WHEN IMITATION ISN'T THE SINCEREST FORM OF FLATTERY: COMBATING FAST FASHION DESIGN PIRACY THROUGH ENHANCED COPYRIGHT PROTECTION

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ABSTRACT

Fashion is art—except in the United States. Classified as purely useful articles, fashion designs have been constrained in their ability to receive copyright protection under the current regime. Today, individual pieces of fashion designs may receive protection under the pictorial, graphic, and sculptural works category of the United States copyright code after satisfying the "separability test." This has opened the door for fast fashion brands to run rampant, copying designs at every turn with little to no penalty. This Note argues that the United States copyright code should be amended, adopting portions of the French Intellectual Property Code, to formally recognize fashion designs as a protected work, thereby protecting them from fast fashion replication. This Note further argues that because fashion is inherently different compared to the protected works recognized by both regimes, the term length of the economic rights granted should be shortened to twenty years to recognize the cyclical nature of fashion and allow for more innovation in the space.

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INTRODUCTION

On June 11, 2021, Mariama Diallo, founder of Los Angeles-based luxury brand Sincerely Ria, faced a harsh reality experienced by many colleagues in the fashion industry after seeing her dress design copied by the fast fashion brand Shein.[1] The sketch process for Diallo's dress began in early 2020, and by November 2020, Sincerely Ria had officially made it available in stores.[2] A little over six months later, Diallo released

1. *See* Natalie Michie, *Shein Accused of Stealing from Small Designers — Again*, FASHION MAG. (June 16, 2021), https://fashionmagazine.com/style/shein-stolen-designs/.

2. *See id.*

a series of tweets venting her frustration after seeing an exact copy of her dress design on Shein's website.[3] In comparing side by side images of the two dresses, Diallo noted that Shein went as far as copying the aesthetic of the brand, photographing the dress in a nearly identical background.[4] Compounding her frustration, the designer noted that the dress became one of Shein's most popular items.[5] Although the two dresses appear to be the same, they are in fact drastically different in terms of material, production, and distribution.[6] Diallo's tweets gained significant traction on social media, and many vowed to no longer buy from Shein because Shein stole the design from Diallo.[7] However, the situation highlighted a far more significant problem in the United States fashion industry.

Historically, the United States has failed to afford copyright protections to the fashion industry.[8] Cases like Mariama Diallo's have become all too common, and the inadequacy of United States copyright law has had a major hand in such widespread appropriation of designers' work by fast fashion brands.[9] Accordingly, this Note argues that the Copyright Act

3. *See* Mariama Diallo (@MariamaDiallo_), TWITTER (June 11, 2021, 2:57 PM), https://twitter.com/MariamaDiallo__/status/1403426272789680129 ("Im SO over these major brands stealing from black designers. @SHEIN_official STOLE my @sincerelyriaxo designs to a T. They couldn't even change ONE thing and it's now one of their highest selling items. They even stole the brands aesthetic. Like Come on.") [hereinafter Mariama Diallo, TWITTER, Im SO over these major brands stealing from black designers]; Mariama Diallo (@MariamaDiallo_), TWITTER (June 11, 2021, 2:57 PM), https://twitter.com/MariamaDiallo__/status/1403426279580311554 ("I started designing last March and launch NOVEMBER 2020. Shein just dropped the style THIS JUNE 2021. I work hard to design and make everything in LA just for them to mass produce in China.").

4. *See* Mariama Diallo, TWITTER, Im SO over these major brands stealing from black designers, *supra* note 3.

5. *See id.*

6. *See* Laiken Neumann, *'I Have to Speak Up': Designer Claims Shein, WeWoreWhat Stole Her Design in Viral TikTok*, DAILY DOT, https://www.dailydot.com/unclick/designer-claims-shein-weworewhat-stole-design-viral-tiktok/ (June 18, 2021, 12:14 PM) (quoting Diallo's TikTok where she notes the quality of material used by Shein is "so cheap you can see [the model's] underwear" in advertising pictures).

7. *See id.* (highlighting how social media users sympathized with Diallo, vowing to boycott the brand for "stealing" and "keeping [designers] from building wealth").

8. *See* discussion *infra* Section II.A.

9. *See* discussion *infra* Section I.C.

of 1976, which currently provides the framework of United States copyright law, should be amended to adopt certain provisions of the French Intellectual Property (IP) Code so that original works of fashion receive protection from replication. In so doing, designers will not only have formal avenues for infringement claims but will also benefit from the economic rights that come with securing a copyright for its term.

Part I of this Note provides an overview of the economic impact of the fashion industry in the United States along with an explanation of what fast fashion is and how it slowly has become the new normal for consumers. Part II provides an overview of copyright laws in the United States and how the Court has interpreted various aspects of fashion designs actionable under copyright law. Part III examines the history of copyright protection in France and the current laws in place affording fashion designs protection. Part IV proposes that Congress amend the Copyright Act of 1976 to include principles codified into the French IP Code, which explicitly recognize fashion designs as work subject to protection under the laws.

I. BACKGROUND

A. *Fast Fashion Explained*

Fast fashion refers to the rapid, mass production and manufacturing of clothing using low-quality materials to bring cheap styles to the public at a low price.[10] Fast fashion has completely changed the landscape of the apparel industry across the world.[11] Interestingly, "[u]p until the mid-twentieth century, the fashion industry ran on four seasons a year: fall, winter, spring, and summer," and designers would spend months planning for each season in the hopes of leading the

10. *See* Chloe Foussianes, *What Is Fast Fashion, and Why Is Everyone Talking About It?*, TOWN&COUNTRY MAG. (Jan. 17, 2020), https://www.townandcountrymag.com/style/fashion-trends/a30361609/what-is-fast-fashion/.

11. Vertica Bhardwaj & Ann Fairhurst, *Fast Fashion: Response to Changes in the Fashion Industry*, 20 INT'L REV. RETAIL, DISTRIB. & CONSUMER RSCH. 165, 165–66 (2010).

latest trends.[12] For years, "fashion shows were the [largest source of] inspiration for the fashion industry," but these shows were limited to industry professionals such as "designers, buyers, and other fashion managers."[13] In the late nineties, everything changed when "fashion shows and catwalks became a public phenomenon, where photographs of the recent fashion shows could be seen in magazines and on the web leading to demystification of the fashion process."[14] This change led to the rise of fast fashion companies that were able to optimize resources to produce nearly identical looks in record time.[15] Now, the fashion industry is consumed by fast fashion brands that introduce "[fifty-two] 'micro-seasons' a year—or one new 'collection' a week" with hundreds of garments in a single collection.[16]

Brands like Zara, Shein, Fashion Nova, and Pretty Little Thing are all the epitome of fast fashion, as they introduce upwards of 600 new styles each week at incredibly low prices to "feed[] into shoppers' desire to buy more."[17] One appeal to shopping with these brands is their ability to replicate looks seen on the runways in real time.[18] Prior to fast fashion, a trend would take roughly one year from the time it debuted on the

12. Audrey Stanton, *What Is Fast Fashion, Anyway?*, THE GOOD TRADE, https://www.thegoodtrade.com/features/what-is-fast-fashion (Dec. 3, 2022); Bhardwaj & Fairhurst, *supra* note 11, at 167 ("Since the 1980s, a typical life cycle for fashion apparel had four stages: introduction and adoption by fashion leaders; growth and increase in public acceptance; mass conformity (maturation); and finally the decline and obsolescence of fashion.").

13. Bhardwaj & Fairhurst, *supra* note 11, at 168.

14. *Id.*

15. *See id.* at 169.

16. *See* Stanton, *supra* note 12; Megan Lambert, The Lowest Cost at Any Price: The Impact of Fast Fashion on the Global Fashion Industry 33, 40 (Dec. 1, 2014) (Senior Thesis, Lake Forest College) (on file with Lake Forest College Publications) ("[T]hese 'micro-seasons' effectively change the product offering in the store and make consumers feel as if they are missing out on the current trends.").

17. Terry Nguyen, *Fast Fashion, Explained*, VOX (Feb. 3, 2020, 7:00 AM), https://www.vox.com/the-goods/2020/2/3/21080364/fast-fashion-h-and-m-zara.

18. Bhardwaj & Fairhurst, *supra* note 11, at 168–69.

runway to reach mainstream retailers.[19] Changes to the fashion cycle have streamlined this process so much that styles debuted on the runway are in stores just a few weeks later.[20] This new model has changed the way people shop: consumers used to buy only a few pieces of clothing each year, taking the time to thoughtfully consider each purchase.[21] Now, "the average person will buy [sixty-eight] garments, and wear each piece only seven times before disposing of it."[22] Thus, the average American purchases a piece of clothing every five days and discards it just as quickly.[23] Further highlighting the significant changes in consumer behavior, apparel consumption in the United States saw a 60% increase from 2000 to 2014.[24]

1. *The intersection of fashion and social media*

Moreover, social media has impacted buying patterns as trends have emerged in recent years, where a consumer will

19. Rachel Monroe, *Ultra-Fast Fashion is Eating the World*, THE ATL. (Feb. 6, 2021), https://www.theatlantic.com/magazine/archive/2021/03/ultra-fast-fashion-is-eating-the-world/617794/; *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the Comm. on the Judiciary*, 109th Cong. 8, 12 (2006) (statement of Jeffrey Banks, Fashion Designer, on behalf of the Council of Fashion Designers of America) ("Copying, years ago, would take anywhere from three to four months to a year or more.") [hereinafter *Hearing on H.R. 5055*]. The production process

> changed with new technology. So once a designer spends the thousands and thousands and gets to that runway show and then reveals a new and original design—it can be stolen before the applause has faded thanks to digital imagery and the internet. Today, there are even software programs that develop patterns from 360 degree photographs taken at the runway shows. From those patterns, automated machines cut and then stitch perfect copies of a designer's work. Within days of the runway shows, the pirates at the factories in China and other countries where labor is cheap are shipping into this country those perfect copies, before the designer can even get his or her line into the retail stores. Since there is no protection in America, innovation launched on the runway—or the red carpet—is stolen in plain sight.

Hearing on H.R. 5055, *supra*.

20. *See* Monroe, *supra* note 19.

21. *See* Foussianes, *supra* note 10.

22. *Id.*

23. Monroe, *supra* note 19.

24. Morgan McFall-Johnsen, *The Fashion Industry Emits More Carbon than International Flights and Maritime Shipping Combined. Here Are the Biggest Ways It Impacts the Planet.*, BUS. INSIDER (Oct. 21, 2019, 12:22 PM), https://www.businessinsider.com/fast-fashion-environmental-impact-pollution-emissions-waste-water-2019-10.

purchase articles of clothing in a single transaction for a "haul."[25] A vicious cycle has emerged because of the pace at which clothes are now produced, worn, and discarded.[26] Now, consumers simply buy more frequently because they expect a constant stream of new products in the pipeline to replace those that were abandoned.[27] However, there is concern with the environmental impact of the fast fashion industry and the fact that purchasing disposable clothing is seemingly the only way to stay on trend.[28] Despite these valid worries, the industry shows no sign of stopping, leaving many to wonder: how did we get here?[29]

One answer is that fast fashion's stratospheric rise to popularity is in large part thanks to social media.[30] The rate at which consumers' tastes and expectations change has seen a substantial increase as different generations reach "adulthood fueled by social media and the near-instant delivery of goods and services."[31] Therefore, the proliferation of media generated by various social networks has increased the speed at which trends develop, subsequently become available for purchase, and are ultimately disposed of by consumers as they find out about the next best thing.[32]

Moreover, "[t]hanks to social media's constantly changing, visually-driven nature, brands have developed a symbiotic relationship with popular celebrities and influencers, like the

25. *See* Lambert, *supra* note 16, at 39.

> There are over one million Youtube videos dedicated to "fashion hauls" which feature dozens of items purchased from fast fashion companies, exclaiming about great deals or explaining the newest trends. Trends saturate the market from every angle, and social media stars push consumers to buy more and more to stay on trend.

Id.

26. *See* Monroe, *supra* note 19; *supra* notes 19–23 and accompanying text.

27. *See* Lambert, *supra* note 16, at 40.

28. *See* McFall-Johnsen, *supra* note 24.

29. *See* Foussianes, *supra* note 10.

30. CAROLYN B. MALONEY, VICE CHAIR DESIGNATE, U.S. CONG. JOINT ECON. COMM., THE ECONOMIC IMPACT OF THE FASHION INDUSTRY 4 (2019), https://www.jec.senate.gov/public/_cache/files/39201d61-aec8-4458-80e8-2fe26ee8a31e/economic-impact-of-the-fashion-industry.pdf.

31. *Id.*

32. *See id.* at 5.

Kardashians, who have the ability to turn whatever they wear into an instant trend."[33] This is a route that fast fashion brands have exploited from the outset: from marketing to product development, the use of "famous" faces is a driving force behind successful campaigns of fast fashion brands.[34] Dubbed the most celebrity-obsessed of all fast fashion retailers, Pretty Little Thing employs Instagram influencers, YouTube creators, and former *The Bachelor* contestants to market its products on social networks.[35] The strategy is tried and true, as studies show a direct correlation between time spent on social media and money spent shopping.[36]

Additionally, social media has changed the way consumers feel about the way they use clothes.[37] In a survey of eighteen to twenty-five year-old women, 41% felt societal "pressure to wear a [new] outfit every time they go out,"[38] and one in six felt it is no longer acceptable to wear an outfit more than once "if it ha[s] . . . been tagged on social media."[39] Thus, between traditional methods of advertising and influencer-sponsored posts, brands ensure consumers are constantly viewing new products, thereby "fuel[ing] a desire for constant wardrobe renewal."[40]

All these changes to the fashion industry forced manufacturers to alter the way they deliver products to

33. Nguyen, *supra* note 17.

34. *See* Monroe, *supra* note 19.

35. *See id.*; *see also The Bachelor*, IMDB, https://www.imdb.com/title/tt0313038/plotsummary?ref_=tt_stry_pl (last visited Dec. 22, 2022) (explaining that The Bachelor is a reality television series where the contestant "dates multiple [people] over several weeks, narrowing them down to hopefully find . . . true love").

36. Monroe, *supra* note 19.

37. *The Truth About Outfit Repetition: "There Are Real Issues at Play Here,"* THE FASHION L. (Jan. 5, 2018), https://www.thefashionlaw.com/outfit-repetition-there-are-real-issues-at-play-here/ [https://web.archive.org/web/20220528080510/https://www.thefashionlaw.com/outfit-repetition-there-are-real-issues-at-play-here/].

38. *Id.* ("[33%] of women – regardless of age – consider an outfit to be 'old' after wearing it fewer than three times. . . . [72%] of women will wear a dress only once.").

39. Trewin Restorick, *Nudging People Away from Fast Fashion*, HUBBUB (Nov. 24, 2017), https://www.hubbub.org.uk/blog/nudging-people-away-from-fast-fashion.

40. Foussianes, *supra* note 10.

consumers.[41] Before, manufacturers utilized a "push model" to forecast market demand and sales estimates, producing goods ahead of time.[42] Now, companies employ a "pull model" that depends on receiving data in real time that reflects the buying patterns of consumers; companies then manufacture products in demand and never sit on excess inventory that may never be sold.[43] This change significantly impacted manufacturers as they had to completely restyle the way they use and receive consumer data.[44] Fast fashion companies, which cut costs in both design and manufacturing, "can gauge consumer reactions to fashion shows and editorial collection previews," and recreate the most sought-after trends before the original hits the store.[45] By doing this, fast fashion firms are able to lead in sales and effectively ice out much smaller competitors, many of which never had a chance to compete in the first place.[46] The inadequate copyright protection offered to fashion designs in the United States allows fast fashion firms to line their pockets while the original designers suffer;[47] therefore, change is needed to protect fashion designs from replication in the market.

B. *Economic Impact of the Fashion Industry*

The fashion industry can be thought of as just the retail and online stores that house the clothes they purchase, the brands that make those clothes, and the designers responsible for creating the ideas.[48] While the fashion industry does include these things, it is far more complex, "encompass[ing] many

41. *See* MALONEY, *supra* note 30, at 5.

42. *See id.*

43. *See id.*

44. *See id.*

45. Lambert, *supra* note 16, at 35.

46. *See, e.g.*, Joanna Paul, The "Piracy Paradox" Is So Last Year: Why the Design Piracy Prohibition Act Is the New Black 1 (2009) (Honors Scholars Seminar Paper, Illinois Institute of Technology) (on file with IIT Chicago-Kent College of Law).

47. *See infra* Section I.C; *infra* Part II.

48. Ellen Terrell, *Fashion Industry: A Resource Guide*, LIBR. OF CONG., https://guides.loc.gov/fashion-industry (May 2019).

different smaller and more niche industries."[49] Each facet of the industry contributes to its overall impact on the economy.[50] Predominantly consumer-focused, the fashion industry contributes to the economy in a number of different ways.[51] For example, New York City is responsible for employing more fashion designers than anywhere else in the United States, and these designers make up 4.6% of the total private sector workforce.[52] Moreover, New York City remains a global fashion powerhouse—along with London, Paris, and Milan—generating "$11.3 billion in wages and $3.2 billion in tax revenue."[53] World-renowned brands like Ralph Lauren, Calvin Klein, and Marc Jacobs consider New York City home.[54] New York Fashion Week, a semi-annual event held in New York City, further highlights the city's prominence in the industry and its significant economic contribution.[55] More than 200,000 people attended the various shows put on during the week-long event across the city, resulting in spending of approximately $532 million dollars.[56] Fashion Week in New York City generates more income than comparable events in its three rival cities combined and has nearly double the economic impact of the Super Bowl.[57]

Even the subsets of the industry have a significant financial presence. As of 2019, the United States market for apparel and footwear was valued at approximately $368 billion.[58] In recent

49. *Id.*

50. *See* MALONEY, *supra* note 30, at 1–2.

51. *See id.*

52. *Id.* at 1.

53. *Id.*

54. *Id.* at 3.

55. *New York Fashion Week*, FASHION UNITED, https://fashionunited.com/landing/new-york-fashion-week (last visited Dec. 22, 2022).

56. Esha Deokar, *The Economics Behind New York Fashion Week: How the Work of European Designers Transcend New York's Clothing Market*, THE ECON. REV. (Mar. 26, 2020), https://theeconreview.com/2020/03/26/the-economics-behind-new-york-fashion-week-how-the-work-of-european-designers-transcend-new-yorks-clothing-market/.

57. *See* MALONEY, *supra* note 30, at 1.

58. P. Smith, *Apparel and Footwear Market Size in the United States, China, and Western Europe in 2019*, STATISTA (Jan. 13, 2022), https://www.statista.com/statistics/995215/apparel-and-footwear-market-size-by-selected-market/.

years, online shopping has become more prevalent in the everyday lives of consumers, especially when it comes to clothing; 59% of consumers purchased clothes online in the United States from the second quarter of 2018 to the second quarter of 2019.[59] E-commerce sales alone generated over $500 billion in revenue in 2019,[60] and the market is "expected to surpass $740 billion by 2023" as the internet continues to influence social and economic activities.[61] Consequently, the fast fashion industry, which relies heavily on the internet and social media, only stands to benefit since its business structure thrives on constant merchandise turnover at low costs.[62]

Fast fashion firms have the potential to reshape the fashion industry for years to come due to the significant differences in their manufacturing and business models compared to traditional retailers, as well as the influence of social media.[63] In 2022, "[t]he global fast fashion market is expected to grow . . . to $99.23 billion . . . at a compound annual growth rate (CAGR) of 8.8%" from roughly $91 billion in 2021.[64] Growth in emerging markets, technology, and media development have been identified as contributing factors to the fast fashion industry's growth over the next several years.[65] However, as the fast

59. Beatriz Estay, *16 Online Shopping Statistics: How Many People Shop Online?*, BIG COM., https://www.bigcommerce.com/blog/online-shopping-statistics/ (last visited Dec. 22, 2022).

60. *Id.*

61. *Id.*

62. Lambert, *supra* note 16, at 8–9.

63. *See id.* at 29–30 ("The fast fashion model relies on quick and effective reactions to forces outside the company. These forces can be consumer demand, industry changes, new design innovations from other firms, and supply chain constraints.").

64. *Fast Fashion Global Market Report 2022*, CISION PR NEWSWIRE (Apr. 25, 2022, 12:15 PM), https://www.prnewswire.com/news-releases/fast-fashion-global-market-report-2022-301531964.html.

65. *See Global Fast Fashion Market Report 2021 - Market Is Expected to Grow at a CAGR of 5.3% from 2025 and Reach $211,909.7 Million in 2030*, CISION PR NEWSWIRE (Nov. 2, 2021, 3:30 PM), https://www.prnewswire.com/news-releases/global-fast-fashion-market-report-2021---market-is-expected-to-grow-at-a-cagr-of-5-3-from-2025-and-reach-211-909-7-million-in-2030--301414180.html ("Market-trend-based strategies for the fast fashion market include using virtual reality and augmented reality (VR/AR), use of blockchain technology in the market, artificial intelligence in designing clothing, using the internet of things (IoT), new ownership models, 3D printing, and increased demand for manmade fibers."); *see also Insights on the Fast*

fashion industry continues to grow, competition among firms remains high.[66] In 2021, 77% of the fast fashion market was controlled by five brands, and Shein was the top competitor with an 8% margin over the second largest brand.[67] By replicating popular designs that already exist in the market, fast fashion firms cut research and development costs, allowing them to enter the market at a much quicker rate compared to their more traditional counterparts.[68] By consistently turning over merchandise at cheap prices, fast fashion companies "create the perfect environment for habitual shoppers at every income level."[69]

Despite a difficult few years, the fast fashion industry shows no signs of stopping, due in large part to the fact that "[i]n times of crisis, consumers don't stop shopping—they just limit their purchases to affordable pleasures."[70] As the economy was on a downward spiral during the 2008 financial crisis, the demand for clothes at affordable prices persisted, leading to an increase in market share for fast fashion brands.[71] However, even after the economy began to recover, the demand for cheaply priced clothing persisted.[72] Clothing production doubled while prices dropped as people continued to spend the same amount of money for nearly double the quantity.[73] As the Coronavirus pandemic emerged in 2020, "[c]lothing retailers were among

Fashion Global Market to 2030 - Identify Growth Segments for Investment, GLOBENEWSWIRE (May 26, 2021, 5:58 AM), https://www.globenewswire.com/fr/news-release/2021/05/26/2236162/28124/en/Insights-on-the-Fast-Fashion-Global-Market-to-2030-Identify-Growth-Segments-for-Investment.html ("The growth is [also] due to the companies resuming their operations and adapting to the new normal while recovering from the COVID-19 impact, which had earlier led to restrictive containment measures involving social distancing, remote working, and the closure of commercial activities that resulted in operational challenges.").

66. *See Shein Now Leads Fast Fashion*, EARNEST (June 24, 2021), https://www.earnestresearch.com/data-bites/shein-leads-fast-fashion/.

67. *See id.*

68. *See* Lambert, *supra* note 16, at 23, 43.

69. *Id.* at 17.

70. Monroe, *supra* note 19.

71. *See id.*

72. *See id.*

73. *See id.*

the hardest hit."[74] The fashion industry suffered one of its worst years on record, with approximately three quarters of companies in the market posting losses.[75] By April 2020, clothing sales in the United States dropped by 79%.[76] The pandemic rocked the industry, impacting brick-and-mortar stores more than e-commerce-only stores.[77] Unlike their direct-to-consumer rivals, companies with brick-and-mortar stores sat on millions of dollars in inventory and were unable to offload it.[78] While fast fashion brands were impacted at the onset of the pandemic, just like the industry as a whole, they were able to pivot and focus their resources on integrating brick-and-mortar locations with their online stores.[79] For example, Inditex, the parent company of Zara, "invested [$3 billion] in the technological integration of its online and in-store shopping."[80] Additionally, by implementing radio-frequency identification chips to streamline their supply chain and merchandise stock system, Inditex increased its online sales by 36%.[81] Consequently, fast fashion brands were winners during the pandemic, as they were able to withstand the financial downturn and utilize technology to integrate their online stores to capture an accessible audience at home.

Unlike fast fashion brands operating exclusively in the e-commerce space, traditional fashion retailers still employ roughly one million workers to manage their brick-and-mortar

74. *Id.*

75. *See* IMRAN AMED, ACHIM BERG, ANITA BALCHANDANI, SASKIA HEDRICH, FELIX RÖLKENS, ROBB YOUNG, JAKOB EKELØF JENSEN & ALTHEA PENG, BUS. OF FASHION, MCKINSEY & CO., THE STATE OF FASHION 2021 10 (2021), www.mckinsey.com/~/media/mckinsey/industries/retail/our%20insights/state%20of%20fashion/2021/the-state-of-fashion-2021-vf.pdf.

76. Monroe, *supra* note 19.

77. *See id.*

78. *See id.*

79. *See, e.g.*, Sophie Mellor, *Fast-fashion Giants Zara and H&M Are Recovering from the Pandemic at Very Different Speeds*, FORTUNE (Sept. 15, 2021, 6:57 AM), https://fortune.com/2021/09/15/fast-fashion-zara-inditex-hennes-mauritz-pandemic-recovery-earnings/.

80. *Id.*; *Inditex Invests in Technology to Merge Online with In-store Shopping*, REUTERS, https://www.reuters.com/article/us-inditex-results-technology-idUSKBN23H2WJ (June 10, 2020, 1:29 PM).

81. Mellor, *supra* note 79.

locations.[82] In addition to retail employees, the fashion and apparel industry employs workers in "professions requiring an increasing range of highly technical education and skills."[83] These positions include: tailors, dressmakers, custom sewers, graphic designers, designers, and patternmakers.[84] Despite the wide range of positions available, employment in the apparel manufacturing industry has been on a steady decline since the early nineties.[85] This decline coincided with the rise of fast fashion.[86] While fashion designers are considered the driving force behind the industry with a median salary of $77,450 in 2021,[87] fast fashion firms "would not be as profitable if [they] relied on creative design teams."[88] Instead, these firms cut costs by wholesale copying designs and contracting with manufacturers who use cheap materials and even cheaper labor.[89] Operating in poor working conditions overseas, fast fashion brands continue to churn out products regardless of the cost.[90] The rapid generation of products at low prices makes them desirable locations for consumers to shop regardless of the methods implemented.[91]

C. *Fast Fashion's Habit of Copying Pre-Existing Designs*

Fast fashion has made various styles more accessible to people with different budgets; this increased access to various styles, however, has come with a price. The lack of design

82. *See Occupational Employment and Wage Statistics*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/oes/current/naics3_448000.htm (Mar. 31, 2022).

83. MALONEY, *supra* note 30, at 1.

84. *See id.* at 2.

85. P. Smith, *Number of Employees in the U.S. Apparel Manufacturing Industry from 1990 to 2021*, STATISTA (Dec. 19, 2022), www.statista.com/statistics/242729/number-of-employees-in-the-us-apparel-manufacturing-industry/.

86. Solene Rauturier, *What Is Fast Fashion and Why Is It So Bad?*, GOOD ON YOU (Apr. 1, 2022), https://goodonyou.eco/what-is-fast-fashion/.

87. *Fashion Designers*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/ooh/arts-and-design/fashion-designers.htm#tab-1 (Sept. 8, 2022).

88. Lambert, *supra* note 16, at 30.

89. *See id.* at 4, 16.

90. *See id.* at 98–101.

91. *See* Monroe, *supra* note 19.

protection available in the United States has forced brands to become accustomed to fighting on various fronts to protect their work and intellectual property.[92] The introduction and rapid takeover of fast fashion brands has made this more challenging as massive international companies like Shein and Zara "increasingly harness advanced data analytics to establish emerging fashion trends and rapidly create and produce associated designs that can be on the market within a matter of days."[93] Fast fashion companies copy luxury brands and independent designers at the same rate.[94]

Take Jennifer Lopez, who walked the red carpet at the 2000 Grammy Awards wearing the now-iconic Versace "Jungle" dress.[95] Nearly twenty years after Lopez wore the dress, Fashion Nova copied the iconic style, prompting an immediate response from the luxury Italian fashion house.[96] In 2019, Versace filed suit in the Central District of California against Fashion Nova seeking damages for the brand's attempt to "exploit the popularity and renown of Versace's signature designs, and to trade on [its] valuable goodwill and business reputation in order to drive profits and sales to line Fashion Nova's pockets."[97] Versace argued that Fashion Nova manufactured and sold deliberate copies of the brand's most notable patterns, silhouettes, and marks to capitalize on the creative efforts of other designers to "bolster [its] bottom line."[98]

92. *See infra* Section II.A; *see also From Dr Martens to Ralph Lauren, Lawsuits Are Starting to Build for $15 Billion Ultra-Fast Fashion Brand Shein*, THE FASHION L. (June 15, 2021), https://www.thefashionlaw.com/from-dr-martens-to-ralph-lauren-lawsuits-are-starting-to-build-up-against-15-billion-ultra-fast-fashion-brand-shein/ [hereinafter *From Dr Martens to Ralph Lauren*].

93. *From Dr Martens to Ralph Lauren*, *supra* note 92.

94. *See* Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And It's Completely Legal.*, VOX (Apr. 27, 2018, 7:30 AM), https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m.

95. *See* Lisette Voytko, *Versace Sues Fashion Nova for Knocking Off Famous Jennifer Lopez 'Jungle' Dress*, FORBES (Nov. 27, 2019, 9:00 AM), https://www.forbes.com/sites/lisettevoytko/2019/11/27/versace-sues-fashion-nova-for-knocking-off-famous-jennifer-lopez-jungle-dress/.

96. *Id.*

97. Complaint at 1, 3, 35, Gianni Versace S.R.L. v. Fashion Nova, Inc., filed, No. 2:19-cv-10074 (C.D. Cal. Nov. 25, 2019).

98. *See id.* at 14–21.

While it seemed like the parties were fully prepared to go to trial, they agreed to a settlement days before the trial date.[99]

Like Fashion Nova, Forever 21 has embroiled itself in controversy on numerous occasions for copying the designs of others.[100] The fast fashion retailer "[has] produc[ed] direct copies result[ing] in over fifty . . . copyright lawsuits."[101] In 2017, German multinational sportswear brand Puma filed suit in the Central District of California alleging that Forever 21 copied three of its footwear designs from the "Fenty" collaboration with Rihanna.[102] The designs were released between 2015 and 2017, with Puma "fil[ing] applications for copyright registrations for each of the Fenty Shoes."[103] Puma alleged that the fast fashion brand sought to profit off of the goodwill of the Puma and Fenty brands by copying the designs and offering them for a fraction of the price.[104] While the sportswear brand reasoned the pirated designs infringed on its intellectual property rights, Forever 21 sought to dismiss the copyright infringement action entirely.[105] The fast fashion brand argued that Puma's designs were not copyrightable, and that the copyright applications submitted by the sportswear brand were lacking.[106] Addressing the sufficiency of Puma's copyright applications, the court found that the applications existed but were inadequately pled.[107] The court reasoned, "the Ninth Circuit [only] allows infringement actions to proceed so long as

99. *Versace, Fashion Nova Settle Case Days Before the Start of Trial Over Copycat Wares*, THE FASHION L. (July 19, 2021), https://www.thefashionlaw.com/versace-fashion-nova-settle-case-days-before-the-start-of-trial-over-copycat-wares/.

100. *See generally From Gucci and Adidas to H&M and Puma, a Look at Forever 21's Long History of Litigation*, THE FASHION L. (Oct. 1, 2019), https://www.thefashionlaw.com/from-gucci-and-adidas-to-hampm-and-puma-a-look-at-forever-21s-long-history-of-litigation/ [hereinafter *Forever 21's Long History of Litigation*] (highlighting the various actions Forever 21 has been a party to as a result of alleged copying).

101. Lambert, *supra* note 16, at 57–58.

102. *See* Puma SE v. Forever 21, Inc., No. CV17-2523 (PSG), 2017 U.S. Dist. LEXIS 211140, at *1–2 (C.D. Cal. June 29, 2017).

103. *Id.* at *2.

104. *See id.* at *3.

105. *See id.* at *3, *17.

106. *Id.* at *17.

107. *Id.* at *17–19.

a complete application—consisting of the application for registration, fee, and deposit—has been received prior to filing suit."[108] Here, the applications were silent as to the date of filing, whether the necessary fees were paid, and if the application had been received by the Register of Copyrights prior to filing suit.[109] Because Puma failed to meet these requirements, the court granted Forever 21's motion to dismiss, with leave to amend.[110] However, like Fashion Nova and Versace, the parties ultimately agreed to settle the case in 2018.[111] Forever 21 faced a number of other copyright infringement suits before declaring bankruptcy in September of 2019.[112]

Independent designers have also faced off with fast fashion brands after seeing their work replicated online.[113] Destiney Bleu, founder of d.bleu.dazzled, saw her sales drop by nearly $100,000 after Fashion Nova began to copy her signature crystal encrusted tights.[114] While Bleu's designs have been worn by high-profile celebrities like Beyonce, Lady Gaga, and Rihanna,[115] it was not until Kylie Jenner posted a picture of herself wearing Bleu's signature tights that she encountered issues with fast fashion companies.[116] Fashion Nova used the

108. *Id.* at *18.

109. *Id.* at *19.

110. *Id.* at *20–21.

111. *Forever 21, Puma Settle Lawsuit Over Copied Fenty Footwear*, THE FASHION L. (Nov. 8, 2018), https://www.thefashionlaw.com/forever-21-puma-settle-lawsuit-over-copied-fenty-footwear/; Hilary George-Parkin, *Puma and Forever 21 Settle Contentious Fenty Footwear Lawsuit*, FOOTWEAR NEWS (Nov. 9, 2018, 12:17 PM), https://footwearnews.com/2018/business/news/puma-forever-21-fenty-lawsuit-settlement-1202704966/; *see Versace, Fashion Nova Settle Case Days Before the Start of Trial Over Copycat Wares*, *supra* note 99.

112. *See Forever 21's Long History of Litigation*, *supra* note 100 (highlighting how, prior to filing for bankruptcy, Forever 21 has been a party to various copyright infringement actions).

113. *See infra* notes 114, 123–24, 128–33 and accompanying text.

114. *See* Marquaysa Battle, *Black Fashion Designers Are Exposing Fashion Nova for Stealing Their Original Work*, CAFEMOM (Apr. 26, 2019), https://cafemom.com/lifestyle/fashion-nova-knock-off-designers/.

115. *See id.*; *About Us*, D.BLEU.DAZZLED, www.dbleudazzled.com/pages/about-us (last visited Dec. 22, 2022).

116. *See* Battle, *supra* note 114; *see also* Alle Connell, *Rihanna's Festival Outfit Contains a Secret Jab at Khloe Kardashian*, INSIDER (Aug. 9, 2017, 6:06 PM), www.insider.com/rihannas-festival-outfit-has-khloe-kardashian-connection-2017-8 ("Bleu is *also* famous for calling out Khloe Kardashian for allegedly ripping off her original designs.").

picture of Jenner to sell its own version of the crystal tights, taking credit for not only the design but also the success.[117] Bleu was understandably frustrated by Fashion Nova's use of the picture and design as it created confusion among consumers and "oversaturated [an already competitive] market with a cheap knock off."[118] Bleu acknowledged Fashion Nova's desire to create affordable products; however, she could not justify allowing the brand to profit off of others' work.[119] With the constant influx of products on the fast fashion retailer's website, Bleu suggested the brand is not trying to provide affordable products to consumers, rather, "their constant copying is greed."[120] Bleu points out that Fashion Nova—like all fast fashion brands—does not "respect the creative process."[121] Bypassing the design process, fast fashion brands save time and money by replicating the successful work of others for a fraction of the price.[122] Thus, to make a profit in the fast fashion industry brands do not need to be creative, they only need to have an eye for the hottest items on the market.

Fashion Nova was involved in controversy once again after copying designs of two dresses also worn by Kylie Jenner.[123] Both dresses were created by Kim Shui, owner of Kim Shui Designs, a New York-based fashion brand.[124] Shui was alerted to the copies after receiving direct messages on social media, noting the similarities between the garments.[125] Despite understanding that the fashion industry often has pieces inspired by others in the market, Shui argued that nothing

117. *See id.*

118. *See id.* (noting "that Fashion Nova still sells a $12 version of Bleu's suspender Meteor Fishnets" while Bleu sells them for $125).

119. *Id.*

120. *Id.*

121. *See id.*

122. *See* Lambert, *supra* note 16, at 22.

123. *See* Dara Prant, *A Fashion Designer is Accusing Fashion Nova of Copying Two of Her Dresses After Kylie Jenner Wore Them*, BUS. INSIDER (Aug. 3, 2019, 10:33 AM), https://www.businessinsider.com/designer-says-fashion-nova-copied-her-dresses-2019-8.

124. *See id.*

125. *See id.*

about the dresses differed.[126] Both Shui and Bleu noted the harm that direct replicas in the marketplace can cause to small, independent designers who do not have the ability to reach the masses.[127]

Independent designers often turn to social media to vent their frustration after discovering their work has been copied.[128] For example, Reclamare PH, an independent crochet designer who creates handmade pieces, alleged that Shein had copied one of its designs and subsequently asked her followers to boycott the company.[129] While designers are typically met with overwhelming support, consumers calling out fast fashion brands' bad behavior does little to stop it from happening again.[130] However, in most cases, this is the only avenue independent designers can pursue to feel vindicated.[131] Many are unable to fund the cost of litigation against fast fashion brands who have virtually unlimited resources and even "budget a set amount of money each year to pay settlements."[132] Thus, even though many small designers never get their day in court, fast fashion brands prepare for the inevitable lawsuits that do arise because they would rather copy designs and make a profit than create their own products.[133]

126. *See id*.

127. *See id*.; Battle, *supra* note 114.

128. *See* Michie, *supra* note 1; Prant, *supra* note 123; Battle, *supra* note 114.

129. Sharon Pruitt-Young, *Why Indie Brands Are at War with Shein and Other Fast-Fashion Companies*, NPR (July 20, 2021, 4:25 PM), https://www.npr.org/2021/07/20/1018381462/why-indie-brands-are-at-war-with-shein-and-other-fast-fashion-companies.

130. *See* Michie, *supra* note 1.

131. *See* Julia Brucculieri, *How Fast Fashion Brands Get Away with Copying Designers*, HUFFINGTON POST (Sept. 4, 2018, 5:45 AM), https://www.huffpost.com/entry/fast-fashion-copycats_n_5b8967f9e4b0511db3d7def6.

132. *Id*.

133. *See id*.

II. LEGAL PROTECTION FOR FASHION DESIGNS IN THE UNITED STATES

Rapid growth in the fashion industry has increased the prevalence of intellectual property rights all over the world.[134] In the United States, copyright law is often thought of as the main source of protection for fashion designs, however this notion is misguided.[135] This Part will discuss the history of copyright law in the United States as it relates to fashion. Moreover, this Part will explore the struggle courts and the legislature have faced in affording protection to fashion.

A. *Copyright Law*

Pursuant to the Promotion Clause of the United States Constitution, Congress is empowered "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[136] Even though this clause does not use the term "copyright," it nevertheless creates the foundation upon which copyright law rests.[137] Consequently, copyright law has been recognized in the United States since the eighteenth century when Congress passed the Copyright Act of 1790.[138] Beginning in 1802 and ending in 1897, Congress amended the Act, significantly altering the types of

134. *See* John Zarocostas, *The Role of IP Rights in the Fashion Business: A US Perspective*, WORLD INTELL. PROP. ORG. MAG. (Aug. 2018), https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html.

135. *Id.*

136. U.S. CONST. art. I, § 8, cl. 8; *see also A Brief History of Copyright in the United States*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/ (last visited Dec. 22, 2022).

137. *ArtI.S8.C8.1 Origin and Scope of Congress's Power over Intellectual Property*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C8-1-1/ALDE_00000124/ [https://web.archive.org/web/20220913133540/https://constitution.congress.gov/browse/essay/artI-S8-C8-1-1/ALDE_00000124/] (last visited Dec. 22, 2022).

138. *The 18th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_18th_century.html (last visited Dec. 22, 2022). The Copyright Act of 1790 was modeled off of the Statute of Anne 1710 from Britain, which "secured to authors of books sole publication rights for designated periods." *ArtI.S8.C8.1 Origin and Scope of Congress's Power Over Intellectual Property*, *supra* note 137; *The 18th Century*, *supra*.

work covered, the length of the copyright term, and the registration procedure.[139] The United States continued to make advancements to copyright law,[140] but the first major revision came when President Gerald Ford signed the Copyright Act of 1976 into law, signaling a new era.[141] While the Act brought about significant changes, it was abundantly clear from the House Judiciary Committee report that fashion was never a work legislators contemplated protecting.[142]

With the adoption of the Copyright Act of 1976, legislators wanted to create a clear distinction between "copyrightable works of applied art," which they would afford protection, and "uncopyrighted works of industrial design."[143] Therefore, the Committee acknowledged that a two-dimensional drawing or graphic work still retained its status as copyrightable and was capable of being identified as such even if it was applied to a

139. *See The 18th Century*, *supra* note 138.

140. *See The 19th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_19th_century.html (last visited Dec. 22, 2022) (describing how "[a] government appropriations bill establishe[d] the Copyright Office . . . and create[d] the position of Register of Copyrights" with Thorvald Solberg, a "Boston book dealer and copyright expert" as the first named to this position); *1900–1950*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1900-1950.html (last visited Dec. 22, 2022) (describing how the Copyright Act of 1909 was signed into law granting "protection to works published with a valid copyright notice affixed on copies" and was later codified as Title 17 of the United States Code in 1947).

141. *1950–2000*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-2000.html (last visited Dec. 22, 2022). The Copyright Act of 1976 extended copyright protection to "all works, both published and unpublished, once they [were] fixed in a tangible form." *Id.* Moreover, the length of the copyright term granted was changed "from a term of years with a renewal period to the life of the author plus fifty years." *Id.* "[T]he renewal provisions for works copyrighted between January 1, 1964[] and December 31, 1977" were altered by Congress as well. *Id.* After adopting the Copyright Act of 1976 "second-term renewal [became] automatic and the correlating registration [became] optional." *Id.*

142. *See* H.R. REP. NO. 94-1476, at 51 (1976).

143. *See id.* at 54–55.

> The Committee has added language to the definition of "pictorial, graphic, and sculptural works" in an effort to make clearer the distinction between works of applied art protectable under the bill and industrial designs not subject to copyright protection. The declaration that "pictorial, graphic, and sculptural works" include "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned" is classic language: it is drawn from Copyright Office regulations promulgated in the 1940's and expressly endorsed by the Supreme Court in the *Mazer* case.

Id.

useful article.[144] The Committee also recognized that an industrial work may provide aesthetic value and satisfaction; however, it noted that it did not intend to offer copyright protection to works of that nature unless some element could satisfy the "separability test" first established in *Mazer v. Stein*.[145] The Supreme Court reasoned that a work of art is subject to copyright protection if the work is incorporated into the design of, but capable of existing separately from, a useful article.[146] Because *Mazer* was decided over two decades before the Copyright Act was passed, the Committee codified this holding and reasoned that, "[u]nless the shape of . . . ladies' dress . . . or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be" subject to copyright protection.[147] By explicitly excluding "ladies' dress" from outright copyright protection and deeming it an industrial article similar to airplanes and food processors, Congress created the first hurdle to copyright protection for fashion.[148]

The Copyright Act of 1976 protects "original works of authorship fixed in any tangible medium of expression" and affords owners exclusive rights in their work for the duration of their life plus seventy years.[149] Even though fashion designs seem to fit seamlessly within this requirement due to the

144. *See id.* at 55; *see also* 17 U.S.C. § 101 ("A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.").

145. *See* H.R. REP. NO. 94-1476, at 55; *see also* Mazer v. Stein, 347 U.S. 201 (1954).

146. *See Mazer*, 347 U.S. at 213–14.

147. H.R. REP. NO. 94-1476, at 55, 105.

148. *See id.* at 55.

149. 17 U.S.C. §§ 102(a), 302(a); *see also id.* § 101.

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

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creative nature of the work, they are hindered in a significant way by not receiving formal recognition.[150] To that end, only "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying 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" are recognized as mediums that can receive protection.[151] Thus, while creators in other artistic industries can capitalize on the extensive protection afforded by the Copyright Act simply because the medium used is a recognized work,[152] fashion designs are left in a precarious position, often exposed to replication by fast fashion brands due to the absence of a formal definition.[153] Fashion designs, architecture, and musical works are of the same creative nature and require similar time, attention to detail, and effort to produce.[154] Therefore, formal copyright recognition is necessary for the protection of fashion designers' original work.

It would be improper to say that fashion designs cannot receive any copyright protection under the current copyright regime; individual aspects of fashion designs can, and do, receive copyright protection.[155] The structure of the Copyright Act protects fashion designs under the "pictorial, graphic, and

150. *See id.* §§ 101–102.

151. *Id.* § 102; *see also* H.R REP. NO. 94-1476, at 53.

> The use of the word "include," as defined in section 101, makes clear that the listing is "illustrative and not limitative," and that the seven categories do not necessarily exhaust the scope of "original works of authorship" that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories.

H.R REP. NO. 94-1476, at 53.

152. *See supra* notes 142–50 and accompanying text.

153. *See supra* Section I.C.

154. *See* Casey E. Callahan, *Fashion Frustrated: Why the Innovative Design Protection Act Is a Necessary Step in the Right Direction, but Not Quite Enough*, 7 BROOK. J. CORP. FIN. & COM. L. 195, 201–02 (2012); *see also* S. Priya Bharathi, *There Is More than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works*, 27 TEX. TECH. L. REV. 1667, 1670 (1996).

155. *See* § 102.

sculptural works" category.[156] Thus, while the particular shape or cut of a design cannot receive protection, "certain fabric designs and patterns may be sufficiently original and protectable, such as an intricate artistic repeated pattern on a blouse" or lace and embroidery accents attached to a particular piece of clothing.[157] Moreover, an individual who creates an inherently unique fabric pattern, lace design, or embroidery accent is afforded protection, and under the current regime, this protection exists from the moment the work is created.[158] A work is deemed to have been created when it becomes fixed in a tangible medium for the first time and "is perceptible either directly or with the aid of a machine or device."[159] While there is no formal process required to receive protection, the United States has an established registration system individuals can take advantage of.[160]

Registration of copyrights in the United States is not required,[161] but it is a relatively straightforward process. At any time after a work has been created, a copyright holder may obtain a registration for the respective copyright by submitting an application, deposit, and filing fee.[162] The Register of Copyrights must then determine whether the article constitutes

156. *Id.* § 101.

> "Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.

Id.

157. Francesca M. Witzburg, *Fashion Forward: Fashion Innovation in the Era of Disruption*, 39 CARDOZO ARTS & ENT. L.J. 705, 708 (2021); Tina Martin, *Fashion Law Needs Custom Tailored Protection for Designs*, 48 U. BALT. L. REV. 453, 462–63 (2019).

158. *See* U.S. COPYRIGHT OFF., CIRCULAR 15A, DURATION OF COPYRIGHT (2011), https://www.copyright.gov/circs/circ15a.pdf; *see also* Francesca Montalvo Witzburg, *Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the United States and the European Union*, 107 TRADEMARK REP. 1131, 1134 (2017) [hereinafter Witzburg, *Protecting Fashion*].

159. *See Copyright in General*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-general.html (last visited Dec. 22, 2022); *see also* § 101.

160. *See Register Your Work: Registration Portal*, U.S. COPYRIGHT OFF., https://www.copyright.gov/registration/ (last visited Dec. 22, 2022).

161. *See Copyright in General*, *supra* note 159.

162. *See* § 408(a).

a copyrightable material.[163] If it does, the claim will be registered, and the owner will be issued a certificate of registration.[164] The certificate will contain the effective date of registration, which represents the day the Copyright Office received the application, deposit, and filing fee.[165] The cost varies based on the method a designer chooses to file, as well as the number of works that will be registered at a single time.[166] Although this process is relatively simple, some may choose not to register altogether because they feel it is unnecessary or are constrained by the cost required to file.[167]

Both the registration and creation of a work afford a creator copyright protection;[168] however, distinguishing the differences between them is vital. Only after a designer has registered a copyright can they pursue a claim for infringement.[169] Courts will not award damages for unregistered copyrights or for:

> (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.[170]

Section 411(b)(1)(A) of the Copyright Act of 1976 provides a safe harbor for copyright registration such that a certificate of copyright registration will be valid even if it contains inaccurate

163. *See id.* § 410(a).

164. *See id.*

165. *See id.* § 410 (a), (d).

166. *See Fees*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/fees.html (last visited Dec. 22, 2022).

167. *See* Kevin R. Casey, *To Register or Not to Register Your Copyright, That Is the Question*, LEXOLOGY (Feb. 8, 2022), https://www.lexology.com/library/detail.aspx?g=bfced906-0c74-4968-b3d5-b3d6448fe125.

168. *See Copyright in General*, *supra* note 159; *supra* notes 156–59 and accompanying text; *infra* notes 169–70 and accompanying text.

169. *See* § 411.

170. *Id.* § 412.

information, as long as the copyright holder was unaware of the fact that the information was inaccurate.[171] The Supreme Court recently held, in *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, that this safe harbor protects both mistakes of law and mistakes of fact.[172] Thus, a copyright holder may pursue an infringement action and receive remedies even if the application submitted to the Copyright Office contains inaccurate information.[173]

In the United States, copyright holders have various remedies for infringement available to them, including injunctions,[174] disposition of infringing articles,[175] damages and profits,[176] costs, and attorney's fees.[177] However, even with varying degrees of remedies, fashion designers still sit on the outside looking in when it comes to protection. While designers may receive protection for an inherently unique fabric pattern,

171. *See id.* § 411(b)(1)(A) ("A certificate of registration satisfies the requirements of this section and section 412, regardless of whether the certificate contains any inaccurate information, unless . . . the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate.").

172. *See* Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 142 S. Ct. 941, 945, 947 (2022) (holding the phrase "with knowledge that it was inaccurate" in § 411(b)(1)(A) does not distinguish between a mistake of law and mistake of fact, and therefore the safe harbor provision protects both).

173. *See* § 411(b)(1)(A).

174. *See id.* § 502; *see also* H.R. REP. NO. 94-1476, at 160 (1976) (noting that courts have the power to "grant injunctions and restraining orders, whether 'preliminary,' 'temporary,' 'interlocutory,' 'permanent,' or 'final,' to prevent or stop infringements of copyright").

175. *See* § 503. Allegedly infringing articles may be impounded the moment an action is filed; a court is not required to wait for an injunction. *See* H.R. REP. NO. 94-1476, at 160. Moreover, upon a finding of infringement a court may "order the infringing articles sold, delivered to the plaintiff, or disposed of in some other way that would avoid needless waste and best serve the ends of justice." *Id.*

176. *See* § 504; *see also* H.R. REP. NO. 94-1476, at 161. Section 504(b) recognizes the various purposes served by awards of damages and profits in that:

> [d]amages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act. Where the defendant's profits are nothing more than a measure of the damages suffered by the copyright owner, it would be inappropriate to award damages and profits cumulatively, since in effect they amount to the same thing. However, in cases where the copyright owner has suffered damages not reflected in the infringer's profits, or where there have been profits attributable to the copyrighted work but not used as a measure of damages, subsection (b) authorizes the award of both.

§ 504(b).

177. *See* § 505.

"[m]any designers do not create their own fabric, instead they buy cloth from manufacturers without taking any assignment of its copyright."[178] Therefore, when fast fashion brands copy the work of other designers, they are unable to pursue a claim for infringement because the garment itself does not receive protection, and designers generally hold no interest in the fabric.[179] The limited protection provided by pictorial, graphic, and sculptural works is restricted even further due to inconsistent decisions regarding separability applied across jurisdictions.[180]

B. *A Lack of Clear Guidance: How Courts Have Struggled with Separability*

Congress seemingly had good intentions when it codified the standard outlined in *Mazer*, hoping it would simplify courts' determination of whether a useful article had elements that could receive copyright protection;[181] however, the "separability test" soon proved too difficult to apply. Under this test, if a pictorial, graphic, or sculptural work incorporated into the design of a useful article was capable of existing independent of the article it could receive copyright protection.[182] However, the House Judiciary Committee report indicated that the separability requirement could be satisfied either "physically or conceptually."[183] Physical separability is achieved when the pictorial, graphic, and sculptural works of a useful article can be removed from the article and the utilitarian elements remain intact.[184] While the test is straightforward, courts have been hesitant to rely exclusively on physical

178. Jennifer Mencken, *A Design for the Copyright of Fashion*, B.C. INTELL. PROP. & TECH. F., 1997, at 1, 3.

179. *See supra* notes 149–51, 155–59, 178 and accompanying text.

180. *See infra* Section II.B.

181. *See* H.R. REP. NO. 94-1476, at 54–55.

182. *See id.* at 55; Mazer v. Stein, 347 U.S. 201, 213–15 (1954).

183. *See* H.R. REP. NO. 94-1476, at 55.

184. Giovanna Marchese, *A Tri-Partite Classification Scheme to Clarify Conceptual Separability in the Context of Clothing Design*, 38 CARDOZO L. REV. 375, 386 (2016).

separability because it has limitations.[185] Namely, the physical separability test could lead to "inconsistent results that turn on how the article is made."[186] Moreover, it is virtually impossible to detach a two-dimensional article from the object it appears on.[187] Therefore, courts attempt to apply the amorphous conceptual separability test. The U.S. Copyright Office will only apply the conceptual separability test "if it determines that the useful article contains pictorial, graphic, or sculptural features that cannot be physically separated from that article."[188] Therefore, a pictorial, graphic, and sculptural element must be capable of being visualized independent from the useful article's overall shape.[189] The test does not present any obvious difficulties in terms of application; however, courts have struggled "adopt[ing] or advocat[ing] at least ten different approaches."[190] As such, there was a lack of uniformity across

185. *See* Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 482 (6th Cir. 2015).

> Few scholars or courts embrace relying on the physical-separability test without considering whether the pictorial, graphic, or sculptural features of an article are conceptually separable because the physical-separability test has limitations. The physical-separability test works well to draw the distinction between aesthetic articles and useful articles when the objects at issue are three-dimensional.

Id.

186. *Id.* at 483.

> [I]f the artist makes the statuette separately before putting a lamp fixture on top of it, then it is copyrightable under the physical-separability test. In contrast, if the statuette is wired through the body with a lamp socket in the head, then the statuette may not be eligible for copyright protection.

Id.

187. *Id.* at 482.

188. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.2(B): 40 (3d ed. 2014), https://www.copyright.gov/comp3/docs/compendium-12-22-14.pdf.

189. *See id.*

190. *See* Marchese, *supra* note 184, at 377; *see, e.g.*, Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980) (noting the test for separability is whether "[t]he primary ornamental aspect" is separable from the "subsidiary utilitarian features"); Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 419 (2d Cir. 1985) (noting the test for separability is whether the aesthetic features are required by the utilitarian features); *id.* at 422 (Newman, J., dissenting) ("[R]equisite 'separateness' exists whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously."); Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1987) ("[I]f 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 elements. Conversely, where design

jurisdictions and no clear understanding as to the correct standard for conceptual separability.

1. *The fine line between Halloween costumes and casino uniforms*

In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the Second Circuit considered whether the sculptural aspects on two ornate belt buckles were subject to copyright protection.[191] The buckles at issue were inspired by art nouveau and Spanish architecture, with intricate designs sculpted and cut out on the surfaces.[192] The plaintiff designer had immense success in the market with each design, even winning an American Fashion Critics' Award for his work, as the smaller version of the buckles were often worn as jewelry by consumers.[193] Thus, the Court rejected the argument that the belt buckles were merely useful objects and instead reasoned there were "conceptually separable sculptural elements" in them evidenced by the fact that they were sold in jewelry stores, and owners wore them as ornamentation on occasion.[194]

Nearly two decades later, the Second Circuit was confronted with yet another case that implicated conceptual separability.[195] In *Chosun International, Inc. v. Chrisha Creations, Ltd.*, Chosun, a manufacturer of children's animal Halloween costumes, filed suit against Chrisha, a competing manufacturer, alleging infringement on several of her costume designs, each consisting

elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists.").

191. *See Kieselstein-Cord*, 632 F.2d at 990.

192. *Id.*

193. *See id.* at 991.

194. *Id.* at 993 ("We see in appellant's belt buckles conceptually separable sculptural elements, as apparently have the buckles' wearers who have used them as ornamentation for parts of the body other than the waist. The primary ornamental aspect of the Vaquero and Winchester buckles is conceptually separable from their subsidiary utilitarian function."). The case was remanded to determine whether the Plaintiff had "satisfied the copyright notice requirements." *Id.* at 994.

195. *See* Chosun Int'l, Inc. v. Chrisha Creations, Ltd., 413 F.3d 324, 325, 328 (2d. Cir. 2005).

of a bodysuit and a sculpted head.[196] The Southern District of New York dismissed Chosun's complaint, reasoning the tests for physical and conceptual separability were simply too inconsistent to provide guidance, and concluded no element on the Halloween costumes could be separated from its intended function.[197] On appeal, the Second Circuit reasoned that the removal of the sculpted heads would not adversely impact the costume "wearer's ability to cover his or her body."[198] Further, Chosun could show conceptual separability by demonstrating that the sculpted heads "invoke in the viewer a concept separate from that of the costume's 'clothing' function, and that their addition to the costume was not motivated by a desire to enhance the costume's functionality *qua* clothing."[199] Therefore, because conceptual separability could be achieved, the costumes were eligible for protection.[200]

While the Second Circuit was deciding *Chosun*, the Fifth Circuit faced a similar issue in *Galiano v. Harrah's Operating Co.* but used a vastly different standard.[201] Galiano, the owner of a clothing design firm, entered into an agreement to provide sketches of employee uniforms for Harrah's casinos.[202] Due to the limited capacity of Galiano's operations, separate manufacturing agreements were made with Harrah's suppliers to produce the uniforms.[203] The design agreement was only to last four months while the manufacturing agreement was to last

196. *Id.* at 325.

197. *Id.* at 326–27 ("Attempting to judge the copyrightability of Halloween costumes reveals the incoherence of these [separability] tests. A costume's utility is in allowing the wearer to pretend to be something else—often a caricature of something else—and it is the artistic choices made in designing the costume that determine its saleability. It is impossible to say whether the utilitarian predominates over the artistic, or vice versa. Until a more coherent distinction is drawn by Congress, district courts can do little more than attempt to be consistent with precedent.").

198. *Id.* at 329.

199. *Id.* at 330.

200. *Id.* at 329.

201. *See id.*; *see also* Galiano v. Harrah's Operating Co., 416 F.3d 411, 413, 417 (5th Cir. 2005).

202. *Galiano*, 416 F.3d at 413.

203. *Id.*

one year.[204] Negotiations to extend the contract for designs failed, and the parties entered into a settlement agreement in May 1996.[205] Three years later, Galiano successfully registered the collection of sketches created for Harrah's, and subsequently filed suit alleging they had infringed by continuing to use and order the uniforms.[206] The court noted the difficulty conceptual separability tests present.[207] After reviewing various tests applied throughout the other circuits, the court opted for the "likelihood-of-marketability standard" to resolve whether the creative elements of the uniform designs could receive copyright protection.[208] Under this standard, the court must consider "whether the useful article would still be marketable, in light of its value as a work of art, even if it had no utilitarian function."[209] Applying this test, the court reasoned that Galiano failed to make an adequate "showing that its designs are marketable independently of their utilitarian function as casino uniforms."[210] Therefore, the designs were not entitled to copyright protection.[211]

Typically, the decorative elements of a design are separable from the overall utilitarian function if the removal of these elements does not impact the designs' ability to function with its intended purpose;[212] however, courts have reached different conclusions. For example, in *Jovani Fashion, Ltd. v. Fiesta Fashions*, the court rejected the argument that "the arrangement of decorative sequins and crystals on the dress bodice; horizontal satin ruching at the dress waist; and layers of tulle on the skirt" on prom dresses merited copyright protection because these elements were not capable of existing

204. *See id.*

205. *Id.*

206. *See id.* at 413–14.

207. *See id.* at 419 ("How to conduct the conceptual separation is, in turn, what continues to flummox federal courts.").

208. *Id.* at 421.

209. Marchese, *supra* note 184, at 398.

210. *Galiano*, 416 F.3d at 422.

211. *See id.*

212. Jovani Fashion, Ltd. v. Fiesta Fashions, 500 F. App'x 42, 44 (2d Cir. 2012).

independent of the dress itself.[213] According to the court, a prom dress is intended to cover the body in an "attractive way for [a] special occasion."[214] Therefore, removing these decorative elements would undoubtedly alter the garment's ability to function with its intended purpose.[215] Because clothing serves a decorative purpose in addition to merely covering the body, the decorative elements are generally intrinsic to the garment's function and cannot be separated.[216] With such varying interpretations of conceptual separability, copyright holders in the pictorial, graphic, or sculptural works category were constantly left scratching their heads trying to determine where the line was.[217] While Halloween costumes had copyrightable elements in one jurisdiction, casino uniforms were left unprotected in the next.[218] These inconsistent decisions left a need for clarity regarding designers' copyright protections, which only the Supreme Court could provide.

2. *The decision that was supposed to change everything*

After years of struggling, the Supreme Court answered the prayers, or pleas, of circuit courts across the country when it stepped in to clarify once and for all the appropriate test for separability in *Star Athletica, LLC v. Varsity Brands, Inc.*[219] Varsity Brands, and its subsidiaries, design, manufacture, and sell cheerleading uniforms,[220] controlling 80% of the market.[221] Over the years, they obtained or acquired over 200 copyright registrations for designs that appear on their uniforms and

213. *Id.* at 44.

214. *Id.* at 45.

215. *Id.* at 44.

216. *See id.* at 45.

217. *See* Jacqueline Lefebvre, *The Need for Supreme Clarity: Clothing, Copyright, and Conceptual Separability*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 143, 166–67 (2016).

218. *See* Chosun Int'l, Inc. v. Chrisha Creations, Ltd., 413 F.3d 324, 329–30 (2d Cir. 2005); Galiano v. Harrah's Operating Co., 416 F.3d 411, 422 (5th Cir. 2005).

219. Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405 (2017).

220. *Id.* at 409.

221. Witzburg, *Protecting Fashion*, *supra* note 158, at 1138.

various other garments.[222] The designs consist of various combinations of different lines and shapes, such as chevrons.[223]

Varsity Brands filed suit alleging Star Athletica, also in the business of marketing and selling cheerleading uniforms, willfully infringed on copyrights they had for five designs.[224] The District Court for the Western District of Tennessee granted summary judgment for Star Athletica, reasoning that the decorative elements served to identify the garments as cheerleading uniforms; therefore, the decorative elements served a utilitarian purpose and could not be separated physically or conceptually from the utilitarian function of the uniforms.[225] The Sixth Circuit disagreed with this characterization and reversed, holding that the decorative elements were capable of existing separately.[226] The designs sitting alongside a blank uniform could be identified individually, one as a graphic design and the other a cheerleading uniform.[227] Further, the designs were not restricted to use on cheerleading uniforms, rather they could be incorporated onto different garments or used as artwork and hung on walls.[228]

In its 2017 decision, the Supreme Court affirmed the Sixth Circuit's holding that cheerleading uniform designs could be protected under copyright law.[229] Although the Court ultimately came to the same conclusion, it chose not to use any of the ten separability tests available.[230] Instead, the Court established a new two-prong test to determine copyright

222. *Star Athletica, L.L.C.*, 580 U.S. at 409.

223. *Id.* at 409–10.

224. *Id.* at 410.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 424.

230. *Id.* ("Because the designs on the surface of respondents' cheerleading uniforms in this case satisf[ies] *[our test]*, the judgment of the Court of Appeals is affirmed.") (emphasis added); *see supra* Section II.B.

protection for design elements incorporated in useful articles.[231] Thus, under the new separability test,

> an artistic feature of the design of a useful article is eligible for copyright protection if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other [tangible] medium if imagined separately from the useful article.[232]

Under this test, the Court noted that the only feature eligible for protection was the two-dimensional fabric designs affixed to the cheerleading uniforms.[233] Nevertheless, the designs satisfied the test as they could be identified as "having pictorial, graphic, or sculptural qualities."[234] By separating the various design arrangements from the surface of the uniforms and applying them to other mediums, the designs would ultimately qualify as two-dimensional works of art, but the uniforms themselves would not be replicated.[235] Moreover, the Court noted that all two-dimensional art will correspond to and retain the shape of the medium it is applied to.[236] Thus, it rejected Star Athletica's argument that the designs could not be copyrighted because they retain the shape of a cheerleading uniform after being removed.[237] Under the new separability test, physical separability, intent of the creator, and marketability of the design are no longer considered.[238] If a design can receive protection independently, in other words, when it is not attached to a useful article, then it can also receive protection

231. *Id.* at 414–15, 424.
232. *Id.* at 424.
233. *Id.* at 419.
234. *Id.* at 417.
235. *Id.*
236. *Id.* at 418.
237. *Id.*
238. Witzburg, *Protecting Fashion*, *supra* note 158, at 1139 (referring to the test created by the Court in *Star Athletica*).

when it is attached to a useful article.[239] Although the Court was able to resolve the confusion among the circuit courts by setting a clear standard, whether the new separability test would effect change remained unclear.[240]

As of late July 2020, *Star Athletica* has been cited over seventy times; however, only 15% of the cases concern the separability test.[241] Further, among the copyright cases that have cited *Star Athletica*, only three concerned clothing.[242] The rest involved video games, lamps, decorated clothespins, and other products.[243] To gauge whether the decision had any impact on design piracy, industry experts looked to "the number of [copyright] registrations . . . filed in the pictorial, graphic or sculptural (PGS) work[s] category."[244] While copyright registrations rose in the wake of *Star Athletica*, there was minimal increase in the pictorial, graphic, and sculptural category, which applies to fashion designs.[245] Thus, the consensus was that the fashion industry viewed *Star Athletica* as beneficial, but only in very limited circumstances.[246]

While the decision did little to change the landscape of fashion design protection in the copyright space, it further highlighted the asymmetries that exist and the need for more adequate protection.[247] *Star Athletica* took over seven years to litigate, and the case ultimately settled.[248] While fast fashion

239. *Id.*

240. *See* David Jacoby, *'Star Athletica' Three Years On*, N.Y. L.J. (Aug. 28, 2020, 3:04 PM), https://www.law.com/newyorklawjournal/2020/08/28/star-athletica-three-years-on/?slreturn=20220916114315 (available through LexisNexis and Bloomberg Law) (noting that commentators were divided on the holding as "[s]ome felt *Star Athletica* approved a path to relatively quick and inexpensive protection for clothing design, at least in some situations" while "[o]thers felt the holding was so limited that it added only modest potential protection for fashion designs").

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *See id.*

246. *Id.*

247. *See id.*

248. *Id.* (noting that the case settled upon "the insistence of Star Athletica's insurance carrier").

firms can afford the expense of a lengthy litigation, independent designers are unable to withstand the financial pressure.[249] As such, some designers do not file infringement suits at all while others fight them out until they agree to a settlement or buckle under the financial pressure.[250] Under the current copyright system, it is more profitable for fast fashion brands to copy designs and pay settlement costs than it is for them to create collections of their own.[251]

C. *Failed Legislative Efforts to Extend Copyright Protection to Fashion Designs*

As courts struggled to apply one of the many separability tests to fashion designs, there was a separate battle happening in the legislative arena. In 2006, the United States Copyright Office considered extending the *sui generis* protection under Chapter 13 to fashion designs.[252] After engaging in these conversations, the Copyright Office believed "there may well be merit to the view that fashion designs should be given protection," but there was insufficient evidence presented to determine the need for legislation.[253] Despite this, on three

249. *See* Lambert, *supra* note 16, at 47.

250. *See* Eliza Huber, *Young Designers Get Ripped Off All the Time. Is There Any Way to Stop It?*, REFINERY29, www.refinery29.com/en-us/2021/05/10387892/fashion-copying-independent-designers-plagiarism-law (May 3, 2021, 11:52 AM).

251. *See supra* Section I.C (discussing fast fashion companies' continuous trends of copying original designs); *supra* Section II.A (discussing the current copyright law); *supra* Section II.B (discussing various courts' failures to uniformly interpret current copyright law); *infra* Section II.C (discussing failed legislative efforts to revise the current copyright law).

252. *Protection for Fashion Design: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop.*, 109th Cong. 197 (2006) [hereinafter *Protection for Fashion Design: Hearing*] (statement of the United States Copyright Office); *see also Sui Generis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *sui generis* as "of its own kind or class; unique or peculiar.").

> The term is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by a sui generis statute designed for that purpose.

Sui Generis, *supra.*

253. *Protection for Fashion Design: Hearing*, *supra* note 252, at 197 (statement of the United States Copyright Office).

separate occasions, bills were introduced in Congress for the purpose of protecting fashion designs.[254] This Section will explore each of those bills, and their ultimate fate.

1. *Design Piracy Prohibition Act*

Fashion design protection became a hot topic in 2006 when a draft of the later proposed Design Piracy Prohibition Act ("DPPA") was introduced into the House of Representatives.[255] The Act was proposed as an amendment to the Vessel Hull Design Protection Act and had the support of the Council of Fashion Designers of America ("CFDA").[256] The bill would have granted a three-year copyright to fashion designs, which were defined as "the appearance as a whole of an article of apparel, including its ornamentation."[257] A design would only receive protection if it was registered with the Copyright Office, which differs from the automatic rights granted to other protected works.[258] If successfully registered, the designs would be protected from those that are "substantially similar" in overall appearance.[259] While "substantially similar" may seem like the optimal standard for protection in fashion where brands are willing to change the shape of buttons and move zippers just enough to avoid liability for infringement, not everyone agreed.[260] Despite this, supporters of the bill applauded Congress for finally taking action to protect fashion, but the bill

254. *See* Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011); Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012).

255. Paul, *supra* note 46, at 1.

256. *See id.* at 2, 12. The Vessel Hull Design Protection Act allows for the designer of a vessel to protect the design in its entirety through a registration process instead of protecting individual, unique features. Vessel Hull Design Protection Act, Pub. L. No. 105-304, § 1306, 112 Stat. 2860, 2907 (1998).

257. *See* S. 1957 § 2(a)(2)(B).

258. *See* H.R. 2196, 111th Cong. § 2(a) (2009); *see also supra* Section II.A (discussing automatic copyright protection and registration copyright protection).

259. *See* S. 1957.

260. *See* Paul, *supra* note 46, at 13; Callahan, *supra* note 154, at 204 ("One of the main concerns and criticisms surrounding the DPPA was the potential for an influx of frivolous lawsuits due to the vague 'substantial similarity' standard.").

ultimately went nowhere.[261] It was reintroduced again in 2007 and 2009 with minor changes but never made it further than the House Committee on the Judiciary.[262]

2. *Innovative Design Protection and Piracy Prevention Act*

In July 2011, a new bill emerged once again with the same goal—to provide designers with copyright protection.[263] The Innovative Design Protection and Piracy Prevention Act (IDPPPA) retained some of the same provisions as the DPPA, including the three-year copyright term, and the requirement that designs be both original and novel to receive protection.[264] The definition of "fashion designs" was expanded to include original elements of the article that "(i) are the result of a designer's own creative endeavor; and (ii) provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles."[265] The owner of a design, in most cases a designer, was entitled to pursue an action for infringement of the design after it was made public.[266] Finally, the bill changed the standard for infringement from "substantially similar" to "substantially identical" thus creating a higher burden.[267] Where some designs could have arguably fallen through the cracks under the former, much broader "substantially similar" standard,[268] under the "substantially identical" standard, an article was required to be "so similar in appearance as to be likely to be mistaken for the protected

261. *See* Callahan, supra note 154, at 203–05.

262. *Id.* at 203.

263. *See* Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011).

264. *See id.* § 2(a)(2)(B), (d)–(e); H.R. 2196, 111th Cong. § 2(a)(2)(B), (d)–(e) (2009).

265. H.R. 2511 § 2(a)(2)(B); *see* H.R. 2196 § 2(a)(2)(B).

266. H.R. 2511 § 2(g)(1).

267. *Id.* § 2(a)(2)–(3), (e)(2) (discussing the "substantially identical" requirement); Design Piracy Prohibition Act, S. 1957, 110th Cong. § 2(d)(2)(C) (2007) (discussing the "substantially similar" requirement).

268. *See* S. 1957 § 2(d)(2)(C) ("In the case of a fashion design, a design shall not be deemed to have been copied from a protected design if it is original and not closely and substantially similar in overall visual appearance to a protected design."); *supra* notes 259–60 and accompanying text.

design, and contains only those differences in construction or design which are merely trivial."[269]

After receiving endorsement from the CFDA and the American Apparel & Footwear Association, the bill was supported by major fashion houses and independent designers who believed the bill would finally close the gaps that existed in United States copyright law for fashion.[270] However, critics voiced concern over the bill's potential to stifle creativity because fashion has long benefited from the ability to build upon existing work.[271] But the criticism of the bill ultimately did not matter as it followed a similar fate to its predecessors and died in the Subcommittee on Intellectual Property, Competition, and the Internet.[272]

3. *Innovative Design Protection Act*

Despite the IDPPPA failing just one year earlier, Senator Chuck Schumer continued his pursuit for copyright protection of fashion designs.[273] The Innovative Design Protection Act (IDPA) included the three-year copyright term as well as the expanded definition of fashion design that was introduced in the IDPPPA.[274] However, fashion designs "embodied in a useful article that was made public by the designer or owner . . . more than 3 years before the date upon which protection of the design is asserted'' were excluded from protection.[275] The IDPA also contained a provision requiring a designer entitled to copyright protection to send written notice to an alleged infringer.[276] In fact, under the bill, a designer could not commence an

269. H.R. 2511 § 2(a)(2).

270. *See* Callahan, *supra* note 154, at 204, 206–07, 207 n.115.

271. Oliver Herzfeld, *Protecting Fashion Designs*, FORBES (Jan. 3, 2013, 9:14 AM), https://www.forbes.com/sites/oliverherzfeld/2013/01/03/protecting-fashion-designs/; *see* Callahan, *supra* note 154, at 206.

272. Callahan, *supra* note 154, at 207.

273. Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012); H.R. 2511.

274. S. 3523 § 2(a), (d); H.R. 2511 § 2(a), (d).

275. S. 3523 § 2(b)(3).

276. *Id.* § 2(e).

infringement action until written notice was sent, and after notice was sent, the designer was required to wait twenty-one days after delivery before the action could officially commence.[277] Further, the bill modified infringement criteria with respect to "retailer[s], seller[s], importer[s] or distributor[s] of an infringing article who did not make the article."[278] Moreover, the bill required designers to send written notice to anyone they believe infringed on their copyright.[279] But once again, the proposed bill stalled in Congress,[280] and designers were left wondering if they would ever receive the protection they so desperately desired.[281]

Although Congress failed to pass all three bills,[282] the passion surrounding the subject of copyright protection for fashion designs is clear. Legislators and fashion industry workers agree that fashion designs are worthy of protection and therefore should benefit from the same rights other works receive.[283] The

277. *Id.*

278. *See id.* § 2(f)(1)(A).

279. *Id.* § (2)(e).

> The written notice required under paragraph (1) shall contain, at a minimum— (A) the date on which protection for the design commenced; (B) a description of the protected design which specifies how the protected design falls within the meaning of section 1301(b)(8); (C) a description of the allegedly infringing design which specifies how the allegedly infringing design infringed upon the protected design as described under section 1309(e); and (D) the date on which the protected design or an image thereof was available such that it could be reasonably inferred from the totality of the surrounding facts and circumstances that the owner of the allegedly infringing design saw or otherwise had knowledge of the protected design.

Id.

280. *Why the Innovative Design Protection Act Is a Good Thing*, N.Y.U. J. OF INTELL. PROP. & ENT. L. BLOG (Jan. 2, 2019), https://blog.jipel.law.nyu.edu/2019/01/why-the-innovative-design-protection-act-is-a-good-thing/.

281. *See* Alice Wickens, *Design Piracy in the United States: Time to Fashion a Remedy?*, 24 J. WORLD INTELL. PROP. 55, 76 (2021).

282. *See supra* Sections II.C.1–.2 and note 280.

283. *See, e.g.*, Lance Godard, *Innovative Design Protection Act Targets Fashion Knockoffs*, JDSUPRA: SMALL BUS. SUPPORT (Oct. 1, 2012), https://smallbusiness.jdsupra.com/2012/10/01/innovative-design-protection-act-targets-fashion-knockoffs/ (noting support of the IDPA by fashion designers and fashion industry lobbyists); Jessica Rosen, Comment, *The Inability of Intellectual Property to Protect the New Fashion Designer: Why the ID3PA Should Be Adopted*, 43 GOLDEN GATE UNIV. L. REV. 327, 331–32, 346 (2013) (suggesting that legislation like the IDPA might pass in the future given the "lively history and recent focus on expanding copyright

classification of fashion as a useful article is outdated and misguided; policy supports respecting original works of fashion—just as music, architecture, and movies are respected—because fashion is an art form.

III. LEGAL PROTECTION FOR FASHION DESIGNS IN FRANCE

While the United States has struggled to find a proper solution which would afford fashion designs protection, France has not faced this issue. This Part will cover the extensive history of copyright protection for fashion designs in France, and the differences between both the United States and French code.

A. *Copyright Law*

France, home to one of the four fashion capitals of the world,[284] has the strongest legal protection for fashion design.[285] France's extensive and long-standing legal rights in connection to fashion date back to the fifteenth century when the King granted exclusive rights for "the fabrication of textiles."[286] Moreover, in Lyon, silk weavers sought protection for their original designs, and in 1711 "[a] government ordinance penalized the counterfeiting of weaving patterns for the first time."[287] By 1787, a royal decree granted protection to silk weavers throughout the country.[288]

In July 1793, the Decree of 19-24 was announced, thereby confirming an artistic property right in French national law; this

protection to cover fashion designers" in Congress); *see supra* notes 149–53 and accompanying text.

284. *Paris Fashion*, ENCYC., https://www.encyclopedia.com/fashion/encyclopedias-almanacs-transcripts-and-maps/paris-fashion (last visited Dec. 22, 2022) ("Paris has been the fashion capital of the Western world from the seventeenth century to the twenty-first century.").

285. *See France: Legal Protections for Fashion*, THE FASHION L., https://www.thefashionlaw.com/resource-center/france-legal-protections-for-fashion/ (last visited Dec. 22, 2022).

286. *Id.*; Fridolin Fischer, *Design Law in the European Fashion Sector*, WORLD INTELL. PROP. ORG. MAG. (Feb. 2008), https://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html.

287. Fischer, *supra* note 286; *see also* Susan Scafidi, *Intellectual Property and Fashion Design*, *in* 1 INTELL. PROP. & INFO. WEALTH 115, 116 (Peter K. Yu ed., 2006).

288. Scafidi, *supra* note 287, at 116.

led to the protection of designs as "pure art."[289] Several years later, the French Design Law of 1806 was passed, which made "industrial designs . . . a branch of industrial property," creating a new set of protections for designs.[290] Despite both of these schemes in place for designers to take advantage of, courts struggled with the proper way to interpret them for nearly a century.[291] French courts were unable to settle on a bright line rule as to what designs deserved protection under the "pure art" law of 1793 and what only qualified for protection under the special design law of 1803.[292] Ultimately, the courts found that using criteria to aid in distinguishing between the two regimes was difficult, and resulted in arbitrary, inconsistent decisions.[293]

The nineteenth century saw the industrialization of textile production and with that came challenges.[294] Design piracy reached new heights as individuals began to manufacture and sell inexpensive copies of the *haute couture* shown in Paris.[295] In response, the couture industry demanded "intellectual property protection for [their] original fashion designs" and

289. *France: Legal Protections for Fashion*, *supra* note 285.

290. J. H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1154 n.49 (1983) (citations omitted).

291. *See id.* at 1154.

292. *Id.*

293. *See id.* at 1154–55 (stating that French courts "experimented with five different criteria for distinguishing the subject matter of these two regimes: 1) the method of reproduction, 2) the purpose or end use of the design, 3) the secondary or accessory character of the aesthetic features, 4) the status of the creator, and 5) the relative artistic value of the candidate design," finding all of them difficult to apply).

294. *See* Scafidi, *supra* note 283, at 117.

295. *See id.*; *see also* Divya Bala, *Everything You Need to Know About the Inner Workings of Haute Couture*, VOGUE (July 6, 2020), https://www.vogue.co.uk/fashion/article/behind-the-scenes-at-haute-couture. Haute couture status is only granted if a specific set of requirements is met which includes:

> creat[ing] made-to-order garments in an atelier of at least 15 full-time staff, as well as 20 full-time technical workers in one of their ateliers. Collections must be presented with a minimum of 50 original designs, including day and evening looks, presented to the public in January and July and created for private clients, with each piece requiring more than one fitting. Guest members are invited each season, and if a brand is invited four times in a row, it becomes eligible to be a member.

Bala, *supra*.

began to license them to reputable manufacturers in both domestic and foreign markets.[296] In 1902, protection was extended to "designers of ornaments, whatever may be the merit and the purpose of the work."[297] Only a few years later, the design law of 1909, which is still in force, was passed and "further refin[ed] the advantages conferred by *sui generis* legislation with respect to establishing proof of ownership, facilitating transfers of title, and restricting competition."[298] French courts elected to apply both types of protection in a series of high-profile cases in the early part of the twentieth century.[299]

Today, "all works of the mind," irrespective of their genre or form, receive protection under the French Code.[300] Article L112-2 lists fourteen categories of work that will receive protection within the meaning of the Code;[301] however, this list is not exhaustive, and courts may recognize other works as long as they are original.[302] The final protected work listed expressly recognizes fashion designs, explicitly identifying them as "creations of the seasonal industries of dress and articles of fashion."[303] As the only protected work with an accompanying

296. Scafidi, *supra* note 287, at 117.

297. Reichman, *supra* note 290, at 1156–57.

298. *Id.* at 1157 (emphasis added).

299. *See* Scafidi, *supra* note 287, at 117.

300. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROPRIÉTÉ INTELLECTUELLE] [INTELLECTUAL PROPERTY CODE] art. L112-1, *translated in* World Intell. Prop. Org. [WIPO], *Intellectual Property Code*, at 1 (2003), https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf [hereinafter *Intellectual Property Code*]; Catherine Mateu, *France*, *in* COPYRIGHT 2022 36, 36 (Phil Sherrell ed., 8th ed. 2021). English translations of the Intellectual Property French Code are unofficial and nonbinding and are used only for reference purposes. *See* Stéphane Cottin & Jérôme Rabenou, *UPDATE: Researching French Law*, HAUSER GLOB. L. SCH. PROGRAM (June 2017), https://www.nyulawglobal.org/globalex/France1.html#englishtranslationsprinted; *Translations of French Legal Texts, Contents and Updating*, LÉGIFRANCE, http://legifrance.gouv.fr/Traductions/en-English [https://web.archive.org/web/20200912024258/http:/legifrance.gouv.fr/Traductions/en-English].

301. *See* Mateu, *supra* note 300, at 36; C. PROPRIÉTÉ INTELLECTUELLE art. L112-1, *translated in Intellectual Property Code*, *supra* note 300, at 1–2.

302. Mateu, *supra* note 300, at 36.

303. C. PROPRIÉTÉ INTELLECTUELLE art. L112-2(14), *translated in Intellectual Property Code*, *supra* note 300, at 1–2.

definition, the Code explains that "seasonal industries of dress and articles of fashion" are

> [i]ndustries which, by reason of the requirements of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of fashion and of footwear and the manufacture of fabrics for upholstery.[304]

Thus, while the United States takes the firm stance that clothing serves a utilitarian purpose,[305] France's history and current Code reflect the notion that fashion is more closely aligned to wearable art, and as such, is worthy of protection.

B. *Comparing French and American Copyright Law*

Even though France and the United States have many differences when it comes to the protection offered to designers, there are similarities between the two regimes that should be noted. Significantly, France, like the United States, does not require its copyright holders to register any of their works.[306] Both countries afford protection to copyright holders upon the creation of a work; however, the two countries define "creation" differently.[307] In the United States, a work is

304. C. PROPRIÉTÉ INTELLECTUELLE art. L112-2(14), *translated in Intellectual Property Code*, *supra* note 300, at 2. Some fashion designs may be eligible for protection as industrial designs under Article L511-1. *See* C. PROPRIÉTÉ INTELLECTUELLE art. L511-1, *translated in Intellectual Property Code*, *supra* note 300, at 31. However, a design is only protected for up to twenty-five years under this section of the Code. *See* C. PROPRIÉTÉ INTELLECTUELLE art. L513-1, *translated in Intellectual Property Code*, *supra* note 300, at 34.

305. *See supra* Section II.B.

306. Jean-Mathieu Bertho & Aurélie Robert, *Copyright Litigation in France: Overview*, THOMSON REUTERS PRACTICAL L., https://uk.practicallaw.thomsonreuters.com/w-011-3781?transitionType=Default&contextData= (Sept. 1, 2022); *see supra* note 160 and accompanying text.

307. Bertho & Robert, *supra* note 306; C. PROPRIÉTÉ INTELLECTUELLE arts. L111-1 to L111-2, *translated in Intellectual Property Code*, *supra* note 300, at 1; *see also supra* notes 157–58 and accompanying text.

"created" once it is fixed in a copy for the first time;[308] "copy" refers to any material object in which a work can be fixed, reproduced, and communicated either by itself or with the aid of a machine.[309] By contrast, a work is "created" in France "irrespective of any public disclosure, by the mere fact of realization of the author's concept, even if incomplete."[310] Thus, while a work is protected in France even in its most infantile, unfinished stages, in the United States a work must be much more complete before it receives protection.[311]

Notwithstanding the similarity in this area of the law, a notable difference between the two regimes must be highlighted. A designer is not required to register their copyright in the United States, yet the option is still available if one elects to.[312] If an individual chooses to register their copyright in the United States, they will be able to pursue a claim for infringement.[313] France, on the other hand, does not have a copyright registration system; therefore, even if a designer desires to register his or her work, there is no uniform system within the Code to achieve this.[314] In this respect, the differences between the systems of France and the United States could not be more evident. Infringement actions may be pursued at any time after a work is "created" because copyright holders in France are not hampered by a registration requirement like their United States counterparts; however, unlike France, the United States has a uniform system for

308. *See supra* note 159 and accompanying text.

309. 17 U.S.C. § 101.

310. C. PROPRIÉTÉ INTELLECTUELLE art. L111-2, *translated in Intellectual Property Code*, *supra* note 300, at 1.

311. *See supra* notes 156–59, 308–10 and accompanying text.

312. *See supra* notes 160–61 and accompanying text.

313. *See supra* note 169 and accompanying text.

314. Olivia Bernardeau-Paupe, *Copyright in France*, LEXOLOGY (July 31, 2019), https://www.lexology.com/library/detail.aspx?g=db4300b2-84aa-4a2a-acc3-e786453798ec; *see* Mateu, *supra* note 300, at 36 ("For practical purposes of identifying and dating a work, right holders may register their works with authors' societies or the Agency for the Protection of Programs (APP), and may request authenticated deeds from bailiffs or public notaries.").

copyright holders to navigate.[315] This system allows for copyright holders in the United States to provide clear and effective notice that they are the creator, or copyright holder, of the respective work.[316] French designers, on the other hand, are left in a much more difficult position because they cannot unequivocally notify other designers of their ownership.[317]

In addition to the protection afforded upon creation, both countries recognize moral and economic rights with respect to copyright.[318] Pursuant to the economic rights granted in each country, a copyright holder shall have the exclusive right in their work, including reproduction and performance.[319] Moreover, in both countries, copyright holders may exploit their work in any manner to receive monetary profit for a period of life plus seventy years.[320] In France, an additional thirty years may be added to this term if the copyright holder has "died for France, as recorded in the death certificate."[321] The

315. *See* Bernardeau-Paupe, *supra* note 314; *supra* notes 312–14 and accompanying text; *see also Register Your Work: Registration Portal*, *supra* note 160 (providing a registration portal for copyright holders and information about registering a work for copyright protection). Remedies for infringement include

> award of monetary damages; injunction (final or preliminary) to refrain from infringing; precautionary seizure order of the capital assets; injunction to disclose all the information regarding the distribution networks and the quantities of infringing products; destruction or confiscation for the benefit of the victim of the objects made or manufactured in breach of the rights of the victim, the media used to extract unlawfully data from a database, and the equipment predominantly used for the manufacture; publication of the judgment at the defendant's costs; and award of legal costs.

Bernardeau-Paupe, *supra* note 314.

316. *See* 17 U.S.C. § 401.

317. *See* Bernardeau-Paupe, *supra* note 314.

318. *Id.*; *What Rights Are Protected by Copyright Law?*, YORK UNIV., https://copyright.info.yorku.ca/what-rights-are-protected-by-copyright-law/ (last visited Dec. 22, 2022).

319. *See* C. PROPRIÉTÉ INTELLECTUELLE, art. L122-1, *translated in Intellectual Property Code*, *supra* note 300, at 4; § 106; Eur. Union Intell. Prop. Off., *Consumers' Frequently Asked Questions (FAQs) on Copyright: Summary Report*, at 16, (Jan. 2017), https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/div/FAQs%20on%20Copyright,%20Summary%20Report%20January%202017.pdf.

320. *See* C. PROPRIÉTÉ INTELLECTUELLE, art. L123-1, *translated in Intellectual Property Code*, *supra* note 300, at 4; § 302(a); Mateu, *supra* note 300, at 36.

321. C. PROPRIÉTÉ INTELLECTUELLE, art. L123-10, *translated in Intellectual Property Code*, *supra* note 300, at 8.

countries ultimately diverge on the topic of moral rights,[322] which protect the personal and reputational aspects of a copyright holder's work.[323] In the United States, moral rights apply exclusively to visual art through the Visual Artists Rights Act of 1990 ("VARA").[324] Unlike the term of economic rights, which subsists for a period after the death of the creator, moral rights in the United States terminate upon death.[325]

Moral rights benefit from the strongest and broadest protection in France in the same way fashion designs do, ensuring the creator "enjoy[s] the right to respect for his name, his authorship and his work."[326] These rights that attach directly to the copyright holder are "perpetual, inalienable and imprescriptible."[327] Therefore, while economic rights terminate seventy years after the death of the creator, moral rights remain, and the author's heirs may exercise the right even after the work has fallen into the public domain.[328] At no point may a copyright holder transfer his or her moral rights, nor may it be included in a contract.[329] Thus, even if a creator transfers the economic rights to another individual, the moral rights will always remain with the creator and their successors in perpetuity.[330] Moreover, the moral right associated with a work may be exercised for as long as it exists, even if the work is not being used.[331] It is by virtue of these moral rights that an author controls divulgement of his or her work, modification of the work, the right to reconsider or withdraw the work from

322. *See infra* notes 324–32 and accompanying text.

323. Betsy Rosenblatt, *Moral Rights Basics*, HARV. L. SCH., https://cyber.harvard.edu/property/library/moralprimer.html (Mar. 1998).

324. *See id.*; *see also* § 106A(d).

325. *See* Rosenblatt, *supra* note 323.

326. C. PROPRIÉTÉ INTELLECTUELLE, art. L121-1, *translated in Intellectual Property Code*, *supra* note 300, at 3.

327. *See id.*

328. *See id.*; *see also Authors' Rights and Their Work*, SACD, https://www.sacd.fr/en/authors-rights-and-their-work (last visited Dec. 22, 2022).

329. *Authors' Rights and Their Work*, *supra* note 328.

330. *Id.*

331. *Id.*

market even after publication, and the right to attribution for the work.[332]

IV. RE-FASHIONING A SOLUTION TO COPYRIGHT LAW IN THE UNITED STATES

The United States recognizes clothing only in terms of its usefulness, as a means to cover the body, regardless of how original or unique it might be.[333] However, if clothing really was governed solely by utility or function, individuals would wear pieces until they fell apart at the seams.[334] There would be little regard for the appearance of an article, but a significant amount of consideration would be dedicated to its practicality and fit.[335] Yet, clothing is produced at an astonishing rate today precisely because consumers are concerned with the aesthetic nature of garments.[336] Thus, clothing serves more than a utilitarian purpose; it is art and should benefit from the same protection afforded to other art forms.

By continuing to identify fashion designs as useful articles, thereby forcing designers to seek protection through the narrow constraints provided by the pictorial, graphic, and sculptural works category, the United States is inadvertently enabling design piracy.[337] The complex nature of judicially created tests has only led to more confusion, inconsistent results, and little benefit to those in the fashion community.[338] As such, formal recognition of fashion designs in the United States Copyright Code is necessary to promote innovation and protect the original works of designers.

332. *See id.*; *see also* C. PROPRIÉTÉ INTELLECTUELLE, arts. L1121-1 to L121-9, *translated in Intellectual Property Code*, *supra* note 300, at 3–4.

333. *See supra* Section II.A.

334. *See supra* Section II.B (discussing the United States' stance that clothing serves a utilitarian purpose).

335. *See supra* Section II.B (discussing the United States' stance that clothing serves a utilitarian purpose).

336. *See supra* Section I.A.

337. *See* Paul, *supra* note 46, at 10–11; *see supra* Sections II.A–.B.

338. *See supra* Section II.B; *see also* Jacoby, *supra* note 240.

A. *Scope of Copyright for Fashion Designs*

Fashion is about creating a "compilation[] of elements," to achieve a finished product; thus, the entire garment should receive protection, not just individual pieces.[339] Therefore, the protection afforded by the pictorial, graphic, and sculptural works category of the United States Copyright Code should be supplanted by Article L112-2(14) of the French Intellectual Property Code, which expressly acknowledges fashion designs as a protected work.[340] By amending Section 102 of the United States Code to include "creations of the seasonal industries of dress and articles of fashion," fashion designs will receive formal recognition, and the entire original work will be protected.[341] In turn, this will eliminate the need for the separability test because fashion designs will no longer be considered useful articles.[342] As a result, judges will be relieved from applying the misguided tests in place today that often lead to absurd results.[343] Adopting this language will also lead to uniformity, as litigants pursuing infringement claims will have a clear understanding of the law and its application. To that end, the determination of whether a fashion design is eligible to receive copyright protection will no longer be left exclusively in the hands of judges.[344] Instead, the Register of Copyrights will handle the initial determination of whether the article is even a copyrightable material.[345] Moreover, fashion designs will be subject to the same standards as music, art, and architecture which judges are comfortable applying.[346] France demonstrates

339. *Hearing on H.R. 5055*, *supra* note 19, at 13–14 (statement of David Wolfe, Creative Director, The Doneger Group).

340. C. PROPRIÉTÉ INTELLECTUELLE, art. L112-2(14), *translated in Intellectual Property Code*, *supra* note 300, at 1–2.

341. C. PROPRIÉTÉ INTELLECTUELLE, art. L112-2(14), *translated in Intellectual Property Code*, *supra* note 300, at 1–2; *see* 17 U.S.C. § 102.

342. *See supra* notes 145–47, 181–90.

343. *See supra* Section II.B.

344. *See supra* Section II.B.

345. *See supra* notes 162–64 and accompanying text.

346. *See supra* notes 150–53 and accompanying text.

that formal recognition of this kind benefits designers.[347] As such, to ensure the United States nurtures the creative spirit within the fashion industry, it is imperative that designs receive protection like this.

While formal recognition of fashion designs is necessary to protect the rights of creators, the French Intellectual Property Code does not account for the unique nature of the fashion industry when setting copyright terms. In both France and the United States, the term of a copyright is the life of the creator plus seventy years.[348] Although some work may benefit from a term of this length, fashion is inherently different from literature, music, paintings, and architecture for a few reasons. First, there is less replication in other art forms, and consumers typically know who the original creator is whereas in the fashion industry, no credit is given.[349] Moreover, unlike the other industries where protected work resides, the fashion industry is cyclical.[350] The industry is dependent on trends; therefore, it is constantly in flux, meaning a garment may go out of style for a period of time, but the trend will come back, though slightly modified.[351] Therefore, to cater to the unique nature of the fashion industry, the term of copyrights granted

347. *See* Mencken, *supra* note 178, at 4.

348. C. PROPRIÉTÉ INTELLECTUELLE, art. L123-1, *translated in Intellectual Property Code*, *supra* note 300, at 7; 17 U.S.C. § 302(a).

349. In music, literature, and art, the author's name is oftentimes prominently displayed on the work, whereas in fashion, the brand name is displayed on the work not the authors' name. For example, the brand Coach is not named after its original lead designer but displays the brand name or logo on many of their products. *See Coach Story*, COACH, https://uk.coach.com/coach-story.html (last visited Dec. 22, 2022) (explaining the company's founding and that Coach is not named after its founders or original designer); *see, e.g.*, *Cassie Crossbody*, COACH, https://www.coach.com/products/cassie-crossbody-19/88346.html?frp=88346%20B4%2FBK (last visited Dec. 22, 2022) (illustrating that Coach often displays their brand name or logo on their products). On the other hand, other forms of art, like literature, readily have the author's name on the work. *See, e.g.*, F. SCOTT FITZGERALD, THE GREAT GATSBY (1925).

350. Caterina Bragoli, *Cyclical Fashion: Then and Now*, VARSITY (Nov. 1, 2019, 12:00 AM), https://www.varsity.co.uk/fashion/18062.

351. *See id.*

for fashion designs must be separate from the seventy years typically afforded.[352] Section 302(a) should be amended to read:

> Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death, except for creations of the seasonal industries of dress and articles of fashion which shall endure for a term of 20 years.[353]

The DPPA, IDPA, and IDPPPA all proposed a three-year term, reasoning it would allow designers to introduce their work to consumers and create any low-cost versions first.[354] In addition to being first in the market, the three-year term would allow designers to recoup the costs associated with designing and marketing their collections.[355] However, *Star Athletica* took seven years to litigate, meaning that copyright protection would have run out before the Court decided the case.[356] This proves that three years is an insufficient amount of time to grant copyright protection in the fashion industry.[357] To that end, a twenty-year term offers designers the opportunity to cater to an entire generation of consumers that will purchase the garments protected by the copyrights held. Moreover, this term ensures that designers can recoup the costs that went into designing and marketing their collections.[358] Nothing is ever obsolete in the

352. *See* C. PROPRIÉTÉ INTELLECTUELLE, art. L123-1, *translated in Intellectual Property Code*, *supra* note 300, at 7; § 302(a).

353. *See* C. PROPRIÉTÉ INTELLECTUELLE, art. L123-1, *translated in Intellectual Property Code*, *supra* note 300, at 7; § 302(a).

354. H.R. 2196, 111th Cong. § 2(d)(a)(2) (2009); Innovative Design Protection Act of 2012, S. 3523, 112th Cong. § 2(b)(3) (2012); Innovative Design Protection and Piracy Act, H.R. 2511, 112th Cong. § 2(d)(a)(2) (2011); *see also* Paul, *supra* note 46, at 13–14.

355. *See Hearing on H.R. 5055*, *supra* note 19, at 12 (statement of Jeffrey Banks, Fashion Designer, Council of Fashion Designers of America).

356. *See supra* note 248 and accompanying text; § 507(b).

357. *See supra* note 248 and accompanying text; *see* § 507(b).

358. *See supra* pp. 460–61, 463–64.

fashion industry; however, no one should control the life of a garment for over a century.[359]

With the adoption of these amendments, designers would finally have a clear path to remedies for design piracy and the resulting infringement.[360] Although France offers some of the highest protection in the world for fashion designs,[361] the United States infringement scheme is superior in many ways and should remain in place. Both countries share similar remedies for infringement;[362] however, the United States requires registration of copyrights before an infringement action may be pursued.[363] While there is a cost to register copyrights,[364] this system ensures that the actual creator will benefit from protection, unlike in France, where no registration system exists; therefore, designers can spend significant amounts of money litigating whether they created the design first.[365] Without the implementation of these changes, fast fashion companies will continue to pirate designs created by small and large designers alike.[366] However, while large designers have the resources to withstand the assaults of fast fashion companies, smaller designers may be wiped out in a single season.[367]

B. *Looking Good Comes at a Price*

The fashion industry, which is often described as an ecosystem, was thought to rely on originality, creativity, and

359. *See supra* note 141 and accompanying text.

360. *See supra* Section II.A (discussing the various remedies for copyright infringement currently unavailable in the fashion industry).

361. *See supra* Section III.A.

362. *See supra* notes 174–77 and accompanying text; *see also supra* Section III.B.

363. 17 U.S.C. § 411(a).

364. *See id.* § 408(a).

365. *See* Mateu, *supra* note 300, at 36–37, 39.

366. *See supra* Section I.C.

367. *See Hearing on H.R. 5055*, *supra* note 19, at 9–11 (statement of Jeffrey Banks, Fashion Designer, Council of Fashion Designers of America); *supra* Section I.C.

copying.[368] Therefore, experts believed that by granting copyright protection to fashion designs and ending the ability of fast fashion brands to copy designs, the entire system would collapse.[369] As such, fast fashion brands have not only profited off of the backs of other designers' works but also off of the idea that the competition they provide is necessary. However, that could not be further from the truth. Testifying before Congress, fashion law expert Susan Scafidi highlighted the impact design piracy has on young, relatively unestablished designers:

> [A]spiring creators . . . struggle each season to promote their work and attract customers before their designs are copied by established competitors. Over the past century successive waves of American designers have entered the industry, but few fashion houses have endured long enough to leave a lasting impression comparable to the influence of French fashion . . . . [T]here is strong anecdotal evidence that design piracy is harmful to the U.S. fashion industry . . . . Copying is rampant in the fashion industry, as knockoff artists remain free to skip the time-consuming and expensive process of developing and marketing new products and simply target creative designers' most successful models. The race to the bottom in terms of price and quality is one that experimental designers cannot win.[370]

Copyright protection is therefore necessary for designers to protect themselves from fast fashion brands pirating their designs.

Moreover, several failed legislative attempts to protect fashion designs did little to curb the notion that copying in fashion is beneficial to all parties involved. In turn, this led to

368. *See Hearing on H.R. 5055*, *supra* note 19, at 13–14 (testimony of David Wolfe, Creative Director, The Doneger Group).

369. *See id.*; Brucculieri, *supra* note 131.

370. *Hearing on H.R. 5055*, *supra* note 19, at 82–83 (statement of Susan Scafidi).

the belief that copyright protection for fashion designs would stifle creativity and encourage monopolies.[371] However, the French copyright system "has protected garment designs since 1793, and there has obviously been no hindrance to either the industry's ability to create new designs or to the public's ability to purchase clothing."[372] Thus, as the world leader, France has demonstrated that extending copyright protection for fashion designs does not stifle creativity, nor does it lead to the collapse of an industry.[373] Rather, copyright protection ensures that a designer can create original work without looking over their shoulder, fearing replication in the market. Competition and growth are not achieved through distributing identical products around the world at a fraction of the price[374] but through new works created by an ever-increasing industry. Without the necessary protection, the United States will see a decrease in American fashion brands and subsequently the loss of American jobs.[375] Fast fashion brands will likely be immune to these issues as a result of the business models implemented, and they will continue to expand, taking out smaller designers in the process. Being a follower is far more profitable in the fashion industry than being a leader; therefore, without proper protection, fast fashion brands will continue to profit off the work of other creators before many have the opportunity to sell a single garment.

CONCLUSION

The decision whether to grant copyright protection for fashion design should be based on the needs of those creating the work and the economic impact piracy has on their livelihood. The fashion industry has survived for decades by

371. *See* Mencken, *supra* note 178, at 2.

372. *Id.* at 4.

373. *See id.*

374. *See Hearing on H.R. 5055*, *supra* note 19, at 9–10 (statement of Jeffrey Banks, Fashion Designer, Council of Fashion Designers of America).

375. *See id.*; *see also supra* Section I.B.

crafting methods to limit the amount of design piracy out of pure necessity.[376] Without these protections, the United States could lose all fashion design creativity and its strides towards becoming a powerhouse in the global industry. With considerably more resources, and significantly less desire to create their own work, fast fashion brands pose a serious threat to designers in the United States.[377] A copyright system that grants protection for fashion would change little about the way the industry works, but it would diminish the frequency designs are pirated.

376. *See supra* Part II.

377. *See* Brucculieri, *supra* note 131.