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Fashion Design Protection: The Eternal Plight of the "Soft Sculpture"

Kimberly A. Harchuck

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FASHION DESIGN PROTECTION: THE ETERNAL PLIGHT OF THE “SOFT SCULPTURE”

*Kimberly A. Harchuck*¹

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I. INTRODUCTION

*“Fashion is not something that exists in dresses only. Fashion is in the sky, in the street, fashion has to do with ideas, the way we live, what is happening.”*²

This writing begs to answer the ninety-year-old question of whether or not fashion designs should be protected by law. In answering this question, Section II explores design protection in the United States and the actions taken for almost a full century in determining the legal protection of fashion. Section III discusses the many facets of fashion design, as information technology and art. Section IV reviews the evolution of copying, its benefits and detriments, and the theories proposing protection against copies. Section V addresses current U.S. intellectual property laws affecting fashion as well as the protections of individual European countries and the European Directive as a whole. Section VI examines the current legislative proposal—the Design Piracy Prohibition Act. It discusses both the Act’s benefits and the detriments, with additional commentary on possible ways to facilitate passage of the Act. Fashion is an international industry grossing more than \$100 billion annually.³ Whether your opinion is that designs deserve legal protection or not, fashion is too lucrative an industry to squander away another ninety years over semantics; Congress is called to make a decision before more revenue is lost.

II. HISTORY

*“History is the key to everything: politics, religion, even fashion.”*⁴

These days, when talking to insiders, fashion piracy is considered an atrocity, a failure of our legal system, and yet another way America has fallen behind the rest of the world. However, despite what current inclinations may be, the United States has had a very long and dedicated history of fashion piracy.⁵ As far back as the nineteenth century,

2. KAREN KARBO & CHESLEY MCLAREN, *THE GOSPEL ACCORDING TO COCO CHANEL* 221 (2009) (quoting legendary French designer Gabrielle Bonheur “Coco” Chanel).

3. See Ben Winograd & Cheryl Lu-Lien Tan, *Can Fashion Be Copyrighted?*, WALL ST. J., Sept. 11, 2006, at B1. Retail sales in 2005 were over \$101 billion. *Id.*

4. Eva Herzigova, a Czech model and actress made famous in the 1990s, made this statement. KAREN WEEKES, *WOMEN KNOW EVERYTHING!* 208 (2007).

5. Susan Scafidi, *Design Piracy Prohibition Act: Historical Regression* (Mar. 10, 2008), http://www.counterfeitchic.com/2008/03/design_piracy_prohibition_act_h.php.

merchants used technology stolen from Europe to copy textile patterns for clothing and other goods.⁶ Sociologists agree that it is not uncommon for industries in a new and developing economy to undergo an initial period of piracy.⁷ Once that piracy period launches a creative revolution local creators eventually appear, and then the law steps in to protect their creative works.⁸

A prime example of this process is the early American publishing industry of the mid-1800s.⁹ Harper Brothers, Inc. was one of the most prominent publishing houses of the United States at the time. Taking advantage of the lack of national and international copyright enforcement, the firm printed pirated copies of works by numerous famous British authors, such as Charles Dickens, William Makepeace Thackeray, and the Brontë sisters.¹⁰ After this era of rampant piracy, great American novelists such as Mark Twain and Herman Melville began to surface, and slowly the American need for piracy in literature began to subside.¹¹ As the domestic writers emerged, the United States saw fit to protect its local creative works and began implementing federal copyright laws to do so. The unfortunate reality shows that this is where the parallel between fashion and literature end. The government, even as far back as the 1800s, believed that writing was an art form, so much so that it was a commodity to be protected by law. Congress has yet to escalate fashion design to that level of importance.

As stated previously, for almost an entire century, industries and experts have been calling on the government to allow legal protection for fashion designs.¹² In 1842, the United States enacted a law for design patents, which, when strictly interpreted, prohibited registration of fashion designs.¹³ Though many issues arose regarding the legislation and fashion designs, the first decision to rouse the fashion industry occurred in 1882 when there was a denial of a patent to a silk manufacturing firm.¹⁴ At that point, the fashion industry assembled

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. See Harper Collins About Us, <http://www.harpercollins.co.uk/about-harpercollins/Pages/about-us.aspx> (last visited Feb. 23, 2010).

11. See Scafidi, *supra* note 5.

12. See generally Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115 (Peter K. Yu ed., 2006).

13. *Id.* at 118 (citing Maurice A. Weikart, *Design Piracy*, 19 IND. L.J. 235 (1944)).

14. Scafidi, *supra* note 12, at 118 (citing SYLVAN GOTSHAL & ALFRED LIEF, *THE PIRATES WILL GET YOU: A STORY OF THE FIGHT FOR DESIGN PROTECTION* (1945)).

itself and began lobbying for some sort of creative protection.¹⁵ For decades, industries petitioned to have fashion design be a part of patent statutory interpretation. Finding little success via a patent argument, designers decided to take a different approach at the turn of the century and sought copyright protection for fashion.¹⁶ By 1913, designers demanded the attention of the Register of Copyrights, requesting an amendment to the Copyright Act.¹⁷ The amendment was to follow French copyright law by allowing registration of fashion designs under the copyrightable category of “fine arts.”¹⁸ Though the demands of the designers were not met by the Copyright Office, there was some evolution in the area.¹⁹ However, the changes did not actually benefit American designers.²⁰ According to the designers, it actually inhibited their goals even more.²¹ The same year of the designer upheaval, Congress passed the Kahn Act to protect textiles and clothing.²² In 1915, San Francisco was to hold a world’s fair called the Panama-Pacific International Exposition.²³ Because of the notorious piracy reputation of the United States, foreign designers refused to allow their works to be exhibited at the fair without receiving assurances against piracy from government officials.²⁴ Though many American designers were discontent at its passage, arguing the new law would allow European designers to steal American designs and eventually register them in their own countries, U.S. lawmakers still enacted the Kahn Act.²⁵ This action by the government marked yet another failure for fashion protection.

Though the fight seemed futile, designers and clothing manufacturers were still determined to obtain some form of intellectual property protection for their designs. Over the next few decades many bills were introduced to Congress in the name of fashion protection.²⁶ One bill, however, the so-called “Vestal Bill,” was seriously considered

15. Scafidi, *supra* note 12, at 118.

16. *See generally id.*

17. *Id.*

18. *Id.*

19. *Id.* at 118-19.

20. *Id.* at 119.

21. *Id.* at 119-20. Antitrust law stopped the Fashion Originators’ Guild of America from pursuing boycotts against pirating companies because the Guild was acting in “unreasonable restraint of trade.” *Id.*

22. *Id.* at 119.

23. PBS, People and Events: The Panama-Pacific International Exposition, http://www.pbs.org/wgbh/amex/ansel/peopleevents/e_exhibition.html (last visited May 31, 2009).

24. Scafidi, *supra* note 12, at 119.

25. *Id.* at 128 n.23.

26. *Id.* at 119.

by Congress.²⁷ In 1930, the House of Representatives passed the Vestal Bill, which provided protection for designers, particularly those designing useful articles (e.g., clothing).²⁸ Unfortunately for the fashion industry, the bill died in the Senate a few months later.²⁹

Unsuccessful in petitioning Congress for relief, clothing manufacturers decided to take a more direct approach with their lobbying efforts and thus founded the Fashion Originators' Guild of America (FOGA) in 1932.³⁰ Initially, FOGA began as a voluntary organization.³¹ By becoming a member of the Guild, the clothing manufacturers involved agreed to sell exclusively to specific retailers who restricted their purchases to only original designs.³²

In order to ensure compliance, the Guild created a system of design registration, policed retailers, engaged in arbitration proceedings, and notified its membership of violations by means of a card index. If a retailer either refused to eschew pirated designs or agreed to the Guild's rules but then cheated, the offender was listed on a red card sent out to Guild manufacturers. If a manufacturer ignored this boycott and sold merchandise to a red-carded retailer, the manufacturer was subject to a fine.³³

The National Federation of Textiles soon developed a similar system of design registration and joined forces with the Guild, whose members agreed to incorporate only original textile designs into their finished garments.³⁴ By 1936 FOGA had registered over 60 percent of all women's fashions selling for more than \$10.75 at the time.³⁵ The Guild made its mark policing the respective industries, so much so that, in 1941, the government felt the need to step in with an antitrust lawsuit.³⁶ The Fashion Originators' Guild argued that its actions were not in violation of antitrust law, but were "reasonable and necessary to protect the manufacturer, laborer, retailer, and consumer against the devastating evils growing from the pirating of original designs and had

27. Lisa J. Hedrick, Note, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215, 234 (2008). The Vestal Bill was also known as the Design Copyright Bill of 1930. *Id.* at 234 n.105.

28. *Id.*

29. Scafidi, *supra* note 12, at 119.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Fashion Originators' Guild of Am., Inc. v. Fed. Trade Comm'n*, 312 U.S. 457, 462 (1941).

36. *See generally id.*

in fact benefited all four [parties].”³⁷ Despite the Guild’s persuasive argument, in the decision of *Fashion Originators’ Guild of Am., Inc. v. Fed. Trade Comm’n* (FTC), the Supreme Court determined that the actions of the Guild were unfair competition and in violation of both the Sherman and the Clayton Acts.³⁸

The ongoing battle with design piracy has been long and arduous, and nothing if not consistent. Though a major blow to the cause, the disbanding of FOGA in the 1940s did not have the detrimental effect that many believed it would. Throughout the rest of the twentieth century, designers and manufacturers kept at it, and even now, in 2010, it can be said there has been a breakthrough for the design piracy cause. In the last few years designers have been more than vocal in their attempts to educate the public on the domino effect of buying knock-offs.³⁹ Designers are spreading the word that as consumers purchase more and more from the retailers offering the inexpensive knock-offs, the fashion industry is suffering.⁴⁰ When a mass merchant copies an entire look, puts their own label on it, and then sells it in their stores for a fraction of the cost of the original, there is bound to be a negative reaction somewhere in the fashion pipeline.⁴¹

III. FASHION AS EXPRESSION

*“Fashion is not about utility. An accessory is merely a piece of iconography used to express individual identity.”*⁴²

Many see fashion as frivolous; clothes are clothes, a necessity at best, and certainly not a reason for deep discussion let alone legislative modification. Because of this, it is “important to recognize the distinction between the general category of clothing and the subcategory of fashion.”⁴³ Clothing, by definition, is a garment used for covering.⁴⁴ Fashion is a subset of that; fashion is generally understood as a

37. *Id.* at 467.

38. *Id.* at 468.

39. See, e.g., Robin Givhan, *Michelle Obama’s Designers Want Protection from Knock-offs*, THE CHINA POST, Apr. 27, 2009, <http://www.chinapost.com.tw/life/fashion/2009/04/27/205860/p1/Michelle-Obama’s.htm>.

40. *Id.*

41. See generally *id.*

42. THE DEVIL WEARS PRADA (20th Century Fox 2006).

43. Scafidi, *supra* note 12, at 122.

44. See Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/clothing> (last visited July 10, 2009) (defining clothes as garments in general and covering).

“seasonally produced form of creative expression.”⁴⁵ The distinction between the two hinges on that one word, “expression.”⁴⁶ Whether it is as a business article, information technology, a way to communicate from designer to customer, or simply as an art form, fashion is the physical embodiment of someone’s ideas.⁴⁷

As stated previously, fashion can be looked at many different ways, one of them being as an avenue to convey information.⁴⁸ “Fashion is a powerful medium of communication, not merely for its creators but also for its wearers. As an information technology, fashion thus functions simultaneously as both message and medium.”⁴⁹ When analyzing fashion as a medium of information technology, it can help cynics understand the reasoning for designers wanting intellectual property protection for their creations.⁵⁰

This perspective of fashion as a mode of communications goes back to the beginning of time itself.⁵¹ Archaeologists have recently discovered jewelry used in ancient times to demonstrate human symbolic thought, used as an almost spoken language.⁵² Scientists have reason to believe that these beads, estimated from 75,000 years ago, indicated the social or marital status of the wearer.⁵³ As a more contemporary example, one can look to Native and African American textile creations.⁵⁴ African tribes were known to sew specific designation symbols and patterns in their kente cloth.⁵⁵ There are even studies indicating that Civil War-era slave communities used sewn-on patterns or quilts to narrate routes to safe houses in the Underground Railroad.⁵⁶

There is no doubt that fashion played a communicative role in history; the debate is whether that is still the case. Fortunately, or unfortunately, because of our Internet age of instant gratification,

45. Scafidi, *supra* note 12, at 122.

46. *See id.*

47. Scafidi, *supra* note 12, at 115.

48. *See generally* Susan Scafidi, *F.I.T.: Fashion as Information Technology*, 59 SYRACUSE L. REV. 69 (2008).

49. *Id.* at 82.

50. *See id.* at 77.

51. *Id.* at 75.

52. *Id.* (citing Anna Gosline, *Ancient Beads Imply Culture Older Than We Thought*, NEW SCIENTIST, July 6, 2009, <http://www.newscientist.com/channel/being-human/dn9392-ancient-beads-imply-culture-older-than-we-thought.html>).

53. Scafidi, *supra* note 48, at 76.

54. *Id.* at 77.

55. *Id.*

56. *Id.*

fashion no longer has the responsibilities it once did. However, contemporary designers have made it very clear they are using their artistic expression to convey their ideas to consumers. The designer creates an artistic statement with the production of a garment, while the consumer responds to this statement by wearing the clothing and thereby giving dimension to the designer's original creation.⁵⁷ Few mediums of communication allow the originator and the user to "simultaneously express the point of view of both originator and user."⁵⁸ For that reason, legislators need to take into account fashion as information technology. Designers are calling on them to learn from history, the same history that shows us fashion has been more than just "clothing" for centuries.

Manolo Blahnik is one of the world's most prominent and widely recognized shoe designers of our time.⁵⁹ Made famous by his celebrity clients and constant reference in the pop-culture staple show *Sex and the City*, Blahnik is considered one of the most fashion-forward designers of the twenty-first century.⁶⁰ Though his esteem has allowed him to reach staggering notoriety in fashion circles, Blahnik is renowned for his insistence that, in fact his "shoes are not fashion . . . [t]hey are . . . [art] that happens to be fashion."⁶¹ This statement by one of fashion's foremost contemporary leaders begs the question: Is fashion art?

It is likely that the average response to that question is "no," as fashion has a much more frivolous connotation than does the copyright-protected world of fine art. Much like seeing it as a medium of information technology, if you look at fashion as a type of art, one might understand the plight of designers a bit more. Designers, especially those on the high-end of the fashion spectrum, have always been very open about the correlation between art and fashion.⁶² From the elegant lines of Parisian sculptures inspiring Diane Von Furstenberg and her now-famous wrapped dresses, to the bright contrasting colors of Andy Warhol's paintings inspiring Betsey Johnson's costume-esque couture, art has always had an impact on what shows up on a runway.⁶³ The two worlds, seemingly always each other's sister craft, have been described in the past as, "[T]wo grande dames at a cocktail party[;] each knew the

57. *Id.* at 79.

58. *Id.*

59. *See generally* Jae-Ha Kim, *Well-Heeled Stars Love Their Manolos*, CHI. SUN TIMES, Aug. 30, 2000, at 57.

60. *See id.*

61. *Id.*

62. *See generally* Maria Puente, *Forget the Walls: Put Art Right On Your Clothes*, USA TODAY, Nov. 3, 2008, at 3D.

63. *Id.*

other was there (and looked fabulous); neither deigned to acknowledge the other.”⁶⁴

As we get deeper into the twenty-first century, those industry-wide snubs are few and far between. Within the last five years, some of the most prominent museums across the globe have not only acknowledged fashion, but have actually invited it into their world.⁶⁵ The Guggenheim in New York has been displaying designs by Giorgio Armani, showing his design evolution and contribution to fashion for the last quarter century.⁶⁶ The Metropolitan Museum of Art (“Met”) in New York has taken great steps to make public its stance on the “fashion as art” debate, proving this by referring to their Jacqueline Kennedy exhibit as “iconic.”⁶⁷ The Met has even gone so far as to create a permanent exhibit in its Costume Institute, entailing more than “75,000 pieces of clothing and accessories from seven centuries and five continents.”⁶⁸ Overseas in London and Japan, museums dedicated specifically to fashion have been opened and are some of the world’s foremost tourist attractions.⁶⁹ Not only are museums showing their support for fashion, but actual artists are as well.⁷⁰

Over the last few years, some of the most influential and top-selling fashion designs have been collaborations with artists.⁷¹ For example, in 2002, prolific Japanese artist Takashi Murakami collaborated with designer Marc Jacobs in creation of a line of handbags for the luxury couture company, Louis Vuitton.⁷² In approximately a year and a half, that particular line of handbags astonished retailers and proved the public’s reaction to a fashion-fine art collaboration, with over \$40 million in sales.⁷³ As we can see, dialogue between the two worlds of fashion and art is stronger than ever. The fact remains, even if you do not see fashion as an art form, it cannot be denied that fashion has clearly become more than just some useful article of clothing.

64. Jeff Chu, *You Know How It Is: Walk Into a Boutique and You Wonder; Where They Are Hiding the Clothes*, TIME MAG., Sept. 2002 at 11.

65. Julie P. Tsai, Comment, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States*, 9 LEWIS & CLARK L. REV. 447, 461 (2005).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 462.

70. *Id.*

71. *Id.*

72. *Id.* Louis Vuitton Malletier v. Dooney & Bourke, Inc., 340 F. Supp. 2d 415, 424 (S.D.N.Y. 2004).

73. *Id.* at 426.

IV. COPYING

*“It is better to fail in originality than to succeed in imitation.”*⁷⁴

A. Counterfeits

It is mostly common knowledge that fashion is basically a progression of ideas revisited from generations before. Nevertheless, there is a line where inspiration crosses over into imitation. Many designers these days are asking themselves, “When does influenced or inspired by, become just plain stealing?”⁷⁵ Piracy was not a significant problem for designers until the major changes in the clothing industry occurred in the 1920s.⁷⁶ By the time legislators truly started paying attention to the problem in the 1950s, it was too late, piracy was already a flourishing industry.⁷⁷

Experts have several theories as to why piracy became so rampant, but most have narrowed it down to three main factors: 1) the “jobbing organization,” 2) “hand-to-mouth buying,” and 3) growth of the industry.⁷⁸ A “jobbing house” is a business ran by a wholesale merchant, who buys from and sells bulk products to manufacturers.⁷⁹ A “Jobber” was essentially the initial terminology for the “middleman.”⁸⁰ The Jobber would purchase the fabrics and turn them over to manufacturers that would finish the garment on a contractual basis.⁸¹ The manufacturers would eventually return the garment to a Jobber to sell. Because of this dissociative way of doing business, the Jobbers were unaffected by labor and overhead, unlike the rest of the players in the fashion pipeline.⁸² This business model encouraged copying because Jobbers purchased from freelance designers and were indifferent as to whether the same design had already been sold or not.⁸³ Possibly even more scathing was the fact that the Jobbers gave each design to several

74. PAUL SLOAN, *THE LEADER’S GUIDE TO LATERAL THINKING SKILLS* 95 (2d ed. 2006) (citing Herman Melville, the American novelist made famous for his contributions to the Dark Romanticism literary period).

75. See Ruth La Ferla, *Faster Fashion, Cheaper Chic*, N.Y. TIMES, May 10, 2007, at G1.

76. Tsai, *supra* note 65, at 451.

77. *Id.*

78. *Id.* at 451-52.

79. JOHN D. ADAMS, *THREE QUARTERS OF A CENTURY OF PROGRESS 1848-1923* 19 (1923), available at <http://freepages.books.rootsweb.ancestry.com/~cooverfamily/siouxcity>.

80. See *id.* See also Tsai, *supra* note 65, at 451.

81. Tsai, *supra* note 65, at 451.

82. *Id.* at 451-52.

83. *Id.* at 452.

different manufacturers to work on, therefore increasing the chance of copying yet again.⁸⁴

The second reason is what is referred to in the industry as “hand-to-mouth” buying.⁸⁵ In 1921, when the term was coined, hand-to-mouth buying meant placing orders for quantities of garments that could be sold immediately.⁸⁶ This type of purchasing increased strain on the Jobbers and manufacturers who had to produce the garments without any advance orders, in effect, requiring them to guess which designs would be in demand at the time.⁸⁷ This pressure encouraged many of those players to simply replicate designs because counterfeiters would wait to see which designs were popular and then copy them; this saved time, effort, and money.⁸⁸

The third and final reason given by experts to explain the insurgence of piracy in the 1920s was the natural growth of the fashion industry as a whole.⁸⁹ As an industry grows with its products becoming more and more in demand, it is completely ordinary for players in the industry to start looking for shortcuts, especially the kind that save money.

Although piracy has changed in many ways throughout the decades since its humble beginnings in the early twentieth century, one thing is for sure: Nothing altered the face of counterfeiting like the World Wide Web.⁹⁰ In the pre-Internet years, the impact of counterfeits was much more modest, as the world itself moved at a much slower pace.⁹¹

There was more lag time before high-end designs trickled down to the world of copies, homages and send-ups. By the time they did, designers had reaped whatever profits they could from their original work and had moved on to the next trend . . . Now, the Internet gives counterfeiters nearly instant access to designers’ most recent work—long before the original version is even available in stores. Super-fast and cheap manufacturing in places such as China make design piracy especially efficient and lucrative.⁹²

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Robin Givhan, *The End of ‘Gown in 60 Seconds’?*, WASH. POST, Aug. 10, 2007, at C2.

91. *Id.*

92. *Id.*

Because of these global technological advances, the production of counterfeit fashions has reached an all-time high.⁹³ The real questions are: Who are these counterfeit products affecting? And to what extent?

Piracy was never considered to be anything more than a victimless crime even though it has always been a threat to honesty and ingenuity.⁹⁴ This was especially true when counterfeiting was a war fought within U.S. borders.⁹⁵ The Internet has changed all that.⁹⁶ It is now safe to say that revenue is in fact leaking out beyond our borders to the numerous different countries that are capitalizing on the lack of U.S. design protection.⁹⁷

Currently, most counterfeit goods making their way to U.S. soil are from: 1) China, 2) South Korea, 3) Pakistan, and 4) India.⁹⁸ According to the U.S. Department of Commerce, American companies are losing over \$250 billion every year in sales to counterfeit goods.⁹⁹ New York City itself loses over \$1 billion per year to counterfeits in taxes alone.¹⁰⁰ Loss of revenue aside, piracy has also been rumored to have ties to child labor, drug trafficking, and terrorism.¹⁰¹ Besides allegations of funding the black market, piracy has taken its toll on the fashion world itself; it affects all from the smallest independent “mom and pop” retailers to the highest of high-end fashion designers.¹⁰² Cases, such as *Knitwaves, Inc. v. Lollytogs, Ltd.*, show us that it is not just the large fashion institutions being harmed.¹⁰³ *Knitwaves* was a small independently owned retail store that created its own designs, but was forced to drastically reduce its prices because of direct competition with a design pirate.¹⁰⁴ This price drop resulted in lost profits.¹⁰⁵

93. *Id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. Edith Honan, *NYC Campaign Shows Dark Side of Counterfeit Goods*, REUTERS, May 16, 2008, <http://www.reuters.com/articlePrint?articleID=USN1642669920080516>.

99. Press Release, Representative Jerrold Nadler, Sen. Schumer and Rep. Nadler Reveal Gaping Hole in Piracy Law That Allows Cheap Imports to Flood NYC Market – Lawmakers Joined By Well-Known NY Designers to Unveil Plan to Protect Designs and Preserve New York as a Fashion Capitol (Aug. 8, 2007), available at http://www.house.gov/list/press/ny08_nadler/DesignPiracy080807.html.

100. *Id.*

101. Honan, *supra* note 98.

102. *See generally* *Knitwaves, Inc. v. Lolltogs, Ltd.*, 71 F.3d 996 (2d Cir. 1995).

103. *Id.*

104. *Id.* at 999-1000.

105. *Id.* at 1000.

Though it is definitely not in danger of having to shut its doors any time soon, global fashion powerhouse Hermes has had to alter its business as model to accommodate pirates as well.¹⁰⁶ Hermes has taken to hiring a private firm outside of its own legal department, whose sole purpose is to patrol both the real and the virtual world searching for counterfeit Hermes goods.¹⁰⁷

Many high-end designers have sought to combat counterfeits by making the designs more difficult to copy.¹⁰⁸ Each season consumers notice less and less of the casual drape-style dresses.¹⁰⁹ More often we are now noticing more “formal, couture-inspired looks, with unusual shapes, extensive stitching and more luxurious fabrics.”¹¹⁰

The total estimated global trade in counterfeit goods is over \$650 billion a year.¹¹¹ Whether or not one believes the purchase of counterfeit goods is funding the evils of the world, the fact remains that the United States is losing billions of dollars every year because of these fraudulent products.¹¹²

B. *Theories of Protection*

There are many arguments as to whether fashion designs should have legal protection.¹¹³ This issue has been brushed under the carpet for so long; it seems that every article or law review is stating a new supposition. Call me old-fashioned, but in this era of immediate gratification, with so much information at our finger tips, I find that it is easy to get lost in the speculation and ultimately ignore the best answers. I have decided that for the purposes of this writing, there really are only two design theories to be examined: the “Desert-Based Theory” and the “Economic-Based Theory.”¹¹⁴

The Desert-Based Theory states that fashion designers are artists; therefore, their resultant creations are considered art.¹¹⁵ According to

106. See Gina Ballefante, *A ‘Satire’ of a Classic Fails to Amuse Hermès*, N.Y. TIMES, Aug. 12, 2003, at 8.

107. *Id.*

108. Cheryl Lu-Lien Tan, *Copy Protection for Fall Fashion*, WALL ST. J., Oct. 27, 2007, at W1.

109. *Id.*

110. *See id.*

111. Honan, *supra* note 98.

112. *Id.*

113. See Emily S. Day, Comment, *Double-Edged Scissor: Legal Protection For Fashion Designs*, 86 N.C.L. REV. 237 (2007).

114. *Id.* at 251-61.

115. *Id.* at 252.

the Constitution, one of the authorities vested in Congress is to “promote the progress of science and useful arts.”¹¹⁶ The question is, does fashion fall under this clause, namely under the category of “art”? The Ninth Circuit recognized the possibility that a piece of clothing, specifically a swimsuit, could be a work of art and not merely a functional swimsuit by reversing a summary judgment order against the designer in *Poe v. Missing Persons*.¹¹⁷ As it happened, none of the later cases from the Ninth Circuit followed the same reasoning.

There are two main counterarguments to the Desert-Based Theory.¹¹⁸

First, one of the primary justifications for copyright is to provide an economic incentive for artists to create and publish, which is achieved by granting them a limited monopoly. Yet, the fashion industry exhibits an empirical anomaly: the industry produces a huge variety of creative goods without strong IP protection in one of its biggest markets (the United States), and without apparent utilization of nominally strong IP rights in another large market (the countries of the European Union).¹¹⁹

Essentially, that means that the fashion industry is doing just fine without high IP protection.

The second argument against the Desert-Based Theory is the fact that since fashion has been around since the beginning of copyright law itself, it stands to reason that if the law was meant to encompass designs, it would have been stated that way.¹²⁰ In 1870, copyright protection was accorded to three-dimensional objects.¹²¹ More recently, in 2000, copyright protection was extended to computer chips.¹²² From 1870, to present day, fashion design has been an established and well-recognized industry.¹²³ Congress has consistently extended copyright protection to different types of articles, yet has chosen to specifically exclude fashion

116. U.S. CONST. art. I § 8.

117. *Poe v. Missing Persons*, 745 F.2d 1238 (9th Cir. 1984). The court listed expert evidence concerning the usefulness of the product, evidence of the designer’s intent, testimony regarding the object’s custom and usage in the art world, and the clothing trade and the marketability of the object as a work of art as factors to be considered to distinguish between a work of art and a useful object. *Id.* at 1243.

118. Day, *supra* note 113, at 253.

119. *Id.* (citing Posting of Christopher Sprigman to Faculty Blog, http://uchicagolaw.typepad.com/faculty/2006/11/fashions_piracy.html (Nov. 13, 2006, 19:44:37)).

120. Day, *supra* note 113, at 255.

121. Act of July 8, 1870, ch 230, § 86, 16 Stat. 198, 212 (repealed in 1916).

122. Day, *supra* note 113, at 255.

123. *Id.*

design.¹²⁴ This counterargument states that if fashion is deserving of protection, it should have been eligible for that security all along, and therefore, would have been instituted as far back as the 1800s.¹²⁵

The other theory pertaining to protection of fashion designs is the Economic-Based Theory, also known as the “Piracy Paradox.”¹²⁶ For years critics have stated that copying actually “economically benefits designers, or at the very least, does not harm the [fashion] industry.”¹²⁷ There are several sub-theories used to support this argument.¹²⁸ First, copies are believed to be a “catalyst” to the ever-changing seasonal fashion cycle.¹²⁹ Second, copying aides in assisting the public to identify trends among the industry, which, in turn, increases sales based on that specific trend throughout the industry.¹³⁰ Third, once these specific trends are established, the actual copying “serves as an expense-free means of advertising.”¹³¹ Fourth, the designers who created the original fashion in question are able to charge a higher price for it, as it is recognized as the original and would not have been without the existence of the knock-offs.¹³²

Though the theories used in defending the Economic-Based Theory are seemingly sound, there are a few discrepancies in the analysis.¹³³ First, there is the underlying premise that most fashion designs are used as status symbols among their wearers.¹³⁴ Secondly, the piracy paradox assumes that the designers themselves would not be able to generate similar revenue through in-house IP protection and their own production of lower-end clothing lines.¹³⁵ And lastly, even if every facet of the theory is presumed as correct, and piracy actually does economically benefit designers, there needs to be a more specific detail added.¹³⁶ Designers may reap benefits from counterfeits, but only when they are of

124. *See generally id.*

125. *Id.* at 255.

126. *Id.* at 259.

127. Day, *supra* note 113, at 259. *See also* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1691 (2006).

128. Day, *supra* note 113, at 259.

129. *Id.*

130. *Id.* at 260.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

“clearly inferior quality,” so as to not infringe on the intended customer-base of the pirated design.¹³⁷

The foremost impediment of the Economic-Based Theory, alluded to above, is its “double-edged scissor” (pun intended).¹³⁸

Luxury designers financially benefit from . . . widespread copies of clearly inferior quality, assuming that [their self-created copies from their own lower-end lines] could not replace this environment of widespread copies without tarnishing the image and thereby the profits of the luxury line. However, all other fashion designers, [namely smaller, newly-emerging ones, garner very] little economic benefit from the [piracy] of their original works. [And experts have made it very clear that] neither luxury nor small-time designers [gain any significant revenue] from the existence of perfect imitations.¹³⁹

Because these alleged economic benefits are not definite or even commonplace, the Piracy Paradox cannot justify piracy.

C. *Dichotomy*

It is true that most designers feel they are just as important to the world as artists and are wronged by not receiving legal protection for their creations. There are, however, quite a few designers who believe that counterfeit goods actually benefit the fashion industry. One of the greatest designers of all time, Coco Chanel, was quoted as saying knock-offs were nothing more than “spontaneous publicity” and that piracy was simply the “flattering result of success.”¹⁴⁰ It has been said that piracy is simply part of the circle of life in the fashion industry.¹⁴¹

Is it possible that the production of knock-offs can actually boost a design house’s profile?

Let’s say Versace does a pair of parachute pants. Then three months later, some other designers do versions of parachute pants. And a year later, you go to Costco or Target and you see parachute pants there.

137. *Id.*

138. *Id.* at 265 (citing Olivera Medenic, *Designers Seek to Prevent Cheaper Knockoffs*, NAT’L L.J., Aug. 28, 2006, at S14).

139. *Id.*

140. Lynn Yaeger, *Sui Generis? Anna Sui & Others Sue Forever 21: How Original Are You?*, THE VILLAGE VOICE, Sept. 18, 2007, <http://www.villagevoice.com/content/printVersion/211411> (Biographer Axel Madsen quoting and paraphrasing Coco Chanel).

141. See generally Day, *supra* note 113, at 259-60.

Everybody is still going to know that it was Versace that kicked off that trend.¹⁴²

According to that logic, knock-offs make fashion design affordable to the masses, seeing as the average customer cannot afford original high-fashion designs.¹⁴³ After hearing these statements, one must ask, whether designers truly believe that piracy has a positive impact on their craft, or is this simply a case of accepting circumstance?

V. CURRENT LAW

*“Fashion is more powerful than any tyrant.”*¹⁴⁴

A. United States

There are three main areas of intellectual property law: copyrights, trademarks, and patents. Unfortunately, because of the statutory requirements of each, they are all problematic in some way when dealing with the legalized protection of fashion design. In the United States, because the laws have not been amended to specifically provide protection for fashion, designers have taken to the main areas of settled IP law to “bridge the gap” in finding some sort of security for their creations.¹⁴⁵

1. Copyright

By definition, a copyright is a “property right in an original work of authorship . . . fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work.”¹⁴⁶ According to Federal statutory law, copyright protection subsists “in original works of authorship fixed in any tangible medium of expression, now known or later developed [derivative work], from which they can be perceived, reproduced, or otherwise communicated.”¹⁴⁷ Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying

142. Winograd & Tan, *supra* note 3.

143. Brandon Scruggs, Comment, *Should Fashion Design Be Copyrightable?*, 6 NW. J. TECH. & INTELL. PROP. 122, 122 (2007).

144. RICHARD ALAN KRIEGER, CIVILIZATION’S QUOTATIONS 247 (2002) (quoting a Latin proverb).

145. See Scaffidi, *supra* note 12, at 121.

146. BLACK’S LAW DICTIONARY 386 (9th ed. 2009) (defining “copyright”).

147. 17 U.S.C. § 102(a) (2009) (defining the protectable subject matter of copyrights).

music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.¹⁴⁸

When it comes to copyright protection, many designers believe that fashion comfortably fits in the category of “pictorial, graphic, and sculptural works.”¹⁴⁹ This classification includes two and three-dimensional works of fine, graphic, and applied art.¹⁵⁰ By definition, “applied art” is the application of design and aesthetics to objects of function and everyday use (for example, clothing).¹⁵¹ The statute goes further to say that “works of artistic craftsmanship” are included under this category of copyright law, “insofar as their form, but not their mechanical or utilitarian aspects, are concerned.”¹⁵² This leads directly into the main obstacle for fashion’s copyrightability: fashion as a “useful article.”

The “useful article” doctrine holds that a work is uncopyrightable if it possesses an intrinsic utilitarian purpose.¹⁵³ The difficulty here is determining when a work is primarily functional instead of aesthetically motivated. Should the item be deemed inherently utilitarian it must pass a test of either physical or conceptual separability in order to be copyrightable.¹⁵⁴ This means that the pictorial, graphic, or sculptural aspect of the work must physically or conceptually be able to actually be separated from the utilitarian, functional parts of the item—and even then, only the separable aspect is given protection.¹⁵⁵ Therefore, the

148. *Id.*

149. *Id.*

150. *Id.* § 101 (defining “pictorial, graphic, or sculptural work”).

151. Wikipedia, Applied Art, http://en.wikipedia.org/wiki/Applied_art (last visited March 16, 2010). In contrast, “fine art” serves as intellectual stimulation to the viewer or academic sensibilities. *Id.* The applied arts incorporate design and creative ideals to objects of utility, such as a cup, magazine or decorative park bench. *Id.*

152. 17 U.S.C. §101 (2009).

153. *Id.* (defining “useful article”).

154. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980). In this case the items (belt buckles) were deemed “intrinsically utilitarian” and therefore subjected to both separability tests to determine copyrightability. *Id.* Ultimately, the belt buckles were determined as items whose “primary ornamental aspect of the Vaquero and Winchester buckles is conceptually separable from their subsidiary utilitarian function” and thus, copyrightable. *Id.*

155. *Pivot Point Int’l, Inc. v. Charlene Prod., Inc.*, 372 F.3d 913, 923 (7th Cir. 2004) (citing 17 U.S.C. §101). This Seventh Circuit court suggested several different approaches to determine separability:

- 1) the artistic features are primary and the utilitarian features are subsidiary; 2) the useful article would still be marketable to some significant segment of the community simply because of its aesthetic qualities; 3) the article stimulates in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function; 4) the artistic design was not significantly influenced by functional considerations; 5) the artistic

surface argument is that while aspects of a fashion design may be copyrighted, the design as a whole cannot be because of its utility. The premise of the physical separability test is “whether the feature to be copyrighted could essentially be sliced off for separate display.”¹⁵⁶ In *Celebration Int’l., Inc. v. Chosun Int’l., Inc.*, the district court decided that, in regard to a tiger costume, the “tiger’s sculptural aspect (the head) is in fact physically separable from the utilitarian function [as a clothing garment].”¹⁵⁷

On the other side of the separability spectrum lays the theory of “conceptual separability.”¹⁵⁸ “Conceptual separability” is a term used to determine which components of a design are eligible for copyright protection and which are held indivisible from useful components.¹⁵⁹ Unfortunately, the test for conceptual separability is much more confusing and much less clear-cut than its counterpart. Conceptual separability exists when “the artistic aspects of an article can be conceptualized as existing independently of their utilitarian function.”¹⁶⁰ Though quite debatable in reality, in theory conceptual separability can exist in certain fashion designs. This occurs when the “design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences.”¹⁶¹ In *Masquerade Novelty, Inc. v. Unique Indus.*, the Third Circuit deemed animal nose masks copyrightable because their utility is technically not derived from their appearance.¹⁶² The court, in *Animal Fair, Inc. v. AMFESCO Industries*,

features can stand alone as a work of art traditionally conceived, and the useful article in which it is embodied would be equally as useful without it; and 6) the artistic features are not utilitarian.

Id. at 923.

156. *Celebration Int’l., Inc. v. Chosun Int’l., Inc.*, 234 F. Supp. 2d 905, 914 (S.D. Ind. 2002). The court declined to issue a preliminary injunction against an accused infringer citing evidence that its similar costume was an earlier, independent creation not a copy of the plaintiff’s design. *Id.* at 919. The court also made clear that the scope of protection for the plaintiff’s costume was limited due to its effort to reproduce a real, lifelike tiger. *Id.* at 913 n.4.

157. *Id.* at 914.

158. *Day, supra* note 113, at 246.

159. *Id.*

160. *Id.*

161. *Id.* (quoting *Brandir Int’l., Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir.1987)). In *Brandir*, a bicycle rack, the “ribbon rack,” made of bent metal tubing was denied copyright. *Id.* at 1147-48. The Second Circuit decided that if “design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian aspects.” *Id.* at 1145. Conceptual separability exists “where design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influence.” *Id.* at 1145. That was not the case here. Form and function were inextricably intertwined. *Id.* at 1147.

162. *Masquerade Novelty, Inc. v. Unique Indus.*, 912 F.2d 663, 671 (3d Cir. 1990).

Inc., concluded that a plush bear claw novelty slipper was conceptually separable from its useful function, and, therefore, the designer was deserving of an injunction against the production of an imitation.¹⁶³ In *Poe v. Missing Persons*, the Ninth Circuit decided that an article of clothing (a bathing suit) was actually a “soft sculpture” and therefore eligible for copyright protection.¹⁶⁴

It must be stated, however, that those results are atypical. In the majority of cases involving a question relating to clothing, the court is apt to decide that “[i]tems of clothing are unlikely to meet the physical or conceptual separability tests’ because most often the design itself, such as the cut of a sleeve, simultaneously serves its function as clothing to ‘cover the wearer’s body and protect that wearer from the elements.’”¹⁶⁵

Though copyright protection for the actual design is still problematic, certain copyright evolutions have occurred in the fashion industry. Currently, it is considered well-settled that fabric designs are, in fact, protected by copyright.¹⁶⁶ For example, the international fashion house Burberry is not able to copyright its world-renown trench coats, but is able to treat its famous “Burberry plaid” as a copyrighted creation.¹⁶⁷ In *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, the court held that a design printed on a dress is protectable as a work of art and as a print under the Copyright Act.¹⁶⁸ Fabric prints are always copyrightable as long as they are considered sufficiently original.¹⁶⁹ Additionally, legal protection has been extended to drawings or pictures of fashion designs.¹⁷⁰ This protection is provided by the “pictorial, graphic, and sculptural works” category of artistic works¹⁷¹—the same

163. *Animal Fair, Inc. v. AMFESCO Indus., Inc.*, 620 F. Supp. 175, 187 (D.C. Minn. 1985). “A novelty slipper made to look like a bear’s claw would be conceptually separable because a slipper would be equally useful without the bear’s paw configuration and because the bear’s paw can stand alone as a – albeit modest – work of art.” 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT §§ 2.5.3, 2:79 (3d ed. 2005).

164. *See Poe v. Missing Persons*, 745 F.2d 1238 (9th Cir. 1984).

165. *Day, supra* note 113, at 247.

166. *Id.*

167. *Winograd & Tan, supra* note 3.

168. *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142, 143 (D.C.N.Y. 1959) (citing 17 U.S.C. § 101 (copyright definitions)).

169. *Peter Pan Fabrics, Inc.*, 169 F. Supp. at 143.

170. *Day, supra* note 113, at 248 n.59 (citing *Jack Adelman, Inc. v. Sonners & Gordon, Inc.*, 112 F. Supp. 187, 188 (D.C.N.Y. 1934) (“It is the drawing which is assumed to be a work of art and not the dress.”)).

171. *Day, supra* note 113, at 248.

classification that many believe may be used to protect the designs themselves.

As mentioned, copyright law has evolved in regard to the fashion industry, but laws are also evolving outside of the industry that can be applied to fashion designs. In 1990, Congress amended the Copyright Act to specifically include “architectural works” as protectable subject matter.¹⁷² Architecture is obviously one of the most *useful* articles society has created. “Part of the importance of creating a separate category for architectural works (and thus differentiating them from pictorial, graphic, and sculptural works) is that the separability requirement for useful aspects that applies to pictorial, graphic, and sculptural works would no longer apply to any architectural works”¹⁷³ It is very clear that if anything may be classified as a “useful article” it would be a building. But architecture’s usefulness as shelter does not take away from its ability to also be a work of art. The parallel drawn between architecture and fashion is very apparent. Both were originally deemed useful articles, incapable of copyright protection.

Pressure for the United States to protect fashion design is growing. In 1998, Congress enacted the Vessel Hull Design Protection Act.¹⁷⁴ The Act provided ten years of *sui generis* protection for designs of watercraft hulls and decks, which are “useful articles” in their own right.¹⁷⁵ Based on testimony before the House and Senate, Congress had reasons to believe that hull designers may invest as much as \$500,000 into the design of one hull.¹⁷⁶ They also believed that investment should be rewarded, for, absent protection, designers would “no longer invest in new, innovative boat designs.”¹⁷⁷ Beyond the fact that Congress explicitly authorized the protection of a useful article in this legislation, the VHPA laws can also be applied to fashion designs.¹⁷⁸

172. 17 U.S.C. § 102(a)(8) (2009) (architectural works).

173. Scruggs, *supra* note 143, at 130.

174. Vessel Hull Design Protection Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§ 1301-32 (2009)). *See also* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989). In *Bonito Boats*, a Florida statute prohibiting copying of unpatented boat hulls by a direct molding process was preempted. *Id.* at 168.

175. 17 U.S.C. § 1301 (2009). “Vessel” is defined as “a craft (A) that is designed and capable of independently steering a course on or through water through its own means of propulsion; and (B) that is designed and capable of carrying and transporting one or more passengers.” *Id.* § 1301(b)(3). “Hull” is defined as the frame or body of a vessel, including the deck of a vessel, exclusive of masts, sails, yards, and rigging. *Id.* § 1301(b)(4).

176. Hedrick, *supra* note 27, at 236 n.114.

177. *Id.*

178. *See id.* at 239.

2. Trademark

A trademark is a word, phrase, or logo used by a manufacturer to distinguish its products from those of others.¹⁷⁹ The purpose of a trademark is to serve as a source indicator for the public; in effect, a trademark is a commercial substitute for one's signature.¹⁸⁰ Famous examples of trademarks in fashion would be the Chanel interlocking Cs, the Nike "swoosh," Polo's horse, or the Louis Vuitton "LV." Being that trademarks can be essentially anything the seller wishes them to be, the main requirement for a successful trademark is "distinctiveness."¹⁸¹ "The general rule regarding distinctiveness is clear: An identifying mark is distinctive and capable of being protected [as a registered trademark] if it either (1) is inherently distinctive or (2) has acquired distinctiveness through secondary meaning."¹⁸² "Secondary meaning" is a form of distinctiveness that is acquired by great public recognition of the mark, most often achieved through lengthy and extensive use throughout the marketplace.¹⁸³ Based on the requirements needed to achieve secondary meaning, it is clear why companies take their trademarks very seriously; owners must devote immeasurable time and money to attain a truly distinctive mark.¹⁸⁴

Because of the lack of fashion design protection, U.S. designers have taken to trademark law to help them protect their creations. For example, Levi Strauss has used their registered trademark on the back pocket of every pair of jeans leaving its factory for the last 100 years.¹⁸⁵ The other way designers use trademark law to "bridge the gap" is by using their trademarks in the actual design of the apparel. It used to be that designers would strategically place their trademark somewhere inside a garment; it was primarily used to identify the product to the

179. 15 U.S.C. § 1127 (2009) (defining "trademark").

180. BLACK'S LAW DICTIONARY 1630 (9th ed. 2009) (defining "trademark").

181. *Id.*

182. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992). This case noted a spectrum of distinctiveness ranging from generic marks, which are unable to be registered, to suggestive, arbitrary, and fanciful marks, which are always eligible for registration. *Id.* Disposed there between are descriptive marks which can only be protected by achieving secondary meaning. *Id.*

183. *Burke-Parsons-Bowlby Corp. v. Appalachian Log Home, Inc.*, 871 F.2d 590, 596 (6th Cir. 1989). In this Sixth Circuit case, the court decided that there was insufficient evidence to show that consumers no longer associated "Appalachian Log Structures" with the region and instead associated it with the good. *Id.* at 596.

184. Hedrick, *supra* note 27, at 226.

185. *Id.* at 259 n.59 (citing to Michael Barbaro and Julie Creswell, *With a Trademark in Its Pocket, Levi's Turns to Suing Its Rivals*, N.Y. TIMES, Jan. 29, 2007, at A1 (reporting that Levi Strauss has initiated approximately 100 lawsuits for trademark infringement since 2001)).

wearer.¹⁸⁶ However, in recent years, trademark use on apparel has become much more noticeable.¹⁸⁷ It has been seen in the last few decades that designers are incorporating their trademarks into the actual creation of the apparel.¹⁸⁸ Though it might be making a fashion statement for the new millennium, the key reason in doing this is to use the trademark to give some semblance of protection to the unprotectable design.¹⁸⁹ “The design of a shirt or handbag might be beyond the scope of U.S. intellectual property law, but a logo appearing on the outside of that garment or accessory enjoys the full protection of the trademark system.”¹⁹⁰ To clarify, this use of the trademark does not render the design of the article protected—the protection applies only to the distinctive mark used.

For this reason, in order for a fashion design to be eligible for trademark protection, the design must rise to that same level of distinction required for a mark to be recognized as a trademark. Because many designs are copied in a relatively short span of time, the general public may identify a distinctive trend in fashion designs but will not likely associate that trend with one particular designer.¹⁹¹

As discussed previously, trademark law does not particularly fit fashion. However, its application to fashion designs would lead to several logical advantages. Trademark law is well-established and grounded in a particularly detailed and stable piece of legislation.¹⁹² “Also, in part because it has its constitutional foundation in the commerce clause rather than the patent and copyright clause, it is potentially unlimited in duration.”¹⁹³ Because of the broadened capabilities that these advantages bring with them, many designers are starting to realize that trademark law is the category of choice to help them bridge the gap until legislators pass a fashion-specific bill.¹⁹⁴ Though trademark law opens the door to allowing some form of protection for fashion designs, its subset, trade dress law, provides a more likely avenue of protection for fashion designs.

186. See Scafidi, *supra* note 12, at 120.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Hedrick, *supra* note 27, at 226.

192. See Lanham Act § 2, 15 U.S.C. § 1072 (2009).

193. Scruggs, *supra* note 143, at 133.

194. See Scafidi, *supra* note 12, at 120.

3. Trade Dress

Trade dress is a subcategory of trademark law that includes product packaging or any product configurations that serve to indicate the source of a good.¹⁹⁵ The actual term “trade dress” refers to a product or service’s overall appearance that incorporates elements that serve to identify the product’s source.¹⁹⁶ Though, a fairly unsettled sector of law, trade dress protection has been granted to numerous unconventional items, from a restaurant’s “ambiance” to a “style” of a musical performance.¹⁹⁷ For a product’s trade dress to be protected under trade dress law, it must be distinctive.¹⁹⁸ The distinctiveness requirement, as with trademarks, can be achieved by inherent distinctiveness or secondary meaning.¹⁹⁹ To prove secondary meaning, “the producer of the product must be able to ‘show that the consuming public identifies the trade dress with the specific producer,’ rather than the product.”²⁰⁰ Fashion designs by their very nature are seasonal, and, consequently, have a very short life span.²⁰¹ For that reason, “consumers are very unlikely to be able to attribute a particular clothing design to a particular designer, without the aid of trademarks, labels or a substantial advertising campaign.”²⁰² Because of the need for advertising and especially secondary meaning, it is safe to say that trade dress protection is really only enjoyed by more established companies and designers.

Based on the above facts, at one point, it seemed trade dress was the ideal opportunity to pilot fashion design into intellectual property protection. However, in 2000, the Supreme Court heard the case of *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*²⁰³ The unanimous opinion decided that the children’s garments at issue could never be considered inherently distinctive or intrinsically capable of being a source of identification.²⁰⁴ The Court opined that product designs are “primarily

195. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000).

196. *U-Neek, Inc. v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 158, 171 (S.D.N.Y. 2001).

197. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 (1992); *Cesare v. Work*, 520 N.E.2d 586, 593 (Ohio Ct. App. 1987).

198. Tsai, *supra* note 65, at 453 (citing *Wal-Mart v. Samara Bros., Inc.*, 529 U.S. 205 at 211 (2000)).

199. Tsai, *supra* note 65, at 453.

200. *Id.* (citing Karina K. Terakura, Comment, *Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Industry*, 22 U. HAW. L. REV. 569, 588 (2000)).

201. Tsai, *supra* note 65, at 453.

202. *Id.* at 453 (citing Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 169, 199 (2002)).

203. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000).

204. *Id.* at 216.

the result of aesthetic or functional considerations” and only really point to their origin if they have developed some sort of secondary meaning in the minds of consumers.²⁰⁵

To be protectable, trade dress must also be nonfunctional.²⁰⁶ The purpose of trademark law is to promote competition by protecting a source identifier.²⁰⁷ The purpose of the functionality doctrine is to prevent trademark law from “inhibiting legitimate competition by allowing a producer to control a useful product feature.”²⁰⁸ “Functionality” depends upon whether the product design in issue is “essential to the use or purpose of the article or if it affects the cost or quality of the article.”²⁰⁹

Trade dress can fall into two categories of “function” that are deemed outside of the scope of the Lanham Act: utilitarian function or aesthetic function.²¹⁰ To be “utilitarian,” the trade dress must contribute to the product’s “use, purpose, or performance.”²¹¹ Aesthetic functionality, on the other hand, focuses on whether the ornamental features of a product are neither essential nor helpful to the utilitarian function of the product.²¹² If the product’s success in the marketplace is due to the appeal of a particular design trait, the trade dress as a whole is unprotectable because that particular trait makes the design “aesthetically functional.”²¹³

205. Scafidi, *supra* note 12, at 122 (citing *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000)).

206. Tsai, *supra* note 65, at 454.

207. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995).

208. *Id.*

209. *Id.* at 165. The Supreme Court decided that a “color per se” could be registered as a trademark under the Lanham Act. *Id.* at 159. The “functionality doctrine” was elaborated on as well, and it was determined that a color is not functional. Exceptions to that rule include, but are not limited to: (1) a product does not work as well with a different color involved, (2) it requires more revenue to change the natural color of a product, and (3) when that product’s commercialization is influenced by its color (allowing it to “fit in” to societal norms). *Id.*

210. Tsai, *supra* note 65, at 454 (citing *New Colt Holding Corp. v. RJG Holding of Fla., Inc.*, 312 F. Supp. 2d 195, 211 (D. Conn. 2004)).

211. Tsai, *supra* note 65, at 454.

212. *Id.*

213. *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 641 n.16 (6th Cir. 2002). Therein, the court noted:

For quite some time, the circuits have disagreed about the most appropriate theory of functionality to use in aesthetic functionality cases. Courts have divided between those recognizing the identification theory (which at times employed the “indicia of source,” “actual benefit,” “consumer motivation,” and “commercial success” tests of a feature’s capacity to identify the manufacturer to consumers) and the competition theory (which at times employed the “comparable alternatives,” “essential to usage,” “relation to usage,” “ease of manufacture,” and “effective competition” tests of whether granting a monopoly

As exemplified in several cases, should a design be held aesthetic in functionality, protection will be denied.²¹⁴ *Knitwaves, Inc. v. Lollytogs, Ltd.*, questioned what type of aesthetics would be considered trade dress for the purposes of that infringement claim.²¹⁵ *Knitwaves, Inc.*, was a small clothing business that designed a line of children's clothing using a "fall motif."²¹⁶ Specifically, the designs in question were girls' sweaters with leaf and squirrel appliqués.²¹⁷ The designs were copied by a designer at Lollytogs.²¹⁸ The designer copied what she believed to be the nonoriginal parts and altered the original parts of the sweater.²¹⁹ The court decided that *Knitwaves'* objective in the designs was primarily aesthetic, rather than source identifying.²²⁰ As a result, the clothing designs did not qualify for trade dress protection.²²¹

Nonfunctionality can be extremely difficult to establish, as almost every design feature of a product could be categorized as utilitarian or aesthetic.²²² However, every single element of trade dress does not have to be nonfunctional per se, but the "end result must be nonfunctional when considered as a whole."²²³

on a feature would prevent other suppliers from competing in the market for the product). See Mitchell M. Wong, *The Aesthetic Functionality Doctrine and the Law of Trade Dress Protection*, 83 Cornell L. Rev. 1116, 1132-52 (1998). The Seventh Circuit explained its adoption of the competition theory by identifying problems with the identification theory: it held that it is error to "define nonfunctional as serving primarily to identify the manufacturer. Understood literally, this would mean that if a particular design feature had two equally important purposes, one to please consumers and the other to identify the manufacturer, it would be functional and could not be trademarked. But a trademark, especially when it is part of the product, rather than being just the brand name, is bound to be selected in part to be pleasing; so this definition of functionality could rule out trademark protection for design features. [It is also error to consider a feature functional] 'when it serves to provide a reason for purchase which is unrelated to the fact that the source of the product is a particular manufacturer.' A reason-- not the most important or even equally important reason; hence [under this reasoning] a pleasing trade name, symbol, or design feature cannot be trademarked. . . . [T]he fact that a design feature is attractive does not . . . preclude its being trademarked. If effective competition is possible without copying that feature, then . . . it is not a functional feature."

Id.

214. See, e.g., *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996 (2d Cir. 1995).

215. *Id.* at 1002. The court applied a more distinctive standard than the "ordinary observer" test. *Id.* at 1003.

216. *Id.* at 999-1000.

217. *Id.* at 1000.

218. *Id.*

219. *Id.*

220. *Id.* at 1009.

221. *Id.*

222. See Tsai, *supra* note 65, at 454.

223. *Id.*

Though, on its surface, trade dress is seemingly the perfect antidote for the fashion industry's design protection problem, after a closer look, it becomes apparent that is not the case. "Unless the public suddenly becomes competent in distinguishing between the styles of particular designers, trade dress will not adequately protect fashion designs" any time soon.²²⁴

4. Patent

A patent is an exclusive government-issued right to the patent holder to exclude others from making, using, selling, offering to sell, or importing, an invention for a specified period of time.²²⁵ To be patentable, the invention must be novel, nonobvious, and possess utility.²²⁶ The purpose of a patent is to encourage the invention of new products, and particularly, to disclose those creations to the public.

For the purposes of this writing, there are two kinds of applicable patents: utility patents and design patents.²²⁷ "Utility patents protect the way an article is used, while design patents protects the way an article looks."²²⁸ Utility patents have the ability to be part of a design, but an entire design is unlikely to be classified as a utility patent.²²⁹ "Fashion designs or design elements that are not merely aesthetically pleasing but also functional can, if sufficiently innovative, meet the exacting standards of a patentable invention."²³⁰

In general, fashion designs are difficult to patent because of the novelty, utility, and nonobviousness requirements.²³¹ However, there are quite a few components to a design that are determined to be utility patents; for example, articles like Velcro or zippers or some "high-performance" fabrics like Lycra.²³²

A design patent must adhere to the same requirements as a utility patent. A design patent protects "any new, original and ornamental design of an article" for a term of fourteen years.²³³ Although design patents appear at first glance to be a compatible mechanism for the

224. *Id.* at 455.

225. 35 U.S.C. § 154(a)(1) (2009).

226. Tsai, *supra* note 65, at 455 (quoting 1 DONALD S. CHISUM, CHISUM ON PATENTS § 1.04[2], at 1-301 (2004)).

227. *Id.*

228. *Id.*

229. *See id.*

230. Scafidi, *supra* note 12, at 122.

231. *Id.*

232. *Id.*

233. Day, *supra* note 113, at 250 (citing 35 U.S.C. §§ 171, 173 (2009)).

protection of fashion designs, historically, clothing has rarely met the criteria of patentability.²³⁴ When it comes to fashion designs, the novelty and ornamentality requirements are likely to be achieved relatively easily. However, some critics have argued that, because fashion is “cyclical,” and therefore constantly reused, few novel and original designs are sufficient for a registered patent.²³⁵

The true difficulty occurs in proving nonobviousness and nonfunctionality.²³⁶ The nonfunctionality requirement poses a problem because courts tend to treat fashion as purely functional.²³⁷ Courts tend to side with the argument that “there is nothing about a fashion design that is not the result of its primary function as clothing.”²³⁸ When determining if a design is able to be a design patent, a court views the design “in its entirety to determine whether the claimed design is dictated by the utilitarian purpose of the article.”²³⁹ Though this may seem to paint a bleak picture for fashion protection, it is specified that a design patent is not rendered invalid merely because it may also perform a useful function.²⁴⁰ The entire resulting configuration must exist primarily for the necessity of the functional or mechanical requirements for the design patent to be invalid.²⁴¹

Although the nonfunctionality requirement is often a difficult hurdle for designers to surpass, it is the nonobviousness requirement that is the primary difficulty for fashion designers.²⁴² The nonobviousness requirement is to be determined from the point of view of a skilled designer in the particular field—this standard necessitates that these designs reach a higher standard than most.²⁴³

234. Day, *supra* note 113, at 250 (citing *Design Piracy Prohibition Act of 2006: Hearing on H.R. 5055 Before the Judiciary Subcommittee on Courts, the Internet, and Intellectual Property*, 109th Cong. (2006)).

235. Day, *supra* note 113, at 251 (citing *Gold Seal Importers, Inc. v. Morris White Fashions, Inc.*, 124 F.2d 141, 142 (2d Cir. 1941) (“[I]t’s not enough for patentability to show that a design is novel, ornamental, and pleasing in appearance,” rather, “it must be the product of invention”; that is, the conception of the design must require some exceptional talent beyond the range of the ordinary designer familiar with the prior art.”)).

236. Hedrick, *supra* note 27, at 223.

237. *Id.* at 224.

238. *Id.* (citing to *Chosun Int’l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324, 328 (2d Cir. 2005)).

239. Tsai, *supra* note 65, at 455 (citing *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1123 (Fed. Cir. 1993)).

240. Tsai, *supra* note 65, at 455.

241. Hedrick, *supra* note 27, at 224 (citing *Barofsky v. General Elec. Corp.*, 396 F.2d 340, 342 (9th Cir. 1968)).

242. Tsai, *supra* note 65, at 456.

243. *Id.*

A case from the Southern District of New York exemplifies the court's hostility towards fashion in regard to the nonobviousness standard.²⁴⁴ A designer had altered a girdle by adding a new element of design, an elastic edging all around the bottom of the girdle, surpassing where the edging would usually stop and continuing the elastic all the way up to the front center panel of the girdle.²⁴⁵ In its decision the court stated that the design was in fact "new, original, and ornamental."²⁴⁶ However, the fact that the designer in question "merely altered" the border of a typical girdle did not reach the point of "requiring inventive genius."²⁴⁷ Although the design was, in fact, altered, creating a new and original design, because the result of the alteration would have been obvious to a person with ordinary skill and art, the new girdle design did not meet the nonobviousness standard needed.²⁴⁸ This case demonstrates the "higher bar" required because design patents need not only be commercially viable in the marketplace, but must also be an actual invention.²⁴⁹

It is apparent that fashion designs face a steep hurdle with respect to patentability. There are numerous other reasons against using design patents to protect fashion. The first hurdle that designers reach concerns the design patentability.²⁵⁰ As mentioned in the previous paragraphs of this section, patentability can be one of the most trying types of intellectual property to achieve.²⁵¹ For example, unlike copyright, which is available to all original expression, design patents are only accessible to fashion designs that are truly new.²⁵² Being that fashion is often just repetitive designs slightly modified occurring on a rolling cycle throughout the years, most fashion designs are simply reworkings that are not considered genuinely "new" in the sense required by patent law.²⁵³

Should a design actually prove patentable, it runs into the second hurdle: the patent process. The current U.S. patent process is notoriously expensive, lengthy, and difficult.²⁵⁴ A patent application

244. H.W. Gossard Co. v. Neatform Co., 143 F. Supp. 139 (S.D.N.Y. 1956).

245. *Id.* at 140-41.

246. *Id.* at 143.

247. *Id.*

248. *Id.* at 143-44.

249. Tsai, *supra* note 65, at 456.

250. Raustiala & Sprigman, *supra* note 127, at 1704.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

requires a large amount of intricate and often complex information.²⁵⁵ This can be very difficult and time consuming for designers, especially considering they often create much more than just one garment at a time.²⁵⁶ As far as time, a patent application takes an average of twenty months to reach an examiner, and then another ten months before a decision is made of its patentability.²⁵⁷ Even then, over one-third of all patent applications get denied protection.²⁵⁸ Based on those statistics, the design patent is often considered too slow and uncertain to be relevant to fashion design.²⁵⁹ Third, the prolonged design patent term is an unnecessarily long amount of time for fashion designs.²⁶⁰ As stated previously, design patents have a statutory term of fourteen years.²⁶¹ Being that fashion is mostly seasonal by nature, a design has an average life span of less than twelve months.²⁶² Logistically speaking, it simply does not make sense for fashion designs to be protected for such a long time.²⁶³ Finally, besides attorney's fees, there is the issue of application, search, and review fees.²⁶⁴ Currently, a designer with a mere ten-article clothing line for a season is looking at spending upwards of \$20,000 to protect one season's work of designs.²⁶⁵ As a result, the likelihood that individual designers or young fashion businesses will be able to attain patent protection for their creations is slim to none.²⁶⁶ Based on the aforementioned information, unless U.S. patent law is altered significantly to cater to fashion design, the protection sought by designers for their creations will need to come from a different type of intellectual property law.²⁶⁷

255. Hedrick, *supra* note 27, at 224.

256. *See id.*

257. *Id.* (citing Examination of Applications and Proceedings in the United States Patent and Trademark Offices, <http://www.uspto.gov/web/offices/pac/doc/general/#examination> (last visited July 28, 2009)).

258. Hedrick, *supra* note 27, at 224.

259. *Id.*

260. Tsai, *supra* note 65, at 457.

261. *Id.*

262. *Id.* (citing Safia A. Nurbhai, *Style Piracy Revisited*, 10 J.L. & POL'Y 489, 502 (2002)).

263. Tsai, *supra* note 65, at 457.

264. *Id.*

265. *Id.* (citing Examination of Applications and Proceedings in the United States Patent and Trademark Offices, <http://www.uspto.gov/web/offices/pac/doc/general/#examination> (last visited July 28, 2009)).

266. Tsai, *supra* note 65, at 457-58.

267. *See id.*

B. Foreign Countries

U.S. designers are being forced to go abroad to have their skills recognized and their work protected.²⁶⁸ In order to have a level playing field with competition across the world, the United States needs to give protection to its designers.²⁶⁹ Fashion has become a global industry and, according to many around the world, it might be time for the United States to take note of that fact. For example, it is no secret that between Milan, Paris, and London, the European Union is clearly on the forefront of fashion design. Their international status in the fashion industry is also exhibited by the fact that their IP laws protecting fashion designs are, and have always been, at the head of that particular arena.²⁷⁰ While fashion remains unprotected in the United States, it is protected by two entities in Europe: the national laws of each individual European country and the European Directive on the Legal Protection of Designs.²⁷¹

1. Individual countries

“While all [are] subject to the E.U. Directive, many nations within the E.U. provide a different, additional level of protection under national law.”²⁷² For example, France, the world’s guiding light of haute couture, is also the strongest advocate and guardian of legal protection for fashion.²⁷³ Fashion designs are considered “works of the mind,” and therefore, they are protected by French copyright law.²⁷⁴ The very liberal French copyright clause, the “doctrine of the unity of art,” leaves a bad taste in the mouths of U.S. legislators, as the doctrine does not authorize the exclusion of copyright protection solely on the basis of a

268. *See id.* at 464.

269. *Id.* In 1994, the World Trade Organization administered and enacted the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) based on its previous efforts, the Paris Convention and the Berne Convention. *See Raustiala & Sprigman, supra* note 127, at 1717. TRIPS was created to bring uniformity to the international IP sector by setting in place “minimum standards of protection” that each member country must provide to its nationals and the nationals of other member countries. *Id.* The United States has yet to follow suit with the rest of the TRIPS member countries and meet this obligation in regard to the protection of fashion design.

270. *See, e.g., Tsai, supra* note 65, at 464-65.

271. *Day, supra* note 113, at 266.

272. *Id.*

273. *Id.*

274. *Id.* (citing Andres Lucas et al., *France, in* INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 2(2) (Paul Edward Gellar ed., 2006) (quoting French Intellectual Property Code, L 112-2)).

design's utilitarian function.²⁷⁵ Furthermore, French law allows for copyright protection as soon as the design "becomes popular with the general public," bypassing the usual "originality" requirement.²⁷⁶

Though seen as the vanguard of fashion law now, France had a long-standing battle to protect its fashion industry.²⁷⁷ A Frenchman, Charles Frederick Worth, is generally recognized as the world's first couturier.²⁷⁸ He set up his studio in the 1850s and made his mark on the industry as he completely revamped design-making protocol.²⁷⁹ At the time, most fashion designs were singularly made by an individual or their own seamstress.²⁸⁰

Worth instead developed a system of presenting a series of new designs each season and then taking orders for the designs from individual clients, for whom the clothes were made to measure. This system, which exists to the present day, established the influence of professional clothing designers over the direction of fashion.²⁸¹

Unfortunately, Worth's new way of expanding fashion to the masses also spawned the French equivalent of the American "counterfeit revolution."²⁸² Because of this rise in design piracy, the French fashion industry was forced to respond in several, albeit unorthodox, ways.²⁸³ First, designers went straight to the French government, requesting intellectual property protection for their fashion designs, much like the kind that had been bestowed upon many other great French art forms.²⁸⁴ Seeing that the legislative route may not be as unambiguous as once thought, designers sought to soften the economic blow of piracy by licensing their designs to clothing manufacturers.²⁸⁵ By the 1900s, French copyright and industrial design laws were amended to pave way for the case law that would be decided on its heels.²⁸⁶ Soon, lawsuits brought by famed French designers would confirm the efforts of

275. Day, *supra* note 113, at 266.

276. *Id.* at 266. French designers rely on the 1793 Copyright law, as amended in 1902, and the 1806 Industrial Design Law, as amended in 1909, to protect their designs. Scafidi, *supra* note 12, at 117.

277. See Scafidi, *supra* note 12, at 117-18.

278. *Id.* at 117.

279. Scafidi, *supra* note 12, at 117.

280. *Id.*

281. *Id.*

282. *Id.*

283. See *id.*

284. *Id.*

285. *Id.*

286. *Id.*

designers decades earlier, as the pursuit of incorporating designs into French intellectual property protection became well-settled.²⁸⁷ “While French intellectual property law has by no means eliminated design piracy, at home or abroad, the protection enjoyed by designers working in Paris contributed to the strength of the industry and its global influence throughout the twentieth century and into the twenty-first.”²⁸⁸

2. European Directive

The European Union (EU), as a whole, contributes to fashion protection via its Community Design laws.²⁸⁹ In 1998, the European Council adopted the European Directive on the Legal Protection of Designs (Directive).²⁹⁰ The Directive, much like other international IP agreements, requires its member states to harmonize their intellectual property laws to the effect of industrial designs, the category that includes fashion designs.²⁹¹ For the purposes of the Directive, there are two types of designs: registered and unregistered.²⁹² For designers choosing to register their designs, the process is simple and relatively quick.²⁹³ The date of registration is the date the application is filed with the relevant office, and, upon that registration, there is protection in every state of the EU.²⁹⁴ One of the main advantages of the registration is that there are no restrictions relating to quantity or particularity; applicants can request to register as many designs as they wish in one application and those designs do not need to be components of the same line or even have any cohesiveness at all.²⁹⁵

According to the Directive, a design is defined as “the appearance of the whole or a part of a product resulting from the features of . . . the lines, contours, colors, shape, texture, and/or materials of the product

287. *Id.* Societe Yves Saint Laurent Couture S.A. v. Societe Louis Dreyfus Retail Mgmt. S.A., [1994] E.C.C. 512 (Trib. Comm. (Paris)). In the case, the French design house Yves Saint Laurent (YSL) received an injunction and a monetary judgment of \$385,000 against American designer, Ralph Lauren. The French Commercial Court held that Lauren’s adaptation of YSL’s ready-to-wear collection black and white evening dress. *Id.*

288. Scafidi, *supra* note 12, at 117.

289. Raustiala & Sprigman, *supra* note 127, at 1735.

290. *Id.*

291. *Id.*

292. Tsai, *supra* note 65, at 465.

293. *Id.*

294. Mauro Paiano & Ann Critchell-Ward, *The Harmonization of Intellectual Property Rights Throughout the European Union*, N.J. L.J., Oct. 2003, at 36.

295. Tsai, *supra* note 65, at 466.

itself and/or its ornamentation.”²⁹⁶ To be eligible for protection, the design must be new, meaning there is a “different overall impression from already known designs.”²⁹⁷ Once registered, the owner of the design is given an “exclusive right to use and prevent making, offering, putting on the market, importing, exporting, using or stocking for such purposes, products incorporating the design, which do not produce a different overall impression.”²⁹⁸ The five-year exclusive right is essentially a monopoly right, as it protects against all infringement, not just direct copying.²⁹⁹

In order to receive these rights, the application must be made within twelve months of the date the design was first made available to the public.³⁰⁰ Should the designer choose not to register their design, the Directive still provides some protection.³⁰¹ Even for unregistered designs, there is an automatic right to protection as soon as the design is made public.³⁰² The legal right lasts for three years from the date of publication.³⁰³ The unregistered design right protects the same exact features as its counterpart; however, there is no monopoly right involved, as there can only be infringement from actual copying.³⁰⁴

The main lesson American designers are hoping to glean from the legalized fashion protection of the EU revolves around the level-playing field theory mentioned previously. Even though the European Union offers this high IP protection from copying, there is no substantial evidence that the fashion houses of the EU have altered their practices as compared to their counterparts in the United States.³⁰⁵ A European study showed that by 2005, only two years after the introduction of the Community Design protection system, the applications had already declined 60 percent from the starting figure.³⁰⁶ These types of reports

296. *Id.* (citing 4 EUROPEAN UNION LAW GUIDE: INTELLECTUAL PROPERTY LAW Tit. II, § 1, art. 3(a), at 6 (Phillip Raworth ed., 2003)).

297. *Id.*

298. *Id.*

299. *Id.* The Directive provides for an initial five-year term of protection which is renewable every five years with a maximum of twenty-five years of protection. Paiano & Critchell-Ward, *supra* note 294, at 39.

300. *Id.*

301. Tsai, *supra* note 65, at 466.

302. *Id.* at 466-67.

303. *Id.*

304. *Id.*

305. Raustiala & Sprigman, *supra* note 127, at 1735.

306. Awapatent, New Rules to Boost British Interest in Design Protection (Nov. 27, 2006), <http://www.awapatent.com/?id=9051&tid=print> (Awapatent is one of Europe’s leading intellectual property firms).

imply that, in fact, changes in the industry's practices with respect to design copying do not necessarily respond to the imposition of new legal regulations.³⁰⁷

Investigation into EU Directive Registration Database proved just that.³⁰⁸

More to the point, the number of actual fashion designs registered is much smaller than the figure of 1631 registrations would suggest. Hundreds of registered designs are nothing more than plain t-shirts, jerseys, or sweat shirts with either affixed trademarks or pictorial works in the form of silk-screen or appliques. The protection sought through registration is not for the apparel design, but for the associated marks and pictorial works, many of which are already protected under applicable trademark, trade dress, or copyright law. Another feature generally covered by trademark law, pocket stitching for jeans, also accounts for a large number of registrations.³⁰⁹

Based on these facts, it is relatively clear that, though it may be achieving its purpose in an indirect way, the EU Directive registration is not functioning as intended. The purpose of the registration was to protect original apparel designs, but, instead, it has become nothing more than a backup for the copyright or trademark rights that the owner already possesses.³¹⁰ Critics of fashion design protection have adamantly noted that if the EU's protection truly made an economic impact on the industry, the EU would thrive and the United States would not.³¹¹ Instead, there are no substantial variations in conduct, and, if anything, copying is still surviving, if not flourishing, in both polar-opposite IP environments.³¹²

Since the early millennium the "cheap chic" clothing stores, selling the knock-offs of the expensive originals, have actually surpassed the profits of most retailers.³¹³ A 2004 study found that European "fast-

307. Raustiala & Sprigman, *supra* note 127, at 1735.

308. *Id.* at 1740. Kal Raustiala and Christopher Sprigman conducted an investigation of the Directive Database by performing several search queries throughout the database relating to the, then known, 1631 registered designs. *See id.*

309. *Id.*

310. *Id.*

311. *Id.* at 1743.

312. *Id.* The "fast-fashion/cheap chic" stores are thriving in both the European Union and the United States. *See Rachel Tiplady, Zara: Taking the Lead in Fast-Fashion*, BUS. WK. ONLINE, Apr. 4, 2006, http://www.businessweek.com/print/globalbiz/content/apr2006/gb20060404_167078.htm.

313. *Id.* The European community has been bombarded over the last decade with "fast-fashion" retailers: Britain's Top Shop, Sweden's H&M, and most influential, Spain's Zara. *Id.* Zara has become the pinnacle for the upper-eschalon of knock-offs with its 21 percent sales growth and \$8.15 billion in retail. *Id.*

fashion” outlets averaged double-digit sales growth compared to the mere 4 percent average growth of retail stores in general from the same geographic area.³¹⁴ Although it has a completely different legal model, the United States is showing similar retail numbers.³¹⁵ That fact alone gives critics more than enough to continue their disapproval towards fashion design protection.

VI. DESIGN PIRACY PROHIBITION ACT [DPPA]

*“Fashion is only the attempt to realize art in living forms and social intercourse.”*³¹⁶

A. Statutory Language

This writing has discussed the history of design piracy, its influence on fashion, and the current fashion laws around the world. However, as stated, the United States has been in limbo on this matter for some time now. The newest edition to the nearly century-old conflict is the Design Piracy Prohibition Act (DPPA) of 2009. The purpose of the DPPA, like the many that came before it, is to extend copyright protection to fashion designs.³¹⁷ The bill was officially reintroduced to the House of Representatives on April 30, 2009, by Representatives Goodlatte, Delahunt, and Nadler.³¹⁸ The DPPA would amend the Copyright Act to treat fashion designs as a “creative product.”³¹⁹ The bill would create a database for all registered designs and allow the design to be protected for three years.³²⁰ The goal of the statute is to bring some fairness to the U.S. design industry, allowing designers to copyright their work, at least long enough for them to “reap the benefits of their often expensive research and development before it enters the public domain.”³²¹

If enacted, the DPPA would most significantly impact the following major groups: 1) high-end designers, 2) copycat designers, 3)

314. *Id.*

315. See, e.g., Ruth La Ferla, *Faster Fashion, Cheaper Chic*, N.Y. TIMES, May 10, 2007, at G1. Forever 21 has positioned itself as the “cheap chic” retail powerhouse of the United States. *Id.* Since 2005, Forever 21 has doubled its number of stores to 400. *Id.* Their sales now tower over competitors at over \$1 billion in 2007. *Id.*

316. ASHTON APPLEWHITE ET AL., AND I QUOTE 331 (2003) (quoting Oliver Wendell Holmes).

317. See Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).

318. *Id.*

319. *Id.*

320. *Id.* § 2(d)(2) (pertaining to the term of protection).

321. Givhan, *supra* note 39.

new and emerging designers, and 4) the general purchasing public.³²² Coco Chanel once said, “Fashion should slip out of your hands. The very idea of protecting the seasonal arts is childish. One should not bother to protect that which dies the minute that it is born.”³²³ Various high-end designers share her sentiments, as they agree that fashion designs should not be protected. Although many designers have gone on record as saying knock-offs cut into their profit margin, copying insults their craft, and the like, there is no consensus among high-end design houses in favor of the DPPA.³²⁴

The second group affected would be the copycat designers. One’s visual image of this category of the darkened New York City alley with the copyist selling counterfeit goods out of the back of a van gets the point across, but is misleading. The truth is, counterfeit goods have been a plague on the fashion industry for centuries, and likely will continue to be.³²⁵

It is when the DPPA hits home, that consumers will finally pay attention. It is not the back-alley purchasers that will be targeted; it will be the ones at our local mall.³²⁶ It will be stores like Forever 21, Dillard’s, and Banana Republic, who have borrowed liberally from high-enders for decades, that will be in the line of fire.³²⁷ These companies, though technically not doing anything wrong, are the ones that have been marketing runway inspired designs to the masses. The DPPA would most certainly alter the business models of these fast-fashion retail outlets, if not shut down the stores altogether.³²⁸ Because of this trickle-down reaction to the bill, many U.S. copycat designers have threatened to leave the country and to do business in less restrictive nations.³²⁹ As the United States is currently one of the most lackadaisical countries in terms of design protection, it is unlikely that these copyists will have any other place to go. Therefore, the likelihood

322. Jennifer E. Smith, *Flattery or Fraud: Should Fashion Designs Be Granted Copyright Protection?*, 8 N.C. J.L. & TECH. ON. 1, 4 (2007), http://jolt.unc.edu/sites/default/files/8_nc_jl_tech_online_ed_1.pdf.

323. Scafidi, *supra* note 12, at 124.

324. Smith, *supra* note 322, at 5.

325. *Id.* at 6 (arguing that copycat designers would turn to the black market).

326. *Id.* at 5.

327. *Id.* As Allen B. Schwartz (designer and owner of ABS Designs, a main design line sold at Dillard’s Department Store) notes, “My job is to bring trends to the consumers at a fair market price. Few people can spend \$4,000 on a dress.” Winograd & Tan, *supra* note 3.

328. Smith, *supra* note 322, at 5.

329. *Id.*

is that they will simply continue their current business practices in the United States, but have to fend off steady litigation.³³⁰

Such is the story of European copycat design power-houses, such as H&M, Top Shop, and Zara, who continue to sell their priced-to-wear imitations, despite the EU's passage of design protection.³³¹

The third affected group is the new and emerging designers.³³² At first glance, the DPPA seems to be the answer to the prayers of many up-and-comers in the field of design. Emerging designers will be able to create without worrying that their designs will be the object of legalized thievery from larger firms, and they can finally reap the economic benefits themselves.³³³ A closer look begs the question of a possible negative repercussion: with copyright-like protection comes the likelihood of less exposure for certain designs, without which a trend cannot come about.³³⁴ Trends are in fact the bread and butter of the design industry. Simple economics tells us that there has to be a demand for something before there is a reason to supply it. There is a very real possibility that “[e]xtending copyright protection would [actually] chill original expression because new designers may channel their talents into other pursuits, rather than face statutory fines.”³³⁵

The last major group affected would be the public.³³⁶ “Middle-class customers, who constitute the consumer base for the copycat designs, would have their options significantly limited,” thus being the area of the public to suffer most.³³⁷ Just because the DPPA would prohibit the fast-fashion outlets, does not mean they would go away. As there has been for centuries, there will always be a middle class; the same middle class that will never be able to afford \$900 for a Diane Von Furstenberg original, but has the means to go to Target and buy the all too similar knock-off brand wrap dress. Should the DPPA pass, there will most likely be an influx of knock-offs flooding the black market, as the demand for the luxury-lookalikes will stay the same, but their supplies and availability will not.³³⁸

330. *Id.*

331. *Id.* at 5-6.

332. *Id.* at 6.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

B. *Advantages and Disadvantages*

There are many different opinions about the DPPA. Although this writing has attempted to provide both sides of the story, it always seems to come back to same uncertainty: Can this really work? There seems to be six main arguments used by critics to devalue what the DPPA is trying to craft. For each one of those theories, there is a counteracting response. Then, for each response, there is very likely a rebuttal. The point being that DPPA supporters believe their explanations are able to successfully refute any statements uttered by naysayers, and vice versa.

The initial argument against the DPPA does not even involve its language or statutory obligations; it is simply that the Act is not needed. Skeptics believe that there is no need for the government to alter current copyright laws, as the resistance to fashion design protection is for good reason. Many believe that the resistance to intellectual property protection for fashion is based not on a sense that fashion has no creative value, but, rather “a connection between fashion and identity so strong that they are reluctant to cede the designer ownership of an original creation and control over its availability—unlike the popular acknowledgement of property rights in the author of a novel or the inventor of a better mouse trap.”³³⁹ To state it more simply, “fashion’s relationship to self-expression . . . can prompt selfishness.”³⁴⁰ The other explanation for the resistance is one that has been flowing off the tongues of cynics since the reintroduction of the DPPA, the ever enigmatic public domain. It can be argued that the fashion industry has purposely left its works in the public domain, and that lack of protection has allowed the industry to thrive in the manner it has for centuries.³⁴¹ Experts have used examples like the Walt Disney Corp. to show the destructive effects of “one-way privatization.”³⁴²

Disney has taken classic folk stories and turned them into works that no one else can access, all the while, Disney has contributed nothing from the public domain. Fashion, on the other hand, is perhaps copied or taken from the public domain, but something is always returned to the public.³⁴³

Allowing fashion to remain in the public domain prevents long and complex litigation in which “the placement of a button or hem of a

339. Scafidi, *supra* note 48, at 86.

340. *Id.*

341. Tsai, *supra* note 65, at 451.

342. *Id.*

343. *Id.*

dress” could be the determinative factor of a multi-million dollar verdict.³⁴⁴ As a response to these claims, supporters of the DPPA state matter-of-factly and simply: It hasn’t worked yet, so it’s not going to work.

The second key argument against the DPPA states that, by permitting copying, you allow a “remix of cultures,” that same spark that has fueled the design industry for years.³⁴⁵ Designers use each other’s work; it is as simple as that. Whether it is deemed inspiration or something more, the cheap chic stores copy from high-enders and high-enders even copy from high-enders. As one reporter noted, “It can be difficult to distinguish between copy and homage.”³⁴⁶ Fashion, by nature, has a cross-pollination aspect that the entire industry acknowledges and respects—one designer’s work starts a trend that inspires another, and so on.³⁴⁷ DPPA advocates respond to this claim by reminding that designers do not just make “remixes.”³⁴⁸ Designers are artists who create original works and, for those who do not, the DPPA will, in essence, force their innovation. Some might say that is part of the beauty of the DPPA; it does not discriminate. Its purpose is to protect fashion designs regardless of the name, influence, or status of the culprit. For example, just within the last five years Marc Jacobs, a fashion phenomenon, was critically panned across the country for his recent fashion show that was deemed “too derivative of other works.”³⁴⁹ Thus far, censure in fashion periodicals is as far as we have come in regards to discouraging the copies. The DPPA would take the next logical step to involve legal protection and, thereby, force innovation where it is lacking.

Third, many believe that copies, given their wide dissemination, are the best way to get a new generation to, not only absorb fashion, but to take it seriously as an art form as well.³⁵⁰ Of course, supporters respond to this claim by stating the obvious; if you want a new generation to take something seriously, then create laws protecting it, thus identifying its significance.³⁵¹ Once the law recognizes fashion as a creative medium by giving designers the “legal respect and support they need” to thrive,

344. Smith, *supra* note 322, at 7.

345. Felix Salmon, Susan Scafidi on Copyrighting Fashion (Sept. 19, 2007), <http://www.felixsalmon.com/001778.html>.

346. Givhan, *supra* note 90.

347. *Id.*

348. Felix, *supra* note 345.

349. *Id.*

350. *Id.*

351. *Id.*

the public will soon follow.³⁵² Though some may believe that recognizing fashion as a creative medium has no bearing on why it should be copyrighted, the rebuttal to that lies in the Constitution itself, as intellectual property laws are in existence “to promote the Progress of Science and the useful Arts.”³⁵³

The fourth argument against the DPPA centers on the cyclical nature of fashion. Critics believe copying actually helps fashion by helping consumers get bored with the current season’s clothes and, therefore, desire what the next season has to offer.³⁵⁴ The response to this is that fashion has always changed with every season, with or without copying.³⁵⁵ Fashion designs have always had a lifecycle—each line dies by the end of a season and is reborn based on the next season’s weather tendencies. DPPA opponents rebut this explanation by countering that if time is truly of the essence in regard to fashion, then that is more of a reason to question its legal protection.³⁵⁶ They claim that sluggish litigation-oriented copyright lawsuits would essentially be pointless, as the damage to the claimant would have already reached culmination.³⁵⁷ Critics go on to assert that not only would the copyright laws be futile, but there is the possibility that the new laws would actually cause harm. There is a fear that “courts will be unable to provide cost-effective, meaningful protection of registered designs given the cost of an attorney, court fees, and the time necessary to take a case to final adjudication.”³⁵⁸ DPPA advocates understand the rapid lifespan of fashion designs, which is the exact reason why the term of protection was altered to be of only three year duration. Also, advocates acknowledge the negative possibilities the Act could have on the court system. However, those risks occur with the enactment of any new law. The uncertainty that occurs with ratifying new laws is a necessary evil, especially concerning an area of law as multifaceted as intellectual property.

The fifth point is one that was touched upon earlier in this writing: Does copying really harm the fashion industry? “As copying has grown [throughout the years], so have revenues and profits at big fashion houses. Empirically, [copying] doesn’t seem to do any harm”³⁵⁹

352. *Id.*

353. U.S. CONST., art. I, § 8.

354. *See Felix, supra* note 345.

355. *Id.*

356. *Id.*

357. *Id.*

358. Hedrick, *supra* note 27, at 255.

359. Felix, *supra* note 345.

Advocates respond to this claim by admitting that fashion houses, especially large ones, have thrived as of late but that is not due to copying, but because they have been using their assets under trademark law to make up for lost revenue.³⁶⁰ It is the small and emerging designers that the DPPA is targeted at protecting. It is also these same designers that do not have the ability to hide behind these trademarks.³⁶¹ The counterargument to this is that trademarks are regularly violated and yet the fashion houses still remain strong and affluent. DPPA supporters respond with evidence that cannot be denied—the trademark logo. Many have wondered why, in recent years, some of the biggest global fashion houses have made the odd aesthetic choice to emblazon their trademarked logos all over their garments and accessories. This is the reason.³⁶² Because designers have been unsuccessful in their attempted legislative persuasion, they took to the protection they already had and tried to use that to their advantage.³⁶³ Again, small design boutiques do not have this luxury, as they do not have the notable reputation that can be tarnished from the copies of their work.

The final, and most significant, argument against the DPPA is one mentioned in the previous section. People who cannot afford the original designs are the ones who purchase the copies.³⁶⁴ Opponents have argued that with passage of the DPPA, fashion will become unaffordable to the average American and will ultimately result in higher clothing prices.³⁶⁵ Advocates respond to this claim by maintaining that purchases of copies occur at all price points in all economic levels.³⁶⁶ In fact, studies show that 20 percent of the consumers purchasing counterfeit and copied goods make an income over \$100,000 per year.³⁶⁷ In recent years a fashion phenomenon has arisen, coined “high-low aesthetics.”³⁶⁸ Consumers usually construct consistent identities by clustering their consumption on one market tier, but, lately, those lines have been blurred.³⁶⁹ Mid-market buyers have begun to accent ordinary

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. Buchanan Ingersoll, *House Considers Protection for Fashion Designs*, World Copyright Law Report, June 22, 2006, <http://www.buchananingersoll.com/media/pnc/7/media.1257.pdf>.

366. Felix, *supra* note 345.

367. *Id.*

368. Julian Sanchez, *Thou Shalt Not Knock Off*, AMERICAN, Sept. 14, 2007, available at <http://www.american.com/archive/2007/september-0907/thou-shalt-not-knock-off>.

369. *Id.*

outfits with one or two high-end accessories, and their counterparts, the high-end fashionistas, are much more willing to mix and match budget and couture garments.³⁷⁰ Additionally, many fashion designers have been following the “masstige line” trend.³⁷¹ A masstige line is created when the high-end designer couples with a retail outlet or manufacturer to create a more affordable “lower-end” product.³⁷² The designer is eliminating the opportunity for copyists, as they are essentially knocking off their own fashions by using cheaper materials, providing lower prices, and thereby reaching more consumers.³⁷³ One thing is clear, whereas the knock-off buyer from the Midwest and the fashion plate from New York were once very different and distinct individuals, they are now, because of copies, becoming much more of the same person.

C. *Improvements of DPPA*

As mentioned numerous times in this writing, U.S. legislators have been addressing the issue of fashion design protection for nearly a full century. As time has passed and more legislators have gotten involved with the cause, more drafts of design protection bills have emerged. After almost 100 years of rough copies, supporters believe the current model of the DPPA has finally reached its peak, and is finally ready to be accepted as law. Unlike its predecessors, the 2009 DPPA has taken into account the opinions of both advocates and opponents. Supporters of the bill realize the task before them, with practically 90 percent of the retail industry lobbying against them; therefore, they tout their bill as being as impartial as possible and still achieving its intended goal. The 2009 DPPA not only encompasses outer garments, but also gloves, headgear, eyewear, belts, underwear, footwear, and handbags.³⁷⁴ The bill incorporates a more detailed definition of “fashion,” so as to eliminate an overbreadth issue.³⁷⁵ Drafters also included a heightened standard of infringement, specifying the words “closely and substantially similar,” whereas the requirements in prior editions were much more

370. *Id.*

371. *Id.*

372. Raustiala & Sprigman, *supra* note 127, at 1725.

373. *Id.* For example, Vera Wang for Kohl’s, Isaac Mizrahi for Target, Eli Tahari and Michael Kors for Macy’s, and most recently, Karl Lagerfeld, Stella McCartney, and Roberto Cavalli for H&M. *Id.*

374. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. § 2(a)(9) (2009) (relating to protected designs).

375. *Id.*

open-ended.³⁷⁶ The bill outlines specific defenses to infringement, i.e., “merely reflecting a trend” and “independent creation.”³⁷⁷ The registration period was changed from three months to an extended six months, to encourage applicants.³⁷⁸ There are now increased penalties concerning false representation in an infringement situation.³⁷⁹ And, in regard to any occurring infringement, designers with protected creations are able to seek recovery via statutory damages of up \$250,000 (or \$5 per copy).³⁸⁰ Possibly most important is the creation of an EU-like searchable database.³⁸¹ Though it took many years, supporters feel very comfortable with this version of the DPPA. It was specifically drafted with as many solutions as possible kept in mind, in particular, the ease of the U.S. court system. The current DPPA legislation is by far the best U.S. fashion design law created to date.

VII. CONCLUSION

*“Some of the greatest artists of the century [are] Halston, Lagerfeld, [and] de la Renta. And what they did, what they created was greater than art because you live your life in it.”*³⁸²

Intellectual property laws have always spawned debate—that is one of the great things about this type of law. The challenge is to attempt to see black and white in a sea of gray. Though it seems that fashion designs do not quite fit in any particular type of IP, this does not negate the fact that something needs to be done to protect these creations. Fashion has become an entity. The law needs to recognize this, as it has done for so many other art forms. The current Design Piracy Prohibition Act acknowledges this need and the industry is taking action. Once the DPPA creates liability, the copyists will be forced to alter their business models and either hire their own designers or decide on a new innovation strategy. Should they ignore these new changes, these cheap chic conglomerates will be compelled to dip into some of the billions in profits they have accrued over the last few decades and pay the rightful owners of the designs they continue to appropriate. The DPPA is narrowly tailored to achieve a balance between protection of innovative

376. *Id.* § 2(e)(3) (relating to infringement).

377. *Id.*

378. *Id.* at § 2(f)(a)(2) (relating to an application for registration).

379. *Id.* at § 2(h) (relating to the penalty for false representations).

380. *Id.* at § 2(g).

381. *Id.* at § 2(j) (relating to a searchable database for fashion designs).

382. THE DEVIL WEARS PRADA (20th Century Fox 2006).

designs and the preservation of the extensive public domain of fashion as an inspiration for future creativity.³⁸³ As fashion guru Tim Gunn so eloquently described the DPPA: This law is a shield, not a sword.³⁸⁴

“This is an incredibly important issue to creative designers, whose work is constantly pilfered by large corporations, often before they can even get their originals into stores, and who constantly suffer economically as a result.”³⁸⁵

Ignoring the problem is definitely not the answer. The United States is not only losing millions of dollars to counterfeiters, but also missing out on the opportunity to economically jump-start this country. This writing cited many arguments for and against the 2009 DPPA. However, for every argument against the Act, each counter-argument was more than persuasive.

Despite the many points and counterpoints, and draconian as it may treat the artistic importance of fashion, the best benefit of the DPPA has nothing to do with creativity or its theft; it is about economics. This country is suffering economically and everyone is feeling the effects. Piracy alone can account for the loss of over 750,000 American jobs.³⁸⁶ The United States has always reinvented itself out of peril. It stands to reason that intellectual property applied to fashion could be an untapped resource that warrants a second glance. Protecting designs could be the next big thing in intellectual property law. There is a high likelihood that fashion design protection would generate unexploited revenue and that new income stream could lead to jobs. It is time to let our creations work for us.

Laws are consistently developed around culture. As real property changed, so did its laws. As the Internet was created, so were applicable laws. Fashion has been an integral part of culture since the dawn of recorded thought. When a single entity has such power and influence to permeate practically every aspect of pop culture as fashion design has, there is no reason to withhold the protection of the law. As it stands, fashion designs do not fit under the realm of current intellectual property

383. *Design Piracy Prohibition Act of 2006: Hearing on H.R. 5055 Before the Judiciary Subcomm. on Courts, the Internet, and Intellectual Property*, 109th Cong. (2006) (written testimony of Susan Scafidi, Associate Professor of Law, Southern Methodist University School of Law and Visiting Professor, Fordham Law School).

384. Susan Scafidi, *March on Washington 2: Project Beltway* (May 6, 2009), <http://www.counterfeitichic.com/2009/05/>.

385. E-mail from Susan Scafidi to author.

386. See Julian Sanchez, *750,000 Lost Jobs? The Dodgy Digits Behind the War on Piracy*, ARS TECHNICA, Oct. 7, 2008, <http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars>.

law. Just as the law has adapted in the past, now is the time to revise the laws and afford protection to the fashion world. The public needs to call on Congress to pass the 2009 Design Piracy Prohibition Act, and only then will the art of fashion design be truly protected.