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## FASHION LAW NEEDS CUSTOM TAILORED PROTECTION FOR DESIGNS

*Tina Martin\**

### I. INTRODUCTION

If imitation were truly the sincerest form of flattery, then high-end fashion houses and designers such as Versace, Celine, Gucci, Alexander Wang, and Christian Dior would welcome the praise rather than sue retailers who copy their original designs.<sup>1</sup> In the United States, where the laws provide very few protections for fashion designs, imitation is not a compliment to designers.<sup>2</sup> Fast fashion retailers, in particular, produce garments and fashion items from concept to retail in a fraction of the time that it takes traditional retailers or design houses to do the same.<sup>3</sup> While consumers benefit from the ability to purchase trendy items sooner and at lower price points, the designers lose sales from their original designs, which are copied often before the original becomes available for purchase.<sup>4</sup> Luxury fashion houses are not the only victims of the weak protections provided by the laws of the United States; small independent designers also see their original designs walking down the runway at Fashion Week or advertised on a retailer's website without a license or permission.<sup>5</sup> Unlike large apparel companies,

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1. *See 15 of Nasty Gal's Most Blatant Knockoffs (and Infringements)*, THE FASHION L. (Apr. 20, 2017), <http://www.thefashionlaw.com/home/13-of-nasty-gals-most-blatant-knockoffs>.
2. *See infra* Section II.B.1.
3. *See* Ganit Singh, *Fast Fashion Has Changed the Industry and the Economy*, FOUND. FOR ECON. EDUC. (July 7, 2017), <https://fee.org/articles/fast-fashion-has-changed-the-industry-and-the-economy/>.
4. *See* Helena Pike, *The Copycat Economy*, BUS. OF FASHION (Mar. 14, 2016, 5:30 AM), <https://www.businessoffashion.com/community/voices/discussions/what-is-the-real-cost-of-copycats/fashions-copycat-economy>.
5. *Marc Jacobs' Resort 2017 Collection Was "Not Original" Per New Lawsuit*, THE FASHION L. (Nov. 7, 2017), <http://www.thefashionlaw.com/home/marc-jacobs-resort-2017-collection-was-not-original-per-new-lawsuit> (alleging that "[a] number of the

with vast legal and economic resources, these designers often have very little recourse to prevent the sale of their “knocked off” designs.<sup>6</sup>

This Comment explores the economics of the fashion industry,<sup>7</sup> the current legal protections for fashion design,<sup>8</sup> the connection between the need for greater protection with the growing field of fashion law,<sup>9</sup> and recommends how the law should change.<sup>10</sup>

Part II provides a general overview of the fashion industry: including a brief look at the difference between knockoff and counterfeit fashion designs, the economic impact of the fashion industry, and the product cycle of fashion design from concept to consumer.<sup>11</sup> Part II also briefly discusses how fast fashion has changed the design cycle.<sup>12</sup> Additionally, Part II details the current intellectual property laws and their application to fashion design in the United States.<sup>13</sup> It examines trademark and trade dress law, patent law, and copyright law, and considers the strengths and weaknesses of each form of protection as it relates to fashion design.<sup>14</sup> Finally, Part II compares the general lack of protection under United States copyright laws to the enhanced protections available in Europe, including France, Italy, the United Kingdom, and the European Union.<sup>15</sup>

Part III of this Comment gives an overview of previous legislative attempts to expand copyright protection in the United States to

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featured pins and patches were flagrant, unlawful copies of [their own] popular original pins and patches” originally created by Laser Kitten, LLC, Katie Thierjung, and Wildflower + Co., Inc.; resulting in a lawsuit in a New York federal court (second alteration in original)); *see also* Chavie Lieber, *Beyond Elle Woods: The Rise of Fashion Law*, RACKED (Jan. 15, 2005, 11:00 AM), <https://www.racked.com/2015/1/15/7561277/fashion-law>.

6. *See* Lieber, *supra* note 5. Independent designer Max Wowch discovered his designs were copied by Urban Outfitters and even featured in the film *Pineapple Express* without his knowledge or permission. *Id.* However, lawyers advised that pursuing a claim would not be worthwhile. *Id.*
7. *See infra* Section II.A.
8. *See infra* Section II.B.
9. *See infra* Part IV.
10. *See infra* Section IV.B.
11. *See infra* Section II.A.
12. *See infra* Section II.A.
13. *See infra* Section II.B.1.
14. *See infra* Section II.B.1.
15. *See infra* Section II.B.2.

fashion design.<sup>16</sup> Part III examines each of the proposed bills introduced for this purpose since 2006.<sup>17</sup>

Part IV evaluates the rapidly growing field of fashion law.<sup>18</sup> Part IV also discusses the need for specialized knowledge of current copyright protections and loopholes in dealing with fashion design.<sup>19</sup> This Part reviews the arguments for and against new legislation, and argues that the impact of social media makes new legislation more likely to happen.<sup>20</sup> Finally, Part IV proposes specialized copyright laws applied to fashion by tailoring a shorter term of protection and separate remedies for infringement by amending Title 17 of the United States Code.<sup>21</sup>

## II. BACKGROUND

Almost all expressions of art—including musical, literary, dramatic, and artistic works—enjoy protection under United States copyright laws.<sup>22</sup> This is not the case with fashion design, which has long been considered useful or functional and as a result is not deemed a protectable work under copyright law, unless it can exist as a separate work apart from the design.<sup>23</sup> The problem with excluding clothing because of its functional nature is that while clothing is

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16. *See infra* Part III.

17. *See infra* Part III.

18. *See infra* Section IV.A.

19. *See infra* Section IV.B.

20. *See infra* Section IV.B.

21. *See infra* Section IV.B.

22. Copyright Act of 1976, 17 U.S.C. § 101 (2012); Nia Porter, *Are High-Fashion Copies Actually Legal?*, RACKED (Aug. 18, 2016, 11:02 AM), <https://www.racked.com/2016/8/18/12428004/fast-fashion-copy-sites-legal-knockoff>. Certain exclusions to copyright protection include “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.” 17 U.S.C. § 102(b) (2012).

23. Porter, *supra* note 22; *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1033 (2017) (“A separable design feature must be ‘capable of existing independently’ of the useful article as a separate artistic work that is not itself the useful article.”); *see also* *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985) (describing “conceptual separateness”); *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 992 (2d Cir. 1980) (stating copyright does not apply to “useful articles except to the extent that their designs incorporate artistic features that can be identified separately from the functional elements of the articles”).

functional and necessary, fashion and luxury goods are not.<sup>24</sup> Because fashion design does not benefit from copyright protection, high fashion designers often see their designs knocked-off or copied by retailers and manufacturers.<sup>25</sup> To clarify, a knockoff is significantly different from a counterfeit.<sup>26</sup> With counterfeits, the entire design including the trademark is replicated and sold as the original, usually through back channels.<sup>27</sup> A knockoff, however, is considered legal because the copyist creates an item of his own expression that is substantially similar to the original, but sells it under its own brand or trademark, thereby not palming it off as originating from a source other than that of the designer.<sup>28</sup>

A. *The Business of Fashion*

The global apparel industry currently generates \$1.4 trillion in sales annually.<sup>29</sup> The value of the fashion and apparel industry has consistently grown at a rate of 4.78% since 2011 with no sign of slowing down.<sup>30</sup> The United States alone accounts for close to \$370 billion in annual sales.<sup>31</sup> The fashion industry, which includes retailers, manufacturers, and wholesalers, employs over 1.8 million people in the United States.<sup>32</sup> In New York, a city often regarded as the fashion capital of the United States, the fashion industry generates nearly \$2 billion in annual tax revenue and pays

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24. See Mary Hanbury, *Zara and Forever 21 Have a Dirty Little Secret*, BUS. INSIDER (Mar. 6, 2018, 8:45 AM), <https://www.businessinsider.com/zara-forever-21-fast-fashion-full-of-copycats-2018-3>.

25. Carey Dunne, *More than 40 Artists and Designers Accuse Zara of Plagiarism*, HYPERALLERGIC (July 29, 2016), <https://hyperallergic.com/314625/more-than-40-artists-and-designers-accuse-zara-of-plagiarism/>; see also Michal Addady, *12 Artists Are Accusing Zara of Stealing Their Designs*, FORTUNE (July 20, 2016), <http://fortune.com/2016/07/20/zara-stealing-designs/>.

26. See Porter, *supra* note 22.

27. *Id.*

28. See *id.*

29. Singh, *supra* note 3.

30. *Id.* Analysts currently value the global luxury market at \$985 billion and project this market to grow to \$1.18 trillion by 2020. Eric Randolph, *Fashion Law Is Becoming a Ridiculously Profitable Industry*, BUS. INSIDER (Nov. 17, 2014, 10:06 AM), <http://www.businessinsider.com/afp-law-gets-fashionable-as-labels-learn-to-love-litigation-2014-11>.

31. STAFF OF J. ECON COMM., 114TH CONG., REP. ON THE ECON IMPACT OF THE FASHION INDUSTRY 1 (Comm. Print 2016), [https://www.jec.senate.gov/public/\\_cache/files/03c175b1-4c65-485a-8bd7-220cf15e146b/the-new-economy-of-fashion---joint-economic-committee-final-lp-.pdf](https://www.jec.senate.gov/public/_cache/files/03c175b1-4c65-485a-8bd7-220cf15e146b/the-new-economy-of-fashion---joint-economic-committee-final-lp-.pdf).

32. *Id.*

approximately \$11 billion in wages.<sup>33</sup> New York City is home to over 900 fashion companies and New York Fashion Week, which draws more than 200,000 visitors annually.<sup>34</sup> In addition to this, U.S. based electronic retailers, like Etsy, contribute sales to the fashion industry by allowing new, smaller designers to sell directly to customers.<sup>35</sup> Etsy alone accounted for almost \$2 billion in sales in 2014.<sup>36</sup>

The traditional fashion design process from concept to consumer typically averages fifty-two weeks or more.<sup>37</sup> Because of the long lead-time, designers unveil their collections for the upcoming fall season during a fashion week in February; likewise, collections developed for the following spring season are debuted in September.<sup>38</sup> Fashion week events occur bi-annually in New York, London, Milan, and Paris.<sup>39</sup> Most retailers require six months or more to design and execute new styles before selling to consumers.<sup>40</sup>

Many companies are now transitioning from a production-driven supply chain into a market-driven one, allowing retailers to provide current styles to consumers more quickly.<sup>41</sup> Retailers like H&M and Zara take inspiration and often copy designs from runway shows, competitors, designers, and photos on social media to create knockoff

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33. *Id.* at 2.

34. *Id.* Fashion week is held semi-annually in New York City. *Important Fashion Week Dates*, FASHION WK ONLINE, <http://fashionweekonline.com/fashion-week-dates> (last visited Apr. 5, 2019). One week in February showcases upcoming fall designs and a second week in September showcases spring designs for the upcoming year. *See id.*

35. *See* Jennifer Lonoff Schiff, *Pros and Cons of Selling on Amazon, eBay and Etsy*, CIO (Oct. 20, 2014, 5:45 AM), <https://www.cio.com/article/2836077/e-commerce/pros-and-cons-of-selling-on-amazon-ebay-and-etsy.html>; *The Future of Fashion: From Design to Merchandising, How Tech Is Reshaping the Industry*, CBINSIGHTS (Feb. 27, 2018), <https://www.cbinsights.com/research/fashion-tech-future-trends/>.

36. *See* Morgan Brown, *Etsy [Ideas Inside] The Story of Etsy's Crafty Growth to IPO and a \$2 Billion Valuation*, GROWTHHACKERS, <https://growthhackers.com/growth-studies/etsys-crafty-growth-to-ipo-and-a-2-billion-valuation> (last visited Apr. 5, 2019).

37. MJ Deschamps, *just-style Management Briefing: Fast Fashion Shifts Supply Chain Focus*, JUST-STYLE (July 2, 2012), [https://www.just-style.com/management-briefing/fast-fashion-shifts-supply-chain-focus\\_id114808.aspx](https://www.just-style.com/management-briefing/fast-fashion-shifts-supply-chain-focus_id114808.aspx).

38. Pamela Simmons, *When Do Fashion Seasons Start?*, LEAF TV, <https://www.leaf.tv/articles/when-do-fashion-seasons-start/> (last visited Apr. 5, 2019).

39. *See Important Fashion Week Dates*, *supra* note 34.

40. *See* Hayley Peterson, *How H&M Churns Out New Styles In Just 2 Weeks*, BUS. INSIDER (Sept. 12, 2014, 3:14 PM), <http://www.businessinsider.com/hm-produces-new-fashions-in-two-weeks-2014-9>.

41. Deschamps, *supra* note 37.

items in a fraction of the time.<sup>42</sup> Shorter lead times in production allow fast fashion retailers to produce and sell these items while they are still trendy.<sup>43</sup> The concept of fast fashion challenges the traditional business model by shortening the lead-time even further into a production cycle that can be completed in as little as two weeks and results in market introduction of knocked-off designs, which took the original creator a year or more to conceptualize and develop.<sup>44</sup> The fast fashion model, however, deprives the designer of licensing revenue and exerting control over quality.<sup>45</sup> The knockoff retailer benefits financially and reputationally without the added cost of development.<sup>46</sup>

The often-cyclical fashion life cycle, is comprised of five phases: 1. Introduction of a style; 2. Growth in popularity; 3. Maturity of popularity; 4. Deterioration in popularity; and 5. Dismissal of a style or obsolescence.<sup>47</sup> The introduction of a style typically occurs when high-end designers reveal new designs, which are created in limited quantities and offered for sale at high price points, thereby making these pieces more desirable.<sup>48</sup> Growth in popularity occurs when these styles garner attention, often from the media.<sup>49</sup> The maturity in popularity stage, signals the height of acceptance.<sup>50</sup> When a design reaches this stage, there is enough demand to inspire producers to copy or modify the original design and produce it in mass quantities in order to sell it at a more moderate price point than the original works.<sup>51</sup>

When a style deteriorates in popularity, it is available to the masses and the supply is more than the demand.<sup>52</sup> At this point, consumers are looking for something new, although they may still desire these older styles at a low price.<sup>53</sup> The final stage, dismissal of a style or obsolescence, is the point at which manufacturers cease production of an item because little to no consumer interest remains in the

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42. See Peterson, *supra* note 40; see also Deschamps, *supra* note 37.

43. Deschamps, *supra* note 37.

44. See Peterson, *supra* note 40.

45. See *id.*

46. See Singh, *supra* note 3.

47. *Fashion Cycle!*, GOLDNFIBER, <http://www.goldnfiber.com/2015/01/fashion-cycle.html> (last visited Apr. 5, 2019).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. See *id.*

53. *Id.*

marketplace.<sup>54</sup> The length of any particular fashion cycle varies largely upon consumer demand and is different for every style and trend.<sup>55</sup>

*B. Current Intellectual Property Law Protections in the United States and Europe*

The United States has no laws or regulations that specifically provide for the protection of fashion designs in their entirety.<sup>56</sup> By contrast, France, Italy, the United Kingdom, and the European Union all have laws enacted to protect fashion designs under copyright law.<sup>57</sup> This Section will explore the protections available in the United States, and their application to fashion design, compared with the protections available throughout Europe.

*1. Intellectual Property Protection Under United States Law*

Intellectual property is a term that includes trademarks, patents, and copyrights.<sup>58</sup> Depending on the item, designers may use one or more of these protections to prevent or deter copying of their work.<sup>59</sup>

*a. Trademark Law*

A trademark protects “any word, name, symbol, or device . . . used by a person . . . to identify and distinguish his or her goods” or services from those of another.<sup>60</sup> Trademark law is codified under Title 15 of the United States Code, commonly referred to as the Lanham Act.<sup>61</sup> Trademark protection also exists under the common law and by many state statutes.<sup>62</sup> The Lanham Act was enacted in 1946, though it has been amended several times since its creation.<sup>63</sup>

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54. *Id.*

55. *Id.*

56. See Tedmond Wong, Comment, *To Copy or Not to Copy, That Is the Question: The Game Theory Approach to Protecting Fashion Designs*, 160 U. PA. L. REV. 1139, 1140, 1142 (2012).

57. See *infra* Section II.B.2.

58. CRAIG ALLEN NARD ET AL., *THE LAW OF INTELLECTUAL PROPERTY 2* (4th ed. 2014).

59. See Tyler McCall, *Copyright, Trademark, Patent: Your Go-To Primer for Fashion Intellectual Property Law*, FASHIONISTA (Dec. 16, 2016), <https://fashionista.com/2016/12/fashion-law-patent-copyright-trademark>.

60. 15 U.S.C. § 1127 (2012).

61. *Id.*; see also McCall, *supra* note 59.

62. *Trademark Protection Under State Common Laws*, THE INTELLECTUAL PROP. CTR. (May 23, 2005), <https://theipcenter.com/2005/05/trademark-protection-under-state-common-laws/>.

63. *Id.*



Trademark protection lasts for as long as the mark remains distinctive of goods or services and is in continuous use in commerce; a trademark has no set time limitation.<sup>64</sup> Trademarks serve to protect both the consumer and the mark's owner or licensee.<sup>65</sup> The consumer can "rely [upon a] trademark[] as [an] indicator[] of the qualities or characteristics of [a] good[] or service[]." <sup>66</sup> The use of a trademark also helps to prevent consumer confusion about the goods or services on which the mark is affixed.<sup>67</sup> Mark users benefit from exclusive trademark rights because they can "reap the benefits of their investment in consistent quality and prevent others from diverting customers who intend to buy from the mark owner."<sup>68</sup>

Trademark law serves to protect against a likelihood of confusion in the minds of consumers or dilution of a famous mark.<sup>69</sup> Trademarks may be federally registered, but exclusive rights also attach in the geographic market where a trademark has acquired secondary meaning or is inherently distinctive.<sup>70</sup> Trademark law also includes trade dress, which serves to protect a brand's packaging, as well as parts of an actual product that may or may not be federally registered, but have acquired secondary meaning as a designation of source in the minds of consumers.<sup>71</sup> The red lacquer sole of a Christian Louboutin shoe is an immediate indicator of source because it has acquired secondary meaning in the minds of consumers and as such, is protectable as trade dress.<sup>72</sup> While trademarks can be useful for fashion designers to designate their brand, the limitation is that the trademark only protects a logo, brand name, or other

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64. NARD ET AL., *supra* note 58, at 7; *see also* McCall, *supra* note 59.

65. NARD ET AL., *supra* note 58, at 7.

66. *Id.*

67. *See* McCall, *supra* note 59.

68. NARD ET AL., *supra* note 58, at 7.

69. *Id.* at 7–8. *See generally* Louis Vuitton Malletier S.A. v. Warner Bros. Entm't, Inc., 868 F. Supp. 2d 172 (S.D.N.Y. 2012). Louis Vuitton sought to protect their mark against dilution by alleging that use of a knock-off bag in the movie *The Hangover II* infringed on its trademarks. *Id.*

70. JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION LAW: CASES AND MATERIALS 103 (5th ed. 2013); *see* McCall, *supra* note 59. Secondary meaning exists when a significant number of prospective purchasers understand the term when used in connection with a particular type of good or service or as an indication of association with a particular entity. *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 166, 174 (1995); GINSBURG ET AL., *supra*. The Court held that a single color may be used as a trademark to designate source so long as it is non-functional. *Qualitex Co.*, 514 U.S. at 166, 174.

71. McCall, *supra* note 59.

72. *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 228 (2d Cir. 2012).

nonfunctional identifying feature that is inherently distinctive or has acquired secondary meaning, not an entire garment or garment design.<sup>73</sup>

*b. Patent Law*

Patent law extends to inventions or discoveries of “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof . . . .”<sup>74</sup> To qualify for patent protection, an invention must be useful, novel, and nonobvious.<sup>75</sup> Patent protection typically lasts for twenty years after the date of filing.<sup>76</sup> There are three types of patents: utility, design, and plant.<sup>77</sup>

Historically, it is challenging to obtain patent protection in most categories of fashion.<sup>78</sup> Some sectors of the apparel industry, such as footwear and lingerie, regularly benefit from the use of utility patents due to the innovative, functional, and mechanical nature of these items.<sup>79</sup>

While some designers have filed for and received utility patents, there is now a growing trend for designers to utilize design patents, which extend protection to “new, original, and ornamental design for an article of manufacture.”<sup>80</sup> This protection is especially useful in fashion because it protects the appearance of a functional item, like the hardware on a handbag.<sup>81</sup> It also gives the owner the right to prevent others from manufacturing, selling, or using a product that resembles the patented product such that an “ordinary observer” might believe the infringing article was the patented product.<sup>82</sup> A design patent provides the owner with fourteen years of exclusive

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73. *Id.*; *Qualitex*, 514 U.S. at 166, 172; McCall, *supra* note 59. Examples of famous trademarks include the Chanel double *C* logo and the Louis Vuitton *LV* logo. See *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 116 (2d Cir. 2006); *Chanel Victorious in Its Latest Trademark Battle*, THE FASHION L. (July 18, 2017), <http://www.thefashionlaw.com/home/chanel-victorious-in-its-latest-trademark-battle>.

74. 35 U.S.C. § 101 (2012).

75. NARD ET AL., *supra* note 58 at 2.

76. *Id.*

77. *Id.* at 21.

78. See McCall, *supra* note 59.

79. See *id.*

80. *Currently Trending in Fashion: Design Patents*, THE FASHION L. (June 23, 2016), <http://www.thefashionlaw.com/home/currently-trending-in-fashion-design-patents> [hereinafter *Currently Trending*].

81. See *id.*; McCall, *supra* note 59.

82. *Currently Trending*, *supra* note 80.

design rights.<sup>83</sup> However, much like a copyright or trademark, a patent does not protect the entire design of a garment.<sup>84</sup> The main pitfall for apparel companies that utilize either utility or design patents is that they are costly to obtain and can take anywhere from ten months up to two years to issue.<sup>85</sup> Because fashion is a seasonal industry, typically by the time a patent issues, unless the item is a staple, the design will no longer be relevant or may possibly have already been knocked-off.<sup>86</sup>

*c. Copyright Law*

United States copyright law, codified in the Copyright Revision Act of 1976, protects an author's original expression of an idea fixed in a tangible medium.<sup>87</sup> To be eligible for copyright, the work must be original and possess a minimal degree of creativity.<sup>88</sup> As defined by the Supreme Court, original means "that the work was independently created by the author (as opposed to copied from other works) . . . ."<sup>89</sup> The term of copyright for an original work (not a work made for hire) is the life of the author plus seventy years.<sup>90</sup> While federal registration for copyright is recommended, rights attach automatically upon fixation of an original work in a tangible medium.<sup>91</sup> Functional items, such as belt buckles, zippers, or entire garments are not eligible for copyright protection.<sup>92</sup> In fashion, jewelry benefits from copyright law because it is similar to a sculpture, which is protected as art under the United States Code.<sup>93</sup>

Certain two-dimensional elements of a garment's design, such as the print on a fabric, jacquard weaves, and lace patterns on an item,

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83. Oliver Herzfeld, *Protecting Fashion Designs*, FORBES (Jan. 3, 2013, 9:14 AM), <https://www.forbes.com/sites/oliverherzfeld/2013/01/03/protecting-fashion-designs/#6d964abcb317>.

84. See Pike, *supra* note 4.

85. See McCall, *supra* note 59; Herzfeld, *supra* note 83. Design patents can be obtained in approximately ten to twelve months. Herzfeld, *supra* note 83. A utility patent can cost up to \$10,000, requires the use of a patent attorney, and can take up to two years to issue. McCall, *supra* note 59.

86. See *Currently Trending*, *supra* note 80; McCall, *supra* note 59. Most clothing debuted on a runway will be obsolete in six months to a year. Porter, *supra* note 22 ("Unless the article is going to last for a few seasons, it's just a waste of your time.").

87. NARD ET AL., *supra* note 58, at 5, 435.

88. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); NARD ET AL., *supra* note 58, at 435, 454.

89. *Feist Publ'ns*, 499 U.S. at 345.

90. NARD ET AL., *supra* note 58, at 5.

91. *Id.* at 435, 521.

92. See McCall, *supra* note 59.

93. See 17 U.S.C. 102(a)(5) (2012); McCall, *supra* note 59.

are also protectable.<sup>94</sup> While copyright extends to pictorial, graphic, or sculptural works, the design of a useful article may only be considered as such, “if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”<sup>95</sup>

In a 2017 Supreme Court decision impacting the fashion industry, the Court held that two- or three-dimensional surface decorations that are separable from a garment are protectable under copyright law.<sup>96</sup> Although the Court did not determine whether surface decorations are copyrightable, it did set forth a test in which to determine the protectability of creative elements on useful articles.<sup>97</sup> The test the Court set forth explains that

[A] feature incorporated into the design of a useful article is eligible for copyright protection only 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 fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.”<sup>98</sup>

Though designers now have some protection for textiles and separable elements, the entire garment design remains unprotectable through copyright.<sup>99</sup>

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94. See Jenna Sauers, *How Forever 21 Keeps Getting Away with Designer Knockoffs*, JEZEBEL (July 20, 2011, 4:20 PM), <https://jezebel.com/5822762/how-forever-21-keeps-getting-away-with-designer-knockoffs>; McCall, *supra* note 59.

95. 17 U.S.C. § 101 (2012); see *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1016 (2017) (holding that certain two- or three-dimensional designs on a cheerleading uniform were copyrightable because the elements were conceptually separable).

96. *Star Athletica*, 137 S. Ct. at 1016; *The Year in Law: 10 of the Biggest Lawsuits of 2016 and Where They Stand Now*, THE FASHION L. (Feb. 1, 2017), <http://www.the-fashionlaw.com/home/fashion-law-in-2016-this-years-top-10-lawsuits>.

97. *Star Athletica*, 137 S. Ct. at 1012 n.1, 1016.

98. *Id.* at 1007; *Supreme Court Sounds Off on Copyright in Cheerleading Uniform*, THE FASHION L. (March 22, 2017), <http://www.the-fashionlaw.com/home/supreme-court-says-cheerleader-uniform-is-protectable-by-copyright-law>.

99. Sauers, *supra* note 94.

## 2. Intellectual Property Protection in Europe

Unlike the limited and patchwork protections available to clothing designs under the laws of the United States, fashion design enjoys much stronger legal protection within France, Italy, The United Kingdom, and The European Union.<sup>100</sup>

### a. France

France arguably provides the strongest protections for fashion design; ornamental designs of useful articles and industrial designs are protected under French copyright law.<sup>101</sup> An ornamental design is defined as the visual appearance of a design used on a product.<sup>102</sup> “Industrial works of applied art include in particular all types of intellectual creations that have a utilitarian or commercial purpose such as designs of . . . shoes, clothing, . . . jewelry, . . . or any other original object, provided that its form is not exclusively dictated by its function.”<sup>103</sup> Fashion is considered “wearable art” as opposed to being viewed as purely utilitarian.<sup>104</sup> Under French copyright law, protection extends to garments and accessories.<sup>105</sup> The term of “copyright” protection in France is the life of the author plus fifty years.<sup>106</sup>

Similar to United States copyright law, registration is not required for a French designer to enjoy copyright protection because it “attaches upon creation,”<sup>107</sup> regardless of whether the design is registered.<sup>108</sup> Remedies for infringement include damages and

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100. Wong, *supra* note 56 at 1142, 1148–49.

101. *Copyright in France*, CASALONGA, <http://www.casalonga.com/documentation/Copyright/copyright-in-france-230/?lang=en> (last visited Apr. 5, 2019); *see* Wong, *supra* note 56, at 1149 (“France arguably provides the most comprehensive protection and has quashed the practice of copying in the fashion industry by explicitly providing copyright protection to fashion.”).

102. *Ornamental Design: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/ornamental-design> (last visited Apr. 5, 2019) (stating that a “unique embossed pattern on a baby wipe” could be an ornamental design).

103. *Copyright in France*, *supra* note 101.

104. Dianna Michelle Martinez, Note, *Fashionably Late: Why the United States Should Copy France and Italy to Reduce Counterfeiting*, 32 B.U. INT’L L.J. 509, 524 (2014).

105. *How Do So Many Fast Fashion Retailers Get Away Copying High Fashion Brands?*, THE FASHION L. (Aug. 4, 2017), <http://www.thefashionlaw.com/home/how-do-fast-fashion-retailers-get-away-copying-high-fashion-brands> [hereinafter *How Do So Many*].

106. *France: Legal Protections for Fashion*, THE FASHION L. (Oct. 3, 2016), <http://www.thefashionlaw.com/learn/legal-protections-for-fashion-in-france>.

107. Wong, *supra* note 56, at 1149.

108. *France: Legal Protections for Fashion*, *supra* note 106.

“infringement seizure,” which requires the courts, at the request of the author, to seize copies of an unlawful reproduction at the request of the author.<sup>109</sup> The major limitation in France is that these protections do not apply “to foreigners who do not reside in France or in the European Union or who did not publish their work for the first time in France . . . .”<sup>110</sup> Much like France, Italy also enjoys strong copyright protection for fashion designs by extending protection to accessories and garments.<sup>111</sup>

*b. The United Kingdom*

The United Kingdom also provides copyright protection to registered and unregistered designs.<sup>112</sup> A registered design right provides “total right of ownership to the appearance of a product or part of a product.”<sup>113</sup> Designers enjoy an exclusive right of use for five years, which can be extended for up to twenty-five years.<sup>114</sup> A design is eligible for protection if it is novel, which means “it must not be identical to a design which has already been made available to the public . . . .”<sup>115</sup> It must also possess individual character, meaning that “the overall impression that [the design] produces must be different from [that of] any other design which has been made available to the public.”<sup>116</sup> The look of the design includes its appearance, physical shape, configuration, and decoration.<sup>117</sup> The unregistered design right only protects against copying and does not confer a total right of design ownership to the owner, meaning that the designer does not enjoy exclusive use rights as with registered designs.<sup>118</sup> Civil remedies in the UK include interlocutory relief, final relief, injunctions against intermediaries, and damages or account of profits.<sup>119</sup>

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109. Wong, *supra* note 56, at 1149–50.

110. *Copyright in France*, *supra* note 101.

111. *See* Martinez, *supra* note 104, at 526–27; *How Do So Many*, *supra* note 105.

112. Wong, *supra* note 56, at 1150.

113. *Id.*

114. *Id.*; *see also Register a Design*, GOV.UK, <https://www.gov.uk/register-a-design> (last visited Apr. 5, 2019).

115. Wong, *supra* note 56, at 1150 (citation omitted).

116. *Id.* (alterations in original) (citation omitted).

117. *Register a Design*, *supra* note 114.

118. *See id.*

119. PRACTICAL LAW IP & IT ET AL., *Civil Remedies*, in COPYRIGHT: INFRINGEMENT AND REMEDIES, PRACTICAL LAW UK PRACTICE NOTE (2019), Westlaw 5-583-8826.

c. *The European Union*

The European Directive (Directive), adopted by the European Council in 1998, created standards for the eligibility and protection of registered designs and suggested that member states organize their laws in accordance with these standards.<sup>120</sup> The Directive defined a design as “the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation . . . .”<sup>121</sup> Similar to the protections provided for design in the UK, designs are eligible for protection if they are novel<sup>122</sup> and have individual character.<sup>123</sup> Exclusive rights to produce, manufacture, or otherwise distribute, are granted to the owner of a registered design for a term of five years; the registration is renewable up to twenty-five years from the date of filing.<sup>124</sup>

Following the adoption of the Directive, the European Council adopted the Council Regulation on Community Designs.<sup>125</sup> This Regulation was adopted in order to prevent conflicts “in the course of trade between member states.”<sup>126</sup> This regulation provides protection for both “registered Community designs” and “unregistered Community design[s] . . . .”<sup>127</sup> The protections to Community designs are applied uniformly to all EU member states.<sup>128</sup> Under the new Regulation, the definition of a design is the same as the definition set forth in the Directive.<sup>129</sup> Unregistered Community designs are protected for a “period of three years as from the date on which the design was first made available to the public within the Community.”<sup>130</sup> Registered Community designs are protected for a term of five years from the date of filing with the option to renew for up twenty-five years.<sup>131</sup>

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120. See Council Directive 98/71, 1998 O.J. (L 289) 28 (EC).

121. *Id.* art. 1(a).

122. See *id.* art. 4.

123. See *id.* art. 5.

124. See *id.* art. 10; at. 12.

125. See Council Regulation 6/2002, 2002 O.J. (L 3) 5 (EC); Laura Fanelli, Note, *A Fashion Forward Approach to Design Protection*, 85 ST. JOHN'S L. REV. 285, 302 (2011).

126. Fanelli, *supra* note 125, at 302.

127. *Id.* at 302.

128. See Council Regulation 6/2002, *supra* note 125, art. 1.

129. See *id.* art. 3; Fanelli, *supra* note 125, at 302.

130. Council Regulation 6/2002, *supra* note 125, art. 11.

131. *Id.* art 12.

### III. PREVIOUS ATTEMPTS TO STRENGTHEN PROTECTIONS IN THE UNITED STATES

Since at least 1913, designers have sought amendment to the Copyright Act, extending protections to fashion designs.<sup>132</sup> This attempt was included in the Vestal Bill, which passed in the House of Representatives, but failed in the Senate.<sup>133</sup> In 1932, clothing manufactures founded the Fashion Originators' Guild of America.<sup>134</sup> In an attempt to protect their designs, members of the Guild agreed to sell exclusively to specific retailers who in turn agreed to restrict their purchase orders to the original designs.<sup>135</sup> This attempt at protection failed, however, when the Supreme Court ruled in *Fashion Originators' Guild of America, Inc. v. Fed. Trade Comm'n* that the Guild served to form monopolies, would stifle competition in the marketplace, and violated antitrust laws.<sup>136</sup>

#### A. *Design Piracy Prohibition Act (2006)*

In 2006, the Design Piracy Prohibition Act was introduced in the House of Representatives.<sup>137</sup> The bill aimed to extend copyright protection to fashion design.<sup>138</sup> The term copyright protection for fashion design was three years.<sup>139</sup> The bill clarified that it was not infringement to make, import, sell, or distribute any article that embodied a design created without knowledge that the design already existed or belonged to another, and was copied from a protected design.<sup>140</sup> Finally, the proposed bill would have allowed recovery of

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132. Katherine M. Olson, Note, *The Innovative Design Protection and Piracy Prevention Act: Re-fashioning U.S. Intellectual Property Law*, 61 DEPAUL L. REV. 725, 730 (2012).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*; *Fashion Originators' Guild of Am., Inc. v. Fed. Trade Comm'n*, 312 U.S. 457, 467–68 (1941).

137. Design Piracy Prohibition Act, H.R. 5055, 109th Cong. (2006).

138. *Id.* Virginia Representative Robert Goodlatte introduced the Design Piracy Prohibition Act into the House. *Copyright Legislation for Fashion Designs (Proposed)*, THE FASHION L. (Oct. 7, 2016), <http://www.thefashionlaw.com/learn/proposed-copyright-legislation-for-fashion-designs>.

139. *Id.* § 1(c).

140. *Id.* § 1(d)(1).



increased damages awarded for infringement of original designs.<sup>141</sup> The bill never came to a vote as it stalled in committee.<sup>142</sup>

*B. Design Piracy Prohibition Act (2009)*

After many revisions, a modified version of the failed 2006 Act was re-introduced in the House of Representatives in 2009.<sup>143</sup> This version proposed to extend copyright to fashion designs, including clothing, handbags, duffel bags, and eyeglass frames.<sup>144</sup> Under this 2009 version, designs “embodied in a useful article that was made public by the designer . . . more than 6 months before the date of the [copyright] application for registration” were excluded from protections.<sup>145</sup> Similar to the 2006 effort, the proposed term for copyright was set at three years.<sup>146</sup> The 2009 bill provided that a fashion design is not “copied from a protected design if it is original and not closely and substantially similar in overall visual appearance to a protected design, if it merely reflects a trend, or if it is the result of independent creation.”<sup>147</sup> Part of the proposed bill also expanded increased allowable damages to include false representation in addition to infringement of original designs.<sup>148</sup> The Design Piracy Prohibition Act did not generate any action in Congress and failed to become law.<sup>149</sup>

*C. Innovative Design Prevention and Piracy Prohibition Act (2010)*

In 2010, Senator Charles Schumer of New York introduced the Innovative Design Prevention and Piracy Prohibition Act (IDPPPA) in the Senate.<sup>150</sup> Like previous attempts, the IDPPPA aimed to amend Title 17 of the United States Code and extend copyright protection to fashion design.<sup>151</sup> The IDPPPA defined “apparel” as articles including clothing, handbags, purses, wallets, tote bags, belts,

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141. See Fanelli, *supra* note 125, at 296.

142. See Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009). This Act was introduced by Representative William Delahunt of Massachusetts. *Id.*

143. *Id.* § 2(a)(2)(B).

144. *Id.* § 2(b)(3).

145. *Id.* § 2(d).

146. *Id.* § 2(e)(2).

147. *Id.*

148. *Id.* §§ 2(g)–(h).

149. See Kaitlyn N. Pytlak, *The Devil Wears Fraud-a: An Aristotelian-Randian Approach to Intellectual Property Law in the Fashion Industry*, 15 VA. SPORTS & ENT. L.J. 273, 278 (2016).

150. Innovative Design Prevention and Piracy Prohibition Act, S. 3728, 111th Cong. (2010).

151. *Id.*; Pytlak, *supra* note 149, at 278.

and eyeglass frames.<sup>152</sup> Similar to the previous bills, the term of copyright was set at three years.<sup>153</sup> The bill expanded the definition of “fashion design” to include original elements of the article of apparel that “are the result of a designer’s own creative endeavor; and . . . provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.”<sup>154</sup> The IDPPPA revised the provision regarding acting without knowledge from the Design Piracy Prohibition Act to state that it does not constitute infringement to make, import, sell, advertise, or distribute “any article embodying a design which was created without knowledge that a design was protected and was copied from such protected design.”<sup>155</sup> Schumer’s proposed bill also addressed the remedy for infringement of a fashion design providing, “the owner of the design is entitled to institute an action for any infringement of the design after the design is made public . . . .”<sup>156</sup> Finally, the bill set forth pleading requirements for an action of fashion design infringement and increased the penalty for false representation.<sup>157</sup> The IDPPPA set a higher standard for proving infringement by requiring that an item be “substantially identical in overall visual appearance to and as to the original elements of a protected design . . . .”<sup>158</sup> Like the previous two efforts, this bill also failed to generate any action and did not move forward.<sup>159</sup>

#### D. *Innovative Design Protection Act (2012)*

The Innovative Design Protection Act (IDPA), introduced by Senator Charles Schumer, was the most recent attempt to amend Title 17 of the United States Code to extend copyright protection to fashion designs.<sup>160</sup> Like the IDPPPA, copyright term was set for three years, and the IDPA included the same definition of a “useful

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152. S. 3728 § 2(a)(1).

153. *Id.* § 2(d).

154. *Id.* § 2(a)(1).

155. 17 U.S.C. § 1309(c) (2006). Knowledge may be “either actual or reasonably inferred from the totality of the circumstances.” S. 3728 § 2(e)(1)(B).

156. S. 3728 § 2(g)(1).

157. *Id.* §§ 2(g)(2)–(h).

158. *See* Fanelli, *supra* note 125, at 305. *Compare id.* § 2(e)(2), with 17 U.S.C. § 1309(e) (2006) (stating that a design may be deemed a copy if it is “substantially similar” to the original).

159. *See* Fanelli, *supra* note 125, at 304; *see also* S.3728 - *Innovative Design Protection and Piracy Protection Act; 111th Congress (2009-2010)*, CONGRESS, <https://www.congress.gov/bill/111th-congress/senate-bill/3728/all-actions> (last visited Apr. 5, 2019).

160. Innovative Design Protection Act, S. 3523, 112th Cong. (2012).

article” and the expanded definition of fashion design from the 2010 bill.<sup>161</sup> Excluded from protection in the IDPA are “design[s] embodied in a useful article that was made public by the designer or owner . . . more than [three] years before the date upon which protection of the design is asserted . . . .”<sup>162</sup> The IDPA modified the infringement criteria with respect to sellers, importers, retailers, and distributors of an infringing design who did not make the article.<sup>163</sup> The IDPA would have prohibited “deem[ing] [a fashion design] to have been copied from a protected design if that design—(A) is not substantially identical in overall visual appearance to and as to the original elements of a protected design; or (B) is the result of independent creation.”<sup>164</sup> The remedy for infringement was also rewritten to state that “[i]n the case of a fashion design, the owner of design is entitled to institute an action for any infringement of the design after—(A) the design is made public under the terms of section 1310(b) of this chapter; and (B) the 21-day [notice] period” provided in the Act.<sup>165</sup> The IDPA was a promising improvement for fashion designers; however, it too stalled in committee.<sup>166</sup>

#### IV. INADEQUATE PROTECTION IN THE UNITED STATES HAS LED TO THE GROWTH OF FASHION LAW

The lack of cohesive regulations governing the protection of fashion design has resulted in a substantial increase in lawsuits over intellectual property rights involving many fashion and apparel companies.<sup>167</sup> Although no new legislation has been passed to address this problem, growth of the fashion law sector may be influential in changing government policy.<sup>168</sup> The increase in “design piracy and copycat litigation” is fueling the need for fashion-specific legal services.<sup>169</sup>

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161. Compare *id.* §§ 2(a)(1), (b)(3), 2(d), with S. 3728 §§ 2(a)(2)(B), (b)(3), (d).

162. S. 3523 § 2(b)(3).

163. *Id.* § 2(f)(1)(A).

164. *Id.* § 2(f)(5).

165. *Id.* § 2(h)(1).

166. See Pytlak, *supra* note 149, at 279.

167. See Richard L. Hermann, *Law . . . After Fashion*, LEGAL CAREER VIEW (Dec. 1, 2017), <http://legalcareerview.com/lawafter-a-fashion/>.

168. Lieber, *supra* note 5.

169. Sally Kane, *An Overview of Fashion Law*, BALANCE CAREERS, <https://www.thebalance.com/fashion-law-2164606> (last updated Nov. 16, 2018).

A. *Fashion Law on the Rise*

As early as 2008, Fordham Law School began offering a course in fashion law.<sup>170</sup> In 2010, Fordham created the first Fashion Law Institute, which offers an LLM in fashion law as well as a two-week intensive Fashion Law “Bootcamp.”<sup>171</sup> Following the growing need for expertise in fashion law, other law schools have started offering coursework and programs dedicated to this niche area.<sup>172</sup> Part of the impetus to create the Fashion Law Institute is that it became apparent to the director, Susan Scafidi, that “there were questions about the fashion industry that no one was trained to answer . . . .”<sup>173</sup> Although companies have in-house counsel, “they aren’t specialized in fashion.”<sup>174</sup> It is a waste of time and money for companies to have to educate a lawyer about the way their business works in order for the lawyer to be effective.<sup>175</sup> Even local bar associations have seen the growing need for expertise in fashion law and established committees to foster growth in this practice area.<sup>176</sup> Entering its fifth year, the Federal Bar Association hosts an annual Fashion Law Conference in New York City, which tackles issues such as enforcement against financial crimes, bankruptcy, wearable technology, licensing, etc.<sup>177</sup>

Brittany Rawlings, who owns her own firm focusing solely on the practice of fashion law, began her career at an entertainment law

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170. Obi Anyanwu, *Fordham University Announces First Fashion Law Degree Program*, FASHION NETWORK (June 24, 2015), <https://ww.fashionnetwork.com/news/Fordham-University-announces-first-fashion-law-degree-program,543051.html#.XGB14S2ZNQI>.

171. Hermann, *supra* note 167; *see Fashion Law*, FORDHAM U., [https://www.fordham.edu/info/23599/fashion\\_law](https://www.fordham.edu/info/23599/fashion_law) (last visited Apr. 5, 2019).

172. *See* Hermann, *supra* note 167. Schools offering fashion law education include: Cardozo Law School, New York Law School, and Loyola (Los Angeles) Law School. *Id.* Brooklyn Law School and SUNY’s Fashion Institute of Technology also now offer courses focused on fashion law. *Fashioning a Lucrative Legal Specialty*, CRAIN’S N.Y. BUS. (Nov. 3, 2013, 12:00 AM), [http://www.craigslist.com/article/20131103/PROFESSIONAL\\_SERVICES/311039999/fashioning-a-lucrative-legal-specialty](http://www.craigslist.com/article/20131103/PROFESSIONAL_SERVICES/311039999/fashioning-a-lucrative-legal-specialty).

173. *See* Lieber, *supra* note 5.

174. *Id.*

175. *Id.*

176. *See* Hermann, *supra* note 167 (“The New York City Bar Association established a Fashion Law Committee in 2011, and the New York County Lawyer’s Association has a Fashion Law Subcommittee. The Florida Bar also has a Fashion Law Committee.”).

177. *5th Annual Fashion Law Conference*, FED. B. ASS’N, [http://www.fedbar.org/Image-Library/Events/2018-Fashion-Law-Seminar\\_1/2018-Fashion-Law-E-Brochure.aspx?FT=.pdf](http://www.fedbar.org/Image-Library/Events/2018-Fashion-Law-Seminar_1/2018-Fashion-Law-E-Brochure.aspx?FT=.pdf) (last visited Apr. 5, 2019).

firm.<sup>178</sup> Most law firms lump fashion into the same category as entertainment or music, but fashion is a distinct kind of intellectual property.<sup>179</sup> “There are general parts to the business . . . that are the same, but there are also idiosyncrasies in fashion. There need[s] to be a niche for this.”<sup>180</sup> Many large firms are beginning to develop fashion law practices or subspecialties.<sup>181</sup> Similarly, many “boutique” firms are being established to focus solely on fashion law.<sup>182</sup> “A fashion lawyer can understand, empathize with, and act on behalf of clients in a technical and specialized industry. They understand all the quirky details.”<sup>183</sup>

*B. The Need for Fashion Design Protection Is Evidenced by the Growth of Fashion Law*

This growing need for professionals with specialized knowledge regarding navigating through the United States weak intellectual property protections clearly demonstrates the value of fashion design in the economy and the need for reform.<sup>184</sup> Neither copyright, nor trademark, nor patent law appropriately protects fashion design.<sup>185</sup> Currently, copyright law applies only to pieces of a garment and the protection term (for works created after 1978) of life of the author plus seventy years, which is entirely too long for the fast-paced fashion industry and would certainly stifle creativity.<sup>186</sup> Trademarks, while useful for branding or as an indicator of source, only protect certain aspects of a garment, not the entire design.<sup>187</sup> Patents, whether utility or design, are helpful for useful designs or long-term

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178. See Lieber, *supra* note 5.

179. *Id.*

180. *Id.*

181. See Hermann, *supra* note 167. Rawlings’ law firm is the first to focus solely on fashion law. See Lieber, *supra* note 5. The law firm of Mitchell Silberg & Knupp began a fashion-industry practice group in 2012. See *Fashioning a Lucrative Legal Specialty*, *supra* note 172.

182. Hermann, *supra* note 167.

183. See Lieber, *supra* note 5 (quoting Susan Scafidi).

184. *See id.*

185. Erika Myers, *Justice in Fashion: Cheap Chic and the Intellectual Property Equilibrium in the United Kingdom and the United States*, 37 *AIPLA Q. J.*, 47, 59–60 (2009) (discussing the inadequacy of intellectual property laws as applied to fashion).

186. CIRCULAR 15A: DURATION OF COPYRIGHT, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ15a.pdf> (last visited Apr. 5, 2019); see also Porter, *supra* note 22. “Trends are forgotten in six months, are recycled two years later, and the world moves on.” *Id.*

187. See Myers, *supra* note 185, at 60.

staple items, but the cost and time to obtain patent protection works sparsely for designers.<sup>188</sup>

The argument against increased protections for fashion design is that the fashion industry actually benefits from copycats.<sup>189</sup> According to what is called the “Piracy Paradox,” fashion trickles down.<sup>190</sup> Original designs shown on the runway are often expensive luxury items, which create a desire in consumers to own these items.<sup>191</sup> These consumers, referred to as early adopters and trendsetters wear these designs, which in turn inspire copies and signals that this will be a trend in the market.<sup>192</sup> The availability of copies then leads retailers and manufacturers to create similar items to be made available to the masses at lower price points.<sup>193</sup> Once a design becomes popular with the masses, designers and trendsetters abandon these styles, as they are no longer exclusive or desirable.<sup>194</sup> From this, new designs are born and cycle through the market in much the same way.<sup>195</sup>

Due to the expansive use of technology, this argument, while once valid is now quite outdated.<sup>196</sup> Copyists no longer have to sketch designs and send them to a distant factory for production; anyone can access images of the latest designs almost immediately after the design is introduced on a runway.<sup>197</sup> Because fashion houses show their designs long before they are available for sale, fast fashion retailers can often re-create the designs, manufacture, and sell their imitations before the original design has even been available for sale.<sup>198</sup> Designers no longer benefit from a first-to-market advantage.<sup>199</sup> Contrary to the Piracy Paradox, “[t]here’s no time for

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188. *Id.* at 59.

189. See Pike, *supra* note 4; see generally Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006) (stating that despite ongoing copying, fashion firms continue to innovate at a rapid pace).

190. See Raustiala & Sprigman, *supra* note 189, at 1693–94; see also Pike, *supra* note 4.

191. See Raustiala & Sprigman, *supra* note 189, at 1719–22; see also Pike, *supra* note 4.

192. See Raustiala & Sprigman, *supra* note 189, at 1719–22; see also Pike, *supra* note 4.

193. See Raustiala & Sprigman, *supra* note 189, at 1718–22, 1724.

194. *Id.* at 1719–20.

195. See *id.* at 1722.

196. See Pike, *supra* note 4.

197. *Id.*

198. *Id.*

199. *Id.*

trendsetters to adopt the item and for people to pay the designers for the original work . . . .”<sup>200</sup>

From the last legislative attempt to amend Title 17 in 2012 to now, the most significant change in the market is the use of social media.<sup>201</sup> Celebrities and media influencers often post themselves wearing the latest designs, which are then immediately available to consumers and copyists alike.<sup>202</sup> In some instances the designers themselves haven taken to social media to call-out imitators.<sup>203</sup> Previous legislative attempts have failed, however, we are now in an age where the problem can clearly be seen through social media platforms.<sup>204</sup> Without useful protection under copyright law, rampant copying in fashion will likely continue.<sup>205</sup>

Title 17 of the United States Code should be amended to extend copyright protection to fashion design with some distinctions from other protected works. This amendment must deal with the nuances of the fashion design industry and include a separate format for remedies. Remedies should include injunctive relief and damages or infringing profits. The code was amended in 1990 to include architectural works, allowing the “[p]rotection [to] extend[] to the overall form[,] . . . arrangement and composition of spaces, and elements in the design . . . .”<sup>206</sup> Fashion design, much like architecture, is not dictated completely by function, which allows the designer to display his or her particular talent, skill, and style.<sup>207</sup> The previously proposed bills were a good starting point for expanding copyright law; however, in an industry where styles change with the season, exclusive protection for three years may be too long.<sup>208</sup> There is truth to the notion of the piracy paradox, but that system

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200. *Id.*

201. See *Social Media Fact Sheet*, PEW RESEARCH CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/>.

202. See *Kim Kardashian Slams Fashion Nova for Ripping Off All Her Outfits for Fast Fashion*, CAPITAL FM, <https://www.capitalfm.com/news/celebrity/kardashian/kim-slams-fashion-nova-rip-off-designs/> (last updated Feb. 20, 2019, 3:44 PM).

203. *Id.*

204. Jessica Schiffer, *Inside the Complex World of Copying in the Fashion Industry*, WHO WHAT WEAR (Oct. 14, 2015), <http://www.whowhatwear.com/copying-in-the-fashion-industry-copyright-the-fashion-law-julie-zerbo/slide4>.

205. See *id.*

206. CIRCULAR 41: COPYRIGHT CLAIMS IN ARCHITECTURAL WORKS, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ41.pdf> (last visited Apr. 5, 2019).

207. See *id.* “Protection . . . does not include individual standard features or design elements that are functionally required.” *Id.*

208. See *Why Is “Copying” So Rampant in Fashion?*, THE FASHION L. (Aug. 28, 2018), <http://www.thefashionlaw.com/home/why-is-copying-so-rampant-in-fashion>.

only serves to promote creativity in the market when original designers benefit from being first-to-market and early adopters and trendsetters have the ability to purchase these designs and solidify these trends.<sup>209</sup> By shortening the term of protection and exclusive use to one year, designers could rest assured that they would be able to show their creations on the runway and sell the items before fast fashion retailers copy their designs.<sup>210</sup> Although some critics believe that providing exclusive design rights would stifle creativity, by providing adequate protection to original designs for one year, it would foster creativity by requiring would-be copyists to produce original designs of their own.<sup>211</sup>

## V. CONCLUSION

The current intellectual property protections, as applied to fashion design in the United States, are inadequate.<sup>212</sup> Trademark, patent, and copyright law today provide designers with patchwork protections that ultimately serve to only protect a portion of their design.<sup>213</sup> This environment breeds a marketplace of knockoff designs where the first to market reaps the benefits of another designer's creative efforts.<sup>214</sup> The advent of the niche practice area for fashion law demonstrates the value of fashion design in the economy and the complexities of intellectual property protections, which require specialized knowledge to effectively protect and enforce designers' rights.<sup>215</sup> By amending copyright law to include fashion design, creative minds will be free to focus on design rather than continuing to fear copycat designers.

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209. See Raustiala & Sprigman, *supra* note 189, at 1691.

210. See Fanelli, *supra* note 125, at 292–93.

211. *Id.* at 294–95.

212. See *supra* Section II.B.1.

213. See *supra* Section II.B.1.

214. See *supra* notes 4–5 and accompanying text.

215. See *supra* Section IV.A.