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"Design Protection in the Fashion Industry and its Potential" – A bilateral comparative analysis with an argument for the harmonization of the United States Design Law in comparison to the European Union

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Tiivistelmä – Referat – Abstract

This thesis aims to introduce the reader to the construct of the fashion industry, the historical relationship between fashion design and intellectual property (IP) frameworks, and future commercial benefits related to integrated legal legislation among international influencers such as the US and the EU. France and the UK's design legislation will be reviewed in addition to EU's Member States protection under the Council Regulation on Community Design (EC) No 6/2002 and Directive 98/71/EC of the European Parliament and the Council on Legal Protections of Design. In comparison to Europe and its Member States, the US's lax intellectual Property framework will be explored, with additional focus on failed attempts at Copyright legislation reform to include fashion through the Design Piracy Prohibition Act (DPPA) and Innovative Design and Prevention Act (IDPPA).

Through thorough analysis, the author aims to establish the relevant need for design legislation within the US and outline the economic and commercial profit that harmonized protection will potentially bring to the industry on a global scale. Moreover, the author intends to shed light on potential new economic theories that may affect the current legal structure and hopefully push for modernization of both the fashion industry and the laws that aim to protect it.

The first chapter's main focus is to introduce the reader to the fashion industry, and define fashion design, fashion innovation, and outline the current hierarchical structure of the industry. Chapter two intends to provide historical context fashion has played within legal rhetoric and its introduction to IP frameworks. Chapter three will introduce the foundations of fast fashion through a business analysis of France and NYC during the interwar years. Furthermore, the first fashion lobbyist attempts will be explored, through the formation of The Fashion Originator's Guild of America (FOGA), which would later inspire modern-day activist organizations such as the Council of Fashion Designers of America (CFDA) and American Apparel & Footwear Association(AAFA), which is explored in the final subchapter of Chapter three.

Chapter four shall shed light on the influence of international treaties in regards to IP legislation and internationally trading countries. Moreover, the current complex issues related to lack of harmonization between the US and the EU will be exposed, and treaties that aim to provide relief to fashion's international legal setbacks.

Chapter five will introduce the US IP framework of the fashion industry, while also providing the current limitations traditional IP structure has when providing protections for the industry. Lastly, Chapter five will review modern attempts at copyright legislation, through the DPPA and IDPPA, which aimed at achieving a design law reform in the US for the fashion industry and provide a more inclusive legal structure. The fifth chapter shall be a comparative review and outline the lack of global immersion of a legal construct between the EU and the US and the potential global benefits the fashion industry shall gain from an international legal accord between the main markets related to this thesis

Chapter six reviews current economic theories that have resulted from the US's lax IP system, which includes the piracy paradox, and its controversial benefits to the fashion industry. Moreover, current economic theories such as circular economy will be highlighted as they may provide the change that fashion needs to open the grounds for design reform.

Chapter seven outlines the European sector through the formation of domestic and EU legislation, and a highlighted look into Europe's fashion capitals of France and the UK. Furthermore, EU regulatory law and directives will be defined, through the Council Regulation on Community Design (EC) No 6/2002 and Directive 98/71/EC of the European Parliament and the Council on Legal Protections of Design. This legal rhetoric will be explored through the scope of the fashion industry, and provide context to fashion's benefits from design legislation in the European market.

Chapter eight provides a final comparison of the two main fashion sectors, with a concluding argument highlighting the benefits of potential design reform in the US, as well as for the overall harmonization between the US and Europe.

Avainsanat – Nyckelord – Keywords

IP law, EU Regulations, US Regulations, Community Design, Community law within the Fashion industry. **(review)**

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GLOSSARY

AAFA	American Apparel & Footwear Association
CC	Coco Chanel
CFDA	Council of Fashion Designers of America
DDPA	Design Piracy Prohibition Act
EC	European Commission
EU	The Treaty of European Union
ECSC	European Coal and Steel Community
FIT	Fashion Institute of Technology
FOGA	Fashion Originators Guild of America
FTC	Federal Trade Commission
IDPPA	Innovative Design and Prevention Act
IP	Intellectual Property
IPO	Intellectual Property Office
ISL	Ives Saint Laurent
LV	Louis Vuitton
LVMH	Louis Vuitton Moët Hennessy Group
NYC	New York City
TRIPS	Trade Related Aspects of Intellectual Property Rights
UCLA	University of California Los Angeles
UK	United Kingdom
US	United States
USPTO	United States Patent and Trade Office
WIPO	Word Intellectual Property Organization
WTO	World Trade Organization

Table of Contents

Introduction

The fashion industry is a 1.5 trillion-dollar industry with increasing yearly growth, including, but not limited to demands for apparel, footwear, and accessories.[1] The industry functions on a global scale and relies on different forms of Intellectual Property (IP) laws to provide sufficient protections for designers, fashion brands, and companies they are associated with. Currently, the structure of protections established to regulate the industry has created a controversial debate both within the fashion industry and in the institutions that govern its protections.[2] Design reform in the United States (US) and the lack of international harmonization between the European Union (EU) and the US, have proved complex and created both legal and economic implications for the fashion industry.

Many fashion companies have expressed that determining design protections within shifting markets has proved taxing.[3] The protection's aim is to allow for fair competition within the market and grant the right to designers and fashion companies to profit from their ventured investments.[4] Notably, fashion legislation has always been adapted into pre-existing legal frameworks, which in some cases have been layouts of other industries rather than built for the needs of the fashion industry.[5] Within current systems, it can be hard to have specific protections granted, and is becoming increasingly challenging to govern an industry that falls so deeply under both the arts and mass-market functionality. Both the US and the EU fall privy to the definition of fashion on a legal and creative basis. Fashion designers and companies seeking protection for designs may fall out of the scope of protection due to functional limitations that garments and accessories ultimately are classified under.[6] To be granted protection, a design or aesthetical element must acquire secondary meaning, where the element or design can be recognizably traced to the designer or company by informed users.[7]

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[1] M. Shahbandeh, 'Topic: Apparel Market Worldwide' (Statista, 2021) <https://www.statista.com/topics/5091/apparel-market-worldwide/> accessed 23 March 2021.
[2] Scafidi, *Intellectual Property and Fashion Design, supra* note 3, at 121.

[3] Matthew S. Miller, 'Piracy in Our Own Backyard: A Comparative Analysis of the Implica- tions of Fashion Copying in the United States for the International Copyright Community', 2 J. INT'L MEDIA & ENT. L. 133, 156 (2008).

[4] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

[5] ibid
[6] ibid
[7] ibid

Furthermore, both the US and the EU approach IP protections of fashion design differently, with the US thriving on lax IP frameworks. Design brands that are domiciled (not limited to only US fashion companies but also any companies entering the US market) in the US lack design legislation almost completely and rely on a trademark-heavy design system that has been argued to be a hindrance of new innovations in design and creative expression.[8] The US by nature has taken a capitalistic approach to the fashion industry and relies on fashion company's adaptive business structure to provide fashion innovation and overall profit, while IP laws outline limited forms of possible protections.[9]

In contrast to the US, the EU grants design rights on a harmonized level through the implementation of Council Regulation on Community Design (EC) No 6/2002 [10], and the Directive 98/71/EC of the European Parliament and the Council on Legal Protections of Designs , of which protections are open to all active commercial entities functioning in the European Community (EC) internal market.[11] Furthermore, European fashion capitals, such as France, have provided design protection on a domestic copyright level, therefore having ingrained the fashion industry socially, legally, and economically. [12] Thus providing a design protective approach to fashion under IP protections.

Despite these complex legal and economical roadblocks in fashion terms the bird-nesting of the bobbin thread, the fashion industry has continued to have a consistent yearly profit increase by 3 % for the past ten years .[13] The purpose of this thesis is to analyze design legislations and intellectual property laws (IP) of the main influencing markets mentioned in this text from a comparative viewpoint, as they apply to fashion design in a profit-oriented application. Supplementary motivations include a further understanding of the formation of the copyist business model into what is a modern fast fashion, international treaties and organizations that aim to provide the foundation for harmonization, and the current economic trends that have led to a push towards legal change for the contemporary fashion industry.

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[8] Note, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment', 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].
[9] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9.
[10] Council Directive 98/71/EC of 13 October [1998] OJ L289.
[11] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego
[12] 'Apparel: Market Growth Rate Worldwide 2020 | Statista' (*Statista*, 2021) <https://www.statista.com/statistics/727541/apparel-market-growth-global/> accessed 23 March 2021.

Methodology

The purpose of research in relation to any field is to gain knowledge on a specific area of study, to produce an educated hypothesis and propose solutions to a given problem, or to gain academic understanding. In terms of the legal field, this research may be conducted in multiple formats to understand the legal doctrine to create potential improvements and a better understanding of jurisprudence concerning the application of law within various fields.[13]

The conducted research aims to define an unprotected area of the fashion industry, and ultimately expose the legal limitations of IP legal frameworks as they pertain to the fashion design. Moreover, to conduct a well-researched hypothesis regarding design protection, a comparative look of legal protection in the EU and the US shall also be explored.

The majority of this thesis shall be rooted in legal research and methods, but shall not be limited to such. The fashion industry is economic in nature, and therefore aspects of this thesis must be economically explored and with intention of serving both legal and business-minded audiences. The foundation of design protection is subject to the field of law, while the practical application must also be viewed commercially as it will result in the final approach of legal reform within fashion. The legal dogmatic approach of analytically evaluating the law as it pertains to the subject at hand shall be used to define design protection and IP law as well as their potential legal limitations.[14] Furthermore, economic theories shall also be explored in terms of commercial argumentation and final findings.

The foundation of the legal research is based on exploring the historical relationship between law and fashion, and how it reflects into the current scenario. Readers will gain a better understanding of the fashion industry which is an invaluable resource to assess the potential legal implications undertaken by designers and fashion brands with regards to IP protection. Moreover, fast fashion and the copyist business structure will be explored, shedding light on consequential economic theories, such as the

13 C. R Kothari and Gaurav Garg, *Research Methodology* (2nd edn, New Age International 2004).

[14] ibid

piracy paradox,[15] and varying attempts at fashion lobbying with the formation of Fashion Originators Guild of America (FOGA),[16] thus highlighting the formative steps of fashion activist organizations.

The stepping stone to modern fashion activist organizations. Once the historical foundation and general definition of the industry are established, the reader will be introduced to the current established international treaties and enforcing international institutions such as WIPO,[17] which aims to aid the fashion industry on a global scale in terms of protections.

To explain the fashion industry's place under an IP structure the author shall conduct a comparative analysis of the US and EU frameworks, with an in-depth look at the structure of IP laws in both the US and the EU. This review shall outline the current IP approach within the US and the EU, while also providing examples as they relate to the fashion industry. Furthermore, there will be a focused look at the current economic trends influencing the future of the industry, which shall pose the question of if and how IP laws will continue to protect fashion as it evolves with time. The arguments related to copyright reform in the US, and the implications of heavy reliance on trademark protection shall also be researched and presented to the reader.[18]

Europe's protective IP approach will be reviewed, by defining both domestic IP laws in fashion capitals, France and the UK, and the formation of the EU and its reciprocal approach to business connections between the EU will be noted.[19] Traditional IP frameworks have been presented in table form, while Member States' long standing IP protection under the EU wide Community Design Regulation (EU) 6/2002[20] and the legal protection of designs directive (EU) 98/71/EC[21], that grants protection for both designs in the EU area will be defined.

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[15] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04 < https://ssrn.com/abstract=878401 > accessed 25 March 2020

[16] Bertram Perkins, 'Dress Up America Aims Somewhat Misinterpreted', and "*Les Echos* Cites Failure to Create American Style,' both in *Women's Wear Daily*, (1933)

[17] 'WTO | The WTO In Brief' (*Wto.org*, 2021) <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed 30 March 2021

[18] Note, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment', 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].

[19] Joanna Elcher &Phyllis Tortora eds, 'Global Perspectives: Berg Encyclopedia of World Dress and Fashion (Oxford: Berg) (2010)

[20] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9

[21] Council Directive 98/71/EC of 13 October [1998] OJ L289

Because the current applicable IP laws framework can only provide an inconsistent and often abstract approach to what is commonly described as fashion law, this thesis shall use case law to provide a real-life application of the current legal structure and to present the legal precedents for future case rulings. Moreover, the case law shall also be used to exhibit examples related to IP terms, that ultimately affect and define the fashion industry. To go along with the presented case law and allow the reader to achieve an informed understanding of the correlation between the weight of commercial influence and its applications towards law and regulations, the author utilized photographic examples of evidence presented and used to sustain court rulings and design innovation examples.

In order for the legal field to continue to play a comprehensive role in a global industry such as fashion, reform will be introduced as an inevitable consequence. Therefore, the final chapters shall be dedicated to a brief final comparison between the two sectors and concluding recommendations. The overall findings related to this thesis have been procured through an in-depth analysis of legal frameworks as they pertain to the fashion industry, extensive research of political-economical influence into regulatory creation, and the authors existing academic and professional qualifications, including a BA in Production Management of Fashion and Related Industries from the Fashion Institute of Technology (FIT) in NYC.

1 The Fashion Industry Defined – A Commercial Introduction

To achieve a well-rounded understanding of fashion, as highlighted in this thesis and its importance to the legal rhetoric, it is important to define fashion design, fashion innovation, the method of "copying" or creating "knockoff goods",[22] which will assist in further explaining how the industry has been approached regarding legal framing and, consequently, where potential infringements may occur.

According to Sorger and Udale, "fashion design" is a well-researched illustration applied to a novel ever-changing silhouette that presents the designer's creative expression that will later be applied to the

[22] Knockoff defined:

> "A less expensive version of a fashion item perhaps with less expensive fabrication and less detailing"

Nancy J Rabolt and Judy K Miler, *"The Knockoff." In Bloomsbury Fashion Business Cases* (Bloomsbury Academic 2018).

human form.[23] Designers must first conduct immersive research on their desired subject matter, in many cases utilizing mood boards to express the intended goal. Following the research, many designers usually start to sketch creative illustrations using a plethora of historically known silhouettes, mixing and matching elements until the desired look is created.[24] Once the desired design sketch is achieved, the design is expanded past the 2-dimensional sphere using various materials depending on the nature of the design, which will fabricate the design process to the 3-D form. Examples would include muslin prototype for garment design, wax casting for jewelry accessories, and shoe molds for footwear design.[25]

Using the garment industry as the main example, a muslin prototype allows the designers to develop their new silhouette while adapting to the limitations of the physical human form, once the muslin meets the designer's satisfaction the garment shall be recreated using desired fabrics (which are referred to as sample garments in the industry).[26] Samples can be replicated to fit to a single clientele and purchased as Haute Couture, or intended as the model for mass production, which will be sent to fashion suppliers to be produced and sold by retailers, which in turn will be sold to the general public.[27]

Fashion innovation may extend past an illustrated design to also include overall style trends, meaning how elements of fashion are paired to create an overall desired look.[28] For the purpose of this dissertation, the term innovation will be limited to fashion design as it pertains to individually created garments or accessories. Fashion innovation may include novel silhouettes or design elements that may be considered inspired by previous works but push past the original into something new, such accessories may include sports shoes built with new technology to track a user's overall performance while running.

Traditional examples of fashion innovation include the following, Gabriella Chanel's (Coco) tweed suit, which brought primarily men's wear fabrics and design forms to a female silhouette. The tweed suit once only associated with men would become a symbol of female liberation from the quiet female

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[23] Richard Sorger and Jenny Udale, *The Fundamentals Of Fashion Design* (3rd edn, Bloomsbury Visual Arts 2017).
[24] ibid
[25] ibid
[26] ibid
[27] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[28] Lorynn R. Divita, *Fashion Forecasting* (5th edn. Fairchild Books 2019)

cultural trope of the 1920s.[29] Coco Chanel would also use innovative fabric blends of wool, silk, and cotton originally reserved for men's fashion to produce a sophisticated female suit.[30] It is said she was inspired by the Duke of Westminster's sports jacket, who offered his jacket in a chivalrous attempt.[31] She would take this gesture and create one of the most iconic fashion innovations in fashion history.[32]

Another relevant example is Christian Dior's "New Look", which aimed to style women post the WWII mentality, and "Featured rounded shoulders, a cinched waist, a very full skirt".[33] In contrast to the Chanel tweed suit, the "new look" brought back a conservative "Ultra-feminine"[34] shape and separated itself from the previous military and civilian uniform fashion movement rooted in restrictions and fabric shortages.[35] Women's wear under Dior's fashion house, aimed to adorn women in classical female shapes, accentuating a small female waist and soft shoulder shapes, which served affluent reserved women. Like many styles in fashion, this style trend would recycle itself during the 1950s with the housewife era.

Despite their differing approaches to design, both Coco Chanel and Christian Dior are noted for being industry innovators, and visionaries of fashion design. They saw the female form as inspiring and aimed to revolutionize female fashion, setting style trends while creating female identity. While Chanel aimed to free women from tight corset-like silhouettes, into a modern women's suit, Dior set out to grant women a traditional female dress form that may be associated with well-to-do socialite housewives.

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[29] Joseph Errico, 'Know Your History: The CHANEL Jacket' (*Marie Claire*, 2020) <https://www.marieclaire.com/fashion/a32391731/chanel-jacket-history/> accessed 1 April 2021.
[30] RUTHIE FRIEDLANDER, 'How Coco Chanel Discovered Her Iconic Tweed' (*ELLE*, 2014) <https://www.elle.com/fashion/news/a15402/the-story-of-chanels-tweed/> accessed 1 April 2021.
[31] ibid
[32] ibid
[33] 'Christian Dior: The New Look - The Metropolitan Museum Of Art - Google Arts & Culture' (*Google Arts & Culture*, 2021) <https://artsandculture.google.com/exhibit/christian-dior-the-new-look-the-metropolitan-museum-of-art/cQKikHJ-Ok8UIg?hl=en> accessed 1 April 2021.
[34] ibid
[35] ibid

Figure 1: Shows Coco Chanel's Tweed Suit which was debuted in 1925 couture collection in Paris[36]

Figure 2: Shows Christian Dior's "New Look" which debuted in his 1947 couture collection in Paris[37]

Modern examples of fashion innovation include the company Sub Zero, which uses heat-tech to produce heat thermal-based garments that provides warmth under extreme sub-zero temperatures.[38]

The most common example of knockoff's or potentially infringeable design companies is directly connected to how fast fashion companies exploit designs from both luxury and designer ready-to-wear collections for profitable gain.[39] In many cases, this has been challenged through trademark infringement claims. Many examples of this can be seen in the footwear, jewelry, and handbags

[36] Joseph Errico, 'Know Your History: The CHANEL Jacket' (*Marie Claire*, 2020) <https://www.marieclaire.com/fashion/a32391731/chanel-jacket-history/> accessed 1 April 2021.
[37] JENNIFER ALGOO, 'In Photos: Dior In The 1940'S' (*Harper's BAZAAR*, 2015) <https://www.harpersbazaar.com/fashion/designers/g5139/christian-dior-1940s-photos/> accessed 1 April 2021.
[38] 'About Sub Zero' (*Sub Zero*) <https://subzero.co.uk/pages/about-sub-zero> accessed 18 March 2021.
[39] ibid

industries because it is easier to classify under the traditional protection of the intellectual property legislation requirements. Although apparel is vastly knocked-off[40] especially within fast fashion, as it is harder to protect based on its functional nature and fashions seasonal structure, in many cases apparel design falls out of the scope of the required guidelines for protections. This allows companies like Forever 21, Zara, H&M, and Nasty Gal to continue producing clothing with a copyist business model with minimal financial impact of infringement suits.[41]

Knock-offs or the direct replication of a previous design stems from the copyist business model dating back to NY's fashion scene during the interwar years, and later in fast fashion business models currently operating today.[42] Knock-offs may result in possible infringements when replicating protected trademarks and protected design elements, while also contributing to unethical business practices that both historically and currently have created controversy.[43] The main reasoning, for said controversy, is the potential interpretation of knock-offs not necessarily being declared as infringements, but rather as common imitations or results of inspired fashion trends.

Potential litigation and infringements carried out in reaction to replicated knock-offs are directly tied to the legal precedents set by applicable local laws, case law, arbitration awards, and regulatory decisions. Supplemental guidelines in determining unlawful knockoffs include the definitions of IP law, especially trademark and copyright legislation, and the overall concept of "brand recognition"[44] among informed users. Aspects related to fashion infringements will be covered throughout this dissertation.[45] In turn, designer brands, such as Balenciaga and Prada, struggle to compete with fast fashion brands such as Zara, which are able to design and produce at low costs compared to high-end designer companies who tend to make small collections four times a year, compared to new collections launching in Zara every two weeks.[46]

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[40] Nancy J Rabolt and Judy K Miler, *"The Knockoff." In Bloomsbury Fashion Business Cases* (Bloomsbury Academic 2018).
[41] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[42] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020
[43] ibid
[44] The Law Dictionary. 2015. *Definition of BRAND RECOGNITION • Law Dictionary • TheLaw.com*. [online] Available at: <https://dictionary.thelaw.com/brand-recognition/> [Accessed 25 March 2021].
[45] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[46] Terry Nguyen, 'Fast Fashion, Explained' (*Vox*, 2020) <https://www.vox.com/the-goods/2020/2/3/21080364/fast-fashion-h-and-m-zara> accessed 9 April 2021.

Due to, high production turnover, companies like Zara may quickly edit the production of goods based on real-time sales projections.[47] This allows Fast Fashion companies to gain the most profit with the least amount of effort, while further devaluing designer goods that originally inspired the duplicated products.[48] Ethically this business model has several implications both within the scope of IP law, industrial law, and human rights, the last two not falling within the scope of this paper.[49]

The following chapter shall outline the history of fashion, its origins in society, and its significant relationship with the law, both in the past and during contemporary times. The author shall also explore Intellectual Property Law as it pertains to the industry, and the base requirements fashion elements must have in order to file for protection. The following sub-sections will elucidate the intricate association Paris and New York fashion trading markets historically shared during the interwar years, that shall define the bedrock of legal complications and birth of the fast fashion industry.

2 The History of Law in Regards to the Fashion Industry - The start of Social Ruling and its Development into Legal Frameworks (IP)

It is correct to assume that the origin of fashion design protection falls under the definitions of intellectual property law, as its fundamentals are ingrained in artistic expression, with the merchandising goal to commercially profit from an intellectual contribution to the public. That said, this chapter intends to provide a background on the formation of the fashion industry as it is known in IP law, its overall importance within the social structure, and further exploration of historical business standards that have provided the foundations for the fast fashion industry. Moreover, previous attempts at legislation reform and changes in industry standards will be explored, through US boycott activist agencies such as the Fashion Originators Guild of America (FOGA), as they have been an influential entity in the formation of the Council of Fashion Designers of America (CFDA),[50] and the American Apparel Footwear Association (AAFA),[51] the current active activist parties lobbying for fashion reform and ethical business practices.

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[47] ibid
[48] ibid
[49] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[50] 'CFDA' (*Cfda.com*, 2021) <https://cfda.com> accessed 23 March 2021.
[51] 'Home' (*Aafaglobal.org*, 2021) <https://www.aafaglobal.org> accessed 23 March 2021.

Traditionally, fashion design was intended for individual use or for an elite clientele that mainly consisted of royal or affluent families.[52] The earliest laws guiding the fashion industry were centered around social decorum and the appropriate attire based on social status and gender.[53] This can be dated back to the Ancient Greeks, who governed fashion under regulatory laws, that outlined "cleanliness, fabric, color, design",[5455] with additional rules on "how sandals, belts, headdresses, rings, and other accessories could be worn".[5657] While, under Roman Law women's fashion aimed to identify a women's, "rank, status, and morality".[5859]

Supplementary laws related to fabric rationing, and social status would continue well into the medieval ages,[60] with the earliest known being in England under the Parliament's 1337 Charter,[61] which "rationed wool, fabrics, and animal skins based on one's class and gender",[6263] and "prohibited the use of imported

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[52] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego Law Review <https://www.researchgate.net/publication/336739145_Fashion_Law_More_than_Wigs_Gowns_and_Intellectual_Property> accessed 14 April 2021.

[53] C. Scott Hemphill & Jeannie Suk, *The Law, Culture and Economics of Fashion,* 61 Stan. L. Rev. 1147, 1162 (2009).

[54] Harrianne Mills, *Greek Clothing Regulations: Sacred and Profane?*, 55 Zeitschrift Für Papyrologie & Epigraphik 255, 257 (1984).

[55] [55] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego Law Review <https://www.researchgate.net/publication/336739145_Fashion_Law_More_than_Wigs_Gowns_and_Intellectual_Property> accessed 14 April 2021.

[56] ibid

[57] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego Law Review <https://www.researchgate.net/publication/336739145_Fashion_Law_More_than_Wigs_Gowns_and_Intellectual_Property> accessed 14 April 2021.

[58] Kelly Olson, *Matrona and Whore: The Clothing of Women in Roman Antiquity,* 6 Fashion Theory 387, 389 (2002)

[59] [59] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego Law Review <https://www.researchgate.net/publication/336739145_Fashion_Law_More_than_Wigs_Gowns_and_Intellectual_Property> accessed 14 April 2021.

[60] Alan Hunt, *The Governance of Consumption: Sumptuary Laws and Shifting Forms of Regulation,* 25 ECON.& SOC' Y 410, 415 (1996).

[61] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego Law Review

[62] *see generally* Ruthann Robson, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from our Hairstyles to our Shoes,* 8-33 (2013) (comprehensively analyzing rights to self-expression and clothing.)

[63] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego Law Review

furs or cloth".[64] As trading among British colonized provinces continued to grow supplementary laws took an economic tone as Great Britain began enforcing Navigation Acts and Hat Acts, limiting colonies' ability to reproduce or export design goods.[65] [66]

With the colonialism of the New World, the US would attempt class governing sublunary laws in fashion in Massachusetts, when in 1651 the Massachusetts General Court moved to restrict garments types based on wealth and education but was later found unenforceable.[67][68] Later in 1787, as an independent state from the UK, the US began to abandon supplementary laws related to social class, excluding them from the US constitution, allowing individuals "the right to self-distinction".[69] As supplementary laws fell out of use and industrialization began to grow so was the rise of IP laws both in the US and Europe.[70] Countries began to trade among one another, build crisscrossed fashion markets, and with trade came the need for legal protection (IP).[71]

Most fashion designs or innovations are sparked by creative ideas that are later sketched out and developed either through production or editorially to meet the needs of the industry. IP rights set forth the legal guidelines for intellectual elements contributed to the public, which in fashion mainly consist of copyright, trademark, Patent, and utility design protections. For the purpose of this dissertation we

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[64] *see generally* Alan Hunt, *Governance of the consuming passions: A History of Sumptuary Law,* at ix-x (1996) (summarizing the various rules and regulations dictating and restricting dress historically).
[65] Eric Mills Holms, *Education for Competent Lawyering- Case Method in a Functional Context,* 76 COLUM. L. Rev. 535, 542 (1976)
[66] *See* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools,* 20 SEATTLE U.L. Rev. 1, 12 (1996).
[67] Susan Scafidi, *Fiat Fashion Law!, supra* note 16, at 13.
[68] [68] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego Law Review <https://www.researchgate.net/publication/336739145_Fashion_Law_More_than_Wigs_Gowns_and_Intellectual_Property> accessed 14 April 2021.
[69] *See, e.g.,* Lani Guinier et al., *Becoming Gentleman: Women's Experiences at One Ivy League Law School,* 143 U. PA. L. Rev. 1, 63 (1994)
[70] The history of intellectual property in the fashion industry represents a rich cross-fertilization of various areas of the law vis-à-vis society and economic development. See MEGAN RICHARDSON & JULIAN THOMAS, FASHIONING INTELLECTUAL PROPERTY 130–46 (2012). After considering the various factors that contributed to the dynamic area of intellectual property and its relevance to the development of fashion law, the authors poignantly note that much of the legal community has "forgot[ten] the utilitarian debates that lay behind [the] long nineteenth-century fashioning's and refashioning, creating the myth of the law as always existing in some narrowly framed 'historical' form rather than—as it really was—in a constant state of flux in its efforts to deal with changing social, cultural and economic circumstances." Id. at 146.
[71] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego Law Review <https://www.researchgate.net/publication/336739145_Fashion_Law_More_than_Wigs_Gowns_and_Intellectual_Property> accessed 14 April 2021.

will focus on copyright, and trademark protection as they directly affect design legislation, with a highlighted focus on patents and utility design.

European countries such as United Kingdom[72], France[73], and Italy[74] have seen aesthetical fashion design as a protectable category under IP law, and have included both two and three-dimensional fashion works. Examples of protections can be outlined under the French copyright laws of *Code De La Propriété Intellectuelle,*[75] which protects aesthetical nonfunctional designs that show the creator's individual character and originality.[76] The UK uses copyright legislation to protect fashion designs, and legacy rights through "passing off" protections are also set under trademark protections, in order to prevent third-party agencies from backpacking from well-known protected trademarks and designs.[77] This is mainly done by creating products or trademarks that aim to confuse consumers into associating products or marks as designers when in actuality they are imitation products and brands.[78] Though fashion has varying capitals, for the purpose of this dissertation, the main focus when comparing the competing legislations between geographical zones will be on France, UK (as they were the first traders and fashion contributors within Europe), and the US.

Historically copyright laws in the US are seen as low protections for fashion "due to the division in the eyes of the law between the fine arts, like literature, music, and art, which are accorded copyright protection, and crafts, which are generally not".[79] The U.S. Copyright Act[80] generally only protects two-dimensional design aspects that are nonfunctional, and include "Pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspect

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[72] *See* Copyright, Designs and Patents Act 1988, c. 48 (Gr. Brit.); Registered Designs Act 1949, c. 88 (Gr. Brit.)
[73] *See* Code de la Propriété Intellectuelle [C. Prop. Intell.] [Intellectual Property Code] (Fr.) (providing comprehensive protection for designs)
[74] *ee* Legge 22 aprille 1941, n. 633, G.U. July 16, 1941, n. 166 (It.) (Italian Copy Law); *see also* Decreto Legislativo 10 febbraio 2005, n.273, C. proprieta industrial Dec. 12, 2002, n.30 (It.) (Code of Industrial Property) (granting broad copyright protection to articles of fashion and requiring industrial designs to have artistic value).

[75] 'Code De La Propriété Intellectuelle - Légifrance' (*Legifrance.gouv.fr*, 2021) <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006069414/> accessed 6 April 2021.
[76] (*Wipo.int*, 2021) <https://www.wipo.int/edocs/lexdocs/laws/fr/fr/fr465fr.pdf> accessed 1 April 2021.
[77] Nicola Laver, 'Passing Off: A Law Of Tort - Inbrief.Co.Uk' (*InBrief.co.uk*, 2021) <https://www.inbrief.co.uk/intellectual-property/passing-off/> accessed 6 April 2021.
[78] ibid
[79] Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy,* 48 AM. Bus. L.J. 27, 32 (2011).
[80] 'Copyright Act Of 1790 | U.S. Copyright Office' (*Copyright.gov*, 2021) <https://copyright.gov/about/1790-copyright-act.html> accessed 6 April 2021.

of the article".[81] Opposite to the EU and France economic and legal viewpoint on fashion design, the US has failed to amend copyright laws to include the "fine arts" based under the category of functional use, which in turn excludes fashion designs on the basis of functionality, and limits the filing for protection due to its seasonal nature.[82] Under the US system, fashion has mainly been seen for its economic profitability rather than artistic contribution and in many cases is not granted copyright protections, therefore it must rely on trademark legislation under the US Intellectual Property laws in order to stay protected. Exceptions to this would include editorial elements, and design sketches, which fall under artistic works and therefore may be categorized as protectable.[83]

In order to provide a consistent IP framework, the US had multiple attempts at reform throughout the 20th century with little to no success.[84] These attempts included "a) amending the Copyright Act 1790[85] to fall closer in line with the French Copyright laws of 1793[86], which allowed for creative design and fine arts to be protected; b) the 1913 Kahn Act[87] meant to grant European designers protection while participating in the Panama-Pacific International World Exhibition;[88] and c) the Vestal Bill of 1926,[89] which was passed by the US House of Representatives only to be denied by the US Senate until congress adjourned the following year".[90] Modern attempts at reform in the form of the Design Piracy Prohibition Act (DDPA)[91] and Innovative Design and Prevention Act (IDDPA)[92] will be covered in chapter 5.

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[81] 17 U.S.C. § 101 (2012). "A "useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.''

[82] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

[83] ibid

[84] Véronique Pouillard, 'Design Piracy In The Fashion Industries Of Paris And New York In The Interwar Years' (2011) 85 Business History Review <https://www.jstor.org/stable/41301394>.

[85] 'Copyright Act Of 1790 | U.S. Copyright Office' (*Copyright.gov*, 2021) <https://copyright.gov/about/1790-copyright-act.html> accessed 6 April 2021.

[86] 'Code De La Propriété Intellectuelle - Légifrance' (*Legifrance.gouv.fr*, 2021) <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006069414/> accessed 6 April 2021.

[87] Wm. Houston Kenyon, 'The Kahn Act: A Criticism' (1914) 14 Columbia Law Review <https://www.jstor.org/stable/1111002> accessed 6 April 2021.

[88] Many US designers opposed the Kahn Act, arguing it would allow European designers to steal American designs, register them in their home countries, and file complaints against the original American manufacturers. Differ on Way to Fight Kahn Act, N.Y. Times, Nov. 22, 1913; Kahn ***Law*** Needs Change, N.Y. Times, Dec. 19, 1913.

[89] 'The Vestal Bill For The Copyright Registration Of Designs' (1931) 31 Columbia Law Review <https://www.jstor.org/stable/1114897>.

[90] Véronique Pouillard, 'Design Piracy In The Fashion Industries Of Paris And New York In The Interwar Years' (2011) 85 Business History Review <https://www.jstor.org/stable/41301394>.

[91] Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009)

[92] Innovative Design Protection and Prevention Act, H.R. 2511, 112th Cong. (2011)

Trademark law has historically been formed to provide the most comprehensive form of protection, as it does not rely on design elements but rather logos and protected marks.[93] Protected components may include a word, name symbol, or device.[94] Examples include the interlocking YSL for Yves Saint Laurent,[95] the double GG's for Gucci,[96] and Medusa's head in connection to Versace.[97] These are internationally protected logos that are granted similar trademark protections both in the US and Europe, which carry out protections similarity through a registry system managed by designated intellectual property office (IPO), and the in some cases the Word Trade Organizations IPO office.

Patents and Utility design protection generally do not cover aesthetical elements of fashion and are focused on protecting industrial-level design elements. Because of their limited coverage of fashion design, both patents and utility designs shall be only presented as supplementary supportive resources for the IP structure introduced in this dissertation.[98]

Fashion elements may be categorized under these forms of protection if they meet similar standards to copyright and trademark identification requirements. The fashion industry mainly invokes these types of protection in terms of chemical finishing of garments and fabrics, signature closures related to accessories, and non-aesthetical design elements.[99] Examples would include softening solutions in order to achieve a more desirable "hand"[100] in association to garments.[101]

In order to be eligible for IP protections, fashion design must meet certain criteria to be categorized as potentially protectable. These touchstones include physical separability, secondary meaning, consumer recognition, originality, and ornamental nature. The "physical separability"-test, which may allow

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[93] Scafidi, *Intellectual Property and Fashion Design, supra* note 3, at 121.
[94] *See* Mitsthal, *supra* note 85, at 30-39 (explaining the process of registration).
[95] 'A Logo Designed By Cassandre' (*Musée Yves Saint Laurent Paris*, 2021) <https://museeyslparis.com/en/biography/cassandre> accessed 6 April 2021.
[96] 'Gucci: What To Know About The Luxury Brand | Highsnobiety' (*Highsnobiety*, 2021) <https://www.highsnobiety.com/tag/gucci/> accessed 6 April 2021.
[97] 'Company Profile' (*Versace*, 2021) <https://www.versace.com/us/en-us/about-us/company-profile.html> accessed 6 April 2021.
[98] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[99] ibid
[100] The term "hand" refers to achieving the desired physical attributes when the garment is handled by a consumer's hand. W. D Schindler and P. J Hauser, *Chemical Finishing Of Textiles* (Woodhead Publishing Ltd 2004).
[101] W. D Schindler and P. J Hauser, *Chemical Finishing Of Textiles* (Woodhead Publishing Ltd 2004).

protections to design elements that are presented for aesthetical purposes only, and when separated from the overall design maintain their recognition among consumers and overall purpose.[102] Examples may include, sketches, editorial works, and physically separable aesthetical design elements.[103] Moreover, fashion design elements must obtain secondary meaning in order to be considered protectable under IP laws.[104] In terms of copyright components, they must be separable from the overall design and hold an ornamental purpose.[105] These elements need to be able to stand alone design-wise. While trademarks and protected marks must independently trace products back to a designer, brand, or manufacturer.[106]

Consumer recognition is a designer's or fashion brand's ability to be well-known among informed consumers.[107] Products produced by well-known brands must be easily realized by consumers and traced back to a specific designer or brand. Brand recognition is the most acknowledged element to fashion next to design, and all IP protections are directly proportional to how well-known a brand is among consumers.[108] The Primary example would include labels, logos, and protected marks.[109]
Lastly, "originality" may be slightly defined differently based on country, but mainly refers to design elements that surpass inspiration and create something nouveau for ornamental purposes only, in the case of fashion this centered around novel designs that project the individuality of the designer.[110] For example, under French copyright laws, originality is explained as an original work that shows the creator individual character.[111]

Contradicting views on the extent required by IP frameworks have ultimately created the mentioned legal and industry-wide debate. While copyright laws in the US only provide a limited form of IP protection, mostly reserved for editorial or preliminary sketches. This has resulted in a trademark reliant, design restrict US domestic industry; European countries mentioned in this chapter, categorize three-dimensional design elements as copyrightable and grants trademark protection as an additional form of protection, while also granting regulatory and directive protections under EU legislation, that

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[102] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[103] ibid
[104] ibid
[105] ibid
[106] ibid
[107] ibid
[108] ibid
[109] ibid
[110] Jeanne Belhumeur, *Droit International de la mode,* (Societá Libraria Editrice 2000)
[111] 'Code De La Propriété Intellectuelle - Légifrance' (*Legifrance.gouv.fr*, 2021) <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006069414/> accessed 6 April 2021.

will be later explored in this thesis. Due to confusion faced by fashion companies related to disjointed frameworks, design infringements in the fashion industry can be complex and in the end damaging to profitability related to a fashion collection.

The next sub-chapter shall review the historical events that have led to the foundation of modern fast fashion companies. Moreover, ethical and legal implications will be explored that should shed light on why fashion is met with so much controversy and the first attempts at reform through a system of boycotting by FOGA.

The Origins of the Copyist Business Model and the Foundations of Fast Fashion

Charles Worth is credited for opening the first atelier in France in the 1850s which revolutionized the fashion business structure by innovating past individual home-sewn pieces to a series of garments made to be shown each season to a specific clientele in the form of a collection.[112] Current fashion trends and fashion companies still use this structure to present their latest collections to buyers, through the use of showrooms and seasonal fashion shows. Unfortunately, what Charles Worth did not anticipate is the vulnerability his new structure would later face with the copyist trend.[113]The modern controversial debate regarding the protection of fashion design has clear roots in the 20th century during the interwar years when NYC's replica fashion companies profited from Paris design ateliers, and Parisian designers fought for international recognition of IP protection of their already registered designs.[114]

Originally, Paris fashion shows allowed for Parisian fashion to spread to women around the world. "This included high-class affluent women traveling to Paris to receive the latest in fashion directly from the design ateliers, while middle-class women would adopt the looks slightly later from registered department stores and lastly, lower-class women inquired the latest looks from the copyist industry or creating their own at home looks, based on what they had seen in magazines and street fashion".[115][116]

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112 Philippe Perrot, *Fashioning the Bourgeoisie: A History of Clothing in the Nineteenth Century* (Richard Bienvenu tr, Princeton University Press 1994)

113 ibid

114 Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020

115 Terri Agins, *How Marketing Changed the Clothing Business Forever,* (William Morrow Paperbacks, 2000)

116 Philippe Perrot, *Fashioning the Bourgeoisie: A History of Clothing in the Nineteenth Century* (Richard Bienvenu tr, Princeton University Press 1994)

Currently, the fashion industry runs systematically the same, although many fashion houses are granted IP protections, many lack the rights to enforce such protections on a harmonized international platform, thus copyist labels and companies have perfected their formula of duplication in order to maximize profit growth with little to no design innovations.[117]

During the interwar years, the Parisian fashion industry implemented strict guidelines on how companies and designers could obtain the valid right to recreate or sell protected designs through licensing agreements set forth by Parisian design workshops and the industry buyers willing to sell to their represented client market.[118] After viewing, these buyers would pay to either be able to sell a certain volume of goods or for licensing rights to replicate certain designs within their own market, thus allowing women around the world to dress in the Parisian style.[119] Designers, in the Parisian Legal and business framework, were seen as the mother of invention in terms of fashion, and therefore protected in order to continue profits made from a designers originality or fashion innovation.[120]

Furthermore, from a business perspective, strong IP Protection, allowed designers to gain fair profits from their creations, thus providing designers the opportunity to reinvest in their *Ateliers* and create new designs for later seasons.[121] Ethical business practices combined with fashion-inclusive IP laws created a protective approach, that allowed for a sustainable fashion industry, which centered around fashion creators and a reciprocal approach of meeting designer needs for economic benefits.[122]

In contrast with France, the United States during the interwar years thrived on a lax IP legal framework, which aimed to put capitalism at its center and pump out fashion trends for economic gain.[123] This method rarely protected designers or fashion creators and provided a take-all business structure with little to no care of the overall implications that would be set forth, which included an overconsuming fast fashion business model, and the unethical use of design elements from a legal and business outline.

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117 Susan Scafidi, 'Intellectual Property and Fashion Design', in Peter K. Yu (ed.), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age,* (Praeger Publishers 2007)

118 Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020

119 ibid

120 Mary Stewart, 'Copying and Copyright Haute Couture: Democratizing Fashion, 1900-1930's', *French Historical Studies 28, no.1* (2005)

121 Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020

122 ibid

123 Sara Marcketti, 'Design Piracy in The United States Women's Ready-to-Wear Apparel Industry, 1910-1941', PhD diss., Iowa State University, 2005, 2.

Examples include exposing French designers to complex copyright infringements that were only seen as illegal under French jurisdiction and standard business practices in the US.[124] This contrast would allow for French design companies to overestimate their legal rights to design protection when opening their shows to New York buyers, who would later profit off of duplicated design sketches taken from runway shows outside the scope of licensing agreements or purchase orders.[125] These unethically obtained designs were then sold or rented to clothing stores and brands within the US, forming the first fast-fashion business model.[126]

The method of renting fashion designs may sound strange but highly efficient in a seasonal business environment such as fashion. Fashion companies such as department stores only wanted to produce designs while they were in fashion, so renting designs allowed for short-term leasing contracts between buyers and copyist companies. Although it should be noted that these leasing agreements were unethical due to the main methods of acquiring the latest designs.

Because the garments were being produced in NYC's fashion district and sold commercially within the US market, French *ateliers* had no means to claim infringement or to stop the production of goods due to the fact that the French IP protections were not recognized in the US jurisdiction.[127] Designers illegally sketching and sending unlawful designs were subject to fines under French law and liable for the cost of damages that occurred to the victim when in France, but in many cases were protected by their employers in the US, who would pay any fines or damages that would occur. In other words, settling the fines for breaching IP in France was a small price to pay in comparison to what could set the copyist back financially in terms of having to pay for licenses.[128] During the 20th century, the copyist model was vastly growing in New York and gaining profitability. Many well-known department stores such as Bergdorf Goodman and Saks Fifth Avenue rented these sketches from copyist companies such as Butterick in order to stay ahead in the growing industry.[129]

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[124] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020
[125] Sara Marcketti, 'Design Piracy in The United States Women's Ready-to-Wear Apparel Industry, 1910-1941', PhD diss., Iowa State University, 2005, 2.
[126] Transcripts of Andrew Goodman interview about the Uptown Retail Guide, 2, reference x-20, Gladys Marcus Library, Fashion Institute of Technology (FIT) special collections, New York.
[127] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020
[128] ibid
[129] ibid

Despite the freshly built fashion industry rapidly growing a new trend began to emerge which aimed to make New York the new authority on fashion with original designs from rising designers.[130] In order to protect these fashion-forward designers from reproducers, an activist organization the Fashion Originators Guild of America (FOGA) was established.[131] At its peak, the FOGA became the largest activist organization in the US that fought for designer rights against the copyist business model. The next subsection of this chapter will highlight their influence on the industry, and their lobbying attempts for granting protection for both US and Parisian designers, which set the grounding for lobbyist organizations continuing to activate for fashion today.

The origins of the fast fashion business model may be directly traced back to New York's relationship with Paris during the interwar years.[132] Both Paris and New York have been defined as the fashion capitals of their respective continents, and continue to be heavily influenced by one another. What is not commonly known is that New York was the first mass copyist capital.[133] While Paris has held a strong tie to fashion and innovation and thus has protected the industry both legally and economically for centuries. New York, oppositely built its fashion empire on lax IP laws and the ability to unethically replicate Parisian designs within the US with little legal ramifications. This has allowed for large profit gain and the foundation of the copyist business model within the US, and subsequently, the evolution of fast fashion merchandising.[134] Moreover, the lack of internationally harmonized legal agreements between the US and European nations of the 20th century ran in congruence with modern implications, as similarly today. European fashion companies have limited legal rights when entering US markets, and US-based designers still lack clear design legislation for artistic innovations applied under functional categorization.

Lobbying – The First Attempt at Design Protected Based Business Structures in the US - FOGA

The Fashion Originator's Guild of America (FOGA) was established in 1932 was the first activist agency to fight for more inclusive copyright legislation and enforced company standards that aimed to

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[130] Sandra Buckland, Linda Welters and Patricia (ed) Cunningham,'Promoting American Designers, 1940-44: Building Our Own House,' in *Twentieth-Century American Fashion,* (New York, 2005)
[131] Bertram Perkins, 'Dress Up America Aims Somewhat Misinterpreted', and "*Les Echos* Cites Failure to Create American Style,' both in *Women's Wear Daily*, (1933)
[132] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020
133 ibid

134 Note, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment', 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].

protect designers from copyist companies.[135] Members of the FOGA were mainly designers who worked with FOGA to sell licensing rights of their designs under a fair non-copyist market.[136] The FOGA strongly disagreed with the replication of designs and attempted to provide protection to their designer members' designs, utilizing a lobbyist framework that had proactive business standards but fell under legal distress when viewed under US anti-trust laws, ultimately making their business models noble but unlawful.[137] Protection was offered through the process of red carding garments and department stores that were thought to be selling replicated designs, thus letting the consumer know that these garments were not original designs.[138]

FOGA created a registry, managed by their piracy committee, where designers could submit their designs for registration resulting in protections under FOGA's lobbyist methods.[139] It is worth noting that protections awarded by the FOGA were not in congruence with the US IP Framework, and therefore generally operated outside the US IP legislation. The FOGA only produced and sold designs to buyers from retailers and manufacturers who would agree to their "Declaration of Cooperation" agreement.[140] Clauses stipulated in these agreements included "retailers acting in good faith and agreeing not to intentionally nor knowingly purchase replicated products, and return any found duplicated products to the manufacturer that were obtained by unavoidable error".[141] This created an authoritative power through a lobbyist method and allowed for original designers to gain recognition and exposure for their latest designs at New York Fashion Week. Furthermore, it allowed designers the protection required to be able to produce their designs on a mass scale.[142]

At its height, FOGA had over 200 members and over 12,000 allied retailers willing to purchase and ethically sell the latest designs of the members of FOGA.[143] The FOGA had expanded to cover all aspects of the fashion industry, from lower-priced garments to high fashion items, but it was FOGA's

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[135] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020
[136] ibid
[137] Sara B. Marcketti and Jean L. Parsons, 'Design Piracy And Self-Regulation: The Fashion Originators' Guild Of America, 1932-1941' (2006) 24 Clothing and Textiles Research Journal.
[138] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020
[139] ibid
[140] Sara B. Marcketti and Jean L. Parsons, 'Design Piracy And Self-Regulation: The Fashion Originators' Guild Of America, 1932-1941' (2006) 24 Clothing and Textiles Research Journal.
[141] ibid.
[142] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020
[143] ibid

push to move to lower price points that would eventually become its downfall.[144] Companies that sold and produced lower-priced goods felt that the FOGA design registration system was monopolistic and unlawful, and later petitioned the Federal Trade Commission (FTC) to investigate the legality of FOGA's authority in the fashion industry.[145] Throughout their operating years the FOGA never obtained any legal authority, and thus was forced to function on a system of boycotting in order to create awareness to protect designers'.[146] Moreover, the FOGA aimed to change business standards that far extended past fair trade business practices and developed to "the elimination of justified returns, the cancellation of ordered merchandise, good faith discounts issued to retailers, and furthermore elicited an 8% end of the month selling terms to retailers, which was meant to become a contractual standard".[147] The FOGA's were found to be an abusive authority, that began to negatively affect the internal market by The Federal Trade Commission (FTC), which found the FOGA's argument against copyist business model insufficient compared to economic benefits, and thus filed charges against the FOGA under 'unfair methods of competition',[148] and stated that "FOGA's influence surpassed the original intention of suppressing style piracy".[149]

In 1941 the FOGA fell under additional legal distress after being sued by the Popular Priced Dress Manufacturers Group, who argued it was "the obligation of the retailer to carry the burden of design

[144] ibid
[145] ibid
[146] ibid
[147] Sara B. Marcketti and Jean L. Parsons, 'Design Piracy And Self-Regulation: The Fashion Originators' Guild Of America, 1932-1941' (2006) 24 Clothing and Textiles Research Journal.
[148] *Fashion Originators' Guild of America inc v Federal Trade Commission* [1941] US Supreme court, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed.949, 1941 US LEXIS 1318 (US Supreme court).
[149] ibid

protections". [150] [151] The argument presented by the Popular Priced Dress Manufactures Group ultimately won in court, and once again FOGA was found violating antitrust laws.[152]

New York held its authority both domestically and globally over the fashion industry after WWII but continued to operate under the US lax legislation with little to no design protections, letting the fashion industry build its own standards and methods in order to protect new designs and innovations.[153] The FOGA quickly lost its hold of the fashion industry and is mostly known for establishing New York Fashion Week.[154] Since the dismantling of the FOGA, there have only been a few notable yet failed attempts at design protection reform, such as the Design Piracy Protection Act of 2006 (DPPA) and the Innovative Design Protection and Piracy Prevention Act of 2010 (IDPPA), which aimed to grant design protections in the US through the ratification of copyright legislation to include fashion design.[155] Activism for the fashion industry continued in the US with the formation of the Council of Fashion Designers of America (CFDA) and American Apparel and Footwear Association (AAFA), which have had long-standing arguments for strict reform of design protections for the fashion industry and protections under IP law.[156]

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Sherman Anti-Trust Act was passed in 1890 by the United States Congress in order to grant fair competition within an economically fair trade internal market. Thus affecting any unfair monopolies, conspiracy to monopolize, or intent to create an unlawful monopoly within a free market. This could also include disputes within an economic nature that result in hindering access to a market or fair trade. Additionally, any meetings between competing parties to band to create a monopoly within a market is seen as unlawful. Penalties and claims for damages can be claimed both on an individual level and additionally on a corporate level. These penalties may include, $100 million for a corporation and $1 million for individuals, and up to 10 years in prison. Additionally, under federal law, these fines can be increased twice the amount that the unlawful party gained or twice the amount that the victim lost due to the actions of the unlawful party if either amount exceed $100 million in both gain or loss.
'The Antitrust Laws' (*Federal Trade Commission*) <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> accessed 7 May 2021.

[151] *Fashion Originators' Guild of America inc v Federal Trade Commission* [1941] US Supreme court, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed.949, 1941 US LEXIS 1318 (US Supreme court).
[152] ibid
[153] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020

[154] ibid
[155] ibid
156 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

In contrast, European countries were forced to face a different approach, as, during World War II, the fashion industry quickly fell to a standstill as war relief became prevalent and France fell under the occupation of Nazi Germany, which temporarily hindered its ability to stay the fashion capital of the world.[157] After World War II and the dismantling of the Nazi Occupation in Europe, France began to rebuild their influence in fashion and returned to be a major center for the industry.[158] Furthermore, additional protections would be granted in 1993 with the formation of the European Union and the single internal market, which allowed for IP protections in all 28 Member States in the Union.[159] Designers had the ability to register through a single registration system allowing for protection among all Members of the EU, and later new regulations and directives such as the Community Design regulation of 2002[160] granted protection for design from the moment the new design becomes public.

3 International Legal Frameworks

Due to the global nature of the fashion industry this chapter intends to outline the international sources that have helped establish IP frameworks among prominently fashion-focused countries, such as the World Trade Organization (WTO)[161] and international treaties, which include a,) The Paris Convention;[162] b) The TRIPS Agreement,[163] c) The Hague Agreement;[164]and d) The Madrid Protocol.[165] The main objective is to explore the regulation of the fashion industry from an IP perspective and the WTO's attempts at harmonization in a multijurisdictional industry.

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[157] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020
[157] Sara B. Marcketti and Jean L. Parsons, 'Design Piracy And Self-Regulation: The Fashion Originators' Guild Of America, 1932-1941' (2006) 24 Clothing and Textiles Research Journal.

[158] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020
[159] 'The History Of The European Union | European Union' (*European Union*, 2021) <https://europa.eu/european-union/about-eu/history_en> accessed 6 April 2021.
[160] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9
[161] 'WTO | The WTO In Brief' (*Wto.org*, 2021) <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed 30 March 2021
[162] Summary Of The Paris Convention For The Protection Of Industrial Property (1883)' (*Wipo.int*, 2021) <https://www.wipo.int/treaties/en/ip/paris/summary_paris.html> accessed 30 March 2021.
[163] 'WTO | Intellectual Property - Overview Of TRIPS Agreement' (*Wto.org*, 2021) <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#copyright> accessed 6 April 2021.
[164] 'Hague Agreement Concerning The International Registration Of Industrial Designs' (*Wipo.int*, 2021) <https://www.wipo.int/treaties/en/registration/hague/> accessed 6 April 2021.
[165] 'Summary Of The Madrid Agreement Concerning The International Registration Of Marks (1891) And The Protocol Relating To That Agreement (1989)' (*Wipo.int*, 2021) <https://www.wipo.int/treaties/en/registration/madrid/summary_madrid_marks.html> accessed 6 April 2021.

As lightly mentioned in the introduction, many fashion conglomerates find difficulty in navigating differing filing systems for IP protection and determining the enforceability of the protections allocated to the fashion industry. This is primarily due to the differing reliance on varying IP laws in the US and the EU, as currently, the US has adapted to a primarily trademark reliant approach, where in contrast the EU is centered around copyright protections.[166] Due to this distortion, fashion companies in many cases must submit to differing registration processes, which may be costly, and in some cases unenforceable or difficult to obtain.[167]

It is commonly known that the US is a capitalistic-centered business market, that puts designers second to overall profit. Moreover, it is traditionally a lax IP framework with historical elements explored in the previous chapter.[168] Due to its lax framework and excluding definition of design under copyright legislation, both domestic and international companies must rely on well-known and consumer recognized trademarks in order to obtain strong IP protections.[169] Although the US does have utility design legislation, it is complex to obtain for fashion design on the count of its aesthetical creative origins. Because the US's fashion industry continues to turn large annual profits, design legislation continues to be excluded under copyright legislation, in favor of continued commercial potential.[170]

In contrast, many European countries also mentioned before, rely on copyright legislation to obtain protections related to designs, and mainly use trademark, patent, and utility design secondary to copyright. Furthermore, the whole of the union relies on EU-level design protection granted by the

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[166] Michele Woods & Miyuki Monroig, 'Fashion Design And Copyright In The US And EU' (WIPO 2015) http://www.wipo.int/edocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf

[167] Matthew S. Miller, 'Piracy in Our Own Backyard: A Comparative Analysis of the Implica- tions of Fashion Copying in the United States for the International Copyright Community', 2 J. INT' L MEDIA & ENT. L. 133, 156 (2008).

[168] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394 accessed 26 Feb 2020

[169] Guillermo C. Jimenez, 'Fashion Law: Overview of a New Legal Discipline', *in* FASHION LAW 3, 6 (Guillermo C. Jimenez & Barbara Kolsun eds., 2010).

[170] Michael S. Mireles, Jr., 'Towards Recognizing and Reconciling the Multiplicity of Values and Interests in Trademark Law', 44 IND. L. REV. 427, 435–38 (2011) (noting that, while trademark protections have arguably expanded, other legal protections applicable to fashion have contracted).

Design Protection Directive[171] and the Community Design Regulation[172], which will be reviewed in-depth in chapter 7.[173]

However, despite both market sectors continuing to be both economically and commercially viable within their own designated markets, with the emersion among fellow European members of the EU, they fail to enact a harmonized system for international companies entering a global market. While, European countries provide protections of designs, allowing many designers to forgo heavily trademarked patterns for artistic taste,[174] the same cannot be said for the US, which does not have design legislation, and therefore limits protections most areas of fashion design, forcing designers to heavily produce trademark centric designs or risk being knocked off.[175]

Many design companies have noticed a skew in the level of protections, US companies entering the European fashion market may obtain a far more inclusive level of fashion protections, than their European counterparts aiming to enter commercial markets in the US.[176] Thus, leaving European and US designers potentially protected in Europe but freely open to knockoffs in the US. In light of the uneven levels of protection, when asked to report to the US Trade Representative, the CFDA stated the following,

> "[F]ashion design has matured to the point where US original creations are increasingly being copied abroad, and we therefore have an interest in ensuring continued reciprocal protection for these original works." … "European designers and their trade associations are becoming increasingly dissatisfied because, even through Europe protects US designs, the US does not adequately protect European designs."[177]

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[171] Council Directive 98/71/EC of 13 October [1998] OJ L289
[172] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9
[173] Maurice A Weikart, 'Design Piracy' (1994) 19(3) Indiana Law Journal <https://www.repository.law.indiana.edu/ilj/vol19/iss3/4> accessed 26 Feb 2020
[174] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014
[175] Matthew S. Miller, 'Piracy in Our Own Backyard: A Comparative Analysis of the Implica- tions of Fashion Copying in the United States for the International Copyright Community', 2 J. INT'L MEDIA & ENT. L. 133, 156 (2008).
[176] ibid
177 Miller, *Supra* note 5, at 156. (emphasis omitted) (quoting Email from Peter Arnold, Exec. Dir., Council of Fashion Designers of Am, to Mark Mowrey, Deputy Assistant US Trade Representative for Eur. And the Mediterranean (Dec. 17, 2004) *available at* http://www.ustr.gov/archive/assets/World_Regions/Europe_Middle_East/Transatlantic_Dialogue/Public_Comments/asset_upload_file637_7044.pdf)

Currently, the EU has seen to some of these necessary adaptions, while the US continues to gain profits on overconsumption of fast fashion business structure and lax IP law framework.
In order to become reciprocal to one another, and create a more mutually beneficial fashion industry, the US will need to reform current legislation to include the artistic aesthetic elements of fashion design. This will not only provide more trustworthy business relationships but also provide domestic and international designers long requested and needed forms of protections.

The WTO and the subsequently mentioned treaties shall aim to alleviate current fashion company's complications and frustrations under a global trading market, promote ethical business practices in fashion, and continue to maintain a sustainable industry, harmonization will be key among the US and EU

International Laws

Due to the distorted IP protections that govern the fashion industry, and its continuous need to operate on a global scale, organizations such as the World Trade Organization (WTO) created in 1995,[178] have stepped in to provide recommendations to its signatory parties, in hopes of bridging the gaps differing international trading nations may have. According to the WTO, in brief, the Organization "is the only international organization dealing with the global rules of trade. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible".[179] Decisions made by the WTO are stipulated by signatory parties and typically ratified by WTO member's parliamentary system.[180]

Trade implications are generally settled under the WTO's dispute settlement process, which interprets international agreements and member's commitments to ensure compliance with trade policies, thus not burdening national jurisdictions and limiting military or political conflict.[181] "These agreements operate similarly as contracts among agreeing parties to guarantee trade rights, such as binding governments to provide transparent and predictable trade policies for the benefit of all".[182] In turn, these global rules help enable cross national trading functions, in congruence with the following treaties, a)

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[178] 'WTO | The WTO In Brief' (*Wto.org*, 2021) <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed 30 March 2021.
[179] ibid
[180] ibid
[181] ibid
[182] ibid

The Paris Convention;[183] b) The TRIPS Agreement;[184] c) The Hague Agreement;[185] and d) The Madrid Protocol.[186]

The WTO aids in the current implications faced by the fashion industry, by lowing trade barriers fashion companies are allotted the foundations of a unified global trading framework, which allows for the potential of internationally recognized trademarks, copyright protections, and open trading capabilities.[187] Although it should be understood that these international bodies and treaties, only provide guidance of traditional intellectual property management, and do not outline recommendations related to design protection legislation. The US and the EU are both signatory members of these international treaties, and therefore acknowledge the benefits of the recommendations granted by the WTO.

The fashion industry's reliance on IP frameworks in particular trademark protections in connection to commercially protected marks developed by designers and brand names fundamentally lies it under the Paris Convention of 1883. The Convention, in connection with the Agreement on Trade-Related Aspects of IP Rights (TRIPS) of 1995, allows for provisional protections of unfair competition in signatory countries related to patents, trademarks, industrial designs, service marks, trade names, and utility models.[188]

Designers and fashion companies operating or domiciled under a signatory nation may be allotted IP protections in other signatory jurisdictions upon registration under their own national member state.[189] Protections under the Paris Convention only provide interim IP frameworks and do not outweigh national precedent, which would include patent and trademark legislation under national laws.[190] For

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[183] Summary Of The Paris Convention For The Protection Of Industrial Property (1883)' (*Wipo.int*, 2021) <https://www.wipo.int/treaties/en/ip/paris/summary_paris.html> accessed 30 March 2021.
[184] 'WTO | Intellectual Property - Overview Of TRIPS Agreement' (*Wto.org*, 2021) <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#copyright> accessed 6 April 2021.
[185] 'Hague Agreement Concerning The International Registration Of Industrial Designs' (*Wipo.int*, 2021) <https://www.wipo.int/treaties/en/registration/hague/> accessed 6 April 2021.
[186] 'Summary Of The Madrid Agreement Concerning The International Registration Of Marks (1891) And The Protocol Relating To That Agreement (1989)' (*Wipo.int*, 2021) <https://www.wipo.int/treaties/en/registration/madrid/summary_madrid_marks.html> accessed 6 April 2021.
[187] 'WTO | The WTO In Brief' (*Wto.org*, 2021) <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed 30 March 2021.
[188] Summary Of The Paris Convention For The Protection Of Industrial Property (1883)' (*Wipo.int*, 2021) <https://www.wipo.int/treaties/en/ip/paris/summary_paris.html> accessed 30 March 2021.
[189] The Paris Convention of 1883, Articles 2 and 3
[190] ibid, The Paris Convention of 1883

example, patent protection is not mutually granted when registered with one signatory body and therefore may not grant the same protections under all signatory nations.[191] Moreover, trademarks are not regulated under the Convention, but rather the responsibility falls under contracting states to regulate the conditions of the filing process and registration of marks based on domestic laws.[192]

Despite domestic precedents, a highly trademark-influenced industry such as fashion may come to depend on registration protections that may not be refused or invalided on the grounds that filing or renewal of registration has not been placed in the country of origin.[193] In continuation, the registration of a trademark in one signatory country is solely independent of other contracting States and does not influence nor validate the registration in other contracting countries, including the country of origin.[194]

If trademarks are duly registered in the country of origin they must be requested by the other contracting countries to accept the filing and protection of the trademark in its original form within other contracting countries.[195] The refusal of trademark protection must be accredited with sufficient reasoning connected to third party rights which the following may apply: a) the trademark is devoid of distinctive character; b) the trademark becomes contrary to morality or public order, and c) the nature of the trademark is liable to deceive the public.[196]

The use of a registered mark is compulsory once approved by a contracting country. The registration can only be canceled after a reasonable time, and only if the trademark's owner cannot provide sufficient justification for keeping the registration active.[197] Contracting countries must prohibit the registration of a mark that constitutes a reproduction, imitation, or translation that may bring confusion in connection to a pre-existing mark that is considered well known in that contracting state and is related to an identical or similar market.[198]

Through this treaty, fashion is provided a stopgap set of laws that aid in one of the main protected pathways taken by fashion companies in the form of trademarks. The Paris Convention allows for provisional IP legislation that has been agreed upon both by the US and the EU. Although full

[191] ibid, Article 2 a
[192] ibid, Article 3 b
[193]ibid Article 3 b
[194] ibid Article 3 b
[195] ibid Article 3b
[196] ibid Article 3 b
[197] ibid Article 3 b
[198] ibid Article 3 b

harmonization has not occurred for the fashion industry, the Convention provides necessary steps and acknowledges the protections needed in order for the industry to operate globally, and continue to hold its commercial and economic influence.

Though contracting countries must prohibit the false indication of the source of goods, and must enforce the identity of the producer, manufacturer, and trader if the trademark in question is considered well-known, it is still up to individual states to proceed with the recommendations of the Paris convention as they see alien with current national laws.

As previously mentioned the Paris Convention runs in congruence with the TRIPS agreement of 1995, which allows for a comprehensive IP agreement for a global market. It provides provisions for copyright, trademark, industrial design, and patent protections. The aim of the TRIPS agreement is to set the grounds for the international IP structure that we see today, which in the case of this thesis are the US and EU legal structures.

Moreover, supplementary acting treaties related to the TRIPS Agreement would include the Paris Convention and the Berne Convention. The acting provisions connected to both the Berne and Paris conventions can be found in Articles 2.1 and 9.1 of the TRIPS Agreement.[199] The Berne convention stipulates a legal framework related to literary and artistic works which in almost all cases excludes the fashion industry, thus for the purpose of this paper the Berne convention will not be explored further. Copyright protection related to fashion is mainly reliant on national laws, with previous examples explored by differing definitions of design under copyright legislation provided by the US and European countries.

Trademarks, also fall under the provisions of the TRIPS Agreement, which allows eligibility to trademark any sign or combination of signs that distinguish goods or services of an undertaking in the market.[200] "Marks that include particular words, letters, numerals, figurative elements, personal names, combinations of certain colors, and lastly combination of any of the previous may fall under trademark provisions".[201]

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[199] 'WTO | Intellectual Property (TRIPS) - Agreement Text - Contents' (*Wto.org*, 2021) <https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> accessed 7 April 2021.

[200] The TRIPS Agreement, Article 15

[201] ibid Article 15

For signs and depictions that do not inherently identify an undertaking, it will be left to national laws to issue trademark protection. Examples of non-visually descriptive signs, that fall under national law trademark stipulations would include, sounds and smells. In terms of the fashion industry, the cosmetics sector falls within these trademark provisions.

Signatory countries hold the right to determine trademark approval based on a mark's active use. The mark must be seen as inactive for three years or more from the date of original filing in order to be deemed inactive. Although, a mark being inactive does not exclude the subsequent parties from having the right to the application process, only in the approval or disproval of the trademark.[202]

The TRIPS Agreement allows owners of a trademark to be granted protection against unlawful use by third parties.[203] This is enforced by requiring the consent of the trademark owner, through licensing agreements that allow the use of similar or identical marks.[204] Marks that do not obtain appropriate consent may be deemed unlawful, as copied or similar marks have the ability to cause confusion among different customer segments. [205] Marks that can be defined as well-known, such as many of the trademarks and brands in the fashion industry, have joint protection between the TRIPS Agreement and the Paris Convention. For brands such as Chanel, Gucci, Dior, and many other well-known brands, the Paris Convention supplements some protection through Articles 6bis. This protection requires that signatory states are obligated to refuse or cancel any marks that may conflict with pre-existing protected trademarks.[206]

Protection under these treaties may also extend to markets not traditionally entered by the original undertakings.[207] Examples would include, joint ventures where well-known brands expanded their mark to new markets, similar to Gucci's partnership with Fiat automotive company. In addition to the

[202] ibid Article 14.5
[203] ibid Article 16.1
[204] ibid Article 16.1
[205] ibid Article 16.1
[206] ibid Article 16.2 & 3
207 ibid Article 16.2 & 3

well-known Gucci logo, the signature red and green stripe combination was used in the design of the famous Italian car. [208]

The TRIPS agreement also provides some provisions related to patents and industrial designs, which subsequently aim to provide protections of functional and industrial elements of the fashion industry. The provisions mainly aid in areas of fashion related to clasps, hooks, closures, and chemical finishes related to garments. Under the TRIPS agreement, industrial design protections require the design to be new, original, and independently created,[209] Nevertheless, this kind of protection is strictly stipulated for technical or functional-based designs.[210]

There are special provisions in place for new designs within the textile sector due to its short product lifecycle, which are stipulated in article 25.2 of the TRIPS Agreement.[211] The special stipulations are granted on the basis of cost, examination, and publication for the granted protection, in connection to the short product lifecycle.[212]

Patent registration can be made accessible for any inventions contributing to the field of technology, including products and processes without discrimination, other than to test that the invention is novel.[213] Patent protection should also be accessible and granted to inventors in their own Member State, as well as other Member States in the EU.[214] The original makers or persons intending to use, sell, or import products for the mentioned purposes may file for protections of a patent.[215] Patents, when granted provide protection throughout the whole invention process and derivative products that are created

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208 Jim Gorzelany, 'Fiat to Unveil '500 by Gucci' During NY Fashion Week' *Forbs Magazine* (New York, 17 August 2011) < https://www.forbes.com/sites/jimgorzelany/2011/08/17/fiat-to-unveil-500-by-gucci-during-ny-fashion-week/ >

209 The TRIPS Agreement of 1994, Article 25 Section 1

210 ibid, Article 25 Section 1

211 'WTO | Intellectual Property - Overview Of TRIPS Agreement' (*Wto.org*) <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#copyright> accessed 7 April 2021.

212 ibid

213 The TRIPS Agreement of 1994, Article 27.1

214 ibid Article 27.1

215 The TRIPS Agreement of 1994, Article 28

under the protected process.[216] The owner of the patent has rights pertaining to licensing contracts, reassigning ownership of the patent, and the right to transfer patent rights by succession.[217]

The Paris Convention and the TRIPS Agreement provide the main IP frameworks related to the fashion industry on a global scale. If the legal outlines stated above sound familiar to current national legislation, that is because they are mutually beneficial to one another, and aim to bestow intellectual property rights both for national fashion companies specific to a country and for newly entering or actively functioning global fashion entities. Further chapters shall outline the US and EU IP legislation, that despite their differences provides similar protections inspired by these two main international treaties.

The last two treaties that require introduction include The Hague Agreement of 1960[218] and the Madrid Protocol of 1996. They aim to assist in the issues many global fashion companies face, which is the confusion of registering IP protections in differing States. The Hague Agreement provides a single registration process for industrial designs among signatory countries. The Agreement consists of three international agreements: the Geneva Act of 1999, the Hague Act of 1960, and the London Act of 1934.[219]

Currently, there are 61 contracting parties, including the European Union. The US has ratified the treaty since 2007, but did not implement the legislation until 2013, and will only fully accede to The Hague Agreement once the United States Patent and Trade Office (USPTO) issues its final rules in regard to the implementation of the Agreement.[220]

The registering of industrial designs allows for minimal protections in multiple countries and regions. The application shall be submitted to the International Bureau of WIPO either directly or through a

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216 ibid Article 28

217 ibid Article 28

218 'Summary Of The Hague Agreement Concerning The International Registration Of Industrial Designs (1925)' (*Wipo.int*, 2021) <https://www.wipo.int/treaties/en/registration/hague/summary_hague.html> accessed 30 March 2021.

219 Tiffany Mahmood, 'Design Law in the United States as Compared to the European Community Design System: What Do We Need to Fix? [2014] Fordham Intell. Prop. Media & Ent. L.J. 555

220 ibid

contracting party's home industrial property office. The provisions of the agreements provide a single registration system that allows applicants the ability to record subsequent changes and renewal of registration through a single procedural entity.[221] The refusal of an industrial design may fall in connection with domestic laws or other formalities set by national laws. If the registered design is not refused by the contracting states, then protections are up to five years with an additional five years granted based on the renewal of the registration based on the 1999 Act.[222]

Once the US has fully acceded to The Hague Agreement there will be an impact in relation to industrial design protection under the US Patent Law. Design Patent protection will be extended to fifteen years rather than fourteen,[223] and applicants will be able to file up to 100 designs in a single application under the same Locarno Classification.[224] In terms of the fashion industry industrial design protection affects multiple areas including: accessories, footwear, jewelry design, and other facets of design.

Fashion conglomerates will be allowed to register under one system and be provided potential protections among multiple countries under a global market. The Hague Agreement cuts confusion faced by individual registration offices is inherently cost-effective as companies are not required to pay for individual IP offices, and provides a legal layout for industrial designs, which formulate under reoccurring functional elements such as jewelry clasps and insole technology in footwear.

Lastly, The Madrid Protocol of 1996, provides similar registration privileges as The Hague Agreement, but in connection to trademarks. As previously mentioned trademarks have become the primary method for fashion companies and designers to obtain IP protections related to fashion design, and allocate large sums in order to file for protections under different countries. The Madrid Protocol is a cost-effective way for companies in the fashion sector to gain widespread trademark protections by filing

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221 'Summary Of The Hague Agreement Concerning The International Registration Of Industrial Designs (1925)' (*Wipo.int*) <https://www.wipo.int/treaties/en/registration/hague/summary_hague.html> accessed 7 April 2021

222 ibid

223 Marshall **J.** Brown, *The Hague Agreement: **A** New Frontierfor **U.S.** Design Patent Applicants,* **INTELLECTUAL PROPERTY TODAY,** http://www.iptoday.com/issues/ 2013/02/the-hague-agreement-new-frontier-for-us-design-patent-applicants.asp (last visited May 14, **2013).**

224 Harold C. Wegner, 'The New Industrial Design Law, a TRIPS Trap?'(PATENTLY-O BLOG, 15 November 2012) < http:/patentyo.com/media/docs/2012/11/wegnerindustrialdesignsov.12.pdf. >

under the World Intellectual Property Organization, which oversees the application and execution of the protocol.[225] After the filing is complete it is brought forth to the International Bureau who; "a) reviews the application and determines if there are any irregularities with the regulations outlining the protocol; b) records and publishes the mark in the International Registrar or WIPO Gazette of International Marks if the application meets the requirements; and c) informs the contracting party's trademark offices".[226] If no refusals are brought forward or if the pre-existing refusal is recanted then protection is granted from the date of filing. Protection, when obtained, allots a 10-year term of protections that may be renewed for another 10 years.[227]

Although the treaty overviews widespread trademark protection, it is within the rights of each signatory to approximate protections based on national law.[228] Moreover, Contracting States have the right to refuse the granting of protections for a mark if provisions do not align with domestic legislation, thus refusing protections within that territory.[229]

The treaty allows for the reduction of costs but does not eliminate expenses related to widespread protection. In addition to costs related to filing in a domestic jurisdiction for international protection, in most cases, each country also requires filing costs.[230] Filing for trademark protection within multiple product sections requires the above-mentioned costs by the company or designer acquiring trademark protections through the Madrid Protocol.[231] Unfortunately, much like most current aids to the fashion industry, this treaty functions as a Band-Aid to a constantly evolving IP issue related to fashion.

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225 ibid

226 'Summary Of The Madrid Agreement Concerning The International Registration Of Marks (1891) And The Protocol Relating To That Agreement (1989)' (*Wipo.int*) <https://www.wipo.int/treaties/en/registration/madrid/summary_madrid_marks.html> accessed 7 April 2021.

227 ibid

228 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

229 'Summary Of The Madrid Agreement Concerning The International Registration Of Marks (1891) And The Protocol Relating To That Agreement (1989)' (*Wipo.int*) <https://www.wipo.int/treaties/en/registration/madrid/summary_madrid_marks.html> accessed 7 April 2021.

230 ibid

231 ibid

The protection granted under the Madrid Protocol allows for fashion companies and designers to gain protection on a global platform with a single registration process, which saves both time and expenses devoted to gaining trademark protection internationally. Fashion is a global industry that, as previously mentioned, relies heavily on trademark protection and recognition, thus the Madrid Protocol allows for crucial protection among the member parties of the treaty.

The following chapter shall outline the US's IP laws as they affect the fashion industry and their possible limitations. Furthermore, attempts at legal reform shall also be expressed, and economic theories related to the fashion industry.

4 Intellectual Property Protection in The US, in Relation to The Fashion Industry

This chapter shall explore intellectual property law under the US framework and its connection to the fashion industry. The United States (US) relies on national IP laws that include the fashion industry on an accessory frame, meaning it was not created with the needs of the industry in mind. Moreover, unlike many EU nations, the US does not recognize fashion design as protectable under copyright laws due to its utilitarian end-use.[232] A good analogy to exemplify the relationship between the fashion industry and IP law in the US would be to imagine an umbrella already protecting two people from the rain and needing to extend its protection to a third person when there is only space for half of that third person, in this case, the two protected people would be literary works and industrial inventions while that third person would be the fashion industry. There is protection but not nearly enough to be effective.

Fashion activists previously mentioned continue to fight for copyright laws to include the fashion sector, much like other areas of functional design, like the transportation sectors and technology industries, have been included. Furthermore, the industries reliance on trademark protection has created controversy, as it hinders the overall creative process and restricts fashion innovation, although many IP laws under the US jurisdiction are used to protect the fashion industry most are limited and may result in economic harm.[233]

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[232] Matthew S. Miller, 'Piracy in Our Own Backyard: A Comparative Analysis of the Implica- tions of Fashion Copying in the United States for the International Copyright Community', 2 J. INT' L MEDIA & ENT. L. 133, 156 (2008).

[233] Note, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment', 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].

Moreover, small start-up level fashion companies generally have low protections, as often they do not possess the financial means to legally challenge established brands or fast fashion companies. This is mainly due to a lack of brand recognition, financial limitations, and smaller platforms whit limited reach among informed users.[234] Brand recognition is a prevalent contributing factor in IP protection, as it determines many outcomes related to consumer confusion, trademark, and IP dilution, and the overall strength a fashion company may have when claiming potential IP infringements.[235] Recognition is defined by a product's ability to instantly inform an educated end-user which company or manufacturer the goods are traced to. This can be achieved through multiple forms of IP protection most popular in fashion being trademark and copyright legislation.[236]

Presently, the current legal framework lacks the same level of protection for apparel as there is for footwear, jewelry, and other accessories. Apparel is generally offered restricted protection due to its functional use and lack of secondary separable aesthetical elements. Fashion designs must pass the "physical separability"-test, which has been defined in chapter 2 of this dissertation.[237] Additional topics such as a) the legal limitations regarding trademark legislation, b) arguments related to copyright reform, c) modern attempts at design legislation reform, and d) economic theories such as the Piracy paradox will be reviewed, as all these aspects directly affect the fashion industry from a business perspective.

The Copyright Act of 1790 – Protection of Two-Dimensional Works

The Copyright Act was originally implemented to protect any written works, maps, books, or charts created by citizens of the United States.[238] The Act functioned on the basis that "learning is the mother of invention and expression".[239] In order to ensure the protection of these works, and the push for further learning, the first elements of copyright protection in the United States are enshrined in the US Constitution under the copyright and patent clause, Article 1, Section 8, Clause 8, "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive

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[234] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[235] ibid
[236] ibid
[237] ibid
238 US Constitution, Article 1, §8, clause 8

[239] U.S. Office, 'What Is Copyright? | U.S. Copyright Office' (*Copyright.gov*) <https://copyright.gov/what-is-copyright/> accessed 8 April 2021.

right to their respective writings and discoveries".[240] In 1790 the US passed The Copyright Act which, over time, has expanded to protect many different types of written works; far exceeded the founding fathers' expectations from their original thoughts of science and literature to music and various aspects of the fashion industry.[241]

The main elements of the fashion industry that are covered by the Copyright Act are drawings, photographs, jewelry designs, editorial content, and design software.[242] However, fashion designs in the physical sense are not protected under copyright law. Only sketches and drawings are protected, while physical garments are exempt from protection due to their functional consumer use.[243] It should be noted that the nature of copyright protection is not to protect three-dimensional works, as these works fall under other forms of protections such as patent and trade dress.[244]

The Copyright Act also exempts designs that are seen as useful, thus causing the age-old problem in fashion: function vs. creative expression.[245] In order to obtain copyright protection, design elements must gain secondary meaning and hold severability to the overall function of a design.[246] Design elements seeking protection may only bring aesthetical expression and not function.[247] For example, garments are functional and in many cases are exempt from protection despite holding many design-related elements.[248] Many of these elements are used to aid in the functionality of a garment and may include, buttons, zippers, closing facets, and pockets.[249]

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240 US Constitution, Article 1, §8, clause 8

241 U.S. Office, 'What Is Copyright? | U.S. Copyright Office' (*Copyright.gov*) <https://copyright.gov/what-is-copyright/> accessed 8 April 2021.

242 17 U.S.C. § 101, 102(a) (2006); *see* Carol Barnhart Inc. v. Econ. Cover Corp., 773 f. 2d 411 (2d Cir. 1985).

243 *See, e.g.,* Whimsicality, Inc. v. Rubies' Costume Co,. 891 F. 2d 452, 455 (2d Cir. 1989); *cf. The Industry Speaks Out, supra* note 25 (musing that "the bestower of patents-who clearly missed Mc Queen's fall 2006 giant gauze-wrapped deer antler headdress—deems clothing "useful articles" not works of art")

244 U.S. Office, 'What Is Copyright? | U.S. Copyright Office' (*Copyright.gov*) <https://copyright.gov/what-is-copyright/> accessed 8 April 2021.

245 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

246 C. Scott Hemphill & Jeannie Suk, Reaction, *What "Design Copyright"?*, 126 HARV. L. REV. F. 164, 164 (2013).

247 ibid

248 ibid

249 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

In order to determine the grounds for copyright protection, courts will often use the "physical separability"-test to determine if certain design elements obtain secondary meaning without affecting the overall function, although even with the use of the separability test, gaining protection may be difficult.[250] The infamous case dealing with a belt buckle, *Kieselstein-Cord v. Pearl* (1980)[251], defined separable aspects of copyright protection.[252] During the course of this case, it was determined that design elements pertaining to apparel design may be copyrighted if they are conceptually or physically separable from the overall utilitarian function.[253] The designer, Kieselstein-Cord, was able to create a belt buckle design that reached the separability requirement despite being attached to a utilitarian belt buckle.[254] This case established the separability doctrine and has been used as precedent in cases concerning multiple aspects of fashion, including fabric prints, images/drawings on fashion items, and jewelry design.[255] It should be cautioned that despite the merits of the separability doctrine, many courts have used it inconsistently in order to determine copyright protection[256].

Despite the potential complications in obtaining copyright protection, it is still the preferred form of protection for non-physical designs that pass the severability factor.[257] In comparison to other IP protections such as patent law, copyrights have a longer term of protection and are generally more cost-effective in terms of two-dimensional protection.[258] Furthermore, copyright protection does not rely as closely on branding and company logo recognition as trademarks protection.

Can Design Protection Amend US Copyright Laws to Include Utilitarian Products?

Historically design legislation reform was purposed as an amendment of US copyright laws in order to expand the scope of creative expression to include the fashion sector; similar to the Community Design

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[250] ibid
[251] *Kieselstein-Cord v. Accessories by Pearl, inc.,* 489 F. Supp. 732 (S.D.N.Y. 1980)
252 ibid

[253] ibid
[254] ibid
[255] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
256 ibid

257 ibid

258 ibid

Regulation (EU) 6/2002[259] and the legal protection of designs directive (EU) 98/71/EC[260] in Europe. The amendments would allow protection for designs outside of the public domain that is strictly rooted in artistic expression but also holds a utilitarian purpose.[261] Copyright laws in the US until recently have been primarily seen as the protection granted for creative expression that holds no function or utilitarian use and falls under a two-dimensional sphere.[262] In contrast components of fashion, for example, apparel, are both three-dimensional and fulfill a functional purpose which currently exempts them from copyright protection. When evaluating the already established argument related to copyright protection on an abstract level, it can be easily argued that: design protection does not fulfill the need to amend the current legal framework to include the fashion sector, for example, on the simple basis of its seasonal framework characteristic, which would not deserve protections due to its rapidly changing environment that would result in the dilution of the innovation value, and it's over functional design use.[263]

Although, when viewed from a practical level in terms of other industries such as transportation or technology, the arguments for the fashion industry quickly regains validity. In recent years' copyright protection has expanded to include vessel hulls in the transportation sector, and microchips and computer programs in relation to the technology industry.[264] The progressive expansion of ornamental elements in other industries has proven the copyright laws may also protect utilitarian aspects without any overall harm obtained by the current legal framework. Vessel hulls and silicon chips are both designs that hold utilitarian components as they aid in the sailing of cargo ships and the primary functions of computers, proving that US may adapt design protection to protect works rooted both in creative expression and utilitarian products.[265] Moreover, courts have not reported issues in adapting the framework to include the transport and technology industries to fit under the copyright protection, thus creating the potential grounds for the adaption of the fashion sector.[266]

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[259] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9
[260] Council Directive 98/71/EC of 13 October [1998] OJ L289
[261] Susan Scafidi, 'Intellectual Property and Fashion Design', in Peter K. Yu (ed.), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age,* (Praeger Publishers 2007)
[262] Tiffany Mahmood, 'Design Law in the United States as Compared to the European Community Design System: What do We need to Fix?, (Fordham University, School of Law) 24, (2014)

[263] Meaghan McGurrin Ehrhard, Note, *Protecting the Seasonal Arts: Fashion Design, Copyright Law, and the Viability of the Innovative Design Protection & Piracy Prevention Act*, 45 CONN. L. REV. 285, 291 (2012).

[264] Tiffany Mahmood, 'Design Law in the United States as Compared to the European Community Design System: What do We need to Fix?, (Fordham University, School of Law) 24, (2014)
[265] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[266] ibid

In comparison, Europe has granted similar protection to fashion and has not experienced uncertainty related to protection nor practical issues in courts proceedings; for example, the courts have not reported being overwhelmed with new waves of court cases related to changed legislation.[267] Moreover, as mentioned before, countries such as France have implemented fashion under copyright laws and granted substantial protections while continuing to have steady economic growth within the fashion industry.[268] Thus proving that design laws have been successfully implemented in the pre-existing legal framework with little to no interruptions to the pre-existing legal precedent.[269]

Furthermore, arguments that debated on whether the fashion industry continues to stay innovative in terms of creative expression, have ultimately been proven weak. Though it is true, classic silhouettes related to fashion fall under the public domain, and therefore are exempt from protection, fashion design is far from declining.[270] On an artistic level fashion designers have created numerous new creations across different areas of design within the industry, including a) Alexander McQueen's Avant-garde head dress collections, which features looks such as large birdcage designs and fantastical butterfly swarms[271]; and b) Nike's highly sought after 2016 Nike Mag, which features a futuristic design and electroluminescent shoe band and sole as a tribute to the cult classic "Back To The Future".[272] One common theme falls within all these areas of fashion: they all combine both separable artistic expression and functional use by the legal definition, thus allowing the grounds for added design protection under the copyright framework.[273] Fashion on a global scale has been seen as art and a form of creative

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[267] ibid

[268] Véronique Pouillard, 'Design Piracy In The Fashion Industries Of Paris And New York In The Interwar Years' (2011) 85 Business History Review <https://www.jstor.org/stable/41301394>.

[269] Tedmond Wong, Comment, 'To Copy or Not To Copy, That Is the Question: The Game Theory Approach To Protecting Fashion Designs', 160 U. PA. L. REV. 1139, 1148–52 (2012) (summarizing protection in the EU, France, and the United Kingdom).

[270] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

[271] 'Exposition Art Blog Alexander Mcqueen — Avant-Garde Fashion' (*Medium*, 2017) <https://milenaolesinska77.medium.com/exposition-art-blog-alexander-mcqueen-avant-garde-fashion-a1c29c2f5f72> accessed 8 April 2021.

[272] Claudia Miller Victor Deng, Victor Deng and Claudia Miller, '15 Best Nike Sneakers Of All Time That You Can Shop Right Now' (*Footwear News*, 2020) <https://footwearnews.com/feature/best-nike-shoes-of-all-time-to-shop-1202880643/> accessed 8 April 2021.

[273] Eanette Cuzella, *Fast Fashion: A Proposal for Copyright Protection of 3D- Printed Apparel*, 13 COLO. TECH. L.J. 369, 370 (2015). Dutch designer Iris van Herpen has adapted the fashion industry to use 3D-printing, by working with architects and engineers to pioneer works, which has enticed fashion centric artists such as Lady Gaga and Björk. *See* Mark Holgate, *Meet Iris van Herpen*, *the Dutch Designer Boldly Goes into the Future*, VOGUE (Apr. 28, 2016), http://www.vogue.com/article/iris- van-herpen-dutch-designer-interview-3d-printing [https://perma.cc/H2ZX-46S2]; Liz Logan, *The Dutch Designer Who Is Pioneering the Use of 3D Printing in Fashion*, SMITHSONIAN (Nov. 6, 2015), http://www.smithsonianmag.com/innovation/dutch-

expression of both the designer who creates the designs and the consumer who chooses to use those creations as a form of expressing individuality.[274]

The argument that US copyright laws are unable to include fashion on the grounds of its utility functions and its short product life cycle[275] have proven to be fragile when viewed practically or compared to other industries.[276] Moreover, the arguments related to economic prosperity have also been proven insufficient after a focused view on the limits of piracy and an in-depth comparison to other markets, such as Europe.[277]

Although fashion design may have additional obstacles in terms of innovation, fashion is far from declining and will continue to widely be seen as a form of art.[278] As a result, copyright laws have the ability to adapt to fit the fashion industry and fall in line with one of the US's most profitable market segments.[279] The lack of protection is based on economic arguments rather than legal, and in many cases fail to hold ground when viewed practically or in terms of the future of fashion. According to Guillermo Jilenez and Barbara Kolsun, design reform in the US has aimed to adapt copyright legislation to include fashion but has failed despite the limitation of trademark protection and proven reform adaptability within other markets such as transport and technology. Moreover, without the potential for design protection in the US, fashion companies will continue to create less innovative designs and European companies will continue to feel uneasy branching into US markets for fear of insufficient protections. Furthermore, as the industry continues to change and adapt to the future, the need for a more constructive relationship with law and fashion in the US will continue to rise.

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designer-who-pioneering- use-3d-printing-fashion-180957184/ [https://perma.cc/5QW7-4K4T].

[274] Hagin, 'A Comparative Analysis of Copyright Laws Applied to Fashion Works', 345.
[275] Product life cycle defined: 'Product life cycle (PLC) is the cycle through which every product goes through from introduction to withdrawal or eventual demise.'
'What Is Product Life Cycle? Definition Of Product Life Cycle, Product Life Cycle Meaning - The Economic Times' (*The Economic Times*) <https://economictimes.indiatimes.com/definition/product-life-cycle> accessed 8 April 2021.

[276] Matthew S. Miller, *Piracy in Our Own Backyard: A Comparative Analysis of the Implica- tions of Fashion Copying in the United States for the International Copyright Community*, 2 J. INT' L MEDIA & ENT. L. 133, 156 (2008).

[277] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[278] ibid
[279] ibid

Lanham Act of 1947 – The Importance of Trademarks in The Fashion Industry

The Lanham Act has been in effect since July 5, 1947, and lays down the legal framework pertaining to the use of trademarks.[280] The Lanham Act defines a trademark as "any word, name, term, symbol, or device or any combination thereof," that identifies and distinguishes the goods of one party from those of others and indicates the source of the goods as defined in section 45.[281] It allows companies that own their own trademarks to gain protection and claim damages when their trademarks have been infringed upon. "Additionally, it provides protection against any consumer confusion pertaining to a trademark, active dilution of a mark, or inaccurate depiction of origin or description of a trademark."[282]

Fashion trademarks can be seen in all areas of the industry from garment patterns, handbag collections, footwear design, and even eyewear collections, it has become a key method of protections for fashion companies, and thus benefit greatly from the Lanham Act.[283] In order to enact protection under the Lanham Act companies must first confirm that their trademark is valid and is properly registered with the US patent and trademark office and that the assumed infringement is either identical or similar enough in order to cause confusion among consumers.[284]

The fashion industry relies heavily on trademark protection as much of fashion design, as previously mentioned falls outside the scope of protections and, therefore, companies must find alternative elements to protect under IP rights. A fashion brand's trademark is arguably the most memorable recognizer among consumers, later following iconic designs or styled looks.[285] Examples of heavy trademark reliant designer brands include Louis Vuitton with its signature LV's, Coco Chanel with their interlocking double CC's, and Couch leather goods with their horse and couch symbol. All of these highly used trademarks instantly inform consumers which brand they are purchasing, and what iconic fashion company they are showing off to the world.

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280 The Lanham Act 1947, 15 USC § 1051
[281] The Lanham Act 1947, 15 USC § 1125 s 45
[282] The Lanham Act 1947, 15 USC § 1051-1141
[283] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[284] see, e.g. *Lane Capital Mgmt., v. Lane Capital Mgmt.,* 192 F. 3d 337, 345 (2d Cir. 1999) (" A Certificate of registration with the [USPTO] is prima facie evidence that the mark is registered and valid (i.e., entitled to protection), that the registrant owns the mark, and that the registrant has the exclusive right to use the mark in commerce.").
[285] Note, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment', 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].

Figure 3: Coco Chanel's Iconic double C trademark[286]

Figure 4: Louis Vuitton's internationally known trademark[287]

Trademarks in regards to fashion have surpassed just legal protections, and have even become pop culture references to show social and economic status in connection to fashion. An example of this can be seen in music with songs like "Fat Raps (Remix)" by Big Sean, with lyrics like " Your girl show me L-O-V-E / I dropped the O and E, and just took the LV / The Louis Vuitton Luggage / Every time you see my passport, Damier Print".[288] Directly referring to the LV logo on his passport cover, thus showing his ability to pay for designer goods and upper-class status in society, while consumers listening to the song instantly know the brand the artist is referring to once the "LV" is mentioned and fostering an encompassing need to purchase the same Louis Vuitton accessory as the famous rapper.[289]

Trademarks have become so valuable that they sparked reincarnated fashion trends that use trademark symbols both as forms of legal protection, but also as continuous "fashion-forward" trends.[290] Infringements related to trademarks come in a plethora in the US with examples such as Adidas active wear suing Forever 21 for wrongfully using the registered trademark "three stripes" mark among their 2017 collection.[291] Adidas, stated " The infringing apparel and footwear and counterfeit apparel imitates Adidas's three-stripe mark… in a manner that is likely to cause consumer confusion and deceive the

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[286] 'Chanel Logo' (*Logos-Word.net*, 2021) <https://logos-world.net/chanel-logo/> accessed 7 April 2021.
[287] 'Louis Vuitton Logo' (*Logos-World.net*, 2021) <https://logos-world.net/louis-vuitton-logo/> accessed 7 April 2021.
[288] 'Big Sean (Ft. Asher Roth, Boldy James, Chuck Inglish, Dom Kennedy & King Chip) – Fat Raps (Remix)' (*Genius*) <https://genius.com/Big-sean-fat-raps-remix-lyrics> accessed 7 April 2021.
[289] ibid
[290] Note, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment', 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].
[291] 'Adidas America, Inc. Et Al V. Forever 21, Inc., No. 3:2017Cv00377 - Document 198 (D. Or. 2018)' (*Justia Law*) <https://law.justia.com/cases/federal/district-courts/oregon/ordce/3:2017cv00377/130842/198/> accessed 7 April 2021.

public regarding their source, sponsorship, and affiliation."[292] The "three stripes" trademark has become so ingrained in Adidas consumer recognition, that Adidas has sued Forever 21 on numerous occasions in the past decade related similar trademark infringements, with the mentioned 2017 infringement being resolved through an outside-of-court settlement.[293]

Trademarks have ultimately become fashion, holding similar importance as design and overall style. The business structure of the fashion industry would not be nearly as profitable as it is today without trademarks, as much of the industry has gained increased revenue on the idea of (what it means to own designer logos).[294] Although it has been argued that trademark protection has become a crutch to fashion innovation, and the industries Band-Aid for lack of copyright legislation, both of which will be further explored in this chapter, but first, the application of determining a possible infringement must be outlined.[295]

When the court has been presented with a possible infringement, they will usually conduct "a *Polaroid*-test"[296] which asks a series of questions that will determine the level of confusion that the consumer may have.[297] These questions and criteria include the following: "(1) how strong the original trademark is within the market;[298] (2) what are the similarities between the original mark and the mark in question, and are the similarities close enough to create confusion that would disrupt the market;[299] (3) do both of the marks fall within similar markets;[300] (4) can the mark be seen as an extension of a company's recognition to an informed user,[301] (5) does it pertain to the defending parties validity in entering the plaintiff's industry market, despite potentially coming from a separate market originally;[302] (6) is there any evidence of potential consumer confusion,[303] (7) is the defending company acting in good faith;[304]

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[292] Cassidy Mantor, 'Adidas Settles Trademark Case With Forever21' (*FashionNetwork.com*, 2017) <https://uk.fashionnetwork.com/news/adidas-settles-trademark-case-with-forever21,901536.html>
[293] ibid
[294] Note, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment', 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].

[295] Jeanne C. Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885, 1890–91 (2011).

[296] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[297] ibid
[298] ibid
[299] ibid
[300] ibid
[301] ibid
[302] ibid
[303] ibid
[304] ibid

(8) analysis of the quality of the defendants' products attached to the trademark;[305] and (9) evaluation of the average consumers' ability to differentiate between existing and introduced trademarks in the target market".[306] Through this process, the court can determine if the plaintiff has a strong case against the defendant and the possible ramifications that may apply.

Consumer confusion may occur when multiple companies produce similar appearing products or bare similar design aspects that may cause confusion with registered trademarks, much like the Adidas v. Forever 21 case mentioned above. Confusion among the public may be seen as an infringement if goods profit from protected trademarks, disrupt the commercial market, or intestinally aim to confuse consumers by imitating trademarks of well-known brands for the purpose of entering a profitable market.[307] Examples of this may include Dooney Bourke imitating the 2003 Louis Vuitton multicolored monogram handbag, which later resulted in a court case when Louis Vuitton sued Dooney Brouke over the imitated design esthetic.[308] Although Dooney Bourke used their own logo on their monogram bag, the style and overall look of the bags next to each other may have caused confusion among consumers, which evolved in the infringement claim.[309]

Figure 5: A compared view of Louis Vuitton's and Donney Bourke's monogram handbags.[310]

When viewed the handbags were similar in design, but under New York state law, Louis Vuitton was unable to prove consumer confusion related to trademarks, having the claim ultimately dismissed, as

[305] ibid
[306] ibid
[307] ibid
[308] ibid
[309] ibid
[310] 'Cases Of Interest: Louis Vuitton Malletier V. Dooney & Bourke, Inc. | The Fashion Law' (*The Fashion Law*) <https://www.thefashionlaw.com/resource-center/cases-of-interest-louis-vuitton-malletier-v-dooney-bourke-inc/> accessed 7 April 2021.

similar design aesthetics through a contributing factor to consumer recognition, does not definitely prove trademark infringement or dilution.[311]

The Lanham Act also protects a few other forms of IPs concerning the fashion industry including trade dress protection and the protections against the counterfeiting of protected goods. Trade dress protection generally protects either products' external packaging or overall look. In practice, this is generally open to interpretation thus making it hard to prove.[312] Originally meant to protect labels, wrappers, and certain packaging of products, the scope of protection has since expanded to cover size, shape, color, or colors used on a package, texture, graphics, and unique sales techniques.[313]

In order for a trade dress to be protected the attributes in question must obtain secondary meaning and nonfunctional use.[314] In order to gain secondary meaning, the aspects that may gain protection must be independently identifiable to the original manufacturer and must be obvious to the consumer, meaning the product configuration cannot strictly be decorative but also a distinctive aspect of the product in which the consumer is made aware of which designer it comes from.[315]Moreover, the configuration of the product that has trade dress cannot be functional, the aspects that are seeking protection must stand alone in a nonfunctional manner.[316] If the trade dress is removed, the product must still hold its integrity as a product. In order to determine whether protection is allowed for certain products the court will consider the following: "a) is the feature in question detrimental to the function of the product;[317] b) is either cost or quality affected by the feature;[318] c) how will the cost of quality in relation to the product

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[311] Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108, 112 (2d Cir. 2006).

312 ibid

313 Tiffany Mahmood, 'Design Law in the United States as Compared to the European Community Design System: What Do We Need to Fix?' (2015) 25(2) Fordham Intell. Prop. Media & Ent. <https://ir.lawnet.fordham.edu/iplj/vol24/iss2/5 >
288 32 Wal-Mart Stores, INC v. Samara Brothers, INC. 529 U.S.___ (2000)

[314] Elizabeth Ferrill & Tina Tanhehco, 'Protecting the Material World: The Role of Design Patents in the Fashion Industry', 12 N.C. J.L. & TECH. 251, 278–79 (2011).

[315] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[316] ibid
[317] ibid
[318] ibid

be affected if it is removed;[319] d) if competitiveness is affected within the market does the trade dress still have grounds for protection".[320]

Although trade dress allows for protection it is heavily influenced by the terms of secondary meaning and can be virtually useless for upcoming or not well-known designers. The famous case between *Wal-Mart v. Samara Bros* (2000)[321] ultimately proved a distinct flaw in the legal framework pertaining to the fashion industry.[322] Trade dress protection is ultimately only useful for well-known designers/brands and new designers/brands are in many cases left to fend for themselves.[323] The facts of the case consist of a Wal-Mart employee taking photographs of Samara Bros entire children wears collection, and sending these photos directly to a sourcing factory in the Philippines.[324][325]

Wal-Mart, one of the largest retail corporations in the US, promptly sold the exact knock-off goods at their retail locations. Samara Bros sued Wal-Mart on the grounds of infringement against a protected design under trade dress.[326] Although it was clear that the goods in question were similar, the Supreme Court stated that fashion designs may never be sufficient "inherently distinctive" in order to receive trade dress protection.[327][328] The Supreme Court determined that in order to gain adequate trade dress protection the designs must gain secondary meaning among consumers.[329] The secondary meaning was defined as the consumer's ability to connect the brand or manufacture to particular designs. This case ultimately proved that unless a brand, designer, or manufacturer is well recognized or holds a strongly protected trademark, there is little protection against replicated goods (*knockoffs*)[330]

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[319] ibid
[320] ibid
[321] Wal-Mart Stores, INC v. Samara Brothers, INC. 529 U.S.___ (2000)

[323] ibid
[324] ibid
[325] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[326] 'WAL-MART STORES, INC. V. SAMARA BROTHERS, INC.' (*Law.cornell.edu*) <https://www.law.cornell.edu/supct/pdf/99-150P.ZS>

327 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

[328] 'WAL-MART STORES, INC. V. SAMARA BROTHERS, INC.' (*Law.cornell.edu*) <https://www.law.cornell.edu/supct/pdf/99-150P.ZS>
[329] ibid
[330] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

Figure 6: Shows the articles of apparel in question in the Wal-Mart v. Samara Brothers case[331]

Currently, trade dress does not need to be registered to be protected, although if so chosen, registering a design will potentially provide protection lasting up to ten years, which may be renewed in perpetuity.[332] Trade dress is covered under section "43(a) of the Lanham Act,[333] and protects both registered and unregistered trade dress. 15 U.S.C. § 1125(a) allows for the legal ramification and claims for damages, injections, and the stop and seizure of counterfeit goods."[334][335]

Even though counterfeit goods are seen as criminal and are regulated more than some other forms of IP infringements, they have proven to be cumbersome.[336] In order to gain protection against counterfeiting under the Lanham Act the plaintiff must prove that: "a) the infringed goods are in fact registered and protectable under the Lanham Act;[337] b) the defendant knowingly used a counterfeit or actively acted

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[331] Michael Atkins,' Trade Dress Protection in the United States', (Graham & Dunn PC) University of Washington school of law lecture presentation, <https://www.slideshare.net/mikeatkins/alicante-presentation-7504041>
332 The Lanham Act 1947, 15 USC § 1125 s 45

[333] '15 U.S.C. 1125 (Section 43 Of The Lanham Act): False Designations Of Origin, False Descriptions, And Dilution Forbidden, Nov. 2015 (Bitlaw)' (*Bitlaw.com*) <https://www.bitlaw.com/source/15usc/1125.html> accessed 9 April 2021.
334 Linda Stevens & Mark S. VanderBroek, 'Protecting and Enforcing Trade Dress' (2009) American Bar Association <https://www.schiffhardin.com/Templates/media/files/publications/PDF/Stevens_ABA_20091014.pdf > accessed 22 Jan 2020

[335] Oanna Large, 'Consuming Counterfeits: Exploring the Assumptions About Fashion Counterfeiting', 9 PAPERS FROM BRIT. CRIMINOLOGY CONF. 3, 16 (2009), http://www.britsoccrim.org/volume9/wholedoc09.pdf [https://perma.cc/M28W-HHYP].

[336] Oanna Large, 'Consuming Counterfeits: Exploring the Assumptions About Fashion Counterfeiting', 9 PAPERS FROM BRIT. CRIMINOLOGY CONF. 3, 16 (2009), http://www.britsoccrim.org/volume9/wholedoc09.pdf [https://perma.cc/M28W-HHYP].

[337] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

blindly to the fact;[338] or c) the defendant was acting in bad faith".[339] In order to gain protection against counterfeit goods the original and the counterfeit must be strongly similar; in some cases even down to the stich pattern that is used to replicate the original product.[340] Counterfeiting is seen as directly harmful to both the market, the individual designers, and companies that can be affected, thus the production that the Lanham Act has both domestic and extraterritorial reach, which can be directly connected to protections outlined by international treaties, which is reviewed in chapter 3.[341] Moreover, they rarely if ever protect fashion design and for this fall outside the scope of this thesis.

Although trademark protection is widely used within the fashion industry, and arguably started the early 2000s, logo fashion trend, it does have its limits when adhering to the needs of the industry.[342] During the early 2000's fashion companies began placing their trademarked logos on all product lines. These included fabrics used for many different design purposes, such as handbags, garments, shoes, accessories and anything else that could be protected by trademarks connected to household names.[343] In addition to creating a questionable era in fashion, it also limited designers' options to create innovations in fashion. These limits especially affected the production and design of garments. In many cases, designers could protect apparel designs that bore the protected logos, but garments that were free of large logos and trademarks usually fell outside the protection and were free to be duplicated and sold at lower price markets for larger profit margins.[344]

This was shown in the court verdict related to both the *Wal-Mart v. Samara Bros* (2000)[345] case and *Louis Vuitton v. Dooney Brouk*e (2003),[346] where the final ruling stated that design is not an element that could defiantly prove trademark or trade dress infringement. In order to gain legal protections,

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[338] ibid
[339] ibid
340 ibid

[341] ibid
342 Susan Scafidi, 'Intellectual Property and Fashion Design', in Peter K. Yu (ed.), 'Intellectual Property and Information Wealth: Issues and Practices in the Digital Age', (Praeger Publishers 2007)

[343] ibid
[344] Note, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment', 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].
[345] Wal-Mart Stores, INC v. Samara Brothers, INC. 529 U.S.___ (2000)
[346] 'Cases Of Interest: Louis Vuitton Malletier V. Dooney & Bourke, Inc. | The Fashion Law' (*The Fashion Law*) <https://www.thefashionlaw.com/resource-center/cases-of-interest-louis-vuitton-malletier-v-dooney-bourke-inc/> accessed 7 April 2021

designers were forced to create designs that depicted their protected trademark within all garments, handbags, or any other commercial design.[347]

Protection among well-known brands has not always proven to show ambiguity in terms of color.[348] Despite the fact that US IP laws favor well-known design houses, companies such as Louboutin and Tiffany & Co. have been known for their particular use of the color red for the red bottom sole on a Louboutin heel, and robin's egg blue as the Tiffany & Co signature color.[349] Both have held exclusive rights to use these specific colors but protection has proven weak when presented in infringement claims.

In 2012 Louboutin filed an infringement against the well-known design company Yves Saint Laurent (YSL) on the basis of trademark infringement on the use of the color red on their monochromatic shoe collection.[350] The court ultimately ruled in favor of YSL, claiming that Louboutin's exclusive rights to the red bottom sole were not in fact enforceable, thus causing confusion on the level of protection trademarks could grant in relation to well-known design houses.[351]

Although the overall fact is, larger well-known fashion brands and particularly fast fashion companies simply have more protections and economic power, giving them an unfair advantage in a competitive market.[352] In particular trademark protections are most effective when used by well-known designers

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347 Note, 'The Devil Wears Trademark: How The Fashion Industry Has Expanded Trademark Doctrine to Its Detriment' (2014) 127(3) Harvard Law Review < https://harvardlawreview.org/2014/01/the-devil-wears-trademark-how-the-fashion-industry-has-expanded-trademark-doctrine-to-its-detriment/ > accessed 22 Feb 2020

348 Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 171–74 (1995). For a full discussion of trademark protection for colors, see Sunila Sreepada, Note, *The New Black: Trademark Protection for Color Marks in the Fashion Industry*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1131, 1135 (2009).

349 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

350 696 F.3d 206, 212 (2d Cir. 2012). For a full discussion, see Monica Sullivan, Comment, *After* Louboutin*: Responding to Trademark Ownership of Color in Creative Contexts*, 64 MERCER L. REV. 1047, 1047 (2012). The author concludes: "The protection of color in the fashion context is unlikely to be limited any further in light of the fact that the *Christian Louboutin* case has reached finality (for now)."

351 ibid

352 ibid

and design houses, leaving an exploitable gap when it comes to smaller brands[353] and designers such as Samara Bros.

The available protections rely heavily on visible logos, and unfortunately do not always cover all facets of the industry or ratify all forms of potential infringements. The following sub-chapter will cover the limitations that trademark legislation has when it comes to fashion design, and the potentially harmful reliance it has developed both legally and in business standards.

The Legal Implications of Trademark Laws in The US

Due to the lack of design piracy protections in the US, many fashion design companies have had to rely on other forms of IP protection, such as trademark protection. As mentioned in previous chapters both copyright and trademark protections hold the strongest protections when it comes to the fashion industry. However, copyright protection in many cases may be difficult to obtain, thus causing many companies to rely on trademarks in order to stay protected in an ever-changing industry.

Although trademark protection offers a solution on a legal, economic, and precedent standard it does establish considerable implications I like to call "the three creations" in terms of the industry, including a) creating a trademark centric business structure that hinders fashion innovation; b) creating an imbalance in protection based on trademark strength and company recognition, and c) creating a lack of uniformity with other countries when protecting the fashion industry under an IP framework.[354]

Since the early 2000s and continuing into the current day trademarks have been used to popularize fashion brands and create strong design protection. Many companies such as Louis Vuitton, Chanel, and Coach have been known to create designs using their signature trademarks in order to protect against design infringements.[355] The push for trademark recognition has helped foster a logo-centric industry, where owning brands is a sign of prestige despite how the product is designed or level of quality. Designers have been given an additional legal obstacle to designing logo-inspired products, rather than focusing on design innovation and creative expression.[356] Trademarks have become such a

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[353] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[354] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[355] Note, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment', 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].
[356] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

standard in the industry that design houses such as Giorgio Armani, who previously were adamantly against monogrammed designs, have been forced to design trademarks through their eagle logo in order to stay protected.[357]

Moreover, implications concerning logos have risen in recent years with the strong backlash against logo-heavy fashion by consumers. Consumers have reported wanting fresh designs and have pushed past the early 2000's fashion statement. In February of 2013 monogram heavy design, house Louis Vuitton showcased a complete collection in Paris without the use of their signature Monogram and Damier canvases, on the basis of large backlash from consumers demanding design change from the famous trunk brand, and reported declined revenue growth since 2009.[358] Though the industry and consumers may be looking to move past logo based designs, the legal framework in the US has not provided a pathway to do so, thus designers remain with the dilemma of increased innovation and lack of protection or trademark protection with hindered innovation and consumer needs.[359]

Trademarks have proven to be an effective bandage to an underlining design protection issue. Though the protection granted by trademarks can be seen as strong, it fails to be adaptable in terms of design, entry of new brands to the market, and the ever-growing need for innovation. Furthermore, the US' lack of design protection ultimately falters when compared to other fashion-related countries, and when used on a global scale.[360] Therefore, the use of adaptive fashion protection measures shall continue to falter, and the overall need for reform will reappear much as fashion trends due with changing eras.

Patent Law – United States Code Title 35

Under US legislation, patent protection grants an applicant protection against third-party entities unlawfully making, using, or selling a protected invention for profitable gain.[361] These laws aim to

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[357] ibid

358 Suleman Anaya, *Has Logo Fatigue Reached a Tipping Point?,* Bus. Fashion (Mar. 11, 2013), http://www.businessoffashion.com/2013/03/has-logo-fatigue-reached-a-tipping-point.html ("[W]hat does it mean when the world's largest luxury brand shifts its focus away from the very trademarks on which its success has been built?").

[359] Dayoung Chung, *'LAW, BRANDS, AND INNOVATION: HOW TRADEMARK LAW HELPS TO CREATE FASHION INNOVATION'* (*Repository.law.uic.edu*, 2018) <https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1440&context=ripl> accessed 9 April 2021.

[360] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

361 The Patent Act 35 U.S.C. § 154 s 1

create a framework for inventors to gain ownership rights that can guarantee the commercial viability of their registered designs. In the US patents are defined in two separate categories under the US Code Title 35.[362] Patents can be quite valuable within the fashion industry because they allow for stronger protections of design elements separate from copyright or trademark legislation. In the case of design patents, designers can protect drawings and sketches both in two-dimensional and three-dimensional spheres, and it does not require a physical model of the end product.

The first category includes design patents which in the fashion industry are generally obtained as a result of lack of protection in copyright framework; for example, allowing brands to protect the ornamental appearance or expression of a certain design object.[363] In most cases, patents protect items such as handbags, footwear, eyewear, perfume bottles, tabletop accessories, and jewelry.[364] The second category is utility design, which protects designs that hold a functional purpose in a novel way and extend past previously created inventions,[365] they can be expressed, for example, in a new clasp on a handbag, a new chemical process for washing jeans or any other product to get the desired look, or even a new technique or method in developing and producing fabrics.[366]

Patent law protects any inventor who creates any "original and ornamental design meant for manufacturing" or in the case of utility any "new functional aspect of a product or method".[367] Design patents grant 14 years of protection before the registered design settles under the public domain,[368] while utility patents provide a maximum of 20 years of protection before settling into the public domain.[369]

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[362] 'United States Code Title 35 – Patent : Appendix L Consolidated Patent Laws' (*Uspto.gov*, 2021) <https://www.uspto.gov/web/offices/pac/mpep/consolidated_laws.pdf> accessed 9 April 2021.

[363] ibid
[364] 35 U.S.C. § 173 (2017).

[365] 'United States Code Title 35 – Patent : Appendix L Consolidated Patent Laws' (*Uspto.gov*, 2021) <https://www.uspto.gov/web/offices/pac/mpep/consolidated_laws.pdf> accessed 9 April 2021.
[366] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, 'Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys*,'* (Fairchild Books New York 2014
[367] Elizabeth Ferrill & Tina Tanhehco, 'Protecting the Material World: The Role of Design Patents in the Fashion Industry', 12 N.C. J.L. & TECH. 251, 278–79 (2011). 116. *See id.* at 277–89 (discussing design protections, the application for design protection, and the elements that provide a strong design patent).

368 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

[369] 'United States Code Title 35 – Patent : Appendix L Consolidated Patent Laws' (*Uspto.gov*, 2021) <https://www.uspto.gov/web/offices/pac/mpep/consolidated_laws.pdf> accessed 9 April 2021.

In order to obtain the full protection, the design must achieve some basic requirements which include the following: the design is to be a) "new and/or original";[370] b) "nonobvious" in comparison with similar designs within the current market;[371] and c) ornamental and non-functional.[372] A mentionable note is that, despite approval from patent protection by the PTO, these above-mentioned requirements can be argued against and proven lacking during legal proceedings, especially during ongoing lawsuits or patent infringement proceedings, thus weakening the overall protection.[373]

Shapewear is a great example of an area of fashion that benefits from design patents.[374] The designs connected to shapewear fall nicely in terms of protection given by design patents due to their profitability in the market and lack of seasonal change.[375] Moreover, when first invented they provided a novel design method for women to appear slimmer when wearing form-fitting garments, through the use of newly invented design. There have been multiple cases including *Yummie Tummie vs, Spanx Inc*. (2013)[376] for damages upward to a billion dollars on the grounds of patent infringement on design patents related to their "Total Taming Tank", and *Lululemon vs. Calvin Klein* (2012)[377] on the grounds of a design patent infringement related to their overlapping waistband design.[378] [379]

In the case of utility design, the protections lie in the expenses connected to an infringement lawsuit. It is much more cost-effective to adhere to the patent than to try and challenge the validity of the patent.[380]

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[370] ibid

[371] ibid
[372] ibid
[373] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[374] ibid
375 ibid

[376] *Yummie Tummie vs Spanx Inc* [2013] NITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 1:13-cv-07635-UA (NITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK).

[377] Sarah Posner, 'Lululemon Settles Patent Dispute With Calvin Klein' (*Jurist.org*, 2021) <https://www.jurist.org/news/2012/11/lululemon-settles-patent-dispute-with-calvin-klein/> accessed 9 April 2021.
378Complaint in *Times Three Clothier,* LLC v. Spanx, Inc., 13 CV 2157 (S.D.N.Y. 2013).

[379] Complaint in *Lululemon Athletica* Canada Inc. v. Calvin Klien, Inc. and G-III *Apparel Group, Ltd.,* 12 CV 1034 (D.Dell 2012).
[380] Elizabeth Ferrill & Tina Tanhehco, 'Protecting the Material World: The Role of Design Patents in the Fashion Industry', 12 N.C. J.L. & TECH. 251, 278–79 (2011). 116. *See id.* at 277–89 (discussing design protections, the application for design protection, and the elements that provide a strong design patent).

Utility design patents are generally scarce as much of fashion design is inspired from previously created silhouettes, and many find innovations in adapting pervious styles to fit the needs of current trends, thus making them rarely new or novel.[381] For example, Diana Von Fürstenberg is famously known in fashion for inventing the first "wrap dress" in the 1970s that flattered many women despite variating body types.[382] Although she is coined for the iconic dress, she holds no rights to utility patents as the dress design was already patented under US patent no. 2,091,084[383] years before Diana's showcased wrap dress hit the runway.

As previously mentioned, utility design protection is mainly used in new finishing methods in the form of chemical solutions, or new technology when applied to fashion. Examples of this would include Nike's US Patent No. 8769,844[384] for the "automatic lacing system".[385] In contrast design patents through far more widely used in fashion only protect against strong imitations or strong copies of a patent design.

Unlike trademarks, patents do not rely on the companies' protected marks but can be challenged by a skillful designer who knows how to change designs in order to avoid potential infringements. In both cases of design and utility, patents can be very costly to obtain and manage, and can still be challenged and overruled by the courts despite the approval of the PTO, putting their value and consistency in question.

Furthermore, as explained in the use of the wrap dress, fashion design is rarely novel as fashion relies on recycled silhouette trends to be mass-market profitable. This explains the recycling of previous era fashion trends, and also shows why patents in terms of fashion design are only a highlight IP protection and not heavily relied on for fashion design by the industry.

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[381] Jason Jardine and Ed. Catherine Holland, 'Utility Patents In Fashion Design? Nike & Huzu Innovate The Way | Knobbe Martens' (*Knobbe.com*, 2017) <https://www.knobbe.com/news/2017/09/utility-patents-fashion-design-nike-huzu-innovate-way#_ftn1> accessed 9 April 2021.
[382] ibid
[383] WRAP DRESS, Registration No. 2,091,084 <https://patentimages.storage.googleapis.com/9c/7e/e4/5dbead65a50d8e/US2091084.pdf>
[384] NIKE AUTOMATIC LACING SYSTEM, Registration No. US 8,769,844 B2 <https://patentimages.storage.googleapis.com/81/f3/bc/c398d73199fe15/US8769844.pdf>
[385] Jason Jardine and Ed. Catherine Holland, 'Utility Patents In Fashion Design? Nike & Huzu Innovate The Way | Knobbe Martens' (*Knobbe.com*, 2017) <https://www.knobbe.com/news/2017/09/utility-patents-fashion-design-nike-huzu-innovate-way#_ftn1> accessed 9 April 2021.

5 Focused Look at Failed Attempts at Design Reform in the United States

DPPA[386] and subsequently the IDPPA[387] were meant to amend §1301, Title 17 of the US copyright legislation[388] pertaining to design, to include the fashion sector .[389] Currently, design protection is only offered *sui generis*[390] to vessel hulls and computer chip designs, which has brought some controversy over design inclusivity within copyright law formulation,[391] being lightly mentioned in previous sub-chapters.

Both DPPA[392] and IDPPA[393] would grant protection to apparel designs that were new, original, and novel. Apparel designs that fall under the public domain or have a functional use would not be granted protection under these amended Acts, meaning designers will not be allowed to protect classic silhouettes such as a T-shirt, which are not protected under design legislation as they are under public domain and can only hold protections related to trademarks and copyrights with the depiction of either a protected logo or copyrighted images.[394]

In continuation, designs must have a purely aesthetical element and cannot hold function within the entirety of the design.[395] The amendment would allow for short-term protection of up to three years, which aligns with the industry's needs, as fashion design functions seasonally, generally showcasing

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[386] Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009)
[387] Innovative Design Protection and Prevention Act, H.R. 2511, 112th Cong. (2011)
[388] 17 U.S.C. § 1301, (2006)
389 Innovative Design Protection and Piracy Prevention Act, S.3728, 111th Cong. § 2 (2010).

[390] Sai Generis defined: A form of legal protection that exists outside the general legal protections, meaning it's unique and may be applied a-typically.
'Sui Generis' (*LII / Legal Information Institute*) <https://www.law.cornell.edu/wex/sui_generis> accessed 9 April 2021.

391 17 U.S.C. § 1301 (2006); H.R. 2196; see also ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 472 (5th ed. 2010) (explaining that Congress has passed two design protection statutes, the Semiconductor Chip Protection Act of 1984 (17 U.S.C. §§ 901–14) and the Vessel Hull Design Protection Act (17 U.S.C. §§ 1301–32), that ―create *sui generis* forms of legal protection to fill in gaps in the intellectual property landscape‖).

[392] Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009)
[393] Innovative Design Protection and Prevention Act, H.R. 2511, 112th Cong. (2011)
394 Susan Scafindi, ' IDPPA: Introducing the Innovative Design Protection and Privacy Prevention Act- a.k.a Fashion Copyright' (*Counterfeit Chic,* 6 August 2010) < http://counterfeitchic.com/2010/08/introducing-the-innovative-design-protection-and-piracy-prevention-act.html > accessed 19 March 2020

[395] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

new designs every three-to-six months.[396] The following sub-chapters shall define both the DPPA and IDPPA attempts at reform.

Design Piracy Protection Act 2006 (DPPA)

The DPPA aimed to grant protection for fashion-based designs which would have included the whole appearance of a garment in addition to its ornamental design and original elements.[397] The bill was first presented on March 30th, 2006 by Representative Bob Goodlatte to the House of Representatives with backed support from the CFDA.[398] Added support for the bill by the AAFA was not received based on a broad definition categorizing the grounds to grant an infringement and copying ruling.[399] The lack of support by the AAFA later prompted a revision of the DPPA introduced by Representative William Delahunt on April 25th, 2007.[400] The Senate version was introduced on August 2, 2007. Both attempts failed to reach a vote and subsequently did not gain traction towards apparel design protection.[401] Other attempts were made in 2009 but unfortunately reached the same conclusion.[402]

The potential protection proposed by Bill H.R. S.3728 would have included the original arrangement of non-original elements within an article of apparel[403]. Where the term apparel, was further defined as more than simply a garment of clothing, also including articles such as gloves, footwear, headwear, handbags, wallets, duffel bags, suitcases, tote bags, belts, and eyeglass frames.[404] The DPPA intended

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[396] ibid

397 Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009)

398 Anya Jenkins Ferris, Note, 'Real Art Calls for Real Legislation: An Argument Against Adoption of the Design Piracy Prohibition Act' [2008] 26 Cardozo Arts & Ent. LJ 559,567

399 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

400 Anya Jenkins Ferris, Note, 'Real Art Calls for Real Legislation: An Argument Against Adoption of the Design Piracy Prohibition Act' [2008] 26 Cardozo Arts & Ent. LJ 559,567

401 ibid

402 Margaret E. Wade, 'The Sartorial Dilemma of Knockoffs: Protecting Moral Rights without Disturbing the Fashion Dynamic' (2011) 96 Minnesota Law Review < https://scholarship.law.umn.edu/mlr/390 > accessed 21 March 2020

403 Design Piracy Prohibition Act, H.R. 2196 § 2(a)(7).

404 DPPA HR 2196 § 2(a)(9).

to grant three years of protection[405] and required the designer to register their designs within six months of making their design public[406]. In addition to the registration process, the DPPA would have allowed for a computerized database to catalog visual representations of protected designs, thus allowing for a clear "lookup" system for all protected works.[407] Infringements were defined as the use of a protected fashion design or an image that was copied without the consent of the owner of the protected design.[408] Similar to other protectionist fashion legislation, if the copied design was seen as "original" or not substantially similar to the overall protected design, then the potential infringement may not be seen as unlawful.[409] The actual act of being inspired by a trend[410] or creating an independent creation does not fall under an act of infringement.[411] The damages granted by the DDPA would be held at $250,000 or $5 per copy.[412]

Innovative Design and Piracy Prevention Act 2010 (IDPPA)

IDPPA, which came after the DPPA aims to grant protection in the fashion sector, with a few adjustments in comparison with the DPPA. It was first presented on August 5, 2010, by Senator Schumer, and it reached the Senate's Judiciary committee but unfortunately ceased to function past that point.[413] Designers would have been allowed to gain protection with no registration period; allowing

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405 DPPA HR 2196 § 2(d)(a)(2).

406 DPPA HR 2196 § 2(f)

407 DPPA HR 2196 § 2(j)

408 DDPA HR 2196 § 2

409 Margaret E. Wade, 'The Sartorial Dilemma of Knockoffs: Protecting Moral Rights without Disturbing the Fashion Dynamic' (2011) 96 Minnesota Law Review < https://scholarship.law.umn.edu/mlr/390 > accessed 21 March 2020

410 ibid. § 2(e)(3). The DPPA defines the term 'Trend" in § 2(a)(10) as follows: ' a newly popular concept, idea, or principle expressed in, or as part of, a wide variety of designs of articles of apparel that create an immediate amplified demand for articles of apparel embodying that concept, idea, or principle.'

411 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

412ibid

413 Margaret E. Wade, 'The Sartorial Dilemma of Knockoffs: Protecting Moral Rights without Disturbing the Fashion Dynamic' (2011) 96 Minnesota Law Review < https://scholarship.law.umn.edu/mlr/390 > accessed 21 March 2020

designs protection as soon as they are introduced to the public for commercial use.[414] Being especially beneficial to new and emerging designers who may not have strong or even adequate legal protection. Designers may be able to showcase their designs with granted protection and less fear of possible copyist acts.[415]

Designers could claim independent creation defense similar to the original bill proposed to Congress (DPPA[416]), which is a form of defense that allowed designers with adequate prove to potentially be exempt from infringement claims on the grounds of, lack of knowledge pertaining to the protection of a pre-existing design.[417][418] The designs in question must have been made within a similar timeframe and must exhibit either the same design or very similar designs.[419] This was aligned with EU protection as community design only protects against intentional copying from an informed copier.[420] Fashion design is defined as only "original elements or arrangements of an article of apparel, additionally, they must be formed from a designer's own creative endeavors, that provides a unique, distinguishable, nontrivial and non-utilitarian variation from prior designs in connection to similar types of articles."[421] Apparel is defined in congruence with the IDPPA's predecessor the DPPA.[422]

Similar to trademark provisions, the IDPPA would only protect identical design copies or designs that are "virtually identical".[423] This stipulation allows for designers to continue to be inspired by the latest trends and fashion designs showcased both currently and in the past. As previously mentioned, inspiration is a fundamental aspect of fashion design and a foundational element in a designer's creative

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414 Susan Scafindi, ' IDPPA: Introducing the Innovative Design Protection and Privacy Prevention Act- a.k.a Fashion Copyright ' (*Counterfeit Chic,* 6 August 2010) < http://counterfeitchic.com/2010/08/introducing-the-innovative-design-protection-and-piracy-prevention-act.html > accessed 19 March 2020

415 ibid

416 Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009)

417 ibid

418 Innovative Design Protection and Piracy Prevention Act, H.R. S. 3728 (2010)

419 ibid

420 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs, art. 11–12, 2002 O.J. (L 3).

421 IDPPA H.R. 2511 § 2(a)2(B)7(B).

422 *see,* a compared view of IDPPA H.R. 2511 § 2(a)2(B)(9), with DPPA H.R. 2196 § 2(a)(9).

423 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

process. The IDPPA would not cover home sewing creations, meaning apparel replicated by small crafters or stay-at-home crafters.[424] Although these parties may identically copy a design, they have low-profit margins, and generally do not enter the mass US internal market, thus not proving a threat to competition. In order to prove that an infringement has occurred, first, it must be proven that the original design is in fact protected, second, that the copied design falls under the definition of infringement, and third, there must be reasonable cause for the defendant to know of the protected design.[425] Damages under the IDPPA are lower than the DPPA's previous attempt at protection and are usually limited to the allotted $50,000 or $1 per unlawful copy.[426]

There are many parallels drawn between the IDPPA bill and the EU's current Community Design regulation. Both were developed to provide designers with immediate protection without the need for registration; grant a term of three years of protection; showcased similar stipulations and guidelines on the definition of "copy";[427] and the potential plaintiffs on infringements litigation. The Community Design regulation provides designers the right to registered design protection, which secures longer protection before the design falls under the public domain.[428] If the IDPPA had been passed, it would have been the first concrete step towards harmonization both in the US, in terms of its own jurisdiction in terms of fashion legislation, and allotted both US and EU fashion companies protection when participating in the US commercial market.

The IDPPA was also backed by both the CFDA and AAFA,[429] but much like its predecessor, the DDPA did not pass Congress nor the Senate, causing fashion design to continue to have a complex relationship with IP protections. Currently, there have been over 70 bills brought forth before Congress with little push forward for granted protection.[430] The main arguments against design protection and the IDPPA

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[424] ibid

425 IDPPA H.R. 2511 §2(g)2(e)(1).

426 *See* 17 USC §1323 (2006). *Compare id. With* DDP H.R. 2196 § 2(a).

[427] *see*, a compared view of IDPPA H.R. 2511 § 2(a)2(B)(9), with Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs, art. 11–12, 2002 O.J. (L 3).

[428] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs, art. 11–12, 2002 O.J. (L 3).

[429] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

430 ibid

tend to be rooted in economics through the "piracy paradox"[431] theory, which states that low IP protection in the fashion industry allows for exponential growth and a healthy competitive market. An in-depth look at the piracy paradox and its effects on both fashion economics and consumer behavior will be discussed in the following sub-chapter. [432]

6 The "Piracy Paradox": Are Knock-offs Secretly Good for Fashion?

The piracy paradox is the economic and legal theory created by Kal Raustiala and Christopher Sprigman, which argues that low IP protection coupled with the rapid growth of fast fashion allows the industry itself to keep a strong economic standing.[433] Furthermore, the argument implies that the copyist business model has allowed the fashion industry to stay competitive and enable constant innovation among designers, while also allowing consumers from multiple price margins the ability to afford the latest styles in fashion.[434] Copying was briefly defined at the beginning of this thesis as the production of knock-offs that can be seen as similar or in some cases identical to a designer's original design.

Though in some cases duplicated designs can be seen as unlawful, in the case of fashion design, as previously reasoned, it can be hard to prove an infringement. In many cases, fast fashion and copyist companies have adapted their own ways of creating a balance between replicating and creating original aspects, while designer brands have been left with few legal options and thus have also created solutions outside the legal field. Through this balance, a global industry has been cultivated, which is accredited as fast fashion. Companies such as Zara, H&M, Forever 21, and Topshop create knockoffs of the latest designer goods, while high-end designers invent more design creations more frequently in order to stay ahead in the industry.

Knock-offs, or the copying of an original design, should not be confused with inspiration.[435] As previously mentioned inspiration is a fundamental aspect of fashion and has led to the continuation of the industry, an example being Diana Von Furstenberg's wrap dress. Although the wrap dress silhouette

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[431] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04 < https://ssrn.com/abstract=878401 > accessed 25 March 2020

432 ibid

[433] ibid

[434] ibid

[435] Nancy J Rabolt and Judy K Miler, *"The Knockoff." In Bloomsbury Fashion Business Cases* (Bloomsbury Academic 2018).

already existed, Diana was inspirited to design a fresh adaptation for the women of the 1970s. Furthermore, fashion magazines such as Vogue, Marie Claire, and Harper's Bazaar have glorified fast fashion through highlight articles, such as "Splurge & Steal", which compare designer looks with knockoff fast fashion imitations educating consumers when to buy fast fashion over designer.[436]

The Consumer and the Dilemma

To fully understand the scope of the paradox we must also look into the main argument against fast fashion, what companies have done outside the legal scope to remedy their potential losses, and current consumer culture related to designer goods over fast fashion, and ultimately the paradox that has occurred. The main argument brought against low IP protection coupled with fast fashion is the devaluing or dilution of original designs and causing original designers to lose profits and advantages from their creative innovations. Designers such as Diane Von Furstenberg[437] and Tom Ford have advocated for design protection in order to allow designers the advantages of their own creations.

Collections can be copied as much as they have been in the past, either right off the runway or by pre-existing knowledge of a designer's upcoming collection.[438] Modern innovation in the technological age has caused replications to occur at a faster pace and knockoffs can be produced rapidly making it hard to distinguish originals from the fakes.[439] Fast fashion companies have thrived on this model both in the US and abroad, while most designers are left with limited options to rectify the situation.

In hopes of gaining the most from their new creations, some designers have either partnered with fast fashion or budget-friendly companies or created budget-friendly fast-fashion lines within their own ateliers. Examples would include: a) Armani Exchange by Giorgio Armani;[440] b) Alexandre Wang

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[436] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04
[437] KAOMI GOETZ, 'Designers Get Fierce With Copyright On The Catwalk' (*Npr.org*, 2010) <https://www.npr.org/templates/story/story.php?storyId=129834984> accessed 9 April 2021.
[438] Nancy J Rabolt and Judy K Miler, *"The Knockoff." In Bloomsbury Fashion Business Cases* (Bloomsbury Academic 2018).
[439] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[440] ibid

collaboration with H&M;[441] c) Isaac Mizrahi long-standing partnership with Target;[442] and lastly even d) a partnership with Uniqlo and a Finnish fashion and home design company Marimekko.[443] For some design houses, the mentality has become "if you can't beat them, join them", despite their strong influence in the industry. Although, it should be mentioned that this is not the preferred approach by designers wanting to stay relevant in the high-end of the industry, but rather a needed push to stay in business. In the case of Isaac Mizrahi, who held a stable line with American retailer Target for many seasons, only to dissolve the partnership when his fashion brand was able to stand alone without the need of a discount collection.[444]

In opposition, fashion companies such as Chanel and its former creative director late Karl Lagerfeld have profited greatly from being infamously replicated, and would never partner with a fast-fashion company or create a budget line on basis that it would lower the company's iconic standing in the industry.[445] The company has become a great example of the piracy paradox and how fast fashion in some cases may help designer brands rather than hurt them. Coco Chanel's famous tweed jacket and skirt, which in the industry has always referred to as the Chanel suit,[446] has been replicated since its first appearance in the 1925 Chanel collection in Paris.[447] The company holds no design protection for the design as it falls outside the scope of available legal protection, but the constant replicas have brought the company long-standing recognition and has ultimately made it more desirable over the years.[448]

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[441] VICTORIA DAWSON HOFF, '7 Things You Didn't Know About Alexander Wang's H&Amp;M Collection' (*ELLE*, 2014) <https://www.elle.com/fashion/news/a15563/alexander-wang-hm-q-and-a-secrets/> accessed 3 May 2021.

[442] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

[443] 'UNIQLO X Marimekko Fall/Winter 2020 - Marimekko' (*Marimekko.com*, 2020) <https://www.marimekko.com/us_en/world-of-marimekko/latest-news/uniqlo-x-marimekko-a-new-limited-edition-holiday-capsule-collection> accessed 3 May 2021.

[444] Ruth La Ferla, 'You'Ve Heard Of The Drop. Target Had It First. (Published 2019)' (*Nytimes.com*, 2019) <https://www.nytimes.com/2019/08/28/style/youve-heard-of-the-drop-target-had-it-first.html> accessed 9 April 2021.

[445] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04

[446] previously mentioned in chapter 2 under design innovations

[447] 'The House Of Chanel' (*Metmuseum.org*) <https://www.metmuseum.org/art/collection/search/83159> accessed 12 April 2021.

[448] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04 < https://ssrn.com/abstract=878401 > accessed 25 March 2020

Fashion has always stood as a status symbol to show one's position in society and their individual statement on one's identity with fashion. Consumers who choose to be fashion-forward will actively hold designer goods at a higher status despite fast fashion products looking similar, and in many cases made with similar quality specifications. The desire to own and be seen with an original will always hold meaning in the world of fashion. Although, consumers who cannot afford designer goods will shop at fast-fashion retailers in order to gain the means to express themselves without the financial burden.

Furthermore, fast fashion has taught and glorified the art of a good bargain and as previously mentioned continues to be supported by influential fashion magazines. Consumers are taught when to invest in an iconic designer item and when to buy H&M basic in order to save.[449] In terms of the paradox, the consumer plays an important role in the success of fast fashion companies as they are in the end the main economic drivers of fashion.[450] Consumers will forever desire to own the original, but in the meantime will not sacrifice style for a price tag.[451] Knock-off brands provide consumers a taste of luxury while still yearning for the real McCoy of a Chanel suit, while potentially hindering less recognized companies such as Marimekko who may not be able to enter into other larger markets without the fast fashion partnership.

The dilemma has become two-sided: increase IP protections and designers will be granted original rights to their creative innovations, but may ultimately hurt their business and economic standing in the industry. While iconic brands such as Chanel continue to thrive despite being knocked off, and ultimately holds strong IP protection on the grounds of its infamous recognition in the market. For the many companies and brands stuck somewhere in the middle, both protection and business strategy can be hindered and difficult to navigate.

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[449] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04 < https://ssrn.com/abstract=878401 >

[450] Rachel Deeley and Aminah Khan, 'Can Anything Shake Consumers' Addiction To Fast Fashion?' (*The Business of Fashion*, 2020) <https://www.businessoffashion.com/articles/sustainability/fast-fashion-consumers-boohoo-asos-primark-investors-sustainability> accessed 12 April 2021.

[451] ibid

The Paradox

As shown above the piracy paradox, much like fashion in general, is complex in nature and generally multifaceted. Despite the CFDA's and AAFA's constant push towards the broadening of IP protection to include fashion, something has always stopped the scope of law from including fashion, which, one can argue, is accredited to the Paradox.[452] Economically, fast fashion has proven to be very profitable for the industry. Luxury brands continue to obtain a level of prestige as their consumers continue to pay large amounts to be dressed by the best, while companies such as Forever 21 grant similar items for cheaper to an up-and-coming fashion-forward audience.[453]

Law Professors Kal Raustiala of UCLA and Christopher Sprigman of NYU have argued the Paradox, stating that fashion design by origin holds a short lifespan and therefore will devalue and diminish by nature.[454] Therefore, the following question can be proposed: can one devalue a collection which intrinsic value is already fading the moment the model steps on the runway? Any style or garment only garners value while it is in style and seen as beautiful.[455] Once its lifespan is over it is quickly discarded for the next season's looks.[456] Fast fashion merely speeds up the garment lifecycle by replicating and distributing the latest of fashion to consumers from multiple budget brackets, but it does not solely devalue the pre-existing design.[457]

Through this process, original designers are forced to create new designs and innovations in order to stay ahead, which paradoxically creates growth in the fashion industry.[458] Moreover, by speeding up the fashion lifecycle, protection becomes harder to be obtained as many companies and jurisdictions find it unprofitable to protect a product that diminishes in value more rapidly each season.[459] Furthermore, not all copying is seen as unlawful. Fast fashion companies such as Zara, a fashion retailer

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[452] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04 < https://ssrn.com/abstract=878401 > accessed 25 March 2020

[453] ibid
[454] James Surowiecki, 'The Piracy Paradox' (*The New Yorker*, 2021) <https://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox> accessed 9 April 2021.
[455] ibid
[456] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04
[457] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04 < https://ssrn.com/abstract=878401 > accessed 25 March 2020
[458] ibid
[459] ibid

domiciled in Spain, and H&M, originally Swedish, both employ real designers to create their latest collections, and be inspired by the latest in fashion.[460] Although their designs fall in trend with the latest collections, they hold distinctive differences that allow these companies to legally produce trends unlike their competitor Forever 21 based in the US.[461]

It should be mentioned that both Zara and H&M have had multiple legal claims against them, particularly in Europe, on the basis of design infringements.[462] When compared to US fast fashion company they hold much less controversy than their US counterpart, Forever 21, which has been accredited to stealing design works from major designers, and allocating large sums to legal aid in the preparation of IP infringements.[463] Because of the US's stance on low IP protection, knock-offs or unlawful copying within the industry has become more apparent.

Kal Raustiala and Christopher Sprigman, who have both extensively researched the paradoxical benefits of piracy in fashion, have used their accredited works, " The Piracy Paradox: Innovation and IP in Fashion Design" and data to show that fast fashion and the copyist model have created growth in the industry and that further regulation would ultimately do more harm than good.[464] Though they argue that piracy does cause damage to certain fashion houses, it also creates potential benefits. These benefits would include: a) prestige and recognition for owning an original design; b) constant and more rapid growth and innovation in the industry; c) consumer purchases on multiple budget points; and d) the continued hold and desire that fashion has on owning the next hottest look, which acts as one of the foundational needs related to fashion.[465]

The Potential Limits of the Piracy Paradox: The Forever 21 Case

The fashion industry is presently adapting to new changes in terms of production standards, consumer behavior, and the 2020 Covid-19 restrictions. It has been reported that the next generation of fashion

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[460] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[461] ibid
[462] Julie Zerbo, 'How Do So Many Fast Fashion Retailers Get Away Copying High Fashion Brands?' <https://www.thefashionlaw.com/how-do-fast-fashion-retailers-get-away-copying-high-fashion-brands/>
[463] Susan Berfield, Eliza Ronalds-Hannon and Lauren Coleman-Lochner, 'The Failure Of The Forever 21 Empire' (*Bloomberg.com*, 2020) <https://www.bloomberg.com/news/features/2020-01-17/the-failure-of-the-fast-fashion-forever-21-empire> accessed 9 April 2021.
[464] Kal Raustiala & Christopher Jon Sprigman, ' The Piracy Paradox: Innovation and IP in Fashion Design' (2006) 92 Virginia Law Review; UCLA School of Law Research Paper No. 06-04 < https://ssrn.com/abstract=878401 > accessed 25 March 2020
[465] ibid

interested shoppers are becoming more environmentally conscious, and are slowly rejecting fast fashion tactics, with the exception of Amazon.[466] Furthermore, environmental pain points have led the industry to rethink production standards and push for circular economies or "slow fashion".[467] Lastly, due to the 2020 Coronavirus outbreak, the fashion industry has had to confront the need for change, arguing that fashion does not need to rely on fashion shows or structured seasons to present new collections and entice new consumers.[468]

The premise of the piracy paradox, as explained above, relies on fast fashion companies adding to the devaluation of the latest looks, in order to promote the production of fresh new looks. What Kal Raustiala and Christopher Sprigman fail to explain is how the paradox will be affected by changing economic strategies, as it is tightly connected to season-based fashion, and may become less effective if the fashion industry both changes how new looks are presented to the public and if fashion becomes season-less. Economic theories such as circular economy may also prove to change the dynamic of the Paradox, as it aims to slow the fashion industry down, retrain consumers to buy quality over quantity, and create collections that sustain multiple seasons.[469]

The circular economy's, foundational premise lies under environmental factors, the aim still is to create a sustainable fashion industry for the future. This economic strategy sets forth to allow designers the freedom to create fashion innovation, consumers to gain good quality products for reasonable prices, and to reduce harmful environmental factors by changing the traditional horizontal production and supply chain to a closed self-sufficient cycle.[470] Although, a fairly new concept that has yet to be fully explored, it presents a premise to a new adaption of the fashion industry, which has already started being implemented by multiple fashion companies.

Lastly, with the use of multi-seasonal fashion, the arguments for design legislation may obtain more validity as designs' popularity would last longer than one season or a few months, but rather for multiple

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466 CHANTAL FERNANDEZ, 'How Can Fashion Embrace The Circular Economy?' (*The Business of Fashion*, 2018) <https://www.businessoffashion.com/articles/news-analysis/how-can-fashion-embrace-the-circular-economy> accessed 9 April 2021.

467 Ed. Kirsi Niinimäki, *Sustainable Fashion In A Circular Economy* (Aalto ARTS Books).
468 VIKRAM ALEXEI KANSARA, 'Why Fashion 'Seasons' Are Obsolete' (*The Business of Fashion*, 2020) <https://www.businessoffashion.com/briefings/retail/why-fashion-seasons-are-obsolete> accessed 12 April 2021.

469 Ed. Kirsi Niinimäki, *Sustainable Fashion In A Circular Economy* (Aalto ARTS Books).
470 ibid

season cycles;[471] opening up protection timelines to fall under more traditional IP frameworks.[472] The changes in the industry have already affected large well-known fast fashion companies and can be clearly seen in the Forever 21 case which will be lightly explored in the nest sub-chapter.

The Forever 21 Case

Companies such as Forever 21 have been proven to show clear abuse of their dominant position when it comes to low design protection, and have built an empire on the production of replicas for pennies in comparison to the value of the original design. Jeannie Suk, an Assistant Professor of Law at Harvard University has explained that companies such as Forever 21 have generated a significant amount of litigation and infringement suits in comparison to its European counterparts, such as H&M and Zara.[473] She has mentioned in her latest article, *"The Squint Test: How to Protect fashion designers like Jason Wu from Forever 21 knock-offs",* that fast fashion companies, particularly Forever 21, have been able to create questionable business models in comparison to European fast fashion companies on the basis of low design protection in the US. Forever 21 has gone through 50 infringement claims in the past five years, hiring large legal teams in preparation for lawsuits.[474] It has also been rumored that the company does not employ fashion designers, but rather relies on a duplicated design from other fashion companies, sending replicated designs for production right after prolific fashion shows.[475]

Forever 21's growth is a direct result of being primarily domiciled in the US, as its attempts to expand to Europe and Asia have landed a hand in their 2019 declaration of chapter 11 bankruptcy for the company.[476] The company will be closing 350 stores globally and shall pull 178 stores in the US. The CEO Mr. Chang has reported that the company shall gear towards markets such as Mexico, but recent reports have shown a closing of the controversial store in South America as well.[477] Multiple factors

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[471] ibid

[472] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

473 Jeannie Suk and C. Scott Hemphill, 'Suk In Slate On Copyright Law In Fashion Industry - Harvard Law Today' (*Harvard Law Today*, 2009) <https://today.law.harvard.edu/suk-in-slate-on-copyright-law-in-fashion-industry/> accessed 12 April 2021.

[474] Jiminez, et al., 'Design Piracy Legislation', 68.

[475] Myers, E., 'Justice in Fashion: Cheap Chic and the IP Equilibrium in the United Kingdom and the United States,' 37 *American Intellectual Property Law Association Quarterly Journal*, 55, 67.

[476] Sapna Maheshwari, 'Forever 21 Bankruptcy Signals A Shift In Consumer Tastes (Published 2019)' (*Nytimes.com*, 2019) <https://www.nytimes.com/2019/09/29/business/forever-21-bankruptcy.html> accessed 12 April 2021.

[477] ibid

have led to the closing of Forever 21, but the current changes in the industry stated in this chapter have played a significant role in the downfall of the company.[478]

Although a fashion industry that is totally separate from fast fashion seems objectively impossible, it can be achieved that fast fashion companies in the US adapt to new standards, much as they have in Europe in terms of IP protection.[479] Companies may rely on inspired products, rather than infringeable replicas, and hire more designers who may create original designs rather than replicated looks from the latest runway shows.[480] The production of cheap products for different price points may continue to strive, but the decreased production of new products made from raw materials, coupled with the aim to have designs sustain multiple life cycles may cause a change in the paradox, and thus potentially limit the main economic argument related to the pros of a low IP protection framework.[481]

7 Design Protection Under Domestic and Union Laws of Europe

Fashion as a business practice has traded on an international platform particularity among European countries for many centuries, allowing certain countries to gain industry fame related to certain goods or products. Examples including, French designers providing the latest in fashion designs, Italian tanneries exporting quality leather goods, and the United Kingdom gaining influence through high Court fashion, its trading goods such as Asian silks, and later London's high fashion scene. [482] In order to create fair trading arrangements, protect industries, and parties involved, national laws were developed in connection to business agreements among contracting parties. These national laws would provide jurisprudence among individual European countries, protecting areas of fashion through laws such as the French Decree of 19-24 July 1793[483] which categorized fashion design as literary artworks

478 Sapna Maheshwari, 'Forever 21 Bankruptcy Signals A Shift In Consumer Tastes (Published 2019)' (*Nytimes.com*, 2019) <https://www.nytimes.com/2019/09/29/business/forever-21-bankruptcy.html> accessed 12 April 2021.

479 Myers, E., 'Justice in Fashion: Cheap Chic and the IP Equilibrium in the United Kingdom and the United States,' 37 *American Intellectual Property Law Association Quarterly Journal*, 55, 67.
480 ibid
481 Ed. Kirsi Niinimäki, *Sustainable Fashion In A Circular Economy* (Aalto ARTS Books).
482 Joanna Elcher &Phyllis Tortora eds, 'Global Perspectives: Berg Encyclopedia of World Dress and Fashion (Oxford: Berg) (2010)
483 French Literary and Artistic Property Act, Paris (1793), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

thus laying out a framework for protections.[484] Prior to the formation of the European Union, national laws were not harmonized and only granted protection under the domestic jurisdiction.

International trade relied on contractual agreements between acting parties, while issues such as copyright infringements were subject to the sphere of differing national laws. Examples of this would include knockoff infringements being subject to differing laws and definitions based on where designs were created and later location goods were commercially sold.[485] Though European nations had far fewer implications between one another when compared to the US during the interwar years, this is primarily due to the legal influence of neighboring countries. National laws continue to be essential in the governing of IP laws within the fashion industry, but are influenced by the previously mentioned international treaties, and must adhere to EU directives and regulations in terms of harmonized protection.[486]

The international treaties mentioned above provide a guiding influence to active signed members, through international organizations such as WIPO which have played an important role in granting IP protection across multiple countries and jurisdictions, but it is not a governing power regarding national laws, nor outweigh potential ruling determined by national precedent.[487]

The formation of the European Union differs as the union is granted some provisional power over its Member States in order to provide a harmonized competitive market. The origins of the European Union was outlined after the Second World War in 1952[488] under the European Coal and Steel Community (ECSC),[489] and consisted of the original six members which included, Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.[490] Later, the 1957 Treaty of Rome would include industries such as the European Atomic Energy Community and the European Economic Community,[491] the latter

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[484] Julie Zerbo <https://www.thefashionlaw.com/resource-center/france-legal-protections-for-fashion/> accessed 29 April 2021.
[485] Véronique Pouillard, 'Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years' (2011) 85(2) The Business History Review https://www.jstor.org/stable/41301394
[486] Robert Schütze, *An Introduction To European Law* (Cambridge University 2012).
[487] 'WTO | The WTO In Brief' (*Wto.org*, 2021)
<https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed 30 March 2021.
[488] G. Schwarzenberger, The Frontiers of International Law (Stevens, 1962).

[489] Robert Schütze, *An Introduction To European Law* (Cambridge University 2012).

[490] ibid
[491] ibid

becoming the guiding force of economic business structures such as the fashion industry within the union. The three main communities would evolve under the Maastricht Treaty of 1991[492] which sets out to unify the current 28 members under one commercial market to provide economic stability and overall peace among the union.[493]

In order to provide a harmonized union, the Treaty of the European Union (EU) was formed and established governing institutions such as the European Parliament, European Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors.[494] The EU has set force legal rhetoric through drafted directives and regulations that are voted among the Member States of the union, and if passed are later ratified.[495] The purpose of both directives and regulations is to provide minimum and maximum legal requirements to ensure that harmonization does not become distorted.[496]

A Member States' legal framework may either be strengthened or weakened in order to meet the overall needs of the Union.[497] Regulations must be ratified completely and may in some cases out rule national laws of an individual member state,[498] for example the recent changes to design protection implanted in the Council Regulation (EC) No 6/2002[499] on Community Designs, which grants protections of unregistered and registered fashion designs. The Member States, that do not meet the legal protections outlined under the regulation were forced to grant more protections to meet the needs of the Community Design regulation. Directives allow national laws to hold precedent and may be approximated differently within the Member States.[500] Directives related to design protection may be viewed under Directive 98/71/EC of the European Parliament and the Council of 1998[501] for Legal Design Protection (Community Design Regulation), which grants a minimum level of protection to registered fashion designs while continuing to rely on national laws in connection to potential infringements. Both the

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[492] 'Treaty Of Maastricht On European Union' (*Eur-lex.europa.eu*) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0026> accessed 13 April 2021.
[493] 'The History Of The European Union | European Union' (*European Union*, 2021) <https://europa.eu/european-union/about-eu/history_en> accessed 13 April 2021.>
[494] ibid
[495] Robert Schütze, *An Introduction To European Law* (Cambridge University 2012).
[496] ibid
[497] ibid
[498] ibid
[499] Council Regulation (EC) No 6/2002 on Community Designs 2002.
[500] ibid
[501] Directive 98/71/EC of the European Parliament and the Council of 1998 for Legal Design Protection 1998.

Council Regulation (EC) 6/2002[502] and Directive 98/71/EC[503] will be further reviewed later in this chapter, in addition to how they affect the fashion industry. The continuation of this chapter shall outline current national IP laws as they regulate multiple areas in fashion.

A Brief Review of Member States' National Laws within the EU in relation to IP Protection in the Fashion Sector

When reviewing national laws of the main fashion capitals, such as France and the United Kingdom, it becomes apparent that many hold equivalent protections. As mentioned in the previous chapter, the Member States' domestic laws have been internationally influenced by boarding nations, and later affected by the formation of the EU. Furthermore, it can be argued that the fashion industry's sheer longevity in connection to IP frameworks, may also have affected the protections allotted to the industry. The thesis shall depict the national laws of current fashion capitals, that greatly influence the industry. The main highlighted protections will include, trademark protection, patent protection, and copyright as they are the most commonly used by the fashion industry. The fashion industry uses European IP legislations for the same purpose as it does in the US, and is systematically executed similarly as well. The aim of the fashion industry is to ensure its intellectual property rights and protect it against potential infringements.

Moreover, similar to the US, fashions need to stay iconic and forward with the times, lends itself to stay a continued pop culture reference on a global scale, and can be seen among European designers. For example, late German designer, Karl Lagerfeld is infamous for his stalk black tailored suits and oversized shades coupled with the contrast of his silver-white ponytail and has gone far enough to create a trademark based on his classic silhouette.[504] He has arguably surpassed regular trademarks in the scope of protections and created an iconic personal reference to his own persona, which over the years has become just as well-known as his creative designs.

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[502] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9
[503] Council Directive 98/71/EC of 13 October [1998] OJ L289
[504] 'How Karl Lagerfeld Made An Icon Of Himself | DW | 20.02.2019' (*DW.COM*, 2021) <https://www.dw.com/en/how-karl-lagerfeld-made-an-icon-of-himself/a-47600901> accessed 13 April 2021.

Figure 7: Karl Lagerfeld Logo[505]

Figure 8: Karl Lagerfeld Cartoon Logo on a Signature leather card holder[506]

The Karl Lagerfeld profile trademark has granted the designer not only legal protections but also a high-profile licensing agreement with the Tommy Hilfiger Corporation, which allowed Karl prior to his death to continue on as creative director of his labels while obtaining the global reach of Tommy Hilfiger Corp.[507] Karl's creative expressions continued to flourish even after this death in 2019, with the recent release of wallpaper designs depicting some of his most prolific trademark motifs, logo ribbons, and signature sketches.[508] Karl, similar to Coco Chanel has become an excellent example of stretching the bounds of classic IP protection, to ultimately become an artistic expression in line with fashion design, which is seen in his official trademark and cartoon version.

More traditional examples of IP protection in fashion would include the French cases between *Vanessa Bruno v. Zara France (Fr.) Oct. 17, 2012*[509] and *Céline v. Zara France (Fr.) Feb. 27, 2013*.[510] Both

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[505] 'Karl Lagerfeld Logo | Evolution History And Meaning' (*1000logos.net*, 2020) <https://1000logos.net/karl-lagerfeld-logo/> accessed 13 April 2021.
[506] 'Karl Card Holder' (*Karl Lagerfeld*) <https://www.karl.com/us/cardholder_cod46552089gu.html?dept=llprdcts> accessed 13 April 2021.
[507] 'Stories: LAGERFELD SELLS TRADEMARKS TO TOMMY HILFIGER CORP.' (*the-spin-off.com*, 2004) <https://www.the-spin-off.com/news/stories/LAGERFELD-SELLS-TRADEMARKS-TO-TOMMY-HILFIGER-CORP.-178> accessed 13 April 2021.
[508] Tess Stenzel, 'Karl Lagerfeld Launches Wallpaper Featuring His Iconic Sketches' (*FashionUnited*, 2021) <https://fashionunited.uk/news/fashion/karl-lagerfeld-launches-wallpaper-featuring-his-iconic-sketches/2021022653927> accessed 13 April 2021.

509 *Vanessa Bruno c. Zara France*, CA Paris, Oct. 17, 2012.

CA Paris, pôle 5, 27 févr. 2013, n° 12/04542. Lire en ligne : <https://www.doctrine.fr/d/CA/Paris/2013/INPID20130044>

510 *Céline c. Zara France*, CA Paris, Feb. 27, 2013.

cases were filed against Zara on the basis of copyright infringement, accusing the fast-fashion company of the potential knockoff of the Vanessa Bruno original dress design, and Céline's latest shirt design.[511] The courts in the end refused protection stating they were commonplace and fell under the definition of an inspired creation rather than fully original.[512] Originality under French law, functions in an *ad hoc* manner, comparing new designs against potentially inspiring fashion elements to determine the overall originality of the design seeking protection.[513]

Examples related to the UK would include, the case between *Vivian Westwood UK v. Anthony Edward Night*[514], where Vivienne Westwood, a UK based designer, brought forth both copyright and passing off claims against a third party trader Anthony Edward Knight, who sold garments and accessories on an online platform that featured similar, but not identical, symbols and phrases that have been originally coined by Mrs. Westwood.[515] The defendant, Mr. Knight, was found by the court as having infringed on copyrights, passing off rights, and trademarks infringements.[516] The court found that the defendant (Mr. Knight) did not hold valid trademarks and thus used the similarities to Mrs. Westwood's creations to turn profits.[517]

The table below will outline IP protections granted to the fashion industry. The United Kingdom (UK) shall be depicted prior to Brexit and its ultimate exit from the EU. Although it should be noted that, As of January 31st , 2020, Brexit has been in effect and has started an 11-month grace period of negotiation time for both the EU and the UK.[518] The negotiations will hopefully set forth a framework of working treaties influenced by the WTO and particularly the TRIPS Agreement and agreed upon business practices based on reciprocal benefits among the UK and the EU, hopefully limiting potential legal implications that may arise post Brexit.[519]

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[511] Julie Zerbo 'Current Form of French Copyright Law' (The Fashion Law) <https://www.thefashionlaw.com/resource-center/france-legal-protections-for-fashion/ > accessed April 17 2020

[512] Rockett, E. (2019). 'Trashion: An Analysis of Intellectual Property Protection for the Fast Fashion Industry', The Plymouth Law & Criminal Justice Review, Vol. 11, p. 80-102. http://hdl.handle.net/10026.1/14349

[513] Hagin, 'A Comparative Analysis of Copyright Laws Applied to Fashion Works', 345.

[514] *Vivian Westwood UK v. Anthony Edward Night* [2011] EWPCC 8, [2011]

515 ibid

[516] ibid

517 ibid

[518] 'Brexit: What you need to know about the UK leaving the EU' (BBC News, 30 December 2020) < https://www.bbc.com/news/uk-politics-32810887 > accessed April 15 2020

519 ibid

Figure 9 depicting national legislation under fashion capitals, Italy and United Kingdom with case law examples

	France National Laws	**United Kingdom's National Laws**
Trademark Protections	"Trademarks protect against third parties profiting from protected marks or logos on the commercial market." [520] Fashion companies may file for trademark protection at the National Institute of Industrial Property (INPI) and may take up to 8 months to complete. [521] After filing a fashion company may be granted 10 years of protection, which can be renewed indefinitely. [522] Unregistered protection may be granted when new marks are presented to the public, which many include fashion industry personal and consumers. [523]	Protection may cover, "traditional trademarks, secondary marks, nontraditional trademarks, such as colors in the abstract form, and smells that can be graphically presented. In addition, trademarks provide protection from third party users gaining profitable gain from identical or similar marks to protected trademarks within the same product category or similar market placemat."[524] Protection is to be registered with the UK IPO office and may take four to six months to complete. [525] After filing a fashion company bay be granted 10 years of protection, and be additionally renewed for a following 10 years. [526]
Patent Protections	Invention patents may be registered with the INPI and can take up to six to twelve months to complete.[527]	Patents related to fabrics, fastenings, and fashion machinery such as sewing machines are categorized as

[520] 'Trademark in France' (IP-coster) < https://www.ip-coster.com/IPGuides/trademark-france > accessed April 16 2020
[521] ibid
[522] ibid
[523] ibid
[524] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[525] 'How long does a UK trademark registration last?' (UK Trademark Registration) < https://www.uktrademarkregistration.com/faqs/how-long-does-a-uk-trade-mark-registration-last/ > accessed 10 April 2020
[526] ibid
[527] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

	The invention must be new and take an inventive step, not simply change an existing invention."[528] Creations related to aesthetical creations are exempt from invention patents as they are generally protected by copyright protection or protections related to design rights."[529] Patents related to the French jurisdictions are governed under the civil law of the Intellectual Property Code.[530] Trade secrets may only be protected if they stay confidential and are protected under French IP laws and in some cases French labor laws.[531]	invention patents and must be registered with the UK IPO office and takes three years to complete.[532] Invention patents are meant for innovative and technically superior inventions and will include inventions that are either made or used, new and surpass simple modification to an invention that already exists, in other words, an innovative step.[533] Inventions should be made public before being filed for protection, and one may not patent areas such as art which in some cases may affect the fashion industry. [534] Protection may grant 20 years of patent protection from the date of filing. [535]
Copyright protections	"Protection allows copyright owners the right to protect against unlawful third party copying or reproduction of protected artistic or literary works." [536] Tem of protection is the lifespan of the creator plus 50 years."[537]	Protection is automatic upon creation and does not require registration with the UIPO office.[541] Term of protection is the lifetime of the creator + 70 years after death.[542]

528 ibid

529 ibid

530 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)

[531] ibid
[532] ibid
[533] 'UK Patents- The Basics' (Mewburn Ellis) < https://www.mewburn.com/law-practice-library/uk-patents-the-basics > accessed 12 April 2020
534 'UK Patents- The Basics' (Mewburn Ellis) < https://www.mewburn.com/law-practice-library/uk-patents-the-basics > accessed 12 April 2020

535 ibid

[536] Julie Zerbo, 'Current Form of French Copyright Law' (The Fashion Law) <https://www.thefashionlaw.com/resource-center/france-legal-protections-for-fashion/ > accessed April 17 2020
[537] ibid
[541] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014
[542] ibid

	Protections are automatic upon creation of artistic work and does not require registration, although it may be obtained, and filed by submitting a Soleau envelope with the INPI.[538] "Fashion designs are considered protectable under French copyright laws, which is stipulated under article L. 112-2.73 in the *Code la Propriete Intellectuelle*[539] and Article L.112-2.73 of the *Code la Propriets Intellectuelle"*. [540]	

Design protection under European Fashion Capitals - The United Kingdom and France

This chapter shall outline design protection under the main Member States previously mentioned in the table above. Both France and the UK will be explored initially as they have pre-existing design and copyright legislation in terms of fashion design. These protections are historically considered strong, as they have been drafted in coloration with fashions impact both socially and economically. The continued sub-chapters shall also outline EU design legislation and how it operating under fashion and lastly a case example depicting how national laws coupled with EU legislation may be used during a possible design infringement.

In the case of the UK, some fashion companies/designers may continue to have unregistered and registered protections post Brexit, as they are currently implanted under national legislation. Although, it should be mentioned that during the time of writing this thesis the UK was still under its 11 months' grace period,[543] thus EU frameworks may have granted some protections despite the leave of the UK.

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[538] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014

539 Code la Propriete Intectuelle, Article L. 112-2.73, in conjunction with n° 92-597, 1st of July 1992 'CODE DE LA PROPRIETE INTELLECTUELLE' (*Wipo.int*) <https://www.wipo.int/edocs/lexdocs/laws/fr/fr/fr465fr.pdf> accessed 14 April 2021.

540 Julie Zerbo, 'Current Form of French Copyright Law' (The Fashion Law) <https://www.thefashionlaw.com/resource-center/france-legal-protections-for-fashion/ > accessed April 17 2020

[543] 'Brexit: What you need to know about the UK leaving the EU' (BBC News, 30 December 2020) < https://www.bbc.com/news/uk-politics-32810887 > accessed April 15 2020

Moreover, as the UK leaves the EU and redefines its legal rhetoric, protection may also be subject to change.[544]

Unregistered design rights may provide fifteen years of protection from the date of the first marketing of the product within the UK, or the moment it is made public. When combined with EU design legislation, designers may be granted an additional three years of protection, which may be subject to change post Brexit.[545] Protection may only be gained for three-dimensional designs in contrast with the EU unregistered protection which grants protection for both two- and three-dimensional designs.[546] Unregistered designs legislation protects the shape and configuration of a product, thus granting protection for the entirety of the product.[547] Designers and creators may also obtain registered design protection for a total of twenty-five years, and is to be renewed every five years. [548] This term of protection is similar to the EU regulation, but protections may only be granted in the UK.[549]

Registered protection allows for protection for the complete appearance of a product which may include "lines, contours, materials, texture, and shape".[550] Registered designs also make it easier for designers to give permission to sell or license agreements with third parties.[551] Both registered and unregistered design laws only protect new and original products and fall into the limitation of functionality in terms of apparel design. Protection will not be granted for designs that are seen as, "a) offensive, such as inappropriate words or images; b) designs already IP protected; and c) designs that use protected

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[544] Mark Brewer, 'Fashion Law: More Than Wigs, Gowns, And Intellectual Property' (2017) 45 San Diego Law Review <https://www.researchgate.net/publication/336739145_Fashion_Law_More_than_Wigs_Gowns_and_Intellectual_Property> accessed 14 April 2021.

[545] Business & IP Center, 'What's the difference between unregistered design right and design registrations?' (*British Library)* <*https://www.bl.uk/business-and-ip-centre/articles/whats-the-difference-between-unregistered-design-right-and-design-registration* > accessed 12 April 2020

[546] Business & IP Center, 'What's the difference between unregistered design right and design registrations?' (*British Library)* < *https://www.bl.uk/business-and-ip-centre/articles/whats-the-difference-between-unregistered-design-right-and-design-registration* > accessed 12 April 2020

547 ibid

[548] ibid

[549] ibid

[550] ibid

551 ibid

emblems such as the Royal Crown."[552] Designs that are considered commonplace or already well known within groups that are related to comparable products are not granted protection.[553]

France tends to categorize fashion design under some copyright legislation or *'droit d'auteur*' in French, which is set out by Article L.112-2.73[554] of the *Code de la Propriété Intellectuelle*[555] and protects multiple areas of fashion design including apparel and accessories.[556] Designs must emulate the author or original creator's personality to be proven original,[557] which is outlined under *'droit moral'* or personality protections clause of the copyright legislation.[558] As previously mentioned originality under French copyright laws is implanted under an *ad hoc* system, which compares a designer's new creation against potentially inspired elements.[559] The main example of this would include current fashion trends that are circulating within the fashion industry during a given time, the court of appeals or *'cour de cassation'* has solidified this by stating that " the specific nature of fashion design should be taken into consideration'[560] separate from currently trending inspirations."[561]

The definition of "originality" under the French system, may prove difficult for some designers to gain protection, as well as economically challenging to the commerciality of a company, as many fashion design companies produce products aligned with profit margins, which are heavily influenced by current fashion trends and a fashion-forward consumer. [562] Moreover, due to the French definition of potentially protected designs combined with fashion knowledge the author of this dissertation has gained from the Fashion Institute of Technology, it can be deduced that protected designs most likely

552 'Register a design', (Gov.UK) < https://www.gov.uk/register-a-design > accessed 12 April 2020

553Business & IP Center, 'What's the difference between unregistered design right and design registrations?' (*British Library)* < *https://www.bl.uk/business-and-ip-centre/articles/whats-the-difference-between-unregistered-design-right-and-design-registration* > accessed 12 April 2020

554 Code de la Propriete Intectuelle, Article L. 112-2.73, in conjunction with n° 92-597, 1st of July 1992 'CODE DE LA PROPRIETE INTELLECTUELLE' (*Wipo.int*) <https://www.wipo.int/edocs/lexdocs/laws/fr/fr/fr465fr.pdf> accessed 14 April 2021.

555 *Code la Propriété Intellectuelle* , Article L.112- 2.73.

556 *Code la Propriété Intellectuelle* , Article L.112- 2.73.

557 Cour D'appel de Paris, Pôle 4- chambre 1, 12 mai 2015, no. 14/11880.

558 Atkinson et al., Comparative Study of Fashion and IP', 518.

559 Hagin, 'A Comparative Analysis of Copyright Laws Applied to Fashion Works', 345.

560 Cour de cassation, Chambre civile 1, 20 mars 2014 12-18518, reported in (2014) Bull civ I n 54

561 Rockett, E. (2019). 'Trashion: An Analysis of Intellectual Property Protection for the Fast Fashion Industry', The Plymouth Law & Criminal Justice Review, Vol. 11, p. 80-102. http://hdl.handle.net/10026.1/14349

562 ibid

fall under avant-garde and are produced as pieces of art, rather than high production goods. Examples of these designers would include, English designer Gareth Pugh[563], Japanese designer Yohji Yamamoto[564], and Dutch designer Iris Van Herpan[565], all of whom have created collections surrounding sculptural elements that or not found in fast fashion, that emulate their individual design personas in an artistic manner. Although French copyright protection may be difficult to protect mainstream fashion, which may be protected under other forms of legislation, it does aim to protect artistic expression, and fashion designs deemed as art.

France and the UK have commercially stood strong as the global fashion industry's most influential European countries, surpassing technique skills such as Italy, but rather setting overall trends and iconic styles. Accredited French fashion brands have been reaching a worldwide 45 million euros annually, and 65 billion if one includes brands associated with French groups such as LVMH Moét Hennessy Louis Vuitton.[566] The UK is not far behind having direct economic profits reaching 21 billion pounds, and indirect profits of upwards of 37 billion pounds when adding "spillover" values such as fashion tourism and investment into fashion technology.[567]

In addition to revenue, both countries have contributed countless iconic fashion designers including French designer Gabrielle Bonheur Chanel, and UK designer Alexandre McQueen, both of which have created iconic looks such as Channel's little black dress[568], and McQueen's 1998 Joan of Arc collection.[569] Furthermore, both fashion capitals have outlined fashion style, with Parisian's effortless sophistication finding the perfect balance between dressed up and laid back, and the UK's heavy clash

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[563] Maya Singer, 'Gareth Pugh Spring 2018 Ready-To-Wear Collection' (*Vogue*, 2017) <https://www.vogue.com/fashion-shows/spring-2018-ready-to-wear/gareth-pugh?utm_medium=internal&utm_source=vogue.co.uk> accessed 14 April 2021.
[564] Laird Borrelli-Persson, 'Yohji Yamamoto Fall 2021 Menswear Collection' (*Vogue*, 2021) <https://www.vogue.com/fashion-shows/fall-2021-menswear/yohji-yamamoto> accessed 14 April 2021.
[565] ibid
[566] 'How Fashion Impacts France - Google Arts & Culture' (*Google Arts & Culture*) <https://artsandculture.google.com/story/how-fashion-impacts-france/qwLSAlykk8X5Lg> accessed 14 April 2021
[567] 'British Fashion Council' (*Britishfashioncouncil.co.uk*) <https://www.britishfashioncouncil.co.uk/news_detail.aspx?ID=228> accessed 14 April 2021.
[568] PENNY GOLDSTO, 'History Of The Little Black Dress From Coco Chanel To Audrey Hepburn' (*Marie Claire*, 2017) <https://www.marieclaire.co.uk/fashion/little-black-dress-524293> accessed 14 April 2021.
[569] SETH RADHIKA, '1 Years On: Remembering Alexander Mcqueen'S Most Fantastical Catwalk Moments' (*British Vogue*, 2021) <https://www.vogue.co.uk/gallery/best-alexander-mcqueen-runway-shows?image=5d544b15b89c2a00085bf9de> accessed 14 April 2021.

between grunge punk and preparatory smart have granted both countries an ever-evolving fashion scene, which is only proven by highly attended and broadcasted seasonal fashion shows.

The EU may advice what protection looks like under the union, but due to fashion's long-standing influence on both France and the UK, protection will continue to be apparent regardless of changes connected to Member States.

EU Design Protection

The purpose of the Design Protection within the European Union, Council Regulation (EC) No 6/2002 on Community Designs,[570] Directive 98/71/EC of the European Parliament and the Council of 1998 for Legal Design Protection[571] is to provide protection for innovative designs in the community and help foster a fair and competitive market among the joining countries. Currently, only the Benelux (Belgium, Netherlands, and Luxembourg)[572] nations have introduced the regulation, although the regulation provides protection within the whole EU territory. The remaining Member States have relied on national laws that pertain to each Member States' territory, and the Council Directive 98/71/EC[573] related to legal design protection.

The Directive 98/71/EC[574] aims to provide similar solutions to registered elements of fashion as the (EC) No 6/2002 on Community Designs regulation,[575] and work incongruence with one another in order to provide the protections outlined in this chapter. Because the main benefits of both the (EC) No 6/2002 on Community Designs regulation[576] and the Directive 98/71/EC[577] operate the same under fashion, this subchapter will mainly focus on the (EC) No 6/2002 on Community Design regulation in the context of fashion. The protection granted under Directive 98/71/EC[578] Unfortunately, does not grant protection for unregistered designs, nor is protection automatically granted when a design has been made public,

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[570] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9

[571] Council Directive 98/71/EC of 13 October [1998] OJ L289

572 'COUNCIL REGULATION (EC) No 6/2002' (*Euipo.europa.eu*) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/designs/design_definition/62002_cv_en.pdf> accessed 14 April 2021.

[573] Council Directive 98/71/EC of 13 October [1998] OJ L289

[574] ibid

[575] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9

[576] ibid

[577] Council Directive 98/71/EC of 13 October [1998] OJ L289

[578] ibid

thus hindering the protection granted for apparel design and other seasonal aspects of fashion.[579] Despite the Directive 98/71/EC[580] emerging prior to the (EC) No 6/2002 on Community Designs,[581] it is the directives lack protection of unregistered designs, that has required the need for additional levels of protection. The (EC) No 6/2002 on Community Designs[582] provides fashion companies potential claims to protections without filing and as soon as their designs are made public. The laws stipulated in the Directive fall closely in line with the protections granted under the Community Design Regulation. Member States have the right to refuse valid designs on the basis of public policy or morality.[583] If design protection hinders the competitive and fair nature of the market, Member States hold the right to approximate the Directive based on national laws.[584] Furthermore, the design and term of protections are defined the same under both forms of protection, and therefore will be further explored in the following sub-sections devoted to the Council Regulation, which provides a more comprehensive legal approach to fashion.

The Council Regulation (EC) No 6/2002 on Community Designs

The protection granted under (EC) No 6/2002 on Community Designs[585] allows fashion brands and designers to become less reliant on trademark-heavy designs, and focus on design innovations and artistic expression, past the traditional fashion capitals but throughout the whole EU.[586] Because the community design protection surpasses traditional IP protection, granting automatic protections throughout the lifecycle of a design, designers may focus on design elements rather than trademark heavy prints. Moreover, it allows the economics of the industry to focus on artistic taste and a design brand's contribution to the continued evolution of fashion innovation.[587]

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[579] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[580] Council Directive 98/71/EC of 13 October [1998] OJ L289
[581] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9
[582] ibid
583 Council Directive 98/71/EC, Article 8 defines designs contrary to public policy or morality [1998] OJ L289

[584] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[585] Council Regulation (EC) 6/2002 of December 2001 [2001] OJ L3/9
[586] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014
[587] ibid

Furthermore, the EU has proven that international design legislation may effectively work in relation to the fashion industry, and lays down the foundation for global design reform.[588] Previously mentioned attempts at design reform DDPA[589] and IDDPA[590] in the US were similar to design protections in the EU and would have aided in the needs of a currently evolving industry.[591] Though the DDPA[592] and the IDDPA[593] were refused, future attempts may look to Europe as an example of a fashion-forward union. Design regulation essentially may become a liberation in terms of fashion, showcasing a designer's artistic works, rather than logos and protected marks.[594]

The Community Design Regulation allows for designers to gain both unregistered and registered protections, which grant varying levels of protections that may benefit different areas of the fashion industry.[595] In the scope of fashion design, unregistered protection provides the most benefits, as it generally allows for designs to be protected throughout a design's full lifecycle and grants immediate protection once the design has been made public.[596] Unregistered protection typically lasts up to 3 years from the moment the design is made public, and only protects against intentional copying, meaning unlawful parties must already be aware of the protected design in question or must belong to an industry where they would be obligated to be aware of protected designs in their industry.[597] A design is deemed public when it provides a commercial purpose, or in the terms of the fashion industry has been traded or presented within the market.[598] Registered community design in some cases can be seen as prior art even if it is disclosed outside of the EU but becomes naturally known within business circles related to

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[588] ibid
[589] Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009)
[590] Innovative Design Protection and Prevention Act, H.R. 2511, 112th Cong. (2011)
[591] Susan Scafindi, ' IDPPA: Introducing the Innovative Design Protection and Privacy Prevention Act- a.k.a Fashion Copyright ' (*Counterfeit Chic,* 6 August 2010) < http://counterfeitchic.com/2010/08/introducing-the-innovative-design-protection-and-piracy-prevention-act.html >
[592] Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009)
[593] Innovative Design Protection and Prevention Act, H.R. 2511, 112th Cong. (2011)
[594] Susan Scafindi, ' IDPPA: Introducing the Innovative Design Protection and Privacy Prevention Act- a.k.a Fashion Copyright ' (*Counterfeit Chic,* 6 August 2010) < http://counterfeitchic.com/2010/08/introducing-the-innovative-design-protection-and-piracy-prevention-act.html >
[595] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014
[596] Gordian N. Hasselblatt, 'Community Design Regulation, Article-by-Article Commentary' (2th edn, Beck, Kemp, and Nomos 2018)
597 Council Regulation (EC) 6/2002 § 2, Article 11, Paragraph 1 & 2 [2001] OJ L3/1defines the commencement and term of protection of the unregistered community design

598 Gordian N. Hasselblatt, 'Community Design Regulation, Article-by-Article Commentary' (2th edn, Beck, Kemp, and Nomos 2018)

the industry and market in question. [599] The terms of protection are given in Article 12, and grant protection for five years from the date of filing. Protection can be renewed and granted up to 25 years from the original date of filing.[600]

In many cases, apparel designs fall out of the scope of registered protection due to their seasonal nature.[601] Although other aspects of the fashion industry, such as jewelry may benefit more from registered design protection, and thus it is important to take note. Design is defined in Art. 3 of the Community Design Regulation,[602] and it may include either part or whole of a product and the protected features may include "lines, contours, colors, shape, texture, and/or materials of the product or ornamentation" (Title II, Section 1, Art. 3, Paragraph a.).[603] Products can be defined as many things and also include "overall packaging, graphic symbols, or even typefaces" (Title II, Section 1, Art 3, Paragraph b.).[604] Article 4, paragraph 1 states that "community design will only protect designs that are new and of an individual character", which is an important factor to remember in an industry that relies heavily on imitations and recreations.[605]

The individual character has been shown to be key when granting community design as outlined by the EU regulation. The case between *Superdry v. Animal*[606] proves the importance of individual character and the weight it may have in a court ruling. The case consists of Superdry under SuperGroup's wholesale arm DKH suing Animal's parent company H Young for knocking off Superdry's academy gilet design.[607] The Superdry parent company claimed infringement under both the UK unregistered design rights and unregistered community design rights under the EU regulation.[608] In order to determine if the gilet design was in fact individual, they were compared to the case of Ruehl and

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599 *see* Ruhl, *Gemeinschaftgeschmacksmuster,* Art. 11, mn. 17; Stone, European Union Design Law, 2nd ed., mn. 18.08; BGH Case I ZR 126/06 GRUR 2009, 79, 81 – *Gebäckpresse,* mn. 16-22.

600 Council Regulation (EC) 6/2002 §2, Article 12 [2001] OJ L3/1

601 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014

602 Council Regulation (EC) 6/2002 Tittle 2, Section 1, §3, paragraph a [2001] OJ L3/1

603 Council Regulation (EC) 6/2002 Tittle 2, Section 1, §3, paragraph a [2001] OJ L3/1

604 ibid

605 Council Regulation (EC) 6/2002 Title II, §1, Article 4, defines requirements for protection [2001] OJ L3/1

606 *DKH Retail Limited v H Young (Operations) Limited* [2014] EWHC 4034 (IPEC) [104].

607 ibid

608 ibid

Abercrombie & Fitch gilets, which was brought forth by Animal during their defense.[609] Neither compared garments included a hood in their design ultimately proving that Superdry's hooded gilet design did in fact have individual character granting them protections and right to damages based on the brought forth infringements.[610]

Fashion design is protected based on aesthetical creative expression, although silhouettes that fall under the public domain are not protected under unregistered or registered design regulations.[611] Designs or elements that have been granted individual character must fall under the stipulation set forth by Article 6 paragraph 1(a),[612] which states that "individual character is directly proportional to the impression given by an informed user". In the case of fashion, this would include end consumers and fashion experts.[613] Community Design protection will only be granted to designs that do not give an alternative or different overall impression. Designs must be authentic and not confuse an informed customer of an already protected design.[614]

A multitude of elements relating to design legislation may be explored in the *Jimmy Choo v. Towerstone in 2008*[615] case, where Jimmy Choo claimed compounding forms of protections, which consisted of proposing infringement claims using national legislation and EU protections to strengthen their case claiming a design infringement of their protected ROMONA handbag, which Jimmy Choo maintains was knocked off by Towerstone Limited and distributed at their Oxford Street location in London.[616]

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[609] ibid

[610] Rockett, E. (2019). 'Trashion: An Analysis of Intellectual Property Protection for the Fast Fashion Industry', The Plymouth Law & Criminal Justice Review, Vol. 11, p. 80-102. http://hdl.handle.net/10026.1/14349

[611] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014

[612] Council Regulation (EC) 6/2002 Title II, §1, Article 6, paragraph 1(a) defines individual character [2001] OJ L3/1

613 ibid

614 Council Regulation (EC) 6/2002 Title II, § 2, Article 10(1) defines the scope of protection granted for a design [2001] OJ l3/1

[615] J Choo (Jersey) Ltd. v Towerstone Ltd. & Ors [2008] EWHC 346 (Ch) (16 January 2008)

<https://www.obi.gr/obi/Portals/0/ImagesAndFiles/VIVIMAKRI_FOLDER/Design_CD/nomologia/agglia/2_UK-Handbags.pdf>

[616] Georgia Davis, 'Jimmy Choo Case Shows Value of Community Registered Designs' *International Law Office* (London, 27 May 2008) <https://www.internationallawoffice.com/Newsletters/Intellectual-Property/United-Kingdom/Reynolds-Porter-Chamberlain-LLP/Jimmy-Choo-Case-Shows-Value-of-Community-Registered-Designs > accessed 3 April 2020

Moreover, additional elements in determining protections were expressed including, (a) impression of an informed user, (b) individual character, (c) the main functions of the overall design elements, (d) a compared analysis of the goods in question to the protects claiming protection, (e) innocent infringement clauses, and (f) the validity of protection under differing levels of jurisprudence.[617]

In order to come to a sound ruling, the court first determined the validity of the infringement argument. The court looked into the possibility of confusion and overall impression between the handbags in question from the perspective of an informed user.[618] An informed user was determined to be "a user who was well versed in handbag design and was aware of handbag design corpus, but was not a regular consumer or handbag designer".[619]

The similarities between the handbags brought forth by Jimmy Choo were based on appearance and related to the overall concept of the products.[620][621] These similitudes included the following: "a) double row of eyelets; b) a belt threading of the eyelets; c) a clasp strap interrupting the eyelets and seemingly running longitudinally around the bag; and d) handle terminating in a lozenge shape which proved integral to the eyelet design." [622]

In counter to Jimmy Choo, Towerstone Limited, proposed eight differences between the compared handbags, with the court ultimately arguing they were not sufficient in regards to the appearance-related to the handbags.[623] The differences proposed were: "1) texture of the handbags; 2) the absence of a

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[617] ibid
618 ibid

619 J Choo (Jersey) Ltd. v Towerstone Ltd. & Ors [2008] EWHC 346 (Ch) (16 January 2008) Page 1 of 8 : Subsection 7 defines the infringement claim. <https://www.obi.gr/obi/Portals/0/ImagesAndFiles/VIVIMAKRI_FOLDER/Design_CD/nomologia/agglia/2_UK-Handbags.pdf>

620 Monseau, S. (2011), European Design Rights: A model for the protection of all designers from piracy, *American Business Law Journal*, 48, pp. 27-76.

[621] *An Evaluation Of Case Jimmy Choo Ltd V Towerstone Ltd & Other (2008)*(2016) <http://page-by-page.co.uk/wp-content/uploads/2016/09/An-Evaluation-of-case-Jimmy-Choo-Ltd-v-Towerstone-Ltd-Other-2008.pdf> accessed 14 April 2021.

622 *ibid*

[623] ibid

square panel of fabric behind the clasp in the Towerstone bag; 3) the longitudinal strap did not run all the way around the defendant's rivets at the rear, and has no belt loop on the base and is sewn into the bag; 4) the back of the clasp is different; 5) number and size of the eyelets; 6) the horseshoe fitting at the end of the strap is absent; 7) the "Jimmy Choo" logo is absent, and 8) the lozenge shapes at the end of the handles where they meet the eyelets are different."[624]

The court ruled out points (1), (2), (7)[625] because they were outside the scope of the overall design of the bag, while (3) was seen to be acceptable but weak difference because it is not prominently seen on the front view of the handbag, and lastly[626], (5), (6), (8) were seen as "non-impactful" to the overall appearance of the defendant's handbag.[627]

Figure 10: Jimmy Choo RAMONA Handbag circa 2008 (Right)[628]

Figure11: Towerstone Limited Handbag2008, potential infringement (Left)[629]

The case regarding *Procter & Gamble vs. Reckitt Benckiser in 2007*[630] played an important role in establishing the importance of contributions given by an informed user in regards to deciding an infringement. Both parties accepted the supporting factors of this case of a registered design of the

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[624] *An Evaluation Of Case Jimmy Choo Ltd V Towerstone Ltd & Other (2008)*(2016) <http://page-by-page.co.uk/wp-content/uploads/2016/09/An-Evaluation-of-case-Jimmy-Choo-Ltd-v-Towerstone-Ltd-Other-2008.pdf> accessed 14 April 2021.

[625] *ibid*

[626] ibid

627 *ibid*

[628] McDermott, Will, & Emery 'Patents' [2008] European IP Bulletin: The Intellectual Property, Media & Technology Department <https://d1198w4twoqz7i.cloudfront.net/wp-content/uploads/2019/08/30200140/euroip0408.pdf> accessed 21 April 2021.

[629] ibid

[630] Procter & Gamble vs. Reckitt Benckiser (UK) Ltd [2007] EWCA Civ 936 (10 October 2007)

RAMONA handbag. In appealing, Towerstone submitted the argument based on paragraph 60 of the *Procter & Gamble vs. Reckitt Benckiser* [631] case, related to qualities granting a difference in impression, stating the use of less luxurious materials may change the impression of an informed user.[632] The court did not find the use of cost-effective materials to be a dominant factor in the difference of impression and ruled out the counterclaim.[633] With the presented arguments coupled with the precedent provided by The *Procter & Gamble vs. Reckitt Benckiser*[634] case, the court was able to determine that a design infringement was in fact valid.

The additional defense presented by Towestone included an innocent infringement, which was claimed under the UK unregistered and registered design protections, but not under the EU's Community Design.[635] The defense brought by Towersone shed light on a complex legal issue related to claiming both national and EU legislation. The IP Enforcement Directive, and the Intellectual Property Regulation 2006 (SI 2006/1028)[636] amended UK design legislation and granted relief, including damages to holders of a community design, which in this particular case was valid in respect of an infringement under paragraph 1A of the design regulation.[637]

In opposition UK Registered Design Act 1949 (RDA)[638] provides an exemption from liability related to damages or an account of profits for infringements that are seen as innocent under section 24B, resulting in a lack of provisions for exemptions of innocent infringement that apply to community design under UK law.[639] Towerstone argued that the Parliament would not have originally ruled damaged based on Community registered design without respecting UK registered design.[640] Although

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631 *An Evaluation Of Case Jimmy Choo Ltd V Towerstone Ltd & Other (2008)*(2016) <http://page-by-page.co.uk/wp-content/uploads/2016/09/An-Evaluation-of-case-Jimmy-Choo-Ltd-v-Towerstone-Ltd-Other-2008.pdf> accessed 14 April 2021.
632 *ibid*
633 ibid
634 Procter & Gamble vs. Reckitt Benckiser (UK) Ltd [2007] EWCA Civ 936 (10 October 2007)
635 *An Evaluation Of Case Jimmy Choo Ltd V Towerstone Ltd & Other (2008)*(2016) <http://page-by-page.co.uk/wp-content/uploads/2016/09/An-Evaluation-of-case-Jimmy-Choo-Ltd-v-Towerstone-Ltd-Other-2008.pdf> accessed 14 April 2021.
636 The Intellectual (Enforcement etc.) Regulation 2006 (SI 2006/1028)
637 J Choo (Jersey) Ltd. v Towerstone Ltd. & Ors [2008] EWHC 346 (Ch) (16 January 2008) <https://www.obi.gr/obi/Portals/0/ImagesAndFiles/VIVIMAKRI_FOLDER/Design_CD/nomologia/agglia/2_UK-Handbags.pdf>
638 Registered Designs Act 1949 Chapter 88 12 13 and 14 Geo 6 [16th Devcember 1949]
639 J Choo (Jersey) Ltd. v Towerstone Ltd. & Ors [2008] EWHC 346 (Ch) (16 January 2008) <https://www.obi.gr/obi/Portals/0/ImagesAndFiles/VIVIMAKRI_FOLDER/Design_CD/nomologia/agglia/2_UK-Handbags.pdf>
640 J Choo (Jersey) Ltd. v Towerstone Ltd. & Ors [2008] EWHC 346 (Ch) (16 January 2008)

this argument may be objectively true and presents a complex issue related to precedent enforceability, in this particular case this argument did not prevail, and the courts sided with Jimmy Choo.

With the use of EU-registered community design, Jimmy Choo was able to ensure the protection of the RAMONA handbag, and with the use of EU directives and regulations to grant themselves stronger protection that would have not been granted under UK IP protections alone. In opposition, Towerstone's argument based on an innocent infringement was shown to have validity, but ultimately did not factor the EU level of protection, nor how national laws may be used in connection to EU matters.

The aim of design legislation in the EU is not to eliminate fast fashion companies or the production of trend-based products, but rather improve their business practices to continue to be highly commercial but also obtain ethical business models, similar to the previously mentioned circular economy theory. Proven by the previous case, protection may vary between EU and national legislation, although the goal is the same, create fast fashion companies who ethically and lawfully produce trend-based fashion products. Moreover, designs based purely on artistic expression should be protected as art, in addition to fashion innovation.

For example, for ethical fast fashion business standards, one can rely on the following: in Chanel's 2017 fall collection, metallic quilting was introduced as a feature design element, which was quickly assimilated by UK fast fashion and online stores who aimed to imitate a trend that emerged from Chanel.[641][642] Though these garments were similar to the original, they had distinguishable features that were independently their own and became a design reference rather than a design duplication.[643] This proves that fashion may have universal trends but individual character as well, and that fast fashion companies can strive for economic profit while respecting ethical fashion standards.

The right to protection is mainly given to designers who have developed the design or the successor of the original designer who is then given the title. If multiple persons are connected to the creation of the design, then they will both be accredited the right to design protection. Lastly, if designs are created

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<https://www.obi.gr/obi/Portals/0/ImagesAndFiles/VIVIMAKRI_FOLDER/Design_CD/nomologia/agglia/2_UK-Handbags.pdf>

[641] See Look 47/98 Chanel AW17 (photo: https://www.vogue.com/fashion-shows/fall-2017-ready-to-wear/chanel/slideshow/collection#47).

[642] Rockett, E. (2019). 'Trashion: An Analysis of Intellectual Property Protection for the Fast Fashion Industry', The Plymouth Law & Criminal Justice Review, Vol. 11, p. 80-102. http://hdl.handle.net/10026.1/14349

[643] ibid

under the roles and responsibilities of a company, then the employer is the main party to be granted protection unless otherwise stipulated by national law.[644] The granting of protection is important in fashion, because many designers are mainly employed by larger parent companies, and therefore are not entitled to proportional revenue in connection to their design contribution unless stipulated by national law or contractual agreements.[645]

Designer's often struggling between artistic credit and financial security. Many fresh designers cannot afford to open their own Ateliers and ultimately give up artistic recognition for continued success in the industry. It has become common for designers to work their way to the creative director of a company to then gain enough traction to start their own brand. Examples of this would include, Karl Lagerfeld who before his death worked his way up in the industry under multiple fashion brands such as Chloé and Fenti, and ultimately became creative director of Chanel, which allowed him to subsequently own his own fashion company KARL LAGERFELD in parallel to running Chanel's creative department.[646]

An additional example includes American designer, Mark Jacobs stepping down from creative director of Louis Vuitton to focus on building his own fashion brand.[647] Moreover, the role of a successor in the fashion industry is highly important in the overall economic structure of a fashion company. Fashion is a close-knit industry, despite mainly functioning under large metropolitan cities, the industry runs on who you know and who is most trusted among a small group of people, thus picking the right successor to a label will ensure both the longevity of the company and legacy of the former designer.[648] Prior to Karl Lagerfeld's death, he spent decades apprenticing Virginie Viard, refining her creative mind, business savviness, and legal obligations, in order to take over as creative director of Chanel.[649]

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644 Council Regulation (EC) 6/2002 §3, Article 14, Paragraph 1,2, &3 defines who/whom is entitled to community design protection [2001] OJ L3/9

645 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014
645 J Choo (Jersey) Ltd. v Towerstone Ltd. & Ors [2008] EWHC 346 (Ch) (16 January 2008)
646 'ABOUT THE MAN KARL LAGERFELD' (*Karl.com*) <https://www.karl.com/experience/en/biography/> accessed 14 April 2021.

647 Suzy Menkes and Eric Wilson, 'Marc Jacobs To Leave Louis Vuitton (Published 2013)' (*Nytimes.com*, 2013) <https://www.nytimes.com/2013/10/02/fashion/marc-jacobs-to-leave-louis-vuitton.html> accessed 14 April 2021.
648 Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014
648 J Choo (Jersey) Ltd. v Towerstone Ltd. & Ors [2008] EWHC 346 (Ch) (16 January 2008)
649 HAMISH BOWLES, 'Getting To Know Virginie Viard, The Woman Behind Chanel'S New Chapter' (*British Vogue*, 2020) <https://www.vogue.co.uk/fashion/article/virginie-viard-chanel> accessed 14 April 2021.

It is quickly seen that the protections granted by both the Community Design Regulation and the Directive are inherently similar, thus posing the need for both forms of protection in the EU. Both aim to grant harmonized protection in the EU, although they pursue this goal in a segmented way. The Directive aims to create harmonization on a minimum level in the EU, but only grants protection for registered designs, while the Community Design Regulation provides maximum level protection for unregistered and registered designs and has only been ratified in the Benelux nations, but grants protections within the whole union.

Design legislation both on an EU or national level allows designers and fashion companies to gain commercial profits and helps diminish the unlawful use of protected designs by third-party users in European countries. Companies that are built on copyist business structure are forced to adapt to legal methods of producing goods while continuing to contribute to a comparative fair market. Applicants or designers hold the right to freely use or grant licenses to their protected designs for commercial gain in multiple forms which include the making, offering, placement in the market, importing, exporting, the use of the design in the form of a corporation.[650] Moreover coupled with national legislation artistic elements may continue to be protected, aiding in the further contribution of fashion innovation and fashion depicted as art.

8 A Comparative view of the fashion industry in The US and The EU, with a Final Recommendation for Harmonization

Fashion has thrived on its ability to allow forward-thinking designers the platform to create art from what some might find taboo and streamline it into collections that are aw- inspiring and historically cultivating in terms of what society deems appropriate. This has been briefly expressed in Chapters 1&2 and can be directly linked to modern-day. There is a strong argument that can be made, that fashion has not only survived but also thrived due to its agility in reinventing itself based on the needs of the commercial evolution, beauty, and culture.

Yet the US, one of the top industry influencers continues to define fashion based on its rigid understanding of functionality in terms of legal rhetoric, while continuing to provide other industries

650 Council Directive 98/71/EC, §2, Article 19, paragraph 1 Defining the implementation of the directive within the legal structure OJ L289

such as technology, favored protection related to creation and designer ownership, despite its similar functional manner as defined by law. This has been reviewed throughout this dissertation but in particular in chapter 6. The US continues to govern the fashion industry through adaptive laws originally developed for other industries such as literature, and in short, provides a quick fix approach to fashion's ever-growing need for reform.

Despite arguments stating that legal reform will be destructive to the industry.[651] When compared to other fashion-forward industries, the US has shown to be falling behind. As this dissertation and additional accredited writers, such as Susan Scafindi,[652] have presented the US has proven itself primitive in terms of IP protection in fashion, while European countries are comprehensive leaders in defining fashion design from a creator's perspective under domestic and supranational law. Not only has the EU shown to continue to stay competitive and economically sound despite its legal protection of fashion, but it has also proved itself trustworthy by ratifying, implementing, and complying with international treaties and its standards, as are other leading nations, such as Japan, that equally protect fashion design as a form of creative expression of the designer instead of focusing on 1 size fits all industries IP framework. No legal system is perfect, and by definition, the law must be adaptive and open to reform, nonetheless, the EU provides the blueprints to reform that have the potential to be adapted in the US, and create formative steps towards harmonization between the market's stakeholders.

The US's independent market viewpoint, although commercially profitable has started to falter as it is no longer able to provide the same competitive benefits it once gave as support to the US fashion industry. With modern technology, the world has become one global neighborhood, where economic markets not only surpass a single country but are rather incentivized to be open to competition and cooperation by all, including private and public organizations. In order to continue to be innovative, create trust, and stay advantageous, the US will have to consider becoming legally harmonized with other countries, in particular, the ones under the EU and Asia. No longer can the US partake in international organizations such as the WTO, without complying with the agreed terms.

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[651] Further defined in chapter 6

[652] Susan Scafindi, ' IDPPA: Introducing the Innovative Design Protection and Privacy Prevention Act- a.k.a Fashion Copyright ' (*Counterfeit Chic,* 6 August 2010) < http://counterfeitchic.com/2010/08/introducing-the-innovative-design-protection-and-piracy-prevention-act.html >

As the US continues to provide subpar IP protections in terms of modern needs, fashion companies will continue to have distorted levels of protection across the US and EU fashion markets. As of now, and as previously mentioned in chapter 4, fashion companies entering the European market are granted far more design legislation than companies entering the US market and are adding more cost-effectiveness in terms of registration methods for IP protections inside the EU. Thus the US's lack of willingness to adapt has created a market that exempts designers and fashion business professional's essential protections to thrive in the industry, both from a domestic viewpoint, and international players entering the US market.[653]

The US legal system continues to contribute to the fashion industry, it fails to see the creative needs outlined by top fashion leaders such as Diana Von Furstenberg and the changing economic climates, and the overall legal structures of international trading partners and subjected treaties. Though international treaties such as the TRIPS and the Paris convention offer some relief in closing the open fly zipper that is fashion protection, it can only aid so much as it is not a governing power, and cannot prompt the US to reform design legislation. Moreover, international treaties may only outline guidelines for fair trade, but it is the responsibility of the fashion industry to initiate change in both business practices through contractual obligation and set industry standards, while in parallel, countries must negotiate harmonization between fashion sectors.

When viewing both fashion sectors side by side and their overall rule in the globalization of the fashion industry, a lack of harmonization becomes abundantly apparent. As previously mentioned, many fashion corporations operating on a global scale find gaining IP protections cumbersome in relation to the US's trademark structure, and the EU's copyright framework.[654] Not to mention the additional costs added by filing for protections in differing markets, which normally are justifiable but in fashion may not provide comprehensive protections.[655]

For worldwide fashion groups such as LVMH which own iconic brands such as Christian Dior, Stella McCartney, and of course Louis Vuitton, filing for protection for one product being entered to multiple target markets globally may prove frustrating and costly. Due to the lack of harmonization fashion

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[653] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[654] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[655] ibid

conglomerates are forced to file the same product under differing registering systems in order to obtain similarly or in the case of the EU and US almost identical traditional IP protections. Not only is this costly for the brands applying for protections, but the cost also does not guarantee that protection will be achieved across all markets, or if achieved prove enforceable. In the case of Christian Louboutin's, their trademark on red bottom soles (granted in 2008) showed by the US courts to be unenforceable and ultimately ineffective.[656] [657]Thus proving both harmful to the brand and the overall economic investment made to protect, which became symbolic of fashion's lack of importance when it came to the US's IP Frameworks and the continued struggle for harmonization for new product lines. In contrast, color is considered protectable under some European nations such as France.

Despite the fact that color is a potentially harmonized aspect of fashion between the US and EU. An additional question arises as to why was the protection granted by the US courts, to begin with, if "color" by the US legal definition was not considered strong enough to provide a second meaning, or in the case of Christian Louboutin, used for functional purpose. The red bottom sole has been a known fashion signature since Christian himself debuted it in 1993.[658] Therefore, should have been reviewed objectively during the registration process.

It should be noted that it is not pertinent to vilify an industry influencer such as the US, that has rapidly gained market power during the interwar years, and continued to sustain its share through the US's lenient legal frameworks, but rather provide an understanding of the parallel nature of the differing yet equally impactful markets such as the US and EU, and their control globally and upon each other.

Both sectors aim to impart formative IP frameworks for overall commercially abundant industries, but it is clear that the jurisdictional streams derive from separate historical and political backgrounds when defining the concept of free competitive markets and the protection of creative works. While Europe, in general, has viewed design as protectable intellectual property from the creator's perspective, and historically valued fashion far past its economic advantages to additionally include its cultural and trading capabilities. Moreover, domestic legal frameworks play an integral part in creating guidelines

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[656] Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc., No. 11-3303 (2d Cir. 2013).

[657] Julie Zerbo, 'Christian Louboutin S.A. V. Yves Saint Laurent Am. Holding' <https://www.thefashionlaw.com/resource-center/cases-of-interest-christian-louboutin-v-yves-saint-laurent/> accessed 31 July 2021.

[658] 'Christian Louboutin : World Of Red Bottoms' (*Lapolo.in*, 2018) <https://www.lapolo.in/blog/christian-louboutin-world-red-bottoms/> accessed 31 July 2021.

for commercial entities to continue fair and ethical business practices.[659] While large fashion companies are important to the overall industry, they hold less political influence on legal reform and must abide by the guidelines set forth in front of them. The US has first and foremost seen the industry for its economic and commercial contributions, and creative expression has been valued last. This is not to say that the US does not have legal guidelines, but rather that large corporate conglomerates have a strong influence in the market, and in some cases commercial politics.[660][661] Differing views on fashions commercial and societal propose as defined by law has provided the foundation for the industry to become what it is today. While both markets are not free of legal limitations, the US has provided the least efforts at redefying reform in terms of design policy.

There have been seventy-plus failed attempts at design reform in the US dating back to the interwar years with little to no industry change in terms of legal protection[662]. The most modern attempts brought forth by the CFDA include DPPA and later the redefied version presented by both the CFDA and AFA includes the IDPPA, both of which are influenced by the Community Design directive ratified in the EU, and have gone on to fail when presented before the House and Senate. Despite modern reform of design protection in the US being modeled after the Community Design polices in the EU, the failure ultimately falls under terms of defining critical legal aspects of fashion. For example, fashion design under the DPPA's section 2(a)2(b)[663] was considered to use confusing terminology to describe commonplace or original.[664] Although the nature of defining fashion was valid and aimed to have designers prove their designs unique, the use of the word "trivial" proved complex in terms of a legal adjective when defining original design.[665]

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[659] Guillermo C. Jilenez and Barbara Kolsun (eds), A Survey of Fashion law: Key Issues and Trends, *Fashion Law: A Guide for Designers, Fashion Executives, & Attorneys,* (Fairchild Books New York 2014)
[660] 'How Corporations Turned Into Political Beasts' (*Business Insider*, 2015) <https://www.businessinsider.com/how-corporations-turned-into-political-beasts-2015-4> accessed 10 May 2021.
[661] Presented further in chapters 3,6, and 7
[662] ibid

[663] IDPA, S. 3523, 112th Cong. § 2(a)(2)(B) (2012).

[664] If it does not contain original elements, then it must have "original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article." *Id.* § 2(a)(2)(B).

[665] Casey E. Callahan, Fashion Frustrated: Why the Innovative Design Protection Act is a Necessary Step in the Right Direction, But Not Quite Enough, 7 Brook. J. Corp. Fin. & Com. L. (2012).
Available at: https://brooklynworks.brooklaw.edu/bjcfcl/vol7/iss1/9

Fashion reform within the US has proven itself prudent dating back to the FOBA lobbyist attempts at protection,[666] but the US's fashion advocates eagerness to achieve change cannot come at the cost of legal understanding when formatting reform, or in the terms of FOBA who ignored the law on the premise of moral ethics. In order for fashion advocates and industry frontrunners to totally contribute towards design legislation in the US, they must provide amendments that clearly fall under the rules of the legal dogmatic approach. This means drafting reform that falls in line with the flow of legal writing. Understanding that law may be subject to interpretation, but cannot be so vague that the simple core definition of the subject is speculated under broad debate.

Moreover, the main objective of design legislation in terms of fashion is to provide original designers the allotted rights within a knockoff fast fashion industry, therefore, defining what is deemed legally inspired or a potential infringed design must be clear to understand. The law must provide both courts, legal advisors, and industry stakeholders appropriate outlines through clear regulatory structures when answering crucial legal questions. For example, when first presented the DPPA's section 2(f)(5),[667] which aimed to outline infringement liability of fashion and amend § 1309 of the Copyright Act, failed to provide a clear understanding of "identical" in terms of knockoffs, and rather described the terms as "substantially identical".[668] [669] Therefore, failing to draw a clear line between what is considered inspired and copied from original designers. [670]

Furthermore, though EU legislation in terms of design protection provided some guidance when drafting both the DPPA and IDPPA, the US reformists must propose a change that is adaptive to the US market and its capitalistic commercial nature. As mentioned before the US and EU are parallel markets with differing views on free-market trade, yet effectively hold influence on one another and the industry. The new law must propose an understanding of global accolades in regards to international trade, and the overall benefit to both the legal rights of a designer and the commercial profit of the industry. Both the DPPA and IDPPPA were the building blocks for reform, and thus achieved at presenting the need for change, the voice of the industry, and the starting path for changed legislation in the US. In order to adapt future design reformists must create clear and legally interpretable outlines

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[666] Explored in chapter 3

[667] IDPA, S. 3523, § 2(f)(5).

[668] ibid

[669] Casey E. Callahan, Fashion Frustrated: Why the Innovative Design Protection Act is a Necessary Step in the Right Direction, But Not Quite Enough, 7 Brook. J. Corp. Fin. & Com. L. (2012). Available at: https://brooklynworks.brooklaw.edu/bjcfcl/vol7/iss1/9

[670] ibid

and definitions of fashion, merging the understanding from industry leaders with formal legal dogmatic understanding. Additionally, reform must make sense both ethically regarding designers, but also commercially in terms of the overall economic nature of the industry.

Much as fashion trends reshape and evolve, so will the current design legislation in the US and the IP harmonization of the fashion industry globally. Change has already been sparked by continued lobbying for design reform in the US by the CFDA and AAFA, economic trends showing the fashion industries' global stance on sustainability and slowed down fast fashion practices, and the continued preserved view of the US's policies from fashion professionals when trading both domestically and internationally. The new fashion calendar is emerging, and the US will have to learn to adapt or take the risk of continuing to fall behind within this globally profitable industry. Much as is the nature of fashion, either one adapts and continues to be fashion-forward or stagnates and becomes dated. As Heidi Klum well stated, "in fashion, one day you're in and the next day you're out."[671]

[671] Heidi Klum, "In fashion, one day you're in and the next you're out", Project Runway (seasons 1-16) 2015-2017

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