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Stop Glorifying Fashion Piracy: It is Time to Enact the Innovative Design Protection Act

Keylon Lo

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STOP GLORIFYING FASHION PIRACY: IT IS TIME TO ENACT THE INNOVATIVE DESIGN PROTECTION ACT

KEYON LO¹

“[C]opyright law will...stimulate and secure creative minds to develop their own designs and to be creative and independent. The United States could ride the crest of a new revolutionary fashion, fueled by the creative potential of their young designers.”²

NATHALIE DOUCET
PRESIDENT OF THE ARTS OF FASHION FOUNDATION

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2. See Nathalie Doucet, *Challenges*, ARTS OF FASHION FOUNDATION (Jan. 18, 2018), <http://www.arts-of-fashion.org/The%20Foundation/pages/+AoFFoundation.html> [<https://perma.cc/VHA3-NL5H>].

ABSTRACT

The current low-IP regime in the United States fails to provide adequate protection for fashion designs. Multiple bills had been proposed in Congress to extend copyright protection to fashion designs, but none of these was passed. Proponents of the “Piracy Paradox” doctrine suggest that unregulated copying is paradoxically beneficial to fashion designers and can foster innovation. This paper shows that the doctrine reflects a clear misunderstanding of fashion theories and how fashion trends are formed. It further argues that the fashion industry requires a diverse portfolio of inspired works rather than line-by-line knockoffs to foster trend formation. The Innovative Design Protection Act is a well-thought-out bill that can maximize the welfare of fashion designers, copyists, and the public. Congress needs to extend limited sui generis copyright protection to fashion designs that can prohibit fashion piracy without interfering with the production of inspired works.

Keywords:

Fashion, Piracy Paradox, Line-by-Line Copy, Inspired Work, Innovative Design Protection Act

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INTRODUCTION

For many years, scholars have glorified fashion piracy to be something paradoxically beneficial to the industry and have thought that fashion designers should take unregulated copying of their designs as “homage” rather than “piracy.”³ These scholars assume that fashion designers are copyists themselves and assert that giving fashion designers basic rights to protect their designs will slow down the fashion cycle.⁴ Fashion, in many fashion designers’ minds, is not just a career or an interest — it is their dream.⁵ They dream to express their aesthetic perspectives, to have their talents recognized, and to have their designs appreciated.⁶ They do not want to see their designs being distorted or copied without a credit.⁷ Indeed, money is not the prime reason these creative talents design, but without the opportunity to recoup their investments, they have to find other ways to sustain a living.⁸ This paper challenges the proposition that a three-year limited, *sui generis* copyright protection for fashion designs is more harmful than beneficial to the industry and wider society. In this paper, I will explain why the “Piracy Paradox” doctrine is a misrepresentation and misunderstanding of the fashion industry and trend, and why the Innovative Design Protection Act (IDPA) will not hinder innovation but rather foster a creative and respectful fashion culture in the United States.

Part I of this paper explains the piracy problems faced by fashion designers in the United States and how fast fashion retailers threaten their businesses, particularly in this technological era. **Part II** of this paper provides a summary of how intellectual property (IP) laws in the United States protect various aspects of fashion designs and their corresponding limitations. **Part III** of this paper provides criticism of the “Piracy Paradox” doctrine through a fashion designer’s lens and illustrates how the doctrine might be unsupported and inapplicable in the contemporary American fashion culture. **Part IV** of this paper examines the compatibility of the IDPA with different copyright theories and the potential benefits it may bring to the society. **Part V**

3. See Kal Raustiala & Christopher Sprigman, *The Piracy and Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1691 (2006) (“Design copying is occasionally complained about, but it is as often celebrated as ‘homage’ as it is attacked as ‘piracy.’”); see also Sara Marcketti & Jean Parsons, *Design Piracy and Self-Regulation: The Fashion Originators’ Guild of America, 1932-1941*, 24 CLOTHING & TEXTILE RSCH. J. 214, 216-220 (2006).

4. See *id.* at 1722.

5. See generally LISA SPRINGSTEEL, *BECOMING A FASHION DESIGNER* (2013); see also generally MARY GEHLHAR, *THE FASHION DESIGNER SURVIVAL GUIDE: START AND RUN YOUR OWN FASHION BUSINESS*, SIMON AND SCHUSTER (2021) (“If you are doing this just to be famous, forget it. The fashion world requires hard work, discipline, perseverance, and passion. There is no magic formula or secret to success, and while designers can learn from others, they each must find their own path.”); see also generally Olivia Martinez, *The Inner Mind of a Fashion Designer*, S. Ill. Univ. Carbondale Graduate Thesis (2018).

6. See *id.*

7. See Amy Adler & Fromer Jeanne, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1502 (2019).

8. See *id.*

of this paper summarizes the underlying implications of enacting the IDPA in fostering an innovative and respectful American fashion culture that will benefit the fashion industry and the society in the long term.

I. FASHION PIRACY IN THE UNITED STATES

A. Fast Fashion Retailers or Fast Fashion Pirates?

The fast-fashion retailing business model first emerged in the late 1980s when Zara opened its stores in New York and was recognized by New York Times as a “Fast Fashion Retailer” because of its incredibly fast production business model that brings fashion trends from designs to stores and ultimately customers in just about two weeks.⁹ When I first learned about this business model as a fashion design student, I was impressed; I genuinely believed that Zara must have a team of talented fashion designers that could efficiently predict seasonal trends and bring affordable creative designs to customers in a timely manner.¹⁰ However, the “beautiful” truth of being able to launch their “designs” so fast is that they copy the hard work of others.¹¹ The success of their business model relies on copying others’ designs and quickly releasing knockoffs to stores, sometimes even faster than the original designers, so that they can deprive the original designers of their first-mover advantage.¹² Fast-fashion products are often more affordable because creating by copying can significantly reduce the costs of design and ultimately costs of production.¹³ The fast-fashion business model minimizes the need for creative input,¹⁴ such that companies can reduce the design lead-time and facilitate the process of frequent inventory adjustment to lower the production costs and provide customers with so-called “affordable items.”¹⁵

9. See PANKAJ GHEMAWAT, JOSE LUIS NUENO & MELISSA DAILEY, *ZARA: FAST FASHION* 8-12 (2003); see also Caitlin Stover, *The Fashion Emergency: Protection at a Price*, 17 COLO. TECH. LJ 241, 261 (2018).

10. See *id.*

11. See *id.*

12. See Fernando Suarez & Gianvito Lanzolla, *The Half-Truth of First-Mover Advantage*, HARV. BUS. REV. MAR.-APR. 2005, at 121, 122 (describing how first-mover status is not guaranteed and much depends on the circumstances); see also Julie Zerbo, *Protecting Fashion Designs: Not Only What, But Who*, 6 AM. U. BUS. L. REV. 595, 598 (2016) (“[R]enowned fast fashion retailers, as their business models are based almost entirely on the offering of inexpensive, line—for—line replicas of designs of both established design houses and sought—after emerging design labels, alike. Thus, enabling them to earn a profit thanks to lower unit costs and the avoided expense of design.”).

13. See GHEMAWAT, NUENO & DAILEY, *supra* note 8, at 9-10.

14. See Michael A. Cortez et al., *Fast Fashion Quadrangle: An Analysis*, 18 ACAD. MKTG. STUD. J. 14, 1-16 (2014) (quoting statement of vice president for merchandising statement on the fact that “[T]he company does not employ designers, ‘just very savvy designers’ to lower the cost of their operation.”).

15. See *id.* at 3; see also Mark Brewer, *Fashion Law: More than Wigs, Gowns, and Intellectual Property*, 54 SAN DIEGO L. REV. 739, 760-61 (2017).

Although the reduction in production costs is partially a result of good business administration decisions including supply chain management, inventory management, human resource management, or brand management,¹⁶ it is also partially due to the appropriation of the hard work of other fashion designers who invested their money, time, and often dreams in their designs and might not get repaid due to the current low-IP regime.¹⁷

If we look at a traditional fashion business model, designing and testing are one of the most costly and time-consuming steps.¹⁸ Some people call fashion designers the engines of fashion brands.¹⁹ When Phoebe Philo left Céline in 2018, the brand lost a substantial amount of loyal customers²⁰ and people in the industry commented that the brand “*is dead*.”²¹ Nonetheless, it is uncommon to see fashion brands provide comprehensive training and generous retention bonuses to fashion designers in order to retain their talents to continue design production in line with the brand image and appealing to their customers; there are not many such prestigious positions available in the industry either.²² Although designers are vital to a brand, there is a high supply of aspiring designers and a limited demand for them.²³ Thus, designers often do not have much market power despite their importance in the

16. See Cortez et al., *supra* note 13, at 3-5 (“Zara maintains a higher level of control throughout the organization....Moreover, by locating its supplier in close proximity to the headquarters, Zara has a faster and more advanced communication system and workforces. Besides production, inventory management is also an indispensable factor to reduce production lead time”); see also MARK O. GEORGE, *THE LEAN SIX SIGMA GUIDE TO DOING MORE WITH LESS: CUT COSTS, REDUCE WASTE, AND LOWER YOUR OVERHEAD* (2010).

17. See Victoria Ledezma, *Globalization and Fashion: Too Fast, Too Furious*, 4 Laurier Undergraduate J. Arts 9, 6 (2017) (“Copying designs is not the only way fast-fashion retailers manufacture their clothing faster. To make these clothes in less time, companies need a lot of labour, and to keep costs down, fast-fashion retailers depend on cheap labour in underdeveloped countries.”); see also Sangeeta Singh-Kurtz, *Fast Fashion Exploits Everyone it Touches*, QUARTZ (Jan. 20, 2019), <https://qz.com/quartz/1367669/fast-fashion-exploits-everyone-it-touches/> [https://perma.cc/C89J-UBZZ].

18. See TIM JACKSON, *THE PROCESS OF FASHION TREND DEVELOPMENT LEADING TO A SEASON*, IN *FASHION MARKETING: CONTEMPORARY ISSUES* 121-32 (2001) (providing a chart of the process of apparel design and product development); see also generally ERIC WILSON, *FASHION INDUSTRY*, IN *THE BERG COMPANION TO FASHION*, (Valerie Steele eds., 2010); see also Marta Sponsiello, *Fashion Design’s Low-IP Protection: The Relationship Between Copycats and Innovation in the Fast Fashions’ Era 12-14*, (2019) (Master’s Degree Thesis, Luiss Guido Carli) (on file with LuissThesis).

19. See PETER MCNEIL, *FASHION DESIGNERS*, IN *BERG ENCYCLOPEDIA OF WORLD DRESS AND FASHION: WEST EUROPE* 129-36 (Lise Skov eds., 2010).

20. See Gabrielle Arruda, *Why Celine Just Isn’t the Same Since Hedi*, GABRIELLE ARRUDA (Jun. 20, 2019), <https://gabriellearruda.com/why-celine-just-isnt-the-same-since-hedi/> [https://perma.cc/Z2WR-H7ZA].

21. See Emilia Petrarca, *Céline Is Dead, Long Live Céline*, *THE CUT* (Jan. 23, 2018), <https://www.thecut.com/2018/01/hedi-slimane-celine-phoebe-philos.html> [https://perma.cc/2W9A-XPMH].

22. See PAMELA GIBSON, *DESIGNERS AND MODELS BECOME BRANDS*, IN *FASHION AND CELEBRITY CULTURE* 183-206 (2012); see also Kati Chitrakorn, *What Makes a Popular Luxury Fashion Brand?*, *VOGUE BUSINESS* (Jun. 5, 2020), <https://www.voguebusiness.com/companies/what-makes-a-popular-luxury-fashion-brand> [https://perma.cc/UU8P-Q8EL]; see also T. S. Lee, C. S. Leung & Z. M. Zhang, *Fashion Brand Image Marketing: Brand Image and Brand Personality*, 4 *RSCH. J. TEXTILE & APPAREL* 60 (2000) (describing brand image and brand personality).

23. See *id.*

system.²⁴ Many emerging fashion designers might never reach celebrated levels if their work is stolen without consent rather than fostered by collaboration.²⁵ Unfortunately, this is how the current copyright law stands. Copying fashion designs is currently legal in the United States and fast-fashion retailers do not seem to have much incentive or intent to foster collaboration with emerging fashion designers or small brands.²⁶ Young design talents who have yet developed any market power often lose opportunities to recoup their investments even though their designs are “chosen/copied” by these fast fashion brands.²⁷ Research shows that it is quite commonplace for some fast-fashion retailers to budget a set amount of money each year to handle expected IP disputes, and oftentimes they will either take down the products from their stores or settle with the fashion designers after “stealing” their designs.²⁸ Fast-fashion retailers will also appropriate the work of less estab-

24. *See id.*

25. *See A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 14-15 (2006) [hereinafter *Hearing on H.R. 5055*] (statement of Jeffrey Banks, Fashion Designer, on behalf of the CFDA, criticizing that “some have argued that protecting fashion will drive up costs, accessibility and ultimately harm consumers....In fact, the same could be said for the protection of music, movies, software and books. If these works weren’t protected by copyright, if new technologies weren’t protected by patents, wouldn’t prices come down for consumers?”).

26. *See Bashirat Oladele, Small Designers Fall Victim to Larger Brands Stealing their Designs*, THE BOAR (Aug. 18, 2020), <https://theboar.org/2020/08/small-designers-victim-larger-brands-stealing-designs/> [https://perma.cc/9YF6-ME7R] (“[S]ome fashion brands have a notorious reputation for stealing designs from other creatives and designers...Designs continue to be stolen unless trademarked by the designer....It appears that in the US, it is easy for brands to steal designs from independent designers because of the lack of legal protection over these designs.”); *see also* Ledezma, *supra* note 16, at 6 (“Popular retailer Forever 21 has been sued and has settled over fifty claims for stealing prints and designs from designers.... The company has come to realize that it can gain more from the production and sale of copied designs than it loses in court. Therefore, it is actually a more profitable strategy for fast-fashion companies to infringe on copyrights and settle the suits later than it is for them to license a design in the first place.”)

27. *See Irene Tan, Knock it Off, Forever 21! The Fashion Industry’s Battle Against Design Piracy*, 18 J.L. & POL’Y 893, 900 (2009) “A representative for the CFDA stated that “[a]lthough a designer can spend tens of thousands to mount their runway show to reveal their new lines, they frequently don’t even recoup their investments. Their designs are stolen before the applause has faded [because] software programs develop patterns from photographs taken at the show and automated machines then cut and stitch copies of designers work from those patterns.”; *see also* Sarah Young, *Shein: Fast Fashion Retailer Accused of ‘Stealing’ Independent Brand’s Design*, INDEPENDENT (Aug. 22, 2020, 4:44 PM), <https://www.independent.co.uk/life-style/fashion/emma-warren-shein-stolen-design-bee-hoodie-instagram-a9683551.html> [https://perma.cc/AD3H-TNJA] (“@sheinofficial should be ashamed of themselves for stealing designs from small businesses....I know they’re notorious for it. They do it a lot....That’s fast fashion for you. It’s infuriating because they’re selling it for a third of the price as well....Emma went on to ask why big fashion companies such as Shein do not consider working with independent designer on a freelance basis instead of simply taking their designs.”); *see also generally* NORMA RANTISI, HOW NEW YORK STOLE MODERN FASHION, IN *FASHION’S WORLD CITIES* 109-22 (Christopher Breward & David Gilbert eds., 2006).

28. *See Tan, supra* note 26, at 900-02 (quoting an empirical study to show that Forever 21 was a defendant in over fifty suits for copyright and trademark infringement in five years and many of them were eventually settled out of court); *see also* Julia Brucculieri, *How Fast Fashion Brands Get Away With Copying Designers*, HUFFPOST (Sept. 4, 2018), https://www.huffpost.com/entry/fast-fashion-copy-cats_n_5b8967f9e4b0511db3d7def6 [https://perma.cc/4T9Y-VBFB] (“According to Zerbo, it’s commonplace for some fast fashion brands to budget a set amount of money each year to pay settlements.

lished fashion designers who would rather invest their money in future designs than spend it on complex legal actions.²⁹ The fast fashion retailers are well aware that they are exploiting the IP law loophole in the United States and have no intention to stop unless the law is changed.³⁰

Nonetheless, some scholars assert that this common practice of copying in the fashion industry induces fashion trend formation.³¹ I remain skeptical about their views and will provide a detailed analysis in this paper to explain why their assertions are based on a misunderstanding of fashion theories and trends. I recommend anyone who reads this paper to take a look at these articles entitled “*The Most Shameless High Fashion Knockoffs of 2017*,”³² and “*Zara, Forever 21, Top Shop and H&M, Etc.. Are Offering Cheap Copies of High Fashion*.”³³ You will find there are various degrees of copying, some copy more, such as Forever 21, and some copy less, like Zara and H&M.³⁴ Most of the knockoff products are “substantially similar”³⁵ to the originals in color, shape, arrangement of details, choice of material, etc. In-house fashion designers of these fast fashion brands do not change much of the design; they intend to appropriate it entirely.³⁶ To produce the most prof-

That’s not necessarily an admission of guilt, it just might be smarter move in terms of spending resources....it’s an issue that emerging designers often can’t afford to be locked in a legal battle with a retail giant.... for designers who consider their work to be art, seeing it get copied and diluted is almost like being “robbed.”“); see also Gil Appel, Barak Libai & Eitan Muller, *On the Monetary Impact of Fashion Design Piracy*, 35 INT’L. J. RSCH. MKTG. 591, 591-593 (2018); see also Elizabeth Vulaj, *Will Fast Fashion Go out of Style Soon? How Couture Designers, Celebrities, and Luxury Brands Fighting Back May Change the Future Legal Landscape for Mass Affordable Retailers*, 36 SANTA CLARA HIGH TECH. L. J. 197, 211 (2020).

29. See Jake Palmer, *Why Young Designers are Using Social Media to Shame Fast Fashion Copycats?*, LEXOLOGY (Feb. 11, 2021), <https://www.lexology.com/library/detail.aspx?g=063b21db-bc86-4d5b-bel1-df1e5d7d1c5f> [https://perma.cc/YP3L-25T9].

30. See *id.*

31. See KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012) (“Surprisingly, fashion designs are not covered by copyright law. What Favi-ana does is perfectly legal—and very common....The development of new apparel designs continues every day at a dizzying pace. Indeed, the American fashion industry has never been more creative. All this copying has not killed the fashion industry. In fact, fashion not only survives despite copying; it thrives due to copying...”)

32. See Stephanie Eckardt, *The Most Shameless High Fashion Knockoffs of 2017*, W MAGAZINE (Dec. 25, 2017), <https://www.wmagazine.com/gallery/most-shameless-high-fashion-knockoffs-2017> [https://perma.cc/SSX6-WWTV].

33. See Bego Ore, *Zara, Forever 21, Topshop and H&M, etc.. are Offering Cheap Copies of High Fashion*, LIFESTYLEOFAFASHIONISTA (Jul. 25, 2016), <https://medium.com/@FASHIONISTA/zara-forever-21-top-shop-and-h-m-etc-are-offering-cheap-copies-of-high-fashion-d9c33dfa3bc7> [https://perma.cc/3D94-XGNZ].

34. See Tan, *supra* note 26, at 901, 915 (“Forever 21, a Fortune 500 company, is considered by some as the “most notorious copyist retailer” and is the target of over fifty lawsuits for copyright and trademark infringement....In comparison, only two copyright and trademark infringement lawsuits have been filed against Forever 21’s competitor, H&M. This vast discrepancy in lawsuits can be attributed to the fact that H&M “engage[s] in loose design ‘referencing’ by borrowing high fashion ideas and interpreting them for the masses,” while Forever 21 generally copies a design to the very last detail.”)

35. See *infra* Part IV.A (explaining why the “substantially identically” standard of the IDPA is a generous threshold for fashion knockoffs).

36. See generally Singh-Kurtz, *supra* note 16.

itable knockoffs, they only copy popular seasonal items and minimize alterations to the original designs such that customers on a budget will recognize the designs and buy the knockoffs instead of the originals.³⁷ Line-by-line knockoff is essentially a “counterfeit without a fake trademark.”³⁸ Although inspired works are beneficial to the industry, line-by-line knockoffs are not.³⁹ While fashion should be made affordable for everybody, this does not justify the practice of fast fashion retailers of stealing designs.⁴⁰ Fast-fashion retailers are true “pirates” in the industry⁴¹ and they are known to be professional in stealing designs from others.⁴² If we continue to allow fast-fashion retailers to exploit the IP law loophole and copy the work of other designers with little consequence, more fashion designers will be put out of business or become fashion pirates themselves.⁴³ I doubt that the United States would like to foster this kind of fashion culture.

B. Threats Caused by Fashion Piracy to Fashion Designers in the Technological Era and Feedback from Industry Stakeholders

Lazaro Hernandez, a well-known fashion designer speaking on behalf of the Council of Fashion Designers of America (CFDA), testified before the Subcommittee on Courts, the Internet, and Intellectual Property regarding the Innovative Design Protection and Piracy Prevention Act (IDPPPA)(hereinafter Subcommittee). Hernandez revealed that while emerging fashion designers put their imaginations to work and spend thousands of dollars in preparation for a fashion show, fashion pirates can wipe fashion designers out in a single season.⁴⁴ Running a fashion business is

37. See Vertica Bhardwaj & Ann Fairhurst, *Fast Fashion: Response to Changes in the Fashion Industry*, 20 INT'L REV. RETAIL DISTRIB. & CONSUMER RSCH. 165, 169-70 (2010).

38. See Tan, *supra* note 26, at 894 (“The blatant copying of another’s designs is akin to counterfeiting without affixing the fake designer label.”); see also Joel Hietanen et al., *Paradox and Market Renewal: Knockoffs and Counterfeits as Doppelgänger Brand Images of Luxury*, 36 MKT. INTEL. & PLAN. 750, 8 (2018)(“Knockoff and counterfeit offerings do not necessarily signify binary distinctions in the market vis-à-vis genuine offerings, but rather create paradoxical symbols that differentiate and complement.”).

39. See *infra* Part III.B.

40. See *Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the H. Subcomm. on Intell. Prop., Competition, & the Internet*, 112th Cong. 4 (2011) [hereinafter Hearing on H.R. 2511] (statement of Lazaro Hernandez, Fashion Designer & Co-Founder of Proenza Schouler).

41. See Dayoung Chung, *Law, Brands, and Innovation: How Trademark Law Helps to Create Fashion Innovation*, 17 J. MARSHALL REV. INTELL. PROP. L. 492, 495 (2018); see also Jessica Rosen, *The Inability of Intellectual Property to Protect the New Fashion Designer: Why the ID3PA Should be Adopted*, 43 GOLDEN GATE UL REV. 327, 344 (2013); see also generally Randal Picker, *Of Pirates and Puffy Shirts: A Comment on the Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 328 Va. L. Rev., Forthcoming, Univ. of Chi. L. & Econ., Olin Working Paper (2007).

42. See Donald Sull & Stefano Turconi, *Fast Fashion Lessons*, 19 BUS. STRATEGY REV. 4, 6 (2008) (describing the fast fashion retail strategy of adapting merchandise assortments to current and emerging trends as quickly and effectively as possible).

43. See *infra* Part V.C.

44. See Hearing on H.R. 2511, *supra* note 39, at 4 (statement of Lazaro Hernandez).

tough and fashion designers find it tougher because of a lack of legal protection.⁴⁵ Professor Susan Scafidi, founder and director of the Fashion Law Institute at Fordham Law School, said that the exact cost of being knocked off and the resulting loss of sales is “notoriously difficult to quantify.”⁴⁶ At the time of writing, there are insufficient empirical studies, and studies that do exist provide limited evidential data on how much harm fashion piracy has caused to fashion designers.⁴⁷ Proponents of fashion design protection should conduct further empirical studies in this area to provide more reliable and supporting data to assess the damage caused by piracy to fashion designers. Fashion piracy might not be extremely harmful to some types of fashion designers (although no data exists to support the conclusion), yet fashion piracy has certainly jeopardized the incentives of many individual fashion designers who lose orders every day.⁴⁸ As suggested by Jessica Silbey, scholars might understand the problems encountered by fashion designers by listening to what the industry stakeholders say.⁴⁹ Legal scholars can also infer from fashion designers’ experiences that the hypothesis proposed by some

45. *See id.*

46. *See* Helena Pike, *What are the Consequences of Copycats?*, BUSINESS OF FASHION (Mar. 14, 2016), <https://www.businessoffashion.com/community/voices/discussions/what-is-the-real-cost-of-copycats/fashions-copycat-economy> [<https://perma.cc/5M98-RQHB>].

47. *See* Gil Appel et al., *The Short- and Long-Term Impacts of Fashion Knockoffs on Original Items*, 13 MSI Report, 20, 20-26 (2013) (an empirical study conducted by Appel et al. in 2013, revealed that the introduction of knockoffs damaged the net present value(-13.1%) of originals in a single year, and may harm original designs more than Raustiala and Sprigman proposed. However, the actual harm caused to fashion designers is still uncertain.); *see also* Gil Appel et al., *supra* note 27, at 602-606 (Appel et al. further conducted a similar empirical study in 2017. Nevertheless, the study covers only 20 specific fashion items collected using Google Trends and can hardly represent the general US fashion industry nor can it measure the harm caused by copying in the American fashion industry.); *see also* Anna Huoviala, *Gatekeepers - How Designers Add Value in the Fast Fashion Process*, 44-48, 82 (2015) (In 2015, Anna Huoviala conducted semi-structured interviews with five professional designers from London, Barcelona, Helsinki and Stockholm to obtain their views about their roles in the fast fashion industry. The overall feedback was that fashion designers are the gatekeepers of brands, but that they are also responsible for adding value to exciting fashion trends. Being able to produce creative products to customers is how they are motivated. Nevertheless, the study did not interview American fashion designers and the sample size was limited); *see also* Alice Janssens & Mariangela Lavanga, *An Expensive, Confusing, and Ineffective Suit of Armor: Investigating Risks of Design Piracy and Perceptions of the Design Rights Available to Emerging Fashion Designers in the Digital Age*, 2 J. DRESS, BODY & CULTURE 229, 231 (2020) (In 2019, Professors Alice Janssens and Mariangela Lavanga conducted a study to investigate the risk of fashion piracy and perceptions of design rights available to UK-based emerging fashion designers. They applied a qualitative approach and interviewed fourteen designers. In their findings, they highlighted that emerging fashion designers lack knowledge of the rights available to them. They also argued that “while this still seems to be true for established fashion brands which can rely on extensive legal advice, the high speed of the contemporary fashion system, its internationalization and medialization may curtail the first mover advantage of emerging fashion designers, putting their businesses under threat.” I would propose that a similar study conducted in the US to determine how American fashion designers have been threaten by fashion piracy. To date, no relevant empirical studies have been conducted in the US that can provide evidential data to support either side’s assertion.)

48. *See* Hearing on H.R. 2511, *supra* note 39, at 4 (statement of Lazaro Hernandez).

49. *See generally* JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015)(Silbey in her book conducted fifty in-depth interviews with a broad range of people in New England and New York, including inventors, musicians, artists, filmmakers, and writers, as well as business agents and attorneys active in intellectual property-intensive industries to understand the various IP issues they encountered in their respective sectors.)

scholars that piracy is not harmful to fashion designers—to a certain extent is not entirely true.⁵⁰

Big fashion brands are not afraid of being sued by fashion designers.⁵¹ Carrie Anne Roberts is a fashion designer and a single mom who sells “Mere Soeur” t-shirts and other baby fashion items to her customers based in the United States via Instagram.⁵² She found that Old Navy had knocked off her designs and sold them at a much lower price within a day or so.⁵³ Roberts then sent an email to Old Navy and the company’s response was that the design did not carry any trademark and therefore she had no legal ground of a claim—which is unfortunately true under the current low IP regime.⁵⁴ Although Roberts received many supportive comments from her followers, there was nothing much she could do.⁵⁵ In an Instagram post, Roberts complained that big businesses take small businesses as sources of ideas and think they are too weak to fight back.⁵⁶ As a single mother, Roberts reveals that the original design was very meaningful to her and the knockoff had destroyed the meaning behind her work.⁵⁷ Roberts is just one of the many victims of fashion piracy who need to be mentioned in academic discourse.⁵⁸ Fast fashion retailers have also routinely imitated designs from Native American tribes, indigenous groups, fashion design competition participants, design students, and many others.⁵⁹ As Lazaro Hernandez said, the United States has become a haven for copyists who steal designers’ works and sell them as their own with no fear of consequences.⁶⁰

50. See Marjorie Yang, *A Model Stakeholder Strategy from the Garment Industry*, HARV. B. REV. (Oct. 6, 2011), <https://hbr.org/2011/10/a-model-stakeholder-strategy-f> [<https://perma.cc/V9C4-HS7G>].

51. See Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And it's completely legal. Blame America's outdated copyright laws*, VOX (Apr. 27, 2018, 7:30 AM), <https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m> [<https://perma.cc/6KVX-8P9G>].

52. See Murray Fairclough, *Rag-Trade Rip-Off*, OPUS UNDERWRITING (Sep. 10, 2019), <https://opusunderwriting.com/rag-trade-rip-off/> [<https://perma.cc/VD3V-DWTK>].

53. See *id.*; See also Figure 1.

54. See Yang, *supra* note 49.

55. See *id.*

56. See *id.* (“They have so much more money, and they know that pursuing these lawsuits is very costly and a lot of artists can’t afford to go through with them”...expecting them to...“cave in and not do anything, or settle for a really low amount.”).

57. See *id.*; see also *infra* Part IV.C.

58. See *id.*

59. See *id.*; see also Chavie Lieber, *Beyond Elle Woods: The Rise of Fashion Law*, RACKED (Jan. 15, 2015, 11:00 AM), <https://www.racked.com/2015/1/15/7561277/fashion-law> [<https://perma.cc/7RTS-TT4T>]; see also TFL, *Artisans and Indigenous People are Sick of Fashion Brands’ Inspirations*, THEFASHIONLAW (Apr. 19, 2018), <https://www.thefashionlaw.com/artisans-are-sick-of-serving-as-fashion-brands-inspiration/> [<https://perma.cc/7RJY-S7L9>].

60. See Hearing on H.R. 2511, *supra* note 39, at 3 (statement of Lazaro Hernandez).

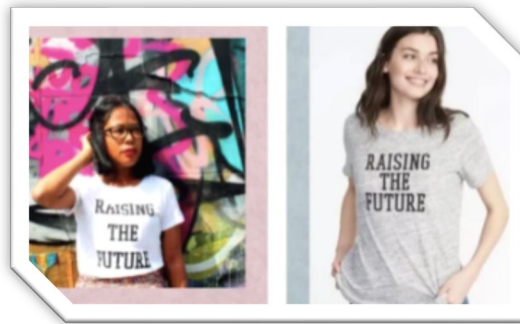


Figure 1: Comparison between Carrie Ann Roberts' T-shirt (left) and Old Navy's Knockoff (right).⁶¹

Developments in technology ramp up fashion piracy to a whole new level in the twenty-first century.⁶² The COVID-19 pandemic has also notably changed the fashion industry.⁶³ Consumers now see a rapidly growing number of online fashion shows given by avatars,⁶⁴ and industry experts foresee that virtual fitting options will soon be available.⁶⁵ The fashion industry expects to see even more fashion designs being widely promoted on social media platforms, which may offer almost unlimited opportunities for copyists.⁶⁶ The cost of copying has never been lower.⁶⁷ An empirical study conducted in the United Kingdom in 2019 shows that digital platforms have further threatened fashion designers' ownership of their designs.⁶⁸ This is akin to the early age of digital music distribution in the 1990s when the recorded music industry was seriously hit by digital downloads and interactive

61. See Evolving World, *Support Independent Designers*, MATTEBRAND (Feb. 28, 2019), <https://mattebrand.com/blogs/blogs/support-independent-designers> [https://perma.cc/TVA2-Z7BT].

62. See ALESSANDRA L. ROYO, VISITING MALLS AND BUYING ONLINE: SHOPPING FOR STYLE, IN CONTEMPORARY INDONESIAN FASHION: THROUGH THE LOOKING GLASS, 100-102 (2020).

63. See IFA, *Post covid-19 Assessment in the Fashion Industry: What Changes for What Future?*, IFAPARIS (Aug. 1, 2020), <https://www.ifaparis.com/media/news/2020/post-covid-19-assessment-fashion-industry-what-changes-what-future> [https://perma.cc/YJ4W-D7SD].

64. See Ritupriya Basu, *As COVID-era Fashion Shows Go Virtual, New Opportunities for Designers Emerge*, EYEONDESIGN (Nov. 30, 2020), <https://eyeondesign.aiga.org/as-fashion-shows-go-virtual-in-the-covid-era-new-opportunities-for-designers-emerge/> [https://perma.cc/R65Z-S9XV].

65. See Abha Bhattarai, *Virtual Try-Ons are Replacing Fitting Rooms during the Pandemic*, WASH. POST (Jul. 9, 2020), <https://www.washingtonpost.com/business/2020/07/09/virtual-try-ons-are-replacing-fitting-rooms-during-pandemic/> [https://perma.cc/68PT-F4KE].

66. See Riadh Ladhari, Jessica Gonthier & Mathieu Lajante, *Generation Y and Online Fashion Shopping: Orientations and Profiles*, 48 J. RTL. CONSR. SERV. 113, 113-21 (2019).

67. See *id.*

68. See Janssens & Lavanga, *supra* note 46, at 251 ("A cogent concern presented in the open response section of the survey was that piracy "stunts the desire to promote online" (open answer from survey respondent). Not only does this allude to the impact that design piracy may have upon firms' actions, but it is pertinent given the growing importance of digital tools to the fashion industry. The comment suggests that the locus of piracy may not just be the physical market, but also online mechanisms, limiting designers' freedom upon a potentially key sales platform.").

streaming;⁶⁹ and digital fashion has the potential to be widely copied and resold instantly.⁷⁰ When fashion designers upload their designs, it would be almost impossible for them to control how people use their designs. If it is free, who would want to pay?

Jai Nice, an independent fashion designer with a small online brand in the United States, found Fashion Nova had copied many of her designs in the past few years.⁷¹ As early as 2018, when she had no website, Nice recalled Fashion Nova ordered several products from her on Instagram and eventually returned those items to her.⁷² Now that Nice has a website with high-resolution photos of her designs from different angles, she has not received more orders from Fashion Nova but still sees knockoff versions of her designs on their website.⁷³ It is evident how “shameless” these copyists can be and how “helpless” independent fashion designers are.⁷⁴ In the midst of the COVID-19 pandemic Tyler Mccall, editor-in-chief of Fashionista, expressed her worries about young American fashion designers being wiped out by the pandemic, as they are not “*as protected by massive conglomerates as their peers in Europe.*”⁷⁵ IP law protection for fashion designs in the United States is still lagging far behind many other countries in the world with leading fashion capitals.⁷⁶

69. See Hearing on H.R. 2511, *supra* note 39, at 5 (statement of Lazaro Hernandez saying that it is like developing their hit song...was stolen and recorded by someone else, with no credit to the songwriter...It is very hard to survive when you become the victim of this type of theft); see also Hearing on H.R. 5055, *supra* note 24, at 12 (statement of Jeffrey Banks saying that “just as the internet has transformed our sister creative industries like music, books...creating opportunities as well as problems.”); see also Seth Ericsson, *The Recorded Music Industry and the Emergence of Online Music Distribution: Innovation in the Absence of Copyright (Reform)*, 79 GEO. WASH. L. REV. 1783, 1805-13 (2011)(“These circumstances led to the P2P dilemma, the slow development of the OMD market, and the institutional crisis of copyright.... Since copyright’s basic objective is creation and its revenue objectives but a means to that end, this is the underlying copyright question. . . . And its answer is far from clear.”).

70. See Carolyn Martin & Margaret Horstman, *AI and Copyright in the Fashion Industry*, LUTZKER & LUTZKER LLP (Jun. 30, 2021), <https://www.lutzker.com/ai-and-copyright-in-the-fashion-industry/> [<https://perma.cc/U2TL-HMR3>] (“The Fabricant even gives away its digital clothes for non-commercial use and has encouraged individuals to download their files and experiment with three-dimensional digital fashion themselves. They do this by posting downloads on their website that anyone can access at no cost....However, similar to music and movies, digital fashion has the potential to be widely copied and resold. If a company wants to charge the public for digital garments, they will have to find a way to prevent customers from copying the files.”).

71. See Marquaysa Battle, *Black Fashion Designers Are Exposing Fashion Nova For Stealing Their Original Work*, REVELIST (Apr. 26, 2019, 12:01 PM), <https://www.revelist.com/style-news/fashion-nova-knock-off-designers/15005> [<https://perma.cc/J2YU-5WDT>].

72. See *id.*

73. See *id.*

74. See Hearing on H.R. 2511, *supra* note 39, at 4 (statement of Lazaro Hernandez saying that we are helpless against copyists who prey on our ideas).

75. See Tyler Mccall, *An Open Letter for American Designers. What Can We Do for You?*, FASHIONISTA (Mar. 23, 2020), <https://fashionista.com/2020/03/fashion-designers-op-eds-coronavirus-covid19> [<https://perma.cc/DD3D-MWUA>].

76. See Roberto Caso & Valentina Mazza, *The Protection of Fashion Design Against Copying: A Comparative Analysis*, 2 ANNO ACCADEMICO 9, 13-28 (2017) (summarizing France offers a strong and explicit form of protection for fashion designs under its copyright law, as well as under its industrial design law; European Union and United Kingdom provide registered and unregistered design protection that include fashion designs; Italy provides protection for fashion designs under the umbrella of “industrial” design works that have creative character or inherent artistic character).

The US IP laws provide little protection to fashion designs and are fostering a copying rather than innovating culture in the fashion industry that fast fashion retailers exploit others' designs as of right.⁷⁷ Scholars construed this lack of full protection for fashion design as a “Low-IP Equilibrium” and believed it is the key to the industry's success.⁷⁸ Kim Kardashian, a celebrity and an owner of a fashion boutique, posted a photo of her wearing a dress designed by her husband, Kanye West on her Instagram and found it being knocked off by Missguided the other day.⁷⁹ She requested on her Instagram “*Fast fashion brands, can you please wait until I wear this in real life before you knock it off?*”⁸⁰ This kind of unethical copyright has become commonplace and entrenched in the American fashion industry.⁸¹ Somehow the right now becomes wrong, as the wrong becomes right and the US IP laws must address fashion piracy.⁸² Missguided replied to Kardashian that “[*t*]he devil works hard but Missguided works harder...you've only got a few days before this drops online.”⁸³ This online exchange exemplifies how copying designs fast and selling them cheap seems again to be a “shameless” victory in the fast fashion industry.⁸⁴ Some brands such as Chanel might credit the original fashion designers as their inspiration and have shown respect of small artisans, but most copyists do not.⁸⁵ Since copying is legal in the fashion industry, fast fashion retailers rarely invest in their fashion designers.⁸⁶ There is even less incentive for retailers to license designs from independent designers, after all, because fashion designers create most designs for one single season.⁸⁷ To protect local talents, lawmakers should strengthen the current copyright law to better protect fashion designs ahead of the forthcoming rise

77. See *infra* Part IV.D.

78. See Raustiala & Sprigman, *supra* note 2, at 1698.

79. See Hannah Preston, *Kim Kardashian West v. Fast Fashion: Reality Star Wins Millions in Lawsuit Against Missguided*, NEWSWEEK (Mar. 22, 2021), <https://www.newsweek.com/kim-kardashian-west-missguided-lawsuit-1447394>. [<https://perma.cc/HY5E-9C2A>]; See also Figure 2.

80. See Lisa Davidson, *As Fast Fashion Thievery is Making Headlines Again, We Explore the Sorry History of Mega-Brands Ripping off Independent Creatives*, WEHEART (Mar. 25, 2019), <https://www.weheart.com/2019/03/25/fast-fashion-rip-off-small-designers-creatives/> [<https://perma.cc/WC62-3846>].

81. See *id.*

82. See Alice Wickens, *Design Piracy in the United States: Time to Fashion a Remedy?*, 24 J. WORLD INTELL. PROP. 55, 58 (2021) (“Permitting piracy while prohibiting counterfeits, has led Beltracchi to remark that this situation is clearly wrong and the law must address it.”); see also generally Karl Eikenberry, *When a Right Becomes a Wrong*, 83 NATIONAL CIVIC REVIEW, 176, 176-183 (1994).

83. See *id.*

84. See Sponsiello, *supra* note 17, at 43-53.

85. See Vanessa Friedman, *Called Out for Copying Chanel Does the Right Thing*, THE NEW YORK TIMES (Dec. 11, 2015), <https://www.nytimes.com/2015/12/12/fashion/called-out-for-copying-chanel-does-the-right-thing.html> [<https://perma.cc/WG37-A59V>] (“Chanel not only said it would credit her work but also added in a statement: “Chanel recognizes that this situation resulted from a dysfunctionality within its teams and has presented its apologies. Chanel also recognizes the heritage and know-how of Fair Isle. Chanel wishes to emphasize that the House is extremely vigilant in terms of its respect for creativity, whether its own or that of others....It has been an oversight from Chanel's team and I feel that with their apology and by crediting the design they have shown respect and support of small artisans.”).

86. See Hearing on H.R. 2511, *supra* note 39, at 5 (statement of Lazaro Hernandez saying that “licensing deals are then no longer an option.”).

87. See Sponsiello, *supra* note 17, at 4-15.

of digital fashion.⁸⁸ The current IP regime in the United States regrettably fails to protect fashion designs.



Figure 2: Comparison between Kardashian West's Dress (left) and Missguided's Knockoff (right)

II. INTELLECTUAL PROPERTY LAWS IN THE UNITED STATES

Current IP laws in the United States do not explicitly protect an entire fashion design, and often fashion designers barely benefit from these statutory IP protections.⁸⁹ Fashion designers may rely on three major types of IP protection to guard some aspects of their designs, copyright law, used to protect textile or graphic designs; trademark law, used to protect marks or logos; and design patent law, used to protect original ornamental designs; nonetheless these IP laws are far from sufficient to protect fashion designs.⁹⁰

A. Limitations of Trademark Protection

(1) Trademark Law Prohibits Counterfeits, Not Knockoffs

Trademark law offers effective protection against counterfeits but not non-confusing knockoffs.⁹¹ Trademarks in the United States are protected by

88. See Antonio Gonzalo et al., *Fashion's Digital Transformation: Now or Never*, MCKINSEY & COMPANY (May 6, 2020), <https://www.mckinsey.com/industries/retail/our-insights/fashions-digital-transformation-now-or-never> [https://perma.cc/K4N5-PQWE]; see also Hee Kyoung Cho, *A Critical Perspective on Strengthening Legal Protection of Fashion Designs*, 11 *Northeast Asian Law Review* 95, 112-113 (2017).

89. See Brandon Scruggs, *Should Fashion Design Be Copyrightable*, 6 *NW. J. TECH. & INTELL. PROP.* 122, 123 (2007).

90. See *id.* at 123-36.

91. See Kevin Tu, *Counterfeit Fashion: the Interplay between Copyright and Trademark Law in Original Fashion Designs and Designer Knockoffs*, 18 *TEX. INTELL. PROP. LJ* 419, 430-431 (2009) ("Therefore, where the overall appearance of a counterfeit or knockoff design is so similar to an original design that it causes confusion as to the origin of the counterfeit or knock-off, a claim for trade dress infringement under 15 U.S.C. § 1125(a) may be available to the original designer."); see also Kate Goldwasser, *Knock It Off: An Analysis of Trademark Counterfeit Goods Regulation in the United States, France, and Belgium*, 18 *CARDOZO J. INT'L & COMP. L.* 207, 215-18 (2010).

the Lanham Act at the federal level,⁹² trademark statutes at the state level,⁹³ and unfair competition principles at the common law level.⁹⁴ The Lanham Act protects a word, name, symbol, device, or any combination thereof—used by a person to identify a single source of goods or services—from those goods or services manufactured or sold by others.⁹⁵ The Act’s primary principles are to prevent illegal misappropriation of a source-identifying mark, prevent consumers from confusing trademarks, and reduce customers’ costs of shopping.⁹⁶ The Act does not serve to protect the aesthetic features of fashion designs.⁹⁷ Although there are established brands that have relied on trademark law to protect their fashion designs by strategically embedding logos onto their items,⁹⁸ those brands have heavily invested in policing any unauthorized use of their marks. Most of the brands’ marks have acquired a secondary meaning where customers understand them as source-identifying marks.⁹⁹

Nonetheless, most small fashion brands and individual fashion designers do not incorporate any trademarks in their designs, nor do they have the same resources to prohibit any unauthorized use of their trademarks proactively.¹⁰⁰ Fast fashion retailers have exploited this very loophole for years without much consequence¹⁰¹ and have blatantly produced line-by-line knockoffs that are essentially “counterfeits without affixing the fake designer label.”¹⁰² This also explains why old Navy well ignored Roberts’s take-down request, and why Missguided could publicly admit that it had knocked off Kardashian’s dress as if it had “won a marathon.”¹⁰³ Fast fashion retailers know how to play the game—and how to play it well.¹⁰⁴ The rule of thumb

92. 15 U.S.C. §§ 1051-1141n (2018).

93. See *State Trademark Information Links*, USPTO (last visited Mar. 22, 2021), <https://www.uspto.gov/trademarks-getting-started/process-overview/state-trademark-information-links> [<https://perma.cc/8WBJ-DKY2>] (providing a list of state trademark laws).

94. See Glynn S. Lunney Jr., *Trademark Monopolies*, 48 EMORY L. J. 367, 375 (1999).

95. 15 U.S.C. § 1127 (2018).

96. See Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1225 (2007).

97. See Lisa J. Hedrick, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215, 226 (2008).

98. See Emily S. Day, *Double-Edged Scissor’: Legal Protection for Fashion Design*, 86 N.C. L. REV. 237, 248-49 (2007).

99. See *id.*

100. See Erin Fitzgerald, *The Fashion Police: Criminalizing the Knowing Purchase of Trademark Counterfeit Fashion Items*, 47 New Eng. L. Rev. 127, 127-38 (2012); see also Hearing on H.R. 2511, *supra* note 39, at 5 (statement of Lazaro Hernandez saying that large corporations with ...recognized trademarks can...afford...very few small businesses can compete....)

101. See Hearing on H.R. 2511, *supra* note 39, at 4 (statement of Lazaro Hernandez)(“As a result, the U.S. has become a haven for copyists who steal designers’ ideas and sell them as their own with no fear of consequences.”).

102. See *id.* at 8; see also Tan, *supra* note 26, at 894 (“The blatant copying of another’s designs is akin to counterfeiting without affixing the fake designer label.”).

103. See generally Lieber, *supra* note 50.

104. See *infra* Part V.C. (discussing how players in the market will find a way to minimize their losses and maximize their gains in a game according to the game theory.)

for fast fashion retailers is to copy the design as close as possible but avoid incorporating any trademarked elements or patterns.¹⁰⁵

(2) *Trade Dress Doctrine Does Not Protect Seasonal Designs*

Certain fashion designs can be protected by the trade dress doctrine.¹⁰⁶ The Lanham Act offers trade dress protection to the total image of a fashion item as defined by its overall appearance and design, including: size, shape, color, and texture.¹⁰⁷ The Act also protects the appearance of an item's packaging and separate design elements making up the total image by which the item is presented to customers.¹⁰⁸ Nevertheless, a trade dress must be non-functional, distinctive, and used in commerce as a source identifier.¹⁰⁹ Functionality can be examined not just from a utilitarian perspective but also from an aesthetic perspective.¹¹⁰ This dual-interpretation of functionality means that an aesthetic feature of a fashion design cannot provide a significant benefit for the fashion designer which is (i) irreplicable by other kinds of aesthetic features (i.e., unique), and (ii) important in a consumer's decision-making process.¹¹¹ Otherwise, the aesthetic feature is functional and cannot be protected by the trade dress doctrine.¹¹²

There are only a handful of established brands that have successfully relied on trade dress doctrine to protect some configurations of their designs, but even so, not the entire appearance.¹¹³ The Supreme Court of the United States (SCOTUS) held that for a product design to be protected by the trade dress doctrine, the design should have already acquired a "secondary meaning" under trademark law.¹¹⁴ Fashion designers need to prove that, in the

105. See Tu, *supra* note 90, at 433 ("While fashion designs may qualify for trademark protection in limited circumstances involving sufficient distinctiveness and likelihood of confusion, protection will extend only to the original designer's famous mark. Therefore, the protection of a valid trademark indirectly encompasses a limited number of designs by virtue of the mark's attachment to a counterfeit item. Absent a registered mark, an owner may not sue for trademark infringement.")

106. See Karina K. Terakura, *Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry*, 22 U. HAW. L. REV. 569, 593 (2000).

107. 15 U.S.C. § 1125(a)(1) (2018); see also *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S. Ct. 2753 (1992); see also *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162 (2d Cir. 1991).

108. See *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27 (2d Cir. 1995); see also Priya Bharathi, *There Is More Than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works*, 27 Tex. Tech L. Rev. 1667, 1691 (1996) ("Under the Two Pesos standard, separate elements of a garment design, such as knit material, racer stripes, and neon colors, are protectable under trade dress if together they create unique retro-looking sportswear.")

109. See Terakura, *supra* note 105, at 578-89.

110. See Seth Di Asio, *Fashion Has No Function: Diminishing the Functionality Bar to Trademark Protection in the Fashion Industry*, 38 MISS. COLL. L. REV. 28, 29-30 (2019).

111. See Jessica Litman, *The Problem of Functional Features: Trade Dress Infringement under Section 43 (a) of the Lanham Act*, 82 COLUM. L. REV. 77, 77-97 (1982).

112. See *id.*

113. See Terakura, *supra* note 105, at 593-607 (discussing trade dress cases in New York, Illinois and Kansas where trade dress law was applied inconsistently in different states and how limited it is even for established brands like Samara Brothers to protect their product designs.)

114. See *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 120 S. Ct. 1339 (2000) (holding that a product's design is protectable only upon a showing of secondary meaning.)

minds of customers, the primary significance of an aesthetic feature is to indicate the source and origin of the product.¹¹⁵ One leading example is the Christian Louboutin's signatory "red lacquered sole."¹¹⁶ The red bottoms of Louboutin's shoes are protected by the trade dress doctrine, but the remainder of the shoe design is not protected for failing to establish secondary meaning.¹¹⁷ Given the fast-paced nature of the fashion industry, many fashion items are created for just one season and customers forget the old items as soon as the new ones are released.¹¹⁸ Under the Act, the aesthetic features have to be distinctive to customers and has been consistently used over time as a source identifier.¹¹⁹ Further, trademark and trade dress infringements often require evidence of actual harm or reduced capacity of famousness of goods sold¹²⁰ and threshold for what might constitute actionable dilution is rather unclear.¹²¹ Since trade dress protection requires a large amount of expenditure and time to prove due to the need for experts and significant advertising required, it is almost impractical for most fashion designers to obtain.¹²²

B. Limitations of Design Patent Protection

(1) *Substantive Requirements for Design Patents Are Burdensome to Meet*

Some scholars argue that the design patent doctrine under patent law offers a mechanism for fashion designers to acquire IP protection for their

115. *See* *Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 855, 102 S. Ct. 2182 (1982).

116. *See* *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012) (holding that Louboutin's distinctive red lacquered soles had acquired limited secondary meaning due to their association as a defining feature of the brand in the market and are protected as a trademark under the trade dress doctrine.)

117. *See id.*

118. *See* Bhardwaj & Fairhurst, *supra* note 36, at 166-70 ("Here Today, Gone Tomorrow...As fashion is considered to be a temporary cyclical phenomena adopted by consumers for a particular time, it becomes evident that the life cycle for fashion is quite small...[F]ast fashion is viewed as a 'waste' because rather than buying one high quality item to satisfy a wardrobe need, consumers buy multiples that are lower quality and then throw old merchandise away as quickly as they bring in new ones"); *see also* Wilson, *supra* note 17, at 591-95 (describing fashion trends for ready-to-wear.)

119. *See* Tu, *supra* note 90, at 431 ("plaintiff must prove (1) that a distinctive mark has been used in commerce; (2) legal or equitable ownership of the mark; and (3) that the use of a similar mark is likely to cause confusion among consumers as to its source.")

120. *See id.* at 432 ("Where infringement is established, a registrant may recover monetary damages.... However, courts will refuse to grant protection where there is no evidence of actual harm or reduced capacity of the famous mark to identify and distinguish the goods sold.")

121. *See* Timothy Greene, *Trademark Hybridity and Brand Protection*, 46 Loy. U. Chi. L.J. 75, 82-96 (2014) ("Finally, assuming away the previous two issues, policymakers and factfinders have not set a threshold for what might constitute actionable dilution.")

122. *See* Ronald Coleman, *Fashion Dos: Acknowledging Social Media Evidence as Relevant to Proving Secondary Meaning*, 106 Trademark Rep. 776, 776, 782 (2016).

designs.¹²³ Theoretically, it does but this is very costly and time-consuming.¹²⁴ Design patent doctrine provides IP protection to any “new, original and ornamental design” of an article of manufacture¹²⁵ for a term of fifteen years,¹²⁶ if the design is novel¹²⁷ and nonobvious.¹²⁸ These substantive standards are often criticized as incompatible with design’s subject matter and unduly “onerous” to meet¹²⁹ compared to copyright protection which requires originality¹³⁰ and trademark protection which requires distinctiveness.¹³¹ The requirement of nonobviousness¹³² and ornamentality¹³³ are unnecessarily burdensome to fashion designers.¹³⁴ The United States Patent and Trademark Office (USPTO) examines design patent applications for novelty and non-obviousness through the application of an “ordinary observer” test.¹³⁵ The test asks a hypothetical ordinary observer to test the obviousness of designs over the prior art.¹³⁶ To prove novelty and non-obviousness, an examiner in a design patent case has to show that, with reference to the prior art, an observer with ordinary skill in the pertinent art resolved would not consider the designs to be substantially the same as any prior

123. See Elizabeth Ferrill & Tina Tanhehco, *Protecting the Material World: The Role of Design Patents in the Fashion Industry*, 12 N.C.J.L. & Tech. 251, 277–81 (2010); see also Keeley I. Vega, *A Proposal for the Protection of Fashion Design: Knocking Off Design Patent Law*, 56 J. Copyright Soc’y U.S.A. 985, 992-95 (2009) (noting that patent protection requirements pose significant hurdles for fashion designers in securing protection for their designs.)

124. See Vega, *supra* note 122, at 994.

125. 35 U.S.C. § 171(a) (2012).

126. See *id.* § 173.

127. See *id.* § 102.

128. See *id.* § 103.

129. See Sarah Burstein, *Moving Beyond the Standard Criticisms of Design Patents*, 17 Stan. Tech. L. Rev. 305, 310, 322-24 (2013) (“Unlike design patent protection, copyright protection arises automatically when a qualifying work is fixed in any tangible medium of expression. Copyright protection is, therefore, instantaneous and essentially costless.... This requirement (Novelty) has been repeatedly criticized. For example, Professor Afori has argued that the high standard of novelty for patents is completely incompatible with design’s subject matter. Designs are concerned with the aesthetic appearance of products, and therefore designs are always based on parameters set by the product and prior knowledge.... The main criticism of this requirement is that it is unduly “onerous.””).

130. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346–47 (1991) (defining an “original” work as the one that is independently created and exhibits a modicum of creativity of the author).

131. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995) (noting that anything that identifying source can function as a trademark).

132. See generally Jason J Du Mont, *A Non-Obvious Design: Reexamining the Origins of the Design Patent Standard*, 45 GONZ. L. REV. 531, 533 (2009).

133. See generally Kelsey M. Mott, *The Standard of Ornamentality in the United States Design Patent Law*, 48 A.B.A. J. 548 (1962).

134. See Vega, *supra* note 122, at 994; see also Chung, *supra* note 40, at 494.

135. See generally Sarah Burstein, *The Patented Design*, 83 TENN. L. REV. 161, 174 (2015) (noting that “[t]he ordinary observer is a hypothetical person, like the ‘reasonable person’ in tort law”) (citing *Arminak & Assocs., Inc. v. Saint-Gobain Calmar, Inc.*, 501 F.3d 1314, 1321 (Fed. Cir. 2007).

136. See *id.*

art.¹³⁷ Since most inspired works share some elements of a seasonal trend¹³⁸ and are often a combination of prior arts with new elements (emphasis added that knockoffs do not add any new elements to the original designs, but inspired works do), a fashion designer of ordinary skill in the art at the time of the invention would mostly find it obvious based on their in-depth industry insights.¹³⁹ These requirements pose a significant burden for individual fashion designers and make it almost impractical for designers to demonstrate their designs are not already apparent in the field.¹⁴⁰

(2) *Design Patents are Suitable for Staple items Not Seasonal Designs*

Filing a design patent application can be time-consuming¹⁴¹ and costly.¹⁴² It takes several thousand dollars and over a year for a patent to be granted.¹⁴³ In the fashion industry, trends may develop quickly and product life cycles could be as short as a few weeks or months.¹⁴⁴ The longer it takes

137. See Sarah Burstein, *Is Design Patent Examination Too Lax*, 33 BERKELEY TECH. LJ. 607, 612 (2018) (“To prevail on a claim for infringement, the patent owner must prove that “an ordinary observer, taking into account the prior art, would believe the accused design to be the same as the patented design.” . . . If the claimed design and the relevant portion of the accused design are not plainly dissimilar, when considered in a vacuum, the prior art can be used “to identify differences that are not noticeable in the abstract but would be significant to the hypothetical ordinary observer familiar with the prior art.”); see also Christopher Carani, *Design Patent Lessons from Apple v Samsung*, 222 MANAGING INTELL. PROP. 32, 32(2012); see also Danielle Baudhuin, *Siri v. Google: Updating the Ordinary Observer Test for Design Patent Litigation in the United States in Response to the Apple v. Samsung Disputes*, 33 WIS. INT’L LJ 291, 313 (2015) (“The ordinary observer is capable of assessing the similarity of the patented and accused designs in light of the similar objects in the prior art.”).

138. See *infra* Part III.B.

139. See *Graham v. John Deere Co.*, 383 U.S. 1, 25 (1966); see also 35 U.S.C. § 103 (2012) (stating that a patent cannot be obtained “if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.”); see also Hearing on H.R. 2511, *supra* note 39, at 4 (statement of designer Lazaro Hernandez saying that “when designers produce basic garments that complement their original designs in their collection, we know the difference between that and what is new”).

140. See Francesca Witzburg, *Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the United States and the European Union*, 107 TRADEMARK REP. 1131, 1134 (2017) (“Because the United States Patent Office grants only patents for “new” designs or “new” features of designs, mere re-workings of previously existing designs cannot obtain patent protection. And because fashion designs often incorporate pre-existing designs, many do not qualify for design patent protection.”).

141. See Burstein, *supra* note 128, at 329 (“Commentators have repeatedly lamented the the long and costly process of patent prosecution.”); see also Robert S Katz, *Examination of Design Patent in the United States*, 10 U. BALT. INTELL. PROP. L.J. 109, 110–11 (2001) (noting that the USPTO may reject a design for several reasons, potentially delaying the application process).

142. See Burstein, *supra* note 128, at 334 (“Critics have often argued that design patents ‘cost too much.’”); see also Sarah Burstein, *Costly Designs*, 77 OHIO ST. L.J. 107, 115 (2016).

143. See Burstein, *supra* note 128, at 329 (“despite strenuous efforts in recent times to surmount the backlog and accelerate the search process, it still can take eighteen months to two years before a design patent is approved or denied.”); see also Zerbo, *supra* note 11, at 608; see also Christopher Buccafusco & Fromer Jeanne, *Fashion’s Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51, 103–4 (2017).

144. See George Sproles, *Analyzing Fashion Life Cycles - Principles and Perspectives*, 45 J. MKTG. 116, 118 (1981)(quoting in footnote 3 that styles lasting only a short period, a matter of weeks or months, are termed fads that are adopted by a small part of population.); see also Laura Fanelli, *A Fashion Forward Approach to Design Protection*, 85 ST. JOHN’S L. REV. 285, (2011) (“[D]esign patents have a lengthy prior review process of approximately eighteen months, which is impractical in light of fashion’s short life span.”); see also Vega, *supra* note 122, at 995 (“[The] fourteen-year term has been regarded as

to obtain a design patent, the less value is garnered from the protection.¹⁴⁵ Therefore, investment in registering a design patent is usually limited to designs with a promising return on investment.¹⁴⁶ Design patent protection is increasingly utilized by established brands for their staple products or best-selling goods with demonstrated longevity, particularly for high-end fashion items such as handbags, belts, shoes, eyewear, and other accessories.¹⁴⁷

Established brands might have the resources to invest in registering design patents for their staple items, but small businesses and independent fashion designers do not.¹⁴⁸ Fashion designers would normally require immediate protection for their designs before they showcase them in a fashion show to protect them from fast fashion retailers copying their work.¹⁴⁹ Since the fashion industry is highly seasonal and a design patent can only protect the ornamental features of a single registered design,¹⁵⁰ it might not be suitable for most of the seasonal collections. By the time a patent is issued, the design would have been exploited by multiple copyists or is no longer in fashion.¹⁵¹ Furthermore, design patent protection may not be available if a design was sold or disclosed (e.g., publicly displayed in a fashion magazine or a fashion show) anywhere in the world more than one year prior to the date of filing the patent application.¹⁵² Given a design patent entails a costly and time-consuming process, it is an unattractive investment for the vast majority of fashion designers.¹⁵³ It would be unrealistic for fashion designers to register every aspect of their designs and wait for a design patent to be granted because of the high risk of piracy due to mediatization.¹⁵⁴ In this regard, copyright protection arguably provides the most timely and cost-efficient means of protection.¹⁵⁵ Nonetheless, fashion designs are currently not protectable under copyright law.¹⁵⁶

inappropriate for fashion design in which the stylistic life span is one season, approximately three to six months.”).

145. See Sarah Burstein, *How Design Patent Law Lost Its Shape*, 41 CARDOZO L. REV. 555, 608-10 (2019); see also Vega, *supra* note 122, at 994-95.

146. See Ferrill & Tanhehco, *supra* note 122, at 292 (discussing how fashion designers can strategically obtain design patents to protect their fashion items in a cost efficient way).

147. See Ferrill & Tanhehco, *supra* note 122, at 277-78; see also Zerbo, *supra* note 11, at 608 (“While this form of protection is being increasingly utilized by established brands for their staple products and/or best-selling goods, it is not ideal for most fashion designs.”); see Buccafusco & Jeanne, *supra* note 142, at 104-5.

148. See Buccafusco & Jeanne, *supra* note 142, at 104-5; see also Zerbo, *supra* note 11, at 608; see also Denisse Garcia, *Fashion 2.0: It’s Time for the Fashion Industry to Get Better-Suited, Custom-Tailored Legal Protection*, 11 DREXEL L. REV. 237, 356 (2018).

149. See Tina Martin, *Fashion Law Needs Custom Tailored Protection for Designs*, 48 BALT. L. REV. 453, 473, 475 (2019).

150. See Zerbo, *supra* note 11, at 608.

151. See *id.*; see also Buccafusco & Jeanne, *supra* note 142, at 103-5.

152. 35 U.S.C. § 102(a)-(b) (2012).

153. See Garcia, *supra* note 147, at 356; see also Zerbo, *supra* note 11, at 608.

154. See Janssens & Lavanga, *supra* note 46, at 235.

155. See Zerbo, *supra* note 11, at 608-09.

156. See Daniel H. Brean, *Enough Is Enough: Time To Eliminate Design Patents and Rely on More Appropriate Copyright and Trademark Protection for Product Designs*, 16 TEX. INTELL. PROP. L.J. 325,

C. Limitations of Copyright Protection

(1) Copyright Law Only Protects Separable Pictorial, Graphic, or Sculptural Elements of a Fashion Design Not Its Entire Form

Even though there are eight categories of work of authorship currently protected by copyright law,¹⁵⁷ fashion designs are deemed useful articles and are not protected.¹⁵⁸ Professor David Nimmer classifies fashion designs into two categories, namely garment designs, and fabric designs.¹⁵⁹ Garment design refers to the overall shape, style, cut, and dimension of a garment.¹⁶⁰ Fabric design refers to patterns or other two-dimensional artistic features of a garment.¹⁶¹ A pictorial, graphic, or sculptural (PGS) feature of a fashion design, such as textile design, can be protected by copyright law if it can be identified separately from, and are capable of existing independently of the utilitarian aspects of a design.¹⁶² Nonetheless, most of the aesthetic features of a fashion design are not separable from their utilitarian functions, and not copyrightable.¹⁶³ As long as they do not copy any PGS works or attach a fake trademark onto the design, they are not infringing. Many fashion designs do not carry PGS features, but rather a three-dimensional shape or arrangement of details that are appealing to customers, and more importantly, fashion pirates.¹⁶⁴ This explains why fast-fashion retailers can blatantly copy others' designs without much legal consequence.¹⁶⁵

Separating aesthetic features from utilitarian functions is difficult and requires imagination.¹⁶⁶ It would be difficult for people without design training to give unbiased, consistent, and predictable judgments, and would re-

374 (2008); *see also* Orit F. Afori, *Reconceptualizing Property in Designs*, 25 CARDOZO ARTS & ENT. L.J. 1105, 1107 (2008); *see also* Jeanne C. Fromer & Mark P. McKenna, *Claiming Design*, 167 U. PA. L. REV. 123 (2018).

157. 17 U.S.C. § 102(a) (2020).

158. *See id.* at § 102.

159. *See* Sahara Farzaneh, *Cultural Appropriation of Traditional Garment Designs in the Post-Star Athletica Era*, 37 CARDOZO ARTS & ENT. L.J. 415, 432 (2019).

160. *See id.*

161. *See id.*

162. 17 U.S.C. § 101(2020).

163. *See id.* at § 101(3).

164. *See* Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 438 (2017); *see also* Stover, *supra* note 8, at 256.

165. *See* Jeanette Cuzella, *Fast Fashion: A Proposal for Copyright Protection of 3D-Printed Apparel*, 13 COLO. TECH. L.J. 369, 375-81 (2015); *see also* 17 U.S.C. §§ 101 & 102(a)(5) (2020) (defining pictorial, graphic and sculptural works); *see also* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (ruling on an infringement of textile design); *see also* Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980 (9th Cir. 2017) (stating that a dress with a fabric design that was overwhelmingly similar to Unicolors' design constituted an infringement); *see also* Tufenkian Imp./Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127 (2d Cir. 2003) (ruling on an infringement of textile designs made into carpets).

166. *See* Christopher P. Bussert, *Copyright Law: A Review of the Separability Test and a Proposal for New Design Protection*, 10 RUTGERS COMPUTER & TECH. L.J. 59, 74-88 (1983).

quire judges to identify physical or conceptually separable copyrightable elements¹⁶⁷ For many years, courts are split over the issue of whether an aesthetic feature of a design can be separated from its utilitarian function on either a physical or a conceptual basis.¹⁶⁸ Since the enactment of the Copyright Act in 1976, courts have applied at least nine different approaches to interpret whether a design element is separately identifiable and capable of independent existence.¹⁶⁹ Some courts within the same circuit even held different views and could not come up with consistent results to protect the authors of their useful articles that contained aesthetic features.¹⁷⁰ As the Sixth Circuit alluded to in its judgment, the problem with these various types of approach is that focusing on aesthetic features often relies upon a judge's artistic taste and is based entirely on conjecture.¹⁷¹ Scholars have also criticized approaches that require judges to make aesthetic judgments as part of their legal analysis. This is against the Court's longstanding admonition that judges should not be art critics.¹⁷²

(2) *Application of Star Athletica in Protecting Fashion Designs is Uncertain and Might Lead to Another Decade of Diverted Interpretations*

In *Star Athletica v. Varsity Brands*, SCOTUS sought to unify the nine conflicting approaches and develop a more uniform two-pronged separability test for lower courts to apply.¹⁷³ The Court held that §101 of the Copyright Act does not require the imagined remainder to be a fully functional useful article once the design element has been imaginatively separated from it.¹⁷⁴ An aesthetic feature of a useful article is eligible for copyright protection if it (i) can be perceived as a two or three-dimensional work of art separated from the useful article, and (ii) would qualify as a protectable PGS work either on its own or in some other medium if imagined separately from the useful article.¹⁷⁵ Nonetheless, the Court emphasized that the protection extends only to surface design and does not cover the shape, cut, style, or

167. *See id.* at 82-88.

168. *See id.* at 69-88.

169. *See Varsity Brands, Inc. v. Star Athletica, LLC*, 779 F.3d 468, 484-85 (6th Cir. 2015) (discussing at least nine notable approaches applied by various courts to determine separability, including (1) the Copyright Office approach, (2) the Objectively Necessary approach, (3) the Stand-Alone approach, (4) the Ordinary Observer approach, (5) the Design-Process approach, (6) the Primary-Subsidiary approach, (7) the Likelihood-of-Marketability approach, (8) the Patry' approach, and (9) the Subjective-Objective approach.)

170. *See Bussert, supra* note 165, at 74-88; *see also* Tyler T. Ochoa, *What Is a Useful Article in Copyright Law after Star Athletica*, 166 U. PA. L. REV. ONLINE 105, 109 (2017).

171. *See Varsity Brands, Inc.*, 799 F.3d at 484-85 (citing *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 419 (5th Cir. 2005)).

172. *See* Cassandra Baloga, *Copyright & Fashion: The Shoe That Does Not Fit*, 64 NYL SCH. L. REV. 265, 274-75 (2019).

173. *See Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017).

174. *See id.* at 1014.

175. *See id.* at 1016.

dimension to the uniform.¹⁷⁶ When the utilitarian and PGS features of a useful article are intertwined, courts should not give copyright protection to the work.¹⁷⁷

At first glance, *Star Athletica* seems to be a precedent for how fashion designs might be protected by copyright law.¹⁷⁸ Nonetheless, scholars commented that fabric design protection was well-established long before *Star Athletica*,¹⁷⁹ and *Star Athletica* did not provide any additional copyright protection to fashion designs.¹⁸⁰ The Court emphasized several times that Varsity Brands had no right to prohibit anyone from making a plain, unadorned cheerleading uniform of that shape without the patterns.¹⁸¹ The Court did not further provide any descriptive analysis of the separability test.¹⁸² Justice Thomas acknowledged the line between art and design is hard to draw, especially when industrial designs incorporates artistic elements.¹⁸³ He reiterated that courts should not give any artistic judgment.¹⁸⁴ Justice Breyer also in his dissent commented that if extending copyright to artistic features to the useful article itself when those features are not truly conceptually separable, then virtually any industrial design could be thought of separately as a work of art.¹⁸⁵ Scholars opined that the Court intended to ensure that the lower court judges would not give any aesthetic preferences and that the test was aesthetically neutral and implementable.¹⁸⁶

In an empirical study, scholars compared the court decisions that have emerged from *Star Athletica*, and found that judges continue to struggle in determining copyrightable elements of a useful article following this SCOTUS decision.¹⁸⁷ Justice Breyer's dissent in application of the new separability test further hints that lower courts may likely create and contend with even more varying interpretations of the same test going forward.¹⁸⁸ Professor Rebecca Tushnet also opined that this *Star Athletica* announced

176. *See id.*

177. *See* Trenton Davis, *A Missed Opportunity: The Supreme Court's New Separability Test in Star Athletica*, 33 BERKELEY TECH. LJ 1091, 1114 (2018); *see also* David Shipley, *All for Copyright Stand up and Holler: Three Cheers for Star Athletica and the US Supreme Court's Perceived and Imagined Separately Test*, 36 CARDOZO ARTS & ENT. L.J. 149, 151 (2018).

178. *See generally* Ochoa, *supra* note 169.

179. *See* Zerbo, *supra* note 11, at 609; *see also* Shipley, *supra* note 176, at 163, 165-67; *see also* Farzaneh, *supra* note 158, at 432 and 433.

180. *See* Baloga, *supra* note 171, at 273, 279.

181. *See* *Star Athletica*, 137 S. Ct. at 1006, 1013.

182. *See* Angelo Marchesini, *Thin Separability: An Answer to Star Athletica*, 43 SEATTLE U. L. REV. 1087, 1094-96 (2019).

183. *See* *Star Athletica*, 137 S. Ct. at 1008.

184. *See id.* at 1015.

185. *See id.* at 1018.

186. *See* Federal Statutes and Regulations, 131 HARV. L. REV. 363, 369, 372 (2017); *see also* Philip Duclos, *Three Cheers for Treconomics: The Future of Copyright Doctrine according to Star Athletica and Star Trek*, 27 CORNELL JL & PUB. POL'Y 207, 231 (2017).

187. *See* Daan G Erikson, *Copyright Protection for Conceptually Separable Artistic Features Post-Star Athletica: A Useful Article on Useful Articles*, 18 CHI.-KENT J. INTELL. PROP. 56, 58-62 (2019).

188. *See* Federal Statutes and Regulations, *supra* note 185, at 372.

only abstract principles that are internally inconsistent and generally unhelpful in dealing with three-dimensional works.¹⁸⁹ In coming years, lower courts will face more challenges in applying the test and create another morass of tests similar to the useful article doctrine’s legal landscape before *Star Athletica*.¹⁹⁰ It will result in as much unpredictability as this cases preceding *Star Athletica* from an aesthetic perspective,¹⁹¹ and brings us from one imaginative abstract to another.¹⁹² It is difficult for judges without much design training to follow,¹⁹³ and as much as for fashion designers to assess whether their designs could be protected by copyright law.¹⁹⁴ It is essential to amend copyright law to clarify the scope of protectable fashion items and infringement standards.¹⁹⁵ In this regard, the IDPA offers a well-thought-out solution.¹⁹⁶



Figure 3: Comparison between Halston’s dress (left) and Calvin Klein’s version (right).

III. PARADOX OF THE “PIRACY PARADOX” DOCTRINE

Although IP laws in the United States provide limited protection to fashion designs, Professors Kal Raustiala and Christopher Sprigman argue that such “low IP equilibrium” does not hinder creativity, but instead helps the fashion industry thrive.¹⁹⁷ They describe the phenomenon as, fashion pi-

189. See Rebecca Tushnet, *Shoveling a Path After Star Athletica*, 66 UCLA L. REV. 1216, 1218, 1222, 1239 (2019).

190. See Barton Beebe, *Star Athletica and the Problem of Panaestheticism*, 9 UC IRVINE L. REV. 275, 294-97 (2018).

191. See Davis, *supra* note 176, at 1092, 1114; see also Soucek, *supra* note 163, at 451.

192. See Baloga, *supra* note 171, at 277; see also Federal Statutes and Regulations, *supra* note 185, at 368; see also Davis, *supra* note 176, at 1105-6.

193. See Soucek, *supra* note 163, at 447-48; see also Shipley, *supra* note 176, at 151; see also Federal Statutes and Regulations, *supra* note 185, at 372.

194. See Baloga, *supra* note 171, at 279; see also Davis, *supra* note 176, at 1091; see also Figure 3.

195. See *id.*

196. See *infra* Part V.

197. See Raustiala & Sprigman, *supra* note 2, at 1745-59.

racy, and proposed the “Piracy Paradox” doctrine in 2006; the “Piracy Paradox” became a dominant view in the literature for opposing any extension of copyright protection to fashion designs.¹⁹⁸ Sprigman was invited to testify before the Subcommittee in opposition of the IDPPPA based on the “Piracy Paradox” doctrine, and Congress subsequently rejected the bill.¹⁹⁹ The doctrine asserts that copying is beneficial to fashion designers as it helps develop fashion trends and accelerate the extinction of these trends which, ultimately, incentivizes fashion designers to create more and more quickly.²⁰⁰ Enhanced IP protection for fashion designs will indeed be harmful to the industry.²⁰¹ Nonetheless, I would argue that these assertions are unsupported by any evidential data and represent a biased perception of today’s fashion industry.²⁰² Hernandez also argues that the “Piracy Paradox” doctrine is similar to the argument that stealing boosts Gross National Product as owners have to replace their lost property.²⁰³

A. Are Fashion Designers Not Incentivized to Lobby for Changes in Copyright Law?

The fundamental reasoning of the “Piracy Paradox” doctrine is based on the “incentive theory.”²⁰⁴ The theory suggests that if extensive copying will destroy fashion designers’ incentives to create, there should not be as many fashion collections released in each season as there currently are.²⁰⁵ As fashion companies continue to rapidly produce new works, the theory asserts that copying fails to deter innovation in the fashion industry—because it is not detrimental to fashion designers—and hence fashion designers are not incentivized to lobby for changes in the law.²⁰⁶ Raustiala and Sprigman further claim that copying is often celebrated as “homage” rather than “piracy.”²⁰⁷

198. See Kal Raustiala & Christopher Sprigman, *Faster Fashion: The Piracy Paradox and Its Perils*, 39 CARDOZO ARTS & ENT. LJ 536, 536-37 (2021).

199. See Hearing on H.R. 2511, *supra* note 39 (statement of Christopher Sprigman, Associate Professor, University of Virginia Law School).

200. See Stover, *supra* note 8, at 259.

201. See Stover, *supra* note 8, at 258.

202. See Raustiala & Sprigman, *supra* note 2, at 1720 (“[T]he diffusion of cheap, obviously inferior copies may tarnish by association the original article, although whether originals are in fact “tarnished” by copies is an empirical question on which there is little research.”).

203. See Hearing on H.R. 2511, *supra* note 39, at 7 (statement of Lazaro Hernandez).

204. See Chung, *supra* note 40, at 494; see also Stover, *supra* note 8, at 256-57.

205. See Raustiala & Sprigman, *supra* note 2, at 1688-89 (“Nonetheless, the industry develops a tremendous variety of clothing and accessory designs at a rapid pace. This is a puzzling outcome.”).

206. See *id.* at 1691 (“[C]opying fails to deter innovation in the fashion industry because, counter-intuitively, copying is not very harmful to originators. Indeed, copying may actually promote innovation and benefit originators.”).

207. See *id.* at 1691 (“Design copying is occasionally complained about, but it is as often celebrated as “homage” as it is attacked as “piracy.”).

Raustiala and Sprigman assume that the amount of fashion designs released in each season is evidence that fashion designers are motivated.²⁰⁸ This assumption ignores the fact that the majority of fashion items are produced only by a few leading fashion houses; many other struggling fashion designers, like Roberts or Nice, are struggling because they are unable to recoup their investments in designs, or are even being forced to give up their dreams.²⁰⁹ It may be a bit arbitrary to conclude copying is not harmful to fashion designers based on the scholars' observations of no obvious decline of innovation output. Raustiala and Sprigman admit that there is little research that could support their assertions on creative output.²¹⁰ There are different types of fashion designs, i.e., haute couture, ready-to-wear, sportswear, fast fashion, tailor-made, costume and many others.²¹¹ While Raustiala and Sprigman could be right that some fashion retailers such as fast fashion and ready-to-wear retailers might not be incentivized to lobby for changing the law because "low-IP equilibrium" benefits them, it is improper to conclude that copying is not harmful to all fashion designers.²¹²

B. Misunderstanding of Fashion Trend Formation

The "Piracy Paradox" further asserts that unregulated copying and the "low-IP equilibrium" help the industry establish trends, which is referred to as "anchoring."²¹³ Raustiala and Sprigman explain that based on the zeitgeist theory (a traditional fashion theory), fashion designers follow other designers' leads each season, by an undirected process of copying, referencing, and testing design themes that eventually convey to customers what is "in fashion."²¹⁴ Raustiala and Sprigman assume that all fashion designers are in some sense copyists and quoted a case held in 1918 to suggest that contemporary

208. See Stover, *supra* note 8, at 261-62.

209. See Sheng Lu, "Made in the USA" Textiles and Apparel - Key Production and Export Trends, JUSTSTYLE (Mar. 22, 2021), https://www.just-style.com/analysis/made-in-the-usa-textiles-and-apparel-key-production-and-export-trends_id138013.aspx [perma.cc/2J2C-28EL]; see also Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1716 (2008); see also Katherine Felice, *Fashioning a Solution for Design Piracy: Considering Intellectual Property Law in the Global Context of Fast Fashion*, 39 SYRACUSE J. INT'L L. & COM. 219, 230 (2011).

210. See *infra* Part III.D; see also Raustiala & Sprigman, *supra* note 2, at 1720.

211. See JENNY LANTZ, DESIGNS, BRANDS AND TRENDS—TO LEAVE A MARK, IN THE TRENDMAKERS: BEHIND THE SCENES OF THE GLOBAL FASHION INDUSTRY, 89-136 (2018).

212. See Raustiala & Sprigman, *supra* note 2, at 1733 ("[E]xistence of identifiable trends is itself a product of pervasive design copying and that the creation and accelerated extinction of these trends helps to sell fashion.").

213. See *id.* at 1728.

214. See *id.* at 1732.

fashion designs are still “free as the air to common use.”²¹⁵ I find their understanding of what constitutes a fashion trend might be one-dimensional.²¹⁶

While fashion designers get their inspiration from various sources, this does not lead them to blatantly copy. There are many resources where designers often find their own style of presentations.²¹⁷ In *The Law, Culture, and Economics of Fashion*, Professors Scott Hemphill and Jeannie Suk—who were also invited to testify before the Subcommittee in favor of the IDPPPA—rightly pointed out that Raustiala and Sprigman failed to differentiate between copying and referencing.²¹⁸ Line-by-line copying does not promote innovation, but rather creates substitutions while inspired works push potential trends to emerge.²¹⁹ Raustiala and Sprigman might be right that fashion designers are inspired by “runway trends,” but they do not blatantly copy others’ designs.²²⁰ Copying does not create trends; it hinders trend development. Near identical knockoffs do not add any creative value to an existing trend.²²¹ Rather, I would argue that they are clones rather than new species of a genus that “serve flocking but not differentiation.”²²² Imagine a fashion show of knockoffs and original designs; we will not see a trend but rather a collection of “counterfeits without fake trademarks” and the respective “originals.”²²³ As Professor Mark Brewer who cited Professor Barton Beebe’s example in the diamond industry saying that “an abundance of persuasive imitations over time will erode the perceived rarity of diamonds” and so are the harms caused by knock-offs which in essence will dilute the market of the originals.²²⁴

Fashion trends are shaped by various design elements such as color, shape, material, trim, pattern, etc.²²⁵ Trendy fashion designs carry common elements of a current trend.²²⁶ Fashion designers create trendy designs by mixing fashionable elements with their own creative styles.²²⁷ They contribute their creative expressions to the industry and find it satisfying both ca-

215. See *id.* at 1705 (“The practice of designers and design firms copying one another is equally common.... These “runway trends,” of course, are the works of other designers.”); see also *id.* at 1716 (citing *Societe Yves Saint Laurent Couture S.A. v. Societe Louis Dreyfus Retail Mgmt. S.A.*, [1994] E.C.C. 512, 514 (Trib. Comm. (Paris)) and quoting that fashion designs are “free as the air to common use.”).

216. See Jackson, *supra* note 17, at 205 (providing a contextual model of clothing sign system).

217. See Hemphill & Suk, *supra* note 208, at 1164–68.

218. See *id.* at 1174.

219. See *id.* at 1175.

220. See Raustiala & Sprigman, *supra* note 2, at 1705.

221. See Hemphill & Suk, *supra* note 208, at 1174–80.

222. See Hemphill & Suk, *supra* note 208, at 1153.

223. See Martin, *supra* note 148, at 456; see also Stover, *supra* note 8, at 260–261.

224. See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 833 (2010); see also Brewer, *supra* note 14, at 762.

225. See Jackson, *supra* note 17, at 170.

226. See *id.* at 172–75.

227. See *id.* at 175–80.

reer-wise and self-fulfilment-wise when their styles are recognized and honored.²²⁸ Fashion shows provide an opportunity for them to identify trendy elements.²²⁹ Unlike fast fashion retailers, fashion designers do not “appropriate” others’ designs.²³⁰ In contrast, they incorporate their own elements to create their own inspired works.²³¹ Raustiala and Sprigman’s statement, “freedom to copy is taken for granted at all levels of the fashion world” proves misleading.²³² It may be true for fashion designers who are hired by fast-fashion retailers to copy other brands’ products and minimize design costs.²³³ Doubtfully any fashion designer would be proud of being a “copycat.”²³⁴ While “anchoring” is essential to convey fashion trends to customers, it does not rely on unethical copying but rather relies on healthy referencing.²³⁵ Paris, France, one of the world’s biggest fashion capitals, possesses arguably the most well-known fashion designers and design techniques.²³⁶ Today, French fashion designers often set fashion trends and inspire the rest of the global design industry. Strong IP protection provided by French copyright law does not seem to affect fashion trend formation in France, nor does it hinder innovation as claimed by the “Piracy Paradox” doctrine.²³⁷

C. Obsolete Definition of Fashion

Raustiala and Sprigman’s definition of fashion is obsolete. They construe fashion items as status-conferring goods²³⁸ based on the status theory and propose that unregulated copying accelerates the diffusion of fashion trends and styles.²³⁹ They describe this phenomenon as “induced obsolescence.”²⁴⁰ As copying erodes the positional qualities of fashion items, early

228. *See id.* at 212–13.

229. *See id.*

230. *See generally* EUNDEOK KIM ET AL., FASHION TRENDS: ANALYSIS AND FORECASTING (2021).

231. *See* Hearing on H.R. 2511, *supra* note 39, at 6 (statement of Lazaro Hernandez).

232. *See* Raustiala & Sprigman, *supra* note 2, at 1716.

233. *See* Zerbo, *supra* note 11, at 622; *see also* Brewer, *supra* note 14, at 760.

234. *See* Marie Roue, *Fashion Copycats*, FASHION COPYCATS, (Mar. 22, 2021, 8:01pm), <https://fashioncopycats.com/> [<https://perma.cc/4JPH-5HT5>]; *see also* Adler & Jeanne, *supra* note 6, at 1479-80; *see also* Jared Schroeder & Camille Kraeplin, *Give Me a C: Refashioning the Supreme Court’s Decision in Star Athletica v. Varsity into an Art-First Approach to Copyright Protection for Fashion Designers*, 26 UCLA Ent. L. Rev. 19, 25-6 (2018).

235. *See* Hemphill & Suk, *supra* note 208, at 1153; *see also* Chung, *supra* note 40, at 501-2.

236. *See generally* VALERIE STEELE, PARIS FASHION: A CULTURAL HISTORY (2017).

237. *See* Kaitlyn Pytlak, *The Devil Wears Fraud-a: An Aristotelian-Randian Approach to Intellectual Property Law in the Fashion Industry*, 15 VA. SPORTS & ENT. LJ 273, 295 (2015); *see also* Susan Scafidi, *Intellectual property and fashion design*, 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115, 116-18, 126 (Peter K. Yu ed., 2006).

238. *See* Raustiala & Sprigman, *supra* note 2, at 1727 (“While some runway fashion can indeed induce nausea, we think it is the positional nature of fashion as a status-conferring good rather than any abstract aesthetic principle that drives the fashion cycle.”).

239. *See id.* at 1724.

240. *See id.* at 1718.

adopter consumers seek out new designs and propel the fashion cycle.²⁴¹ Hence, fashion piracy is paradoxically beneficial to fashion designers as it induces more rapid turnover and additional sales.²⁴² They contend that if copying were illegal, fashion cycles will be slowed.²⁴³ These assertions are dubious, and the application of the status theory to all levels of fashion designs may be too simplistic.²⁴⁴ Historically, fashion was once a process of emulation by which new fashion designs pass from upper-class people to the lower; and through this descent, a new fashion cycle starts.²⁴⁵ This is also known as the trickle-down theory invented by Veblen in 1899.²⁴⁶ Scholars have created new fashion theories: for example, trickle-across theory (where fashion moves horizontally between groups on similar social levels) and trickle-up theory (where innovation flows from lower-income groups to upper-income groups).²⁴⁷ These theories beg the question of whether fashion items should still be considered as merely status-conferring products and perhaps might only be relevant in the prestigious high-end fashion market.²⁴⁸

While some fashion items, particularly those designed by high-end fashion brands, allow customers to signal their status and confer prestige, many items do not (i.e., ready-to-wear, sportswear).²⁴⁹ At the time of this writing, there is no empirical research conducted to examine the correlation between the fashion cycle pace and unregulated copying. Raustiala and Sprigman have yet provided any supporting data in their article either.²⁵⁰ The evidentiary data certainly does not show how individual fashion designers like Roberts, who designs day-to-day casual wear and baby dresses, will benefit from this “induced obsolescence” argument, and why unregulated copying will induce additional sales for her either. Further, fashion designs receive better protection in Europe and the fashion cycle is comparable to the American fashion cycle.²⁵¹ Raustiala and Sprigman are aware of the lack of evidence to prove whether the value of originals is tarnished by knockoffs.²⁵²

241. *See id.* at 1722.

242. *See id.* (“[P]iracy paradoxically benefits designers by inducing more rapid turnover and additional sales.”).

243. *See id.* (“[I]f copying were illegal, the fashion cycle would occur very slowly.”).

244. *See* Hemphill & Suk, *supra* note 208, at 1157; *see also* Chung, *supra* note 40, at 500; *see also* Stover, *supra* note 8, at 262.

245. *See* Chung, *supra* note 40, at 495, 500.

246. *See* Hemphill & Suk, *supra* note 208, at 1156.

247. *See* MARILYN DELONG, THEORIES OF FASHION, ENCYCLOPEDIA OF CLOTHING AND FASHION (2005).

248. *See* Chung, *supra* note 40, at 500, 528, 582.

249. *See generally* Fred Davis, Fashion, culture, and identity (2013).

250. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1212 (2009) (“[G]iven this dynamic and in the absence of empirical evidence to the contrary, there is no compelling reason to distinguish between line-by-line copies and derivative reworkings for the purposes of differentiation and flocking.”).

251. *See* Witzburg, *supra* note 139, at 1141-47.

252. *See* Raustiala & Sprigman, *supra* note 2, at 1720.

Without supporting data, their claim might be theoretically plausible but detached from current reality.

D. Empirical Research Should be Conducted to Understand Industry's Preference

Raustiala and Sprigman infer the industry's acceptance of piracy from the prevailing silence.²⁵³ They compare the attitude of the fashion industry towards piracy with the music industry, suggesting that the lack of vigorous legislative and litigation campaigns from fashion designers implies that copying does not harm them.²⁵⁴ Public choice theory, however, suggests that individuals may assess the costs and benefits, and ultimately determine it is not worth to take legal action against the infringers.²⁵⁵ Nonetheless, stagnation does not equal indifference. Fashion designers Peggy Noland and Seth Bogart reveal that they cannot afford to sue fast-fashion retailers who make large profits by copying their designs.²⁵⁶ They would rather spend their money creating their next designs than pursue a costly and timely lawsuit.²⁵⁷ The Arts of Fashion Foundation initiated an online petition in 2009 to enlist support from the public to stop fashion piracy.²⁵⁸ Furthermore, in 2011 (five years after the publication of the "Piracy Paradox" doctrine, in 2006), the CFDA and the American Apparel & Footwear Association (AAFA) both testified before the Subcommittee in favor of the IDPPPA.²⁵⁹ A growing number of fashion designers are voicing opposition against fashion piracy.²⁶⁰ Even if Raustiala and Sprigman's assertions were once correct it appears that we can no longer assume that unregulated copying benefits fashion designers.

Raustiala and Sprigman admit in their paper that without knowing the business strategies of individual firms they cannot predict whether a low-IP

253. *See id.* at 1691 ("[D]espite these exhortations, the fashion industry itself is surprisingly quiescent about copying...they largely appear to accept appropriation of designs as a fact of life.").

254. *See id.* at 1691 ("[T]his diffidence stands in striking contrast to the heated condemnation of piracy - and associated vigorous legislative and litigation campaigns in other creative industries. In Congress, these industries have sought broader and more durable IP protections through new laws."); *see also id.* at 1717 ("In the courts, they have aggressively fought alleged pirates and their enablers....The fashion industry, in comparison, has done none of these things.").

255. *See id.* at 1695 ("Public choice theory may provide an alternative explanation for fashion's low-IP regime: perhaps the low-IP regime persists because the various fashion industry players, unlike those in film or music, cannot effectively organize to press their case before Congress.").

256. *See* Anna Colon, *Two Artists Opened A Pop-Up Shop Filled With Fast-Fashion Rip-Offs*, REFINERY 29 (Mar. 22, 2021), <https://www.refinery29.com/en-us/2016/10/128088/wacky-wacko-pop-up-shop-zara-fast-fashion-knockoffs> [<https://perma.cc/4868-HWW4>].

257. *See id.*

258. *See Online Petition*, ARTS OF FASHION FOUNDATION (Mar. 22, 2021), <http://www.arts-of-fashion.org/stopdesignpiracy.html> [<https://perma.cc/LTQ6-LMYT>].

259. *See* Hearing on H.R. 2511, *supra* note 39 (statements of representatives of CFDA and AAFA).

260. *See* Hemphill & Suk, *supra* note 208, at 1183-84; *see also* Giselle Defares, *Lines Blur With Inspiration and Theft*, NEW YORK TIMES (Mar. 22, 2021), <https://www.nytimes.com/roomfordebate/2014/09/07/who-owns-fashion/lines-blur-with-inspiration-and-theft> [<https://perma.cc/V7A3-C2EE>].

equilibrium benefits these firms or not.²⁶¹ Nonetheless, their “Piracy Paradox” doctrine is founded on their assumptions and predictions of fashion trends.²⁶² In 2009, Raustiala and Sprigman revisited the “Piracy Paradox” doctrine, and maintained their assertions of induced obsolescence and anchoring.²⁶³ Nevertheless, they admit that there is no compelling evidence to support their arguments.²⁶⁴ In contrast, they counter-argue that Hemphill and Suk’s proposition that low-IP equilibrium harms small fashion brands and individual designers is lacking empirical support either.²⁶⁵ They maintain their position that extending copyright protection to fashion designs is likely to harm more than help new or small fashion brands.²⁶⁶ In conclusion, they agree that even though they are skeptical that fashion designers’ preferences are likely to coincide with social welfare, it is helpful to know what industry preferences are.²⁶⁷

A wealth of academic literature has developed in response to Sprigman and Suk’s divergent propositions.²⁶⁸ However, these propositions have yet

261. See Raustiala & Sprigman, *supra* note 2, at 1758 (“We cannot predict without knowing more about the business strategies of individual firms whether a particular retailer would prefer a low-IP environment in which product differentiation in fashion is limited to brands or a higher-IP environment in which retailers differentiate not just via brands, but also designs.”).

262. See Raustiala & Sprigman, *supra* note 249, at 1213 (“[P]ersuasive evidence for this proposition is lacking. Until we see such evidence, Congress should let well enough alone.”).

263. See *id.* at 1200 (“[C]opying, in other words, signals a trend, solidifies it, and then exhausts it.”).

264. See *id.* at 1212 (“[I]ndeed, there is no compelling evidence that copying, whether close or not, has produced systematic harm for the industry.”).

265. See *id.* at 1211 (“[W]e are very skeptical of this argument. First, Hemphill and Suk have raised empirical questions—do fashion consumers lifecycle price...do they do so effectively?...but they offer no evidence in favor of their claims.”); see also *id.* at 1214 (“[B]ut for the differentiation concept to have more purchase as a normative construct, we need to know at what level consumers differentiate. The Law, Culture, and Economics of Fashion does not offer much evidence about this issue (nor have we seen evidence presented elsewhere).”).

266. See *id.* at 1221 (“[B]ut more importantly, extending copyright is likely to harm, not help, new or small designers. Relatively unknown and poorly funded entrants are at a disadvantage, relative to a rich and well-known incumbent.”).

267. See *id.* at 1223 (“That said, even if we are skeptical that the designers’ preferences are likely to coincide with social welfare, it may nonetheless be helpful to know what industry preferences are.”).

268. See generally Robin M. Nagel, *Tailoring Copyright to Protect Artists: Why the United States Needs More Elasticity in Its Protection for Fashion Designs*, 54 U. RICH. L. REV. 635 (2020); see also Lauren E. Purcell, *A Fashion Flop: The Innovative Design Protection and Piracy Prevention Act*, 31 J.L. & COM. 207 (2012-2013); see also David Reap, *A Proposal for an Alternative Dispute Resolution Process for the Fashion Industry after the Innovative Design Protection and Piracy Prevention Act*, 13 CARDOZO J. CONFLICT RESOL. 621 (2012); see also Katelyn N. Andrews, *The Most Fascinating Kind of Art: Fashion Design Protection as a Moral Right*, 2 NYU J. INTELL. PROP. & ENT. L. 188 (2012); see also Brittany West, *A New Look for the Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Prevention Act (IDPPPA)*, 5 J. BUS. ENTREPRENEURSHIP & L. 57 (2011); see also Emma Xiao, *The New Trend: Protecting American Fashion Designs through National Copyright Measures*, 28 CARDOZO ARTS & ENT. L.J. 417 (2010); see also Jonathan M. Barnett, Gilles Grolleau & Sana El Harbi, *The Fashion Lottery: Cooperative Innovation in Stochastic Markets*, 39 J. LEGAL. STUD. 159 (2010); see also Silvia Beltrametti, *Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease - An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community*, 8 NW. J. TECH. & INTELL. PROP. 147 (2010); see also Sara R. Ellis, *Copyrighting Couture: An Examination of Fashion Design Protection and Why the DPPA and IDPPPA are a Step towards the Solution to Counterfeit Chic*, 78 TENN. L. REV. 163 (2010); see also Shayne Adler, *Pirating the Runway: The Potential Impact of the Design Piracy Prohibition Act on Fashion Retail*, 5 HASTINGS BUS. L.J. 381 (2009); see also Joseph E. McNamara, *Modifying the Design Piracy*

to be supported with evidence. In 2017, Sprigman emphasized that “the most interesting question will be answered in the coming decades, when the empirical scholarship on copyright and creative incentives matures.”²⁶⁹ He urges scholars who are interested in the deep empirics of copyright to conduct varied empirical studies to provide a clearer picture of how much copyright is required to motivate creativity.²⁷⁰

Without further evidence, this “Piracy Paradox” doctrine is now in a deadlock where parties of both sides will keep making similar arguments without investigating what the society perceives through any empirical studies in the United States.²⁷¹ Empirical data on fashion designers’ incentives and social norms on American fashion culture seems to be the most crucial yet missing piece of the puzzle of this fashion piracy debate.²⁷² Further empirical research is necessary before presenting more persuasive arguments, bolstered with data, to Congress.²⁷³

IV. COMPATIBILITY OF IDPA WITH COPYRIGHT THEORIES

In the past fifteen years, there have been multiple bills proposed to Congress to amend the Copyright Act to provide *sui generis* protection to fashion designs.²⁷⁴ From the proposed amendments in each of the attempts, we can see that activists have narrowed down the scope of protection as much as possible,²⁷⁵ so that fashion designers can seek inspiration without the chilling

Prohibition Act to Offer Opt-Out Protection for Fashion Designs, 56 J. COPYRIGHT SOC’Y U.S.A. 505 (2009); see also Elizabeth F. Johnson, *Defining Fashion - Interpreting the Scope of the Design Piracy Prohibition Act*, 73 BROOK. L. REV. 729 (2008); see also Lynsey Blackmon, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 PEPP. L. REV. 107 (2007); see also Laura C. Marshall, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305 (2007); see also Fitzgerald, *supra* note 99, at 127-29; see also Martin, *supra* note 148, at 456; see also Tan, *supra* note 26, at 893-95; see also Hedrick, *supra* note 96, at 215-17.

269. See Christopher Sprigman, *Copyright and Creative Incentives: What We Know (and Don’t)*, 55 HOUS. L. REV. 451, 478 (2017) (“[w]e need better access to data, which is usually proprietary. And those of us who do empirical research on the link between copyright and creativity need to do more to attract talent into the field. The question of what spurs creativity is of surpassing importance to human life. It’s a scandal we know as little about it as we do.”).

270. See *id.*

271. See Duclos, *supra* note 185, at 214-16.

272. See Sprigman, *supra* note 268, at 455, 478; see also Brewer, *supra* note 14, at 758.

273. See *id.*

274. See Scafidi, *supra* note 236, at 118-21 (outlining past legal efforts to obtain copyright protection for fashion designs).

275. See *Design Piracy Prohibition Act*, H.R. 5055, 109th Cong. (2006) (In 2006, Representative Robert Goodlatte introduced a bill to include fashion designs in the Vessel Hull Design Protection Act as a protected form of design. The bill defined fashion designs as the ornamental appearance of an article of apparel and asked for a three year of protection. In 2007, Representative William Delahunt proposed another version of the bill clarified that making, selling, importing, and distributing by anyone without knowledge that the design might have already existed or belonged to another will not constitute any infringement); see also *Design Piracy Prohibition Act (DPPA)*, H.R. 2196, 111th Cong. (2009) (In 2009, Representative William Delahunt introduced a third modified version of the DPPA. The revised bill proposed to include fashion designs as articles of apparel under the definition of “useful article” in the Copyright Act, which includes clothing, handbags, purses, wallets, eyeglass frames and many other fashion items. In the revised version, Registration within six months of design’s publication was added to the bill.

effect of frivolous lawsuits.²⁷⁶ Although concessions were made, none of these attempts were successful.²⁷⁷ The latest attempt was the IDPA proposed by Senator Charles Schumer in 2012.²⁷⁸ The following section will explain why the IDPA is a well-thought-out bill that can maximize the welfare of the public, provide a balanced yet fair solution for fashion designers to protect their designs, and allow for copyists and customers to utilize the works.

A. Welfare Theory

The most influential and predominant theory that shapes the copyright law regime in the United States is the welfare theory.²⁷⁹ The theory grows out of utilitarianism on which the “Piracy Paradox” doctrine is based.²⁸⁰ It aims to maximize social welfare by striking a balance between (i) incentivizing creators by giving them enough exclusive rights to continue to create and (ii) making these rights limited enough so that the public can utilize these creative works.²⁸¹ Opponents of copyright protection for fashion designs often assert that copyright protection will deprive the public’s right to buy affordable fashion. This assertion violates the principle of the welfare theory. The first limb of the theory is to give the creators enough exclusive rights to continue to create and then the law can limit the extent that others can use the works.²⁸² Allowing the public to utilize the works is not the only factor, and immediately available for use is not a consideration either. To balance the incentives for creators and general welfare, the Constitution construed this to include two major factors: (i) to allow the public access to the products of the creator’s genius after a limited period of exclusive control has expired,

A searchable electronic database contains visual representation of all registered fashion designs and their registration status would be available to the public if the law were enacted. The proposed standard of infringement was higher which required the infringing designs to be closely and substantially similar in the overall visual appearance of the original design to constitute an infringement. The DPPA once again failed to become law); *see also Innovative Design Prevention and Piracy Prohibition Act, S. 3728*, 111th Cong. (2010) (In 2010, Senator Charles Schumer proposed the Innovative Design Protection and Piracy Prevention Act (IDPPPA). Most of the provisions of the IDPPPA were similar to those proposed by the DPPA, but the new bill further heightened the standard of originality by requiring a fashion design to carry a unique, distinguishable, non-trivial, and non-utilitarian variation over prior fashion designs, and must be the result of a designer’s original and independent creation. The IDPPPA set an even higher standard for proving infringement by requiring that an item be “substantially identical” in overall visual appearance to the original elements of a protected design. Nonetheless, the IDPPPA had taken out the registration requirement but stipulated that registration was required in an infringement action. Again, this bill failed to generate any further action and did not move forward).

276. *See* Hearing on H.R. 2511, *supra* note 39 (statement of Kurt Courtney, manager of government relations at the AAFA testified in front of the Subcommittee suggesting that the IDPA is a targeted approach).

277. *See* Ellis, *supra* note 267, at 170-73 (2010).

278. *See Innovative Design Protection Act of 2012, S. 3523*, 112th Cong. (2012)[hereinafter IDPA S. 3523].

279. *See* William W. Fisher, *When Should We Permit Differential Pricing of Information*, 55 UCLA L. REV. 1, 21-27 (2007).

280. *See id.*

281. *See id.*

282. *See id.*

and (ii) to reward the owner.²⁸³ Copyright law should not be one-sided and only protect the public's interest (in fact the copyists' interests) to utilize the works. The IDPA indeed provides limited protection for fashion designs against close copying while allowing the public to utilize fashion designs to create inspired works.²⁸⁴ Copyists can either wait until the three-year term of protection expires or create an inspired work instead. They are not obliged to copy the entire work.

Fashion designs embrace a broad range of creative items.²⁸⁵ Many of them are "public goods" that are nonrivalrous and nonexcludable.²⁸⁶ Particularly in this technological and social media era, once fashion designers make their designs available to the public, it is very difficult for them to prevent copyists from gaining access to them.²⁸⁷ The fashion design process involves a large amount of investment of time and money.²⁸⁸ Fast fashion retailers can easily knock off fashion designers' works and sell them cheaply in the market within weeks if not days.²⁸⁹ If fast fashion retailers were free to copy fashion designs without compensating the original designers, fashion designers would arguably lose their motivation to continue their creative efforts.²⁹⁰ They will see a disproportionate effect on their profitability and hence are discouraged from innovating.²⁹¹ Without adequate protection for their works, burgeoning fashion designers might curtail their careers if they fail to earn a living.²⁹² The public will be the ultimate loser and be deprived of the right to utilize creative fashion designs these talents would have made but for the fashion piracy.²⁹³

The IP clause of the United States Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for

283. See Chung, *supra* note 40, at 531; see also Zerbo, *supra* note 11, at 596; see also Adler & Jeanne, *supra* note 6, at 1494-95.

284. See Hemphill & Suk, *supra* note 208, at 1184-90.

285. See generally VERONICA MANLOW, *DESIGNING CLOTHES: CULTURE AND ORGANIZATION OF THE FASHION INDUSTRY* (2009).

286. See Glynn S. Lunney Jr., *Copyright, Private Copying, and Discrete Public Goods*, 12 TUL. J. TECH. & INTELL. PROP. 1, 18-22 (2009).

287. See Chung, *supra* note 40, at 495, 519.

288. See Hearing on H.R. 2511, *supra* note 39, at 4 (statement of Lazaro Hernandez saying that "it takes tens of thousands of dollars to start a business and even more to sustain it....The cost of a typical show is approximately \$320,000....a significant amount of money has been spent before a designer has received their first order"); see also Sponsiello, *supra* note 17, at 43-53.

289. See Zerbo, *supra* note 11, at 598.

290. See Stover, *supra* note 8, at 258; see also Mala Chatterjee, *Conceptual Separability as Conceivability: a Philosophical Analysis of the Useful Articles Doctrine*, 93 NYUL REV. 558, 586 (2018).

291. See Doucet, *supra* note 1 (stating that "one of the challenges for the American fashion industry as well as for the design education resides in the adoption of a copyright law for fashion design. Even if the passing of such a law can only help to end the productions of copycats and to diminish the piracy industry, young professionals will access to the creative positions that they deserve and to be recognized for their work."); see also generally Lieber, *supra* note 50.

292. See Tom W. Bell, *Author's Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 235-42 (2003).

293. See Buccafusco & Jeanne, *supra* note 142, at 76.

limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁹⁴ To promote innovation, fashion designers must have assurance that they will benefit from their designs.²⁹⁵ Congress should extend *sui generis* copyright protection to fashion designs to protect fashion designers’ incentives to create while not stifling competition or impeding creative progress in the industry.²⁹⁶ In view of the fast-paced and dynamic nature of the fashion industry, *sui generis* protection would be suitable for fashion designs and Congress had passed similar protections before for architecture,²⁹⁷ vessel hulls,²⁹⁸ and semiconductor chips.²⁹⁹ Scafidi and other scholars contended that this limited form of *sui generis* copyright protection is well suited to the dynamics of the fashion industry and would best preserve innovation than any other kind of IP protection available for fashion designs in the United States.³⁰⁰

The IDPA is a balanced approach to provide basic but essential protection for fashion designs with a limited term of three years³⁰¹ such that the fashion designers can be rewarded to create while not limiting others to access their works except for line-by-line copies.³⁰² Three years of protection is much less than the standard lifetime of copyright³⁰³ and the duration of *sui generis* protections available for other designs such as vessel hull.³⁰⁴ Due to the rapidly moving fashion cycle, most fashion designers do not require an extended year of protection.³⁰⁵ Although some scholars suggest that the first three years of creation are when fashion designers can generate the most profits from their designs,³⁰⁶ the actual time for fashion designers to recoup

294. U.S. Const. art. I, § 8, cl. 8.

295. See Bell, *supra* note 291, at 244-51.

296. See John T. Cross & Peter K. Yu, *Competition Law and Copyright Misuse*, 56 *DRAKE L. REV.* 427, 433-37 (2008).

297. See Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 *Duke L. J.* 1598, 1604-08 (1991); See also Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, §§ 701-06, 104 Stat. 5089 (codified in scattered sections of 17 U.S.C.).

298. See Vessel Hull Design Protection Act, Pub. L. 105-304, §§ 501-02, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 1301-1332).

299. See Semiconductor Chip Protection Act of 1984, Pub. L. 98-620, § 301, 98 Stat. 3335 (1984) (codified at 17 U.S.C. §§ 901-14).

300. See Stover, *supra* note 8, at 264; see also Beltrametti, *supra* note 267, at 158; see also Xiao, *supra* note 267, at 436.

301. See IDPA S. 3523, *supra* note 277, at § 2(d).

302. See Hemphill & Suk, *supra* note 208, at 1184-1190.

303. 17 U.S.C. § 302(a) (2020).

304. See *id.* at § 1305(a) (giving vessel hulls up to a term of ten years copyright protection.)

305. See Sproles, *supra* note 143, at 116-24.

306. See Sproles, *supra* note 143, at 118 (This period will allow designers time to develop their ideas in consultation with influential editors and buyers prior to displaying the work to the general public, followed by a year of exclusive sales as part of the designer’s experimental signature line, and another year to develop diffusion lines or other mass-market sales); see also Susanna Monseau, *European Design Rights: A Model for the Protection of all Designers from Piracy*, 48 *AM. BUS. LJ* 27, 71-2 (2011); see also Jasmine Martinez, *Intellectual Property Rights & Fashion Design: An Expansion of Copyright Protection*, 53 *USFL REV.* 369, 391 (2019).

their investments depends on the types of work they create.³⁰⁷ Some fashion designers may need more time to recoup than others, such as bridal dress fashion designers.³⁰⁸ Three years of protection is generally long enough to protect fashion designers from piracy, but not too long where it may hinder innovation or slow down the fashion cycle.³⁰⁹ Furthermore, the IDPA limits the protection for fashion designs that are created through independent creative endeavors and are “unique, distinguishable, non-trivial, and non-utilitarian.”³¹⁰ The IDPA specially excludes certain fashion designs from protection if they are embodied in a useful article that is made public more than three years before the date upon which copyright protection is asserted.³¹¹

The IDPA targets only line-by-line copyists.³¹² It is a huge concession which only targets the fast-fashion retailers who blatantly copy fashion designs without adding much creative value to the industry.³¹³ Hemphill and Suk pointed out that line-by-line copying is extremely detrimental to innovation.³¹⁴ It reduces the profits of the original designers and diminishes the demand for original works.³¹⁵ The copyright infringement standard under the IDPA is “substantially identical,”³¹⁶ which is different from the “substantial similarity” standard prevalent in copyright law.³¹⁷ Although there is no judicial precedent on the interpretation of “substantially identical,”³¹⁸ the IDPA defines the term as an article of apparel that is so similar in appearance that it is likely to be mistaken for protected designs and contains only those differences in construction or designs which are merely trivial.³¹⁹ The language itself suggests that “substantially identical” presents a much higher threshold than the “substantially similar” infringement standard. In other words, the resemblance between the original design and the knockoff must be close enough to be deemed “substantially identical” to infringe.³²⁰

307. See Chung, *supra* note 40, at 504-05, 507, 519, 581.

308. See Rita Choy & Suzanne Loker, *Mass Customization of Wedding Gowns: Design Involvement on the Internet*, 22 CLO. & TEXT. RCH. J. 79, 79-87 (2004).

309. See Hearing on H.R. 2511, *supra* note 39, at 8 (statement of Lazaro Hernandez saying that “in three years a designer will have time to recoup the work that went into designing the article, develop additional lines, or license lines to retailers.”).

310. See IDPA S. 3523, *supra* note 277, at § 2(a).

311. See Tina Martin, *Fashion Law Needs Custom Tailored Protection for Designs*, 48 U. BAL. L. REV. 453, 470 (2018); see also IDPA S. 3523, *supra* note 277, at § 2(b)(3).

312. See *infra* Part V.

313. See Rosen, *supra* note 40, at 349; see also Ellis, *supra* note 267, at 205-06.

314. See Chung, *supra* note 40, at 501.

315. See Zerbo, *supra* note 11, at 603-03, 606; see also Alissandra Burack, *Is Fashion an Art Form That Should Be Protected or Merely a Constantly Changing Media Encouraging Replication of Popular Trends*, 17 VILL. SPORTS & ENT. LJ 605, 606-7 (2010).

316. See IDPA S. 3523, *supra* note 277, at § 2(e)(3).

317. See Victoria Elman, *From the Runway to the Courtroom: How Substantial Similarity is Unfit for Fashion*, 30 CARDOZO L. REV. 683, 685-94 (2008).

318. See Hearing on H.R. 2511, *supra* note 39 (statement of Christopher Sprigman, Associate Professor, University of Virginia Law School); see *id.* (statement of Jeannie Suk, Professor of Law, Harvard Law School).

319. See IDPA S. 3523, *supra* note 277, at § 2(a).

320. See *infra* Part V.A.

In short, the IDPA grants limited but essential protection for fashion designers to prevent their designs from being appropriated by fast-fashion retailers who do not bother to modify the designs or intentionally copy the whole work to deprive the incentives of the original fashion designers.³²¹ As long as the newly created work is not “substantially identical” to the original design or is a result of independent creation, it will not be prohibited.³²² The IDPA allows fashion companies to carry on a fashion trend and create other designs inspired by the protected works.³²³ It will also encourage fast-fashion retailers to add value to any fashion designs they appreciate and carry on the fashion trend by creating inspired works.³²⁴ Finally, the IDPA will not slow down fashion cycles, as asserted by the “Piracy Paradox” doctrine, but instead encourage copyists to create inspired works that would ultimately be beneficial to the fashion industry and the general welfare.³²⁵ Fast fashion retailers, such as H&M, with mechanisms to avoid line-by-line copying by reinterpreting and readapting popular design elements would not be affected.³²⁶ Giving fashion designers a limited period of exclusive rights and control of their work while allowing the public to utilize their works after the protection expires is in line with the principle of the welfare theory.

B. Fairness Theory

Fairness theory suggests that, without creators’ intelligent labors, the raw materials of creative works are of little creative value.³²⁷ Creators of original works deserve the “natural right” to control their creations and to be rewarded for their efforts.³²⁸ Professor Amy Landers also notes that fashion piracy presents an unfair problem that is not faced by other creative industries in the United States.³²⁹ The replication of a few early designs could be

321. See Monseau, *supra* note 305, at 67, 69; see also Tedmond Wong, *To Copy or Not to Copy, that is the Question: the Game Theory Approach to Protecting Fashion Designs*, 160 U. PA. L. REV. 1139, 1160 (2011); see also Courtney Daniels, *Made in America: Is the IDPPPA the Answer to the United States Fashion Industry’s Quest for Design Protection*, 20 U. MIAMI BUS. L. REV. 113, 148 (2011).

322. See IDPA S. 3523, *supra* note 277, at § 2.

323. See Xiao, *supra* note 267, at 441.

324. See Hemphill & Suk, *supra* note 208, at 1175.

325. See Raustiala & Sprigman, *supra* note 2, at 1722 (“If copying were illegal, the fashion cycle would occur very slowly.”); see also Elise Ruff, *If the Shoe Fits: The Effects of a Uniform Copyright Design Test on Local Fashion Designers*, 17 J. MARSHALL REV. INTELL. PROP. L. I, 275 (2017); see also Stover, *supra* note 8, at 264.

326. See Stover, *supra* note 8, at 264-65.

327. See Stephanie Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 BUL REV. 1487, 1501 (2017).

328. See Bair, *supra* note 326, at 1501; see also Zerbo, *supra* note 11, at 621.

329. See Amy L. Landers, *The Anti-Economy of Fashion: An Openwork Approach to Intellectual Property Protection*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 427, 473-74 (2014).

problematic to the fashion industry as it deprives fashion designers' incentives to create original designs.³³⁰ She wonders why fashion piracy is allowed in the industry and yet Congress has not taken any serious steps to stop it.³³¹

Fashion designers transform raw materials into fashionable items. Hernandez said that fashion designs are born in fashion designers' imaginations and fashion designers create "something from nothing at all."³³² They often invest a substantial amount of time and money in their works, and it takes about fifty weeks or even more for them to create a collection to be presented in a fashion show.³³³ With these upfront expenses, the subsequent sale of designs is crucial for fashion designers to make some money to support themselves and to continue to create.³³⁴ They normally profit from their original designs by collaborating with mass-market retailers³³⁵ to produce cheaper derivative works based on their main lines for a more expansive audience.³³⁶ Some fashion designers also authorize or license their designs to mass-market retailers to produce ready-to-wear copies.³³⁷ It is unfair to them if others can copy their hard work without compensating their creative and intelligent labors.

Knockoffs are substitutes for the original designs and jeopardize the original fashion designers' opportunities to seek potential buyers to recoup their costs of labor.³³⁸ Widespread fashion piracy hinders the establishment of such partnerships.³³⁹ It also makes it impossible for fashion designers to sell collections to stores when the garments have already been knocked off.³⁴⁰ Who would pay the original fashion designers for their works if there are cheaper knockoffs readily available in the market?³⁴¹ Some commentators argue that extensive copyright protection will deprive the public's right

330. *See id.* at 481-98.

331. *See id.* at 482-84.

332. *See* Hearing on H.R. 2511, *supra* note 39, at 4 (statement of Lazaro Hernandez).

333. *See* Sponsiello, *supra* note 17, at 12-13 (explaining a traditional fashion production cycle).

334. *See* Misha Nonoo, *Fashion Businesses Are No Longer a Worthwhile Investment*, FORTUNE (Aug. 11, 2020, 6:00 PM), <https://fortune.com/2020/08/11/fashion-industry-investment-misha-nonoo/> [<https://perma.cc/AA45-CDXR>].

335. *See* Aya Eguchi, *Curtailing Copycat Couture: The Merits of the Innovative Design Protection and Piracy Prevention Act and a Licensing Scheme for the Fashion Industry*, 97 CORNELL L. REV. 131, 151-55 (2011).

336. *See* Margaux Rollet et al., *The Concept of Creative Collaboration Applied to the Fashion Industry*, 4 J. GLOB. FASHION MKTG. 57, 57-66 (2013); *see also* Hearing on H.R. 2511, *supra* note 39, at 5 (statement of Lazaro Hernandez).

337. *See id.*

338. *See* Peter H. Bloch, Ronald F. Bush & Leland Campbell, *Consumer "Accomplices" in Product Counterfeiting: A Demand Side Investigation*, 10 J. CONSUMER MKTG. 27, 28-32 (1993).

339. *See* Mariachiara Colucci, Elisa Montaguti & Umberto Lago, *Managing Brand Extension via Licensing: An Investigation into the High-End Fashion Industry*, 25 INT'L J. RSCH. MKTG. 129, 130-37 (2008).

340. *See* Brewer, *supra* note 14, at 760; *see also* Hearing on H.R. 2511, *supra* note 39, at 4 (statement of Lazaro Hernandez, Fashion Designer & Co—Founder, Proenza Schouler).

341. *See* Margaret Bruce & Lucy Daly, *Buyer Behaviour for Fast Fashion*, 10 J. FASHION MKTG. MGMT. 329, 340-44 (2006).

to purchase affordable designs produced by fast-fashion retailers.³⁴² They blame fashion designers for not making their designs more affordable.³⁴³ Nonetheless, fashion designers are only able to offer their affordable, ready-to-wear collections if they can sell their original designs to mass-market retailers.³⁴⁴ Fashion piracy makes it very difficult for fashion designers to move from high-priced fashion to developing affordable renditions.

Fast fashion retailers have exploited loopholes in this low IP law regime which have caused unfair and severe damage to fashion designers who lose orders every day.³⁴⁵ They also deprive fashion designers' opportunities to receive recognition and access to creative positions that they deserve based on their creative investments.³⁴⁶ Emerging fashion designers are even more vulnerable because they lack the ability and resources to protect their designs from fashion piracy.³⁴⁷ Without sufficient IP protection for fashion designs, many fashion designers have been put out of business before they have had a chance to be recognized.³⁴⁸ It would be unfair to deny copyright protection to this vulnerable group.³⁴⁹ Fashion piracy is spoiling things with undue haste. If fast fashion retailers keep appropriating fashion designers' works for free, these fashion designers risk being wiped out. Ultimately, the American fashion industry will suffer from the loss of young creative talents in the field.³⁵⁰ This vicious cycle will never end if we do not stop fashion piracy. The three years of copyright protection offered by the IDPA is a fair protection for fashion designers to safeguard their designs against line-by-line copyists. It would be unfair to deny such fundamental, yet not overly restrictive, laws to protect the labor they invested in their works according to the fairness theory.³⁵¹

C. Personality Theory

Personality theory is more predominant in civil law countries and provides strong support for moral rights.³⁵² Its underlying rationale is that creative works are manifestations of the personalities of their creators, and the

342. See Allison De Vore, *The Battle Between the Courthouse and the Fashion House: Creating a Tailored Solution for Copyright Protection of Artistic Fashion Designs*, 35 T. JEFFERSON L. REV. 193, 210 (2013).

343. See *id.* at 209-11.

344. See Colucci, Montaguti & Lago, *supra* note 338, at 130-32; see also Hearing on H.R. 2511, *supra* note 39, at 5 (statement of Lazaro Hernandez saying that but only after they offer their own more affordable ready-to-wear lines based on their high-end collections).

345. See Hearing on H.R. 2511, *supra* note 39, at 4 (statement of Lazaro Hernandez).

346. See *id.*

347. See Janssens & Lavanga, *supra* note 46, at 244-48; see also Garcia, *supra* note 147, at 343-44.

348. See Gil Appel et al., *supra* note 27, at 591-605.

349. See Janssens & Lavanga, *supra* note 46, at 229-33; See also Rosen, *supra* note 40, at 329.

350. See Hearing on H.R. 2511, *supra* note 39 (statement of Lazaro Hernandez).

351. See Bair, *supra* note 326, at 1501-14.

352. See Giorgio Resta, *Personnalité, Persönlichkeit, Personality: Comparative Perspectives on the Protection of Identity in Private Law.* 1 EUR. J. COMPAR. L. & GOVERNANCE 215, 216-17 (2014).

legal system should grant the creator the power to control the use or modification of their works.³⁵³ The Visual Artists Rights Act of 1990 (VARA)³⁵⁴ grants certain moral rights to artists.³⁵⁵ However, it does not protect fashion designs.³⁵⁶ Line-by-line knockoffs often distort the original designs and eventually damage fashion designers' reputations that directly correlate with sales as well.³⁵⁷ This is a major issue for individual fashion designers, particularly for those who are working to establish their identity in the market.³⁵⁸ On the other hand, some commentators argue that fashion designs are useful articles and should not be protected by copyright law.³⁵⁹ However, Professor Susan Scafidi commented that it is essential to differentiate fashion from clothing.³⁶⁰ Clothing is the basic useful article that covers the human body and serves other functional purposes, while fashion design is a unique form of art that should be recognized and appreciated as such.³⁶¹

Fashion designers are artists and clothing is the medium through which they express their independent creative ideas,³⁶² especially in this booming era of social media and digital fashion.³⁶³ For example, the notorious "meat dress" designed by Franc Fernandez that Lady Gaga wore to the 2010 MTV Video Music Awards Ceremony.³⁶⁴ The dress was not only a functional piece but also an artistic design meant to inspire and to express the contemplation of the fashion designer.³⁶⁵ Gaga said that the meat dress was a statement of protest against the military's "don't ask, don't tell" policy and the government restrictions placed on the rights of gay soldiers.³⁶⁶ Fashion designers have responded that seeing their designs selling at a much cheaper price is

353. *See id.* at 218-26.

354. 17 U.S.C. § 106A (2020).

355. *See* Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U.L. REV. 945, 951-52 (1990).

356. *See id.* at 949-51; *see also* Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128, 5133 (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506).

357. *See* Hemphill & Suk, *supra* note 208, at 1176.

358. *See* Rosen, *supra* note 40, at 344; *see also* Hearing on H.R. 2511, *supra* note 39 (statement of Lazaro Hernandez).

359. *See id.*

360. *See* Susan Scafidi, *Creation, Destruction, and the Future of Fashion*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 393, 396 (2019); *see also* Hearing on H.R. 5055, *supra* note 24, at 19 (statement of Susan Scafidi saying that fashion is a form of creative expression while clothing is an article of dress that cover the body); *see also* Nagel, *supra* note 267, at 666.

361. *See id.*

362. *See* LEAH ARMSTRONG & FELICE MCDOWELL, FASHIONING PROFESSIONALS: IDENTITY AND REPRESENTATION AT WORK IN THE CREATIVE INDUSTRIES, 1-26 (2018).

363. *See* SYNNE SKJULSTAD, VETEMENTS, MEMES, AND CONNECTIVITY: FASHION MEDIA IN THE ERA OF INSTAGRAM, 24 FASHION THEORY 181, 181-209 (2020).

364. *See* ADAM GECZY & VICKI KARAMINAS, LADY GAGA: AMERICAN HORROR STORY, FASHION, MONSTROSITY AND THE GROTESQUE, 21 FASHION THEORY 709, 727 (2017).

365. *See id.* at 727-728.

366. *See id.* at 728.

an ugly nightmare.³⁶⁷ It is essential to protect fashion designers' personhoods. The IDPA can discourage fast-fashion retailers from destroying the original fashion designs by urging them to create inspired works rather than a close but distorted copy.³⁶⁸ Fashion designers' legal rights and artistic output could be better safeguarded even though they do not have the same extensive rights that are granted by the VARA to artistic works.³⁶⁹

D. Culture Theory

Culture theory is the least influential of the four theories, but Professor William Fisher comments that the theory is potentially the most powerful of all.³⁷⁰ Culture theory suggests that copyright law can help foster a just and attractive culture in a society, for example promoting a richer artistic tradition³⁷¹ or empowering education.³⁷² If fashion piracy is left unregulated, both the American fashion industry and the broader culture will be dominated by the mindset of: "You create first, I copy second."³⁷³ According to McKinsey & Company, the COVID-19 pandemic has accelerated fashion industry trends in 2021, with shopping shifting to online channels and consumers continuing to "champion fairness and social justice."³⁷⁴ A recent empirical research by Gazzola et al. also found from a survey conducted online with over a thousand of respondents, that the respondents generally desire fashion companies could apply more ethical and sustainable strategies in their future businesses.³⁷⁵ Customers are also found to be paying more attention to sustainability and environmental issues caused by fast-fashion retailers.³⁷⁶ Fast fashion retailers have accelerated the fashion cycle, which has led to many

367. See Singh-Kurtz, *supra* note 16 (Designer had expressed and said on a blog that "[I] didn't even want to post this on my feed cause it looks ugly but I'm so mad.... I know it's pretty common in fast fashion for big brands to copy other designers but I thought they would at least make some changes instead of replicating the design down to the number of rows in the stripes. The level of detail being identical is proof that this was no coincidence.").

368. See Hemphill & Suk, *supra* note 208, at 1176.

369. See *id.*

370. See Fisher, *supra* note 278, at 33-36.

371. See Ronald Dworkin, *Art as a Public Good*, 9 COLUM. J. ART & L. 143, 153-57 (1985) (contending that the more "resonant" the "shared language" of a culture - the richer it is in representation, metaphor, and allusion - the more opportunities for creativity and subtlety in communication and thought it affords all persons).

372. See Dan Hunter & Lastowka F. Gregory, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004).

373. See Veronique Pouillard, *Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years*, 85 BUS. HIST. REV. 319, 330-31 (2011).

374. See Business of Fashion, *The State of Fashion Report 2021*, MCKINSEY & COMPANY (Mar. 22, 2021), <https://www.mckinsey.com/industries/retail/our-insights/state-of-fashion> [https://perma.cc/SXG9-QATU].

375. See Patrizia Gazzola et al., *Trends in the Fashion Industry. The Perception of Sustainability and Circular Economy: A Gender/Generation Quantitative Approach*, 7 SUSTAINABILITY 1, 14 (2020).

376. See *id.* at 1, 15; see also Lisa McNeill & Rebecca Moore, *Sustainable Fashion Consumption and the Fast Fashion Conundrum: Fashionable Consumers and Attitudes to Sustainability in Clothing Choice*, 39 INT'L J. CONSR. STUD. 212, 222 (2015).

environmental issues.³⁷⁷ Some proceeds have gone to institutions that support child labor, animal testing, gruesome factory conditions and terrorist activities.³⁷⁸ As argued under the fairness theory, allowing copyists to knock off fashion designers' creative works is unfair. Having the opportunity to buy cheap knockoffs might not be the dominant social norm in the country anymore.

Historically, fashion designs have fostered cultural in the United States.³⁷⁹ Alongside the increasing globalization of the fashion industry, fashion designs have become highly adaptive to the current concerns of contemporary culture, while also drawing on influences from the past, such as historical fashion styles or cultural and regional forms of dress.³⁸⁰ Some major museums in the United States have started to exhibit fashion collections in recent years in recognition of their cultural and artistic value.³⁸¹ Clothing has gradually evolved from a purely utilitarian product to a form of wearable culture over the past centuries.³⁸² Fashion serves purposes beyond wearability and many fashion designs have become iconic symbols of various periods.³⁸³ If fashion piracy continues to be unregulated and the fast fashion companies continue producing knockoffs, the number of knockoffs could possibly fill a fashion museum that represents solely the current fashion culture. Forever 21 will certainly need to have a ballroom just for its collections of knockoffs.³⁸⁴ While we do not know the latest social norm, the IDPA can certainly foster a "Copy Less, Create More" culture.³⁸⁵ Nonetheless, an empirical study should be conducted in the future to discover the current social norms in the United States regarding fashion culture and the general perspective on fashion piracy.

377. See Najmul K. Kaikobad et al., *Fast Fashion: Marketing, Recycling and Environmental Issues*, 4 INT'L J. HUM. SOC. SCI. INV. 28, 30-33 (2015).

378. See generally Kirsi Niinimäki et al., *The Environmental Price of Fast Fashion*, 1 NATURE REV. EARTH & ENVR. 189 (2020); see also John Hobson, *To Die For? The Health and Safety of Fast Fashion*, 63 OCCP. MED. J. 317, 319 (2013).

379. See generally ROBIN GIVHAN, *FLATIRON BOOKS* (2015).

380. See VÉRONIQUE POUILLARD, *PRODUCTION AND MANUFACTURE*, IN *THE END OF FASHION: CLOTHING AND DRESS IN THE AGE OF GLOBALIZATION*, 141-54 (Adam Geczy & Vicki Karaminas eds., 2019).

381. See JULIA PETROV, *WINDOW SHOPPING: COMMERCIAL INSPIRATION FOR FASHION IN THE MUSEUM*, IN *FASHION, HISTORY, MUSEUMS: INVENTING THE DISPLAY OF DRESS*, 31-62 (2019).

382. See generally JOANNE ENTWISTLE, *THE FASHIONED BODY: FASHION, DRESS AND SOCIAL THEORY* (2015).

383. See ANDREA HAUSER, *INTERNATIONAL FASHION SHOWS: CREATING TRANSCULTURAL RELATIONSHIPS THROUGH CLOTHING*, IN *FASHION AND MATERIALITY: CULTURAL PRACTICES IN GLOBAL CONTEXTS*, 241-59 (Heike Jenss & Viola Hofmann eds., 2020).

384. See Véronique Hyland, *The Museum at FIT's New Exhibits All About Knockoffs*, *THE CUT* (Mar. 22, 2021), <https://www.thecut.com/2014/11/new-fashion-exhibit-thats-all-about-knockoffs.html> [https://perma.cc/47TC-ZYQE].

385. See *Infra* Part V.C.

V. ANALYSIS OF IDPA'S SCOPE OF PROTECTION FOR FASHION DESIGNS AND ITS IMPERATIVE IMPLICATIONS ON AMERICAN FASHION CULTURE

A. Knockoffs that are "Substantially Identical" to the Originals are Prohibited

Under the current low-IP equilibrium, Kardashian's husband's dress may not be protected by a various aspects of IP laws in the United States.³⁸⁶ As Kardashian's husband has never applied for a design patent for the dress, it is not protected by the design patent doctrine.³⁸⁷ In terms of trademark protection, the design does not contain any registered logos on the fabric and is thus not protected by trademark law.³⁸⁸ Furthermore, the dress is a new design and its form has not acquired any secondary meaning in customers' minds, it would not be protected under the trade dress doctrine either.³⁸⁹ In terms of copyright protection, the Court in *Star Athletica* reiterated that it was not extending protection to the aesthetic aspects of a fashion design unless they are separable from the functional aspects.³⁹⁰ Separating artistic elements of a fashion design from its functional aspects is difficult even for experts in the fashion industry and judges should not give any aesthetic judgment.³⁹¹ The first challenge for the court to tackle in the Kardashian case is whether the aesthetic features of the dress are separately protectable. The second challenge is whether Missguided has infringed on the design. Missguided copied the entire form of Kardashian's dress but it did not copy any PGS work. It is unlikely for the court to find the dress protectable under traditional copyright law according to *Star Athletica*. Thus, there is no protection for the dress under the current low-IP equilibrium.

The IDPA serves to plug the current legal loophole by prohibiting blatant line-by-line copying similar to the scenario between Kardashian and Missguided. The IDPA clarifies what kind of fashion designs are protectable, and it eliminates judicial subjectivity and the involvement of judges' aesthetic preferences.³⁹² The apparel items that are protectable under the IDPA include clothing, handbags, purses, belts and eyeglass frame.³⁹³ Nevertheless, the list is not exhaustive as the definition of fashion clothing could be very broad.³⁹⁴ The IDPA protects the overall appearance of a fashion design

386. See *supra* Part II.

387. See *supra* Part II.B.

388. See *supra* Part II.A(1).

389. See *supra* Part II.A(2).

390. See *supra* Part II.C(2).

391. See Mark A. LoBello, *The Dichotomy between Artistic Expression and Industrial Design: To Protect or Not to Protect*, 13 WHITTIER L. REV. 107, 109 (1992).

392. See IDPA S. 3523, *supra* note 277, at § 2(a)(10).

393. See *id.*

394. See Caen Dennis, *AI-Generated Fashion Designs: Who or What Owns the Goods*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. LJ 593, 599-600 (2019).

including the “arrangement or placement” of original or non-original elements as incorporated in the overall appearance.³⁹⁵ As long as the design falls within the definition of apparel, e.g., clothing, undergarments, outerwear, judges can avoid the trouble of having to abstractly separate protectable elements from a design where *Star Athletica* offers very little guidance. Furthermore, the standard of infringement under the IDPA is “substantially identical” such that the appearance of the knockoff is likely to be mistaken for the protected design.³⁹⁶ When comparing Kardashian’s dress with Missguided, a viewer can see that the color, the oval opening at the waist, the proportion of the two pieces, and the draped fabric that wraps around the hips with a knot on the front made the dresses “substantially identical” to each other.³⁹⁷ Courts may also consider applying the ordinary observer test or rely on expert testimony to assist them in making a consistent and objective judgment.³⁹⁸ Accordingly to the IDPA, Missguided’s blatant line-by-line knockoff might constitute an infringement.

Nonetheless, to balance the exclusive right granted to fashion designers, the IDPA requires a fashion designer in an infringement action to satisfy a heightened set of pleading requirements before infringement can be established.³⁹⁹ The pleading standard requires the fashion designer to show that the protected fashion design (i) was a protectable item; (ii) available in such a manner that the court can infer that the infringer had seen or had knowledge of the protected design; and (iii) the infringer had indeed infringed the design.⁴⁰⁰ A fashion designer also needs to give written notice to the infringer twenty-one days before commencing any infringement action.⁴⁰¹ An infringer shall be liable only for damages and profits accrued after the date on which the action for infringement is commenced.⁴⁰² It means that an infringer will bear no legal liability if he ceases to continue to infringe. By heightening the pleading standard, the IDPA can eliminate frivolous lawsuits.⁴⁰³ And the written notice requirement will oblige the fashion designer to try to resolve the issue with the infringer first.

Under the IDPA, Kardashian’s husband would have to first write to Missguided and explain why he thinks Missguided has infringed the work. This notice requirement significantly improves two issues currently faced by

395. See IDPA S. 3523, *supra* note 277, at § 2(a)(8).

396. See *id.* at § 2(a)(11).

397. See *supra* Figure 2.

398. See Soucek, *supra* note 163, at 437, 450; see also Buccafusco & Jeanne, *supra* note 142, at 80.

399. See Monseau, *supra* note 305, at 55.

400. See *id.*

401. See IDPA S. 3523, *supra* note 277, at § 2(e).

402. See *id.*

403. See Eguchi, *supra* note 334, at 148; see also Hearing on H.R. 2511, *supra* note 39, at 15 (2011) (statement of Jeannie Suk, Professor of Law, Harvard Law School stating that the IDPPPA, unlike the DPPA, contains a heightened pleading standard aimed at reducing frivolous litigation.)

fashion designers. First, it will stop infringers to openly admit their infringing act similar to what Missguided posted on its Instagram. Otherwise, it constitutes *prima facie* evidence of knowledge and infringement. Furthermore, the IDPA creates an opportunity for the infringer to negotiate with the original fashion designers to come up with settlement terms or to obtain a license. With such a provision, fashion designers will have the grounds to bargain for what they deserve rather than having their complaints ignored by the infringers. It will not be detrimental to other fashion designers who genuinely want to promote creativity in the fashion industry. With the IDPA, Missguided will have to either take down the dress from its website after receiving a notice from Kardashian or will not be that overconfident to challenge Kardashian of being so slow to launch the products to the market. Missguided can also wait until the three-year protection expires, or create inspired works that contain fewer elements of the original design and more of its own style.⁴⁰⁴ The protection granted by the IDPA is thin but essential to stop blatant line-by-line copying. This offers a well-thought-out solution to balance the interests of fashion designers, copyists, and the public. There is nothing for the industry to worry about if they have no intention to blatantly appropriate someone else's designs and genuinely want to foster a fashion trend with their own inspired works.

B. Inspired Works and Works Created Independently are Not Affected

Roberts' case illustrates why the IDPA will not hinder innovation nor trend formation in the fashion industry. Old Navy was right that Roberts had not registered any trademark for the phrase "Raising the Future" printed on the t-shirt, and thus Roberts cannot rely on any trademark protection.⁴⁰⁵ Roberts did not apply for a design patent, and even if she did, the USPTO will likely not grant her a design patent for the t-shirt given the obvious and non-novel nature of the design.⁴⁰⁶ In terms of copyright protection, the design of the t-shirt may not meet the "substantially identical" threshold because the color, spacing, and fonts of the words in the knockoff design are slightly different from the original.⁴⁰⁷ Furthermore, printing words on t-shirts is a very customary way of designing in the fashion industry and copyright law does not protect *scène à faire*, ideas or words such as "Raising the Future."⁴⁰⁸ Even if the court finds the prints are "substantially identical," the infringer can still argue that the designs are not unique, distinguishable, non-trivial

404. See Chung, *supra* note 40, at 531.

405. See *supra* Figure 1.

406. See *supra* Part II.B(1).

407. See IDPA S. 3523, *supra* note 277, at § 2(f)(3)(A).

408. See Farzaneh, *supra* note 158, at 425; see also Derek E. Bambauer, *Paths or Fences: Patents, Copyrights, and the Constitution*, 104 *LOWA L. REV.* 1017, 1054-55 (2018); see also Chung, *supra* note 40, at 542.

and non-utilitarian as required by the IDPA.⁴⁰⁹ Furthermore, any works that are the results of a designer's own creative endeavor are not protected either.⁴¹⁰ As long as Old Navy can provide evidence to show that it created the design independently without any prior knowledge of Roberts' design, there would not be any infringement.⁴¹¹

In addition, the IDPA will also impose pressure on sellers, importers and distributors to ensure that the designs they sell, import or distribute are not knockoffs. The IDPA states that if a seller, importer and distributor has actual or constructive knowledge that the works might be an infringing article, they will be held liable for the infringement as well.⁴¹² By enacting the IDPA, industry stakeholders will be more careful when handling orders from fast-fashion retailers and cancel their orders if there is any suspicion of violation of the IDPA. In order for fast-fashion retailers to continue their businesses as usual, they would be more incentivized to "copy less and create more" to produce inspired works rather than line-by-line copies. Last but not least, the IDPA excludes certain fashion designs from the protection that are embodied in a useful article that was made public by the designer more than three years before the date upon which the protection of the design is asserted.⁴¹³ Overall, the protection granted by the IDPA is thin and will not hinder other fashion designers to produce inspired works based on the original designs.

C. Implications on Fostering an Innovative and Respectful Fashion Culture

After examining the piracy issue in the American fashion industry, we understand that fashion designers are mostly harmed by line-by-line knockoffs that jeopardize their opportunities to sell their original designs to mass-market retailers and collaborate with other brands. The major issue is not whether copying should be allowed, but rather how much copying should be allowed such that the interests of fashion designers and the wider society can be balanced. Ultimately, the IDPA can promote a more innovative and respective fashion culture in the United States. Line-by-line knockoffs do not add any creative value to a fashion trend but inspired works do.⁴¹⁴ It would also be beneficial for society to see a more diverse portfolio of inspired works in the market rather than a number of knockoffs (clones). Oftentimes, fast-fashion retailers can produce inspired works but they are not incentivized to do so under the current IP law regime.

409. See IDPA S. 3523, *supra* note 277, at § 2(a).

410. See *id.*

411. See Chatterjee, *supra* note 289, at 562; see also Chung, *supra* note 40, at 531-32; see also Denis, *supra* note 393, at 602-4.

412. See IDPA S. 3523, *supra* note 277, at § 2(f)(2)(B).

413. See IDPA S. 3523, *supra* note 277, at § 2(b).

414. See *supra* Part IV.

The IDPA can encourage fast-fashion retailers to “copy less and create more.” According to game theory, players in the market will find a way to minimize their losses and maximize their gains in a game.⁴¹⁵ If the IDPA is enacted and “substantially identical” knockoffs will constitute an infringement, fashion designers will start sending a cease-and-desist letter to infringing fast-fashion retailers. Even though there is a window period for the infringer to take down the infringing knockoffs, it involves costs and time to handle the disputes.⁴¹⁶ To minimize the costs, fast fashion retailers will be more incentivized to take the “copy less and create more” approach.⁴¹⁷ In essence, customers will still be able to find low-priced inspired works that may be “substantially similar” but not “substantially identical” in the market which will also foster innovation and trend development in the industry. It is a way to permit fashion designers to protect their designs while not unduly restricting the freedom of the fashion industry to simultaneously manufacture clothing and sustain trends. Consumers will continue to enjoy a greater diversity in the fashion industry with more inspired works and fewer line-by-line knockoffs. Fast fashion retailers can carry on their piracy business as usual and fashion designers’ reputations and personhoods in their fashion designs will be better safeguarded.⁴¹⁸

Moreover, passing the IDPA will have a symbolized educative effect according to expressive theory.⁴¹⁹ Although the IDPA only targets the specific line-by-line knockoffs, it can educate the stakeholders in the industry and the public to respect the creative minds of fashion designers.⁴²⁰ Fashion design education in the United States is currently facing a challenge on how to teach fashion students not to copy others’ designs if copying is not illegal. Scafidi says that it is difficult to explain to law students and designers that the current IP regime does not consider fashion designs to be worthy of protection.⁴²¹ Furthermore, emerging fashion designers find it difficult to access the creative positions they deserve and to be recognized for their designs given there are plenty of knockoffs in the market. With the enactment of the IDPA, schools and universities can adjust their curricula to teach students how to develop fashion collections creatively and independently given the home sewing exception provided in the IDPA.⁴²² Students will learn to respect others’ designs as much as others respect theirs. Retailers will invest

415. See Wong, *supra* note 320, at 1165-71.

416. See *id.*

417. See *id.*

418. See *supra* Part IV.C.

419. See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1759-61 (2012).

420. See *id.* at 1790.

421. See Hearing on H.R. 5055, *supra* note 24, at 78 (statement of Susan Scafidi).

422. See IDPA S. 3523, *supra* note 277, at § 2(f) & (i) (The IDPA allows anyone to produce a single copy of a protected design for personal use or for the use of an immediate family member if that copy is not for sale. It allows students or other designers to get inspired by reproducing the works without infringing it).

in their in-house fashion designers and collaborate with creatives talents rather than “shop” in fashion shows and treat other fashion designers as “free sources of ideas.”⁴²³

Fashion piracy has been around for over nine decades and yet elements that foster fashion trend formation have been misunderstood and fashion designers have been falsely accused to be copyists themselves. Roberts’ quote “*Rising the Future*” serves as a relevant ending note. Lawmakers must balance the interests of the public today when they draft laws. Nonetheless, the society also needs to foster a better culture for future generations. The three-year *sui generis* copyright protection is thin but has an imperative implication to the American fashion culture. Copyright laws were written in 1976 when America was largely a country of manufacturers rather than designers.⁴²⁴ Both the global fashion industry and American fashion culture have changed so fast. It is time for Congress to reconsider amending copyright law and enact the IPDA. Hopefully, Americans will be able to see the benefits of the law through more innovative, inspired works and fewer line-by-line knockoffs in the future. Most importantly, fashion designers will be well-respected and incentivized.

CONCLUSION

Fashion piracy has deprived fashion designers of their incentives to create and the opportunities to receive the recognition they deserve. The current low-IP regime in the United States has failed to adequately protect fashion designs. The “Piracy Paradox” doctrine reflects an obsolete understanding of fashion theories and trend formation and may no longer apply to our understanding of contemporary American fashion culture. While inspired works might induce fashion trend formation, line-by-line knockoffs do not. Congress should extend limited *sui generis* copyright protection to fashion designs to prohibit line-by-line knockoffs without interfering with the production of inspired works. Very little is needed to significantly improve the fashion piracy issue in the United States. The IDPA is a well-thought-out and narrowly-tailored bill that provides three-year limited protection for fashion designers to safeguard their original designs. The IDPA only protects unique and original designs and the standard to qualify for protection is high. Copyists are still allowed to create other inspired works or wait until the three-year term expires. The amendment to copyright law will encourage the production of inspired works and customers will benefit from having more options to choose from in the market. The IDPA will also stimulate creative workers to develop their own designs independently. Ultimately, it will pro-

423. See Hearing on H.R. 2511, *supra* note 39, at 8 (statement of Lazaro Hernandez).

424. See generally Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 NYL SCH. L. REV. 477(1976).

mote a respectful and innovative American fashion culture. Without adequate IP protection, the creativity that put American fashion in a world-class position might soon dry up.