5-14-2021

Iconic Designs, Icon Status, and Intellectual Property: Discussing Copyright and Fashion and the Ideal Mode of Protection for Fashion Designs and Patterns

Bianca Lindau
bel82@cornell.edu

ICONIC DESIGNS, ICON STATUS, AND INTELLECTUAL PROPERTY: DISCUSSING COPYRIGHT AND FASHION AND THE IDEAL MODE OF PROTECTION FOR FASHION DESIGNS AND PATTERNS

Bianca Lindau

ABSTRACT

In the United States, the establishment of copyright protection for fashion designs and patterns has been a struggle that has only partially been successful. Protections available under design patent, trademark, and trade dress law only provide insufficient protection to fashion designs. Since the *Star Athletica v. Varsity* decision, it is clear that fashion patterns enjoy sufficient protection under copyright law. In the European Union and in Germany, the intellectual property protection capital of Europe, fashion designs enjoy much greater protection than in the United States. This paper uses a comparative approach to discuss the advantages and disadvantages of providing more protection to argue that fashion designs should be granted protection even though they are intrinsically utilitarian, and to issue recommendations as to specific principles and elements that must be included in any legislation to introduce protection.

TABLE OF CONTENTS

Introduction

Being fashionable and keeping up with what is deemed "trendy" at any given point in time is important to many, whether young or old, consumer or retailer, designer or fashion house owner. The Hermès Kelly or the Hermès Birkin bag is not immediately recognized due to branding or the inclusion of a conspicuous Hermès logo, but rather by the specific shape, style and cut, *i.e*., the design of the bag. Those unfamiliar with these particular bags would probably not realize that they are looking at an item priced between $7,000 to over $300,000.[1] To those familiar with designer bags, however, these are the most expensive, valuable, and coveted bags on the market arguably because of the design. They are more sought-after than the most popular bags created by the likes of Chanel, Louis Vuitton, Gucci, and other luxury brands, and have reached icon status.[2]

Popular and valuable designs are not only found in the handbag sector. Designs in all areas of fashion can reach icon status. Many consumers wish to buy fashion items that are currently popular or are deemed particularly desirable and retailers search for and carry these trendy items to make the largest profit possible. The designers strive to create something that is appreciated by the public and/or is commercially successful. Fashion houses also aim to profit from trending designs or patterns.[3] In this paper a fashion pattern, or fabric design,

[1] Brooke Unger, *Demand curve*, THE ECONOMIST (Jul. 28, 2016), https://www.economist.com/1843/2016/07/28/demand-curve (last visited Mar. 28, 2021).

[2] The Hermès Birkin is listed as the number one or most expensive bag, closely followed by the Kelley. *See* Eva Thomas, *The 10 Most Popular Designer Bags Ever*, WHO WHAT WEAR (Jan. 16, 2021), https://www.whowhatwear.com/most-popular-designer-handbags; Jenny Chang, *Top 10 Most Expensive Handbags in the World: From Hermes to Mouawad*, FINANCES ONLINE, https://financesonline.com/top-10-most-expensive-handbags-in-the-world-louie-vuitton-diamonds-crocodile-skin (last visited Apr. 18, 2021); Dominic-Madori Davis, *Birkins, Louis Vuitton trunks, and vintage Chanel: Collecting rare handbags can be a lucrative investment strategy*, BUSINESS INSIDER (Jul. 15, 2020, 5:31 PM), https://www.businessinsider.com/most-expensive-handbags-ever-auctioned-christies-hermes-birkin-chanel-2020-7; Ellie Sanders, *What Do Luxury Brands' Inflating Prices Mean for Them & for the Industry at Large?*, THE FASHION LAW (Nov. 11, 2020), https://www.thefashionlaw.com/what-do-luxury-brands-inflating-prices-mean-for-them-for-the-industry-at-large (showing a graphic illustrating the price increase in the Hermès Togo Birkin handbag 35cm and Kelly handbag in the past 60 years).

[3] A fashion house is "a company that designs and sells new styles of clothes, shoes, bags, etc., especially expensive ones." *Fashion house*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/ fashion-house (last visited Apr. 18, 2021).

means, "the design printed on a fabric."[4] A fashion design is a design that depicts the shape, style, cut and dimensions of an article of clothing or an accessory graphically, in order to enable the transformation of fabric into a finished article of clothing or an accessory.[5]

The fashion industry is a highly creative field where new designs are constantly being conceived, produced, and offered to the public. When a specific design or pattern is particularly well-received by consumers, the design or pattern can become famous and highly profitable. This, however, raises several legal issues. When a design becomes successful or is viewed as having the potential to be successful, diverse market players often copy the design or pattern, either exactly or with various changes, and offer these products to consumers for sale. If the market is flooded with look-alikes, the original design or pattern may become less desired by consumers and therefore, less valuable. This apparently facile and commonplace exploitation of the original designer's intellectual and monetary investment by copyists[6] raises the question of how the law protects fashion designs or patterns.

This paper aims to explore the current protection of fashion designs and patterns under copyright and design laws of the United States ("U.S."), the European Union ("E.U."), and Germany, and to compare these approaches before making a recommendation as to whether a change to increase protection in the U.S. is desirable. The first section will discuss current protection under U.S. intellectual property law in general, copyright law specifically—particularly focusing on the *Star Athletica, L.L.C. v. Varsity Brands, Inc.*[7] case—and different legislative proposals brought before Congress concerning fashion designs and patterns. In the second section, protection under E.U. laws will be discussed, highlighting the extent to which

[4] 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08(H)(1) (Matthew Bender, rev. ed. 2021). The terms "fashion pattern" and "fabric design" will be used interchangeably, but consistently throughout this paper.
[5] *Id.*
[6] Alexandra Manfredi, *Haute Copyright: Tailoring Copyright Protection to High-Profile Fashion Designs*, 21 CARDOZO J. INT'L & COMP. L. 111, 123 (2012).
[7] 137 S. Ct. 1002 (U.S. 2017).

harmonization measures in the E.U. have taken place in the area of copyright and design laws and their effect. The third section illustrates protection of fashion designs and copyrights under German copyright and design laws. This paper specifically looks at German law because, on the one hand, Germany is considered to have a very robust intellectual property enforcement and protection regime and has been designated by some as the European capital of intellectual property protection, and on the other hand, interesting parallels and distinctions can be drawn to U.S. intellectual property law.[8] The final section discusses the advantages and disadvantages of fashion design and pattern protection before providing an opinion as to what solution appears to be most attractive and appropriate for the U.S.

I. Current Protection in the United States

In the U.S., fashion designs currently do not benefit from meaningful intellectual property protection.[9] Although this paper is focused on a discussion of protection available to fashion designs and patterns under copyright and design law, a discussion of other relevant areas of intellectual property law is merited to illustrate that they do not, or only poorly, protect the works of fashion designers.[10] Then, the discussion will proceed to one of how fashion designs and patterns do, or do not, fit into the current copyright regime as well as to the effect of the *Star Athletica* case, before finally addressing attempts to introduce legislation that would

[8] Andreas Bielig, *Intellectual property and economic development in Germany: empirical evidence for 1999-2009*, 39 EUR. J. LAW ECON. 607, 608 (2015), https://doi.org/10.1007/s10657-012-9324-5 (stating that Germany has expansively implemented intellectual property rights and strict protection regimes which ensure efficient monitoring and sanctioning of infringements); Judyta Kasperkiewicz, *Fashion Design Protection in European Union: Unregistered Community Design*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. BLOG (Feb. 22, 2017), http://www.fordhamiplj.org/2017/02/22/fashion-design-protection-european-union-unregistered-community-design (stating that Germany is the European capital of intellectual property protection).
[9] Manfredi, *supra* note 6, at 113; Cassandra Baloga, *Copyright & Fashion: The Shoe That Does Not Fit*, 64 N.Y. L. SCH. L. REV. 265, 266 (2019).
[10] Baloga, *supra* note 9, at 283.

allow for the protection of fashion. In particular, the Design Piracy Prohibition Act and the Innovative Design Protection and Piracy Prevention Act will be considered.[11]

A. Non-Copyright Forms of Intellectual Property Protection

Intellectual property relevant to the fashion industry encompasses protection arising from design patents, trademarks, and trade dress. Ornamental designs for an article of manufacture that are novel, original, non-obvious, and non-functional may be granted protection as a design patent.[12] These types of patents provide protection for a term of fifteen years, from the date of grant.[13] The issuance of a design patent takes approximately nine to fourteen months from the date of filing, but can take longer if there are issues with the design patent application.[14] This is far from ideal in the fashion world, where fast fashion companies produce and offer new items of clothing to consumers on a weekly basis and where designers for luxury brands are no longer creating just two collections for spring/summer and fall/winter, but also additional collections, amounting to five or more collections a year.[15] Reinvention and evolution in fashion significantly outpaces the amount of time it takes for the grant of a single design patent. This points to another issue, namely that fifteen years is arguably a lengthy period for protection, effectively granting a monopoly over the design for this period of time.[16]

---

[11] DESIGN PIRACY PROHIBITION ACT, H.R. 2196, 111th Cong. (2009); INNOVATIVE DESIGN PROTECTION AND PIRACY PREVENTION ACT, S. 3728, 111th Cong. § 2(a), (d), (e) (2010).
[12] 35 U.S.C. §§ 171(a), (b), 101–103 (2021).
[13] 35 U.S.C. § 173.
[14] James Yang, *How much does a design patent cost?*, OC PATENT LAWYER (Aug. 19, 2019), https://ocpatentlawyer.com/design-patent-cost.
[15] "Fast fashion is a design, manufacturing and marketing method focused on rapidly producing high volumes of clothing. Garment production utilizes trend replication and low-quality materials in order to bring inexpensive styles to the public. These cheaply made, trendy pieces have resulted in an industry-wide movement towards overwhelming amounts of consumption." Audrey Stanton, *What is Fast Fashion, Anyway?*, THE GOOD TRADE, https://www.thegoodtrade.com/features/what-is-fast-fashion (last visited Apr. 18, 2021); Miles Socha et al., *Tipping Point: Will the Flood of Collections Yield to Slower Fashion?*, WOMEN'S WEAR DAILY (Apr. 2, 2020), https://wwd.com/fashion-news/designer-luxury/will-coronavirus-reduce-fashion-seasons-collections-1203549445.
[16] *See* Baloga, *supra* note 9, at 283.

Protection of fashion has been extensively discussed in connection with trademark and trade dress law. Trademark law allows for the protection of "any word, name, symbol, or device, or any combination thereof" used or intended to be used in commerce to identify and distinguish goods from those manufactured or sold by others and to indicate their source.[17] The Louis Vuitton "LV" or Chanel "CC" Monogram logos are famous protected trademarks for many classes of goods.[18] Trademark law could provide sufficient protection for a pattern, if it is indicative of a source and registered. However, the placement of the trademarked logo on, for example, a bag made by a company, does not lead to the protection of the design of the bag itself. Affixing the protected mark to any protected class of goods without authorization of the trademark holder is prohibited, but this does not aid designers who wish to stop their designs from being copied. Further, trademark law allows for an indefinite extension of the term of protection, which arguably goes too far and provides a problematic indefinite monopoly.[19] Under the guise of trademark, a fashionable and desirable design would be accessible only to the holder of the trademark and their licensees, without ever making the design idea available to others for further innovation.

Trade dress allows for protection of the overall image, design and shape of a product that indicates the source of the good, if those elements are non-functional and distinctive.[20] In a case concerning a children's dress design, the Supreme Court held that the dresses were product designs and that product designs can never be inherently distinctive.[21] The owner of the trade dress must show that the design acquired distinctiveness and that it therefore has secondary meaning.[22] This is a difficult hurdle to overcome and places a heavy burden on the

[17] 15 U.S.C. §§ 1114, 1127.
[18] *See* Baloga, *supra* note 9, at 283; *A Bill to Control and Prevent Commercial Counterfeiting, and for other Purposes: Hearing on S. 1136 Before the H. Comm. on the Judiciary*, 104th Cong. 58 (1995) (statement of Chanel, Inc., submitted by Veronica Hardy, Vice President-Counsel and Robin Gruber, Assistant Counsel).
[19] The term of a federally registered trademark lasts ten years and, at the end of each ten-year period, the registration can be renewed for another ten years. 15 U.S.C. §§ 1058(a), 1059(a).
[20] 1 ANNE GILSON LALONDE, GILSON ON TRADEMARKS, § 2A.12(4) (Matthew Bender, rev. ed. 2020).
[21] *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 212 (2000).
[22] *Id.* at 216.

trade dress applicant.[23] Acquiring recognition takes time and is marginally easier for a well-established designer than for a younger one.[24]

B. The Current Copyright Regime and the Star Athletica Case

It is important to ponder why fashion designs or patterns are deserving of copyright protection in the first place. When a designer embarks on their creative process, a high degree of artistic choice is involved; the designer subjectively assesses and combines various elements such as color, shape, fabric and cut to create an article of clothing or an accessory.[25] Andy Warhol said, "fashion is more art than art is."[26] One might not fully agree with Warhol, but it is certainly justified to posit that fashion is a form of art that is deserving of copyright protection. Currently, copyright is afforded to original works that fall into one of the enumerated categories and that are fixed in a tangible medium of expression.[27] Fashion designs and patterns are not an expressly named category in the Copyright Act. However, fashion designs and patterns are frequently categorized as pictorial, graphic or sculptural works.[28] A particularly poignant example can be seen in the Sarabande dress made by Alexander McQueen for his 2007 spring/summer collection.[29] The dress was composed of nude silk organza embroidered with silk flowers and fresh flowers.[30] The dress featured hundreds of real roses that fell as the model walked; McQueen intended to symbolize the tension between beauty and

[23] GILSON 1, *supra* note 20, § 2A.12(4).
[24] *See id.*
[25] Manfredi, *supra* note 6, at 112, 116.
[26] *The Marriage of Art and Fashion*, ARTDEX BLOG, https://artdex.com/art-world/marriage-art-fashion (last visited Apr. 18, 2021).
[27] 17 U.S.C. § 102.
[28] HOWARD S. HOGAN AND JENNIFER BELLAH MAGUIRE, FASHION LAW AND BUSINESS: BRANDS & RETAILERS § 4:2 (2nd ed. 2019).
[29] *Alexander McQueen, Savage Beauty*, BLOG.METMUSEUM.ORG, https://blog.metmuseum.org/alexander mcqueen/dress-sarabande (last visited Apr. 18, 2021).
[30] *Id.*

death.[31] The dress was made to be worn but was regarded by many as a true work of art, worthy of display at the Metropolitan Museum of Art.[32]

Pictorial, graphic, or sculptural works "include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans."[33] This at first seems to indicate that fashion designs and patterns could be protected as they constitute applied art. The statute however incorporates the useful articles doctrine.[34] Mechanical or utilitarian aspects of a work cannot be protected.[35] An article is useful if it has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[36] A design of a useful article can be protected as a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[37] This is the central copyright dilemma for fashion designs; even though an item of apparel may be wildly innovative and fantastical, like the McQueen dress, it has ultimately been made to be worn and is thus always useful.

In *Mazer v. Stein*, the Supreme Court first set forth the separability requirement.[38] At issue in that case were statuettes that formed the bases for table lamps.[39] The Court held these were copyrightable, even though they have a utilitarian function, to ensure that an article that would otherwise be copyrightable does not forfeit copyright protection merely because it forms part of a useful article.[40] In subsequent decisions, courts have held that fashion patterns or

[31] Steff Yotka, *A Look Back at Some of Alexander McQueen's Most Beloved and Beautiful Rose Creations*, VOGUE.COM (Dec. 4, 2019), https://www.vogue.com/slideshow/alexander-mcqueen-rose-dresses.
[32] *Id.*
[33] 17 U.S.C. § 101.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *See generally* 347 U.S. 201 (1954).
[39] *Id.* at 218–19.
[40] *Id.*

fabric designs are copyrightable. The Second Circuit Court of Appeals held in a case that a decorative belt buckle could be copyrighted, as the artistic features were primary and its utilitarian features subsidiary.[41] In a later case the Second Circuit held that a pattern composed of leaves, squirrels, and acorns was copyrightable and that the work was infringed, since someone viewing the plaintiff's sweaters side by side with those of the defendant could only perceive the patterns as coming from one creative source even though the defendant had slightly altered the designs.[42] Since the decision in *Mazer,* it is clear that fashion patterns or fabric designs on an article of clothing are copyrightable since that design is easily separated from the underlying useful article, namely the article of clothing.[43]

In the fashion world, *Star Athletica, LLC v. Varsity Brands, Inc.* was hailed as a landmark case.[44] The plaintiff designed, made and sold cheerleading outfits and held over 200 copyright registrations for two-dimensional designs on the surface of its outfits.[45] The designs were composed of different arrangements of elements such as chevrons, lines, curves, stripes, angles, diagonals, coloring, and shapes.[46] The defendant also marketed and sold cheerleading uniforms and the plaintiff sued for infringement of copyrights in five designs.[47] Certiorari was granted in the case to remove the uncertainty regarding the appropriate test and relevant standard when determining the separate identification and independent-existence requirements expressed in section 101 of the Copyright Act.[48]

The Court articulated a two-pronged test to determine the copyrightability of a feature incorporated into the design of a useful article. The first requirement, separate identification,

[41] *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993–94 (2d Cir. 1980).
[42] *Knitwaves v. Lollytogs*, 71 F.3d 996, 1002–1004 (2d Cir. 1995).
[43] NIMMER, *supra* note 4, § 2A.08(H)(2).
[44] Kshithija Mulam, *The Intellectual Property Implications of Star Athletica v. Varsity Brands*, CULAWREVIEW.ORG (Apr. 15, 2019), https://www.culawreview.org/journal/the-intellectual-property-implications-of-star-athletica-v-varsity-brands.
[45] *Star Athletica*, 137 S. Ct. 1002 at 1007 (2017).
[46] *Id.*
[47] *Id.*
[48] *Id.*

only demands that a feature is present that can be perceived as a two- or three-dimensional pictorial, graphic or sculptural work.[49] The second requirement, independent existence, is met where "the separately identified feature has the capacity to exist apart from the utilitarian aspects of the article."[50] Sections 106(1) and 113(a) of the Copyright Act were concluded to clearly show that a pictorial, graphic or sculptural work benefited from copyright protection, irrespective of whether it constituted a freestanding piece of art or a feature of a useful article.[51] From this, the Court formulated the relevant test, ruling that "a feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium."[52]

The Court held that the design on the cheerleading uniforms met the standards imposed by the two-pronged test and thus were copyrightable.[53] The arrangements of the chevrons, colors, stripes and shapes possessed pictorial, graphic, or sculptural qualities that could be separated from the uniform and placed on another medium as two-dimension works of art and the conceptual removal of the design did not lead to replication of the uniform.[54] The Court made clear that physical separability, *i.e.*, the ability to "physically separate [a feature] from the article by ordinary means while leaving the utilitarian aspects of the article completely intact", was not necessary; rather the useful article does not have to remain whole and useful after separation.[55] Conceptual separability, *i.e.* separation is possible, even if not by ordinary means, is sufficient.[56]

[49] *Id*. at 1010.
[50] *Id.*
[51] *Id.* at 1011.
[52] *Id.* at 1012.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 1013–14.
[56] *Id*.

Various commentators argue that the *Star Athletica* decision does not have as much an effect in the fashion industry as it would first seem, as it does not expand copyright protection, but merely reiterates the state of existing copyright law.[57] As regards the rejection of the idea of a physical separability and holding that conceptual separability is sufficient, the Court in *Star Athletica* merely repeated what it had held in *Mazer*.[58] Further, in *Star Athletica* the design was not simply placed on the uniform, but rather the design was created from many individual pieces of fabric of different colors that were sewn together to produce the decorative designs.[59] The Court in *Star Athletica* had, however, emphasized that the shape, cut and physical dimensions of the cheerleading uniform were ineligible for copyright protection.[60] This finding leads to the odd situation that because the design was composed of pieces of fabric sewn together to create the design and not, for example, screen-printed onto the uniform, the district court on remand could find that the design is the uncopyrightable shape, cut and dimension of the outfits.[61] The decision effectively reemphasizes that fabric designs or fashion patterns can be copyrighted, but does not expand protection to include, or even really address, fashion designs.

C. Legislative Attempts at Enacting Protection for Fashion

Throughout the years, numerous bills intended to provide fashion designs legal protection have been introduced. Particularly noteworthy are the Design Piracy Prohibition Act ("DPPA") and the Innovative Design Protection and Piracy Prevention Act ("IDPPPA").

---

[57] Baloga, *supra* note 9, at 273; Mulam, *supra* note 43; Jared Schroeder and Camille Kraeplin, *Give Me A ©: Refashioning the Supreme Court's Decision in* Star Athletica v. Varsity *Into an Art-First Approach to Copyright Protection for Fashion Designers*, 26 UCLA ENT. L. REV. 19 (2019); Eleanor M. Lackman, *Cartwheeling through Copyright Law: Star Athletica, L.L.C. v. Varsity Brands, Inc.: The Supreme Court Leaves as Many Open Questions as It Provides Answers about the Viability and Scope of Copyright Protection for Fashion Designs*, 107 TRADEMARK REP. 1251, 1252 (2017).
[58] *See* Baloga, *supra* note 9, at 273-74.
[59] *Id.* at 275–76 (citing Reply Brief for the Petitioner at 32–33, Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017) (No. 15-866) (discussing Varsity's cut-and-sew cheerleading uniforms)).
[60] *Star Athletica*, 137 S. Ct. at 1013.
[61] Baloga, *supra* note 9, at 277.

Although all such legislative attempts have thus far failed, particularly out of expressed concerns of enabling anticompetitive monopoly creation,[62] a discussion of these bills is imperative to understand why fashion designs merit protection.

On March 30, 2006 the DPPA was introduced to Congress by Congressman Robert Goodlatte. [63] The DPPA aimed to protect designers by amending the Copyright Act to include protections for fashion designs.[64] Fashion design was defined as "the appearance as a whole of an article of apparel, including its ornamentation; and original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel."[65] However, the copyright term was seen as too long. As noted, the production life cycle for fashion designs is quite short; usually a design becomes fashionable and passes out of fashion within a few months. Therefore, the DPPA provided for a shorter period of protection, three years.[66] Registration of the design was a prerequisite to enforcement and provisions concerning infringement were delineated.[67] The DPPA failed due to a lack of support from the American Apparel & Footwear Association ("AAFA") and from Congress, even though it received substantial support from the New York's Council of Fashion Designers of America ("CFDA") and several famous designers.[68]

The IDPPPA, in contrast, had the support of both the AAFA and the CFDA.[69] Senator Charles Schumer introduced the IDPPA to Congress on August 5, 2010.[70] Similar to the DPPA,

[62] Maria Laurato, *Copyright on the Catwalk: Extending Protection to Fashion in Light of Advancing Technology*, 6 SAVANNAH L. REV. 42, 52 (2019).
[63] INTRODUCTION OF THE DESIGN PIRACY PROHIBITION ACT, 101st Cong., 152 Cong. Rec. E472, 472–473 (2006).
[64] *See generally* DESIGN PIRACY PROHIBITION ACT, H.R. 2196, 111th Cong. (2009).
[65] H.R. 2196, 111th Cong. §2(a).
[66] *Id.* at §2(d).
[67] *Id.* At §2(e).
[68] Laurato, *supra* note 62, at 53.
[69] *Id*.
[70] 156 CONG. REC. S6886, 6893.

it broadly defined "apparel",[71] protected fashion designs,[72] had a term of three years and included an independent creation defense against an infringement claim.[73] However, the IDPPPA did away with the registration requirement; included a home sewing exception, which allowed an individual to produce a single copy of a protected design for personal use as long as it is used for non-commercial purposes; implemented a "substantially identical" standard, which allowed the copying of a design that is not substantially identical in overall visual appearance to the original elements of the protected design; and required pleading with particularity for an infringement action.[74] Ultimately the IDPPPA failed in Congress out of concern that the fashion cycle would be slowed by the regulation and protection of fashion designs, the "fast fashion" market would be destroyed, and prices would dramatically increase, hurting the consumer.[75]

II. Current Protection in the European Union

Fashion designs enjoy much greater protection in the E.U. than in the U.S. Preliminarily, it is important to understand the two primary forms of E.U. legislation that are relevant to this discussion. First, there are regulations, which directly apply to all Member States generally and are binding in their entirety.[76] Second, there are directives. These

[71] Apparel under the DPPA was defined as "an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear; handbags, purses, wallets, duffel bags, suitcases, tote bags, and belts; and eyeglass frames." H.R. 2196, 111th Cong. §2(a).
[72] Fashion design meant "…the appearance as a whole of an article of apparel, including its ornamentation; and includes original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel." H.R. 2196, 111th Cong. §2(a).
[73] INNOVATIVE DESIGN PROTECTION AND PIRACY PREVENTION ACT, S. 3728, 111th Cong. § 2(a),(d),(e) (2010).
[74] *Id*. at § 2(b),(e),(f),(g).
[75] Laurato, *supra* note 62, at 54.
[76] CHRISTIAN CAMPBELL, 4 SMIT & HERZOG ON THE LAW OF THE EUROPEAN UNION § 288.06 (Matthew Bender, Rev. Ed., 2020).

directives are binding as well, but only as to the result that is to be achieved. The choice of form and method of implementation is left to the sovereign discretion of each Member State.[77]

A. The Current State of European Union Copyright Law

As regards copyright law, there has been little harmonization.[78] Certain directives have been passed, such as the InfoSoc Directive, the Database Directive, and the Term Directive,[79] but none of these are relevant to fashion designs and patterns. No E.U.-wide protection under copyright law exists; rather each Member State determines whether fashion designs and patterns are protected.[80]

B. The Community Design System[81]

Contrastingly, in the area of design law, there has been significant harmonization. In 2002 a design-protection system was implemented with the Council Regulation 6/2002, of 12 December 2001 on Community designs 2001 O.J. (L003) (EC) ("Regulation"), which provided uniform design protections in all Member States.[82] The purpose of the system lies not only in subduing piracy and counterfeiting, but also in promoting creation and innovation by making design protection in the whole of the E.U. easier by providing a single application system.[83]

A design is defined as "the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the

[77] ROSIE BURBIDGE, EUROPEAN FASHION LAW: A PRACTICAL GUIDE FROM START-UP TO GLOBAL SUCCESS 19 (2019).
[78] *Id*. at 56.
[79] Council Directive 2001/29, 2001 O.J. (L167) (EC); Council Directive 96/9, 1996 O.J. (L77) (EC); Council Directive rights 2006/116, 2006 O.J. (L372) (EC).
[80] *See* BURBIDGE, *supra* note 77, at 57–58.
[81] Although this is not a formal name, the system in place is often referred to as the Community design system. *Cf.* European Union Intellectual Property Office, *Community design legal texts*, EUIPO (Page last updated Mar. 30, 2021), https://euipo.europa.eu/ohimportal/en/community-design-legal-texts.
[82] Council Regulation 6/2002, 2001 O.J. (L003) 1, Recital 8 (EC).
[83] *See* HOGAN, *supra* note 28, at § 5:2.

product itself and/or its ornamentation."[84] A design can be protected if it stands on its own or if it is incorporated into a product, if it is new and has individual character.[85] Thus, a design on or of an article of clothing or accessory could be protected. Novelty exists if no identical design has been made available to the public before the date on which the design for which protection is claimed has first been made available to the public in the case of an unregistered design, or before date of filing or priority in the case of a registered design.[86] The existence of novelty is considered by making a worldwide assessment, under the caveat that those designs will not be considered that "could not reasonably have become known in the normal course of business."[87]

If the overall impression a design produces on the informed user differs from the overall impression produced on such a user by any design previously existing, it has individual character.[88] In considering the individual character of a design, the nature of the product, the industry to which it belongs, and the designer's freedom in developing the design are considered.[89] The design is considered in its entirety and purely functional elements are not protectable.[90] In the case of a registered design this decision is reexamined by the European Union Intellectual Property Office if invalidity proceedings are brought, or by a Community design court on the basis of a counterclaim in infringement proceedings.[91] In the case of unregistered design this determination is made by a Community design court on application to such a court or on the basis of a counterclaim in infringement proceedings.[92] It seems that the more creative a design, the more likely it will be deemed protectable. Designs that are contrary to public policy or accepted principles of public morality are not protectable.[93] If all these

[84] Council Regulation 6/2002, at art. 3(a), 2001 O.J. (L003) 1, 4.
[85] *See id.* at art. 4.
[86] *Id.* at art. 5.
[87] *Id.* at art. 7; HOGAN, *supra* note 82, at § 5:2.
[88] Council Regulation 6/2002, at art. 6(1).
[89] *Id.* at Recital 14, art. 6(2).
[90] *Id.* at art. 8; Case C-345/13, *Karen Millen Fashions Ltd. v. Dunnes Stores*, ECLI:EU:C:2014:2013, ¶ 35 (Jun. 19, 2014) (holding that the overall impression of the entire design must be compared and not individual aspects).
[91] Council Regulation 6/2002, at arts. 24(1), 25(1)(b).
[92] Council Regulation 6/2002, at arts. 24(3), 25(1)(b).
[93] *Id.* at art. 9.

requirements are met, the holder of a Community design possesses the exclusive right "to use the design concerned and to prevent any third party from using it anywhere within the European Union."[94]

Registration of the design is not required, but it does provide additional protection. Unregistered designs have three years of protection from the date the design was first made available to the public in the EU.[95] In contrast, registered designs receive an initial five-year term of protection, with the possibility of four successive five-year renewal terms, such that the maximum term of protection can amount to twenty-five years.[96] Furthermore, unregistered designs are protected merely against deliberate copying, whilst registered designs are additionally protected against the independent development of similar designs.[97] Additionally, registered designs are presumed to be valid, whereas in the case of an unregistered design evidence must be produced that the design qualifies for protection under the Regulation.[98]

In order to determine whether there has been infringement, the overall commercial impression of the two designs is compared from the perspective of an informed user.[99] The informed user possesses general knowledge of the product or industry to which the product belongs.[100] The later design infringes, except where the defendant can prove independent creation, in the case of an unregistered design,[101] or where the defendant can avail themselves of fair use exceptions for personal, educational, and experimental uses or a prior use defense, where the design was used in good faith prior to filing.[102] The remedies available to a right holder include injunctions throughout the E.U. prohibiting the sale of infringing goods, orders seizing infringing product, damages or products used to make infringing products as well as

[94] *Id.* at art. 19(1), (2).
[95] *Id.* at art. 11, 1.
[96] *Id.* at art. 12.
[97] *Id.* at art. 19(1), (2).
[98] *Id.* at art. 85(2).
[99] *Id.* at art. 10.
[100] HOGAN, *supra* note 83, at § 5:2.
[101] *Id.*
[102] Council Regulation 6/2002, at arts. 20, 22.

sanctions as determined by the laws of the member country in which the infringement transpired.[103]

III. Current Protection in Germany

In Germany, both copyright law and design law must be considered when discussing the legal protections available to fashion designs and patterns. German copyright law is regulated in the German Act on Copyright and Related Rights of 1965 ("UrhG").[104] German design law is laid down in the German Act on the Legal Protection of Designs of 2004 ("DesignG").[105]

A. German Copyright Law

According to UrhG section 2 para. 2, a work must be the product of a person's own intellectual creation (*persönliche geistige Schöpfung*) to be protectable.[106] A work is a person's creation if it is created by a human (*persönliche Schöpfung*).[107] There must be some form of communication intended by the work (*geistiger Inhalt*).[108] The work must be perceptible to some extent, though it does not need to be fully completed nor permanently fixated (*wahrnehmbare Formgestaltung*).[109] Unlike in most countries, there is no requirement of fixation.[110] The work must be the product of an author's intellect, of their individuality (*Individualität*).[111] The greater the scope of creative leeway available, the greater the likelihood

[103] *Id.* art. 89.
[104] Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sep. 9, 1965, BGBl. I at 2014 (Ger.), https://www.gesetze-im-internet.de/englisch_urhg.
[105] Designgesetz [DesignG] [Act on the Legal Protection of Designs], Jun. 1, 2004, BGBl. I at 2541 (Ger.), https://www.gesetze-im-internet.de/englisch_geschmmg.
[106] UrhG § 2 para. 2.
[107] As distinct from a work created by a machine, by an animal or something that already existed. Winfried Bullinger in: Wandtke/Bullinger UrhG, 5th ed. 2019, § 2 recital 15 (Ger.).
[108] Gernot Schulze in: Dreier/Schulze UrhG, 6th ed. 2018, § 2 recital 12 (Ger.).
[109] Bullinger, *supra* note 107, § 2 recital 19.
[110] *Cf. id.* at § 2 recital 20.
[111] *Id.* at § 2 recital 21.

that this requirement will be found to be fulfilled.[112] It does not matter whether the work is objectively original compared to existing works.[113] The work must be subjectively new, which is the case where the author has independently created the work, even if it is identical to previously existing works.[114]

The enumerated list of works is not exhaustive, so fashion designs and patterns can be protected without falling into a specific category, although they are categorized as artistic works, in particular works of applied arts.[115] A work is artistic if it has some visual intellectual content in two- or three-dimensional form, manifested through means of expression such as colors, lines, planes, volume and surface area.[116] It must be a personal creation, produced by using artistic means of depiction through a formative process and intended primarily for the aesthetic stimulation of the emotions through contemplation.[117] Traditional fine art (*reine bildende Kunst*) easily meets these requirements. Applied art (*angewandte Kunst*), is different from fine art in that such works are useful and produced differently, *e.g.*, in an industrial manner or as a series.[118]

In the case of useful articles, the question arises whether there is sufficient individuality in their design. In the *Geburtstagszug* case the Federal Court of Justice (*Bundesgerichtshof*) held that copyright protection is to be denied if the design is based solely on technically or functionally conditioned features, *i.e.*, its aesthetic effect is due solely to the purpose of use.[119] Also, the Court held that the requirements for copyright protection of works of applied art are basically no different from the requirements for copyright protection of works of fine arts or of

[112] *Id.* at § 2 recital 23.
[113] *Id.* at § 2 recital 21a.
[114] *Id.* at § 2 recital 22.
[115] *Cf.* UrhG, § 1, no. 4.
[116] Bullinger, *supra* note 107, § 2 recital 81.
[117] Schulze, *supra* note 108, § 2 recital 150.
[118] *Id.* at § 2 recital 158.
[119] Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 13, 2013, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 175, 179 (2014) (Ger.)
[119] *Id.*

literary and musical creations.[120] It is sufficient that they reach a level of creativity which, in the opinion of those who are art enthusiasts and reasonably familiar with artistic opinions, justifies speaking of an artistic contribution.[121] The case dealt with a colorful wooden, birthday toy train on which candles and different numbers could be positioned.[122] The plaintiff had drawn the designs for this toy that the defendant then produced and successfully sold.[123] The plaintiff then sued the defendant, *inter alia*, for payment or an additional appropriate compensation.[124] The plaintiff's claim was denied by the lower courts, but the Federal Court reversed and remanded the case for new decision.[125] Thus, in principle, it is irrelevant whether the work serves a practical purpose in addition to its aesthetic purpose. Nonetheless, the appellate court, Higher Regional Court (*Oberlandesgericht*) Schleswig, held that the toy train did not qualify as a protectable work, because the plaintiff's design was modeled on a preexisting design which it only slightly modified and because the design largely incorporated technical features that made the train have a specific purpose, namely use as a birthday train, and that idea itself is not protectable.[126]

The Federal Court decision, however, brought about a change in German copyright law. For a long time, in the case of applied art, courts had a higher standard for determining the presence of sufficient individuality of a design, especially where the design could be protected under design law.[127] This change was largely justified in the decision with the amendment of the old German Design Act in 2004 to produce the now existing DesignG.[128] The court held

[120] *Id.* at 177.
[121] *Id.*
[122] *Id.* at 175.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[125] *Id.*
[126] Oberlandesgericht [OLG] [Higher Regional Court] Schleswig, Sep. 11, 2014, Multimedia und Recht [MMR] 49, 50-51 (2015) (Ger.).
[127] Schulze, *supra* note 108, § 2 recital 160.
[128] NJW 175, 178-179 (2014).

that the reform of this law created a separate industrial property right, such that a tiered relationship between copyright and design law no longer existed.[129]

To determine what is protectable, it must be determined, on the one hand, what part of the design is based on the function and the intended purpose of the article and a technically conditioned feature and, on the other hand, to what extent creative leeway exists that is not technically predetermined and whether use was made of that creative room.[130] When both of these things have been determined, a decision can be made as to whether a sufficient artistic contribution exists that merits protection. Only this creative, artistic contribution may be protected, not the technical variation.[131]

As regards fashion designs, protection thereof is possible under German copyright law.[132] In a 2001 decision, a regional court held that the dress of the plaintiff dress-designer was a protected work, since the resulting dress and the way the fabric was draped was new and an unconventional image and unusual fabric were used on the dress.[133] It did not matter that this style of dress was typical for a designer, because even dresses that are produced in greater numbers can be protected under copyright.[134] However, copyright protection has been denied for fashion designs in most cases, in favor of protection under unfair competition law, as a fashion innovation (*Modeneuheit*) for one to two seasons or because of avoidable origin deception (*vermeidbare Herkunfstäuschung*), if the design is older than two years.[135] Copyright protection has, however, generally only been recognized for and afforded only to unusual or eccentric designs, such as Haute Couture.[136]

---

[129] *Id*; DesignG, *supra* note 104.
[130] Schulze, *supra* note 108, recital 160.
[131] NJW 175, 179 (2014).
[132] Schulze, *supra* note 108, recital 170.
[133] Landgericht [LG] [Regional Court] Leipzig, Oct. 23, 2001, Zeitschrift für Urheber- und Medienrecht [ZUM] 315, 316 (2002) (Ger.).
[134] *Id.* at 317.
[135] BGH, Nov. 6, 1997, GRUR 477, 478 (1998); BGH, Nov. 10, 1983, GRUR 453 (1984); BGH, Jan. 19, 1973, GRUR 478, 479 (1973); BGH, Dec. 14, 1954, GRUR 445, 446 (1955).
[136] Bullinger, *supra* note 107, § 2 recital 101. Haute Couture garments are those that are made as one off pieces for a specific client and specific requirements must be fulfilled to qualify as an official Haute Couture house.

B. German Design Law

The 2004 DesignG implemented the European Community Directive on the legal protection of designs.[137] Since 2002, Regulation 6/2002 exists autonomously beside the DesignG.[138] In the area of applied art, as previously indicated, copyright and design law may apply interchangeably.

Two-dimensional or three-dimensional designs, or a design applied to or incorporated in a product of an industrial or handcrafted item, including packaging, get-up, graphic symbols, typographic typefaces, and parts intended to be assembled into a complex product, are protectable under the Act.[139] The design or product must be registered, new and have individual character.[140] Novelty is given if prior to the date of filing the registration no identical design was disclosed.[141] If the overall impression produced by a design on the informed user is distinct from the overall impression produced on such a user by any design disclosed before the filing date, then the design has individual character.[142] The freedom of the designer in developing the design is considered when assessing individual character.[143] Designs that lay in the features of appearance of products that are exclusively determined by their technical function are not protectable.[144] In the case of fashion patterns, this does not pose an issue. However, fashion designs are to an extent determined by their technical function. To be protectable, the design would have to go beyond this function.

Camilla Morton, *Fashion A-Z, Haute Couture*, BOF, https://www.businessoffashion.com/education/fashion-az/haute-couture (last visited May 6, 2021).
[137] Bullinger, *supra* note 107, § 2 recital 98; Council Directive 98/71, 1998 O.J. (L289) 28 (EC).
[138] Bullinger, *supra* note 107, § 2 recital 98.
[139] DesignG § 1 no. 1, no. 2, no, 3.
[140] *Id.* at § 2 para. 1.
[141] *Id.* at § 2 para. 2 sentence 1.
[142] *Id.* at § 2 para. 2 sentence 2.
[143] *Id.* at § 2 para. 2 sentence 3.
[144] *Id.* at § 3 para. 1 no. 1.

The provisions do not substantially differ from the E.U. Regulation. The key difference between design protection under E.U. law and German law lies in the fact that only registered designs are protectable under the DesignG.[145] For unregistered designs the design holder must rely on the Regulation that affords three years of protection.[146] Registered designs in Germany are protected for twenty-five years from the date of filing at the outset and are not renewed or renewable.[147]

IV. What is the Best Approach for the U.S.?

This discussion of design and copyright law in the U.S., the E.U., and Germany raises the question: What approach best suits the protection of fashion designs and patterns in the U.S.? Is there sufficient protection provided or would the fashion industry benefit from additional protection? What can be learned from the regimes applied across the Atlantic? Economic, policy, practical and comparative arguments must be considered in suggesting the best approaches.

A. Arguments For and Against Protection

In the case of fashion, many emphasize that design piracy is an established part of the fashion industry. Without the possibility of copying innovation, growth and creativity would come to a standstill or at least slow down significantly (so-called "design piracy paradox").[148] From an economic standpoint, it is argued that an increase in competition is promoted if legal protection is denied.[149] If popular designs are subject to copying, the result is an increase in competition, more goods are available on the market, and prices drop, ultimately benefiting the

[145] *See id.* at § 27 para. 1.
[146] Council Regulation 6/2002, at art. 11, 1.
[147] DesignG § 27 para. 2.
[148] Laurato, *supra* note 62, at 51.
[149] *Id.* at 43.

consumer.[150] These arguments, however, do not take into account that technological advancements make it easier to copy.[151] A fashion designer can bring out a collection in a runway fashion show that can be viewed live from anywhere in the world, enabling fast-moving fashion companies to almost instantaneously begin copying and mass-market reproducing, to the financial detriment to the designers of the original works.[152] Copying reduces the value of a brand and also leads to a loss in sales.[153] Current copyright law is not equipped to address this situation.

Another point that must be recognized and remembered is that clothing and accessories have intrinsic utilitarian purposes: The wearer is protected from the elements, modesty can be maintained by using clothes to cover one's body, and the wearer can creatively express their style and use apparel and patterns to decorate their body.[154] The protection of useful articles should not lead to the inhibition of their useful purpose. Nonetheless, other useful articles, such as architectural works, are protected by copyright.[155] Before the U.S. Copyright Act was amended in 1990 to include architectural works, only blueprints—comparable to fashion sketches—enjoyed protection as pictorial, graphic, and sculptural works, but the buildings erected on the basis of the blueprints did not, just as garments made from design sketches are not protected.[156] Even though protection for architectural works was introduced by Congress, new buildings continue to be designed and erected. No standstill in innovation and creativity has occurred.

It might also be argued that perhaps it is best if the fashion industry itself puts measures in place to hinder copying.[157] This self-regulation can be achieved by promoting registration

[150] *Id.*
[151] *Id.*
[152] Manfredi, *supra* note 6, at 118-119.
[153] Laurato, *supra* note 62, at 51.
[154] HOGAN, *supra* note 28, at § 4:2.
[155] 17 U.S.C. § 102(a)(8).
[156] HOGAN, *supra* note 28, at § 4:4.
[157] *Cf. id.* at § 4:2.

and advocating that retailers refrain from supporting copyists.[158] This type of self-regulation was attempted by the American fashion industry in 1932.[159] Fifteen manufacturers of high-quality, costly dresses established the Fashion Originator's Guild of America, and put in place a system of registration for fashion designs. Ultimately, the Fashion Originator's Guild, and all similar associations created to prevent copying in the fashion industry failed because the Supreme Court held the agreements between the Guild and the retailers promoted unfair competition and established a monopoly in violation of the relevant anti-trust acts.[160]

Hopefully, it has been made sufficiently clear in this paper that protection of fashion patterns is much more easily obtained than protection for fashion designs is. *Star Athletica* teaches that patterns enjoy copyright protection if the graphic design is separately identifiable and capable of (conceptually) existing independently.[161] Fashion designs, however, do not meet the conceptual separability standard. This concept was demonstrated in a case before a federal court in New Jersey, where the court held that the cutout holes of a banana costume solely served the utilitarian function of wearability, but the length, shape, color, and lines were unique and resulted from artistic and stylistic choices.[162]

Furthermore, as illustrated in part I.A. of this paper, the argument that other forms of intellectual property protection that sufficiently protect fashion designs arise from trade dress, trademarks, and design patents is weak. Aside from the issues with these modes of intellectual property protection in the context of fashion design highlighted there, it is worth noting that trademark protection might also lead to a decrease in the creation of innovative designs, as a fashion designer may fear that they cannot obtain legal protection if an item is not covered in logos.[163]

---

[158] *Id.*
[159] *Id.*
[160] Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941).
[161] *See Star Athletica*, 137 S. Ct. 1002 at 1008 (2017).
[162] *Silvertop Assocs., Inc. v. Kangaroo Mfg.*, 319 F. Supp. 3d 754, 763–765 (D.N.J. 2018).
[163] Laurato, *supra* note 62, at 49.

The existing regimes promulgated by the E.U. and by Germany support the provision of some form of intellectual property protection in the U.S. It does not seem that the implementation of the design system in the E.U. has negatively affected the growth of the fashion segment.[164] In particular, the short terms of protection, in particular as compared to the term for copyrights, better meet the needs of the fashion industry. It could be argued that due to the short length of fashion cycles, even the term of three years effectively amounts to a monopolization of a design, since after that time it is no longer relevant. This, however, does not take account of the fact that variations of designs can be used. Designs are not taken out of the available creative commons for too long, especially in the case of unregistered designs. Further, the E.U. and German regimes greatly promote dissemination of designs for the benefit of the public at large. If a design is not made available to the public, alternative causes of action must be explored, *e.g.*, misuse of confidential information or other trade secrets laws.[165] If, however, a design is copied or misused before it is made available to the public, as in the case where a new dress design is leaked before it is premiered and falls victim to trade-secrets theft or computer hacking, the unregistered design right is not triggered unless or until it is disclosed in its original form, as an unregistered community design only exists from the date of first public disclosure.[166] Trade secret protection and misuse of confidential information, however, do not promote dissemination of designs and only provide protection for the very limited amount of time a design is secret.

The E.U. Community design system provides designers with the freedom to choose the extent of the protection they wish to have. Where a designer considers a design to be one that

[164] In 2007, 7,421 designs were registered by the E.U. Office for Harmonization in the Internal Market, mostly for accessories. In the case of clothing unregistered designs seem to be preferred to deal with counterfeiting, due to the short amount of time fashion seasons last. Fridolin Fischer, *Design law in the European fashion sector*, WIPO MAGAZINE (Feb. 2008), https://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html.
[165] Burbidge, *supra* note 77, at 86.
[166] *Id.*

will potentially be highly successful, they are able, and more likely, to register their design.[167] If the fashion designer finds that their fashion design is ephemeral and likely only to be a short-lived trend, they can choose to not register their items and instead invest their time and money in the creation of new designs.[168]

The fluidity between copyright and design in Germany is particularly interesting. In practice, most courts have not recognized copyright protection for garments and accessories.[169] Nonetheless, the possibility is there and the decision as to copyrightability takes account of the opinions experts in the fashion industry would have, even if the design sought to be protected is useful. Germany, the E.U., and the U.S. all deal with the issue of useful articles. However, it appears to be that the standard in the U.S. is by far the strictest of these three and no other viable and accessible method of protection is available to a fashion design in the U.S.

B. A Mixed Approach

As regards fashion designs, it seems that some form of protection should be afforded. Allowing copying does not support innovation, merely the reproduction of more of the same thing. Creativity can result when an older, existing design is taken and from that basis, someone else creates something new. Yet, only that additional, new design innovation is deserving of protection. From the perspective of the experience in the E.U. and Germany, it is apparent that any protection provided must be limited in term. Given the rapid innovation in the fashion industry and the shortness of a fashion cycle, a term of around one year seems to be appropriate

[167] *See* example in Design Protection, YOUR EUROPE, https://europa.eu/your europe/business/running-business/intellectual-property/design-protection/index_en.htm (last visited Mar. 26, 2021).
[168] Fischer, *supra* note 164.
[169] *Supra* note 135.

for most fashion designs.[170] Such term would prevent undue hindrance of competition or harm to the consumer.[171]

Additionally, a dual system of unregistered and registered designs seems to provide the flexibility needed by the fashion industry. An option to register a design, with the possibility to extend the term of use, allows designers of celebrated and coveted items to establish a strong connection with the consumer and also serves notice to fast-moving fashion copyists that a design is protected.[172] The protection should be extendable up to a total term of ten to twenty years. These numbers are somewhat arbitrary, but a decade seems appropriate, particularly since decades are often used to describe specific fashion trends.[173] However, if a designer is unsure of how successful a design will be, they will still have some protection, although it should be to a lesser extent and the term should not be extendable, similar to the scheme in the E.U.

Fashion designs and the meaning of apparel should be expressly defined, and the design definition should be modeled after the definition in the E.U. Regulation. The requirements of originality, independent creation, and fixation should apply to prevent the protection of commonplace or otherwise non-copyrightable designs.[174] The more creative that pieces are, the more likely it will be that an item of apparel will be found to be original. Accomplishing originality is arguably easier in the case of Haute Couture than seasonal fashion pieces.[175] It would be invaluable to have some sort of panel of fashion experts that expresses the views of the industry and determines whether a design is truly unique, similar to the way individuality

[170] Manfredi, *supra* note 6, at 149. It should be noted that Manfredi argues only for the protection of haute couture designs, however, many of the ideas and recommendations expressed by Manfredi can arguably be applied to fashion designs in general.
[171] *Id.*
[172] *Id.* at 144.
[173] Looking at fashion from the past by limiting the view to a decade, for example, 60s, 70s or 2000s fashion trends, is quite common. *See*, *e.g.*, Amanda Krause, *The fashion trends that were all the rage the year you were born*, INSIDER (Sep. 16, 2020, 4:23 PM), https://www.insider.com/popular-fashion-trends-history-us-2019-2.
[174] Manfredi, *supra* note 6, at 145.
[175] *Id.*

of an article of applied art is assessed in Germany, as determining whether a piece merits protection is a difficult proposition.[176] The panel could make this decision upon registration or, in the case of an unregistered design, at the moment of litigation.

Any sort of attempt at legislation, whether it be amending the Copyright Act or introducing *sui generis* protection, should include these elements. The biggest concern with the protection of fashion designs lies in the creation of an indefinite monopoly.[177] By limiting the term of protection and observing some form of an originality standard, akin or identical to the one already applicable in U.S. copyright law, these concerns may be effectively addressed.

Conclusion

Fashion may be considered art, but articles of fashion are and always will be intrinsically utilitarian products.[178] This is apparent whether one looks to U.S. copyright law, E.U. design law, or German design and copyright law. All these regimes aim to find an appropriate balance between promoting creation and innovation, protecting creative works, and preventing useful articles from becoming unusable as a result of over-protection. The legal systems explored in this paper all grant fashion patterns adequate protection, made particularly clear in the U.S. following the *Star Athletica* decision.[179]

Regarding the protection of fashion designs, however, the U.S. is eclipsed by the E.U. and Germany. The shape, cut and physical dimensions of clothing items are currently ineligible for copyright protection.[180] Previous attempts at providing legislated protection to fashion designs have failed, particularly out of concern that the proposed term was too long, the turnover in the fashion world would be slowed, monopolization facilitated, and that the

[176] *Cf. id.* at 148.
[177] *See* Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941).
[178] *Cf.* Schroeder, *supra* note 57, at 26.
[179] *Star Athletica*, 137 S. Ct. 1002 at 1012 (2017).
[180] *Id.* at 1013.

consumer would ultimately bear the cost of protection.[181] These fears are partially unreasonable, since there has been no apparent detrimental effect to the fashion industry in the E.U. where protection is afforded to fashion designs, and insofar as they remain, they can be addressed in legislation.

To ensure that fashion designs are sufficiently, but not over-extensively protected in the U.S., it is important that protection be expressly granted by legislation. This legislation should not include a term that is overly long, but one that is compatible with the relatively quick innovation cycles prevalent in the fashion world. A term of approximately one year appears appropriate. If a work is registered and enjoys popularity, it should be possible to extend the term of protection for a limited number of years. To ensure that only true innovations are protected, the opinions of fashion experts should form part of the decision as to the originality of the design. Keeping these principles in mind will allow for legislation that provides for the protection of fashion designs while also addressing the trepidation expressed against protection. Clothing and accessories are a central form of creative expression and are part of everyone's lives. Protection of the underlying designs is possible, and the U.S. is far past being fashionably late to introducing fashion design protection.

[181] *See* Laurato, *supra* note 62, at 53–54.