.O.R. letter charms, just as a Louis Vuitton product typically combines the Damier pattern with the LV monogram or word mark. The difficulty arises when the brand seeks to register the pattern alone as a

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[60] EUIPO Guidelines (n 30) Part B, Section 4, ch 14.3; see also Case T-413/14, *Szajner v EUIPO* [2016] ECLI:EU: T:2016:292, para-61

[61] *Societe Des Produits Nestlé SA v Cadbury UK Ltd* [2017] EWCA Civ 358, para 67. See also the discussion in David Tan, Ng-Loy Wee Loon and David Wei, 'Non-Traditional Trademarks in the Fashion Industry' in *Fashion and Intellectual Property* (CUP 2024/2026) ch 5, section 5.4.1.

[62] S*ociété des Produits Nestlé SA v Petra Foods Ltd* [2016] SGCA 64, para 47; see also *Nestlé SA v Cadbury UK Ltd (No 2)* [2016] EWHC 50 (Ch), para-59

trademark, claiming that consumers perceive it independently as a source identifier. As Jacob J observed in *Société des Produits Nestlé SA v Unilever Plc*, there is "a bit of sleight of hand" in such claims: "The manufacturer sells and advertises his product widely and under a well-known trademark. After some while the product appearance becomes well known. He then says the appearance alone will serve as a trademark, even though he himself never relied on the appearance alone to designate origin and would not dare to do so" [63]. This observation describes the central evidentiary challenge facing any luxury brand seeking pattern trademark protection: demonstrating that the pattern functions as an independent source identifier rather than merely as a recognisable decorative element that consumers have learned to associate with expensive products.

The Van Cleef & Arpels four-leaf clover case in China exemplifies how this distinction operates with particular severity outside the European context, and illustrates that the tension between recognition and reliance is a global challenge rather than one confined to any single jurisdiction [64]. Despite successful registration of its signature Alhambra jewellery design as a three-dimensional trademark in 2016, Van Cleef & Arpels saw this registration nullified following invalidation proceedings. The Beijing High Court ruled that the four-leaf clover pattern, although originated by VCA, was more likely to be perceived by the relevant public as a decorative element rather than as a badge of origin [65]. Evidence of the design's iconic status in the luxury jewellery market proved insufficient under Chinese standards, which questioned whether consumers relied on the pattern as a source indicator rather than simply recognising it as an attractive design element associated with expensive products. The Chinese approach thus applied a form of the reliance test that parallels the more demanding European standard, reinforcing the observation that the mere association of a design with a luxury brand does not establish the kind of source-indicating function that trademark law requires.

This scepticism reflects a fundamental tension in assessing acquired distinctiveness for aesthetic elements. Different legal systems resolve this tension in opposite ways, with the EU generally more receptive to comprehensive evidentiary dossiers and Switzerland and China applying stricter scrutiny, creating the fragmented protection landscape that global luxury brands must navigate when seeking pattern mark registration. The empirical research presented in Chapter 4 of this thesis addresses precisely this question: whether consumers actually rely on patterns as source indicators, or whether their recognition is better characterised as familiarity with a decorative style rather than dependence on a commercial sign.

This chapter has established the legal framework for understanding non-traditional trademarks, demonstrating that while international treaties created space for pattern marks, significant jurisdictional variations persist in how distinctiveness requirements are applied. The analysis revealed that pattern marks occupy an inherently ambiguous position, fulfilling dual aesthetic and identificatory roles, with Switzerland applying more restrictive standards than the EU in assessing whether geometric patterns function as

[63] *Société des Produits Nestlé SA v Unilever Plc* [2003] RPC 35, para 32 (Jacob J)
[64] Beijing High Court, *Van Cleef & Arpels v TRAB* [2019] (China). For a comprehensive analysis of the Chinese approach to non-traditional trademarks in the fashion sector, see Jyh-An Lee and Wei Wei, 'Fashion and Intellectual Property in China' in *Fashion and Intellectual Property* (CUP 2024/2026) ch 9, section 9.4.1.
[65] ibid

brand identifiers. Having established this framework, and the doctrinal tests examined in this section, distinctiveness, significant departure, functionality, and acquired distinctiveness, provide the analytical framework through which trademark authorities evaluate pattern mark applications. How these tests operate in practice, and why they can produce divergent outcomes for identical design elements, becomes concrete in the examination of the Dior Cannage pattern in Chapter 3.

CHAPTER II

PATTERN TRADEMARKS IN THE LUXURY FASHION INDUSTRY

SUMMARY: 2.1. The economics of pattern protection – 2.2. Legal strategies: Trademark, Design, and Copyright – 2.3. Case law review: Non-traditional trademarks in European and international courts – 2.4. Critical perspectives: The limits and risks of pattern trademark protection – 2.5. Christian Dior: IP strategy and the role of the Cannage pattern

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Having established in Chapter 1 the formal legal requirements that govern non-traditional trademark registration, this chapter asks a different question: how do those requirements behave when they encounter the commercial reality of the luxury fashion industry? The central argument is that the gap between legal doctrine and market practice is wider and more critical than the formal framework suggests. The same standards that trademark law presents as neutral and universally applicable, in practice result in outcomes that are expensive, geographically fragmented, and difficult to predict, even for the most established brands.

Five sections develop this argument from different but complementary angles. Section 2.1 establishes the economic foundation, examining why geometric patterns carry extraordinary commercial value in the luxury sector and developing the distinction between seasonal garment designs and heritage identifiers; a distinction that, the analysis demonstrates, reveals the limits of the piracy paradox when applied to enduring brand elements. Section 2.2 moves from motivation to strategy, analysing the choices brands face when seeking to protect their signature design elements across trademark law, design rights, and copyright. Section 2.3 translates these strategic considerations into jurisprudential reality through a review of the landmark case law that has shaped non-traditional trademark protection in Europe and beyond. Section 2.4 then steps back to engage with the scholarly and judicial critiques that have addressed the extension of trademark protection to aesthetic elements; critiques that surface in the reasoning of the very courts and offices that judge pattern mark applications. Finally, Section 2.5 introduces Christian Dior's intellectual property strategy and situates the Cannage pattern within it, demonstrating that the pattern embodies, in a single design element, the three doctrinal tensions that the chapter has examined.

The argument that emerges from these five sections is that non-traditional trademark protection in luxury fashion cannot be understood through legal doctrine alone, nor through commercial strategy alone, but only through the interaction between them.

2.1. The economics of pattern protection

The luxury fashion industry occupies a unique position within the broader economy, understanding the economics of pattern protection requires examining why geometric patterns and other visual design elements carry such extraordinary commercial value in this sector, and what consequences arise from the presence or absence of legal protection.

Fashion firms "take significant, costly steps to protect the value of their trademarked brands" [66] while largely accepting the copying of designs as a fact of industry life. This observation captures a fundamental tension: while trademark protection for brand names and logos is fiercely defended, the protection of design elements, including patterns, has historically occupied uncertain legal territory, yet these patterns often embody enormous commercial value.

The economic logic of luxury brands differs fundamentally from ordinary consumer goods. When consumers purchase a Louis Vuitton handbag featuring the Damier pattern or a Burberry scarf with the characteristic check, they are not merely acquiring a functional product, they are purchasing access to the social meaning, heritage, and aspirational identity that the brand communicates. Patterns serve as visual shorthand for these intangible values: a recognisable pattern allows consumers to signal brand affiliation without flashy logos, while simultaneously enabling brands to extend their visual identity across product categories. This function has become increasingly important with the rise of "quiet luxury" as a dominant consumer trend; consumers signal status through restraint rather than visible branding; geometric patterns, distinctive textures, and characteristic stitching have evolved from supplementary brand assets to core elements of brand identification [67]; this recognition reflects decades of brand-building investment that rivals seek to exploit through imitation.

The absence of effective protection for pattern marks creates significant economic vulnerabilities for luxury brands. According to OECD and EUIPO studies, trade in counterfeit and pirated goods represents up to 2.50% of world trade, with fashion and luxury goods being among the most affected sectors [68]. Within fashion specifically, the European Union estimates annual losses in the tens of billions of euros, encompassing both direct revenue displacement and indirect harm to brand reputation [69]. Importantly, the economic harm extends beyond traditional counterfeiting, meaning the production of fake goods bearing protected trademarks; a more insidious form of imitation involves copying a brand's signature patterns while omitting the protected word marks or logos. This practice allows imitators to evoke a luxury brand's aesthetic identity and benefit from consumer associations without technically infringing registered trademarks; the mobility of global supply chains has intensified this problem, enabling imitators to produce visually similar goods at a fraction of the cost while maintaining plausible legal distance from traditional trademark infringement.

From a market structure perspective, protected elements function as barriers to entry that help established luxury houses maintain their competitive position. A new entrant cannot simply replicate the Louis Vuitton monogram, the Burberry check, or the Louboutin red sole; these elements are legally protected and their unauthorised use triggers enforcement action. This protection allows established brands to capture the returns on their creative investments and incentivises continued innovation in design. However, this competitive advantage raises legitimate concerns about the boundaries of trademark protection;

[66] Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 Virginia Law Review 1687, 1692

[67] Ibid 1691-1692.

[68] OECD/EUIPO, Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact (OECD Publishing 2016) 11.

[69] EUIPO/OECD, Trends in Trade in Counterfeit and Pirated Goods (2019) 54-58.

intellectual property law increasingly functions as a "sumptuary code" [70] that regulates status signalling through fashion. Granting trademark protection to patterns that serve primarily aesthetic functions may unreasonably narrow the aesthetic choices available to competitors, potentially stifling rather than promoting creative innovation. This tension between protecting legitimate brand investments and preserving competitive freedom in design choices underlies many of the judicial decisions examined later in this chapter.

The economic analysis of pattern protection must also contend with what Raustiala and Sprigman called the "piracy paradox": the observation that the fashion industry, despite relatively weak intellectual property protection for designs, continues to exhibit high levels of creative innovation [71]. Their argument rests on two interrelated mechanisms. The first, "induced obsolescence", means that widespread copying of designs accelerates their diffusion, erodes their positional value, and thereby drives consumers to seek the next new style, generating additional sales opportunities for originators [72]. The second, "anchoring", describes how copying helps communicate and consolidate seasonal trends: by converging on a limited number of design themes, the industry enables consumers to understand when the trend has shifted, what defines the new trend, and what to purchase to remain within it [73]. Together, these mechanisms suggest that a low-protection environment, far from stifling creativity, may actually sustain the fashion cycle by making each season's designs obsolete more quickly than they would become in a regime of strong protection.

The piracy paradox is a powerful analysis of seasonal fashion design, and it has rightly shaped academic debate about the necessity of IP protection in creative industries. However, the theory was developed primarily with garment designs in mind, that is, seasonal silhouettes, fabrics, and stylistic choices that are intended to mark a particular moment in fashion and to be replaced by the following season's output. When applied to signature patterns, the analysis operates fundamentally differently, and this distinction has not been adequately explored in the existing literature.

Signature patterns such as the Dior Cannage or the Burberry check, represent a categorically different type of creative output from seasonal garment designs: they are designed not to participate in the fashion cycle but to transcend it. Their commercial value lies precisely in their endurance and recognisability across decades, not in their novelty within any particular season. These elements function as what might be called "heritage identifiers": design features whose purpose is to secure a brand's identity over time rather than to signal participation in a seasonal trend [74].

For seasonal designs, the Raustiala and Sprigman model predicts that copying accelerates obsolescence, which benefits originators by generating demand for new designs, for heritage identifiers, however, copying produces a clearly different dynamic. When

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[70] Barton Beebe, 'Intellectual Property Law and the Sumptuary Code' (2010) 123 Harvard Law Review 809, 812-820.

[71] Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 Virginia Law Review 1687

[72] Ibid 1718-1727

[73] ibid 1728–1733. As Raustiala and Sprigman explain, anchoring helps fashion-conscious consumers understand when the mode has shifted, what defines the new mode, and what to purchase to remain within it.

[74] The term 'heritage identifier' is used here to distinguish enduring brand-identifying design elements from seasonal garment designs. The distinction is analogous to the difference between a brand's trade dress, which may evolve, and its core visual identity, which is deliberately maintained for continuity.

competitors imitate they do not accelerate the pattern's obsolescence because the pattern was never intended to be obsolete; instead, they erode its distinctiveness as a source indicator without creating any corresponding demand for a successor design. The originator cannot respond to copying by "moving on" to a new pattern, in the same way that Miuccia Prada described dropping copied designs [75], because abandoning the signature pattern would mean relinquishing the accumulated brand equity of decades, sometimes over a century, of consistent use. The Cannage cannot be discarded and replaced the way a copied dress silhouette can; it is the brand's visual identity, not a seasonal proposition.

This structural difference has three implications for the legal analysis of pattern protection. First, the piracy paradox's central mechanism, that copying benefits originators through induced obsolescence, does not apply to heritage identifiers: copying harms rather than benefits the originator, because it dilutes the pattern's capacity to function as a source indicator without generating any offsetting innovation cycle. The induced obsolescence mechanism is uncertain even for seasonal designs, since obsolescence has causes other than copying, including the passage of seasons, desire for the new, and the innovative output of other designers; for long-lasting brand elements, these alternative causes of obsolescence are mainly absent, meaning that copying holds a proportionally greater responsibility for any loss of distinctiveness [76].

Second, the piracy paradox does not account for the specific harm that pattern copying inflicts on the trademark function of heritage identifiers. When a competitor produces handbags featuring a diamond quilting pattern similar to the Cannage, the harm is not merely economic, the rerouting of sales, but also symbolic: it weakens the association between the pattern and the brand in consumer perception, potentially undermining the very acquired distinctiveness upon which trademark protection depends [77]. This is the opposite of the beneficial diffusion that Raustiala and Sprigman describe for seasonal designs; here, diffusion destroys rather than creates value. In trademark terms, copying of heritage patterns operates as a form of dilution by blurring, reducing the public's perception that the pattern means something unique and singular [78].

Third, the paradox creates an illogical dynamic for pattern marks within the distinctiveness framework. The more a heritage pattern is copied, the more it becomes common within the landscape, potentially undermining the originator's claim that the pattern constitutes a "significant departure" from industry norms. The brand's own success, by inspiring imitation, generates the very conditions that make legal protection harder to obtain. This is the paradox within the paradox: the design element that most needs protection, because it has been most widely copied, may be the one least likely to receive it under current distinctiveness standards, because copying has made similar patterns ubiquitous.

[75] Raustiala and Sprigman (n 66) 1722, quoting Miuccia Prada: 'We let others copy us. And when they do, we drop it.'

[76] C Scott Hemphill and Jeannie Suk, 'The Law, Culture, and Economics of Fashion' (2009) 61 Stanford Law Review 1147, 1175–1178. See also Hemphill and Suk's observation that the practical importance of induced obsolescence is uncertain because obsolescence has causes other than copying.

[77] On the semiotic dimension of trademark dilution, see Barton Beebe, 'The Semiotic Analysis of Trademark Law' (2004) 51 UCLA Law Review 621, 688–691, analysing dilution as the erosion of the relationship between the trademark's signifier and its signified.

[78] See Barton Beebe, 'Search and Persuasion in Trademark Law' (2005) 103 Michigan Law Review 2020, 2044–2046, on the relationship between differential distinctiveness and dilution by blurring.

This analysis suggests that the fashion industry's IP landscape is not uniform: it contains at least two distinct economies of creative output that require different legal responses. Seasonal garment designs may indeed benefit from, or at least remain unharmed by, a low-IP environment, as Raustiala and Sprigman argue. Heritage identifiers, by contrast, are structurally vulnerable to copying in ways that the piracy paradox does not account for, and their protection through trademark registration addresses a market failure that the theory's mechanisms cannot self-correct.

2.2. Legal strategies: Trademark, Design, and Copyright

Luxury fashion brands seeking to protect their signature patterns face a strategic choice among several intellectual property regimes, each offering distinct advantages and limitations. The decision of which route to pursue, or whether to combine multiple forms of protection, depends on factors including the nature of the pattern itself, the brand's commercial objectives, the evidentiary resources available, and the specific jurisdictions in which protection is wanted. This section examines these strategic considerations, analysing when trademark protection is preferable to design rights or copyright, and how sophisticated brand owners combine multiple forms of protection in layered strategies.

Trademark protection offers the most attractive features for long-term brand protection: potentially perpetual duration, strong enforcement mechanisms, and protection based on source indication rather than novelty or originality. Unlike design rights, which expire after a maximum period of 25 years in the EU, trademarks can be renewed indefinitely as long as they remain in use and distinctive; this duration advantage explains why luxury houses invest substantial resources in establishing trademark protection for their signature patterns, once achieved, it provides permanent exclusivity [79]. However, trademark protection comes with significant obstacles for pattern marks. As Chapter 1 established, geometric patterns must satisfy distinctiveness requirements that prove challenging to meet: trademark authorities presume that consumers perceive such patterns as decoration rather than source indicators, placing the burden on applicants to demonstrate either inherent distinctiveness, rare for geometric patterns, or acquired distinctiveness through extensive commercial use. The evidentiary requirements for proving acquired distinctiveness can impose costs reaching hundreds of thousands of euros for a comprehensive dossier covering multiple jurisdictions.

Design rights under EU Regulation 6/2002 [80] provide an alternative route that avoids the distinctiveness hurdle entirely. Design protection requires novelty and individual character, the design must differ from existing designs and produce a different overall impression on the informed user, but it does not require proof that the pattern functions as a source indicator. For newly introduced patterns, design registration offers immediate protection without the need to demonstrate consumer recognition. The principal limitation, however, is temporal: registered Community designs receive protection for up to 25 years through renewable five-year terms, while unregistered Community designs are protected for only three years [81]. For a pattern introduced decades ago, such as Dior's

[79] Raustiala and Sprigman (n 66) 1725.
[80] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community design [2002] OJ L 3/1
[81] Ibid, art 12 (maximum 25 years for registered designs); art 11 (3 years for unregistered designs).

Cannage dating from 1947, design protection would have long expired, making trademark registration the only viable route to ongoing legal protection.

Copyright protection presents yet another set of trade-offs. Where available for applied art, copyright offers long duration, typically the author's lifetime plus 70 years, without registration requirements. However, copyright protection for patterns applied to fashion products faces the "separability" doctrine in most jurisdictions: copyright protects original creative expression only to the extent that the expressive elements can be conceptually or physically separated from the functional aspects of the article. Geometric patterns on handbags or clothing blend aesthetic and functional roles in ways that make separability analysis challenging and outcomes uncertain [82]. Moreover, copyright's scope of protection differs fundamentally from trademark: it protects against copying of the specific expression rather than against use of confusingly similar patterns on competing goods. A competitor who independently creates a similar pattern without copying would not infringe copyright, whereas trademark protection extends to any use likely to cause confusion regardless of independent creation.

Given these trade-offs, sophisticated luxury brands typically employ layered protection strategies that combine multiple intellectual property regimes. A newly introduced pattern might initially receive unregistered design protection automatically upon disclosure, followed by registered design protection if the brand chooses to invest in formal registration. Simultaneously, the brand builds evidence of distinctiveness through consistent exclusive use, extensive advertising, and documented market presence, with the goal of establishing trademark protection once sufficient consumer recognition has been acquired; this temporal sequencing allows brands to maintain some form of protection at each stage while building toward the most valuable long-term protection that trademark registration provides.

The choice of protection route also depends on the nature of the pattern itself. Highly distinctive or unusual patterns may possess inherent trademark distinctiveness, enabling immediate registration without the need to demonstrate acquired distinctiveness; more conventional geometric arrangements will require the acquisition of distinctiveness over time through commercial use. Patterns with strong aesthetic appeal but weak source-indicating capacity may be better suited to design protection, accepting the temporal limitation in exchange for avoiding the distinctiveness obstacle altogether.

Strategic timing further complicates these decisions. Filing a trademark application too early, meaning before the pattern has acquired sufficient distinctiveness, risks rejection and potentially weakens subsequent applications by creating an adverse administrative record. Filing too late may allow competitors to establish their own uses of similar patterns, complicating both the registration process and subsequent enforcement. Many luxury brands therefore adopt a staged approach: they document their use from the outset, monitor the market for imitation, and file trademark applications once they have accumulated sufficient evidence to demonstrate acquired distinctiveness. Cost considerations inevitably shape these choices as well. Design registration is relatively inexpensive and procedurally straightforward, while trademark registration for non-traditional marks, particularly when relying on acquired distinctiveness, requires

[82] Irene Calboli, 'Hands Off "My" Colors, Patterns, and Shapes! How Non-traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation' in Irene Calboli and Martin Senftleben (eds), The Protection of Non-Traditional Trade Marks (OUP 2018) 296-307.

substantial investment in consumer surveys, market research, and comprehensive documentation of commercial use across all relevant territories. For emerging brands with limited resources, design protection may represent the only feasible option, with trademark protection deferred until the brand achieves sufficient scale to justify the investment required. Established luxury houses, by contrast, can afford comprehensive protection strategies that pursue multiple forms of IP protection simultaneously across numerous jurisdictions.

The relative features of the three intellectual property regimes available to luxury fashion houses are summarised in Table 3, which clarifies the trade-offs that drive the layered protection strategies discussed above.

ASPECTS	Trademarks	Design Rights	Copyrights
Duration	Indefinite, renewable in 10-year terms	25 years maximum (registered); 3 years (unregistered)	Author's life + 70 years
Registration required	Yes (with limited common-law exceptions)	Yes for registered; automatic for unregistered	No (automatic upon creation)
Protection requires	Distinctiveness as source indicator	Novelty + individual character	Originality / creative expression
Scope of protection	Against confusingly similar use on related goods	Against same overall impression on informed user	Against substantial copying of expression
Independent creation defence	Not available	Not available	Available (no infringement without copying)
Cost of acquiring protection	High (especially for non-traditional marks; acquired distinctiveness dossier)	Low to moderate	None for creation; enforcement costs vary
Cost of maintaining protection	Renewal fees; ongoing exclusive use required	Renewal fees	None (subsists by operation of law)
Sustainability for heritage patterns	High (once distinctiveness is established)	Limited (temporal cap)	Limited (separability doctrine in many jurisdictions)
Strategic role for luxury houses	Primary long-term protection	Initial protection upon launch; bridge to trademark	Supplementary, where applicable to applied art

Table 3
Comparison of trademark, design rights, and copyright as routes for the protection

Trademark protection is the most valuable endpoint, potentially perpetual, enforceable regardless of independent creation, and tied to the brand's ongoing commercial identity; but its obstacle is precisely what makes it attractive: proving that a design element functions as a source indicator in consumer perception, a status that must be earned through exclusive use and, where inherent distinctiveness is absent, demonstrated through comprehensive and costly evidentiary documentation. Design protection is the accessible starting point: inexpensive, requiring no proof of consumer recognition, and immediately available upon a pattern's introduction, but capped at twenty-five years under EU Regulation 6/2002, which is why, for heritage elements like the Cannage whose design rights expired decades ago, trademark registration is not merely preferable but the only viable route to ongoing exclusivity. Copyright occupies a more uncertain position: automatic and long-lasting where applicable to applied art but protecting only against literal copying rather than against the use of independently created similar patterns, making it supplementary rather than primary for brands whose concern is preventing competitors from evoking their aesthetic identity.

The strategic implication is that the choice is rarely between regimes but about sequencing them: design protection covers the early life of a pattern while the brand builds the commercial record needed for trademark registration, and trademark protection, once acquired, provides the indefinite exclusivity the other regimes cannot.

2.3. Non-traditional trademarks in European and international case law

The legal landscape for non-traditional trademarks in the luxury sector has been shaped by a series of landmark decisions that reveal both the possibilities and the persistent limitations of protecting design elements through trademark law. This section examines cases spanning four categories of non-traditional marks, colour marks, pattern marks, position marks, and shape marks. The doctrinal principles that determine registration outcomes, in particular the distinctiveness requirement, the significant departure test, and the functionality doctrine, operate across all categories and influence each other. The cases selected all concern the fashion and luxury goods sector, or raise principles of direct analytical relevance to it. Reading them together establishes the jurisprudential framework within which the Dior Cannage case, examined in Chapter 3, must be understood.

<u>2.3.1. Louboutin v. Van Haren: functionality and aesthetic elements</u>

The Christian Louboutin red sole case offers important preliminary insights into non-traditional trademark protection in fashion, despite involving a colour mark rather than a pattern. Louboutin had registered its lacquered red sole as a trademark; when competitor Van Haren marketed high-heeled shoes with red soles, Louboutin brought infringement proceedings. The defendant challenged the validity of the registration, arguing that the mark fell within the exclusion for shapes giving substantial value to goods under Article 7(1)(e) EUTMR.

Figure 1
The Christian Louboutin red sole mark as registered (Source: EUIPO Database, EUTM No 008845539)

The Court of Justice of the European Union held that the shape exclusion did not apply to a mark consisting of a colour applied to a specific part of a product, rather than to the shape of the product itself. The Court reasoned that the mark was not one "consisting exclusively of the shape" within the meaning of the exclusion, even though it related to the external appearance of the product [83].

Although the Louboutin sign is more accurately characterised as a combination of colour and position rather than as a proper pattern mark, a distinction confirmed, the ruling carries direct analytical relevance for pattern marks by analogy. It establishes that the mere fact that a design element contributes aesthetic value to a product does not automatically engage the functionality exclusions designed for three-dimensional shape marks. Applied to pattern marks, this means that a quilted or woven motif on a luxury handbag, an element that undeniably renders the product more attractive, does not fall outside trademark protection solely on the ground that it adds aesthetic value. The principle is directly relevant to the Cannage pattern, whose undeniable decorative character did not, in the EU assessment, preclude its protection. At the same time, the Louboutin decision leaves open the harder question, addressed in subsequent cases, of whether sufficient distinctiveness exists to justify registration in the first place.

2.3.2. Louis Vuitton Damier: limits of inherent distinctiveness

The Louis Vuitton Damier case represents one of the most instructive defeats for pattern trademark protection in European jurisprudence and constitutes an indispensable reference point for any analysis of geometric pattern marks. In August 1998, Louis Vuitton successfully registered its checkerboard pattern, the iconic Damier design, as a community trademark. More than a decade later, in 2009, competitor Nanu-Nana applied for a declaration of invalidity, arguing that the pattern was devoid of distinctive character [84].

[83] Louboutin and Christian Louboutin, Case C-163/16, ECLI:EU:C:2018:423 (CJEU, June 12, 2018).

[84] Louis Vuitton Malletier v Office for the Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-359/12 (General Court, April 21, 2015).

Figure 2
The Louis Vuitton Damier pattern as registered (Source: EUIPO Database, EUTM No 000370445)

The OHIM Cancellation Division granted the invalidity application, and this decision was upheld by the First Board of Appeal. On further appeal to the European Union General Court, Louis Vuitton's arguments were rejected [85]. The Court held that the Damier pattern lacked inherent distinctiveness because the relevant public's perception is not necessarily the same for pattern marks as for word or figurative marks: average consumers are not in the habit of making assumptions about a good's origins based on patterns or surface decorations in the absence of graphic or word elements [86].

Applying the significant departure test, the Court concluded that Louis Vuitton's checkerboard showed "no notable variations" from conventional checkerboard forms; the alternating arrangement of light and dark squares in a regular grid did not depart significantly from decorative patterns commonly used across industries [87]. As to acquired distinctiveness, the Court held that Louis Vuitton had failed to discharge its burden of proof across all EU member states, evidence was insufficient to establish that consumers throughout the Union perceived the pattern as indicating commercial origin rather than as mere decoration [88].

Two aspects of this judgment deserve particular attention for the present analysis. First, the Court's application of the significant departure test operates at the level of the pattern's visual characteristics in the abstract, without regard for the brand's commercial success or the global recognition of the Damier print. This methodological choice, assessing the geometric configuration independently of its market history, creates a high threshold that even iconic patterns may fail to meet. Second, and crucially for the comparison with the Cannage case, the Court's definition of the relevant public was not restricted to sophisticated luxury consumers likely to perceive subtle design elements as brand identifiers; it was the average consumer of consumer goods generally. As will be seen in Chapter 3, the choice of reference public can prove determinative in the outcome of a distinctiveness assessment.

[85] Irene Calboli, 'Hands Off "My" Colors, Patterns, and Shapes! How Non-traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation' in Irene Calboli and Martin Senftleben (eds), The Protection of Non-Traditional Trade Marks (OUP 2018) 296-299.
[86] Case T-359/12 (n 84) para 28.
[87] Ibid, paras 30-32.
[88] Ibid, paras 36-40.

2.3.3. Adidas Three Stripes: the fragility of pattern protection

The Adidas three-stripe design presents a complex picture of protection outcomes that illustrates the contingent and vulnerable nature of pattern trademark enforcement. Adidas has vigorously defended its three-stripe mark against competitors with varying degrees of success, demonstrating that even a well-established pattern mark with substantial commercial presence requires continuous evidential maintenance.

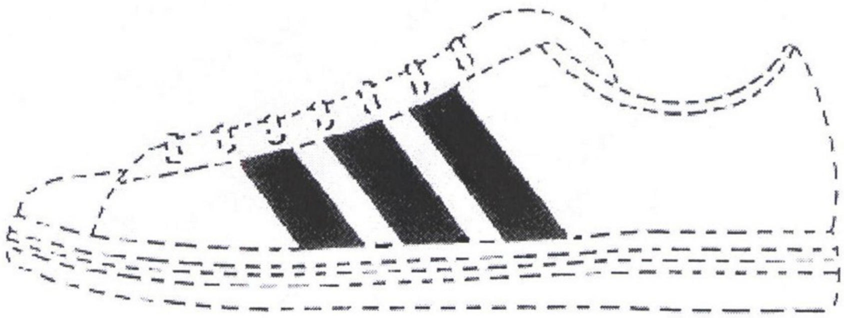

Figure 3
The Adidas three-stripe mark as registered (Source: EUIPO Database EUTM No 003517646)

In opposition proceedings against Shoe Branding Europe BVBA, which had applied to register a two-stripe design, Adidas successfully argued confusing similarity. The CJEU affirmed that "the difference between two and three stripes placed on a shoe is not sufficient to affect the similarities arising from the configuration of the signs at issue and from their position on the side of the shoe" [89]. This decision confirmed that Adidas's stripe mark, when properly registered and supported by evidence of distinctiveness, could block competitors from adopting similar stripe configurations [90].

However, Adidas has not been universally successful. In separate cancellation proceedings, one of Adidas's own registered three-stripe marks was invalidated on the ground that it was devoid of distinctive character, both inherently and through acquisition [91]. The EUIPO found that Adidas had failed to prove that the particular configuration of three parallel stripes, as registered, had acquired distinctiveness throughout the European Union. This invalidation demonstrates a fundamental point that directly concerns the Cannage case: registration does not provide permanent security. Even marks with decades of commercial presence remain vulnerable to cancellation if the evidence of acquired distinctiveness fails to meet the requisite territorial and quantitative standards.

More recently, in January 2023, a United States federal jury ruled against Adidas in its trademark dispute with designer Thom Browne over the latter's use of a four-stripe design on luxury tailored clothing, finding no likelihood of confusion between the marks in their distinct market contexts [92]. This outcome further illustrates that the scope of protection for pattern marks tends to be market-specific and narrower than brand owners may

[89]Shoe Branding Europe BVBA v Adidas AG, Case C-396/15 P (CJEU, February 17, 2016).
[90]Ibid, para 26.
[91]EUIPO Cancellation Division, Decision of 19 June 2019 in Cancellation No 14448 C.
[92]'Thom Browne Beats out Adidas in Stripe-Centric Trademark Battle', The Fashion Law (January 12, 2023); see also adidas America, Inc, et al, v Thom Browne, Inc, Case 1:21-cv-05615 (SDNY).

anticipate; protection achieved in one context does not translate automatically to other commercial environments.

The combined lesson of the Adidas litigation is awakening, pattern trademark protection is neither self-sustaining nor unlimited, it requires continuous documentation of consumer recognition, is sensitive to territorial gaps in evidence, and may prove insufficient against competitors operating in different market segments.

2.3.4. Bottega Veneta Intrecciato: exclusive use as a path to trademark protection

Bottega Veneta's "intrecciato" weave, the distinctive diagonal woven leather that has come to define the brand's visual identity, provides the counterpoint to the Damier invalidation: a pattern that successfully achieved trademark protection in multiple jurisdictions, including the European Union, primarily on the basis of acquired distinctiveness [93].

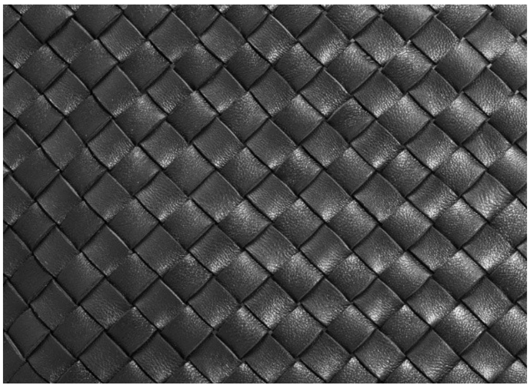

Figure 4
The Bottega Veneta intrecciato pattern (Source: EUIPO Database EUTM No 006632905)

The intrecciato case illustrates that the path to pattern trademark registration, while demanding, is navigable. Bottega Veneta's strategy combined three elements: decades of consistent and exclusive application of the pattern across its entire product range, substantial advertising investment that explicitly positioned the weave as a brand signature rather than a decorative option, and careful documentation of consumer recognition over time, the precisely assembled dossier that the EUIPO and national offices require as evidence of acquired distinctiveness. None of these elements individually would have sufficed; it was their combination and the sustained temporal commitment they represent that ultimately established the intrecciato as a protectable trademark.

The evidentiary model established by the intrecciato registration is helpful for understanding Dior's strategy with the Cannage pattern. Both marks share structural similarities: they are textile-inspired geometric motifs, applied consistently across diverse product categories, maintained over decades of exclusive use, and invested with brand significance through deliberate commercial positioning. The intrecciato success demonstrates that these characteristics, when properly documented, can satisfy the EU's evidential requirements for acquired distinctiveness. Conversely, as commentators have

[93] See EUIPO Database, EUTM registrations for 'Bottega Veneta' including figurative marks representing the intrecciato pattern.

observed, the trademark protection achieved creates its own constraint: Bottega Veneta must continue to use the pattern consistently to maintain protection, potentially limiting the creative freedom to evolve its core visual language [94].

Moreover, the protection of the intrecciato has not been uncontested. In Bottega Veneta v Franco Martini S.r.l., the Court of Appeal of Florence held that secondary meaning may strengthen a weak mark's capacity for distinctiveness but cannot make up for an initial lack of distinctiveness when the sign cannot be distinguished from the product itself but rather coincides with it in the consumer's perception. The Court observed that while a company's commercial standing may give its products a certain market appeal, a common raw material and manufacturing technique cannot become a distinctive sign. This ruling, though specific to the Italian enforcement context, introduces a qualification to the intrecciato's protection that is relevant for the broader analysis: even a pattern with documented acquired distinctiveness may face challenges when courts consider the sign to be inseparable from the product's physical characteristics rather than functioning as an independent indicator of origin [95].

This tension between legal protection and design evolution is one that luxury houses seeking pattern mark registration must consciously accept.

2.3.5. Levi's Pocket Tab: consistent placement and distinctiveness

Levi Strauss & Co.'s pocket tab, a folded ribbon sewn with its ends captured in the seam of a rear patch pocket, represents one of the oldest and most durable examples of non-traditional trademark protection in apparel. Introduced in 1936 and formally registered in 1949, the tab initially was created for a simple identification purpose, allowing consumers to recognise Levi's jeans at a glance on retail shelves. Over decades of consistent exclusive use, it accumulated the consumer recognition necessary for trademark registration and has since been vigorously enforced against imitators.

Figure 5
The Levi's tab device as registered (Source: EUIPO Database EUTM No 000065318 and 002292373)

Three principles emerge from this case that are relevant beyond position marks. First, even a simple and formally undistinctive element can achieve trademark protection when

[94] Calboli (n 82) 304-307.

[95] Court of Appeal of Florence, Case 1114/2016, Bottega Veneta v Franco Martini S.r.l. (2016). This ruling should be read alongside the Hermès/Buti litigation examined in Section 2.3.6, where the Italian Supreme Court subsequently clarified the allocation of the burden of proof for registered shape marks in decision no. 30455 of 17 October 2022.

applied with absolute consistency to a fixed location across an entire product range; it is the exclusivity and consistency of use, not the visual sophistication of the element itself, that teaches consumers to associate it with a particular source. Second, the mark's success was the direct result of a deliberate strategy, maintained over decades, of deploying the tab as a brand identifier rather than as a variable design detail. Third, position marks may encounter fewer initial distinctiveness objections than pattern marks because the very unexpectedness of a design element in a specific location provides an additional differentiating dimension beyond the element's intrinsic visual characteristics.

The Levi's case reinforces a principle that runs through the entire case law reviewed in this section: acquired distinctiveness is not a passive by-product of commercial success but an active legal status that must be earned through a deliberate and documented process of exclusive, consistent, and market-wide use.

2.3.6. Hermès Birkin and Kelly: the burden of proof in Italy

Three-dimensional shape marks are a very demanding category of non-traditional trademark protection, requiring courts to distinguish between product shapes that function as genuine source indicators and those that only constitute attractive product designs appreciated for their aesthetic qualities rather than their brand-identifying function. The Hermès litigation over its Birkin and Kelly bag shapes provides a very valuable example of this challenge in the European luxury sector.

Figure 6
The Hermès Birkin (left) and Kelly (right) three-dimensional shape marks as registered (Source: EUIPO Database EUTM No 004467247 and 002083327)

Hermès successfully registered both the Kelly bag, introduced in 1935 and renamed in honour of Grace Kelly in 1977, and the Birkin bag, created in 1984 for actress Jane Birkin, as EU three-dimensional trademarks, relying on decades of exclusive use and substantial evidence of consumer recognition. When Hermès enforced these registrations against Italian competitor Buti, which was marketing unauthorised copies of both bags, Buti counterclaimed for invalidity, arguing that the shapes lacked distinctive character because they reproduced, in the Court's words, "the canonical parameters of bags ordinarily found on the market" [96]. Both the Florence Intellectual Property Court, in decision no. 3442/16, and the Florence Court of Appeal, in decision no. 540/18, upheld the invalidity counterclaim, denying protection on the grounds that neither original nor acquired distinctiveness had been established. Notably, both courts placed the evidentiary burden

[96] Corte d'appello di Firenze, sentenza n. 540/2018, reasoning on distinctiveness assessment

on Hermès to affirmatively prove its marks' distinctive character, a distribution of the burden that would prove fatal to the case at that stage.

The Italian Supreme Court, in decision no. 30455 of 17 October 2022, annulled the Court of Appeal's decision and remanded the case to a different panel of the Florence Court of Appeal for a fresh assessment. The Supreme Court's reasoning is significant on two distinct grounds; first, it corrected the lower courts' allocation of the burden of proof: registered trademarks enjoy a rebuttable presumption of distinctiveness under Article 121 of the Italian Industrial Property Code, and it is therefore for the party challenging the mark's validity, in this case Buti, to demonstrate the absence of distinctive character, not for the trademark owner to prove its presence affirmatively. The lower courts had inverted this principle without adequate justification, a procedural error that the Supreme Court characterised as a misapplication of the applicable rules. Second, the Supreme Court found the lower courts' dismissal of Hermès's acquired distinctiveness evidence to be "apodictic", meaning conclusory without adequate reasoning, criticising in particular the failure to conduct a proper, separate examination of whether the marks had acquired secondary meaning through advertising investment and commercial use, and the treatment of consumer surveys as the only admissible evidence of acquired distinctiveness. The Court clarified that demographic surveys are one tool among many, that judges may also commission expert technical assessments ex officio, and that documentary evidence such as advertising materials and media coverage must be properly evaluated rather than disregarded [97].

The Supreme Court's ruling does not itself establish that the Birkin and Kelly shapes are valid trademarks, but it recalibrates the legal framework within which that determination will be made in two ways that could favour Hermès. The presumption of validity shifts the initial evidential burden away from the trademark owner, and the requirement of reasoned, comprehensive assessment of all available evidence means that the body of commercial and media documentation that Hermès has accumulated over decades of brand-building cannot be summarily discarded.

The Hermès/Buti case carries three lessons relevant to the broader analysis of shape and pattern trademark protection. First, the allocation of the burden of proof is not a procedural technicality but a substantive determinant of outcome: a framework that requires challengers to prove invalidity is structurally more favourable to established trademark owners than one that requires owners to affirmatively prove distinctiveness, even where the underlying legal standard is nominally identical. Second, the range of admissible evidence for acquired distinctiveness is broader than consumer surveys alone, advertising expenditure, media presence, and the documented history of exclusive commercial use, all contribute to the assessment, a point directly relevant to Dior's evidentiary strategy for the Cannage in both the EU and Swiss proceedings. Third, and most fundamentally, the case illustrates that registration does not guarantee enforcement even for globally iconic product shapes: the gap between legal protection on paper and its practical vindication in court can be wide, and bridging it requires not only the right evidence but the right procedural framework for its evaluation.

[97] Corte di Cassazione, Sez. I civ., 17 October 2022, n. 30455, published in *Rivista di diritto industriale (2023)*

2.3.7. Synthesis: common principles and persistent uncertainties

The preceding case analysis reveals a series of principles that reoccur across different categories of non-traditional marks and different European jurisdictions, establishing a coherent jurisprudential framework within which the Dior Cannage case must be situated.

The first and most fundamental principle is that inherent distinctiveness is extremely difficult to establish for non-traditional marks in the fashion sector. Whether the mark consists of a colour, a geometric pattern, a positional element, or a three-dimensional shape, courts and trademark offices begin from the presumption that consumers perceive design elements as decorative or functional rather than as indicators of commercial origin. Successful registrations almost invariably depend on acquired distinctiveness through extensive commercial use; the question is not whether the element is distinctive in the abstract but whether consumers have, over time, learned to rely on it as a badge of source.

The second principle concerns the territorial scope of the evidentiary burden. The Damier invalidation and the initial Adidas cancellation demonstrate that even decades of globally recognised use may prove insufficient when evidence fails to cover all relevant member states. For EU-wide protection, the CJEU's standard requires proof of consumer recognition across the entire territory, a requirement that imposes substantial costs and may disadvantage brands whose commercial presence is uneven across member states. As the comparative analysis in Chapter 1 established, and as the Cannage case examined in Chapter 3 will concretely demonstrate, Switzerland applies these same territorial requirements with even greater rigour, suggesting that identical doctrinal standards can produce divergent outcomes depending on how they are interpreted and what evidentiary threshold is applied in practice.

The third principle is that registration does not guarantee permanence. Pattern and shape marks remain vulnerable to invalidity challenges throughout their lifetime, as the Adidas cancellation proceedings demonstrate. Brands must therefore maintain ongoing and systematic documentation of consumer recognition and exclusive use, treating the evidential basis for their registrations as a live asset requiring continuous investment rather than a one-time achievement.

Fourth, the functionality and substantial-value exclusions, while primarily targeting shape marks, create residual doctrinal uncertainty for any non-traditional mark that serves significant aesthetic functions. The Louboutin decision provided reassurance that marks applied to products are not automatically caught by the shape exclusions, but the boundaries of the expanded functionality doctrine, which now covers "other product characteristics" beyond shape under the 2015 reformed legislation, remain to be fully tested by the Courts.

Fifth, the scope of protection for non-traditional marks tends to be narrower than for traditional word marks, both in terms of the goods covered and the degree of similarity required for a finding of infringement. As the Adidas v. Thom Browne verdict illustrates, even a well-established pattern mark may not prevent competitors from using similar designs in different market contexts. For luxury brands, whose design elements are by nature influential and widely imitated, this limitation means that trademark registration provides meaningful but not comprehensive protection against the full range of competitive imitation they face.

Sixth, the case law reveals a persistent and unresolved tension regarding the appropriate standard for assessing whether consumers treat a non-traditional mark as a source indicator. As examined in Section 1.6.5, the distinction between the "mere association" test and the "reliance" test produces different outcomes: a pattern that consumers associate with a luxury brand may nonetheless fail the reliance standard if there is no evidence that consumers treat the pattern itself, independently of accompanying word marks or logos, as a badge of origin. This is precisely the question that divides the EU and Swiss assessments examined in Chapter 3.

Seventh, and underlying the territorial dimension of the second principle, there is the architecture of international trademark registration through the Madrid System that is structurally designed to permit divergent outcomes for identical signs across jurisdictions. A single international application designating multiple countries is examined independently by each designated office according to its own national law, with no obligation of mutual recognition. The Cannage case examined in the following chapter is the paradigmatic illustration of this mechanism: the same international registration designating both the European Union and Switzerland produced opposite outcomes for the same product categories. This is not a doctrinal accident but a foreseeable consequence of a system that combines centralised filing with decentralised examination.

These seven principles establish the analytical framework for understanding the divergent outcomes in the Dior Cannage case. The pattern's successful registration in the EU and its rejection in Switzerland do not reflect arbitrary inconsistency but rather different weightings of the competing interests that these seven principles embody: the protection of legitimate brand investment on one side, and the preservation of competitive freedom in design on the other. How each jurisdiction struck that balance, and what the resulting divergence reveals about the capacity of current legal standards to accommodate heritage identifiers in the luxury fashion sector, is the subject of Chapter 3.

2.4. Critical Perspectives: The limits and risks of pattern trademark protection

The preceding sections have demonstrated both the strategic attractiveness of non-traditional trademark protection for luxury fashion brands and the demanding doctrinal standards that govern its availability. This section engages with the competing interests that any system of pattern trademark protection must weigh, interests that are not only secondary objections but active considerations in the reasoning of courts and trademark offices, including those that adjudicated the cases examined in Section 2.3.

Four interconnected concerns have shaped judicial and scholarly scepticism toward extending trademark protection to geometric patterns and aesthetic elements. While each has its own doctrinal expression, they share a common root: the tension between recognising that design elements can function as source indicators deserving of legal protection, and acknowledging that trademark law was not designed to grant perpetual monopolies over the aesthetic vocabulary of an industry.

The competition and design freedom concern is the most fundamental. Trademark protection's indefinite duration distinguishes it from patents and registered designs, which deliberately expire to return protected innovations to the public domain. When this perpetual exclusivity extends to geometric patterns, it permanently removes design elements from the shared vocabulary available to the industry [98]. The CJEU has repeatedly emphasised the importance of keeping basic signs freely available for other traders, yet the doctrine of acquired distinctiveness structurally undermines this principle: any design element can become protectable through sufficient marketing investment, meaning that the "need to keep free" offers only contingent protection for the design commons. This concern surfaced directly in the Louis Vuitton Damier decision, where the General Court's invalidation of the checkerboard pattern reflected, at least in part, a reluctance to grant one company permanent exclusivity over a basic geometric arrangement that competitors might legitimately wish to use [99]. The case of Missoni's zigzag, introduced in 1966 and continuously associated with the brand for nearly six decades, further demonstrates this tension. Despite being one of the most recognisable signatures in Italian fashion, it is an extremely basic geometric configuration, a pattern of alternating diagonal lines that predates Missoni by centuries in textile tradition. This illustrates the structural difficulty that the competition concern addresses: some geometric arrangements may be too fundamental to the shared design vocabulary to justify removal from the public domain, regardless of how strongly consumers associate them with a particular brand.

This concern intensifies when considered alongside what may be termed the "standardisation effect". As the case law in Section 2.3 demonstrated, the protection of non-traditional marks creates a constraint that affect the very brands that obtain it: trademark owners must continue using the protected pattern consistently to maintain protection, potentially limiting their creative freedom to evolve their visual language [100]. The consequence is that IP law, which is designed to promote innovation, may instead incentivise the repetitive use of established design elements. As the analysis of Bottega Veneta's intrecciato in Section 2.3.4 illustrated, the brand's trademark strategy requires ongoing consistent use of the pattern across all product categories, a commercial necessity that may constrain rather than encourage design evolution [101].

The evidentiary inequality concern follows directly from the demanding standards examined in Section 1.6.5. The cost of assembling a comprehensive acquired distinctiveness dossier, encompassing consumer surveys across multiple member states, sales data over extended periods, and advertising expenditure records, effectively reserves the pattern trademark route to well-resourced luxury houses. The fundamental principle

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[98] Irene Calboli, 'Hands Off "My" Colors, Patterns, and Shapes! How Non-traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation' in Irene Calboli and Martin Senftleben (eds), *The Protection of Non-Traditional Trade Marks* (OUP 2018) 296–307

[99] Case T-359/12, *Louis Vuitton Malletier v OHIM* [2015] ECLI:EU: T:2015:215, paras 30–32

[100] See the discussion in *Fashion and Intellectual Property* (CUP 2024/2026) ch 5, section 5.4.4, observing that granting excessive protection to NTTMs can result in limiting investments in product innovation and quality.

[101] ibid, noting that Bottega Veneta has introduced products with the intrecciato weave in different sizes, but this innovation arguably does not depart significantly from the strategy of using the same iconic pattern on all products.

of trademark law, that protection follows from distinctiveness in consumer perception rather than from the applicant's market power, is compromised when only the wealthiest applicants can afford to demonstrate that required distinctiveness. For the Cannage case specifically, this observation is particularly significant: Dior possessed exactly the resources and institutional infrastructure necessary to assemble a compelling EU dossier, which may partially explain its success there; but those same resources did not suffice in Switzerland, where the evidentiary threshold operated differently.

The tension with time-limited IP regimes is perhaps the most doctrinally significant critique: design rights and copyright deliberately expire to enable the eventual entry of protected works into the public domain. Non-traditional trademark protection potentially undermines these limits: a pattern whose design protection has long expired can continue to receive trademark protection indefinitely, provided it maintains distinctiveness [102]. The Louis Vuitton monogram exemplifies this concern: introduced in 1896, any design right protection for the original configuration would have expired over a century ago, yet the monogram continues to receive trademark protection today, effectively granting perpetual exclusivity over an arrangement that has existed for over 130 years. This raises a fundamental question: whether a geometric motif that has been in use for more than a century should remain the exclusive property of a single brand, or whether, once design protection has expired, the pattern should return to the public domain. Different jurisdictions answer this question differently.

These four concerns do not lead to the conclusion that non-traditional trademark protection is unjustified. What they establish is a set of countervailing interests, competitive freedom, design diversity, equitable access to IP protection, and temporal limits on aesthetic monopolies, that courts must weigh against the legitimate brand protection goals of the applicant. The divergent outcomes in the Dior Cannage case reflect, at least in part, different weightings of precisely these competing concerns. The EU framework, more receptive to evidence of acquired distinctiveness, implicitly prioritises the protection of legitimate brand investment. The Swiss framework, more sceptical of such evidence and more attentive to preserving design freedom, implicitly prioritises competitive access to geometric forms.

2.5. Christian Dior: IP strategy and the role of the Cannage pattern

The critiques examined in Section 2.4, the competition concern, the standardisation effect, the evidentiary inequality, and the tension with time-limited IP regimes, are not abstract theoretical objections. They take concrete form in the history of Christian Dior's efforts to secure trademark protection for its Cannage pattern: a geometric motif designed in 1947, whose design rights have long expired, and whose registration as a trademark therefore exemplifies precisely the use of trademark law as a route to ongoing exclusivity that critics of non-traditional mark protection have identified as problematic. At the same time, the Dior case equally illustrates the legitimate commercial interests that motivate such protection: the investment of decades of brand-building in a design element that consumers have come to associate with a specific source. Understanding Dior's

[102] Martin Senftleben, 'Public Domain Preservation in EU Trademark Law – A Model for Other Regions?' (2013) 103 Trademark Reporter 775, 812–813; Irene Calboli, 'Overlapping Rights: The Negative Effects of Trademarking Creative Works' in Susy Frankel and Daniel Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (CUP 2014) 52

intellectual property strategy and the Cannage pattern's place within it is essential context for the comparative legal analysis that follows in Chapter 3.

Christian Dior maintains one of the most extensive and strategically diversified trademark portfolios in the global luxury sector, encompassing word marks, figurative marks, and an increasing number of non-traditional registrations [103]. At its foundation we find the denominative marks, "DIOR", "CHRISTIAN DIOR", "LADY DIOR", "MISS DIOR", "J'ADORE", which protect the brand's core commercial identifiers across numerous classes of goods and services. These are complemented by figurative marks including the interlocked CD monogram and the bee motif, a recurring symbol with roots in Christian Dior's original collections and the gardens of his childhood home in Granville. The strategic logic underlying this architecture is not merely defensive accumulation: it reflects the deliberate construction of overlapping layers of protection that together make it extremely difficult for competitors to evoke the Dior aesthetic without infringing at least one registered right.

Non-traditional marks occupy an increasingly important position within this architecture precisely because they protect the visual signatures that sophisticated consumers use to identify the brand in the absence of visible logomarks, a function that has grown in commercial importance as quiet luxury has replaced visible branding as the dominant trend of luxury signalling. The Cannage pattern [104] and the J'Adore perfume bottle shape represent Dior's principal non-traditional registrations. However, even brands like Dior that have remarkable resources, cannot assume that a non-traditional registration will be granted as a matter of course. In September 2022, the EUIPO's Second Board of Appeal upheld a partial refusal of Dior's application to register the Saddle Bag shape as a three-dimensional trademark, finding that the configuration lacked sufficient distinctive character for several classes of goods and services. The decision is a useful reminder that the doctrinal obstacles examined in the preceding sections of this chapter, the difficulty of establishing inherent distinctiveness for design elements, the demanding evidentiary standards for acquired distinctiveness, the tension between aesthetic value and source-indicating function, apply with full force even to applicants who possess substantial resources and a sophisticated trademark strategy. Each application, regardless of the applicant's profile, must overcome the same doctrinal thresholds, and the outcomes can vary significantly depending on the product context and the jurisdiction in which protection is sought.

The Cannage pattern derives its name from the French word for caning, the woven cane or rattan traditionally used in chair seats. Its origin is from one of the most celebrated moments in twentieth-century fashion history: the chairs that Christian Dior arranged for the audience at his inaugural collection on 12 February 1947, the legendary debut of the New Look at 30 Avenue Montaigne in Paris. Those chairs were Napoleon III's and they

[103] Christian Dior Couture SA, Document de Référence 2023, 18–22; see also EUIPO Database, EUTM No 000391615 and related Dior pattern registrations.
[104] EUIPO Database, EUTM No 000391615 (Dior Cannage pattern registration, Classes 18, 24, 25, filed 15 November 1996, registered 14 October 1998). See also WIPO International Registration IR 580'546 (same pattern, Classes 18, 24, 25, registered 20 December 1991, holder Christian Dior Couture) and IR 1'064'983 (same pattern, Classes 3, 20, 21, 35, 44, registered 16 September 2010, holder Parfums Christian Dior, protection refused in Switzerland by decision B-2655/2013 of 17 February 2014)

featured the distinctive woven diagonal grid that would become the Cannage motif [105]. The quilted diamond pattern created by intersecting diagonal lines, inspired by the caned seat surface, was incorporated into Dior's work as a recurring visual reference, initially as a subtle design element rather than a primary brand identifier. For nearly five decades, the Cannage existed within the brand's aesthetic language without having been elevated to the status of a protected commercial sign.

The transformation of the Cannage from internal design reference to public brand signature occurred with the introduction of the Lady Dior bag in 1995. The bag, originally named "Chouchou", acquired its lasting identity when Bernadette Chirac, then France's First Lady, presented one to Diana, Princess of Wales during an official Paris visit, and the Princess subsequently appeared carrying it repeatedly in public photographs [106]. The bag was later renamed "Lady Dior" in her honour; the bag featured the Cannage pattern prominently on its quilted leather surface and the dangling D.I.O.R. letter charms that completed the design. The combination proved immediately iconic: the Lady Dior became one of the most recognisable luxury handbags of the late twentieth century, and, in doing so, it elevated the Cannage pattern from a decorative motif to a visual identifier that consumers came to associate directly with the Dior brand.

Figure 7
The Dior Cannage pattern as registered in the European Union (Source: EUIPO Database, EUTM No 000391615)

Today the Cannage pattern appears across the entire Dior's product range: bags, shoes, small leather goods, ready-to-wear, jewellery, accessories, and home décor. This consistent, cross-category use is not accidental: it is a deliberate strategy that serves the dual purpose of maintaining and expanding consumer recognition of the pattern as a Dior identifier while simultaneously building the evidentiary record of exclusive commercial use that trademark law requires as proof of acquired distinctiveness. The Cannage's particular commercial value lies in its dual character: simultaneously distinctive enough to be recognised by consumers familiar with the brand, and subtle enough to align with the preferences of a clientele that favours design codes over visible logos.

Yet it is precisely this dual character that creates the legal challenge at the heart of this thesis. The Cannage is, from one perspective, a heritage identifier [107] whose commercial

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[105] Marie-France Pochna, *Christian Dior: The Man Who Made the World Look New* (Arcade Publishing 1996) 112–115. The inaugural collection of 12 February 1947 introduced the 'Corolle' and 'En Huit' lines, later dubbed the 'New Look' by Carmel Snow of Harper's Bazaar

[106] Pochna (n 105) 115. The bag was renamed 'Lady Dior' in 1996 in honour of the Princess. Diana's tragic death in August 1997 further consolidated the association between the name and the design.

[107] The concept of 'heritage identifier' is developed in Section 2.1 to distinguish enduring brand-identifying design elements from seasonal garment designs. The Cannage, with its nearly eight decades of continuous use, is the paradigmatic example of this category.

value depends on endurance and recognisability: nearly eight decades of continuous association with a single brand, consistent deployment across product categories, and substantial investment in advertising and market presence. From another perspective, it is a geometric arrangement, a configuration that has its roots in centuries of decorative tradition in textile weaving, furniture design, and architectural ornamentation, and that competitors might legitimately wish to employ in their own designs. From a third perspective, it is an aesthetic feature that undeniably enhances the visual appeal of the products on which it is included, raising the question whether its primary function is to indicate commercial origin or to make products more attractive.

These three perspectives correspond directly to the three doctrinal tensions that this chapter has examined: the tension between source indication and decoration that the distinctiveness requirement aims to resolve, the tension between protecting brand investment and preserving competitive freedom in design that both the functionality doctrine and the "need to keep free" principle address, and the tension between perpetual trademark protection and the deliberately time-limited exclusivity that design rights and copyright provide. The Cannage pattern does not merely illustrate these tensions, it has been the subject of formal legal proceedings in which different jurisdictions, applying theoretically similar standards, reached opposite conclusions about whether these tensions should be resolved in favour of protection or refusal.

This chapter has developed a single argument: that non-traditional trademark protection in luxury fashion can be understood only through the interaction between commercial strategy and legal doctrine. The economic analysis developed the distinction between seasonal garment designs and heritage identifiers, demonstrating that the piracy paradox does not apply to enduring brand elements whose copying reduces distinctiveness without generating any compensating innovation cycle. The case law review presented identified seven recurring principles and the critical analysis established the competing interests that different jurisdictions balance differently and the Cannage pattern embodies these tensions in concrete form.

CHAPTER III

THE CANNAGE PATTERN: COMPARATIVE LEGAL ANALYSIS

SUMMARY: 3.1. Framing the comparative analysis – 3.2. The EU assessment: international registration IR 1'064'983 – 3.3. The Swiss rejection: Case B-2655/2013 – 3.4. Comparative analysis: explaining the divergence – 3.5. Implications for pattern trademark protection in the luxury fashion sector

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Having established in the previous chapters the legal framework governing non-traditional trademarks and the economic, strategic, and jurisprudential context within which pattern marks operate, this chapter turns to the central case study of the thesis: the Dior Cannage pattern and the divergent outcomes its trademark applications have produced across jurisdictions.

The puzzle that the chapter addresses can be stated in simple terms. The same international application, IR 1'064'983, filed by Parfums Christian Dior in September 2010 to extend the Cannage pattern's trademark protection beyond the fashion core, was examined by the OHIM in the European Union and by the Swiss Federal Institute of Intellectual Property under their respective national laws. Both authorities applied the same fundamental question: whether the Cannage departs sufficiently from what is common and expected in the relevant product segment to function as an indicator of commercial origin. Both reached the same conclusion for furniture (the pattern is too common) and for services (the pattern can function as a service mark). Yet for cosmetics and cosmetic accessories, the very product categories where the divergence is analytically most interesting, they reached opposite conclusions.

The chapter explains this divergence and draws out its broader implications across five sections. Section 3.1 frames the comparative analysis by mapping the three Cannage trademark registrations and identifying IR 1'064'983 as the centre of the divergence. Section 3.2 examines the EU assessment of that application and the partial refusal issued by the OHIM. Section 3.3 reconstructs the Swiss Federal Administrative Court's decision in Case B-2655/2013 in its essential elements. Section 3.4 brings the two assessments together and identifies three dimensions of divergence: substantive, methodological, and strategic, that combine to produce the contrasting outcomes. Section 3.5 moves from explanation to implication, examining what the case reveals about the doctrinal treatment of pattern marks rooted in historical traditions, what it means for the strategic choices of luxury fashion houses, and how the empirical gap between legal assessment and consumer perception frames the research presented in the following chapter.

3.1. Framing the comparative analysis

The legal and doctrinal framework established in Chapters 1 and 2, and the principles that emerged from the case law review, find their most concrete test in the registration history of the Dior Cannage pattern. Before analysing the divergent outcomes that have produced the comparative puzzle at the centre of this chapter, it is necessary to map the chronological sequence of the Cannage trademark filings and to identify precisely where the EU and Swiss assessments diverge.

The Cannage pattern is protected through three distinct trademark registrations, filed by different Dior entities and covering different product categories. The first and oldest is WIPO International Registration IR 580'546, filed by Christian Dior Couture SA through the Madrid System on 20 December 1991, covering the fashion core categories: Class 18 (leather goods, bags, luggage), Class 24 (textiles), and Class 25 (clothing, footwear, headgear). It designates over thirty countries, including both Switzerland and Italy, and protection has been granted in both jurisdictions for the designated classes.

The second registration is EUTM No 000391615, filed directly at the EUIPO by Christian Dior on 15 November 1996 for the same fashion core categories but with EU-wide effect. The EUIPO accepted the pattern as inherently distinctive without requiring proof of acquired distinctiveness, a significant finding because, as the case law analysis in Chapter 2 demonstrated, geometric patterns almost never achieve inherent distinctiveness. The examination took place in 1996–1998, before the CJEU developed the more restrictive approach to non-traditional marks, and whether the same application would succeed today is an open question.

The third registration, and the one at the centre of this chapter's analysis, is WIPO International Registration IR 1'064'983, filed through the Madrid System by Parfums Christian Dior on 16 September 2010. This registration represents the strategic extension of the Cannage's trademark protection beyond the fashion core into new product categories: Class 3 (cosmetics, perfumes, skincare), Class 20 (furniture, mirrors, promotional displays), Class 21 (cosmetic accessories), Class 35 (retail services), and Class 44 (beauty and hygiene services). The registration designates numerous countries, including the European Union and Switzerland, and it is this filing that produced the divergent outcomes at the centre of this chapter.

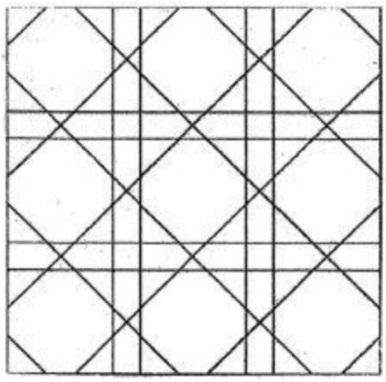

Figure 8
The Cannage pattern as deposited in WIPO IR 1'064'983 (Source: WIPO Madrid Monitor)

The architecture of the Madrid System is essential for understanding this divergence. A single international application designating multiple countries is examined independently by each designated office according to its own national law, with no obligation of mutual recognition. The two earlier registrations covering the fashion core (IR 580'546 and EUTM 000391615) do not present comparative difficulties: in their respective scopes, the Cannage has been accepted as a registered trademark across jurisdictions without significant controversy. The doctrinally interesting case is IR 1'064'983, where the same international application was examined by the OHIM in the European Union and by the Swiss Federal Institute of Intellectual Property under their respective national laws, producing significantly different outcomes for the same goods.

The meaningful divergence between the two jurisdictions concerns cosmetics in Class 3 and cosmetic accessories in Class 21. For these product categories, the EU accepted the Cannage as distinctive while Switzerland rejected it, even though both jurisdictions applied the same fundamental legal question: whether the pattern departs sufficiently from what is common and expected in the relevant product segment to function as an indicator of commercial origin. This convergence on the underlying question, combined with divergence in the outcome, is what makes the case suitable for comparative analysis.

3.2. The EU assessment: International registration IR 1'064'983

The EU assessment of the Cannage for non-fashion product categories is documented in the OHIM's examination of international registration IR 1'064'983. Unlike the Swiss decision examined in the following section, the EU outcome was not the result of a judicial proceeding but of an administrative examination, with the OHIM issuing a partial provisional refusal that was subsequently confirmed without contestation by the applicant.

On 1 March 2011, the OHIM issued a partial provisional refusal under Article 7(1)(b) of the Community Trade Mark Regulation [108], finding that the pattern lacked distinctive character for certain goods. The OHIM described the mark as a motif of horizontal, vertical, and oblique lines forming squares, and identified the products for which the objection applied: the entire Class 20 (furniture, mirrors, promotional displays, wooden signs, plastic signs) and part of Class 21 (toilet cases and powder compacts).

The reasoning of the OHIM refusal is important for the comparative analysis. The OHIM began by establishing the relevant public: average consumers of everyday consumer goods, normally informed and reasonably attentive and careful. The OHIM then noted that the level of attention of the average consumer may vary depending on the product category, citing the CJEU's ruling in Lloyd Schuhfabrik Meyer [109]. Applied to the goods in question, the OHIM concluded that neither the average consumer nor the specialised professional public would show a high level of attention to the graphic representation of the products, because consumers generally do not identify the origin of products from a simple representation [110], particularly when the representation consists of a pattern of lines forming squares that could serve to decorate the goods.

The OHIM then assessed the overall impression produced by the pattern and concluded that it was nothing more than a combination of presentation elements typical of the packaging of the products in question. The pattern did not differentiate itself substantially from the basic forms commonly used in commerce for those products and appeared simply as a variant of standard packaging designs [111]. The mark therefore could not allow the relevant public to distinguish immediately and with certainty the applicant's products from those of other commercial origins.

Crucially, however, the OHIM raised no objection to the registration for Class 3, for part of Class 21 (combs, sponges, and brushes), and for the service classes 35 and 44. For

[108] OHIM, ''Notification de refus provisoire partiel — International Registration No 1'064'983 (Cannage)' (1 March 2011)
[109] Case C-342/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [1999] ECR I-3819, para 26
[110] OHIM, Notification de refus provisoire partiel (n 108) 2. See also General Court, Joined Cases T-324/01 and T-110/02, *Axions and Belce/OHIM* [2003] ECR II-1897, para-29
[111] OHIM, Notification de refus provisoire partiel (n 108) 2–3

these goods and services, the OHIM implicitly accepted that the Cannage pattern possessed sufficient distinctive character. The distinction drawn by the OHIM is significant: the same pattern was considered too common and decorative for furniture, mirrors, and toilet cases, but sufficiently distinctive for cosmetics and certain cosmetic accessories. This suggests that the OHIM considered geometric grid patterns to be more common as surface decoration on furniture and display items than on cosmetic products, where the pattern might appear more unusual and therefore more likely to be perceived as an indicator of origin.

Following the completion of the examination procedures, the protection was confirmed on 20 December 2011, with partial refusal maintained for Class 20 and for toilet cases and powder compacts in Class 21. Notably, Dior did not invoke acquired distinctiveness through use to overcome the partial refusal, a strategic choice that would also characterise the parallel Swiss proceedings.

3.3. The Swiss rejection: Case B-2655/2013

The Swiss Federal Administrative Court's decision of 17 February 2014 in Case B-2655/2013 provides the most detailed judicial analysis of the Cannage pattern's distinctive character available in any jurisdiction. Unlike the OHIM's relatively brief administrative refusal examined in Section 3.2, the Swiss decision runs to eighteen pages and examines in detail the legal framework for pattern marks, the relevant consumer public, the historical origins of the Cannage motif, and its distinctiveness in relation to each product category.

3.3.1. Procedural history and the absence of acquired distinctiveness

Parfums Christian Dior filed the international registration IR 1'064'983 on 16 September 2010, designating Switzerland among other countries for the protection of the Cannage pattern in Classes 3, 20, 21, 35, and 44. The Swiss Federal Institute of Intellectual Property (IGE) notified Dior of a partial provisional refusal on 10 February 2012, granting protection only for the services in Classes 35 and 44 and refusing it for the goods in Classes 3, 20, and 21, with the exception of essential oils for personal use (Class 3), wooden and plastic signs (Class 20), and sponges (Class 21). The IGE concluded that for the remaining goods, the pattern was commonplace and lacked distinctive character and therefore belonged to the public domain.

Dior responded on 10 July 2012, arguing that the pattern was distinctive and possessed sufficient character to function as a source indicator for the goods in exam. In the alternative, Dior requested that chairs with woven seat surfaces be excluded from the goods list in Class 20. The IGE maintained its position and, following Dior's request for a formal decision, issued its final refusal on 8 April 2013 [112]. Dior later appealed to the Federal Administrative Court on 10 May 2013.

Two procedural features of the case deserve particular attention. First, the alternative request to exclude woven-seat chairs reveals that Dior was aware of the potential connection between the Cannage and the historical Viennese weaving tradition: the brand attempted to neutralise this connection at an early stage of the proceedings, suggesting that the legal team had identified the Wiener Geflecht as the principal evidentiary obstacle. Second, Dior did not invoke acquired distinctiveness through use in any phase

[112] Swiss Federal Administrative Court, Case B-2655/2013, *Parfums Christian Dior v Eidgenössisches Institut für Geistiges Eigentum* (17 February 2014), section F

of the Swiss proceedings. The Court explicitly observed at paragraph 5.5 that the question was whether the sign possessed distinctive character without having established market recognition [113]. This strategic choice meant that the entire Swiss assessment was conducted on the basis of the pattern's inherent characteristics alone, without considering whether decades of commercial use had taught consumers to associate the Cannage with the Dior brand.

3.3.2. The legal framework and the definition of the relevant public

The Federal Administrative Court applied a framework that aligns with the principles examined in Chapter 1 but is articulated through two elements of distinctively Swiss emphasis. The first is the requirement of memorability: the Court stated that a sign possesses the required distinctive character only if it makes such an impression on consumers that they can recognise the product of a particular undertaking within the range of available alternatives [114]. This formulation places considerable weight on memorability, a requirement that geometric patterns composed of basic shapes may struggle to meet; and also set a higher bar than the corresponding CJEU formulations, which focus primarily on whether the sign departs from industry norms.

The second is the structural presumption against non-conventional signs that coincide with the appearance of the goods. The Court observed that such signs are not necessarily perceived by consumers in the same way as word or figurative marks that are independent of the product's appearance. Without graphic or verbal elements, the average consumer generally does not draw conclusions about commercial origin from the form or decoration of a product alone [115]. This principle, which echoes the CJEU's reasoning in Linde, establishes a presumption against distinctiveness for surface patterns that the applicant must overcome.

Within this framework, the Court set out the decisive test for surface patterns: a sign belongs to the public domain when it does not deviate, either in its individual elements or in their combination, from what is expected and customary in the relevant product segment. The Court also noted that nostalgic design elements in retro style cannot be registered as trademarks even if they have temporarily fallen into obscurity [116].

The Court then turned to identifying the relevant public for each product class. For cosmetics in Class 3, the relevant public was defined to include both wholesale purchasers (cosmetic studios, drugstores, department stores, supermarkets) and end consumers, both men and women, since cosmetics are purchased not only for personal use but also as gifts [117]. For furniture in Class 20, the relevant public consisted of furniture retailers and end consumers, primarily adult individuals and legal entities.

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[113] Case B-2655/2013 (n 112) para 5.5: 'Ob dem Zeichen auch ohne die – vorliegend nicht geltend gemachte – Verkehrsdurchsetzung Unterscheidungskraft zukommt'.
[114] Case B-2655/2013 (n 112) para 3.3, citing BGE 134 III 547 (Freischwinger Panton); BGE 133 III 342 (Verpackungsbehälter [3D]); BGE 122 III 382 (Kamillosan)
[115] Case B-2655/2013 (n 112) para 3.5, citing BGE 134 III 403, 410, 412 (Wellenverpackung [3D]). This principle echoes the CJEU's reasoning in Cases C-53/01 to C-55/01, *Linde AG and Others* [2003] ECR I-3161, para-48
[116] Case B-2655/2013 (n 112) para 3.6, citing Eugen Marbach, in von Büren/David (eds), *Schweizerisches Immaterialgüter- und Wettbewerbsrecht*, vol III/1, Markenrecht (2nd edn, Helbing Lichtenhahn 2009) paras 325–327.
[117] Case B-2655/2013 (n 112) para 4.1–4.2

This broad definition of the relevant public, which does not distinguish between general consumers and luxury consumers, is a significant analytical choice. The Court did not consider whether consumers of luxury cosmetics or high-end furniture might exhibit a higher level of attention to design details or might be more likely to perceive patterns as brand identifiers in retail contexts where such patterns are commercially expected. By calibrating the assessment to the level of attention of the least sophisticated consumer in the market, the Court effectively raised the distinctiveness threshold: a pattern that may function as a clear source identifier for the regular luxury consumer can be perceived as mere decoration by the broader public. This methodological choice anticipates one of the principal explanatory factors for the EU/Swiss divergence.

3.3.3. The identification of the Cannage with the Wiener Geflecht

The Court's analysis of the pattern itself constitutes the most distinctive aspect of the Swiss decision and the point of sharpest contrast with the EU assessment. The Court identified the Cannage as a stylised representation of the Wiener Geflecht (Viennese cane), a weaving technique originally developed for the seat surfaces of the bentwood café chair No. 14 manufactured by the Thonet company in Vienna from 1859 onwards. The Court described the technical construction of the Viennese cane in detail: rattan strips of approximately 2.5 millimetres in width, stretched in four directions at 45-degree intervals and knotted in the vertical holes of the frame. The Court also explained the functional basis of this weaving technique: its high strength results from the uniform distribution of forces, which are absorbed not only by horizontal and vertical rows but also by two perpendicular diagonal rows.

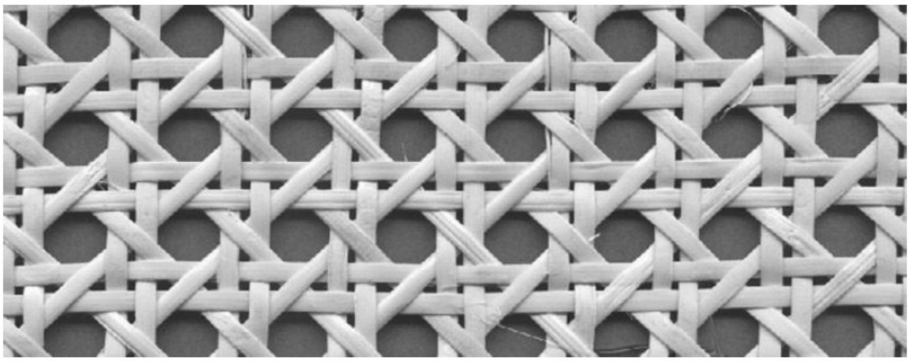

Figure 9
The Wiener Geflecht (Viennese cane) weaving technique as reproduced in the Swiss Federal Administrative Court's decision (Source: Case B-2655/2013)

The Court observed that the Viennese cane has high recognition in Switzerland as both a functional and decorative element of furniture attributing part of the popularity to the Thonet chair No. 14, described as one of the most widely produced pieces of furniture in the world [118]. The Court noted that today the Viennese cane is used for other purposes as well, including loudspeaker and radiator covers, and is sold as ready-made material on rolls, and is even offered as a structural form for surface decoration of various products.

The significance of this historical framing cannot be ignored. By identifying the Cannage with a specific design tradition that predates Dior by nearly a century, the Court placed the pattern firmly within the public domain of decorative vocabularies. This constitutes a

[118] Case B-2655/2013 (n 112) para 5.3–5.4. On the Thonet chair No. 14, see also Alexander von Vegesack, *Thonet: Classic Furniture in Bent Wood and Tubular Steel* (Hazar Publishing 1996)

choice that reshapes the distinctiveness assessment. A pattern presented as a specific geometric configuration may appear distinctive when evaluated in the abstract; the same pattern, presented as a variant of a weaving technique with over 150 years of continuous commercial use, is far more easily characterised as belonging to the design commons. The Court's "renaming" of the Cannage as a stylised Wiener Geflecht, operates as the principal mechanism through which the Swiss decision diverges from the EU assessment, which had evaluated the same pattern as a specific geometric configuration without reference to its historical origins.

3.3.4. The assessment by product class

The Court then assessed the distinctiveness of the Cannage for each product class separately. For cosmetics in Class 3, the Court rejected Dior's argument that none of the examples provided by the IGE showed a pattern identical to the Cannage. The Court clarified an important methodological principle: surface patterns do not belong to the public domain only when the exact same pattern has already been used on similar products. Rather, the originality of the deviations must be assessed in comparison with patterns that are customary in the relevant product segment. Applied to the cosmetics sector, the Court observed the existence of a great variety of designs, including printed packaging and products with relief-patterned surfaces. The majority of these were identified as variants of grid-like structures similar to those underlying the Cannage. The deviation of the Cannage from existing patterns in the cosmetics sector was therefore considered minor, and the pattern represented merely an ordinary combination of common features [119]. For cosmetic accessories in Class 21, the Court reached the same conclusion: a great variety of printed, relief, and quilted surface patterns with various grid variations are common in the sector, and the Cannage deviates only marginally from the existing range of forms [120].

For furniture in Class 20, the Court provided the most extensive analysis. The Viennese cane is widely used for chair seats, but also for tables, shelves, benches, and cabinets. The Court cited numerous online listings for furniture with Viennese cane as evidence of its prevalence, including both historical and modern pieces. The availability of Viennese cane as inexpensive material sold by the metre on rolls was cited as a further indication that it constitutes a common design element for furniture. The Court also noted that the structure of the Viennese cane is technically conditioned, as its diagonal weaving provides greater stability than comparable weaving techniques without diagonal elements. The Court concluded that for Class 20 goods, the use of the Cannage pattern is common, widespread, and often technically conditioned, and therefore lacks distinctive character [121].

Three analytical observations rise from this product-by-product assessment. First, the Court's "variant test", assessing originality through deviation from existing patterns rather than through identity with them, sets a higher analytical threshold than a purely identity-based comparison. This methodological choice systematically disadvantages stylised reproductions of pre-existing decorative traditions, since such reproductions are by definition variants. Second, the Court's reasoning for Class 20 introduces an additional element of functionality (technical stability through diagonal weaving) that reinforces the

[119] Case B-2655/2013 (n 112) para 5.5.1
[120] Case B-2655/2013 (n 112) para 5.5.2
[121] Case B-2655/2013 (n 112) para 5.5.3

conclusion of non-distinctiveness through a doctrinal logic separate from the Wiener Geflecht framing. Third, and most importantly for the comparative analysis, the Court's assessment of the cosmetics sector, finding grid-like patterns to be common across packaging, bottles, soaps, and make-up kits, directly contradicts the OHIM's implicit assessment that the Cannage was sufficiently distinctive for Class 3 goods. This contradiction is not a matter of conflicting legal standards but of conflicting empirical assessments of the same market.

3.3.5. The overall assessment and outcome

The Court provided its overall conclusion on the pattern. The deposited surface pattern shows two overlapping grids of different mesh sizes at an angle of 45 degrees, without further specification of execution, thickness, contour, or colour. On the basis of this minimal graphic representation, the Court characterised the pattern as a common configuration whose dominant character is ornamental and functional rather than source-indicating, and therefore unable to fulfil the function of a trademark for the goods at issue [122].

Two analytical observations follow from this conclusion. First, the Court's reasoning treats the Cannage's graphic abstraction as a weakness rather than a feature: the pattern's deliberate stylisation, which Dior had positioned as a brand-identifying simplification of the Wiener Geflecht, was reinterpreted by the Court as evidence of geometric simplicity. This illustrates a recurring difficulty for non-traditional marks based on stylised reproductions of pre-existing design elements: the very abstraction that the brand uses to distinguish its version from the original may be read by trademark authorities as a sign of simplicity rather than of creative departure. Second, the Court's emphasis on the "ornamental and functional character" of the pattern echoes the doctrinal tension examined in Section 1.6.4: trademark authorities tend to treat aesthetic and functional dimensions as mutually exclusive of source-indicating capacity, even though pattern marks in the luxury sector are specifically designed to combine all three functions in a single sign.

Dior advanced a further argument that warrants brief mention: that the IGE had violated the principle of equal treatment by refusing the Cannage for the contested goods while a 1997 decision by a court in Bern had found a nearly identical pattern to be sufficiently distinctive for handbags. The Court rejected this argument on three grounds: there is no right to equal treatment with oneself under Swiss law, so a party's own earlier registrations do not create binding precedent; the 1997 decision was sixteen years old and therefore did not reflect current market knowledge; and the 1997 decision concerned a different set of goods (Class 18, with no overlap with the Classes at issue) [123]. The rejection of this argument is of limited analytical importance, but it confirms a structural feature of the Swiss approach: prior registrations for the same sign in different product categories are treated as independent assessments confined to their specific commercial contexts, not as evidence of the sign's source-indicating capacity in the abstract.

The Court dismissed the appeal in its entirety, confirmed the IGE's refusal, and assessed costs of CHF 2,500 against Dior. The decision became final on 17 February 2014,

[122] Case B-2655/2013 (n 112) para 5.6. The court compared the Cannage with the checkerboard pattern examined in RKGE, decision of 15 October 2004, published in sic! 2005, 280 (Karomuster)
[123] Case B-2655/2013 (n 112) para 6.1–6.5, citing WIPO International Registration IR 580'546 (n 104)

establishing the Swiss treatment of the Cannage in non-fashion product categories that Section 3.4 now examines alongside the EU outcome.

3.4. Comparative analysis: explaining the divergence

The preceding sections have presented the EU and Swiss assessments of the same pattern for the same product categories. Both jurisdictions applied the same fundamental question: does the Cannage pattern depart sufficiently from what is common and expected in the relevant product segment to function as an indicator of commercial origin? Both reached the same conclusion for furniture (the pattern is too common) and for services (the pattern can function as a service mark). Yet for cosmetics and cosmetic accessories, they reached opposite conclusions. The comparative outcomes of IR 1’064’983 across the two jurisdictions are set out in Table 4.

PRODUCT CATEGORY	CLASS	EU OUTCOME	CH OUTCOME
Cosmetics (soap, perfumes, skincare, make-up)	3	Protection Granted	Protection Refused
Essential oils for personal use	3	Protection Granted	Protection Granted
Furniture, mirrors, promotional displays	20	Protection Refused	Protection Refused
Wooden signs, plastic signs	20	Protection Refused	Protection Granted
Combs, sponges, brushes	21	Protection Granted	Protection Refused (except sponges)
Toilet cases, powder compacts	21	Protection Refused	Protection Refused
Retail services (perfumery, beauty, care)	35	Protection Granted	Protection Granted
Beauty and hygiene services	44	Protection Granted	Protection Granted

Table 4
Comparative outcomes of IR 1’064’983 across EU and Swiss jurisdictions

This section identifies the factors that explain the divergence visible in Table 4. Rather than presenting these factors as a list of independent variables, this analysis will group them into three dimensions that operate together. First the substantive dimension, concerning how each jurisdiction framed the sign and the market against which it was assessed; second the methodological dimension, concerning the analytical choices that shaped the assessment including the definition of the relevant public and the temporal context of the examination; and third the strategic dimension concerning the procedural choices made by the trademark holder, in particular the absence of acquired distinctiveness arguments. These three dimensions are not alternative explanations: they combine to produce the divergent outcomes.

3.4.1. The substantive dimension: framing the sign and the market

The EU and Swiss authorities differed on two interconnected questions: what kind of sign the Cannage is, and how saturated the relevant market is with comparable patterns. The two questions are inseparable, because the framing of the sign directly determines the assessment of the market.

The OHIM, in its partial refusal, described the Cannage in purely geometric terms: a motif of horizontal, vertical, and oblique lines forming squares [124]. They did not investigate the historical origins of this configuration or connect it to any preexisting design tradition. Within this framing, the OHIM considered geometric grid patterns to be relatively common on furniture and display items but sufficiently unusual on cosmetic products to function as an indicator of origin. The result as anticipated, was a partial refusal.

The Swiss Federal Administrative Court took a fundamentally different approach. It devoted three paragraphs of its decision to identify the Cannage as a stylised representation of the Wiener Geflecht tracing its origins to the Thonet chair No. 14 of 1859, to describe the technical construction and functional properties of the weaving technique, and to document its continued prevalence in Swiss commercial life [125]. By placing the Cannage within a specific historical design tradition, the Court made it substantially harder for Dior to argue that the pattern constitutes a departure from what is customary. A pattern that is presented as a specific geometric configuration may appear distinctive; the same pattern, presented as a variant of a weaving technique that has been in continuous commercial use for over 150 years, is more easily characterised as belonging to the public domain.

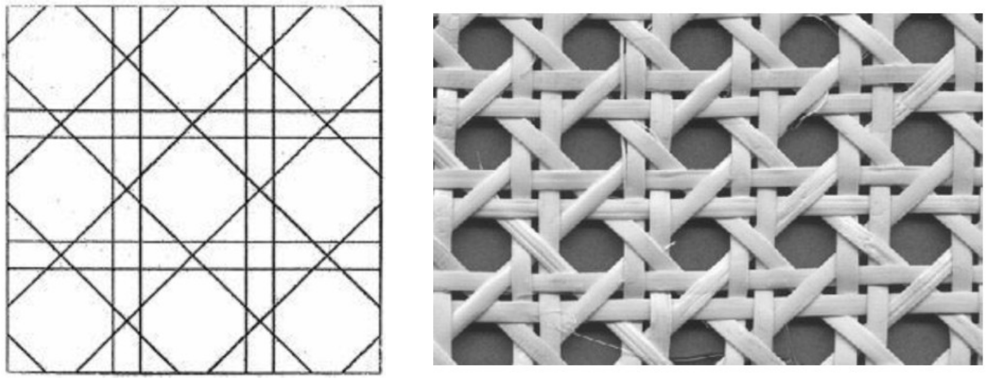

Figure 10
Visual comparison — the Cannage as registered (left) and the Wiener Geflecht as identified by the Swiss court (right)
(Source: WIPO IR 1'064'983; Case B-2655/2013, p. 10)

This difference in framing had direct consequences for the assessment of the market. The OHIM, evaluating the Cannage as a geometric arrangement, found it sufficiently distinctive for cosmetics, where it considered geometric grid patterns relatively less common than on furniture. The Swiss Court, with its historical framing, found it to be a common decorative element across all the product categories at issue, because the Wiener Geflecht and its variants are documented in use not only on furniture but also on a wide range of consumer products, including loudspeaker and radiator covers, ready-made decorative materials, and surface decorations of various goods.

[124] OHIM, Notification de refus provisoire partiel (n 108) 1

[125] Case B-2655/2013 (n 112) paras 5.3–5.4. For a discussion of how the framing of a sign affects the distinctiveness assessment, see Eugen Marbach, 'Die Verkehrskreise im Markenrecht' (2007)

Two observations follow from this divergence. First, the framing of the sign is not a neutral preliminary step in the distinctiveness analysis: it is a determinative methodological choice that shapes everything that follows. When a designer takes inspiration from a historical decorative tradition and transforms it into a brand signature through decades of exclusive commercial use, the question of whether the legal analysis should evaluate the result as an autonomous geometric configuration or as a variant of the historical tradition, is not a question of fact but of legal characterisation. The EU and Swiss authorities answered this question of characterisation differently, and the outcome followed accordingly.

Second, the divergence reveals a structural difficulty for non-traditional marks rooted in preexisting decorative vocabularies: the more recognisable the historical antecedent, the more likely a trademark authority is to identify the brand's version as a variant of the antecedent rather than as a distinctive sign. This difficulty does not depend on the actual market recognition of the brand's pattern: it depends on the framing applied by the examining authority.

Dior argued before the Swiss Court that the Cannage was an unusual combination of basic geometric forms, not a reproduction of the Wiener Geflecht. The Court disagreed, but the argument highlights a tension that the distinctiveness framework does not fully resolve: at what point does a design that originates from a public-domain decorative tradition cease to belong to that tradition and begin to function as a source identifier? The EU and Swiss authorities answered this question on opposite sides.

3.4.2. The methodological dimension: relevant public and temporal context

The second dimension of divergence concerns methodological choices that shaped the assessment, even where the underlying legal standard was nominally identical. Two such choices are particularly relevant: the definition of the relevant public, and the temporal context in which each examination took place.

Neither authority restricted the relevant public to luxury consumers or to consumers with particular knowledge of fashion design codes. The Swiss Court explicitly included drugstore and supermarket shoppers among the relevant consumers of cosmetics; a methodological choice that effectively calibrated the distinctiveness threshold at the level of the least attentive consumer in the market. The OHIM, by contrast, accepted the pattern for cosmetics without conducting an equally detailed analysis of the typical retail context, by doing so they left room for the choice of a more attentive average consumer.

This observation connects directly to the concept of heritage identifiers, the Cannage functions as a source indicator in the context where it was constructed as one over decades: leather goods, bags, and clothing purchased by consumers familiar with Dior's visual language. When the same pattern is applied to cosmetics purchased by a broader public in different retail environments, its source-indicating capacity attenuates, not because the pattern itself has changed, but because the consumers and the commercial context have. The Swiss Court's broader definition of the relevant public makes this attenuation analytically visible; the OHIM's less granular approach allowed the pattern's fashion-derived distinctiveness to extend, by implicit assumption, into the cosmetic context.

The second methodological factor, the temporal factor does not, by itself, explain the divergence: a difference of three years between the OHIM partial refusal and the Swiss decision is not sufficient to assume that the relevant doctrinal standards had shifted decisively in the interval. But it suggests that the methodological climate within which each assessment took place differed in subtle ways, and that the Swiss Court, deciding later, was working within a more developed body of case law on the difficulty of protecting geometric patterns. The methodological dimension therefore reinforces the substantive divergence: not only did the two jurisdictions frame the sign and the market differently, but they did so while operating within slightly different methodological environments.

3.4.3. The strategic dimension: the absence of acquired distinctiveness

The third dimension of divergence is procedural rather than substantive: Dior's strategic choice not to invoke acquired distinctiveness through use in any phase of the proceedings. The Swiss Court observed at paragraph 5.5 that the question before it was whether the sign possessed distinctive character without having established market recognition. An analogous choice characterised the EU partial refusal: Dior accepted the OHIM's reasoning on inherent distinctiveness for Class 20 and for certain Class 21 goods rather than mounting an acquired distinctiveness defence. Both assessments were therefore conducted on the basis of the pattern's inherent characteristics alone, without considering whether decades of commercial use had taught consumers to associate the Cannage with the Dior brand.

This strategic choice is significant because it is unexpected for a brand of Dior's resources and institutional sophistication. Two possible explanations come immediately to mind. First, Dior's commercial presence in the relevant non-fashion product categories: cosmetics, furniture, and cosmetic accessories, with Cannage-branded items may have been insufficient at the relevant times to support an acquired distinctiveness claim under either EU or Swiss standards. Second, the cost of assembling the required evidence for these non-fashion markets, including consumer surveys demonstrating recognition of the pattern on cosmetic products or furniture, may have been considered disproportionate to the commercial value of the extended registration.

A third explanation, more consistent with the framework developed in this thesis, may complement the two above. By the time of the Swiss proceedings, Dior had already secured trademark protection for the Cannage in Switzerland for the fashion core categories through international registration IR 580'546, in force since 1991. In that commercial context, leather goods, textiles, and clothing, the Cannage had accumulated decades of exclusive use, substantial advertising investment, and the consumer recognition that the Lady Dior had crystallised since 1995. In the non-fashion categories at issue in IR 1'064'983, however, the same accumulated evidence was not available: the Cannage had not been deployed on cosmetics, furniture, or cosmetic accessories with comparable consistency or duration. Dior's decision not to invoke acquired distinctiveness may therefore reflect an internal strategic assessment that the evidentiary record was simply not yet strong enough to satisfy the demanding standards of either jurisdiction in the non-fashion product context, an assessment that itself confirms the context-dependent nature of the distinctiveness analysis. The brand effectively acknowledged, through procedural silence, what the Swiss Court concluded through substantive analysis: that the Cannage's source-indicating capacity is firmly established in the fashion context but remains, at least for the time being, less developed in non-fashion commercial environments.

Whatever the precise weight of these factors, the absence of acquired distinctiveness arguments means that both the EU and Swiss assessments tested only one dimension of the Cannage's potential for trademark protection in the non-fashion sector. Neither decision forecloses the possibility that a future application, supported by stronger evidence of consumer recognition specifically in the relevant non-fashion product contexts, might produce a different outcome. This observation, in turn, anticipates the empirical research presented in Chapter 4: if consumer recognition of the Cannage extends to non-fashion product categories with sufficient strength, future acquired distinctiveness arguments might shift the analysis in a direction that neither the OHIM nor the Swiss Court was asked to consider.

3.5. Implications for pattern trademark protection in the luxury fashion sector

The comparative analysis developed in the preceding section identified three dimensions of divergence between the EU and Swiss assessments of the Cannage pattern. This concluding section moves from explanation to implication: what does the Cannage case reveal about the broader treatment of pattern marks in the luxury fashion sector? The analysis is organised around three levels of implication. The first is doctrinal: the case illuminates a structural difficulty in trademark law's treatment of patterns rooted in pre-existing decorative traditions. The second is strategic: the case has practical consequences for how luxury houses should approach the registration of signature patterns beyond their fashion core. The third is empirical: the case reveals a fundamental gap between the legal assessment of distinctiveness and the actual perception of consumers, a gap that the research presented in Chapter 4 is designed to address.

3.5.1. Doctrinal implications: pattern marks rooted in historical traditions

The Cannage case exposes a doctrinal problem that extends well beyond the specific dispute between Dior and the Swiss Federal Institute of Intellectual Property. Many of the most recognisable patterns in the luxury sector originate as stylised reproductions of pre-existing decorative traditions: woven grids derived from textile or furniture techniques, diamond patterns drawing on centuries of needlework, and so forth. The Cannage itself, as the Swiss Court documented in detail, is a stylised representation of the Wiener Geflecht weaving technique that predates Dior by nearly a century. When trademark authorities are asked to evaluate the distinctiveness of such patterns, they face a choice that is not adequately governed by current doctrine: whether to evaluate the pattern as an autonomous geometric configuration designed by the brand, or as a variant of the historical tradition from which it draws.

This choice is not a procedural detail. As the comparison between the OHIM and the Swiss assessments demonstrated, the categorisation of the sign, whether as autonomous configuration or as historical variant, determines the substantive outcome of the distinctiveness assessment. A pattern framed as an autonomous configuration is evaluated against the design vocabulary of the relevant product market; a pattern framed as a historical variant is evaluated against the entire history of the decorative tradition from which it derives. The two framings produce systematically different distinctiveness thresholds, and the trademark doctrine of both the EU and Switzerland provides no explicit guidance on which framing should be preferred or under what conditions.

Three doctrinal implications follow. First, the absence of an explicit classification rule means that the distinctiveness assessment for pattern marks rooted in historical traditions is effectively at the discretion of the examining authority. Two examiners applying nominally identical legal standards can reach opposite conclusions depending on whether they identify the historical antecedent. This is not a defect that the harmonisation of legal standards can remedy, the legal standards are already substantially harmonised between the jurisdictions but one that requires a methodological rule about how the sign should be characterised before the distinctiveness assessment begins.

Second, the framing problem creates a structural disadvantage for brands whose patterns are most clearly rooted in identifiable historical traditions. The more recognisable the historical antecedent, the more likely a trademark authority is to identify the brand's version as a variant of the antecedent rather than as a distinctive sign. This effect operates independently of the actual market recognition of the brand's pattern: a Cannage with eighty years of exclusive use by Dior remains, in the Swiss analysis, a variant of the Wiener Geflecht. The doctrine thus systematically penalises brands that have developed their signature patterns through reinterpretation of existing decorative vocabularies, which is to say, most luxury fashion houses.

Third, and most fundamentally, the framing problem reveals a tension between two competing principles that trademark law has not adequately reconciled: the principle that distinctive signs should be protectable as trademarks once they have acquired source-indicating capacity through exclusive use, and the principle that elements of the public domain should remain available for use by all market participants. When a pattern is rooted in a public-domain tradition, these two principles point in opposite directions, and the resolution depends on which classification the examining authority adopts. The Cannage case suggests that current doctrine resolves this tension inconsistently across jurisdictions, producing outcomes that are difficult to predict even for sophisticated trademark applicants.

3.5.2. Strategic implications for luxury fashion houses

Beyond its doctrinal significance, the Cannage case carries practical implications for how luxury fashion houses approach the trademark protection of their signature design elements. Three strategic observations emerge from the comparative analysis.

The first is that protection achieved in the fashion core does not automatically extend to other product categories. Dior's successful registrations for the fashion classes created neither legal nor evidentiary momentum that could carry the Cannage into cosmetics, furniture, or cosmetic accessories.

Each extension into a new product category is, from the perspective of the examining authority, a substantially new application: the sign must be re-evaluated against the design vocabulary of the new market, and prior registrations in different classes carry limited weight. This finding is of direct strategic importance for luxury houses pursuing brand extension across different product categories: the trademark protection achieved in the fashion core cannot be assumed to automatically extend to the close commercial segments. The strategic assumption that a signature pattern, once protected for fashion goods, is broadly protected as a brand identifier is not supported by the trademark doctrine examined in this thesis.

The second is that acquired distinctiveness is not an optional supplement to inherent distinctiveness arguments in the non-fashion extension context: it is the primary route through which extensions can plausibly succeed. The Cannage case demonstrates that inherent distinctiveness arguments for geometric patterns in non-fashion product categories face systematic obstacles, both in the EU and in Switzerland, regardless of the brand's overall reputation. Dior's decision not to invoke acquired distinctiveness in either jurisdiction's proceedings, whether for strategic reasons, evidentiary limitations, or an internal assessment of the strength of the available evidence, left the assessment of the Cannage's distinctiveness in non-fashion contexts entirely dependent on inherent distinctiveness arguments that were unlikely to succeed under either jurisdiction's standards. For luxury houses seeking to extend pattern protection to new product categories, the strategic implication is clear: an acquired distinctiveness dossier specifically tailored to the new product context, supported by consumer surveys conducted on the relevant goods, must be constructed before the application is filed.

The third is that the choice of registration route: national, EU-wide via EUIPO, or international via the Madrid System, has practical consequences that go beyond geographical coverage.

The Madrid System's architecture of centralised filing and decentralised examination, while administratively convenient, exposes the application to independent assessments by each designated office. The Cannage case illustrates how this architecture can produce divergent outcomes for the same sign in the same product categories: a partial protection in the EU, a substantially broader refusal in Switzerland, both arising from the same international application. Luxury houses must therefore weigh the administrative efficiency of the Madrid System against the strategic risk of inconsistent outcomes across jurisdictions, and consider whether national filings supported by tailored evidentiary dossiers might produce more reliable results in markets where pattern protection is commercially critical.

None of these strategic implications suggests that luxury houses should abandon their efforts to protect signature patterns. The commercial value of pattern marks, established in Chapter 2, justifies the investment required. But the implications do suggest that the strategic framework within which these efforts are undertaken should be more deliberate, more empirically grounded, and more sensitive to the doctrinal complexities that the comparative analysis has revealed.

3.5.3. The empirical gap and the role of consumer research

The most fundamental implication of the Cannage case is methodological rather than doctrinal or strategic: it concerns the gap between how trademark authorities assess distinctiveness and how consumers actually perceive signs in the marketplace. Both the OHIM partial refusal and the Swiss Federal Administrative Court decision reached their conclusions on the basis of assumptions about consumer perception that were never empirically tested.

Consider what each decision implicitly assumed about consumers. The OHIM assumed that consumers would perceive a stylised diagonal grid pattern differently depending on the product, distinctive on cosmetics but decorative on furniture. The Swiss Court by contrast, calibrated its assessment on the level of attention of the least sophisticated consumer in the market and concluded that the Cannage would be perceived as a common geometric arrangement across all product categories at issue. These two assumptions about consumer perception are not compatible: they predict different patterns of recognition and association for the same sign across the same product categories. Yet neither decision was supported by empirical evidence on which assumption was actually correct.

This empirical gap is not a peculiarity of the Cannage case. As the analysis of the reliance and mere association tests in Chapter 1 demonstrated, the entire doctrinal framework for assessing acquired distinctiveness presupposes that examiners can accurately predict whether consumers perceive a sign as a source indicator or as decoration. The CJEU's articulation of the "perception" test in Nestlé v Cadbury, and the more demanding "reliance" test endorsed by the English and Singaporean courts, both depend on assumptions about consumer cognition that are, in the absence of empirical evidence, effectively unverifiable. These predictions remain only assumptions that the legal analysis cannot verify independently: trademark authorities reach decisions about consumer perception every day, but they do so on the basis of legal reasoning, market familiarity, and intuition rather than on the basis of measured consumer behaviour.

This is the gap that the empirical research presented in Chapter 4 is designed to address. The consumer survey created for this thesis test consumers' recognition of patterns providing empirical evidence also on the questions that the OHIM and the Swiss court resolved through assumptions.

The comparative analysis developed in this chapter has revealed that the divergence in the outcome is not an anomaly of a single case, but a structural feature of how trademark law treats pattern marks that were created with an inspiration from historical decorative elements. The three dimensions of divergence, share a common foundation as each of them depends on assumptions about how consumers perceive the signs in different commercial contexts. Both jurisdictions reached their conclusions by reasoning about consumers' perception in the abstract without measuring it. The empirical research that follows examines what consumers actually perceive, and what the difference between assumption and actual measurement might mean for pattern trademark protection.

CHAPTER IV

EMPIRICAL ANALYSIS OF CONSUMER PERCEPTION

SUMMARY: 4.1. Research design and methodology – 4.2. Sample description – 4.3. Findings – 4.4. Discussion

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Chapter 3 concluded that the divergence between the OHIM and the Swiss Federal Administrative Court on the Cannage was based, in significant part, on assumptions about consumer perception that the comparative legal analysis was forced to address without empirical measurement. This chapter presents an empirical research designed to address that gap: a consumer survey administered to 200 + respondents, testing the recognition of the Cannage in comparison with four other signature patterns of the luxury fashion industry aiming to prove the perception of the pattern along four dimensions of distinctiveness.

The chapter starts with the research design, leading to the findings and their discussion, and moving to the limitations of the empirical evidence and the contribution it offers to the analytical framework developed in the previous chapters.

4.1. Research design and methodology

This section describes the empirical research conducted for this chapter. The research questions lead to some hypotheses that will be tested, each of them is linked to a specific question that was raised by the previous comparative analysis. The survey instrument is then described as well as its design, including the rationale behind the selection of the patterns used in the visual recognition test. Lastly, the sample recruitment is described, as well as the data collection procedures, and the characteristics of the final analytical sample.

4.1.1. Research questions and hypotheses

The empirical study addresses four research questions, each formulated as a hypothesis to be tested through the survey data.

The first hypothesis (H1) concerns recognition rates across patterns. Five patterns were tested: three that have been registered as trademarks in at least the European Union (the Burberry check, the Bottega Veneta intrecciato, and the Dior Cannage) and two that, despite high commercial prominence, have not been granted registration as protected pattern marks in the relevant jurisdictions (the Chanel diamond quilting and the Missoni zigzag)[126]. The hypothesis addresses two different questions: it asks whether the recognition rate of each pattern differs significantly from that of the others (H1a), and whether the registered and non-registered patterns considered as two groups differ significantly in their recognition rates (H1b).

[126] For the Burberry check (also known as 'Haymarket check'), see EUTM No 000377580 (filed 1996, registered 1999) and its various extensions. For the Bottega Veneta intrecciato, see EUTM No 006632905 (registered 2014). For the Dior Cannage, see IR 1'064'983 and its EU/Swiss designations, analysed in detail in Chapter 3. For Chanel and Missoni, no pattern trademark registrations have been identified in the European Union or Switzerland; both houses rely on combined marks, design rights, and unregistered protection mechanisms.

The second hypothesis (H2) is about the relationship between consumer's profile and Cannage recognition. The comparative analysis noted that the divergence between the OHIM and the Swiss assessment of the Cannage rested in part on different implicit assumptions about the relevant consumer. H2 tests whether this distinction is reflected in the survey data, by examining the effect of two consumer profile variables on the correct identification of the Cannage as Dior: self-reported luxury knowledge (H2a) and luxury purchasing experience (H2b).

The third hypothesis (H3) is about the perceived distinctiveness of the Cannage along four dimensions: perceived primary function (decorative versus source-indicating), sufficiency of the pattern as a brand identifier in the absence of other marks, perceived exclusivity of the pattern to a single brand, and perceived effectiveness compared with a traditional logo. The hypothesis tests whether the Cannage is perceived as a fully distinctive sign across these dimensions, or whether the perception is weaker than the doctrinal categorisation of the pattern as a registered trademark would suggest.

The fourth hypothesis (H4) addresses the question that motivated the empirical research most directly: does the consumer association between the Cannage and the Dior brand persist when the pattern is applied to a product category outside the fashion core? H4 tests this presumption directly by asking respondents whether they would still associate the pattern with the brand if they saw it applied to a cosmetic product.

4.1.2. Survey instrument and design

The survey was developed using the Qualtrics platform and was administered in Italian [127]. The questionnaire was structured in four blocks. The first block collected demographic and educational information (age, gender, level of education, professional sector). The second block collected information on luxury consumption habits and the spontaneous attention paid to visual brand elements; respondents were asked, among other things, what they primarily use to identify a brand on a product, and how important they consider the recognition of a brand through subtle visual elements such as patterns or textures, as opposed to explicit elements such as logos or names.

The third block tested the visual recognition of five patterns. Each pattern was presented as an image of the pattern alone, without any accompanying brand name, product context, or other identifying information. For each pattern, respondents were asked three questions: whether they recognised the pattern, with three response options ("Yes, I know exactly which brand it belongs to"; "It seems familiar but I am not sure"; "No, I do not recognise it"); to which brand they associated the pattern, with the response collected as an open text field; and how confident they were in their answer, on a three-point scale [128].

The fourth block focused exclusively on the Cannage. After being shown a new image of the pattern, respondents were asked six questions: how they primarily perceived the pattern (decorative, source-indicating, both, or no opinion); to what extent they considered the pattern sufficient, on its own and without visible logos, to identify a specific brand; whether they considered the pattern exclusive to one brand or potentially usable by others; whether they considered that such a pattern should be legally protected, in the sense that only the brand that created it should be entitled to use it; whether they

[127] A copy of the questionnaire in its original Italian version is provided in Annex [A].

[128] Pattern 5 (Missoni) was an exception: due to a survey design constraint, no confidence question was administered for this pattern.

would associate the pattern with the brand if they saw it applied to a cosmetic product, such as a perfume bottle or a cream container, instead of a fashion item or accessory; and how effective they considered the pattern compared with a traditional logo in communicating brand identity.

The selection of the five patterns for the visual recognition test followed a specific logic; the three registered patterns (Burberry, Bottega Veneta, Dior) represent the central case study of the thesis and some close competitors within the registered universe. The two non-registered patterns (Chanel, Missoni) were selected because both are widely associated with their respective luxury houses in popular culture, yet neither has been granted registration as pattern marks in the European Union or Switzerland. The inclusion of these two non-registered patterns allows the empirical comparison between the legal category of registration and the empirical category of consumer recognition.

4.1.3. Sample recruitment and data collection

The survey was distributed between 11.04.2026 and 14.06.2026. Recruitment followed a simple sampling approach: the questionnaire link was distributed through personal social media accounts and informal contacts. No financial incentive or compensation was offered for participation. The questionnaire was anonymous and required approximately ten minutes to complete.

During the data collection period, the survey received 222 responses. Six of these were incomplete and were excluded from the analysis, leaving a final analytical sample of 216 complete responses. The high completion rate (97.3 per cent of responses received) suggests that the questionnaire was experienced as accessible and manageable in length.

Two methodological characteristics of the sample should be acknowledged: first, the sample is a convenience sample, drawn through personal and social media network; it is not statistically representative of the Italian general population, nor of the population of luxury consumers more broadly. Second, the sample is geographically and linguistically circumscribed: all responses were collected in Italian, and the respondents are predominantly Italian residents. The implications of these characteristics for the generalisability of the findings will be discussed in another section.

4.2. Sample description

This section describes the demographic profile and the consumption characteristics of the final analytical sample. The data are presented in aggregated form in Table 5; the discussion below recaps the dimensions that are most relevant for the interpretation of the findings in Section 4.3.

Demographic profile

The sample is composed of 216 respondents. The age distribution is concentrated in the younger adult brackets: 25.93 % of respondents are aged 18–24, and 50.93% are aged 25–34, for a combined 76.86% below the age of thirty-five. The remaining respondents are distributed across the 35–44 (10.19%), 45–54 (6.48%), 55–64 (3.70%), and 65-or-older (1.85%) brackets; less than 1 per cent of the sample is below the age of eighteen.

In terms of gender, the sample shows a moderate propensity toward female respondents (60.65%), with male respondents accounting for 36.57% of the sample and a small fraction (2.78%) preferring not to disclose, or identifying as non-binary or third gender.

The educational profile of the sample is composed as follow: 37.50% of respondents hold a high school diploma, 27.30% hold a bachelor's degree, and 30.56% hold a master's degree or higher, for a combined 57.87% of respondents with at least a bachelor's degree.

Professional profile
Respondents reported their professional sector through four pre-defined options and a free-text “Other” field. Among the pre-defined options, 16.20% of respondents reported working or studying in fashion, luxury, or design; 12.96% in law or consultancy; and 10.65% in marketing, communication, or advertising. The remaining 60.19% of respondents selected 'Other' and specified their sector through the free-text field. These 130 free-text responses were organised manually into eight macro-categories following a content analysis approach. The two most frequent categories were the services sector (29.35% of the 130 “Other” responses) and the technical-engineering sector (12.31%); the remaining categories include the educational, economic-financial, design and creative, healthcare, public administration, and humanities and social sciences sectors, none of which exceeded 10% of the “Other” responses individually. The aggregated professional composition of the sample is therefore heterogeneous, with the majority of respondents working in fields that are not directly connected to the fashion, marketing, or legal sectors most exposed to luxury brand discourse. This heterogeneity is methodologically valuable: it broadens the perspective of the survey beyond the specialist audience.

Familiarity with the luxury sector
Two variables capture the respondents’ familiarity with the luxury sector. The first is self-reported knowledge of the fashion and luxury sector, measured on a four-point scale. Just under half of the sample (49.07%) reported “basic” knowledge, indicating a familiarity with the principal brands without active engagement with the sector. A further 33.33% reported “medium” knowledge, defined as following the sector and being familiar with the iconic products of major brands. Respondents with “in-depth” knowledge, meaning those who work or study in the sector and follow it with strong interest, represented 10.65% of the sample, while 6.48% reported no knowledge of the sector.

The second variable captures luxury purchasing experience. The majority of the sample (67.59%) reported having purchased at least one luxury item, with the largest sub-group (43.98%) reporting occasional purchases. The remaining respondents reported no luxury purchases: 23.6% considered a luxury purchase without making one, and 8.80% reported no interest in the sector.

Two further questions from the second block of the questionnaire, while not directly testing the hypotheses, are relevant for the interpretation of the findings. When asked which elements primarily allow them to identify a brand on a product, 48.15% of respondents spontaneously mentioned the pattern or the texture of the material as one such element, alongside or instead of the more explicit logo. When asked how important they consider the recognition of a brand through subtle visual elements such as patterns or textures, as opposed to explicit elements such as logos or names, 47.69% of respondents reported “very high” or “maximum” importance. These two choices, taken together, indicate that nearly half of the sample attributes meaningful brand-identifying function to pattern elements, providing initial empirical validation of the doctrinal relevance of pattern marks.

VARIABLE	CATEGORY	PERCENTAGE %
Age	18-34	76.86%
	35-54	16.67%
	55 and over	5.55%
Gender	Female	60.65%
	Male	36.57%
	Other / Prefer not to say	2.78%
Education	At least a bachelor's degree	57.87%
	High school diploma	37.50%
	Other	4.63%
Professional sector	Fashion, marketing, law (combined)	39.81%
	Other (Mainly services, technical)	60.19%
Luxury knowledge	None or Basic	55.55%
	Medium or in-depth	43.98%
Luxury purchasing	At least one purchase	67.59%
	None	32.41%

Table 5
Sample profile summary (N = 216)

4.3. Findings

This section reports the empirical findings organised by hypothesis. Each sub-section presents the descriptive statistics relevant to the corresponding research question, the inferential tests where applicable, and a brief discussion of the immediate analytical implications. The broader interpretive discussion, including the relationship between the empirical findings and the comparative legal analysis developed in Chapter 3, is reserved for Section 4.4.

4.3.1. Pattern recognition rates (H1)

The first hypothesis is about the recognition rates of the five patterns tested in the survey, and the relationship between these rates and the legal status of each pattern (registered or not registered as a trademark in the European Union). For each pattern, recognition was measured through an open-text question asking the respondent to identify the brand to which the pattern belonged. Responses were coded as correct or incorrect, accommodating minor typographical and spelling variations of the correct brand name. The proportion of respondents correctly identifying the brand for each pattern is the primary measure of recognition adopted in the analysis.

The recognition rate of each pattern (H1a)

Figure 11 reports the brand identification rate for each of the five patterns. The Burberry check is the most widely recognised pattern: 166 respondents correctly identified the brand. The Bottega Veneta intrecciato follows at a substantial distance with 121 correct answers. The remaining three patterns are clustered in a much narrower range: the Chanel quilting was correctly identified by 91 respondents, lastly the Dior Cannage and the Missoni zigzag by 86.

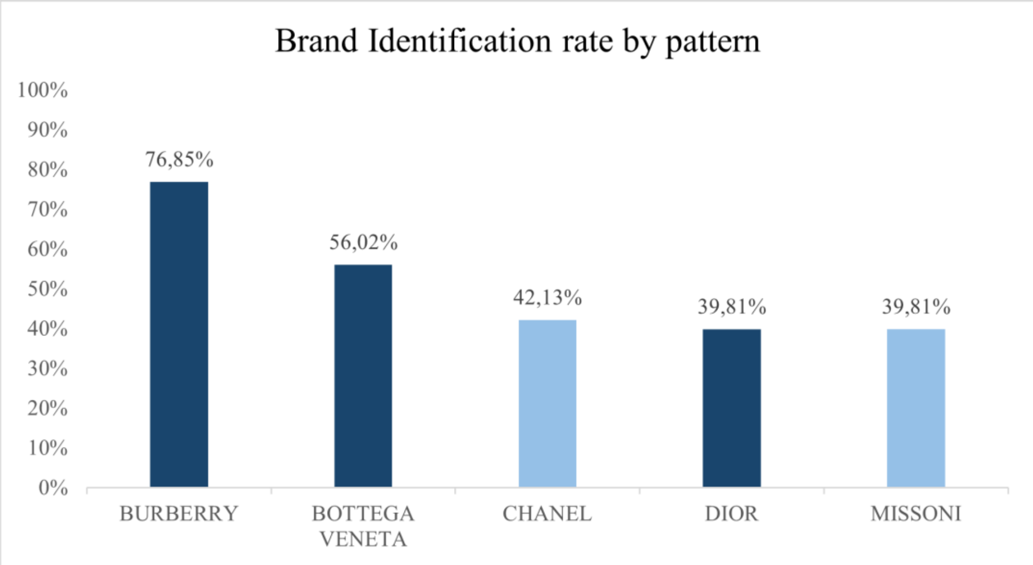

Figure 11
Brand identification rate by pattern

The most striking feature of this distribution is not the dominance of the Burberry check, which is consistent with its hundred-year commercial history and continuous presence on the most visible luxury accessory category, but the close clustering of the three lowest-ranked patterns. The Cannage and the Missoni zigzag receive identical recognition rates (39.81% each), and the Chanel quilting exceeds them by only 2.32%. This clustering eliminates the legal divide between registered and non-registered patterns: the Cannage, a registered trademark in the European Union, achieves a recognition rate marginally lower than that of the non-registered Chanel quilting, and identical to that of the non-registered Missoni zigzag.

Comparison between registered and non-registered patterns (H1b)
To test the relationship between trademark registration and recognition more formally, the five patterns were grouped into two categories: registered patterns (Burberry, Bottega Veneta, Cannage) and non-registered patterns (Chanel, Missoni). A chi-square test of independence was performed to assess whether the proportion of correct identifications differed significantly between the two groups. The relationship was statistically significant: $\chi^2(1, N = 1080) = 28.54$, $p < .001$ [129].

This result, considered in isolation, would suggest that the legal categorisation of registration corresponds to a substantively meaningful difference in consumer recognition. The descriptive figures, however, qualify this conclusion. The aggregated recognition rate of the registered patterns (57.56%) is substantially higher than that of the non-registered patterns (40.97%), but this aggregated difference is largely driven by the Burberry check. Excluding Burberry, the recognition rate of the remaining registered patterns (Bottega Veneta and Cannage, averaging 47.92%) is much closer to that of the non-registered patterns (Chanel and Missoni, averaging 40.97%), with a difference of only 6.95%.

[129] The chi-square test was performed on the aggregated data: 373 correct identifications among the 648 observations for registered patterns (3 patterns × 216 respondents), and 177 correct identifications among the 432 observations for non-registered patterns (2 patterns × 216 respondents). The test statistic and degrees of freedom are $\chi^2(1) = 28.54$; the exact p-value is $p = 9.16 \times 10^{-8}$. The chi-square statistic was derived from the p-value using the inverse chi-square distribution function with one degree of freedom.

The legal category of trademark registration, in other words, distinguishes the Burberry check as an outlier but does not cleanly separate the remaining registered patterns from the unregistered ones in terms of empirical consumer recognition. The Cannage, despite its registered status in the relevant fashion classes, is recognised by consumers at a rate that is statistically indistinguishable from that of the unregistered Missoni zigzag, and slightly lower than that of the unregistered Chanel quilting.

4.3.2. Effects of consumer profile on Cannage recognition (H2)

The second hypothesis examines whether two consumer profile variables, self-reported luxury knowledge (H2a) and luxury purchasing experience (H2b), predict the correct identification of the Cannage as Dior. The hypothesis was motivated by the observation, that the divergent assessments of the OHIM and the Swiss Federal Administrative Court appeared to be based on different implicit assumptions about the relevant consumer.

Luxury knowledge (H2a)

Self-reported luxury knowledge was collected through a four-point scale ranging from "no knowledge' to 'in-depth knowledge". Figure 12 reports the proportion of respondents correctly identifying the Cannage as Dior at each level of luxury knowledge. The progression is monotonic and substantively large: 21.43% of respondents with no luxury knowledge correctly identified the Cannage, rising to 22.64% at the "basic" level, 52.78% at the "medium" level, and 86.96% at the "in-depth" level.

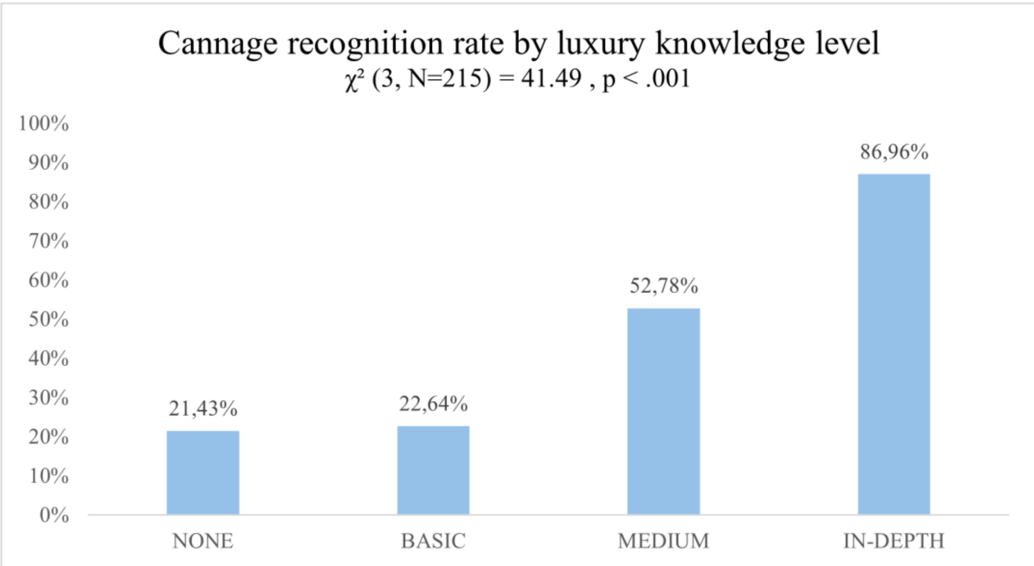

Figure 12
Cannage recognition rate by luxury knowledge level

A chi-square test of independence confirmed that this relationship is highly statistically significant: $\chi^2(3, N = 215) = 41.49$, $p < .001$ [130]. The recognition rate among respondents with in-depth knowledge of the luxury sector (86.96%) is approximately four times higher than the recognition rate among respondents with no or basic luxury knowledge (combined, approximately 22%). The sharpest single increase in the progression is

[130] The chi-square test was performed on the contingency table cross-classifying the four levels of luxury knowledge by the binary correct/incorrect identification of the Cannage. One respondent did not provide an answer on the luxury knowledge question and was excluded from the test, yielding N = 215. The exact p-value is $p = 5.14 \times 10^{-9}$

between the "basic" and "medium" levels of knowledge, where the recognition rate more than doubles, from 22.64% to 52.78%.

This finding has direct implications for the consumer-profile question raised in the comparative analysis of Chapter 3. The Cannage functions as an effective brand identifier predominantly among respondents who self-identify as having medium or in-depth knowledge of the luxury sector. Among respondents with basic or no knowledge, who together represent 55.55% of the sample, the recognition rate of the Cannage is approximately one fifth.

Luxury purchasing experience (H2b)
The second consumer profile variable is luxury purchasing experience, measured through a five-point scale reflecting different intensities and modalities of past purchase behaviour. Figure 13 reports the proportion of respondents correctly identifying the Cannage as Dior across the five categories.

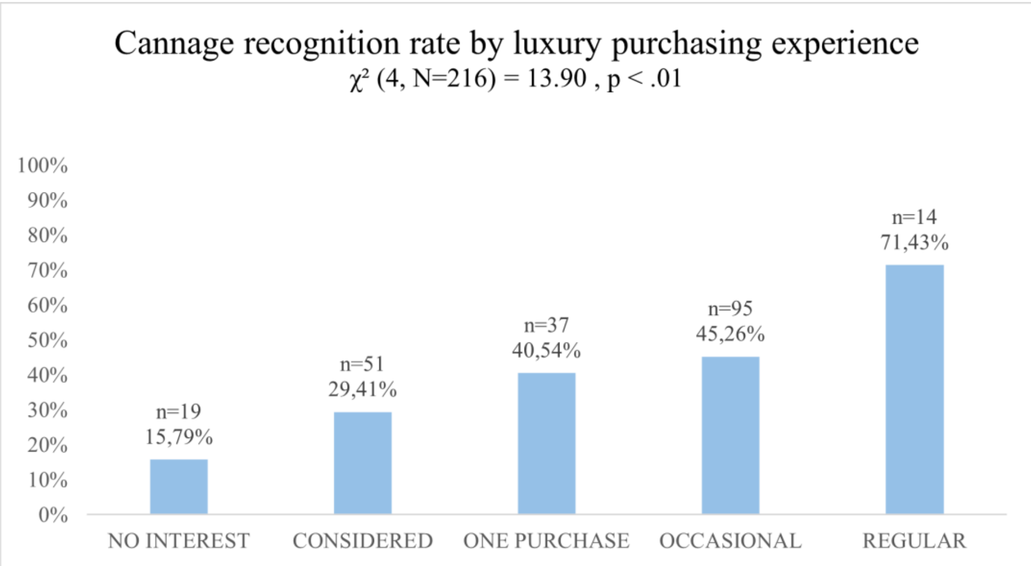

Figure 13
Cannage recognition rate by luxury purchasing experience

Among respondents who reported no interest in the luxury sector, only 15.79% correctly identified the Cannage. The rate rises to 29.41% among respondents who considered a luxury purchase without making one, 40.54% among respondents who made one luxury purchase, 45.26% among occasional purchasers, and 71.43% among regular purchasers.

A chi-square test of independence confirmed that the relationship between purchasing experience and Cannage recognition is statistically significant: $\chi^2(4, N = 216) = 13.90$, $p < .01$ [131]. The effect is somewhat less pronounced than that of self-reported luxury knowledge, the recognition gap between the highest and lowest categories of purchasing experience is approximately 56%, against the approximately 65% observed for luxury knowledge, and the smallest category (regular purchasers, n = 14) limits the statistical precision of the highest estimate.

Synthesis

[131] The chi-square test was performed on the full sample of N = 216. The exact p-value is p = 0.0076. The expected frequencies in all cells were above 5, satisfying the standard assumptions of the test.

The two consumer profile variables tested in H2 show convergent results. Both luxury knowledge and luxury purchasing experience predict the correct identification of the Cannage in a substantively large and statistically significant manner. The combined finding indicates that the Cannage functions as a source-indicating pattern primarily for the segment of the sample that has either cultural familiarity with the luxury sector or direct purchasing experience with luxury goods. For the remaining segment of the sample, meaning respondents without specific luxury familiarity, who in the present data represent more than half of the respondents, the Cannage is not consistently associated with its brand of origin.

4.3.3. Perceived distinctiveness of the Cannage (H3)

The third hypothesis examines the perceived distinctiveness of the Cannage along four dimensions: the primary perceived function of the pattern (decorative versus source-indicating), the sufficiency of the pattern as a brand identifier in the absence of other markers, the perceived exclusivity of the pattern to a single brand, and the perceived effectiveness of the pattern compared with a traditional logo. The four dimensions were measured through separate questions in the fourth block of the questionnaire, after respondents had viewed the Cannage pattern again, isolated from any product or brand context.

Perceived function: decorative or source-indicating

Respondents were asked how they primarily perceived the Cannage pattern, with four response options: as a decorative element that embellishes the product without communicating brand information; as an identifying element that allows recognition of the brand even without a visible logo; as both decorative and identifying; or as a pattern on which they had no opinion. The distribution of responses is reported in Figure 14.

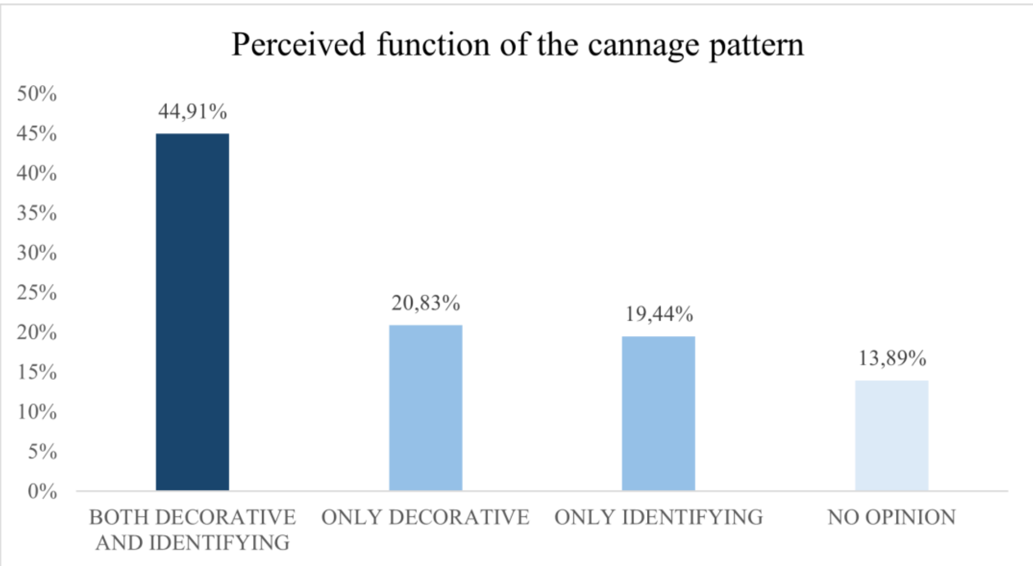

Figure 14
Perceived function of the Cannage pattern

The majority of respondents (n = 97) perceived the Cannage as both decorative and identifying, that is, as fulfilling both functions simultaneously. Among the remaining respondents, 45 perceived the pattern as purely decorative, 42 as purely identifying, and 30 reported no opinion. The two “pure” categories, decorative-only and identifying-only, are therefore almost identical in size, with the two diverging by less than two percentage points.

Aggregating across the response options, the perception of the Cannage as performing some identifying function (combining “purely identifying” and “both”) reaches 64.35% of the sample, while the perception of the Cannage as performing some decorative function (combining “purely decorative” and “both”) reaches 65.74%. The pattern, in the perception of the sample, is not unambiguously decorative or unambiguously identifying: it is characterised by a strong and roughly symmetrical co-presence of both functions.

Sufficiency, exclusivity, legal protection, and effectiveness

The remaining four questions of the fourth block measured the perceived distinctiveness of the Cannage along progressively more demanding dimensions. The results are summarised in Figure 15.

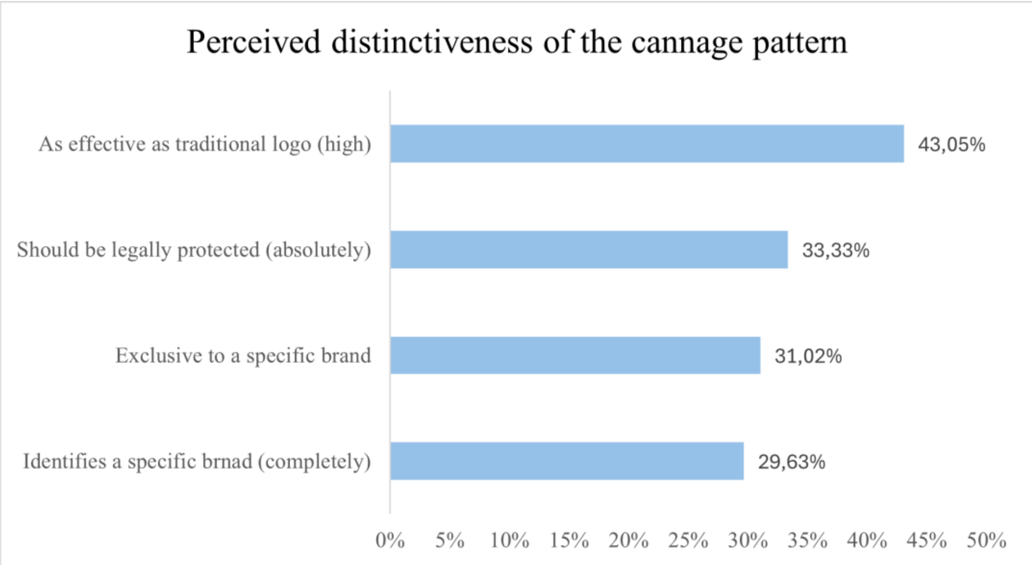

Figure 15
Perceived distinctiveness of the Cannage across four dimensions

On the dimension of sufficiency, 64 respondents reported that the Cannage “completely” identifies a specific brand on its own, in the absence of visible logos; 91 reported that the pattern identifies a brand only “in part”; and 59 considered the pattern generic and not associated with any specific brand. The plurality of the sample, in other words, recognises the pattern as familiar but does not associate it with sufficient precision to identify a specific brand without further markers.

On the dimension of perceived exclusivity, only 31.02% of respondents (n = 67) considered the Cannage exclusive to a specific brand. The remaining respondents reported that the pattern could plausibly be used by other similar brands (47.69%, n = 103), or that it is a generic pattern available to any producer (7.41%, n = 16), with 12.50% (n = 27) reporting no opinion.

On the dimension of legal protection, 33.33% of respondents (n = 72) endorsed unconditional legal protection for the pattern, agreeing that “such a pattern should be protected legally, so that only the brand that created it may use it”. A further 37.96% (n = 82) endorsed protection conditional on the pattern being clearly associated with a specific brand. The two responses combined indicate that 71.29% of the sample supports some form of legal protection for the Cannage, although only a minority supports unconditional protection.

On the dimension of perceived effectiveness compared with a traditional logo, 43.05% of respondents (n = 93) reported that the pattern is "very" or "extremely" effective in communicating brand identity. A further 34.72% (n = 75) reported moderate effectiveness, and 20.83% (n = 45) reported low or null effectiveness.

Synthesis

The four dimensions of perceived distinctiveness measured by H3 converge on a consistent profile of the Cannage. The pattern is perceived as performing both decorative and identifying functions in the majority of cases, but it is not consistently perceived as a strong source indicator on any single dimension. Across the four dimensions, the proportion of respondents endorsing the "strongest" distinctiveness response ranges from 29.63% (sufficient to identify a brand "completely") to 43.05% (as effective as a traditional logo in communicating brand identity). The four figures cluster around one third of the sample, with none of them reaching a majority.

The most striking finding within H3 is the response on perceived exclusivity. Less than one third respondents considered the Cannage exclusive to a specific brand, while 55.10% considered the pattern as either usable by other similar brands or as generic to the market.

4.3.4. Cross-category recognition (H4)

The fourth hypothesis addresses the question that most directly engages the comparative legal analysis developed in Chapter 3. The OHIM refused registration of the Cannage for Class 3 (cosmetics), and the Swiss Federal Administrative Court refused for both Class 3 and Class 21 (cosmetic accessories), on the presumption that the pattern, in a cosmetic context, would be perceived as decorative rather than source-indicating. The questionnaire tested this presumption directly by asking respondents whether they would associate the Cannage with the brand if they saw the pattern applied to a cosmetic product, with "a perfume bottle or a cream container" offered as concrete examples.

The aggregate response

Among 210 respondents who answered the question, 25.46% reported that they would associate the pattern with the brand "immediately" if they saw it on a cosmetic product. A further 48.15% reported that they would "probably" associate it with the brand, although not with certainty. Only 12.04% reported that they would perceive the pattern as mere decoration in a cosmetic context, and 11.57% reported no opinion. Combining the two positive response categories, 73.61% of respondents indicated that they would maintain the brand-pattern association if the Cannage were applied to a cosmetic product [132].

The response disaggregated by correct identification

The aggregate figure should be interpreted in light of the recognition results reported in Section 4.3.1. Among the 216 respondents, only 39.81% correctly identified the Cannage as Dior in the visual recognition test. A natural question is therefore whether the cross-category association is driven primarily by respondents who already associate the pattern with Dior, or whether it persists among respondents who did not correctly identify the

[132] Six respondents did not provide an answer to this question, yielding an effective sample of N = 210 for the aggregate cross-category analysis. The percentages reported in the text are calculated over this effective sample.

brand. Figure 16 separates the response to the cross-category question by the correctness of the original brand identification.

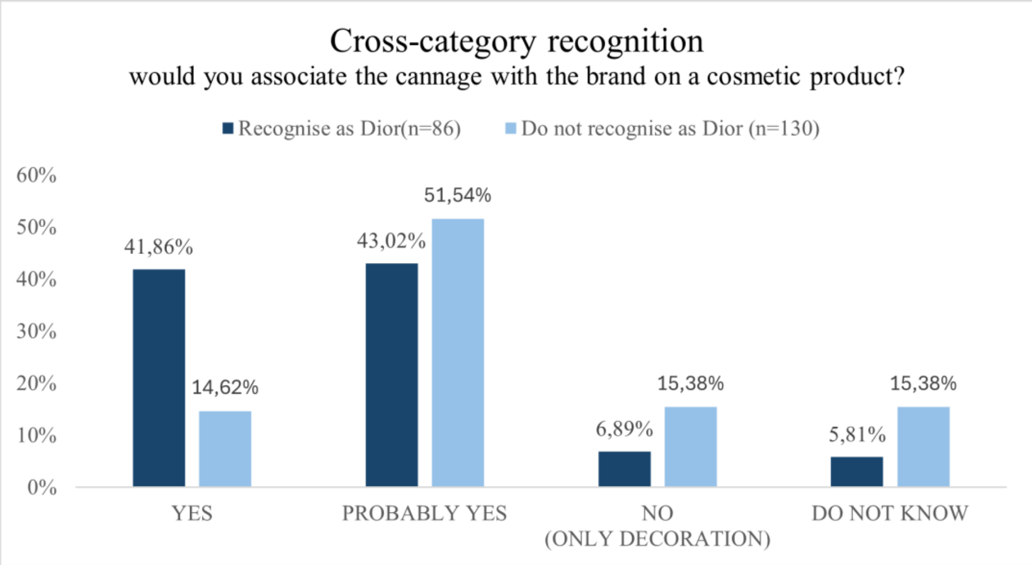

Figure 16
Cross-category recognition by correct identification of the Cannage

Two distinct patterns can be identified. Among the 86 respondents who correctly identified the Cannage as Dior in the visual recognition test, 41.86% reported that they would associate the pattern with the brand "immediately" on a cosmetic product, and a further 43.02% reported they would "probably" associate it. Combined, 84.88% of respondents who correctly identified the Cannage indicated that the brand-pattern association would persist across the categorical shift from fashion to cosmetics. Only 6.98% of this group (n = 6) reported that they would perceive the pattern as merely decorative on a cosmetic product.

Among the 130 respondents who did not correctly identify the Cannage as Dior in the visual recognition test, the pattern is somewhat different but remains substantially positive. In this group, 14.62% reported that they would associate the pattern with the brand "immediately" on a cosmetic product, and 51.54% reported they would "probably" associate it. Combined, 66.16% of respondents in this group indicated that the cross-category association would persist, although only 15.38% explicitly reported that they would perceive the pattern as mere decoration.

Synthesis

Two findings emerge from the cross-category analysis. First, among respondents who already associate the Cannage with Dior, the association persists strongly when the pattern is hypothetically applied to a cosmetic product: nearly 85% of this group reported they would maintain the brand-pattern link, and fewer than 7% reported they would perceive the pattern as decorative in the cosmetic context. Second, the cross-category association is not confined to respondents who already recognise the Cannage as Dior. Among respondents who did not correctly identify the brand in the visual recognition test, two thirds still reported that they would associate the pattern with "a brand" (without necessarily being able to name it) if they saw it on a cosmetic product. Only a small minority of these respondents, reported they would perceive the pattern as merely decorative in the cosmetic context.

These findings directly connect to the presumption that grounded the OHIM and Swiss refusals of the Cannage for cosmetic-related classes. The presumption that the pattern, outside the fashion core, would be perceived as decorative rather than source-indicating, finds limited empirical support in the present data.

4.4. Discussion

This section interprets the empirical findings presented considering the comparative legal analysis developed in Chapter 3. The discussion is organised around three points. The first connects the findings to the doctrinal and strategic dimensions of the Cannage case, the second articulates the contribution that the empirical evidence offers to the analytical framework of the thesis, and the third acknowledges the limitations of the empirical study and the consequent restrictions on the generalisability of its findings.

4.4.1. Findings and the comparative legal analysis

The findings reported in Section 4.3 engage three distinct dimensions of the comparative legal analysis: the relationship between trademark registration and consumer recognition, the relevance of the reference consumer to the distinctiveness assessment, and the persistence of the brand-pattern association across product categories.

On the first dimension, the recognition data presented in Section 4.3.1 qualify the implicit assumption that informs the entire registration system: that the legal category of registration corresponds to a meaningful difference in consumer perception. The data show that, while the registered patterns considered as an aggregate group are recognised more often than the non-registered ones, the difference is largely produced by a single outlier (the Burberry check). Once Burberry is excluded, the two remaining registered patterns (Bottega Veneta and Cannage) are recognised at rates that closely approximate those of the non-registered Chanel and Missoni patterns. The Cannage itself, despite its registered status in the European Union and Switzerland for the fashion classes, is correctly identified by less than 40% of respondents, a rate marginally lower than that of the non-registered Chanel quilting and identical to that of the non-registered Missoni zigzag. The legal categorisation of trademark registration, in this sample, does not cleanly separate the patterns according to consumer perception.

On the second dimension, the consumer profile findings reported in Section 4.3.2 directly engage the methodological question identified in the previous chapter. The OHIM and the Swiss Federal Administrative Court reached divergent conclusions on the Cannage in part because they operated with different implicit assumptions about the relevant consumer: the OHIM treated the consumer as moderately attentive, while the Swiss Court explicitly considered the perception of the less sophisticated consumer, including the supermarket shopper for cosmetics. The empirical data confirm that this distinction is not merely theoretical. The recognition rate of the Cannage rises from 21.43% among respondents with no luxury knowledge to 86.96% among respondents with in-depth luxury knowledge, with the sharpest single increase occurring between the "basic" and "medium" levels. The same general pattern is observed for luxury purchasing experience. The choice of reference consumer therefore appears to determine, in a substantively important way, the outcome of the distinctiveness assessment: among the consumer segment that the Swiss Court explicitly considered, the Cannage functions as a source indicator for a clear minority of respondents; among the consumer segment closer to the OHIM's implicit reference, it functions effectively for the great majority.

On the third dimension, the cross-category data presented address directly the presumption shared by the OHIM refusal of the Cannage for cosmetics and by the broader Swiss refusal extending also to cosmetic accessories. The presumption shared by both decisions was that the pattern, applied to a cosmetic product, would be perceived as decorative rather than source-indicating. The empirical data offer limited support for this presumption, among respondents who already associate the Cannage with Dior, the brand-pattern association persists when the pattern is hypothetically applied to a cosmetic product in 84.88% of cases; only 6.98% of these respondents reported that they would perceive the pattern as merely decorative in the cosmetic context. Even among respondents who did not correctly identify the Cannage in the visual recognition test, only 15.38% would perceive the pattern as merely decorative on a cosmetic product, while the majority would still associate it with “a brand” even without being able to name it. The categorical shift from fashion to cosmetics does not, on the basis of these data, dissolve the brand-pattern association in the way that the legal presumption assumed.

A further finding deserves attention because it engages the central concern of the Swiss decision specifically. Only 31.02% of respondents perceived the Cannage as exclusive to a single specific brand, while 47.69% considered that the pattern could be used by other similar brands, and a further 7.41% considered it generic to the market. The Swiss Federal Administrative Court’s conclusion that the Cannage does not function as an exclusive source indicator for the relevant public (because it belongs to a broader decorative tradition, the Wiener Geflecht), finds on this point, considerable empirical support. The two findings (cross-category persistence and limited perceived exclusivity) point in different directions, and their coexistence is itself substantively informative.

4.4.2. The empirical gap between legal categorisation and consumer perception

Taken together, the findings outline a more complex picture of the Cannage than either the OHIM or the Swiss decisions alone could provide. On some dimensions, the empirical data align with the OHIM’s grant of registration for the fashion classes: the pattern is recognised correctly by a substantial portion of luxury-informed consumers, and its brand-pattern association persists across product categories among the consumer segment most exposed to the luxury sector. On other dimensions, the data align with the Swiss refusal: less than one third of the sample perceives the Cannage as exclusive to a single brand, and the broader sample does not consistently associate the pattern with its brand of origin.

The substantive observation that emerges from this analysis is that the distinctiveness of pattern marks cannot be adequately captured by the binary distinction (distinctive / not distinctive) that trademark law operates with; the Cannage is distinctive for some consumers and on some dimensions, while remaining non-distinctive for other consumers and on other dimensions. Trademark law, however, requires a binary answer: a pattern either qualifies for protection, or it does not; the empirical picture of the Cannage does not divide as cleanly. The evidence offers the framework that the doctrinal analysis cannot provide on its own: a quantitative picture of where, and for whom, the distinctiveness of a pattern is actually located.

This is the empirical gap that the present chapter has aimed to address, the one that the OHIM and the Swiss Federal Administrative Court solved by reasoning about consumer perception in the abstract. The empirical research presented here measures this perception directly, and the resulting picture supports neither of the two decisions in their entirety, nor in isolation. It supports both in parts, and challenges both on others. The implication is not that the legal decisions are wrong, but that the methodological framework within which they were made, like the construction of a hypothetical "reasonably attentive consumer" as a single reference point, is empirically thinner than the substantive complexity of consumer perception would suggest.

4.4.3. Limitations

Several methodological and analytical limitations restrict the generalisability of the findings reported in this chapter. The first and most significant is the nature of the sample. The 216 respondents were recruited through a convenience sampling approach via social media and personal contacts; the sample is not statistically representative of the Italian population, nor of any defined population of luxury consumers. The sample is also demographically skewed: 76.86% of respondents are aged 18 to 34 and the female-to-male ratio is approximately 60:40. The findings should therefore be read as informative for a particular consumer segment, that can be identified as younger adults, predominantly Italian, with above-average education, rather than as representative of the consumer population at large.

The second limitation concerns the survey instrument. The visual recognition test presented the patterns in isolation, against a neutral background, without product or brand context. Real-world consumer perception of luxury patterns occurs in considerably richer contexts: on a product, in a store, alongside other brand markers, with prior exposure through advertising. The recognition rates reported in this chapter therefore represent a particular condition (decontextualised exposure to the pattern) and should not be interpreted as estimates of recognition in real consumer environments. A pattern presented on a product, with appropriate visual cues, is likely to achieve higher recognition rates than the same pattern presented as an isolated image.

The third limitation concerns the cross-category question. The question asked respondents whether they would associate the Cannage with the brand if they saw it on a cosmetic product, with examples provided in the question text. The hypothetical nature of this scenario, as respondents were asked to imagine the pattern in a cosmetic context, rather than to react to a pattern actually shown in such a context, is itself a methodological constraint. A more rigorous test would have presented respondents with the Cannage actually applied to a cosmetic product image, and measured their reactions directly. The present design, while informative, captures the persistence of the brand-pattern association at the level of hypothetical reasoning rather than perceptual response.

The fourth limitation concerns the absence of confidence data for the Missoni pattern. The questionnaire, due to a survey design constraint, did not include a confidence question for the fifth pattern. The H1 analysis is therefore based on a slightly asymmetric set of measurements across the five patterns. This asymmetry does not affect the primary recognition results, which depend only on the open-text identification question, but it limits the comparability of the confidence dimension across patterns.

Lastly, the categorical sample analysis (H2) involves at least one cell with a small number of observations: the "regular purchasers" category in H2b contains only 14 respondents.

The 71.43% recognition rate observed in this category is therefore a relatively imprecise estimate, and its interpretation should be tempered accordingly. The chi-square test on H2b remains valid because the expected frequencies in all cells exceed the standard threshold of five, but the magnitude of the observed effect at the extreme of the distribution should be treated as suggestive rather than definitive.

This chapter has tested the central legal questions raised in Chapter 3 against empirical evidence on consumer perception. The 216 respondents surveyed correctly identified the Dior Cannage as belonging to Dior in 39.81% of cases, a rate marginally lower than that of the unregistered Chanel quilting and identical to that of the unregistered Missoni zigzag. The recognition of the Cannage varies sharply with the consumer's familiarity with the luxury sector. Less than one third of the sample perceives the Cannage as exclusive to a single brand, while nearly three quarters of those who recognise the pattern would maintain the brand-pattern association if the pattern were applied to a cosmetic product.

These findings do not resolve the legal divergence examined in Chapter 3, nor do they support either of the two assessments; They suggest, instead, that the methodological foundation on which both assessments rest (the construction of a single reference consumer whose perception can be predicted in the abstract) is empirically thinner than the distinctiveness analysis would require.

CONCLUSIONS

This thesis began from a question that combined doctrinal curiosity and commercial urgency. In the luxury fashion industry, brand identity increasingly relies on visual elements, like geometric patterns, woven structures and distinctive textures, rather than on traditional word or logo marks. The rise of so-called "quiet luxury" has elevated non-traditional trademarks from supplementary brand assets to core instruments of competitive strategy. Their legal protection, however, remains doctrinally contested: trademark law was developed around verbal and figurative marks and applies only with difficulty to patterns rooted in pre-existing decorative traditions. The thesis questioned how non-traditional trademarks function as distinctive signs in luxury fashion, what legal requirements and consumer perceptions determine their eligibility for protection, and whether the doctrinal framework adopted by trademark authorities reflects the empirical reality of consumer recognition.

The Dior Cannage pattern was selected as the central case study because it embodies the entire tension at the heart of the thesis. The pattern is a stylised diamond motif drawn from a nineteenth-century weaving technique, the Wiener Geflecht, which Christian Dior incorporated into the salon chairs of his first 1947 collection. The motif subsequently became a recurring brand element across Dior's leather goods, ready-to-wear, and accessory lines. Despite this prolonged commercial use, the trademark protection of the Cannage has produced a striking jurisdictional divergence: the OHIM granted registration for the fashion classes (18, 24, 25) but refused for furniture (Class 20); the Swiss Federal Administrative Court refused registration for both cosmetics and cosmetic accessories (Classes 3 and 21), while the EU itself refused for furniture (Class 20). The divergence concerns specifically the extension of protection from the fashion core to adjacent product categories and provides an ideal laboratory for examining how doctrinal frameworks operate on the boundary between fashion and non-fashion goods.

The contribution of each chapter

Chapter 1 established the doctrinal framework. It traced the evolution of trademark law from the verbal and figurative marks of the nineteenth century to the open-ended definition of trademark introduced by TRIPS Article 15 and consolidated by post TRIPS treaties. The chapter showed that the legal openness toward non-traditional marks has not been matched, in practice, by a comparable openness in the assessment of distinctiveness: pattern marks, in particular, must overcome a structural presumption that consumers do not naturally perceive surface decoration as a source indicator. The comparative review of the four jurisdictions examined (the European Union, France, Switzerland, and Italy) revealed that the doctrinal standards are substantially harmonised but that the methodological choices that govern their application (the construction of the relevant public, the threshold of perceived distinctiveness, the role of acquired distinctiveness), can produce divergent outcomes.

Chapter 2 examined the commercial and economic dimensions that frame the legal analysis. The chapter introduced the distinction between seasonal garment designs, where the piracy paradox of Raustiala and Sprigman may operate, and heritage identifiers, which fall outside the paradox because their copying does not generate any compensating innovation cycle. The Cannage was situated within this framework as a heritage identifier: a pattern whose commercial value derives precisely from its continued association with the brand across decades, and whose protection therefore requires a doctrinal logic distinct from that governing seasonal apparel. The chapter also analyses the European case law that informs the protection of pattern marks in the fashion industry, identifying seven recurring principles that guide judicial reasoning across jurisdictions.

Chapter 3 conducted the comparative legal analysis of the Cannage case. The chapter examined in detail the OHIM proceedings and the Swiss case B-2655/2013, identifying three dimensions of divergence between the two assessments: the substantive framing of the sign and the market, the methodological choices that shape the assessment (including the construction of the relevant public), and the strategic procedural choices of the trademark holder. The analysis showed that the divergence is not an anomaly of the Cannage case but a structural feature of how trademark law treats pattern marks rooted in historical decorative traditions. The chapter closed with the observation that both the OHIM and the Swiss Court reached their conclusions by reasoning about consumer perception in the abstract, without measuring it.

Chapter 4 measured that perception directly. A consumer survey was administered to 200+ Italian respondents, testing the recognition of five luxury patterns (three registered as trademarks in the European Union, two not) and probing the perception of the Cannage along multiple dimensions of distinctiveness. The findings reported in the chapter qualify, in important ways, the assumptions that underlie the doctrinal analysis. The Cannage was correctly identified as Dior by 39.81% of respondents, a rate marginally lower than that of the non-registered Chanel quilting and identical to that of the non-registered Missoni zigzag. The recognition rate varied sharply with the consumer's familiarity with the luxury sector, from 21.43% among respondents with no luxury knowledge to 86.96% among respondents with in-depth knowledge. Less than one third of the sample perceived the Cannage as exclusive to a single brand, while nearly three quarters of those who recognised the pattern would maintain the brand-pattern association if the Cannage were applied to a cosmetic product.

The empirical–doctrinal integration

Taken together, the four chapters allow an integrated reading of the Cannage case that neither doctrinal analysis alone nor empirical research alone could provide.

The first integrated finding concerns the relationship between trademark registration and consumer recognition. The doctrinal framework of trademark law presupposes that registration corresponds to a meaningful difference in consumer perception: a registered pattern, having met the distinctiveness threshold, should function as a source indicator more effectively than a non-registered one. The empirical data qualify this presupposition, while the registered patterns as an aggregate group are recognised more often than the non-registered ones, the difference is largely produced by a single outlier (the Burberry check) whose hundred-year commercial history sets it apart from any of the other patterns tested. Excluding Burberry, the recognition rates of the remaining registered and non-registered patterns are statistically indistinguishable. The legal category of registration, in other words, does not cleanly correspond to the empirical category of brand-pattern association.

The second finding concerns the role of the reference consumer, chapter 3 noted that the divergence between the OHIM and the Swiss Federal Administrative Court was in part based on different implicit assumptions about which consumer was relevant for the distinctiveness assessment: the OHIM treated the consumer as moderately attentive, while the Swiss Court explicitly considered the perception of the less sophisticated consumer. The empirical evidence presented in Chapter 4 confirms that this distinction is not merely theoretical. The recognition rate of the Cannage varies by approximately 65% across the spectrum of luxury familiarity, from 21.43% at the lowest end to 86.96% at the highest. The choice of reference consumer is therefore not a methodological detail but a determinative factor in the outcome of the distinctiveness assessment, and the doctrinal framework currently provides no rule to govern that choice.

The third integrated finding concerns the persistence of the brand-pattern association across product categories. The OHIM and the Swiss decisions both rested on the presumption that the Cannage, applied to cosmetic-related products, would be perceived as decorative rather than source-indicating; the empirical data offer limited support for this presumption. Among respondents who already associated the Cannage with Dior, the brand-pattern link persisted in 84.88% of cases when the pattern was hypothetically applied to a cosmetic product. The categorical shift from fashion to cosmetics did not, on the basis of these data, dissolve the brand-pattern association in the way that the legal presumption assumed.

Considered together, these three findings outline the central argument of the thesis. The Cannage is neither simply a source-indicating sign nor is it simply a decorative pattern, it is a pattern whose distinctiveness exists differently for different consumer segments, in different product contexts, and along different perceptual dimensions. Trademark law, with its binary categories of distinctive and non-distinctive, registrable and non-registrable, cannot capture this multi-dimensional reality without some form of methodological refinement. The thesis demonstrates that the jurisdictional divergence in the protection of the Cannage reflects, at least in part, the inability of the current doctrinal framework to articulate the complexity of consumer perception that empirical research revealed.

Implications and directions for future research

Two implications follow from this argument.

The first is doctrinal. Trademark authorities, when assessing the distinctiveness of pattern marks rooted in historical decorative traditions, would benefit from a more explicit articulation of the reference consumer on which their analysis rests. The "reasonably attentive consumer" is not a single empirical object but a range of perceptual positions distributed across the consumer population. The choice of where, within this range, to locate the reference consumer is itself a substantive choice that determines the outcome of the assessment. Acknowledging this choice, and providing reasons for it, would make the distinctiveness analysis more transparent and more responsive to the empirical reality of consumer perception.

The second implication is methodological. The doctrinal framework of trademark law was developed in an era in which empirical evidence on consumer perception was practically inaccessible. The framework therefore relies on legal constructs (the average consumer, the reasonably attentive purchaser, the relevant public) as proxies for empirical observation. Contemporary consumer research, by contrast, offers tools that did not exist when these constructs were first elaborated. The use of empirical evidence in distinctiveness assessments, whether through expert testimony, consumer surveys, or independent academic research, could supplement the doctrinal analysis with the evidentiary basis that the constructs themselves were designed to approximate.

The empirical research presented in this thesis is, of course, only a starting point; two directions for future research can be suggested naturally. The first is replication on a larger and more representative sample. The 216 respondents who participated in the present survey were recruited through a convenience approach and over-represent the younger Italian adult population. A larger study, with a stratified national or transnational sample, would provide a more rigorous test of the findings reported in Chapter 4. The second direction is a more controlled cross-category test; the present survey asked respondents to imagine the Cannage applied to a cosmetic product but did not show them the pattern in that context. A study that presented respondents with the Cannage actually applied to cosmetic packaging, alongside an unrelated control pattern, would provide stronger evidence on the persistence of the brand-pattern association across product categories, and would speak more directly to the doctrinal question that the OHIM and the Swiss Court had to resolve.

Other than two previous points that can be implemented, this thesis points toward the integration of doctrinal and empirical methods in the analysis of trademark law. The legal questions that the protection of non-traditional marks raises are increasingly questions about consumer perception, and consumer perception is increasingly more available to direct measurement. The opportunity, for the next generation of trademark scholarship, is to bring these two strands of analysis into closer and more systematic dialogue.

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Dichiarazione del ricorso a strumenti di Intelligenza Artificiale (IA)

La sottoscritta Viviana Alessia Celmanti matricola 905821,

iscritta presso Ca' Foscari al corso di Laurea magistrale in Global development and entrepreneurship, autrice dell'elaborato finale/tesi di laurea "Beyond the label: Non-traditional trademarks in the luxury fashion industry", relatore Carlo Meo, consapevole delle sanzioni previste dall'art. 76 del Testo unico, D.P.R. 28/12/2000 n.445, e della decadenza dei benefici prevista dall'art. 75 del medesimo Testo unico in caso di dichiarazioni false o mendaci, sotto la propria personale responsabilità ai sensi degli artt. 46 e 47 del D.P.R. 28/12/2000 n. 445,

DICHIARA

di aver fatto ricorso a tecnologie di intelligenza artificiale generativa per supportare vari aspetti della ricerca e della scrittura del suo elaborato finale/della mia tesi di laurea, in particolare:

Claude AI per la revisione grammaticale, traduzione da testo scritto in italiano a inglese per migliorare la scrittura e traduzioni da documenti in altre lingue (es. francese). Non è stata usata intelligenza artificiale per la generazione automatica di testi, immagini o grafici.

DICHIARA INOLTRE

che tutto il materiale generato dall'IA è stato attentamente verificato, rivisto e rielaborato dall'autore/dall'autrice, che si assume la piena responsabilità per la qualità, l'accuratezza e l'integrità scientifica del lavoro.

ANNEX A - Questionnaire (in Italian)

Introduzione

Questo questionario fa parte di una ricerca per una tesi di laurea magistrale ed ha l'obiettivo di analizzare come i consumatori percepiscono e riconoscono gli elementi visivi dei brand di moda nella luxury industry, in particolare pattern e texture ricorrenti sui prodotti.

Il questionario è anonimo e richiede meno di 10 minuti, ti chiedo di rispondere in modo spontaneo, basandoti esclusivamente sulla tua percezione personale.

Grazie per il tuo contributo!

Blocco 1 - Profilo

Quanti anni hai?

- ○ Meno di 18 anni
- ○ 18-24 anni
- ○ 25-34 anni
- ○ 35-44 anni
- ○ 45-54 anni
- ○ 55-64 anni
- ○ Dai 65 anni in su

Come descrivi te stesso/a?

- ○ Maschio
- ○ Femmina
- ○ Genere non-binario/Terzo genere
- ○ Preferisco descrivermi personalmente
- ○ Preferisco non dirlo

Qual è il tuo titolo di studi?

- ○ Licenza media
- ○ Diploma di scuola superiore
- ○ Laurea Triennale
- ○ Laurea magistrale o superiore
- ○ Preferisco non rispondere

In quale ambito lavori/studi?

- ○ Moda, lusso o design
- ○ Marketing, comunicazione o pubblicità
- ○ Legge o consulenza
- ○ Altro

Come descriveresti la tua conoscenza del settore della moda e del lusso?

- ○ Nessuna conoscenza - non seguo il settore
- ○ Conoscenza base - conosco i brand principali ma non seguo attivamente il settore
- ○ Conoscenza media - seguo il settore, conosco i brand ed i loro prodotti iconici
- ○ Conoscenza approfondita - lavoro o studio nel settore, lo seguo con grande interesse

Blocco 2 - Abitudini di consumo

Hai mai acquistato un capo o accessorio luxury?

- ○ Si, regolarmente
- ○ Si, occasionalmente
- ○ Si, una volta sola
- ○ No, ma ci ho pensato
- ○ No, non è un settore che mi interessa

Quando vedi un prodotto, cosa ti permette principalmente di identificare il brand?

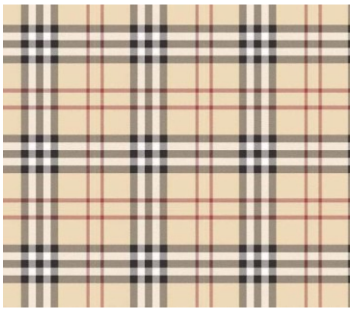
- ○ Il logo o il nome del brand visibile sul prodotto
- ○ Il pattern o la texture del materiale
- ○ La forma o il design del prodotto
- ○ Il colore caratteristico
- ○ Il punto vendita o il contest
- ○ Non riesco ad indentificare il brand senza il logo

Quando acquisti o valuti un prodotto luxury, quanto è importante per te riconoscere il brand attraverso elementi visivi sottili come pattern o texture, rispetto a elementi espliciti come loghi o nomi?

- ○ Per niente - preferisco il brand sia chiaramente visibile
- ○ Poco
- ○ Moderatamente
- ○ Molto
- ○ Moltissimo - preferisco riconoscere il brand attraverso elementi discreti

Blocco 3 - Visual recognition test

Riconosci questo pattern?



- ◯ Sì, so esattamente a quale brand appartiene
- ◯ Mi sembra familiare ma non sono sicuro/a
- ◯ No, non lo riconosco

A quale brand associ questo pattern?

Quanto sei sicuro/a della tua risposta?

- ◯ Molto sicuro/a
- ◯ Abbastanza sicuro/a
- ◯ Poco sicuro/a

Riconosci questo pattern?

- ◯ Sì, so esattamente a quale brand appartiene
- ◯ Mi sembra familiare ma non sono sicuro/a
- ◯ No, non lo riconosco

A quale brand associ questo pattern?

Quanto sei sicuro/a della tua risposta?

- ◯ Molto sicuro/a
- ◯ Abbastanza sicuro/a
- ◯ Poco sicuro/a

Riconosci questo pattern?

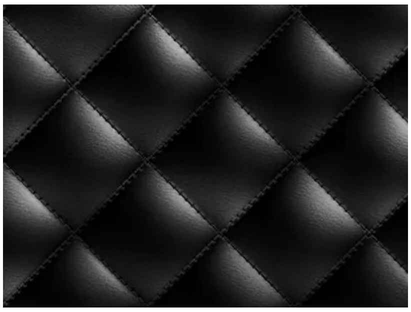
- ◯ Sì, so esattamente a quale brand appartiene
- ◯ Mi sembra familiare ma non sono sicuro/a
- ◯ No, non lo riconosco

A quale brand associ questo pattern?

Quanto sei sicuro/a della tua risposta?

- ◯ Molto sicuro/a
- ◯ Abbastanza sicuro/a
- ◯ Poco sicuro/a

Riconosci questo pattern?



- ◯ Sì, so esattamente a quale brand appartiene
- ◯ Mi sembra familiare ma non sono sicuro/a
- ◯ No, non lo riconosco

A quale brand associ questo pattern?

Quanto sei sicuro/a della tua risposta?

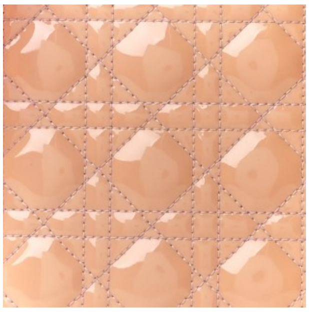
- ◯ Molto sicuro/a
- ◯ Abbastanza sicuro/a
- ◯ Poco sicuro/a

Riconosci questo pattern?

- ◯ Sì, so esattamente a quale brand appartiene
- ◯ Mi sembra familiare ma non sono sicuro/a
- ◯ No, non lo riconosco

A quale brand associ questo pattern?

Blocco 4 - Distintività percepita



Le seguenti domande riguardano specificamente questo pattern geometrico

Guardando questo pattern, come lo percepisci principalmente?

- ◯ Come elemento decorativo - abbellisce il prodotto ma non dice nulla sul brand
- ◯ Come elemento identificativo - mi permette di riconoscere il brand anche senza vedere il logo
- ◯ Come entrambe le cose - è sia decorativo che identificativo
- ◯ Non ho un'opinione in merito

In che misura ritieni che questo pattern sia sufficiente, da solo e senza loghi visibili, a identificare un brand specifico?

- ◯ Per niente: è un pattern generico che potrebbe appartenere a qualsiasi brand
- ◯ In parte: lo riconosco ma non lo associo automaticamente ad un brand preciso
- ◯ Completamente: questo pattern identifica immediatamente un brand specifico

Secondo te, questo pattern è usato esclusivamente da un brand o potrebbe essere usato anche da altri brand o produttori?

- È esclusivo di un brand specifico
- Potrebbe essere usato da altri brand simili
- È un pattern generico utilizzabile da chiunque
- Non saprei

Pensi che un pattern come questo dovrebbe essere protetto legalmente, nel senso che solo il brand che lo ha creato può usarlo?

- Sì, assolutamente - è parte dell'identità del brand
- Sì, ma solo se il pattern è chiaramente associato ad un brand specifico
- No, i pattern geometrici dovrebbero essere liberamente utilizzabili
- Non ho un'opinione in merito

Se vedessi questo pattern su un prodotto cosmetico (ad esempio una bottiglia di profumo o una crema) anziché in un capo d'abbigliamento o un accessorio, lo assoceresti comunque al brand?

- Si, immediatamente
- Probabilmente sì, ma non con certezza
- No, su un cosmetico lo vedrei solo come decorazione
- Non saprei

Quanto ritieni che questo pattern sia efficace quanto un logo tradizionale nel comunicare l'identità di un brand?

- Per niente
- Poco
- Moderatamente
- Molto
- Moltissimo