

1-1-2015

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### Recommended Citation

Lampasona, Jacqueline (2015) "Discrimination Against Fashion Design in Copyright," *Journal of International Business and Law*: Vol. 14: Iss. 2, Article 6.

Available at: <http://scholarlycommons.law.hofstra.edu/jibl/vol14/iss2/6>

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## DISCRIMINATION AGAINST FASHION DESIGN IN COPYRIGHT

Jacqueline Lampasona<sup>†</sup>

*"Clothes make the man. Naked people have little or no influence on society."*<sup>1</sup>

### INTRODUCTION

The quilted bag, the woman's suit, the little black dress, these all are innovative designs that changed the world of fashion. The designer behind these creations is Gabrielle "Coco" Chanel. Her early career began by designing a line of hats. Following this she branched out and designed a full line of clothing, accessories, and fragrances that transformed the idea of femininity.<sup>2</sup>

Chanel's work combined classic French elegance with a "modern ideal of freedom and fun."<sup>3</sup> Overall, her work reflected a period of progression. Specifically, Chanel's designs symbolized social change, which included the change in the attitude towards the freedoms of women. Due to her, the tight corset was now being replaced by comfortable, casual blazers. However, Chanel's most enduring innovation of the decade was the little black dress. This simple, well-constructed design is one of the primary reasons why Chanel is an icon and "remains one of the world's most powerful fashion empires."<sup>4</sup>

Fashion is a large part of our culture, along with the arts, sciences, entertainment, and even politics.<sup>5</sup> The fashion industry is comprised of short product life cycles, erratic consumer demands, an abundance of product variation, and complex supply chains.<sup>6</sup> As a result, fashion lacks the prestige of being deemed a "fine art."<sup>7</sup> However, it is indisputable that fashion is an innovative, original form of art, which consists of expressive and unique features.<sup>8</sup>

Fashion's originality enables a unique form of communication, which embodies both individual and social importance.<sup>9</sup> Fashion theorists believe that fashion is a reflection of

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<sup>1</sup> MARK TWAIN: COLLECTED TALES, SKETCHES, SPEECHES AND ESSAYS, VOL.2, 1891-1910 (Louis J. Budd ed., Library of America, 1992).

<sup>2</sup> *Coco Chanel Biography in Women's History*, ABOUT.COM, [http://womenshistory.about.com/od/chanelcoco/a/coco\\_chanel.htm](http://womenshistory.about.com/od/chanelcoco/a/coco_chanel.htm) (last visited Sept. 5, 2015).

<sup>3</sup> MARY E. DAVIS, CLASSIC CHIC: MUSIC, FASHION AND MODERNISM 153 (University of California Press, 2005).

<sup>4</sup> *Id.* at 167.

<sup>5</sup> C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L.REV. 1147, 1149 (2009).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1162.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1151.

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social, economic, political, and cultural changes, and ultimately symbolizes the “spirit of the times.”<sup>10</sup> Fashion serves as a way in which individuals can join in the participation of a “group movement.”<sup>11</sup> This unique movement expresses both modern cultural meanings and social values.<sup>12</sup> This movement is especially unique because it can include individuals who attempt to differentiate themselves while still desiring to be part of something bigger, namely a movement.<sup>13</sup> While such a movement is unique, it is essential to possess an “element of conformity.”<sup>14</sup> Within such a movement individuals are still able to engage in self-expression while still finding support in others who possess a similar style.<sup>15</sup>

Individuals want to be “in fashion.”<sup>16</sup> They desire to be in “step with societ[ies]” present style.<sup>17</sup> Fashion is a tool that individuals use to express themselves.<sup>18</sup> Individuals reveal their personalities through their unique styles. The fashion world values originality and innovation, constantly introducing new designs and trends for the world to follow, giving people a variety of ways in which to mix their own personal style with the latest fashion trend.<sup>19</sup> Influential factors can range from individual tastes, to current events, even marketing and sales promotions.<sup>20</sup> This social dynamic of innovation and continuity is most directly engaged by the law of intellectual property.<sup>21</sup> This poses the question of whether intellectual property has a place in fashion design.

Fashion designers want to be recognized as artists. This Note consists of eight parts. Part I provides background information on the laws surrounding intellectual property. Part II further discusses the applicable laws while also distinguishing United States law from foreign law. Parts III and IV both discuss the process of copying and the overall benefit of copyright protection. Part V further builds upon the topic of copyright protection by outlining the benefits it provides to the fashion industry and the fashion designer. Part VI provides a detailed description of the disagreement that exists over fashion protection in the legal realm. Part VII of this Note sets forth a proposed solution that would benefit both fashion designers and consumers alike. The solution proposed would be to pass a bill that allows for fashion designs to be protected by copyright for three years. Part VIII will conclude with an analysis of how the proposed solution will benefit the fashion designer, the consumer, and the fashion industry.

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<sup>10</sup> MARILYN REVELL DELONG, *Theories of Fashion* in *ENCYCLOPEDIA CLOTHING & FASHION* 21 (Valerie Steele ed., Charles Scribner's Sons 2005), available at Gale Virtual Reference Library.

<sup>11</sup> Hemphill & Suk, *supra* note 5, at 1164 (arguing that being part of this group movement is called “flocking.”) Flocking takes place when individuals not only buy new clothes, but they buy the clothes not because they need them, but because the clothes that they currently have seem outdated. This is one aspect of fashion consumers wanting to be “in fashion” and partake in a collective movement in order to stay in touch with the current trend. *Id.*

<sup>12</sup> DeLong, *supra* note 10.

<sup>13</sup> Hemphill & Suk, *supra* note 5, at 1164.

<sup>14</sup> DeLong, *supra* note 10.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Hemphill & Suk, *supra* note 5, at 1164-65.

<sup>18</sup> DeLong, *supra* note 10.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Hemphill & Suk, *supra* note 5, at 1150 (arguing that currently, fashion itself has caught the attention of policymakers as they consider whether they will provide copyright protections for fashion designs).

## DISCRIMINATION AGAINST FASHION DESIGN IN COPYRIGHT

## I. EXISTING PROTECTIVE MEASURES

## A. Intellectual Property

Although intellectual property is mostly intangible, it still carries an individual property right, similar to tangible property.<sup>22</sup> It is the kind of property that results from the fruits of mental labor.<sup>23</sup> The owner can allow the property to be “sold, bought, licensed, or damaged.”<sup>24</sup> Within Article I, Section 8 of the U.S. Constitution, Congress is given the express authority to grant both authors and inventors the exclusive rights to their unique creations.<sup>25</sup> This section also grants Congress the authority to regulate both interstate and foreign commerce providing additional support for the right to legislate in this particular area.<sup>26</sup>

Patents, trademarks, and copyrights are the principal means used to establish ownership of inventions and creative ideas in their various forms, providing a legal foundation to generate tangible benefits from innovation.<sup>27</sup> When Congress passes Intellectual Property laws two government agencies, the U.S. Patent and Trademark Office, and the U.S. Copyright Office, administer and regulate said laws.<sup>28</sup>

In the United States a factor, which determines the amount of copyright protection awarded to a specific work, is when the work was created.<sup>29</sup> Works that were created prior to 1923 are considered public domain.<sup>30</sup> Public domain gives the public free access to published works or inventions in instances where a published work’s status or an invention’s status has expired or has not been patented or subject to copyright.<sup>31</sup> Works created after 1923 fall under the laws of intellectual property.

Intellectual Property protection encourages innovation.<sup>32</sup> It rewards the creator with exclusive rights to commercially exploit their ideas and creations.<sup>33</sup> Additionally, it induces creators/inventors to allow the public access to their work by establishing a limited, set period of time where said individual can enact “monopoly prices.”<sup>34</sup> For the statutory period, said copyright owner attains the “exclusive right to control the reproduction, distribution, public

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<sup>22</sup> CENTRE FOR FASHION ENTERPRISE, *Intellectual Property in the Fashion Design Industry* (Mar. 2012), <http://www.fashion-enterprise.com/wp-content/uploads/2015/05/CFE-IP-Copyright-Download1.pdf>

<sup>23</sup> AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, *An Overview of Intellectual Property*, AIPLA.ORG, [www.aipla.org/about/iplaw/Pages/default.aspx](http://www.aipla.org/about/iplaw/Pages/default.aspx) (last visited April 20th, 2015).

<sup>24</sup> CENTRE FOR FASHION ENTERPRISE, *supra* note 22.

<sup>25</sup> U.S. CONST. art. I, § 8; *Intellectual Property Law*, HG.ORG (Apr. 15, 2015), <http://www.hg.org/intell.html>.

<sup>26</sup> *Id.* Many fashion designs and designers deal in foreign markets, making congress’ ability to legislate in those areas important when dealing with potential solutions for fashion law. *Id.*

<sup>27</sup> ECON. & STATISTIC ADMIN. & U.S. PATENT & TRADEMARK OFFICE, U.S. DEP’T OF COMMERCE, *Intellectual Property and the U.S. Economy: Industry Focus*, USPTO.GOV (2012), available at [http://www.uspto.gov/news/publications/IP\\_Report\\_March\\_2012.pdf](http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf).

<sup>28</sup> *Intellectual Property Law*, *supra* note 25.

<sup>29</sup> *U.S. Copyright Law*, HG.ORG: LEGAL RESOURCES, <http://www.hg.org/copyright-law.html>.

<sup>30</sup> *Id.*

<sup>31</sup> *Public Domain Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/public+domain> (last visited Sept. 3, 2015).

<sup>32</sup> CENTRE FOR FASHION ENTERPRISE, *supra* note 22.

<sup>33</sup> *Id.*

<sup>34</sup> Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L.REV. 55, 63 (2007).

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performance, and display of the work,” in addition to controlling all derivative works if created.<sup>35</sup>

A paramount issue faced by innovators is infringement.<sup>36</sup> Infringement is defined as the utilization of a copyrighted work, by someone other than the original creator, during the copyright term.<sup>37</sup> The infringer attempts to gain financially, the economic due that the original creator is entitled to.<sup>38</sup> Infringement can give the original creator certain legal remedies including monetary relief for damages and the implementation of an injunction.<sup>39</sup>

While fashion fits within the definition of intellectual property it does not receive the aforementioned protection.

### B. Protection of Copyright Law

In the United States, the first Copyright Act was enacted under the Constitution to protect authors' literary works, which was defined as writings.<sup>40</sup> Eventually it was expanded to include, but was not limited to, any form of literary works such as:

books, manuscripts, magazines, articles, and poetry; dramatic works like plays with accompanying music, movie scripts, screenplays, written or recorded pantomime performance art and choreography; musical works like songs, music, lyrics, compositions, musical scores, and sound recordings; visual artistic works like maps, drawings, sketches, paintings, photographs, sculptures, art reproductions and films; audiovisual work like motion pictures, television shows and cartoons; architectural work like designs, technical drawings and blueprints; and computer software programs.<sup>41</sup>

Further, it is essential that the creator engage in “some measure of creative effort” while creating said work.<sup>42</sup> The work does not have to be unique in order for this constitutional protection to apply.<sup>43</sup> Therefore, such work may even resemble other works, as long as it is original and not copied directly from another source,<sup>44</sup> merely some evidence of creative effort must exist.<sup>45</sup>

A variety of legal remedies are available for infringement of copyright including: [a]n interim injunction, which is a temporary order to stop the

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 64.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *U.S. Copyright Law*, *supra* note 29.

<sup>41</sup> *Id.* (expanding the definition in order to help cover other types of creative, original works, represented in tangible formats other than writing).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (discussing further how to qualify for copyright protections the work must have been represented at one time in some sort of “tangible” form, although it did not indefinitely have to be in that form).

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infringer from committing the infringing activity until the matter is resolved at a full trial; a permanent injunction, a legal order to permanently stop the infringer from continuing to commit the infringing activity; an order for delivery up or destruction of the infringing goods; an award for payment of damages or an account of the net profit made from the infringing goods; and a declaration that copyright subsists in a specific work and has been infringed.<sup>46</sup>

## II. UNITED STATES V. FOREIGN LAW

## A. Copyright Protection for Fashion Design in the United States

Within the United States, fashion design is a subset currently lacking copyright protection.<sup>47</sup> “Section 101 of the Copyright Act states that ‘pictorial, graphic, and sculptural works’ are only protected if the design can be separated from, and exists independently of the usefulness of the article.”<sup>48</sup> Copyrights are valid for the creator’s lifetime, plus 70 years.<sup>49</sup> Music, art, and literature are all copyrightable in the United States.<sup>50</sup> Fashion design is not seen to fit into this category because it is not understood to have creative value. Rather it has only a utilitarian value; meaning such designs are meant to be functional and practical.<sup>51</sup>

## 1. Application of Copyright Law

Fashion law is a relatively new “specialty” within the legal realm.<sup>52</sup> Currently the field is gaining momentum due to the existence of multiple challenges in the fashion industry such as “the increased availability of counterfeit goods” and even, “specific employment law concerns, such as the use of minors for fashion modeling or as labor in overseas factories.”<sup>53</sup> The rise of counterfeit goods and knock-off items drive fashion designers to attain protection for their designs under copyright law.

Copyright law does provide protection to “original prints and patterns, unique color arrangements and novel combination of elements used on apparel and accessories;” however,

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<sup>46</sup> CENTRE FOR FASHION ENTERPRISE, *supra* note 22.

<sup>47</sup> See generally *Should Fashion Design Be Given Copyright Protection*, MTTLR BLOG (Jan. 25, 2013, 7:59 AM), <http://www.mttlrblog.org/2013/01/25/should-fashion-design-be-given-copyright-protection>.

<sup>48</sup> *Id.*; see also Copyright Act, 17 U.S.C. § 101 (2012).

<sup>49</sup> *Intellectual Property Law*, *supra* note 25.

<sup>50</sup> MTTLR BLOG, *supra* note 47.

<sup>51</sup> *Id.*

<sup>52</sup> *Fashion Law-Guide to Fashion Law*, HG.ORG LEGAL RESOURCES, <http://www.hg.org/fashion-law.html>. “Fashion law refers to a specialized area of the law that deals with legal issues affecting the fashion industry,” it primarily focuses on intellectual property rights including copyright and trademark law, contracts, commercial transactions (both domestic and international), employment and labor laws, and customs. *Id.*

<sup>53</sup> *Id.* (law schools have acknowledged the growth of this field by dedicating programs in their schools to fashion law in order to fill the need for these specialized attorneys in the fashion field).

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typically not to the copyright design itself.<sup>54</sup> An exception exists under the U.S. Copyright Act allowing fashion design to attain protection if the design meets the test for separability.<sup>55</sup>

### 2. Useful Articles

Useful articles are not copyrightable under 17 U.S.C. §§ 101 and 102.<sup>56</sup> These sections state the definitions, the subject matter, and the scope of copyright.<sup>57</sup>

Works of authorship that are included under copyright fall under a discrete list of categories: “(1) literary works; (2) musical works, including accompanying words; (3) dramatic works, including 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.”<sup>58</sup>

Section 102(b) states, “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>59</sup> Neither of the aforementioned sections of the U.S.C. benefit fashion design.<sup>60</sup> Therefore, if an item is considered to be a “useful article” that falls under either of these sections, it will be precluded under copyright law.<sup>61</sup>

It has been argued that no law in the United States protects fashion design sufficiently.<sup>62</sup> This argument is best exemplified in *Beverly Hills Design Studio (N.Y.) Inc. v. Morris*, where the plaintiffs alleged that the defendants infringed their copyrights in paper patterns of Brooks’ designs.<sup>63</sup> When Brooks filed applications with the Copyright Office for registration of claims to copyright these paper patterns, the Copyright Office refused registration.<sup>64</sup> Subsequently, when Brooks asked for reconsideration, the Copyright Office refused approval once again on the basis that the patterns were “useful articles.”<sup>65</sup>

### 3. Test for Separability

An exception under the U.S. Copyright Act enables fashion design to have protection if said design “[i]ncorporates pictorial, graphic, or sculptural features that can be

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<sup>54</sup> Copyright Act, 17 U.S.C. § 101 et seq.; Oliver Herzfeld, *Protecting Fashion Designs*, FORBES (Jan. 3, 2013, 9:14 AM), <http://www.forbes.com/sites/oliverherzfeld/2013/01/03/protecting-fashion-designs/>.

<sup>55</sup> Herzfeld, *supra* note 54.

<sup>56</sup> 17 U.S.C. §§ 101-102 (2010).

<sup>57</sup> *Id.*

<sup>58</sup> 17 U.S.C. § 102.

<sup>59</sup> *Id.*

<sup>60</sup> 17 U.S.C. §§ 101-102.

<sup>61</sup> 17 U.S.C. § 101.

<sup>62</sup> *Louboutin v. YSL*, 696 F.3d 206, 223 (2nd Cir. 2012).

<sup>63</sup> *Beverly Hills Design Studio (N.Y.), Inc. v. Morris*, 126 F.R.D. 33 (S.D.N.Y. 1989).

<sup>64</sup> *Id.* at 37.

<sup>65</sup> *Id.*

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identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”<sup>66</sup> Courts, when considering cases that involve the aforementioned exception, have held that the applicable test, namely, the test for separability, may be fulfilled by either a physical or conceptual separability.<sup>67</sup>

Regarding separability, an element meets the test when it is able to be removed from the item itself and therefore sold as a separate unit.<sup>68</sup> A prime example is a belt buckle that can be separated from the belt itself.<sup>69</sup> An element is considered conceptually separable when it “contains artistic features that have no relation to the utilitarian aspect of the item, and invokes an idea that separates itself from the functionality of the item.”<sup>70</sup> The test for a product being conceptually separable requires just a “philosophic inquiry” of the “very nature of the utilitarian thing itself.”<sup>71</sup>

In *Kieselstein-Cord v. Accessories By Pearl, Inc.*, a belt buckle designer brought a suit claiming copyright and trademark infringement as well as unfair competition.<sup>72</sup> The Court of Appeals held that “decorative belt buckles, which were used primarily for ornamentation, could be copyrighted since the aspect of the buckle was conceptually separate from its subsidiary utilitarian function.”<sup>73</sup> The two belt buckles at issue were sketched and designed separately from the belt itself.<sup>74</sup> Prototypes were carved by hand in order to make a mold in which to cast the buckles in gold and silver.<sup>75</sup> The appellee admitted to copying and selling imitations of this design.<sup>76</sup> However, the appellee argued that the appellant’s buckles were not copyrightable because they were “useful articles” with no “pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of the utilitarian aspects of the buckles.”<sup>77</sup> The Court held that the appellant was successful in creating an artistic design with the belt buckle, separating it from the functional aspect of the buckle, allowing for it to be copyrighted.<sup>78</sup>

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<sup>66</sup> Herzfeld, *supra* note 54.

<sup>67</sup> *Id.*; H.R. REP. NO. 94-1476, at 55 (1976).

<sup>68</sup> H.R. REP. NO. 94-1476, at 55.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; Robert Welsh, *Apparel Designs and the “Metaphysics” of Copyright Protection*, MONDAQ BUS. BRIEFING (Oct. 14, 2014), available at <http://global.factiva.com/hp/printsavews.aspx?pp=Print&hc=Publication>.

<sup>72</sup> *Kieselstein-Cord v. Accessories by Pearl*, 489 F. Supp. 732 (1980); *Kieselstein-Cord v. Accessories by Pearl*, 632 F.2d 989 (2d Cir. 1980).

<sup>73</sup> *Kieselstein-Cord v. Accessories by Pearl*, 632 F.2d 989. “This conclusion is not at a variance with the expressed congressional intent to distinguish copyrightable applied art and copyrightable industrial design.” *Id.* at 993.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (during the process of creating the belt buckle, the actual utilitarian purpose of the belt was not taken into consideration, the prototypes only displayed the design that was to appear on the belt buckle itself).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 991-92.

<sup>78</sup> *Id.* The court acknowledged the importance of the decision in the case, stating “important policies are obviously at stake. Should we encourage artists and increase the compensation to the creative? Or should we allow cheap reproductions which will permit our less affluent to afford beautiful artifacts?” The court further acknowledges that, so far, “Congress and the Supreme Court have answered [this question] in favor of commerce and the masses rather than the artist, designer, and the well-to-do.” *Id.* at 999.

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In contrast the same Court addressed this issue in *Jovani Fashion, Ltd. v. Fiesta Fashions*. In this case a company, Fiesta Fashions copied the specific design of a prom dress from Jovani Fashion. The Court held that the “elements of the prom dress design were not physically separable from the garment itself, precluding infringement claim, and elements of the design were not conceptually separable.”<sup>79</sup> Thus, failing to meet the test of separability and instead fulfilling 17 U.S.C. § 101.<sup>80</sup>

**B. Fashion Overseas**

Unlike the United States, in other countries copyright protection is not as difficult to obtain. For instance, in the United Kingdom [UK] it is unnecessary to register for copyright protection.<sup>81</sup> Copyright protection is automatically granted assuming the designer’s final product “(i) falls within one of the protected categories, (ii) is expressed in a material form, (iii) is original, and (iv) has a connection with the UK.”<sup>82</sup> To meet the fourth element, “the designer either has to be a UK citizen, or have the company domiciled in the UK.”<sup>83</sup> If these connections do not exist the design may still have copyright protection “by virtue of international convention to which the UK is a party to.”<sup>84</sup>

European design law is directly correlated to the history and development of the textile industry itself.<sup>85</sup> In the fifteenth century, the King of France first established exclusive rights regarding the creation of textiles.<sup>86</sup> The counterfeiting of weaving patterns was first penalized in 1711 in Lyon, France.<sup>87</sup> Additionally, in 1787 both England and Scotland implemented the first statutes regarding the protection of design.<sup>88</sup> In 1876, Germany, implemented a law regarding copyright protection on both patterns and models, responding to textile industry’s requests.<sup>89</sup>

In 1998, the European Council implemented a European Directive on the Legal Protection of Designs [Directive].<sup>90</sup> The Directive obligates its Member States to “harmonize their laws regarding protection of registered industrial designs, and to put in place design

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<sup>79</sup> *Jovani Fashion, Ltd. v. Fiesta Fashions*, 500 Fed.Appx. 42 (2d Cir. 2012).

<sup>80</sup> 17 U.S.C. § 101; *Jovani Fashion, Ltd. v. Fiesta Fashions*, 500 Fed.Appx. 42 (2d Cir. 2012) (“No different conclusion is warranted by § 101’s definition of a “useful article” as one having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”) (internal quotation marks omitted). *Id.* at 44.

<sup>81</sup> CENTRE FOR FASHION ENTERPRISE, *supra* note 22.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (explaining that under the UK convention, the second you create the fashion design, it may have an automatic copyright, regardless of whether you actually go through the acts of having the design copyrighted).

<sup>84</sup> *Id.* (indicating that the textile industry was once one of the most powerful industries in the world, commanding a lot of attention of the law makers).

<sup>85</sup> Dr. Fridolin Fischer, *Design Law in the European Fashion Sector*, WIPO MAG., Feb. 2008, at 12.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 13.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* The issuance of this copyright law in Germany was consistent with the previous ones being initiated at the request of the textile industry. *Id.*

<sup>90</sup> Council Directive 98/71, 1998 O.J. (L. 289) (EC); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L.REV. 1687, 1735 (2006).

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protection laws that follow standards set out in the Directive.”<sup>91</sup> For protection to apply, the standards provide that: (1) “a fashion design must be registered” and (2) “the owner of a registered design gains exclusive rights to that design.”<sup>92</sup>

The aforementioned rights apply not only against copies of the protected design, but also against substantially similar designs.<sup>93</sup> Protection extends to the “lines, contours, colours, shape, texture and/or materials” of the registered design<sup>94</sup> also including ornamentation.<sup>95</sup> A design registration is valid for a twenty-five year period.<sup>96</sup>

The European Union (EU) also legally protects unregistered designs under the EU Regulation.<sup>97</sup> Unlike a registered design, an unregistered design is only protected for three years from the date which the design was first published.<sup>98</sup> Within the EU, any firm or individual marketing apparel may register within this database; therefore, gaining protection under said regulations.<sup>99</sup>

In France, courts typically adhere strictly to the originality requirement for designs and as a result tend to deny copyright protection to designs that could be considered “commonplace.”<sup>100</sup> Further, French law grants both moral and patrimonial rights to designers for their designs, which become applicable at the time of creation of the design.<sup>101</sup> Patrimonial rights grant “the exclusive rights to represent, reproduce, sell or otherwise exploit the copyrighted work of art and to derive a financial compensation therefrom.”<sup>102</sup>

Section L121 of the French IP Code states the four main branches of moral rights: (1) the *droit de paternité* - the right of attribution of a work, which is the designer’s right to be identified as the author; (2) the *droit au respect de l’intégrité de l’oeuvre* - the right of integrity, which is the designer’s right to prohibit the modification or destruction of his or her work; (3) the *droit de divulgation* - the right of disclosure, which is the designer’s right to choose when and how to publicize his work; and (4) the *droit de repentir ou de retrait* - the right of withdrawal, which allows the designer to take back works that have been already publically disclosed.<sup>103</sup>

If other countries recognize the talent of fashion designers, then why doesn’t the United States? Europe rewards fashion designers’ creativity just like any other artist and justly so.

<sup>91</sup> Raustiala & Sprigman, *supra*, note 90 at 1735; *see also* Council Directive 98/71, 1998 O.J. (L. 289) (EC).

<sup>92</sup> *Id.*

<sup>93</sup> CENTRE FOR FASHION ENTERPRISE, *supra* note 22 (explaining that a substantially similar design is one that copies the design “exactly or substantially, whether directly or indirectly).

<sup>94</sup> Raustiala & Sprigman, *supra*, note 90 at 1736; *see also* Council Directive 98/71, 1998 O.J. (L. 289/30) (EC).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; Council Directive 98/71, 1998 O.J. (L. 289/31) (EC).

<sup>97</sup> Raustiala & Sprigman, *supra* note 90, at 1735-36.

<sup>98</sup> Council Directive 98/71, 1998 O.J. (L. 289/30) (EC).

<sup>99</sup> Raustiala & Sprigman, *supra* note 90, at 1740.

<sup>100</sup> Francesca Montalvo, *Protecting Fashion: A Comparative Analysis of Fashion Design Copyright Protection in the U.S. and Europe*, CARDOZO ARTS & ENT. L.J. BLOG (Sept. 19, 2014), <http://www.cardozoarlj.com/2014/09/19/protecting-fashion-a-comparative-analysis-of-fashion-design-copyright-protection-in-the-u-s-and-europe/#.VesVydNVikp>

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> C. de la Propriété Intellectuelle art. L121-1 - L121-9 Fr.); Intellectual Property Code art. L121-1 ~ L121-9 (Fr.) available at [www.legifrance.gouv.fr/content/download/1959/13723/.../Code\\_35.pdf](http://www.legifrance.gouv.fr/content/download/1959/13723/.../Code_35.pdf).

### III. COPYCATS: DO THEY HURT OR HELP THE FASHION INDUSTRY?

Intellectual Property rights prevent counterfeiters and copycats, both of which deter individuals from investing their time and money into creating new works.<sup>104</sup> Counterfeiters create copied products that bear the trademark of the copied designer.<sup>105</sup> While a copycat differs by creating knock-off products of a designer. Knock-offs are products that copy the design and style of another product, but do not bear the trademark.<sup>106</sup> However, it has been argued that the copying of fashion designs is one of the forces that encourage designers to continue creating new styles and collections.<sup>107</sup> Thus encouraging designers to stay ahead of the counterfeiters and copycats by creating new trends.<sup>108</sup>

The process of copying is both literal and direct. Copying is when an individual specifically “targets” an original production for replication.<sup>109</sup> Therefore, copying is typically seen within the same season or year that the original design makes its appearance.<sup>110</sup> It is even suggested that fashion design is different from other arts, in that its vitality may even depend on copying.<sup>111</sup> However, not all copying is done with the intention to make a replication.<sup>112</sup> Rather, the motivation may be merely an effort to meet the need of a specific consumer base “for individual differentiation within the trend.”<sup>113</sup>

#### A. Interpretations

Interpretation differs from copying.<sup>114</sup> Interpretations do not try to pass off the work as if it is the original piece,<sup>115</sup> unlike close copies, which can be a replacement for and significantly drive down the value of the original piece, thereby reducing the incentive to create.<sup>116</sup>

For instance, many designers have reinterpreted the quilted handbag, which is a classic, original product of Chanel.<sup>117</sup> Such designers do not try to pass these bags off as the original Chanel, but try to capture the spirit and elegance of the look.<sup>118</sup> Interpretation incorporates existing works along with the drive to differentiate by changing, mixing, and

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<sup>104</sup> CENTRE FOR FASHION ENTERPRISE, *supra* note 22 (arguing that fashion designers would not spend their money and time creating works that they would not solely profit from).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (arguing that if they do not stay ahead, the copycats and counterfeiters would “cannibalize” their sales).

<sup>109</sup> Hemphill & Suk, *supra* note 5, at 1159.

<sup>110</sup> Raustiala & Sprigman, *supra* note 90, at 1712. There is a “driving shoe” model that shows that design copying sometimes occurs with a lag.” *Id.*

<sup>111</sup> Hemphill & Suk, *supra* note 5, at 1151.

<sup>112</sup> *Id.* at 1159-60 “For example, a consumer can imitate the length of a skirt without necessarily purchasing a copy of that skirt.” *Id.*

<sup>113</sup> *Id.* at 1153.

<sup>114</sup> *Id.* at 1160.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

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transforming such original works.<sup>119</sup> Thus, interpretation allows individuals to purchase a product with a design that they admire, but created with different details or materials making the product more suited to an individual's personal style.<sup>120</sup> This pleases the consumers by giving them more options and a more satisfying shopping experience.<sup>121</sup>

**B. Fair Use**

Copyright law can also protect derivatives of copyrighted work, unless it is considered to be "fair use."<sup>122</sup> "Fair use" is defined as a right bestowed upon the public that enables individuals to use certain copyrighted works without both the copyright holder's authorization<sup>123</sup> and the fear of legal consequences.<sup>124</sup> Therefore, typically, "fair use" allows such reproduction if certain factors are met including, "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."<sup>125</sup> The analysis of whether a particular work falls under the Fair Use Doctrine is greatly premised upon whether the copied work becomes a replacement for the original work.<sup>126</sup>

**C. Knockoffs**

A "knock-off" is a product that copies both the style and design of another product; however, without the usage of the trademark.<sup>127</sup> Overall, knock-offs are beneficial to the fashion industry.<sup>128</sup> Contrary to popular belief, knock-offs tend to increase both industry revenue and promote innovation.<sup>129</sup> If knock-offs failed to exist, it would be more expensive to produce clothes.<sup>130</sup> In turn, the consumers would have to pay more money for these clothes.<sup>131</sup>

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<sup>119</sup> *Id.* at 1160 (arguing that interpretations, while not only not being a copy of the original, "may even be a complement for other on-trend articles").

<sup>120</sup> *Id.* at 1166.

<sup>121</sup> *Id.*

<sup>122</sup> *U.S. Copyright Law*, *supra* note 29.

<sup>123</sup> Fair Use Doctrine, 17 U.S.C. § 107.

<sup>124</sup> *U.S. Copyright Law*, *supra* note 29.

<sup>125</sup> *Id.* (discussing also that there is one other, "work for hire" exception, which refers to when an item is created by an individual for another entity, so although it is the individual's work, the product actually belongs to the entity).

<sup>126</sup> Fair Use Doctrine, 17 U.S.C. § 107.

<sup>127</sup> CENTRE FOR FASHION ENTERPRISE, *supra* note 22 (explaining that knock-offs are different from counterfeiting because knockoffs do not claim they are the trademarked product, while counterfeited products try to appear that they are the trademarked product).

<sup>128</sup> MTTLR BLOG, *supra* note 47.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

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**D. Difference Between Counterfeit and Knock-off**

There is a difference between a counterfeit product and a knock-off product.<sup>132</sup> Counterfeit products specifically include a direct copy of the original brand's label or trademark symbol.<sup>133</sup> They are designed to be "virtually identical" to the original product.<sup>134</sup> Such products are illegal to sell.<sup>135</sup>

The United States government agents attempt to stop counterfeit products from entering the nation; however, said products still manage to enter the U.S. and are sold in both local stores and on the internet.<sup>136</sup> On the contrary, a knock-off does not have the original designer's marks or exact design.<sup>137</sup> It only closely resembles the true product, without confusing consumers that it is the true product.<sup>138</sup>

A knock-off is just a cheap imitation, but it generally is not illegal.<sup>139</sup> Both counterfeit and knock-off items are priced at significantly lower prices than the original items.<sup>140</sup> Therefore, representatives of the European clothing industry are lobbying for the implementation for a global intellectual property protection for fashion designs due to their fear of the monetary losses that they foresee arising from counterfeiting.<sup>141</sup> However, it can be argued that the sale of such counterfeit products cannot be equated to the loss of sales of the original products since the consumer groups that are being primarily targeted for the counterfeit items are not the same consumer groups that are in the market for the original items.<sup>142</sup>

**IV. WHY COPYRIGHT?**

The best option for designers is the existence of the ability to copyright. Adversely, patents are typically expensive, and the process is time consuming.<sup>143</sup> As a result, this isn't necessarily the best method in the fashion industry when time is of the essence.<sup>144</sup> Overall, fashion trends are "short-lived" and, therefore, it would be impossible to benefit from patent protection.<sup>145</sup> To receive a patent, the design must be "novel, non-obvious, and useful."<sup>146</sup> It is

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<sup>132</sup> *Is it Illegal to Buy Counterfeit or Knockoff Designer Goods*, HG.ORG (Nov. 17, 2013), <http://hg.org/article.asp?id=31573>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Buyers purchase these counterfeit products as an item that is close enough to the original such that it may deceive people into thinking that it is in fact an original. *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* Knock-off items appeal to those whom like the style of the item and do not need the social image of having the original item, which would have a specific designer's name attached to it. *Id.*

<sup>141</sup> Fischer, *supra* note 85, at 12.

<sup>142</sup> *Id.* (discussing that many people who purchase counterfeit items are well aware that they are not purchasing the originals).

<sup>143</sup> MTLR BLOG, *supra* note 47.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

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very difficult to meet these elements as it is highly unlikely that new fashion designs will be considered to be non-obvious enough to receive protection under this law.<sup>147</sup>

The U.S. Trademark Act, also known as the Lanham Act, solely “protects brand names, logos, symbols, designs, and other optional elements of items.”<sup>148</sup> It is meant to avoid confusion and help consumers distinguish one brand from another.<sup>149</sup> This Act, in which its sole purpose is to identify brands, is not useful in fashion design.<sup>150</sup> However, Christian Louboutin owns the trademark rights to his distinctive red outsoles, which makes it clear to the consumers that he is the designer of his shoes.<sup>151</sup> Shoe lovers could identify Louboutin shoes without ever having to read the name on the label. Even Burberry’s famous plaid print is a registered trademark.<sup>152</sup> The plaid design is incorporated into almost all of Burberry’s products as its signature.<sup>153</sup> Levi’s even trademarked the cloth label placed on the back left pocket of denim pants.<sup>154</sup> In fact, the double row of stitching on the back pockets of Levi’s jeans has been utilized for over one hundred years.<sup>155</sup>

Trade dress law, which differs from trademarks, protects the “design, packaging, or appearance of items to the extent that they are meant to help identify the source and origin of such items.”<sup>156</sup> Thus, trade dress protects the item’s distinctive traits.<sup>157</sup>

The ideal and most reasonable form of protection for fashion design would be copyright. As soon as an item is designed, it would be protected right away without a heavy cost. This would help give designers incentive to create.

## V. THE FASHION INDUSTRY v. THE FASHION DESIGNER

Many advocates believe that if other artists such as musicians and architects receive copyright protection, then fashion designers deserve copyright protection as well.<sup>158</sup> However, there is a debate over such a bill protecting design.<sup>159</sup> The conflict lies between rewarding a designer’s hard work and creativity, and ensuring that clothing can also be made inexpensively.<sup>160</sup> If you protect the fashion designer, you could hurt the fashion industry.<sup>161</sup> If

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<sup>147</sup> *Id.*

<sup>148</sup> See generally Trademark Act of 1946, 15 U.S.C. §§1051 – 1141 (2006); Herzfeld, *supra* note 54.

<sup>149</sup> See generally Trademark Act of 1946, 15 U.S.C. §§1051 – 1141 (2006); *Intellectual Property Law*, *supra* note 25.

<sup>150</sup> *Intellectual Property Law*, *supra* note 25.

<sup>151</sup> Herzfeld, *supra* note 54; Louboutin v. YSL, 696 F.3d 206, 223 (2nd Cir. 2012). “We further hold that the District Court’s holding, that Louboutin’s trademark has developed “secondary meaning” in the public eye, was firmly rooted in the evidence of record and was not clearly erroneous, and that the Red Sole Mark is therefore a valid and enforceable trademark.” *Id.* at 212.

<sup>152</sup> Lisa J. Hedrick, *Tearing Fashion Design Protection Apart at the Seams*, 65 Wash. & Lee L. Rev. 215 (2008).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Herzfeld, *supra* note 54.

<sup>157</sup> *Id.*

<sup>158</sup> MTTLR BLOG, *supra* note 47.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

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you help the fashion industry, you're not protecting the fashion designer.<sup>162</sup> This "Catch 22" is the issue at large.<sup>163</sup> However, it seems that whatever is right for the fashion industry is the decision that is most favored.

A. The Competition

In a French court ruling, Yves Saint Laurent was awarded \$395,090 in damages from Ralph Lauren for "counterfeiting and disloyal competition."<sup>164</sup> Yves Saint Laurent accused Ralph Lauren of copying a black tuxedo dress that Saint Laurent first created back in 1966, and showed it again during the fall collection of 1991-1992.<sup>165</sup> The dresses created by Lauren were seized and impounded.<sup>166</sup> This case, which was decided back in 1994, was the first time a designer was able to protect a dress as "intellectual property."<sup>167</sup>

The French Tribunal de Commerce also awarded Ralph Lauren \$87,720 in damages for a defamation lawsuit against Yves Saint Laurent's chairman, Pierre Berge.<sup>168</sup> Berge commented to a fashion trade newspaper saying that, "[i]t's one thing to draw inspiration from another designer; it's quite another to rip off a design, line for line, cut for cut, which is what Ralph Lauren did."<sup>169</sup>

Some high-end designers have a second line that is priced lower than their premier lines in order to target a different consumer group.<sup>170</sup> Giorgio Armani is the most prominent user of this strategy.<sup>171</sup> His distinct lower priced lines include Emporio Armani, and Armani Exchange.<sup>172</sup> Some design houses are opposed to this out of the fear of blurring a brand's identity.<sup>173</sup>

Retailers that are notorious for copying or interpreting high fashion and turning such products into low budget items are Forever 21, H&M, and Zara.<sup>174</sup> Forever 21 is known as a copyist retailer.<sup>175</sup> It is infamous for duplicating the hottest designs for cheap.<sup>176</sup> While H&M and Zara avoid close copying and instead create their own adaptations of trends.<sup>177</sup>

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<sup>161</sup> *Id.* This is similar to the way copyright protections have affected the music industry, "in the music industry, new copyright laws led to a decrease in consumption of music, causing an eighty percent decrease in the industry's revenue." *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Amy M. Spindler, *A Ruling by French Court Finds Copying in a Design*, N.Y. Times, May 19, 1994, available at <http://www.nytimes.com/1994/05/19/business/company-news-a-ruling-by-french-court-finds-copyright-in-a-design.html>.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Raustiala & Sprigman, *supra* note 90, at 1725.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1724.

<sup>174</sup> Hemphill & Suk, *supra* note 5, at 1172.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1174.

<sup>177</sup> *Id.* at 1172.

## DISCRIMINATION AGAINST FASHION DESIGN IN COPYRIGHT

Between 2003 and 2008, Forever 21 was a defendant in fifty-three lawsuits, compared to two for H&M and zero for Zara.<sup>178</sup> The allegations against Forever 21 include “close copying.”<sup>179</sup> Some popular plaintiffs against Forever 21 include: Anna Sui, Anthropologie, Bebe Stores, Diane Von Furstenberg, and Harajuku Lovers.<sup>180</sup> Forever 21 still continues to copy high fashion designs, season after season.<sup>181</sup>

Copyright protection in Europe has little impact upon the U.S.’s industry.<sup>182</sup> Zara and H&M, which are both based in Europe, are subject to design protection.<sup>183</sup> These companies both avoid close copying as to the products sold in Europe in order to avoid copyright infringement.<sup>184</sup>

Since the same products sold in Europe are also sold in the United States, there are relatively few close copies in the United States, unlike Forever 21, which is a United States based company with no stores in Europe.<sup>185</sup> Existing European protection does little to help many U.S. designers who lack a substantial non-U.S. business.<sup>186</sup>

### B. The High-End Fashion Designer

It is unnecessary for producers of luxury goods to have apprehension. Most high-end products are difficult to duplicate due to low-cost outsourcing because the materials and finishes that are utilized are expensive and distinctive.<sup>187</sup>

Accompanying a luxury image, the high-end shopping experience itself may insulate some products from the harm that comes from copying.<sup>188</sup> Brand image also guarantees consumer loyalty, in addition to a luxurious in-store experience, and the prestige and value of the authenticity of owning an original product.<sup>189</sup> These effects reduce substitutions of the original product when copying occurs.<sup>190</sup>

The opposing argument is that the increase in copying will result in a shorter fashion lifespan, which will, in turn, lead the consumer to lessen her willingness to pay a high price therefore reducing the designer’s profit by diminishing sales.<sup>191</sup>

Many factors have significantly accelerated the pace of copying. These factors include “digital photography, digital design platforms, the internet, global outsourcing of manufacture, more flexible manufacturing technologies, and lower textile tariffs have

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<sup>178</sup> *Id.* at 1173.

<sup>179</sup> *Id.* “Close copying” is defined as an almost identical copy of the original product. *Id.*

<sup>180</sup> *Id.* at 1174.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1192.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* (reflecting the fashion industry’s adamant effort to try and get a bill passed in the United States to award copyright protections to fashion designs).

<sup>187</sup> *Id.* at 1178.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* (arguing that copiers may be discouraged as it is uncertain whether the buyers are shopping for the experience rather than the product itself; if it was just for the experience, the copier’s efforts would be fruitless).

<sup>191</sup> *Id.* at 1183.

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significantly accelerated the pace of copying.”<sup>192</sup> As a result of these factors, copies of products are now produced and in stores before the design even becomes a trend.<sup>193</sup>

Typically this cycle does not directly affect high-end fashion. There are designers and brand names that is a signature of status.<sup>194</sup> An item from brands such as Gucci or Prada has value due to the fact that fashionable individuals own such items and unfashionable individuals do not.<sup>195</sup> The exclusivity of the item partially influences the appeal of such goods.<sup>196</sup>

When a fashion design is duplicated by others and utilized as a less-expensive derivative, the design itself becomes widely purchased.<sup>197</sup> This encourages “status-seekers” to participate in new fashion in an attempt to separate their “look” from others.<sup>198</sup> This process then begins again when the designers respond with new designs.<sup>199</sup>

Even high-end designers known for their originality are found to copy each other on occasion.<sup>200</sup> The designer or brand that starts a trend one season may be following another new trend the following season.<sup>201</sup> Whether a particular designer or brand will be the leader or the follower in any season is difficult to foresee.<sup>202</sup> All designers, at some point, are guilty of copying another designer’s design.<sup>203</sup>

Copyright throughout the industry results in each season’s output of fashionable items to be mostly coherent.<sup>204</sup> To create a trend, multiple actors must converge on a particular theme.<sup>205</sup> Creative intuition, testing, and communication within both the industry and amongst consumers, and copying one another by producing derivatives of such items largely characterize the process of the emergence of the design theme per season.<sup>206</sup>

It is unlikely that amending American Intellectual Property law would result in an increase in innovation in the fashion industry.<sup>207</sup> Although European Union laws are in place, copying in fashion still exists. Hardly any high-end fashion designers in Europe have any designs registered.<sup>208</sup> Design houses such as Chloe, Yves Saint Laurent, Balenciaga, and Dolce & Gabbana, have no registrations at all.<sup>209</sup> Within the United States, there has been no

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<sup>192</sup> *Raustiala & Sprigman, supra* note 90, at 1714-15.

<sup>193</sup> *Id.* at 1715. Copiers look out for designs that may become “hot” and are quick to copy those products. *Id.*

<sup>194</sup> *Id.* at 1718.

<sup>195</sup> *Id.* at 1719.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1721.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1721-22 As designs get watered down by copies over time, it has been compared to art as, “art produces ugly things which frequently become more beautiful with time. Fashion, on the other hand, produces beautiful things which always become ugly with time.” *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1727.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1728.

<sup>204</sup> *Id.* at 1728-29.

<sup>205</sup> *Id.* at 1729.

<sup>206</sup> *Id.* This is necessary because “[t]he very concept of a trend requires multiple actors converging on a particular theme.” *Id.*

<sup>207</sup> *Id.* at 1744.

<sup>208</sup> *Id.* at 1743.

<sup>209</sup> *Id.*

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detection of any “obvious disinclination of fashion firms to market.”<sup>210</sup> The mere fact that in both the European Union and the United States fashion firms actively engage in design copying leads to the assumption that the differing laws has no “substantial effect.”<sup>211</sup> Perhaps one explanation is that most designers are in favor of a low intellectual property environment. The possibility exists, that if there is a legal risk, designers may cease designing derivative works, which may significantly slow down innovation by encouraging designers to distribute cease and desist letters to eliminate threatening competition.<sup>212</sup>

Currently, in this low intellectual property environment, major retailers like Bloomingdale’s are able to purchase and resell original designs, as well as the brands of the copyist firms.<sup>213</sup> If such intellectual property law existed for design, major retailers would be unable to carry most of their inventory.<sup>214</sup>

Noteworthy, is the fact that the scarcity of copyright protection for fashion designers has failed to deter investment in the fashion industry.<sup>215</sup> Additionally, it has failed to reduce innovation.<sup>216</sup> Instead, it has encouraged and accelerated innovation.<sup>217</sup> In 2012, the United States fashion industry alone brought in revenue amounting to a surplus of 330 billion dollars.<sup>218</sup>

## VI. THE DISAGREEMENT OVER FASHION PROTECTION

In September of 2012, New York Senator, Chuck Schumer, proposed a bill entitled<sup>219</sup> the Innovative Design Protection Act of 2012 (IDPA).<sup>220</sup> If this bill had been approved, Chapter 13 of the Copyright Act would have been amended to include fashion design.<sup>221</sup> The IDPA received approval of the Senate Committee, however, still required votes from both the House of Representatives and the Senate to be passed.<sup>222</sup>

Further, during the time at which the bill was proposed, Congress was undergoing a transitional period, namely the conclusion of the 112<sup>th</sup> Congress and the initiation of the 113<sup>th</sup>

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 1744-45.

<sup>213</sup> *Id.* at 1758.

<sup>214</sup> *Id.* Because retailers like Bloomingdales sell multiple designers that essentially copy each other, their inventory would be significantly decreased because they would not be able to sell copies even though both are “high end brands.” *Id.*

<sup>215</sup> *Id.* at 1775. The fashion industry in itself attracts a significant amount of investment simply because it “engages in fast-moving innovation with a far lower degree of propertization” unlike other intellectual property. *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Montalvo, *supra* note 100. The U.S. apparel industry reached a value of 338 billion dollars in 2012. Fashion has not only become a prominent part of the U.S. economy but it is now also now a large part of its culture, having prominent museums, such as the Metropolitan Museum of Arts, devote their halls to fashion exhibits. *Id.*

<sup>219</sup> Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012).

<sup>220</sup> MTLR BLOG *supra* note 47.

<sup>221</sup> *Id.*; S. REP. NO. 112-259 (2012).

<sup>222</sup> MTLR BLOG, *supra* note 47.

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Congress.<sup>223</sup> Because the IDPA was not approved by the end of the 112<sup>th</sup> Congressional Term, the bill failed to come to fruition.<sup>224</sup>

If passed the IDPA would have given copyright protection for three years to fashion designs that “(i) are a result of a designer’s own creative endeavor; and (ii) provide a unique, distinguishable, non-trivial and non-utilitarian variations for prior designs for similar types of articles.”<sup>225</sup> The original owner of the design would be entitled to damages that accrue from the profits made from an infringement once notification of the infringement has been made.<sup>226</sup> The infringed design would have to be made public, then, after a twenty-one day notice period the owner of the design can sue.<sup>227</sup>

Some of the heads of the fashion industry considered the IDPA as a tool that would have finally leveled the playing field in the counterfeit goods and design infringement cases that have been increasing over recent years.<sup>228</sup> However, if the Copyright Law was to be amended, the bill would have to be reintroduced.<sup>229</sup>

Since 2006, this issue is still at the forefront, as Congress has still been uneasy regarding the failure of the IDPA’s passage and has been constantly contemplating reintroducing a similar bill.<sup>230</sup> If such a bill is passed, this would greatly benefit fashion designers by protecting them from copyright infringement.<sup>231</sup> Large names such as the Council of Fashion Designers of America, and the American Apparel and Footwear Association are in support of such protection if a bill is passed.<sup>232</sup>

However, there are people who oppose the IDPA, or a bill similar to the IDPA, because they feel it fails to protect fashion designers to its fullest.<sup>233</sup> This hesitation is due to the fact that the bill merely allows for damages from sales occurring after the receipt of notice of infringement.<sup>234</sup> Therefore, this does not include any prior sales.<sup>235</sup> Typically, the issue regarding knock-offs is that the vast majority of the money is made prior to any notice of infringement.<sup>236</sup> Therefore, even if a fashion designer is able to successfully prevail in a copyright infringement lawsuit, the damages will fail to include the “true profits” attained from the copied design.<sup>237</sup> Opponents disapprove, stating that a bill would:

(i) chill creativity to the extent that new works often borrow and build upon what has come before, (ii) increase fashion designers’ legal costs, due to required consultations with lawyers to reduce the likelihood of

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012); Herzfeld, *supra* note 54.

<sup>226</sup> MTTLR BLOG, *supra* note 47.

<sup>227</sup> Montalvo, *supra* note 100.

<sup>228</sup> *Id.*

<sup>229</sup> MTTLR BLOG, *supra* note 47.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* “To advocates, there seems to no reason why other artists, such as musicians and architects, should receive copyright protection and fashion designers should not.” *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

## DISCRIMINATION AGAINST FASHION DESIGN IN COPYRIGHT

infringement claims as well as representation for actual infringement disputes, and (iii) indirectly increase the cost of apparel and accessories for all consumers.<sup>238</sup>

In the 1930s designers set up a successful private system of self-help, namely the Fashion Originators' Guild of America.<sup>239</sup> This system boycotted retailers that participated in business with copyists until it was enjoined as a violation of antitrust law.<sup>240</sup> For decades, designers have been lobbying for stronger protection; however, have yet to be successful.<sup>241</sup> Thus, within the United States, fashion firms and designers have failed to obtain any expansion on copyright protection applicable to their respective industry.<sup>242</sup>

## VII. PROPOSAL

## A. Background

One of the primary reasons why the fashion industry thrives is because of copying.<sup>243</sup> Copying allows for trends to take place, which forces new trends to come out to replace the old trends.<sup>244</sup> In any other category of intellectual property, copying could harm the original creator.<sup>245</sup> However, in fashion, the opposite is true. A decline in innovation would actually occur.<sup>246</sup>

Innovation in the fashion industry moves at a fast pace.<sup>247</sup> "Innovation is perceived as having a life cycle that is born, mature, and dies."<sup>248</sup> Fashion designers are encouraged to stay ahead of the trends, always thinking about the future of fashion.<sup>249</sup> They inspire to pave the way for the newest, hottest trend, forcing them to constantly be on their toes when it comes to their creative choices.

Copying also benefits both the fashion designer as well as the consumer.<sup>250</sup> Consumers who have a status to maintain, or just have an appreciation for high-fashion goods, are going to purchase the original items despite the costs. Those consumers look and expect to receive lux, quality items, made with exquisite craftsmanship, from the designers who are known for it. No matter how many other producers have copied such items, the original designers will always have their devout following. Such followers are very loyal to their favorite designers, and will consistently collect these designers' items.

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<sup>238</sup> Herzfeld, *supra* note 54.

<sup>239</sup> Hemphill & Suk, *supra* note 5, at 1184.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* (arguing that the lack of success was not a result of the lack of harm to designers, but because they were "not sufficiently powerful" enough to invoke the change that they wanted to achieve).

<sup>242</sup> Raustiala & Sprigman, *supra* note 90, at 1717.

<sup>243</sup> Hemphill & Suk, *supra* note 5, at 1151.

<sup>244</sup> Raustiala & Sprigman, *supra* note 90, at 1721-22.

<sup>245</sup> Heymann, *supra* note 34.

<sup>246</sup> Raustiala & Sprigman, *supra* note 90, at 1744-45.

<sup>247</sup> *Id.* at 1771.

<sup>248</sup> DeLong, *supra* note 10.

<sup>249</sup> CENTRE FOR FASHION ENTERPRISE, *supra* note 22.

<sup>250</sup> Montalvo, *supra* note 100.

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Consumers who are not interested in the original items have the option of purchasing the copies.<sup>251</sup> Usually, the copies are produced and sold for less money than the original items. Consumers who do not have the means to pay for the absurd prices of the original items, often buy the copied items. They do this so they can save money while still participating in modern fashion trends. Some consumers just prefer to purchase the copied items. These consumers are aware that trends do not last long, and rather buy a less expensive version of the trend just to stay relevant in modern fashion until the trend moves in a different direction. These people are very aware that they are not buying the original product, and purposely go out of their way to purchase such copies.

Whatever the reasons may be, when it comes to the fashion industry, most can agree that everybody wins. Designers get the prestige and money they want for their items, while the consumers possess the option to decide what they want to pay for such items, depending upon which brand they choose to purchase from. These brands can range from the large expensive brands such as Christian Louboutin, and Dolce & Gabbana, to the low budget store, Forever 21.

However, most designers don't feel the same. They want to be awarded and recognized for their art, just like any other artist in any other creative industry would be recognized. This is especially true for new, rising artists that are still trying to become a household name.

New designers that are just starting up their company may create a design that can be copied by a more well-known designer, but because this new designer hasn't made a large profit yet, they most likely would not be able to afford a lawyer to sue for copyright infringement. By allowing for fashion design to be copyrighted, it would protect the new designers, who are trying to break into the fashion industry, from having their ideas stolen by more prestigious fashion designers.

## **B. Proposed Solution**

The passage of a bill allowing fashion designs to be protected by copyright for three years would benefit both fashion designers and consumers. During the three-year period, if other designers duplicated that design they would merely have to pay a fee (dependent upon variable factors relevant to the design) to the designer itself. This would eliminate the requirement of requesting permission from the original designer during the aforementioned three-year period. Once the copyright protection has expired, that design then goes into the public domain, where the design can be freely copied by whoever desires.

Because fashion trends frequently come and go, three years of copyright protection is a significant amount of time for the design to become a popular trend. It is also the same amount of time that the UK gives copyright protection to unregistered designs.<sup>252</sup> This allows for the original designer to profit from both consumers and other designers who are willing to pay to become a part of the trend. Once the three year protection has expired, whoever desires to copy the design, is more than welcomed to, considering that it is likely that the trend has either died out, or is currently on its way out. Whatever copying occurs at this point, will most likely not hurt the profits of the original designer.

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<sup>251</sup> *Id.* at 61.

<sup>252</sup> *Id.*

## DISCRIMINATION AGAINST FASHION DESIGN IN COPYRIGHT

“Flocking” and being “fashionable” are two ideals that drive the fashion industry forward.<sup>253</sup> Copyrighting would make it hard for people in different economic groups to join certain trends, as well as making it difficult for certain designers to become a part of a trend. Failure to copyright said designs leaves room for “flocking” which would assist in the creation of trends and therefore result in an overall increase in the revenue to the fashion industry.<sup>254</sup>

While copying may occur, differentiation still exists within flocking. This means that individuals, while still being part of a trend, try to and stand out from the pack.<sup>255</sup> This leads to creation from copying. Out of copying, which would help enforce a trend by having mass people flock to a single type of item, it would help these designers branch off within a single trend. This branching off would not only give the trend life and help it last longer by making more items and designs under a single theme, it would also help creative minds of designers who don’t have the economic ability to compete with these big names, create their own designs which branch out from the theme of the item.

Although fashion design is an art, and so many innovative designs have rocked the world of fashion, fashion is still mainly a utilitarian function.<sup>256</sup> The public benefits from the options of different fashions they are offered because not everyone has the luxury of purposely participating in fashion solely to make a statement.<sup>257</sup>

Whether someone favors high-end designer labels, or just wants to be fashionably relevant by purchasing a copied item, the purpose of fashion is not just for art, but for function as well. Unless the design can exist separately from the utilitarian part of the item, fashion should not be protected under the current copyright law according to the United States Copyright Act.<sup>258</sup> This proposal should remedy such law.

## VIII. CONCLUSION

Fashion designers should be treated like artists. They should be rewarded for their creativity and receive recognition. Their work should be protected under copyright law just like any other intellectual property. However, because fashion is considered to be a utilitarian function, and because fashion trends come and go so frequently, fashion designers should only be protected for a limited amount of time rather than the typical duration of the creator’s life plus 70 years after the creator’s death. Also, allowing people to use the copyrighted design for a fee paid to the original designer, would still allow new trends to take place. This would benefit the fashion designer, the consumer, and the fashion industry.

The fashion industry is dependent upon the creation of trends and in turn trends are dependent on copying.<sup>259</sup> The majority of the copies in the fashion industry are lower in price than the originals.<sup>260</sup> This breeds competition within the marketplace, giving consumers an

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<sup>253</sup> Hemphill & Suk, *supra* note 5, at 1165.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> MTLR BLOG, *supra* note 47

<sup>257</sup> Montalvo, *supra* note 100.

<sup>258</sup> Copyright Act, 17 U.S.C. § 101 et seq. (2010).

<sup>259</sup> *Why Knockoffs Are Good For The Fashion Industry*, NPR BOOKS (Sept. 10, 2012, 3:28 AM), <http://www.npr.org/2012/09/10/160746195/why-knockoffs-are-good-for-the-fashion-industry>.

<sup>260</sup> *Id.* The materials used for these copies are often of a noticeably lesser quality than that of the originals. *Id.*

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option of prices and a variety of products.<sup>261</sup> Consumers enjoy having several options available when it comes to a specific design, brand name, and price. These consumers make the fashion industry the billion-dollar industry it is today. In addition, allowing copying in the apparel industry allows the industry to grow, which in turn creates jobs.<sup>262</sup> It can also be argued that counterfeit and/or knock-off products are beneficial by bringing more publicity to a fashion designer, resulting in an increase in demands for original products.<sup>263</sup>

Every well-known fashion designer can make a profit through copying, but not every fashion designer can create art. Art can trigger a short-lived trend amongst the masses, or it can create a women's movement the way Chanel's designs have done. By creating a women's movement solely through fashion, would it be fair to not consider Chanel to be an artist? Should she not receive the rewards and recognition as any other artist does? Further, should fashion designers, as a whole, not be rewarded and receive the recognition as artists?

Even now, every designer creates their own versions of the highly and forever fashionable little black dress. After all, it was Gabrielle "Coco" Chanel who asserted, "imitation reflects the highest form of flattery."<sup>264</sup>

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<sup>261</sup> Montalvo, *supra* note 100. This is shown by the financial gains from the fashion industry that haven't been dwindling, but in fact have been booming in the three hundred million dollar range. *Id.*

<sup>262</sup> NPR BOOKS, *supra* note 259.

<sup>263</sup> Fischer *supra* note 85. The counterfeit items bring the look of the original item to a group of people who would usually not invest money into such an item or are unaware of the item to begin with. *Id.*

<sup>264</sup> *Id.*

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