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Fashion Design Piracy: An Issue of Intellectual Property or Economic Impact?

Vendela Dente
Fordham University

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NOTE

FASHION DESIGN PIRACY: AN ISSUE OF INTELLECTUAL PROPERTY OR ECONOMIC IMPACT?

*Vendela Dente**

Currently, United States law offers no fashion design protection against design piracy. The fashion industry profits from pioneering creative content; yet, this content lies outside the domain of intellectual property law. Fashion designs are inevitably undervalued by consumers and the industry due to the lack of protection of original designs for the benefit of the industry's monetary value. Fashion design can be protected under copyright, trademark and patent law but these laws provide ambiguity and strict requirements for fashion labels. This Note will discuss the effects of fashion piracy both on innovation and the fashion industry's bottom line.

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I. INTRODUCTION

Clothing is no longer limited to hygienic or protective purposes. Our apparel defines our individual identities and enables our personal expression by highlighting our personality. It is the responsibility of fashion designers across the United States to provide the consumers with original designs to enhance their personal identity. The United States protects musicians, artists, and filmmakers so thoroughly that even a child can be sued for distributing

* B.A. Candidate for International Political Economy, Anthropology and Business Law and Ethics, Fordham College at Rose Hill, Class of 2021. I am honored to be granted the opportunity to be a part of the Fordham Undergraduate Law Review as a Staff Writer. I look forward to the many years in which other undergraduates at Fordham University with a passion in the legal field get to express and share their ideas amongst their peers. I would like to personally thank the Editorial Board for their support and assistance from start to finish.

music on the internet.⁹⁷ Yet, the United States does not see the need to provide equal protection for the designs that fashion designers create.

While design piracy does have some beneficial monetary impact, it directly harms fashion designers. The fashion industry in 2017 was valued at \$391.7 billion.⁹⁸ Self-employed fashion designers make up 24 percent of the 25,800 jobs in the industry.⁹⁹ The median annual income for fashion designers was \$72,720 in May 2018.¹⁰⁰ The highest 10 percent earned more than \$155,470 while the lowest 10 percent earned less than \$36,420.¹⁰¹ Smaller fashion label owners and new designers are especially vulnerable to the detrimental effects of design piracy from the lack of protection under the law and the lack of funds to form suits against design piracy.¹⁰² Since larger businesses recognize the advantage they have over smaller businesses with regard to design piracy, there is little to deter them from copying the designs of smaller labels. Therefore, a new or smaller designer may face a loss of credibility with customers, a decline in the original design value, and ultimately lose their brand.

Congress has been hesitant to protect fashion design due to its contributions to the economy. They believe that if the designs become protected, it will inevitably stunt the growth of the GDP.¹⁰³ The more protection a design has the less widespread the design will be throughout the market, especially in popular low-cost brands. Yet, this lack of protection prevents new and smaller designers from gaining proper recognition for their brands. A decrease in innovation amongst the industry will result from this circumstance due to hesitation and weakened motivation of new designers to share their creative content.

Protection under United States law for fashion design would allow for smaller and newer designers to present suits against design piracy because their design rights would be undeniably established. Other countries have become increasingly aware of the detriments to the fashion industry with little

⁹⁷ See *12-Year-Old Settles Music Swap Lawsuit*, CNN.COM, Feb. 18, 2004, at <http://www.cnn.com/2003/TECH/internet/09/09/music.swap.settlement>

⁹⁸ See Eric Duncan, Topic. Apparel Market in the U.S. STATISTA.COM <https://www.statista.com/topics/965/apparel-market-in-the-us/>.

⁹⁹ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: DESIGNERS 120 (2002–03 ed.), <http://www.bls.gov/oco/ocos090.htm>.

¹⁰⁰ *Id.*, at “Pay.”

¹⁰¹ *Id.*

¹⁰² While there is no specified protection for fashion designs, particular elements of the designs can be protectable. 35 U.S.C. § 171 (2000); 17 U.S.C. § 102 (2000). The problems with the said protections are examined *infra* Part III. The high costs of litigation for these suits are probable for deterring copying by other designers.

¹⁰³ A Bill to Provide Protection for Fashion Design: Hearing Before the Subcomm. On Courts, the Internet and Intellectual Property, 109 Cong. 2 (2006).

to no protection. By comparing global intellectual property regimes and fashion designs, it is evident that the United States is falling behind other countries.

While modern French law still offers the most extensive protection to fashion design, Japan, India, and many other countries have incorporated both registered and unregistered design protection into their domestic laws. In addition, E.U. law has since 2002 provided for both three years of unregistered design protection and up to 25 years of registered design protection, measured in five-year terms. The global legal trend toward fashion design protection has rendered the U.S. an outlier among nations that actively support intellectual property protection, a position that is both politically inconsistent and contrary to the economic health of the domestic fashion industry. Congress should take these factors into account when considering a reasonable level of legal protection for fashion design.¹⁰⁴

Litigation costs would be reduced correlating to the probability of achieving sound relief. Therefore, a new fashion designer or a small label would have a higher chance of success if their design was truly pirated and they would be able to defend their rights despite lacking the financial advantage that larger designers have. As seen today in the United States, no rights are clearly defined or even exist for the protection of fashion designs.

Fashion designers, big and small, new and old, need explicit protection for their designs. In the striving nation of entrepreneurship and gratifying those for their creative and original ideas, fashion design is an industry in need of a reform. Fashion designers must be innovative and hard working to stay ahead of current in trends, and to maintain or improve their success in the competitive industry. Fashion designers work endlessly on creating innovative designs and content; thus, they should be entitled to the protection of said creations. Although differing opinions on fashion protection have their respective persuading arguments, fashion design should have some legal protection. Art, music, and many other creative industries are protected by the United States law; therefore, the fashion industry should be protected in the same respect.

II. DESIGN PIRACY

Fashion designers lose hundreds of millions of dollars per year from design piracy.¹⁰⁵ Blatant design copying occurs very often. Design pirates will send their designers to fashion shows to sketch the apparel on the

¹⁰⁴ A Bill to Provide Protection for Fashion Design: Hearing Before the Subcomm. On Courts, the Internet and Intellectual Property, 109 Cong. 2 (2006).

¹⁰⁵ Samantha L. Hetherington, *Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design*, 24 HASTINGS COMM. & ENT. L.J. 43, 44 (2001).

runways and produce them before the original is available in stores.¹⁰⁶ The defendant in *Johnny Carson Apparel, Inc. v. Zeeman Manufacturing Co.*¹⁰⁷ purchased a suit the plaintiff designed, disassembled it to make a copy, reassembled it, and attempted to return it to the place of purchase.¹⁰⁸ Other companies will send their manufacturers an article of clothing that they intend on reproducing and overtly instruct them to use it as a model to create a copy.¹⁰⁹ Others will go directly to the manufacturer of the original design and request that they directly reproduce the design for them.¹¹⁰

A.B.S Clothing Collection, Inc. (ABS) is a fashion design firm that has created an entire business around pirating designs.¹¹¹ The president of ABS, Allen B. Schwartz, confessed to sketching the dresses of stars during the Academy Awards and then determines which he will “interpret.”¹¹² After ABS produces the design, they name it after the celebrity seen wearing it.¹¹³

Many small designers will turn a blind eye to design piracy because of litigation expenses and improbable redress. Larger designer firms take severe precaution to defend their designs. Hermès is represented by a large private New York Law firm whose lawyers seek out knockoffs of the brand’s scarves, handbags, and other accessories on the internet and streets.¹¹⁴ If a knockoff’s shape or style deceives the consumer into thinking it is a genuine Hermès product, then a court will be convinced that the knockoff violates Hermès trade dress or trademark rights.¹¹⁵

To the contrary, many people believe that the original works by fashion designers should be protected under the law. Some have considered that the fashion industry has strategically chosen for creation to remain in the public

¹⁰⁶ Bill to Provide Protection for Fashion Design: Hearing Before the Subcomm. On Courts, the Internet and Intellectual Property, 109 Cong. 2 (2006) (Testimony of Jeffrey Banks).

¹⁰⁷ *Johnny Carson Apparel, Inc. v. Zeeman Mfg. Co.*, No. C75-544A, 1978 WL 21356 (N.D. Ga. Nov. 4, 1978).

¹⁰⁸ *Id.*, at 4.

¹⁰⁹ *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 59 (1st Cir. 2000).

¹¹⁰ *4 U-Neck, Inc. v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 158, 166 (S.D.N.Y. 2001).

¹¹¹ Samantha L. Hetherington, *Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design*, 24 HASTINGS COMM. & ENT. L.J. 45 (2001).

¹¹² *Id.*

¹¹³ *Id.*, at 56 n.90 (ABS named a knock-off Ralph Lauren pink dress worn by Gwyneth Paltrow at 71st Annual Academy Awards “Gwyneth.”).

¹¹⁴ Jen Chung, Purse Gestalt: *The Hermes Problem*, GOTHAMIST, (Aug. 12, 2003), http://www.gothamist.com/archives/2003/08/12/purse_gestalt_the_hermes_problem.php; Fashion Industry Copes with Designer Knockoffs: With Copyright Protection Elusive, Copies are Common, NPR, Sept. 18, 2003 at http://www.npr.org/display_pages/features/feature_1434815.html [hereinafter Fashion Industry Copes].

¹¹⁵ S. War *Knockoffs and Counterfeit Goods*, War IP Law, (2 April 2019), <https://wariplaw.com/knockoffs-and-counterfeit-goods/>.

domain.¹¹⁶ David Bollier and Laurie Racine argue that the fashion industry thrives from the lack of protection because the designs are recycled for the public's benefit.¹¹⁷ This argument relates to the monetary belief that the fashion industry is a publicly profitable sector of the economy. While that is half of the story, the fashion industry is also a creative sector. It is clear that there are differing, persuasive opinions when it comes to design piracy. Yet, fashion design should have some, if any, protection because it is an industry built upon innovation and creativity. Once the fashion industry becomes a copy-cat industry, innovation and creativity will begin to decrease due to the absence of incentives to create new designs by new designers.

A. Trademark

A trademark is a symbol, name, word, design or color in any combination used to identify a particular brand.¹¹⁸ Trademarks allow for consumers to instantly distinguish the source of a product. Trademark law protects design logos such as the "LV" on Louis Vuitton products or the red bottoms of Louboutin shoes.¹¹⁹ U.S. trademark registration is granted to the first to use.¹²⁰ In other words, a company gains the rights to a trademark by being the first to use it in their products.

In 2016, Adidas AG filed a suit against Forever 21 Inc. for selling products that allegedly infringed on the Adidas three striped design.¹²¹ This is a clear example of trademark because Adidas stated that:

[Adidas] does *not* use stripes merely as a design element, its three-stripe trademark – which it has used since as early as 1952 – is a source identifier that adidas has carefully cultivated through its investment of hundreds of millions of dollars in advertising and promotions, including its sponsorships of athletes, sports teams, musical artists, and fashion designers.¹²²

Therefore, the three stripes have contributed to brand recognition and the identity of the company.

¹¹⁶ David Bollier & Laurie Racine, *Control of Creativity? Fashion's Secret*, CHRISTIAN SCI. MONITOR, Sept. 9, 2003, para. 2, at <https://www.csmonitor.com/2003/0909/p09s01-coop.html>.

¹¹⁷ *Id.* para 4.

¹¹⁸ 15 U.S.C. § 1127 (2000).

¹¹⁹ *Louis Vuitton Malletier, S.A. v. i-Fe Apparel, et. al.*, 1:18-cv-10352 (SDNY); *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, No. 11-3303 (2d Cir. 2013).

¹²⁰ 15 U.S.C. § 1052(a)(1)(a)(b) registration).

¹²¹ *Adidas Responds to Forever 21 Counterclaims: We Do "Not Use Stripes Merely as a Design Element"* TFL, (Sept 24, 2019), <https://www.thefashionlaw.com/home/adidas-responds-to-forever-21-counterclaims-we-do-not-use-stripes-merely-as-a-design-element>.

¹²² *Id.*

Since Adidas was unable to achieve further protection beyond trademark, Forever 21 easily recreated their three stripe design. This significantly hurt Adidas, given that the design has contributed to their brand recognition and identity as a company. However, it simultaneously benefitted the fashion sector fiscally by making a more affordable option for consumers to buy. When a design with such importance is used by someone other than the original creator it drives their value down as a company. With such a volume of designers and brands in the industry, a value of a single company would not completely affect the fashion sector economically. Arguably, if these higher market brands begin to lose their value, there will be a lack of new and creative designs for lower market brands to pirate.

B. Design Patent

A design patent is protection on the way a product looks. In order to obtain a design patent a product is required to show novelty, non-obviousness and non-functionality.¹²³ Design patents require expertise beyond that of usual designers.¹²⁴ This high standard prevents new fashion designs that lack the incorporation of a known design element from acquiring patent protection.¹²⁵

In addition, many courts have expressed uncertainty that clothing can never qualify for design patent protection.¹²⁶ There are three major considerations that allow for the difficulties of patent protection of fashion designs in addition to the requirements of obtaining a design patent. First, the process of achieving a patent is difficult and lengthy. It takes the Patent and Trademark Office 26 months to review a patent application and 25 percent of the applications are rejected.¹²⁷ Second, the length of design patents for fourteen years from the date granted is not needed for the fleeting trends of fashion designs.¹²⁸ Therefore, the trend will die out before the applicant even receives a response. Lastly, the design patent application can cost anywhere

¹²³ 1 DONALD S. CHISUM, CHISUM ON PATENTS § 1.04[2], at 1-301 (2004).

¹²⁴ Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 177, (2002).

¹²⁵ *White v. Lombardy Dresses, Inc.*, 40 F. Supp. 216, 218 (S.D.N.Y. 1941) (holds that dresses copied by the defendant did not meet the novelty and non-obviousness standards, but the dresses did not have neither known dress design elements nor were they combinations of prior known dress designs.).

¹²⁶ See *H.W. Gossard Co. v. Neatform Co.*, 143 F. Supp. 139, 143 (S.D.N.Y. 1956); *White*, 40 F. Supp. at 218. (“[U]ntil and unless a higher court decides that a design patent does not require the exercise of the inventive faculty to the extent that patent law now requires in advancing the particular art, the obtaining of a patent on simply a new and attractive dress is a waste of time.”).

¹²⁷ S. PATENT AND TRADEMARK OFFICE, SUMMARY OF PATENT EXAMINING ACTIVITIES, at http://www.uspto.gov/web/offices/com/annual/2003/060401_table1.html.

¹²⁸ Safia A. Nurbhai, *Style Piracy Revisited*, 10 J.L. & POL’Y 489, 502 (2002).

from \$1,005 to \$3,000.¹²⁹ This makes it difficult for small labels or individual designers to obtain protection for their collection.

It is because of these various reasons that design patents are unappealing to the fashion industry. Even if fashion designers were granted design patents upon the PTO reviewing their application, designers and small businesses would be unable to beat the monetary and time constraints. Design patents do provide a way for designers to gain greater protection of their designs. However, if the government were to provide the patents, the brands that survive off of design piracy would fail and currently that is how most affordable brands profit. Therefore, design patents are purposefully unlikely to be granted so that stores like H&M, Zara and Primark can continue fueling the industry.

C. Copyright

Copyright is a relatively easy process and registration is not required for protection.¹³⁰ Copyright law is the protection of the authorship of original works and is “fixed in any tangible medium of expression.”¹³¹ Fashion designs, under the Copyright Act, falls under the “pictorial, graphic, and sculptural works” section.¹³² The use of the Copyright Act to protect fashion designs has the obstacle of the “useful article” doctrine. This limits the copyright protection of products with an aesthetic and functional purpose. Under the Useful Article Doctrine, the pictorial, sculptural or graphic feature of the work must be conceptually or physically divisible from the utilitarian functional element, but only the separable aspect is provided protection.¹³³

In *Galiano v. Harrah’s Operating Co.*, the court found that Galiano’s artistic design feature of uniforms was not conceptually separated from their utilitarian function.¹³⁴ Galiano entered a contract with Harrah casinos to provide uniform design for their employees.¹³⁵ After their contract expired, Galiano received a Certificate of Registration from the U.S. Copyright Office

¹²⁹ *Design Patent Cost: Everything you Need to Know*, “How Much Does a Design Patent Cost?” UpCounsel, <https://www.upcounsel.com/design-patent-cost>.

¹³⁰ 17 U.S.C. §§ 408–409 (2000).

¹³¹ 17 U.S.C. § 102(a) (2000). The Copyright Act includes works of authorship in the following categories: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”

¹³² 17 U.S.C. § 102(a)(5).

¹³³ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2nd Cir. 1980).

¹³⁴ *Galiano v. Harrah’s Operating Co.*, No. Civ.A. 00-0071, 2004 WL 1057552, at 9. (E.D. La. May 10, 2004).

¹³⁵ *Id.*, at 1.

to collect their uniform sketches.¹³⁶ Galiano then filed a complaint for copyright infringement against Harrah.¹³⁷ While the court did acknowledge the aesthetic value of the designs identified by Galiano's expert, they ruled that the uniform's artistic design features were not conceptually separated from their utilitarian function.¹³⁸ However, the court found that the silkscreen artwork of the uniforms are subject to copyright protection because of its means of independent existence beyond the clothing.¹³⁹

Similarly, with design patent protection, copyright protection presents difficulty for fashion design protection. The separability requirement poses an obstacle for fashion design protection. The main aspect in clothing design is establishing the proper fit. This aspect cannot be physically separated from the product itself and is almost impossible to conceptually separate.¹⁴⁰

III. MONETARY IMPACTS

It could be argued that the protection of fashion designs effectively provides larger labels with a monopoly of the market. Zac Posen launched his fashion line in 2001 with huge support from A-list celebrities, such as Rihanna and Kim Kardashian. Zac Posen saw his luxury brand slipping away due to affordable clothing lines. Therefore, he entered an agreement with Target to sell an affordable fashion collection. Despite Zac's best efforts, investors and buyers did not want to take part in his business due to the growing interest in affordable fashion companies. Ultimately, Zac Posen had to terminate his brand. With Zac Posen already pushed out of the industry, many other talented young designers may face a greater risk if the fashion industry is monopolized.

With regard to the modern industry, an argument is presented that such a monopoly can no longer exist.¹⁴¹ The globalization of fashion centers has allowed for young designers to challenge the status quo and find their place in the market. Nevertheless, many argue that the lack of intellectual property protection within the fashion industry supports the industry by reducing prices, and increasing the consumption of high-end designers.¹⁴² This argument is based on the induced obsolescence theory which states that the mass manufacturing of clothing allows for design to become rapidly vintage

¹³⁶ *Id.*

¹³⁷ *Id.*, at 2.

¹³⁸ *Id.*, at 10.

¹³⁹ *Id.*

¹⁴⁰ Briggs, *supra* note 24, 176-177.

¹⁴¹ Jennifer Mencken, *A Design for the Copyright of Fashion*, 1997 B.C. INTELL. PROP. & TECH. F. 121201, 121204, (1997).

¹⁴² Rau Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1733, (2006).

due to the movement from the elite to the masses.¹⁴³ The new designs are developed and copied, which, in turn, reduces prices and raises sales. Jennifer Mencken asserts that this threat to the marketplace's viability rather increases the cost of high-end goods instead of reducing their prices.¹⁴⁴ Therefore, fewer consumers are able to purchase the designer goods.

A. Arguments in Favor of Loose Protections

Not everyone views design piracy as a problem. America's GDP for fashion is \$350 billion.¹⁴⁵ Therefore, Congress believes that the rapid trends of fashion contributes to the American economy, making them hesitant to provide protection for fashion designs. Their argument is that if fashion designs are protected, economic growth might be stunted.

A theory called the "Piracy Paradox," argues that design copies beneficially affect the innovation of the fashion industry.¹⁴⁶ The Piracy Paradox explains how consumers want to buy the latest trends as they are released. This paradox stems from the induced obsolescence theory. The furthering inspiration for Piracy Paradox is that intellectual property theory suggests that copying designs destroys innovation, but the fashion industry has demonstrated to be an exception. The founders of Piracy Paradox state:

Copying fails to deter innovation in the fashion industry because, counter-intuitively, copying is not very harmful to originators. Indeed, copying may actually promote innovation and benefit originators.¹⁴⁷

Fashion design is a status-conferring good; its value is tied to the perception of its viewers. The lack of intellectual property protection slows for the copying and diminishing of styles to occur so that new designs are created, and the industry is moved forward. There is more rapid turnover and constant increasing sales.¹⁴⁸ High-end designers are able to compete with lower-end copycats by creating lower cost lines. For example, Dolce & Gabbana have a lower cost line called D & G. Yet, many high-end designers steer away from this strategy to maintain their exclusivity over competing high-end brands and because of the fear that their trademark could tarnish.

Many contend that there is healthy competition within the fashion industry. If a single item design was granted protection, larger brands with a greater legal budget could constantly file lawsuits and create a hostile

¹⁴³ *Id.*

¹⁴⁴ Mencken, *supra* note 24.

¹⁴⁵ *A Bill To Provide Protection For Fashion Design supra* note 7.

¹⁴⁶ Raustiala *supra* note 42.

¹⁴⁷ *Id.* at 1687.

¹⁴⁸ *Id.* at 1687.

environment in which smaller brands will be forced out of business. The healthy competition amongst large and small brands makes a monopoly in the industry nearly impossible.

B. Arguments against Loose Protections

To the contrary, many believe that there is an uneven playing field within the industry. Larger companies hire lawyers with or without legal claims to send cease-and-desist letters so companies can stop selling similar pieces to theirs. Smaller brands may splurge on legal fees to only have their claims dismissed by larger companies.¹⁴⁹ It is also argued that copycat designs affect the whole industry by cheapening designs and conditioning shoppers to trivialize the creative process that fashion design entails.¹⁵⁰

IV. CONCLUSION

Fashion design is a major aspect of American culture. Its influence stems from monetary value to consumer expression. When something reaches every aspect of popular culture in the way fashion design does, legislation should not only provide protection but also encourage it. The intellectual property issue that fashion design piracy faces becomes disregarded when analyzing the monetary impact from copycats within the industry.

Consumers are less incentivized to buy higher-end products when replicas are offered at an affordable cost. While the fear of larger labels monopolizing the industry is a major concern for new and smaller designers, the fashion industry is grounded by the creative process and originality. The lack of protection for original designs for the sake of the GDP creates an environment where fashion designs are undervalued by consumers and the industry itself. Fashion designs change with the times. New and young designers influence the trends in fashion. When their designs are pirated and sold at a cheaper cost, they gain no profit or proper recognition for their designs. This, in turn, provides a lack of incentive to create new content. Thus, more protection should be offered to fashion designers for their creativity and innovation to fuel the industry, not the design piracy of mid-price stores.

* * *

¹⁴⁹ Gabby Bess, *How Fashion Brands Like Zara Can Get Away with Stealing Artists' Designs*, (Jul 21, 2016, 4:35pm), https://www.vice.com/en_us/article/nejwdz/how-fashion-brands-like-zara-can-get-away-with-stealing-artists-designs-tuesday-bassen.

¹⁵⁰ Nick Grant, *Inside the Anything-Goes World of Instagram Fast Fashion*, (Oct 26, 2017), <https://www.gq.com/story/fast-fashion-streetwear-brands-of-instagram>.