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# FASHION POLICE: INTELLECTUAL PROPERTY IN THE FASHION INDUSTRY

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Property, Law and Society AWR

Professor Marc Poirier

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## I. Introduction

In his 1820 novel, *Lacon, or Many Things in Few Words, addressed to those who think*, Charles Caleb Colton famously opined: “Imitation is the sincerest of flattery.”<sup>1</sup> Though this phrase is now a universally recognized idiom, imitation, in intellectual property (“IP”) law, as flattering as it may be, is usually also illegal. Intellectual property law is fundamentally intertwined with economic ideas of ownership and control, which form the basis for the laws against copying. Proponents for strong protections of intellectual property argue that creativity and innovation is costly to the originator, and copying is a form of “free-riding” that not only frustrates, but also inhibits incentive.<sup>2</sup>

When we think of the realm of innovative creations and expression, among the first industries that come to mind are science, technology, art, literature and music. Less traditional, though just as relevant, is fashion. Fashion has been around for centuries, yet only relatively recently has society come to accept the world of fashion as art. One has only to look at the Metropolitan Museum of Art in New York City, which recently dedicated an entire exhibit to the designs and creations of famed designer Alexander McQueen, dubbed “Savage Beauty,” to see

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<sup>1</sup> 1 CHARLES CALEB COLTON, *LACON, OR, MANY THINGS IN A FEW WORDS: ADDRESSED TO THOSE WHO THINK*, CCXVII, (1824), *available at* <http://books.google.com/books?id=6Ac1AAAAMAAJ&pg=PA114&output=text>.

<sup>2</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1777 (2006).

that fashion is not only accepted as art – it is embraced.<sup>3</sup> Yet fashion receives little, if no, legal protection from copying under intellectual property law.

This omission has become a contentious point for debate in the legal and political arenas. Fashion, or more specifically, apparel design, exists outside the realm of traditional IP protection in an area called by some scholars “negative space.”<sup>4</sup> Delineated by scholars Kal Raustiala and Christopher Sprigman, negative space refers to “the territory where IP law might regulate, but (perhaps for accidental or nonessential reasons) does not.”<sup>5</sup> Yet according to Raustiala and Sprigman, the fashion industry not only continues to exist despite this lack of legal protection, it thrives.<sup>6</sup> The act of copying others is a fundamental aspect of human nature, and both the action of copying and the reaction to copying is perfectly encapsulated in the way fashion trends rise and fall.<sup>7</sup> In other words, trends take off because people want what others have and trends fade away because people no longer want what they have once everybody has it.<sup>8</sup> The unique cyclical nature of the fashion industry allows it to exist outside of the scope of current intellectual property protection, but whether it should stay this way is not a foregone conclusion. This paper will examine the fashion industry and how it has operated in the past and how it operates today. It will then review the theories behind intellectual property and how these relate to fashion. Finally, it will discuss the IP protections that are currently available to fashion designers and the argument that enacting stronger legal protection would grant designers the protection they

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<sup>3</sup> Alexander McQueen, *Savage Beauty*, The Metropolitan Museum of Art (2012), <http://www.metmuseum.org/exhibitions/listings/2011/alexander-mcqueen> (last visited March 18, 2013).

<sup>4</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1202 (2009).

<sup>5</sup> *Id.* at 1689.

<sup>6</sup> *Id.* at 1691.

<sup>7</sup> *Id.* at 1691.

<sup>8</sup> *Id.* at 1718-21.

deserve for their labor, but ultimately conclude that such protections would frustrate the industry because it is inconsistent with human behavior.

## II. The Fashion Industry

“So soon as a fashion is universal, it is out of date.”  
— Marie von Ebner-Eschenbach<sup>9</sup>

The fashion industry is a multi-billion dollar global enterprise. In 2011 alone, the leading apparel markets posted profits totaling 331 billion U.S. dollars.<sup>10</sup> But for centuries, the masses viewed clothes as items that served a strictly utilitarian function – to cover the body.<sup>11</sup> After all, clothing is one of the basic needs on Maslow’s famed needs hierarchy.<sup>12</sup> Considered a physiological need, or the most basic need for physical survival, clothing provides us with protection from the elements and is considered on par with shelter.<sup>13</sup> Only the very wealthy had the ability to use clothing as something else, something the world came to understand as fashion.<sup>14</sup> To this wealthy elite, clothing was more than just protection from the elements.<sup>15</sup> It was pretty; it was wildly expensive, often custom made.<sup>16</sup> And, perhaps most importantly, it was

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<sup>9</sup> Marie von Ebner-Eschenbach Quotes, *available at* [http://www.brainyquote.com/quotes/authors/m/marie\\_von\\_ebnereschencbac.html](http://www.brainyquote.com/quotes/authors/m/marie_von_ebnereschencbac.html) (last visited April 20, 2013).

<sup>10</sup> Value Of The Leading Apparel Markets Worldwide In 2011, Based On Sales (in billion U.S. dollars), <http://www.statista.com/statistics/243063/value-of-the-leading-apparel-markets-worldwide-based-on-sales/> (last visited April 20, 2013)(Hereinafter value of apparel markets).

<sup>11</sup> MARK TUNGATE, LUXURY WORLD: THE PAST, PRESENT AND FUTURE OF LUXURY BRANDS 124 (2009).

<sup>12</sup> A. H. MASLOW, A THEORY OF HUMAN MOTIVATION (1943), *available at* <http://psychclassics.yorku.ca/Maslow/motivation.htm> (last visited March 20, 2013).

<sup>13</sup> TUNGATE, *supra* note 12.

<sup>14</sup> Value of Apparel Markets, *supra* note 11, at 192.

<sup>15</sup> *Id.* at 370.

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

exclusive.<sup>17</sup> To them, mass-produced cookie-cutter clothing hanging on “the rack” in department stores didn’t exist.<sup>18</sup>

Then, in the beginning of the 21<sup>st</sup> century, corporations took hold of the world of luxury goods and like Prometheus and his fire, delivered fashion to the masses.<sup>19</sup> This development didn’t destroy the luxury industry, but it fundamentally changed the way it operated.<sup>20</sup> Today’s fashion designs can be divided into three broad categories, which Raustiala and Sprigman identified as a fashion pyramid.<sup>21</sup> Topping the pyramid are the fashion powerhouses, including “haute couture,” which is essentially the antithesis to mass-produced, ready to wear clothing.<sup>22</sup> Haute Couture items are custom items, often one-of-a-kind, tailored to fit a specific client, extremely expensive, and made by appointment only.<sup>23</sup> This is the top of the top. Directly below is designer made clothing that is ready to wear,<sup>24</sup> for example, what you see when you walk into a Chanel or a Christian Dior store. Also in this top category but falling below the ready-to-wear designer clothing, are those clothes that are made by designers but under a lower-priced label,<sup>25</sup> such as Marc by Marc Jacobs, or Armani Exchange by Giorgio Armani. The second tier in the pyramid is what Raustiala and Sprigman call “better fashion,” which consists of “moderately priced apparel.”<sup>26</sup> Finally, there is the basic commodity category, which has the lowest priced clothes.<sup>27</sup> This is how the industry is structured today, with stores like H&M, Zara

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Value of Apparel Markets, *supra* note 11, at 124.

<sup>20</sup> *Id.* at 444.

<sup>21</sup> Raustiala & Sprigman, *supra* note 2, at 1693.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1693.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Raustiala & Sprigman, *supra* note 2, at 1693

<sup>27</sup> *Id.*

and Forever 21 selling affordable clothes that are loosely based on runway looks but capture and exploit the seasons hottest trends.<sup>28</sup> In order to understand why this works and understand the argument that it should not change, we need to examine the theories behind intellectual property and examine how the fundamental nature of the fashion industry is incompatible with these theories.

It all begins on the runway.<sup>29</sup> Designers spend months creating their collection, often sewing the pieces from scratch.<sup>30</sup> Models are meticulously chosen to represent “the look” of the collection.<sup>31</sup> Every last detail is agonizingly planned out, from hairstyle, to makeup, to nail polish, to shoes.<sup>32</sup> The set is created and the music is selected.<sup>33</sup> For months the public relations machines have been pumping out teaser clips, images and interviews to build up the hype for the latest collection.<sup>34</sup> Finally, everything comes together during fashion week. It happens two times a year: in February for the autumn and winter collections and in September for the spring and summer collections.<sup>35</sup> Commencing in New York, then off to London, Milan and finally concluding in Paris.<sup>36</sup> From the designs that are showcased during Fashion week, smaller retail stores and large corporations produce clothes, tapping into the now established trends.<sup>37</sup> This has a trickle down effect where months (and sometimes weeks) later, one now sees a design that first

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<sup>28</sup> *Id.* at 1705.

<sup>29</sup> *Id.* at 1693.

<sup>30</sup> Kimberly Heit: How To Organize A Fashion Show, (October 7, 2008), <http://www.helium.com/items/1202107-organizing-a-fashion-show>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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

<sup>34</sup> *Id.*

<sup>35</sup> Raustiala & Sprigman, *supra* note 2, at 1693.

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

<sup>37</sup> *Id.* at 1720.

popped up on the runway in the clearance bin.<sup>38</sup> It is now so widespread that the trend is abandoned, until a designer rediscovers it and uses it again.<sup>39</sup>

This cycle of clothing wear by following trends is what Kal Raustiala and Christopher Sprigman call the “Piracy Paradox.”<sup>40</sup> As soon as designs are introduced on the runway demonstrating the new trends for the season, the copying begins.<sup>41</sup> More and more people copy so as to be a part of the latest trend.<sup>42</sup> The more widespread the trend becomes, the sooner those at the top of the pyramid, that were the first to adopt the designs, look for something new.<sup>43</sup> In order to stay at the forefront of the latest trends, designers must continuously come out with

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<sup>38</sup> *The Devil Wears Prada*, (Twentieth Century Fox Productions 2006). This movie has a famous scene where Editor-in-Chief Miranda Priestly, played by Meryl Streep, ridicules her assistant for not understanding that every trend starts on the run way:

This... 'stuff'? Oh... ok. I see, you think this has nothing to do with you. You go to your closet and you select out, oh I don't know, that lumpy blue sweater, for instance, because you're trying to tell the world that you take yourself too seriously to care about what you put on your back. But what you don't know is that that sweater is not just blue, it's not turquoise, it's not lapis, it's actually cerulean. You're also blithely unaware of the fact that in 2002, Oscar De La Renta did a collection of cerulean gowns. And then I think it was Yves St Laurent, wasn't it, who showed cerulean military jackets? I think we need a jacket here. And then cerulean quickly showed up in the collections of 8 different designers. Then it filtered down through the department stores and then trickled on down into some tragic casual corner where you, no doubt, fished it out of some clearance bin. However, that blue represents millions of dollars and countless jobs and so it's sort of comical how you think that you've made a choice that exempts you from the fashion industry when, in fact, you're wearing the sweater that was selected for you by the people in this room. From a pile of stuff.

*Id.*

<sup>39</sup> Raustiala & Sprigman, *supra* note 2, at 1720.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

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

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

something new.<sup>44</sup> Thus, the copying of fashion designs is what spurs designers to constantly innovate.<sup>45</sup>

However, efforts were made in the past to curb the copying in the industry. American's had always (and in many ways still do) looked to Paris for style inspiration.<sup>46</sup> As the fashion industry grew in the United States, fashion companies looked for ways to curtail copying amongst the American designers.<sup>47</sup> In 1932 American designers officially formed the "Fashion Originators Guild," whose primary goal was to police design piracy by requiring members to deal only with original creations and would fine and boycott known copyists.<sup>48</sup> The Guild operated for a few years but eventually ran into antitrust issues with the federal government and was shut down.<sup>49</sup> Since its closing, no subsequent organization has formed to protect designs in the fashion industry and designers have been forced to lobby congress for formal intellectual property protections.<sup>50</sup> While the industry does have some IP protection, mostly in the field of trademark law, which protects the use of the brand name, there is still no copyright protection for the pictorial aspect of the design.<sup>51</sup> In the next section, I will look at the theories behind why we have intellectual property rights and how those theories relate to legal rights for fashion designs.

### **III. IP in the Fashion Industry**

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<sup>44</sup> Raustiala & Sprigman, *supra* note 2, at 1720.

<sup>45</sup> *Id.*

<sup>46</sup> TUNGATE, *supra* note 11, at 370.

<sup>47</sup> *Id.* Copying the designs of Parisian fashion houses was thought to be just fine.

<sup>48</sup> Raustiala & Sprigman, *supra* note 2, at 1697.

<sup>49</sup> *See, e.g.*, Fashion Originators Guild of America v Federal Trade Commission, 312 U.S. 457 (1941) (holding that the Guild pursuant to understandings, arrangements, agreements, combinations and conspiracies entered into jointly and severally, had prevented sales in interstate commerce, had substantially lessened, hindered and suppressed competition, and had tended to create in themselves a monopoly).

<sup>50</sup> Raustiala & Sprigman, *supra* note 2, at 1697.

<sup>51</sup> *Id.* at 1700.



Intellectual property is generally viewed as the right to profit exclusively, for a limited period of time, off of something you have created.<sup>52</sup> There are many reasons why we have intellectual property rights, but the argument essentially boils down to one fundamental point – allowing creators to recoup their investment in the creative process and earn a profit encourages them to invest their time and effort in the development of new products, services and expressive works.<sup>53</sup> After all, who would bother to create something if it can just be stolen? This incentive-based policy provides the foundation on which modern IP protection is built.<sup>54</sup> It is the idea that people need financial incentives to create, exclusivity gives that, and without it people will not create as much.<sup>55</sup> Courts and legislators derive some intellectual property rights from common law<sup>56</sup>, but other rights such as copyright,<sup>57</sup> and to a lesser extent, trademark<sup>58</sup> are derived directly from the U.S. Constitution. However, while the constitution provides the primary legal basis for intellectual property protection in this country, some argue that these rights stem from moral obligations.

### **A. Moral Arguments for IP Protection in Fashion**

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<sup>52</sup> GREGORY ALEXANDER & EDUARDO PENALVER, AN INTRODUCTION TO PROPERTY THEORY 184 (2012).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Elizabeth Rosenblatt, *A Theory Of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 343 (2010) (“The chief financial benefit of exclusivity is that one can charge more for a product.” However, here Rosenblatt argues that exclusivity is of less value creators who have other motivations besides financial gain, such as name recognition.”).

<sup>56</sup> ALEXANDER & PENALVER, *supra* note 52.

<sup>57</sup> U.S. CONST. art. 1, § 8, cl. 8, (“[T]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

<sup>58</sup> U.S. CONST. art 1, §8, cl. 3, (This clause gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”).

In 1948, with the support of the United States, the United Nations General Assembly adopted the Universal Declaration of Human Rights.<sup>59</sup> Article 27 of that declaration holds, “[E]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>60</sup> We accept moral arguments for ownership of real property because we view the relationship between the creator and the creation as almost inseparable, therefore to harm the creation is to also harm the creator.<sup>61</sup> This relationship between the creator and the creation is also present in intellectual property.<sup>62</sup> The creation, expression and ownership of an idea or ideas become an extension of person who created it, and creators desire and value that recognition.<sup>63</sup> The moral value of granting creators ownership rights in the expression of their ideas competes with the economic value of maintaining an open market place where new creations are encouraged.<sup>64</sup> It is this tension that requires that the rights of intellectual property to be considered and differentiated from the theories under which the ownership of real property is qualified.<sup>65</sup> There are three principal moral arguments for real property ownership that can also be applied to intellectual property: utilitarian, personality and natural rights.<sup>66</sup> This section discusses the theories behind the ownership of real property as they relate to the ownership of ideas.

### **(1) The Utilitarian Theory: Encouraging Innovation**

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<sup>59</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217(III) (1948).

<sup>60</sup> *Id.* at art. 27.

<sup>61</sup> Jeanne L. Schroeder, *Unnatural Rights: Hegel And Intellectual Property*, 60 U. MIAMI L. REV. 453, 457 (2006) (“A moral right assumes a unique relationship between artist and creation so that destruction of the creation is somehow harmful to the artist.”).

<sup>62</sup> Rosenblatt, *supra* note 55, at 344.

<sup>63</sup> *Id.*

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

<sup>65</sup> ALEXANDER & PENALVER, *supra* note 52, at 183.

<sup>66</sup> *Id.*

As explained throughout the Tragedy of the Commons, the inability to exclude others from using the property leads to overconsumption and degradation.<sup>67</sup> But information is not consumed the way real property is consumed, that is, the consumption of information does not degrade it.<sup>68</sup> Thus, the concern that excessive free riding by copiers will discourage investment in the production of new ideas provides the bases for the utilitarian case for intellectual property.<sup>69</sup> Proponents of strong IP in the fashion industry often make arguments grounded in utilitarian theories, though the utilitarian origin is not always credited.<sup>70</sup> It is the idea that being able to make copies of a design (and it is often cheaper to copy than to create) unjustly allows competitors to profit off of the designer's concept, and this profit is to the detriment of the original designer and to society as a whole.<sup>71</sup> Social utility is maximized when innovators have strong protection for developing their ideas into marketable goods.<sup>72</sup> Therefore, the argument goes, fashion designers must have legal protections of their designs to have the incentive to create new designs so the industry may continue to thrive.<sup>73</sup>

The critical assumption being made in this theory is that rational innovators are deterred by excessive copying and free riding.<sup>74</sup> Yet this deterrence is notably absent in the fashion industry.<sup>75</sup> The fundamental nature of the fashion industry is built upon copying, because the rise of trends are a result from people copying and then the inevitable fall of those trends is also

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<sup>67</sup> *Id.* (The Tragedy of the Commons is discussed in further detail at *id.* pages 19-29).

<sup>68</sup> *Id.* (quoting Thomas Jefferson, letter to Issac McPherson, August 13, 1813, "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights at mine, receives light without darkening me.").

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

<sup>70</sup> ALEXANDER & PENALVER, *supra* note 52, at 183

<sup>71</sup> *Id.* at 189-90.

<sup>72</sup> *Id.* at 183.

<sup>73</sup> Raustiala & Sprigman, *supra* note 4, at 1206.

<sup>74</sup> ALEXANDER & PENALVER, *supra* note 52, at 189.

<sup>75</sup> *Id.* at 190.

because of that copying.<sup>76</sup> Kal Raustiala and Christopher Sprigman demonstrated that this copying actually spurs greater investment in fashion innovation because high-end designers constantly update their looks to stay one step ahead of the knockoffs and these new looks, in turn, become the new trends.<sup>77</sup> Because designers are not deterred by copying or free riding and are in fact incentivized to create more, it is precisely this cyclical nature of the fashion industry that makes it incompatible with utilitarian arguments for intellectual property protection.<sup>78</sup>

## **(2) The Personality Argument: Fashion as an extension of the Person**

The classic personality theory of property owes its genesis to Georg Hegel. The gist of Hegel's theory is that the things (property) we own contributes to the development of the self, or personality.<sup>79</sup> Thus, private ownership is justified, not because of the social utility, as is the case under utilitarian theories, but because of this nexus with self-development.<sup>80</sup> More modern personality theorists such as Margaret Jane Radin in her "personhood" theory argue that to be a person, "an individual needs some control over resources in the external environment" and property rights provide that level of control.<sup>81</sup> Radin goes on to state that owning things (property) goes beyond self-development; it becomes part of our identity, a part of who we are.<sup>82</sup> However, extending Hegel and Radin's theories to intellectual property is complicated and has been criticized by some.<sup>83</sup> In as much as we have legal protection over harm done to our person,

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<sup>76</sup> Raustiala & Sprigman, *supra* note 2, at 1696.

<sup>77</sup> Raustiala & Sprigman, *supra* note 2, at 1716.

<sup>78</sup> ALEXANDER & PENALVER, *supra* note 52, at 190.

<sup>79</sup> *Id.* at 197.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 66.

<sup>82</sup> Heit, *supra* note 81.

<sup>83</sup> Schroeder, *supra* note 61, at 458. (Schroeder argues that Hegel's logic cannot be applied to the promulgation of positive laws for the protection of intellectual property. Hegel believed that property related only to the subjugation of the law and not to creativity.)

the personality case for intellectual property argues that we must also have legal protections over those extensions of ourselves.

As noted before, some designs are less about wearing clothes, and more about creative expression,<sup>84</sup> if the two can be separated in today's style-conscious society. Put differently, people wear things not out of necessity, but because it is a form of expressing who they are, or in Radin's terms, as a form of expressing their personhood.<sup>85</sup> What people choose to clothe themselves with is subjective, and it varies from person to person. Additionally, what types of clothes or what designs on clothes that people create is a function of the designer's personality, and this design when appropriated by another who identifies with it, becomes a part of his or her personhood.<sup>86</sup> This nexus between the individual person and the intellectual product justifies legal rights because those rights serve to strengthen our sense of individuality.<sup>87</sup>

### 3. Natural Rights: Lockean Justice

John Locke's well-known labor theory of appropriation was outlined in his *Two Treatises of Government*, in which he famously introduced the idea that people have a fundamental right to property over which they have labored and therefore to appropriate another's property is simply unjust.<sup>88</sup> Applying this theory to intellectual property is not difficult – we own our ideas because we created them. The thinking of the idea is a form of labor, and that labor establishes the

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<sup>84</sup> McQueen, *supra* note 3.

<sup>85</sup> See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, And Economics Of Fashion*, 61 STAN. L. REV. 1147, 1161 (2009) (stating “everyone inevitably expresses themselves through the clothes they wear (even if to communicate that they are too serious to care about fashion).” Hemphill and Suk's arguments are discussed in greater detail further on in this paper.).

<sup>86</sup> Justin Hughes, *The Personality Interest Of Artists And Inventors In Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 87 (1998), (discussing whether an individual's personality causes an object to come into existence, or whether the individual's personality has moved into an existing object.).

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

<sup>88</sup> ALEXANDER & PENALVER, *supra* note 52, at 191.

fundamental ownership right in whatever the thinker makes of the idea.<sup>89</sup> Put differently, the creator owns the product of his thoughts. While Locke didn't specifically mention intellectual property in his treatise, it is not too far a stretch to say that when a person labors over an idea, using it to create a product, it would be similarly unjust for another to appropriate it.<sup>90</sup>

Legislatures and Courts, in creating and enforcing intellectual property rights are mindful of the public interest and of the open market place. Similarly, Locke argued that people may only own and use property to the extent "there is enough, and as good left in common for others" (II, 27).<sup>91</sup> Based on this, one can say that it is for this reason that IP rights are limited in scope, often expiring after a preset number of years.<sup>92</sup> Thus, intellectual property rights seem to fit in intuitively with Locke's theories.

The parallels between Locke's labor theory and the arguments in favor of IP protection in the fashion industry are readily apparent.<sup>93</sup> Because the creator labors over the item he designs, he has a fundamental ownership right in that item.<sup>94</sup> Despite these seemingly clear parallels, this approach is over-simplified. This argument takes an overly romanticized look at the creative process, treating new ideas as a wholly individualized act as though nothing came before.<sup>95</sup> This paper has already discussed at length how prevalent copying is in the fashion industry. When

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 192.

<sup>91</sup> *Id.* at 39.

<sup>92</sup> *Id.* at 187. (Patents expire after 20 years and Copyright currently survives for seventy years after the death of the author.).

<sup>93</sup> Hughes, *supra* note 86, at 191 (citing Justin Hughes, *The Philosophy Of Intellectual Property*, GEO. L. J. 77 (1988): 287, 296-97, arguing that Locke's theory "can be used to justify intellectual property without many of the problems that attend its application to physical property.").

<sup>94</sup> ALEXANDER & PENALVER, *supra* note 52, at 191-92.

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

most clothing designs are creatively inspired by previous designs,<sup>96</sup> the argument is less straightforward. However, well-known fashion law professor and academic director of the Fashion Law Institute, a nonprofit based at Fordham Law School, Susan Scafidi, argues just that, stating stronger IP protection is needed to ensure “creators are the ones who receive the benefit of their own intellectual investments.”<sup>97</sup>

#### (4) Legalized Piracy

A leading proponent for legal protections in the fashion industry, Susan Scafidi, argues that the fashion industry as it exists today without strong IP protections is a system of “legalized piracy.”<sup>98</sup> The technological changes of the past twenty years, plus globalization of the economy requires that the law change as well.<sup>99</sup> Additionally, because the world has accepted fashion as creative expression, the general public should view stronger legal protections as deserved, rather than as elitist.<sup>100</sup> She notes the accuracy of the “piracy paradox” outlined by Raustiala and Sprigman, and holds that the exploitation of the fashion cycle and social control evolved because designers were forced to find extralegal means to either prevent copying or mitigate its effects.<sup>101</sup> Unlike Raustiala and Sprigman, however, Scafidi claims such legal protection would not stifle the industry but rather, a properly worded bill would “both promote innovation and preserve the

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<sup>96</sup> Raustiala & Sprigman, *supra* note 2, at 1724 (stating “many ‘copies’ are not point-by-point reproductions at all, but instead new garments that appropriate design elements from the original and recast them in a derivative work.”).

<sup>97</sup> Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the H. Comm. on the Judiciary, 109th Cong. (July 27, 2006) (statement of Susan Scafidi, Prof. Fordham Law School), <http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg28908/html/CHRG-109hhrg28908.htm>.

<sup>98</sup> Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115 (Peter K. Yu ed., 2006).

<sup>99</sup> *Id.* at 125.

<sup>100</sup> *Id.* at 126.

<sup>101</sup> *Id.* at 124.

development of trends.”<sup>102</sup> As such, designers should have real legal protection on items that are a result of a designer’s unique vision.<sup>103</sup>

Scafidi is not the only scholar who has disagreed with Raustiala and Sprigman regarding this issue. Also at the forefront of advocating for stronger legal protection in the fashion industry are law professors C. Scott Hemphill and Jeannie Suk, who dispute Raustiala and Springman’s thesis that copying is the driving force behind innovation.<sup>104</sup> Hemphill and Suk argue that copying is just one form of imitative practices, and is not actually necessary for a trend to take root.<sup>105</sup> New trends do not gain popularity because exact replicas are sold in various stores, rather the trend is successful because enough stores have articles containing elements of the original but with enough differentiating details to satisfy the competing desires of consumers for both connection to and differentiation from the trend.<sup>106</sup> In this sense, there is a difference between close copies, which can diminish the value of the original and interpretations, which gives a nod toward the earlier work, but ultimately highlights the difference between the two works.<sup>107</sup>

Although they note that most consumers are interested in interpretative designs and not in close copies, there are enough businesses engaging in harmful close copying and designers should be able to proceed against them legally.<sup>108</sup> This, according to Hemphill and Suk, harms new designers the most because since they have no established business, they cannot proceed against the copier under trademark and since there is no legal design protection (besides design

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<sup>102</sup> Scafidi, *supra* note 97.

<sup>103</sup> Scafidi, *supra* note 98, at 124.

<sup>104</sup> Hemphill & Suk, *supra* note 85, at 1161.

<sup>105</sup> *Id.* at 1160.

<sup>106</sup> *Id.* at 1167.

<sup>107</sup> *Id.* at 1160.

<sup>108</sup> *Id.* at 1175.



patents, but this paper will address why that is impractical in the next section), there is no legal remedy available.<sup>109</sup> Scafidi, Hemphill and Suk have clearly propagated convincing arguments because it wouldn't be an ongoing debate if they hadn't. However, the fashion industry is still without this kind of legal protection because scholars, Congress, and the fashion associations have not been able to come to an agreement on legislation that has actually garnered enough support to pass.<sup>110</sup> The next section will examine the legal rights that fashion designers do have and how they fall short, and then discuss the recent political attempts to expand these rights.

#### **IV. Legal Protections in the Fashion Industry Today**

To understand the legal protections that designers do and don't have today, we must examine the protections that are available and why some argue they are inadequate. As previously discussed, intellectual property law is designed to benefit the public by fostering an efficient marketplace where competition and innovation is encouraged.<sup>111</sup> This is achieved by granting innovators property rights in their tangible creations,<sup>112</sup> but these rights must be limited in scope so that new creators are incentivized to enter the market.<sup>113</sup> The question then becomes: what are the appropriate rights that will adequately accomplish this goal?

There are three applicable property rights that can be granted to creators in the fashion context in this respect: trademarks, design patents and copyrights. This section will examine these types of intellectual property rights and discuss how each one, in turn, is inadequate, impractical or too far reaching to achieve the proper balance between providing adequate protections and encouraging new designers to innovate. I will then look at the most recent

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<sup>109</sup> Hemphill & Suk, *supra* note 85, at 1177.

<sup>110</sup> *See* The Innovative Design Protection And Piracy Prevention Act, H.R. 2511, 112th Cong. Status: Died (Referred to Committee). <http://www.govtrack.us/congress/bills/112/hr2511>.

<sup>111</sup> ALEXANDER & PENALVER, *supra* note 52, at 185.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 187.

legislation aimed at expanding IP rights for designers and discuss whether it satisfies these competing goals.

### (1) Trademark

“The shiny red color of the soles has no function other than to identify to the public that they are mine.”

— Christian Louboutin<sup>114</sup>

A very effective, but also a very limited, intellectual property protection that is available to designers today is through trademark and trade dress law. According to the U.S. Patent and Trademark office, a trademark is a mark that is “used or intended to be used to identify and distinguish the goods and/or services of one seller or provider from those of others, and to indicate the source of the goods and/ or services.”<sup>115</sup> In other words, a trademark is a word or symbol that indicates the origin of products or services to consumers.<sup>116</sup> The symbol is generally the brand name of the product and rather than aiming to encourage innovation, trademark protection aims to encourage companies to develop goodwill in connection with their brand name and to prevent consumer confusion regarding the source of goods or services.<sup>117</sup> Related to trademark law, but not identical, is trade dress.<sup>118</sup> Trade dress is the total image of the product and its overall appearance.<sup>119</sup> So long as the trade dress of a product designates its source, it can receive trademark protection.<sup>120</sup>

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<sup>114</sup> CHRISTIAN LOUBOUTIN RED SOLE, Registration No. 3,361,597.

<sup>115</sup> The United States Patent and Trademark Office, an agency of the Department of Commerce. <http://www.uspto.gov/trademarks/> (last visited April 2, 2013).

<sup>116</sup> Daniel R. Kimbell, *Intellectual Property: An Attorney's Guide*, 27 BEVERLY HILLS B. ASS'N J. 109 (1993).

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

<sup>118</sup> Charles E. Colman, *An Overview Of Intellectual Property Issues Relevant To The Fashion Industry*, 2012 WL 167352, 1 (2002).

<sup>119</sup> *Id.* (citing *Abercrombie & Fitch Inc. v. American Eagle Outfitters Inc.*, 280 F.3d 619, 629 (6<sup>th</sup> Cir. 2002)).

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

When a person is granted a trademark, with it comes the right to “prevent others from using the same mark or a similar mark which is likely to cause confusion, deception, or mistake in the mind of the public as to the source or sponsorship of the goods or services associated with the trademark.”<sup>121</sup> While trademark law has roots in the commerce clause, it is predominately a common law doctrine and rights will accrue outside of official registration.<sup>122</sup> This happens by simply using a mark in connection with goods or services.<sup>123</sup> So long as the mark is used, the legal right continues. Thus, trademark allows for the longest enduring protection and could, hypothetically, exist in perpetuity.<sup>124</sup>

Trademark protection has been effective for fashion designers not only because of the nature of the fashion industry, but also because of human economic and social behavior regarding exclusivity.<sup>125</sup> By making their goods immediately identifiable (and often very expensive), high-end fashion designers have established that the value of the good lies in its source, as opposed to in its intrinsic value.<sup>126</sup> Take for example, Christian Louboutin high heels, known for their iconic red-lacquered soles.<sup>127</sup> A pair of classic black Louboutin pumps has a retail value of \$645.00.<sup>128</sup> A nearly identical shoe, but for the red sole, is sold by accessories

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<sup>121</sup> The United States Patent and Trademark Office, *supra* note 116, at 112.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Kimbell, *supra* note 116, at 1.

<sup>126</sup> *Id.*

<sup>127</sup> *See* Christian Louboutin S.A. v. Yves Saint Laurent America Holdings, Inc., 696 F.3d 206 (2d Cir. 2012) (In 1992, Christian Louboutin obtained a trademark for the red lacquered outsoles of his shoes. In 2012, the Second Circuit court of appeals upheld this mark has acquired a secondary meaning as a distinctive symbol that identifies the Louboutin brand.).

<sup>128</sup> Christian Louboutin, Fifi Pumps, [http://us.christianlouboutin.com/us\\_en/shop/women/fifi.html](http://us.christianlouboutin.com/us_en/shop/women/fifi.html).

manufacturer Bandolino for \$65.55.<sup>129</sup> I am able to speak from personal experience when I say that Louboutin shoes are remarkably uncomfortable, yet they remain my favorite pair of heels and I internally squeal with delight every time someone notices that I am wearing them. The fact that other people can identify my shoes as famous red-bottomed Christian Louboutins, makes them that much more valuable to me.

It is an interesting aspect of human nature, to somehow feel better knowing that you own a thing not everyone can have. Economists call such things “positional goods,” meaning “goods whose value is closely tied to the perception that they are valued by others.”<sup>130</sup> The Economist explains that positional goods “are a way for a person to establish or signal their status relative to people who do not own them: fast cars, holidays in the most fashionable resorts, clothes from trendy designers.”<sup>131</sup> Similarly, Christian Louboutins are valuable because wealthy, fashionable people have them, and regardless of your actual status, possessing them gives the impression that you are wealthy and fashionable too. And thanks to the recent decision by the Second Circuit Court of Appeals, red-bottomed heels can only be Christian Louboutins because Christian Louboutin has a valid, enforceable trademark in its use of red soles, so long as the red sole contrasts with the rest of the shoe.<sup>132</sup>

Ultimately, these protections are inadequate for most fashion designers. It is exceedingly difficult to obtain trademark protection for a mark that is not a brand name.<sup>133</sup> Generally, marks that function as the design of the product are not protectable, particularly if granting trademark

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<sup>129</sup> Bandolino, Women's Eladia 3 Pumps, <http://www.shoes.com/en-US/Product/EC1283997-5162244/Bandolino/Black+Patent/Womens+Eladia+3.aspx>.

<sup>130</sup> Raustiala & Sprigman, *supra* note 2, at 1719.

<sup>131</sup> *Id.* (Citing Economics A-Z, [www.economist.com](http://www.economist.com) (follow “Economics A-Z” hyperlink; then follow “P” hyperlink; then follow “positional goods” hyperlink) (last visited Apr. 20, 2012).

<sup>132</sup> Kimbell, *supra* note 116.

<sup>133</sup> *Id.* at 25.

rights in the design would hinder competition.<sup>134</sup> Certain descriptive<sup>135</sup> marks that only identify something about the product must obtain secondary meaning.<sup>136</sup> Secondary meaning is a sort of acquired distinctiveness that occurs when, “in the minds of the public, the primary significance of a product feature ... is to identify the source of the product rather than the product itself.”<sup>137</sup> Proving secondary meaning requires long-term use, advertising expenditures, media coverage, and sales success that together establish that the design is “used so consistently and prominently by a particular designer that it becomes a symbol.”<sup>138</sup> Therefore, it is unlikely that the majority of designers, arguably lacking the resources available to a designer such as Christian Louboutin, will be able to satisfy this evidentiary burden.

## (2) Patents

Generally, patents are granted for useful inventions such as a machine, process, manufacture or composition of matter.<sup>139</sup> However, also available, and more relevant to fashion<sup>140</sup> are “design patents,” which are granted to “whoever invents any new, original, and ornamental design for an article of manufacture.”<sup>141</sup> Protection for design patents is available for

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<sup>134</sup> See *Christian Louboutin S.A. v. Yves Saint Laurent*, 696 F.3d 206 at 219-20. (When the aesthetic design of a product is itself the mark for which protection is sought, it is deemed functional if granting the right to use it would put competitors at a significant non-reputation-related disadvantage.)(citations omitted).

<sup>135</sup> See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976) (Marks fall into one of the following categories, in the order of its distinctiveness: generic, descriptive, suggestive, arbitrary or fanciful. The amount of protection given to a particular mark is determined by how strong the mark is in its distinctiveness.).

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

<sup>137</sup> *Id.* at 216 (citing *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982)).

<sup>138</sup> *Id.* at 226.

<sup>139</sup> 35 U.S.C. § 101 (2011).

<sup>140</sup> Colman, *supra* note 118, at 20. (Utility patents are rare except in the areas of footwear, undergarments and component parts, such as fasteners. A well-known utility patent in fashion is the modern zipper, patented in 1917 by Gideon Sundback (Patent Number 1,219,881).).

<sup>141</sup> 35 U.S.C. § 171 (2011).

an article that is “ornamental, a product of aesthetic skill and artistic conception”<sup>142</sup> so long as the functional aspects do not dominate nature of the article.<sup>143</sup> A patent provides the strongest intellectual property right available but it also lasts for a shorter amount of time (compared to the trademark, which could last in perpetuity).<sup>144</sup> A patent-owner enjoys the right to wholly “exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States.”<sup>145</sup>

Despite its strength and duration, obtaining a design patent is impractical for most fashion designers. Kal Raustiala and Christopher Sprigman give two explanations for the failure of patent law to shelter fashion designers.<sup>146</sup> First, design patents only cover designs if they are truly “new” and therefore cannot be mere “reworkings of previously existing designs.”<sup>147</sup> As this paper has discussed already, most apparel designs are not new, but are re-workings of the latest trends from the runway. Secondly, the waiting period for getting a patent application approved is more than eighteen months, on average and since most trends come and go much quicker than that, the process is simply too slow (and not to mention uncertain).<sup>148</sup>

### **(3) Copyright**

With trademark protections exhausted, and patent protection impracticable, the fight for intellectual property protection in the fashion industry and landed squarely in the realm of

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<sup>142</sup> See *Warbern Packaging Industries Inc. v. Cut Rate Plastic Hangers Inc.*, 652 F.2d 987, 988 n.1 (2d Cir. 1981).

<sup>143</sup> See *Tough Traveler v. Outbound Prods.*, 60 F.3d 964, 971 (2d Cir. 1995) (Jacobs, J., concurring in the result).

<sup>144</sup> Colman, *supra* note 118, at 19 (Under 35 U.S.C. § 173, design patents last for fourteen years from the date the patent is issued. Utility patents last for twenty years from the date on which the application is filed, 35 U.S.C. § 154(a)(1)(2).).

<sup>145</sup> 35 U.S.C. § 154 (2011).

<sup>146</sup> Raustiala & Sprigman, *supra* note 2, at 7.

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

<sup>148</sup> *Id.* at 7.

copyright. Generally described as a “bundle of rights,”<sup>149</sup> a copyright owner enjoys the exclusive right to reproduce the original work, create derivative works based on it, distribute the work publicly, perform the work (if applicable) and display the work (if applicable).<sup>150</sup> Copyright protection is granted for “original works of authorship,” that are fixed in a “tangible medium.”<sup>151</sup> For a work to be original, it must be not copied and at least minimally creative.<sup>152</sup> It would therefore seem that fashion garments satisfy these threshold requirements for coverage under copyright law. However, there are several statutory bars and exceptions that withhold protection from otherwise copyrightable works.<sup>153</sup>

Under Section 101<sup>154</sup> of the federal copyright act, “pictorial, graphic and sculptural works” include two-dimensional and three-dimensional works but only so far as the design can be considered separately from the useful aspects of the article. Although Courts have accepted that clothing possess both utilitarian and aesthetic values,<sup>155</sup> an article that is “normally part a

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<sup>149</sup> Kimbell, *supra* note 116, at 2.

<sup>150</sup> 17 U.S.C. §106(1)-(6) (1976).

<sup>151</sup> 17 U.S.C. §102(a) (1976).

<sup>152</sup> *See* Feist Publications v. Rural Telephone Service, 499 U.S. 340 (1991) (Holding that for a work to be original it must (1) be an independent creation and (2) have a modest quantum of creativity.).

<sup>153</sup> Kimbell, *supra* note 116, at 2.

<sup>154</sup> 17 U.S.C. 101 (1976)

Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only 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.

*Id.*

<sup>155</sup> *See, e.g.,* Galiano v Harrah’s Operating Co., Inc., 416 F.3d 411, 417 (5<sup>th</sup> Cir. 2005) (“There is little doubt that clothing possesses utilitarian and aesthetic value.”).

part of a useful article” is considered as a whole to be a “useful article.”<sup>156</sup> This means that a designer’s sketch of a garment could qualify for copyright protection, but because clothing is considered “useful,” the garment itself is not protectable unless the pictorial aspects of the design can be identified separately from the utilitarian aspects of the garment.<sup>157</sup> As it stands today, only if the artistic aspects are physically or conceptually separable from the underlying product are they able to obtain copyright protection.<sup>158</sup>

Fashion designers seeking a legal remedy against copying have therefore been limited to proving either physical or conceptual separability in their garments to exempt them from the useful article bar.<sup>159</sup> The first exception, physical separability, requires that a design element “can actually be removed from the original item and separately sold, without adversely impacting the article’s functionality.”<sup>160</sup> The second exception, conceptual separability, has proven to be more difficult for the courts to apply.<sup>161</sup> A design has conceptual separability when the artistic aspects or elements can be mentally differentiated from their utilitarian functions, therefore independently reflecting the existence of the designer’s artistic judgment.<sup>162</sup> A conceptually separate design must have its own “likelihood of marketability” that exists separate

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<sup>156</sup> 17 U.S.C. 101 (1976) (defines “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article”).

<sup>157</sup> Coleman, *supra* note 118, at 3.

<sup>158</sup> *See, e.g., Chosun Int’l v Chrisha Creations, Ltd.*, 413 F.3d 324, 328 (2d Cir. 2005).

<sup>159</sup> Kimball, *supra* note 116, at 5.

<sup>160</sup> *See Chosun v Chrisha*, 413 F.3d 324 (The court stated “while ‘useful articles’, taken as a whole, are not eligible for copyright protection, the individual design elements comprising these items may, viewed separately, meet the Copyright Act’s requirements.”).

<sup>161</sup> Coleman, *supra* note 118, at 4 (citing e.g. *Masquerade Novelty v Unique Industries*, 912 F.2d 662, 670 (3<sup>rd</sup> Cir. 1990) (“Courts have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article’s utilitarian function.”).

<sup>162</sup> *See Galiano v Harrah’s Operating*, 416 F.3d 411 at 418 (citing *Pivot Point Int’l, Inc. v. Charlene Products, Inc.*, 372 F.3d 913, 920 (7th Cir. 2004).



from the functional influences.<sup>163</sup> While these two exceptions provide an avenue around the useful article bar, they are exceedingly difficult to prove and more often than not, provide no relief for designers.<sup>164</sup>

#### **(4) Sui Generis Copyright**

In the last ten years, the United States Congress has been considering expanding copyright protect as it is currently known in ways that would cover fashion designs.<sup>165</sup> Introduced in the House by Representative Bob Goodlatte (D-VA)<sup>166</sup> and in the Senate by Senator Charles Schumer (D-NY)<sup>167</sup>, the most recent version of the legislation that was considered in the last session of Congress, called the Innovative Design Protection Piracy and Prevention Act (“IDPPPA”) would amend Chapter 13 of Title 17 of the U.S. Code, which grants copyright-like protection to boat hulls.<sup>168</sup> This section, called the Vessel Hull Act, is relevant to fashion because it grants “sui generis,” copyright-like protection to items that would be normally be denied such a copyright because they are categorized as useful articles.<sup>169</sup> This Act represents a concerted joint-political effort from two major trade associations in the fashion industry: the Council of Fashion Designers of America (“CFDA”) and the American Apparel and Footwear Association (“AAFA”).<sup>170</sup> Traditionally, the CFDA has been at the forefront of lobbying for additional IP protection in the industry, but it was not until more recently that the AAFA has joined the fight.<sup>171</sup> The AAFA opposed earlier versions of the IDPPA<sup>172</sup> because of the flood of

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

<sup>164</sup> Coleman, *supra* note 118, at 4.

<sup>165</sup> *Id.* at 16.

<sup>166</sup> The Innovative Design Protection And Piracy Prevention Act, H.R. 2511.

<sup>167</sup> *Id.*; S. 3523 112<sup>th</sup> Cong. (2011) (Same text as house version.).

<sup>168</sup> The Innovative Design Protection And Piracy Prevention Act, H.R. 2511.

<sup>169</sup> Coleman, *supra* note 118, at 16.

<sup>170</sup> *Id.*

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

applications the Copyright office would face.<sup>173</sup> The IDPPPA, as a result, eliminated the registration period completely and allows protection to fashion designs for three years, and added a few other key provisions, discussed below, to appease the AAFA.<sup>174</sup>

For fashion apparel and accessory designs to obtain this copyright-like protection under the IDPPA, they must display a “a unique, distinguishable, non-trivial, and non-utilitarian variation over prior designs.”<sup>175</sup> By adding the term “fashion design” to the Vessel Hull Act, the IDPPPA would protect apparel and ornamentation, “men's, woman's, and children's clothing, including undergarments, outerwear, gloves, footwear, headgear, handbags, purses, wallets, tote bags, belts and eyeglass frames.”<sup>176</sup> To qualify as an infringement, the accused design must satisfy a “substantially identical” standard, meaning the design is “so similar in appearance as to be likely to be mistaken for the protected design and contains only those differences in construction or design which are merely trivial.”<sup>177</sup> The IDPPPA also calls for a heightened pleading standard that would require designers to demonstrate “it can be reasonably inferred from the totality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design.”<sup>178</sup> Additionally, there is a home sewing exception for

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<sup>172</sup> Design Piracy Prohibition Act, H.R. 5055, 109<sup>th</sup> Congress (2006)(The bill allowed for a three-year protection period for fashion designs, specifically, so long as registration occurred within three months of the design's publication. In 2009, this registration period was extended to six months.); Design Piracy Prohibition Act, H.R. 2196, 111<sup>th</sup> Cong. § 2(b)(3) (2009).

<sup>173</sup> See Louis S. Ederer & Maxwell Preston, *The Innovative Design Protection and Piracy Prevention Act: Fashion Industry Friend or Faux?*, LexisNexis Copyright and Trademark Law Community Blog (Aug. 25, 2010), [http://www.arnoldporter.com/resources/documents/Advisory-The\\_Innovative\\_Design\\_Protection\\_and\\_Piracy\\_Prevention\\_Act\\_83010.pdf](http://www.arnoldporter.com/resources/documents/Advisory-The_Innovative_Design_Protection_and_Piracy_Prevention_Act_83010.pdf).

<sup>174</sup> Coleman, *supra* note 118, at 16.

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

<sup>176</sup> The Innovative Design Protection And Piracy Prevention Act, H.R. 2511, at §2(a)(2)(9)(A)-(C).

<sup>177</sup> The Innovative Design Protection And Piracy Prevention Act, H.R. 2511, at § 2(e)(2)-(3), (g)(2).

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

those who would actually sew the clothes themselves for personal use.<sup>179</sup> Together, these sections represent the compromise between the CFDA and the AFAA and aim to place limits on the potential infringement claims and discourage litigation. Yet, despite the backing of these two associations, and not to mention scholars such as Susan Scafidi, the IDPPPA never made it out of committee, and has yet to be reintroduced in the current session of Congress.<sup>180</sup>

## V. Conclusion

Without a doubt, one of the goals of the proposed IP protections is to make it easier for new designers to enter the marketplace. If an unknown author comes out with a captivating tale, and doesn't have any copyright protection, a giant publishing firm can take the story, repackage it, and sell it to the masses. The small author, who doesn't have access to the market the way the large publishing house does, has no ability to compete. Similarly, an unknown designer can come forward with a new style that is adopted and used by larger, already established brand, thus making the newcomer look like the copier. Shouldn't there be a law against that? Fashion also has the opposite problem. While a large designer could (and some maybe do) steal the idea or collection of a new, upcoming designer, this is not the argument you hear proponents of stronger legal protection using. The argument that seems to be used the most is that designers need protection from those that, through Internet broadcasts and other electronic transmissions, can copy a pattern off the run through a low-cost contract manufacturer overseas.<sup>181</sup> It is the wealthy, established designers that are the loudest proponents of bills like the IDPPPA.<sup>182</sup>

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<sup>179</sup> *Id.* at § 2(h)(1)-(2).

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

<sup>181</sup> Hemphill & Suk, *supra* note 85, at 1171.

<sup>182</sup> L.J. Jackson, Some Designers Say Their Work Deserves Copyright Protection; Others Say It Would Harm the Industry, (Designers Anna Sui, Gwen Stefani and Diane von Furstenberg have

This is because the appropriation big designers are concerned about is the kind that comes from corporate retail stores.<sup>183</sup> In the Internet age, the top, impossible-to-get-access-to fashion shows are now live-streamed over the Internet.<sup>184</sup> People who do get to attend videotape the show on their smart phones. Pictures of the collection are everywhere as soon as the model comes out from behind the curtain. This instant worldwide exposure allows for copying to happen faster than designers can mass-produce their own clothes.<sup>185</sup> The designs are copied, sometimes identical, usually with variations, mass-produced and sold for pennies compared to what the real clothes would be worth by stores like H&M and Forever 21.<sup>186</sup>

Intuitively, one would think the designers should be granted protection. How dare China! First they take our jobs, now they take our clothes. Poor Chanel and Diane von Furstenberg and all the fashion power houses. They must really be struggling. Only they're not. Last year alone, Diane von Furstenberg brought in \$200 million in revenue, according to Forbes Magazine.<sup>187</sup> It would be almost comical to cite Chanel's earnings last year.<sup>188</sup> So what is the harm?

High-end fashion designers are not actually harmed by unauthorized appropriation. Yes people create knock offs of high-end designs, and yes, lots of other people buy them hoping to pass them off as the real thing. But knock offs are critically limited in one major aspect that is

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all sued Forever 21 for stealing design patterns used on their products.)

[http://www.abajournal.com/magazine/article/the\\_genuine\\_article/](http://www.abajournal.com/magazine/article/the_genuine_article/).

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

<sup>184</sup> Hemphill & Suk, *supra* note 85, at 1171.

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

<sup>186</sup> *Id.* at 1173 (Forever 21 was a defendant in copying suits fifty-three times between 2003 and 2008.).

<sup>187</sup> Profile: Diane von Furstenberg, FORBES (last accessed April 25, 2013)

<http://www.forbes.com/profile/diane-von-furstenberg/>.

<sup>188</sup> Willow Duttge, Buying Chanel (all of it), May 12, 2008

<http://upstart.bizjournals.com/culture-lifestyle/goods/style/2008/05/12/How-Much-Is-Chanel-Worth.html>. (Chanel actually keeps its financial reports private. However, in 2008, financial gurus estimated Chanel's profits to be around \$2.3 to \$3 billion.) (last accessed April 25, 2013).

ignored by proponents of strong legal protection in the fashion industry – knock offs and close copies are intrinsically limited because they are knock offs and not the real thing. The reason this doesn't seriously harm anyone is because there are people who want to pay more for high-end products. The more expensive a product is, the more exclusive it is; the more exclusive a product is, the more people want it. Therefore, if Oscar de la Renta were to one day, up and decide that his clothes were to all be under \$200, he would lose his status as one of the most sought-after designers in the country. Celebrities would stop wearing his gowns on the red carpet and the rich would stop buying. In other words, the uber wealthy that can afford to walk into his store and buy a dress, do so because they want to buy something that is so expensive, so exclusive, that a typical 99%-er could not possibly afford it. It may seem counter-intuitive. After all, even if you could afford it, who would want to pay that much for a dress?<sup>189</sup> It is because of positional goods.<sup>190</sup> Legal protection or no, we judge the value of an apparel item based on how much other people want it and how easily other people can get it.

Intellectual property covers the creative fields such as art, literature, music, technology and science. Though it has been around for centuries, fashion, while considered a creative field, is not given the same level of legal protection even though the general arguments and justifications for intellectual property appear at first blush to also apply to fashion. This omission is often credited to the “piracy paradox” outlined by scholars Kal Raustiala and Christopher Sprigman, which holds that the lack of IP protection is not harmful to fashion innovators, but rather has allowed the industry to thrive.<sup>191</sup> In this paper, I explored the utilitarian theories, which hold that excessive free riding will discourage innovation. I looked at

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<sup>189</sup> A ‘ready to wear’ Oscar de la Renta dress runs anywhere from \$900 to \$6,000. <http://www.oscardelarenta.com/ready-to-wear/dresses/> (last accessed April 25, 2013).

<sup>190</sup> Raustiala & Sprigman, *supra* note 2, at 1719.

<sup>191</sup> *Id.* at 1718.

the personality theory and how fashion becomes an extension of the person. I also examined the Lockean labor theory that holds that we own our creations because we created them. These theories cannot overcome the fundamental cyclical nature of the fashion industry where designs and trends come and go at a remarkable pace, nor the fact that most designs use recycled elements of previous designs.

I also looked at the legal protections that are available and outlined their shortfalls. Trademark will likely always be used to some extent, because there is value to companies in creating a brand name. And also because of the desire to own things that other people know is expensive and from a certain high-end designer. But for those designers not considered high end, this has proven inadequate because of the time and expense required to establish a brand name as a source identifier. Design patents would also seem to be a good option for protecting a design. However, by the time the application gets approved, the design looking to be protected may or may not still be in the collection. Unless it is something a designer intends on using for years in their collection, it is not worth the cost and effort to obtain. Finally, I identified that proponents for stronger IP protection have focused their attention to copyright law, which provides the simplest, quickest and most inexpensive path to gaining legal rights. The recent legislation known as the IDPPPA attempted to strike a balance of giving copyright protection that is not overarching but still providing designers a way around the useful article bar present in general copyright law. The bill never passed Congress and the current session has not seen another bill.

In the end, opening the door to litigation is not the right answer to solving this issue, unless the law is somehow able to target specific design details and differentiate between a trend and an actual technical design. Even if this is achieved, smaller designers do not have the money

or resources with which they can go after copiers who infringe on their designs with the same force as larger companies. Because fashion collections only last for a few months before designers are on to the next trend, in all likelihood the fashion industry will continue to exist in a negative space where designers do not receive legal protection for their apparel design.