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Susanna Monseau, The College of New Jersey

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Monseau, Susanna

A Review Of European Design Protections Does Not Support The Fashion Industry
Contention That Congress Should Single Out Fashion For Special Design
Protection

At the 2006 hearings on the Design Piracy Prohibition Act, Jeffrey Banks called design piracy a “blight,” and asked Congress for legal protections for America’s fashion designers, arguing that the European industry was more vibrant because Europe’s fashion designers received legal protection for their designs under European design right laws. This paper argues that the proposed protection for fashion design is unnecessary and, even, harmful to the fashion industry. Copying has always been part of the creative process, and is, actually, important to the success of the fashion industry. The proposed Design Piracy Prohibition Act is far more likely to function as a “lawyer-employment bill, not a fashion-industry protection bill.” A review of European law demonstrates that it does not in practice, protect fashion design in the manner proponents of U.S. legislation imagine. Even if European design law does provide some protections not available to U.S. fashion designers, for a variety of legal and cultural reasons, these laws are rarely used by European fashion designers to prevent design copying. Finally, it is argued that Congress should consider following Europe’s lead in protecting market entry level industrial design, but the new law should focus on the needs of all design industries, as European law does, rather than single out fashion, or indeed, any other industries, for special status.
A REVIEW OF EUROPEAN DESIGN PROTECTIONS DOES NOT SUPPORT THE FASHION INDUSTRY CONTENTION THAT CONGRESS SHOULD SINGLE OUT FASHION FOR SPECIAL DESIGN PROTECTION

Susanna Monseau*

INTRODUCTION

“Fashion design piracy has become a blight that affects all who depend on the U.S. fashion industry,” claimed designer, Jeffrey Banks, dramatically, during his testimony before Congress on the proposed Design Piracy Prohibition Act in 2006.\(^1\) He asserted that “in Europe most member states protect fashion for a term of 25 years, without registration.”\(^2\) Many fashion designers support the stance of the Council of Fashion Designers of America (CFDA) on whose behalf Mr. Banks testified. This organization has lobbied for the passage of U.S. legislation specifically protecting the fashion industry from the harm of design copying or design piracy. The terms are ill-defined, but law professor, Susan Scafidi, suggested in her testimony in favor of the passage of design protection, that the Act was necessary to protect designers from the manufacture and sale of “closely and substantially similar” copies of their designs.\(^3\) Fashion designers argue that such legislation is essential to protect the industry from rampant copying, and would, in any event, merely be following Europe’s lead in this area.\(^4\)

This paper takes issue with the idea that fashion designers need new legal protections for fashion design in the form of the Design Piracy Prohibition Act. It contends that there is much evidence to show that the lack of the type of legal protection requested by fashion designers has not harmed the U.S. fashion industry, in fact, the industry shows little sign of “blight,” and has been thriving, at

* Assistant Professor, School of Business, The College of New Jersey. The author wishes to thank Michael Pudlowski, undergraduate in the International Business program at The College of New Jersey, for his help with the research for this article.


\(^2\) Id. at 3.

\(^3\) Id. Prepared statement of Susan Scafidi, Visiting Professor, Fordham Law School, at 812, available at 2006 WL 2127242 (F.D.C.H.)

\(^4\) Ben Winograd and Cheryl Lu-Lien Tan, Style & Substance: Can Fashion Be Copyrighted?; Designers Want to Halft Knockoffs But Some Say They Spur Sales; Few People Can Spend $4,000, Wall Street Journal, Sept 11, 2006, at. B1
least in part, because of the lack of legal protections, or "low-IP equilibrium," in the industry. The proposed Design Piracy Prohibition Act is far more likely to function as a "lawyer-employment bill, not a fashion-industry protection bill." European law does not in practice, protect fashion design in the manner proponents of U.S. legislation imagine. Even if European design law does provide some protections not available to U.S. fashion designers, for a variety of legal and cultural reasons, these laws are not greatly used by European fashion designers to prevent design copying. Finally, it is argued that Congress should consider following Europe’s lead in protecting market entry level industrial design, but the new law should focus on the needs of all design industries, as European law does, rather than single out fashion, or indeed, any other industries, for special status.

Part I of the paper describes the history of the fashion business, including the development of the role of designers, and the relationship between design and art, to demonstrate why legal protection has not played a major part in the business of fashion. The current economics of the global fashion business, are considered with reference particularly to the European and American marketplaces, to show that the U.S. fashion market is, in fact, more robust economically than the more legally protected European markets. Part II describes how the actual and proposed U.S. laws protect design, and compares U.S. law with the European scheme of legal protection for design, focusing particularly on the laws of the U.K., France and Italy. It demonstrates that the proposed Design Piracy Prohibition Act is unlikely to protect fashion in the way that its proponents desire, and uses European cases to demonstrate that the legal protection of fashion designers in Europe is not substantially different in practice than the protection of fashion designers in the U.S. The dynamic of the fashion business in Europe is not substantially from the dynamic of that business in the U.S. In Part III the suggestion is made that the fashion industry is wrong to point to European law as a model specifically for the protection of fashion design. European design laws are not directed specifically to the fashion industry but to industrial design in general. It is argued that if Congress wants to learn from European design law, it should be as a model for a balanced system of protection for all new industrial design, and not as a justification for providing an unnecessary monopoly for global fashion conglomerates. The better way to follow Europe’s lead is not to single out fashion as a supposedly unique industry, but to ensure that reasonable market entry design protections are provided to all creative industries to encourage innovative design.


See H.R. 5055 Hearings supra note 1 above, prepared statement of Christopher Sprigman, Associate Professor, University of Virginia Law School at Congress Hearings 2006 at *2. available at 2006 WL 2127243 (F.D.C.H.)
A. History and Development of the Fashion Industry

For many hundreds of years clothing was viewed as a functional necessity rather than a means of artistic expression. Fashion as a concept is a fairly recent phenomena. In the seventeenth and eighteenth centuries, the craft of making clothes, which involved dressmakers, tailors, and eventually designers, existed exclusively in the realm of the upper class. The middle and lower classes were left to wear second-hand clothing that had been passed down. Clothes were handed down to lower classes until they could eventually be used for nothing but rags. Thus, most people, excluding the wealthy upper class, wore clothes for the purpose of covering their body; they were not looking to evoke a particular image or wear what was ‘fashionable’. The vast majority of clothing served a utilitarian, not an aesthetic, function.

Through industrialization in Europe, ready-to-wear clothing began to emerge, and by the beginning of the twentieth century, the U.S. became the world leader of ready-to-wear clothing. The advent of the sewing machine and the emergence of large factories, the wholesale trade, and department stores put an end to the home dressmaking of the past. Now, in addition to the tiny market for custom-made clothing for the wealthy (the haute couture industry originated in Paris where those who belong to the Syndicate de la Haute Couture still produce runway shows of their designs twice per year in January and July), there existed a larger market segment of ready-to-wear fashion which was cheaper and so more available to the masses. According to Jeffrey Bank’s testimony this sector is where U.S. designers are now setting trends after years of copying them from Europe, perhaps why they now seek more legal protection.

1. Fashion as Art or Craft

Fashion has not historically been protected by copyright law in the U.S. due to the division in the eyes of the law between fine arts, like literature, music and art, which are accorded legal protection, and crafts, which are generally not. The design and manufacture of clothing was, until the last one hundred years,

8 Id.
9 Id. at 36.
10 Id. at 36.
11 See H.R. 5055 Hearings supra note 1 above, prepared statement of Jeffrey Banks at *7.
certainly seen more as a functional task like cooking, often part of homemaking. Veronica Manlow in DESIGNING CLOTHES describes a continuum of the purpose of apparel, which illustrates the several purposes of clothes designing and how the fashion industry has shifted over the last 200 years. On one end of the spectrum, apparel is considered a craft and its purpose is simply utilitarian. On the other end of the spectrum, the apparel’s main purpose is purely artistic. In the center of the spectrum, fashion is artistic-craft; the clothes are designed to portray an image, but are also meant to be functional as they are worn by people. Manlow notes how, even among designers, there is a disagreement as to whether fashion is as an art or craft, stating, “Chanel viewed dress-making as a profession while Schiaparelli regarded it as an art.”

In France, the couturier or high end designer tends to be viewed as an artist, and exquisitely crafted designer clothing can be nearer to wearable art than merely utilitarian and functional. In the U.S. research suggests that successful designers are viewed more as “corporate executives” or “lifestyle specialists,” than as artists. It can be argued that fashion has a different place in culture in France and the U.S., viewed as a form of “art” by some in France and more as a commercial enterprise in the U.S., and thus it is perhaps not surprising that legal regimes for the protection of the fashion design have developed somewhat differently in the two countries, with France following a unity of art approach and providing copyright protection for fashion design as art.

The debate about the status of fashion as an art or craft continues because of its impact on the legal status of fashion design. At the Congressional Hearings on H.R. 2033, Jeffrey Banks talked about advancing the status of fashion design “as a branch of American art and culture.” Although fashion is meant to be functional – it has to fit the human form and keeps us warm and dry – it clearly can also be artistic and creative. Most would agree that fashion is not, in most cases, fine art because it also fulfills a utilitarian function, although that does not mean that there should be no legal protection at all for fashion or other design industries.

14 See H.R. 5055 Hearings supra note 1 above, prepared statement of Susan Scafidi at *5.  
15 See MANLEY, supra note 7, at 102.  
16 Id. at 102.  
17 Id. at 103.  
2. Designers and Creativity

As the fashion industry has grown in importance so has the role of designers, no longer mere dressmakers to the upper classes, today designers are the arbiters of fashion, interpreting culture and setting trends. High-end designers can be highly influential across the industry. In a modern consumer culture, designers create the objects of our desire, and the fashion industry brings them to the marketplace. Over the last forty years this has led to the increased importance of the individual named designer and, as demand has increased for the status symbols people believe allow them to express their individuality, the designer logo developed allowing people to seek out and purchase the products of well-known, star designers.

The designer creates fashion, whether he or she is labeled as an artisan or an artist, and the fact that U.S. designers are now setting trends in fashion rather than copying them from Paris, along with the technology-fuelled rise in design piracy, is part of what has led the U.S. fashion industry to seek legal protection as the logical step to protecting designers’ creative activity. However, the complexity and collaborative nature of the design process in fashion makes it particular hard to discern who is the creator, and who is the copyist of a fashion design. Designers may call it “interpreting,” “referencing” and “borrowing,” rather than copying, but the process of creating fashion, even more than the process of creating music or literature, is not accomplished by a solitary genius working hidden away from the world in his attic. Designers are influenced by and influence other designers. They look for inspiration to the Paris catwalks, to the clothes of celebrities, and to the street. They also collaborate with each other on projects. Design copying in the fashion industry is ubiquitous. Writing like fashion magazine, Marie Claire’s “Splurge or Steal” feature make clear that copying happens all the time, at all levels of the industry, and is accepted as standard practice.

It is not just at the cheaper end of the market that designers sometimes stray too close to making exact copies of the designs of others. A recent round up by professor Scafidi at her blog, revealed that well-known designer, Michael Kors is being sued for a dress fabric design in his 2009 collection, that another designer, Tony Duquette, believes is too closely inspired by his own work. Superstar

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22 See MANLEY, supra note 7, at 47 describing how French couturier, Christian Dior created the famous “New Look” in 1947 as a reaction to the privations of the war. However on page 94, MANLEY describes how fashion design can also derive from what real people wear, explaining how in the 1960’s London street fashion was one of the first styles to “bubble up” from the street.

23 See MANLEY, supra note 7, at 99 describing how interestingly it was designer, Jeffrey Banks who was instrumental in creating designer logos.


25 See e.g.MANLEY, supra note 7 above at 99.

26 Raustiala & Sprigman, supra note 5, at 1706.
designer, Isaac Mizrahi, of Target fame, who has been brought in to revive Liz Claiborne’s fortunes, has been accused of designing a shoe which is a little too similar to a classic by Belgian Shoe.27

Not only is copying or drawing on the creative work of others part of industry practice, there is not always agreement, even among fashion experts as to what constitutes illegitimate copying and what is legitimate interpretation or derivative work. As many commentators have noted there is rarely anything entirely new or original in fashion design,28 so originality as the principal on which protection is based is hard to define and harder to apply. Either, every tiny variation on a theme would merit separate protection, (so copying would be nearly impossible to demonstrate) or, the opposite, one designer could appropriate a theme (e.g. a particular shape of skirt) and prevent others from using it entirely.

Certainly the process by which designs are created and disseminated in fashion would make the drafting or application of a design piracy law extremely difficult. The concepts both of originality and authorship so central to copyright protection provoke difficulties in the fashion world. First, there is the issue of what constitutes an original design and what constitutes an illegal copy rather than a reinterpretation, and the sub-question of who would determine whether copying had taken place. Second, there is the issue of who is the creator of a fashion design when it is typical for a team to work on design projects. These issues are relevant to all applied art but are fraught with especial difficulty in the fast moving, and imitative fashion business.

Kal Raustiala and Christopher Sprigman argue in The Piracy Paradox that copying is in fact beneficial to the industry because, while it may harm individual designers who are copied too closely, it drives the fashion cycle which encourages people to buy more clothing than function would require, by causing what was elite to quickly become mass,29 as well as by freeing up designers’ creativity to constantly reinterpret old designs to create new ones.30

3. Market Sectors

Another characteristic of the fashion market also makes it particularly able to bear the constant recycling of themes and even straight design copying. The market falls relatively easily into three definable sectors catering to different economic and social groups. At the high end, there is haute couture, which still

28 See H.R. 5055 Hearings supra note 1 above, prepared statement of David Wolfe at *3 available at 2006 WL 2127241 (F.D.C.H.)
29 Raustiala and Sprigman, supra note 5, at 1722.
30 Raustiala and Sprigman, supra note 5, at 1724.
has immense influence acting as a “guiding light” to the rest of the fashion industry.\textsuperscript{31} but caters only to a tiny group of the super-wealthy worldwide.\textsuperscript{32} Many aspire to the high-end, but few can afford it. Next, the ready-to-wear market makes up a far larger market segment from high-end designer ready-to-wear collections, to mid range clothing. Ready-to-wear designers have shows in Paris, London, Milan and New York during February and September to showcase their next season designs. Their garments are sold in department stores and boutiques. At the lower end of the market, an even larger market segment, mass-market fashion (sold in discount stores such as Wal-Mart and Target in the U.S.) enables people from lower income groups to choose what they wanted to wear in stores according to its cut and color. At the lower end also stores like Hennes & Mauritz (H&M), Zara and Top Shop have democratized fashion, speeding the fashion cycle and bringing catwalk styles to the masses.

When ready-to-wear and mass-market clothing took fashion beyond the few hundred women worldwide who wear haute couture,\textsuperscript{33} the modern fashion industry was born. The current success of television shows like Project Runway, and What Not to Wear, and the huge sales of women’s fashion magazines, attest to the demand for fashionable clothing from all sectors of society and explain the importance of fashion as a global business. In an assessment of employment prospects for fashion designers, the U.S. Department of Labor is clear, like Mr. Banks, that the mass-market and ready-to-wear are the sectors which will enjoy more growth in employment for designers in the U.S. than the very small haute couture industry.\textsuperscript{34}

4. Organization of the Global Fashion Industry

There are four capitals of the fashion world: London, New York, Milan, and Paris.\textsuperscript{35} Each fashion capital plays its own distinct role in the fashion business and helps promote the fashion cycle. For high-end fashion designers trying to make a name, London is usually the first stop, and is the place where designers will usually attempt to “shock” the fashion world with strange, unique, and wonderful designs. The purpose of displaying a design in London is to attract media attention. These designs, however, are rarely meant to be sold to a final

\textsuperscript{31} See MANLEY, supra note 7, at 93.
\textsuperscript{32} TIM JACKSON AND DAVID SHAW, THE FASHION HANDBOOK 177 (Routledge 2006) discusses that only a handful can actually afford the pieces and the collections are unprofitable and expensive to produce however, they set trends for the rest of the industry to follow. Here fashion is closest to art.
\textsuperscript{33} See MANLEY, supra note 7, at 100, where she puts the number who can afford haute couture at less than 500 women worldwide.
customer. The next stop is typically New York, the financial fashion capital, which contains influential stores, such as Barney’s and Saks 5th Avenue. A designer will showcase more “realistic” designs in New York with hopes of attracting the attention of the media and financial backers that will enable the designer to make his/her vision a marketable product to sell as haute couture or, preferably, at the high end of the ready-to-wear market. Milan is often described as the manufacturing fashion capital of the world. A designer who has attained financial backing may bring his/her designs to the Milan runway in hopes of having them put together by some of the highest quality clothing manufacturers in the world. If a designer has been able to attain the financial backing and has secured a business for manufacturing his/her line, she will present the finalized design in what is still to many the fashion capital, Paris.

Each of these cities hold fashion weeks in the spring and fall for new designs for the next season. Some designers show in several cities. Some only ever show in one of the cities. What is shown at these catwalk shows provides inspiration for other designers and filters down through the process of referencing and borrowing to the mass-market. There was a time when this fashion cycle took a few months, but the digital age has made copying easier and quicker and many designer now complain that designs from their catwalk collections can be copied in minutes from photos and cheap versions can reach stores like H&M from a factory in China quicker than they can produce the more detail intensive versions. At the Congressional Hearings on the proposed fashion protection bill, professor Scafidi said that this development now renders the traditional fashion cycle obsolete, while professor Sprigman contended that it encourages designers to be more creative.

Consumerism and the public appetite for brand names, and named designers, drives the increasingly global business of fashion. People buy clothing and accessories less through necessity, and more based on factors like celebrity endorsement and the skillful promotion of brand image. The global and complex business of fashion has to constantly produce and determine how to market “new” designs to survive. Design is actually a small part of the fashion process.

Over recent decades, the global fashion industry has become increasingly consolidated, although much less than other creative industries like music and

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36 Id.
37 See H.R. 5055 Hearings supra note 1 above, prepared statement of Susan Scafidi, Visiting Professor, Fordham Law School, at *4. available at 2006 WL 2127242 (F.D.C.H.)
38 See H.R. 5055 Hearings supra note 1 above, prepared statement of Christopher Sprigman at *3.
39 See MANLEY, supra note 7, at 81.
publishing, and today on the design side there are several huge international conglomerates, such as the Gucci Group, Liz Claiborne, and Louis Vuitton Moet Hennessy (LVMH). The large design houses concentrate on promoting their brands as aspirational, “must-have” status symbols, whether purchasers can afford the $3000 suit or only the $40 bottle of perfume. On the retail side, designers sell their ready-to-wear collections at various price points through a variety of department stores and boutiques. There are influential stores like Barney’s and Saks 5th Avenue whose buyers set trends at the higher end, and large department stores, such as Macy’s in the U.S., and Printemps in France, which sell mid-range ready-to-wear collections.

Catering to the mass-market end there are large discount stores like Carrefour in France and Wal-Mart and Target in the U.S. which used to sell only basic poor-quality, mass produced clothing, but which in recent years, have partnered with various high end designers to sell fashionable clothing. These licensing deals have blurred the sharp distinction between high-end fashion and the cheaper end of the market and made fashion a less “hierarchical system of status.” They have also been lucrative for the high-end designers who have licensed their brand images. Cheaper fashion chains like H&M, Top Shop, Zara—all, interestingly, based in Europe—have also changed and globalized the fashion business. They specialize in the interpretation of the higher end designers’ trends in cheaper fabric at cheaper prices for a mass-market audience. H&M is able to get copies of runway designs into its stores within a few months or even weeks. It employs seventy in-house designers who keep a watch on trends on the runways of the fashion capitals as well as in the street, according to Margareta Van Den Bosch, chief designer at H&M for sixteen years quoted in DESIGNING CLOTHES. Spanish retailer, Zara, has an even faster production and delivery system, which is able to get reproductions of a celebrity’s clothing into its European stores within a few weeks. These businesses, which operate in the European design law environment, base their business models on cost effective operational strategies on a global scale. Higher end designers, like Jeffrey Banks, often complain about these mass market chains as copyists, but do not mention that despite European design laws, they operate the same way within the European market as in the U.S.

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40 Raustiala and Sprigman, supra note 5, at 1722.
41 See MANLEY, supra note 7, at 106.
42 Id. at 90.
43 Id.
44 Id. at 79.
45 Id. at 83.
46 Id. at 84.
47 Id.
48 See H.R. 5055 Hearings supra note 1 above, prepared statement of Jeffrey Banks at *7.
At the Congressional Hearings, professor Scafidi used the story of a handbag designer told by a department store that her designers were no longer wanted as they could source “virtually identical” copies at a lower price. Proponents of legal protection for fashion design use these kinds of examples to argue that without legal protection for creativity in the fashion business, designers will not be able to work and everyone will be reduced to buying the cheapest knock-off products. Jessica Litman demonstrates the absurdity of this argument by imagining that restaurants and the food industry had intellectual property protection that was suddenly withdrawn, and imagining, tongue in cheek, that we would all thereby be forced to eat cheap packaged food for every meal. In fashion, as in many areas of design, those who buy high-end products do not suddenly start shopping at discount stores, H&M, or Zara, because they see a “virtually identical” copy of a dress they admire rendered in a cheaper fabric. There are a whole host of reasons to do with the appreciation of quality and status that tend to keep people buying designer fashion. The cycle by which cheaper knock-offs bring fashion to the masses may hurt individual designers at times but it also increases profits for designers as it enables designers to create new luxury status items which continuously feeds the process of filtering down to the lower market sectors. The behavior of consumers has little, if anything, to do with legal protection. Sprigman and Raustiala call this process “induced obsolescence” and argue that it would be slowed by increasing design protection because designers would become more cautious due to a fear of litigation if they created anything that was too close to previous designs.

These cheaper “knock-offs” are, by necessity, pale imitations of truly detailed higher end luxurious designs and are meant for a different sector of the market. Although there are anecdotes of orders cancelled, and designers told that identical copies of their work are available more cheaply elsewhere, few who can afford the real thing are beguiled by a low level copy. Notorious celebrity, Paris Hilton, quoted at Susan Scafidi’s blog, CounterfeitChic, summed up this argument by declaring: “Nobody wants the fake Prada bag; they want the brand new bag that no one can get and is the most expensive.”

Interestingly, despite their stronger design protections, as well as

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49 See H.R. 5055 Hearings supra note 1 above, prepared statement of Susan Scafidi at *9.
50 Jessica Litman, The Exclusive Right to Read, 13 Cardozo Arts & Ent. L.J. 29, 44-45 (1994). Imagine “Congress suddenly repealed federal IP protection for food creations. Recipes would become common property. Downscale restaurants could freely recreate the signature chocolate desserts of their upscale sisters. . . Great chefs would be unable to find book publishers . . . Ultimately we would all be stuck eating Uncle Ben’s Minute Rissotto (eleven yummy flavors!) for every meal.”
51 Raustiala and Sprigman, supra note 5, at 1720.
accommodating the “knock-off” retail chains like H&M, Europe is not immune to the problems of counterfeit bags and other fakes, and the E.U. is considering a directive to institute criminal penalties for selling counterfeits. It is odd that to counter the undoubted market in fakes, the fashion industry in the U.S. has not instituted any anti-counterfeiting initiatives, unlike, for example, the music recording industry.

It could be argued (although this is beyond the scope of this article) that strengthening criminal penalties for counterfeit and trademark infringing items would discourage pirated goods more effectively than the vague and untested civil penalties of the proposed design piracy law.

**B. The Economics of the Industry**

While fashion is now a global business worth billions of dollars, statistics as to the true size and value of the industry are quite hard to find. In his testimony before the House Sub Committee hearing on the proposed Design Piracy Prohibition Act before Congress in 2008 (HR. 2033), Narciso Rodriguez gave a figure of $350 billion for the U.S. clothing and accessory industry, a figure which, according to these figures, the total U.S. fashion industry generated $291.2 billion in 2007.

It is clear from their testimony where Narcisco Rodriguez or Jeffery Banks got their figures, but the actual revenues generated by the fashion industry in the U.S. are likely somewhere between $290 billion and $350 billion.

Raustiala and Sprigman, in The Piracy Paradox, claimed that the global fashion industry sells more than $750 billion of apparel annually. There are also

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54 See e.g. Susanna Monseau, Fit for Purpose:” Why the European Union Should Not Extend the Term of Related Rights Protection in Europe, XIX 2 Fordham Intell. Prop. Media & Ent. LJ (forthcoming March 2009).
56 See H.R. 5055 Hearings supra note 1 above, prepared statement of Jeffrey Banks at *2.
57 The information comes from industry reports compiled by Marketline on the clothing, footwear, accessories and luxury goods industries. The reports are available through the Marketline commercial electronic database. Marketline describes itself as a leading provider of online data, analytic and forecasting platforms for key vertical sectors. (all Marketline reports referenced are on file with the author).
59 Raustiala and Sprigman, supra note 5, at 1693.
According to Marketline data, the global women's wear market generated revenues of $502.9 billion, the global menswear market generated revenues of $332.9 billion, and the global infants' wear market generated revenues of $26.5 billion in 2007. Based on these figures, the global fashion industry generated approximately $862.3 billion in 2007. Thus, we can put the revenues of the global fashion industry somewhere between $750 billion and $862 billion.\(^{60}\)

Whatever, the true figures for fashion sales, in his testimony on H.R. 5055, professor Sprigman stated that according to data from the Bureau of Economic Analysis, sales of apparel and shoes had “registered uninterrupted annual increases between 1945 and 2004, growing during this period more than twenty-fold.” In 2005, he said, the growth of the fashion sector was greater than the growth of the economy as a whole.\(^{61}\) This is a robust long-term performance, impressive for any industry, and does not immediately suggest “blight”, or a pressing need for legal protection. A review of statistics from the U.S. and Europe suggests even more strongly that, notwithstanding the current economic slowdown, the U.S. fashion industry is in better economic health than the European industry and, therefore, enhanced legal protections for the industry would not necessarily be beneficial.

1. Statistics on the U.S., U.K., French and Italian Fashion Markets. In the United States, where there is “a low IP equilibrium”, both the women’s wear and menswear markets have grown from 2003-2007, and the projection for the next 5 years is promising.\(^{63}\) In the U.K, which probably has the lowest levels of legal protection in Europe for fashion, but where London fashion designers claim to be one of the most profitable sectors of the economy, the fashion market has grown even more robustly than in the U.S. over the last five years, and projections predict continued growth at a reasonable rate.\(^{65}\)

By contrast, over the past 5 years, the French fashion market has fluctuated and has shown little overall growth.\(^{66}\) Both the women’s wear and

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\(^{61}\) See H.R. 5055 Hearings supra note 1 above, prepared statement of Christopher Sprigman at *2.

\(^{62}\) Raustiala and Sprigman, supra note 5, at 1687.

\(^{63}\) The women’s wear market grew by 2.0% from 2003-2007, and the segment is projected to grow by 1.3% in the period from 2007-2012. The menswear market grew by 2.4% from 2003-2007, and is expected to continue to grow from 2007-2012 by 2.9%.

\(^{64}\) The menswear fashion market experienced a CAGR of 2.4% from 2003-2007, while the women’s wear market grew by 3.5% in the same period.

\(^{65}\) Women’s wear is expected to grow at a CAGR of 1.9% in the next five years and menswear is expected to grow at a CAGR of 2.7% over the next five years.\(^{65}\) In 2007, the fashion industry in the U.K. was worth approximately $62 billion.

\(^{66}\) In 2003, the women’s wear market value increased by 1.0%; in 2004, it increased 0.2%; in 2005, it increased 1.40%; in 2006 and 2007, it increased again by 2.31.8%. The CAGR for this time period is 1.8% for the women’s wear market. This market is expected to grow slowly but steadily over the next 5 years.\(^{65}\)
menswear markets in France have grown by a mere 0.7% from 2003-2007. These growth rates are significantly lower than those of the U.S. and U.K. markets. In 2007, the French fashion industry was worth approximately $36 billion, in contrast to the $62 billion figure for the U.K. market which is a similar size, and that value is not expected to grow significantly in the coming years.

In Italy, growth in fashion industry revenues over the last five years was a meager 0.3% for the women’s wear segment and 1.7% for the menswear segment. From 2006 to 2007, the women’s wear market actually decreased by 1.6% and this segment was valued at $22.1 billion in 2007. The predictions for the menswear segment are not promising; over the next five years, the menswear market in Italy has not done as poorly and is projected to grow over the next five years.

Since design protection laws are not based on whether the designs are for menswear or women’s wear, this is a fascinating discrepancy, but is outside the scope of this study.

2. Economic Differences in U.S. and European Fashion Industries

Although, of course, some of the projections for future growth may have to be reassessed in the current economic climate, the United States fashion industry clearly has been more robust than the European market, and looks poised to continue reasonable, if not spectacular, growth. Though the European market as a whole is growing modestly and is expected to continue growing, it is important to take note of the situation in France and Italy, where the fashion industry sales have been fluctuating and stagnating.

Source:

<table>
<thead>
<tr>
<th>Womenwear</th>
<th>Menswear</th>
<th>GDP Growth Rates (~03-07)</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>2.0%</td>
<td>2.4%</td>
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<td></td>
<td></td>
<td>2.80%</td>
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<td>UK</td>
<td>3.5%</td>
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<tr>
<td>France</td>
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<td>Italy</td>
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Markeline reports and Nationmaster.com

2005, and 0.5% in 2006. The CAGR for the womenswear market for this time period was 0.7%. The French womenswear segment is not expected to flourish in the coming years; the projected CAGR for the time period from 2007-2012 is only 0.5%. The menswear market in France has performed similarly to the womenswear market. In 2003, the menswear segment experienced a 1.0% increase; the market value increased 0.2% in 2005, and 0.8% in 2006. The CAGR for this time period was 0.7% and the projected CAGR for 2007-2012 is 0.8%.

72 Italy Marketline Report 2007.
73 The 2003-2007 CAGR was 1.7%, and the projected CAGR for the next five years is 2.8%.
In fact, real GDP growth rates in the U.S. and U.K., France and Italy track quite closely the growth in fashion sales in those countries, suggesting that the fashion industry is affected more by the state of the general economy in each country, and less by the strengths or weaknesses of legal protections for designs. Fashion designers in the U.S. continually point to Europe where they say designers are protected, but the economic figures for the fashion markets offer a better outlook for the relatively unprotected U.S market. This may not be due entirely to the lack of legal protection, but it does indicate that the argument that the fashion industry in the U.S. is suffering a “blight” compared to Europe is not borne out by the industry statistics. In the next section there is an analysis of the various protections provided to fashion designers under the laws of the U.S. and Europe, focusing on those of the U.K., France and Italy.

II. A COMPARISON OF LEGAL PROTECTIONS FOR DESIGNS IN THE U.S. AND EUROPE

Although the U.S. currently has no specific legislation protecting fashion, it is wrong to label the industry as without legal protection in the U.S. U.S. intellectual property laws are already some of the strongest in the world, and while there is no specific law protecting fashion design law, U.S. law provides various methods of protecting some aspects of fashion design through the mechanisms of copyright, design patents, and trademark law.

European countries, particularly France, where, as noted, the designer is viewed more as an artist than artisan, have a stronger tradition of providing legal protections for fashion and other design industries. However, in practice, European law does not provide as much protection as many Americans designers imagine. E.U. law focuses on design rights for all types of industrial design; protection is not tied to the fashion industry alone. In fact, Raustiala and Sprigman found little use of registered design rights by fashion designers in Europe, and there are few lawsuits concerning fashion designs. During the hearings on the Design Piracy Prohibition Act in 2006, David Wolfe quoted French designer, Coco Chanel as saying that fashion should “simply slip out of your hands. The very idea of protecting the seasonal arts is childish.” So, apparently, even in Europe there is not necessarily a consensus that it is necessary to protect fashion designs per se.

A. U.S. Trademark, Copyright and Patent Law

72 See H.R. 5055 Hearings supra note 1 above, prepared statement of Jeffrey Banks at *1.
73 See MANLEY, supra note 7, at 102.
74 Raustiala and Sprigman, supra note 5, at 1722.
75 See H.R. 5055 Hearings supra note 1 above, prepared statement of David Wolfe at *6.
1. What is Protected?

The U.S. Constitution provides the underpinnings for the protection of intellectual or intangible property, requiring Congress to make laws “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

In protecting intangible property, the Framers of the U.S. Constitution wanted to provide a balance between creators and innovators, and the public. James Madison, who introduced the copyright and patent clause into the Constitution, argued in *The Federalist* that it would increase access to information and operate as an incentive system for creators.

Federal copyright and patent law, which, together with trademark law (derived from the Commerce Clause powers of Congress) provides some legal protections for the creative endeavors of fashion designers in the U.S., which are considered below.

2. Copyright Law

a. General Copyright Protection under U.S. Law

The first U.S. Copyright Act of 1790 protected copyrights in only “maps, charts and books” for a term of 14 years. The act did not regulate other types of artistic expression, even other kinds of writings, such as newspapers were not protected. The laws were not even much used by book publishers, the vast majority of writings were never registered — between 1790 and 1800, of more than 15,000 printed works published in the United States, less than 800 works were registered.

For more than 120 years, although the subject matter protected expanded, U.S. copyright law adhered to a regime of protecting fairly limited subject matter for a short duration, the public domain was strong, and copyright protection correspondingly weaker. In 1989, the U.S. essentially changed its

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76 U.S. Const. art I, §8, cl.8.
77 See Lawrence Lessig, Copyright’s First Amendment, 48 UCLA L. Rev. 1057, 1072 (2001).
78 See SIVA VAIDHANANTHAN, supra note 24 at 71.
79 Copyright Act 1790 1 Statutes at Large, 124.
80 See WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE (1994) (2000) available at http://digital-law-online.info/patry/patry5.html. According to Patry, “records assembled by the Library of Congress indicate that more than 15,000 works were published in the United States between 1790 and 1800, but that only 779 copyright registrations were made in this same period.”
81 For example, copyright protection was extended to dramatic works, choreographic works, sound recordings and motion pictures.
82 See VAIDHANANTHAN supra note24, at 25. In 1831 the copyright term remained a 28 year term, renewable for 14 years. Under the 1909 the term was extended to a 28 year term, renewable for 28 more years.
84 See VAIDHANANTHAN supra note24, at 16.
longstanding copyright tradition by acceding to the Berne Convention,\textsuperscript{85} which required it to change its law to protect copyrighted work from creation, without the need for formalities, for the life of the author plus 50 years.\textsuperscript{86} In 1998, partly to harmonize with E.U. law, U.S. law was further amended to increase the term of copyright protections from life plus 50 years, to life plus 70 years, or 95 years for works made for hire.\textsuperscript{87}

Current U.S. copyright law protects "original works of authorship fixed in any tangible medium of expression."\textsuperscript{88} The categories of copyrightable subject matter enumerated by the law today are: (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.\textsuperscript{89}

b. Applied Art and Design

In 1948 The Berne Union (of which the U.S. was not then a member) decided to revise the Berne Convention to require legal recognition of applied art.\textsuperscript{90} The laws of France had long applied a unity of art thesis to design, essentially considering applied art as no different to fine art. However, the Berne Union did not mandate this approach. The actual method of protection, design law, copyright law or a combination approach, was left up to the individual member state.

c. The U.S. Approach to Applied Art

U.S. law has long sought to draw a line between copyrightable works of art, and "useful articles," which are generally not protected. Under U.S. law, if the shape of an article (such as an item of clothing) contains some element that is "staple or commonplace... (or) which has become standard, common, prevalent, or ordinary," or the design is "dictated solely by a utilitarian function of the article that embodies it,"\textsuperscript{91} the design element cannot be protected under copyright law. This means that designs per se are not protected but "pictorial, graphic or sculptural works" which are separable from the design, such as a textile print, or picture on the material, are protectable.\textsuperscript{92} This doctrine

\begin{itemize}
  \item \textsuperscript{86} Id.
  \item \textsuperscript{88} 17 U.S.C. § 102.
  \item \textsuperscript{89} Id.
  \item \textsuperscript{90} See Reichman supra note 20 above at 1149.
  \item \textsuperscript{91} See 17 U.S.C. § 1302. Under 17 U.S.C. § 101 "Useful articles" are defined as "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information".
  \item \textsuperscript{92} See e.g. \textit{Mazer v. Stein}, 347 U.S. 201, 209 (1954).
\end{itemize}
of “conceptual separability” has unfortunately not proved a very clear or workable guide for designers.93

d. The Test for Conceptual Separability

In the 1954 Mazer v. Stein case the Supreme Court got a chance to consider whether to protect applied art under the law of copyright. It ruled that a lampbase design of a  
Balinese dancer was eligible for copyright protection.94 Succinctly phrasing the question as whether a lamp base manufacturer can copyright his lamp bases, the Court reasoned that a work of art that is incorporated into the design of a useful article is protectable under copyright law.95 Justice Reed said, “We find nothing in the copyright statute to support the argument that the intended use in industry of an article eligible for copyright bars or invalidates its registration.”96 The Mazer ruling potentially put the U.S. at the forefront of creating a general design law as part of copyright, which would have put the U.S. in the unity of art thesis camp.97 After the ruling, courts started interpreting what designs could be copyrighted very broadly.98 However, the Copyright Office apparently favored protecting designs under a new limited design law rather than as part of copyright law and thus did not want give its support to this broad approach.99 Although numerous attempts have been made over the years,100 Congress has never actually passed a design law.

Meanwhile, the Mazer rule was codified narrowly in the Copyright Act of 1976 which specifically permitted the protection of a useful article that can be identified separately from the utilitarian aspects of the article.101 Though it would appear that this would allow designers to copyright at least the artistic ornamentation portions of their apparel designs, the truth is that courts since Mazer have been so inconsistent with the tests for conceptual separability that mechanism has not been particularly useful in protecting designs. The U.S. is therefore left without a specific design law to balance the narrow formulation of

93 See Robert C. Lind, Copyright Law 40 (3d ed. 2006) (noting that there is a split of authority regarding the test of conceptual separability); Brandir International, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987) (designer must have intended to exercise artistic judgment independent of functional influences); Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984) (multifactor test); Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985) (artistic features of the article must be superfluous or wholly unnecessary to the performance of the utilitarian function).
95 Id. at 204.
97 See Reichman supra note 20 above at 1152.
98 Id. at 1174.
99 Id. at 1176.
100 Id. at 1171 fn 139 listing at that date 71 design bills not passed by Congress since 1914.
the Mazer rule which effectively prevents copyright from being used to protect design. Current U.S. law does not protect design by any of the methods envisaged by Berne 1948.

In 1991, the Copyright Office issued a policy decision in order to try and clarify the principal of conceptual separability as it related to clothing. It explained that the Office had generally refused to register copyright in “three-dimensional aspects of clothing or costume design” as clothing was a useful article that ordinarily contained “no artistic authorship separable from their overall utilitarian shape.” Fanciful costumes would “be registered if they contain separable pictorial or sculptural authorship.”

Despite the Copyright Office’s attempts to explain the application of the test, the Fifth Circuit recently complained of the lack of clarity regarding the tests. It used a likelihood-of-marketability standard, under which a useful article is protectable if “it would still be marketable to some significant segment of the community simply because of its aesthetic qualities.” Under this test it rejected buttons and artistic pleats on uniforms as eligible for copyright protection. This result returns us directly to the question of whether fashion is art or a utilitarian craft. Under the Fifth Circuit’s reasoning, if a market of people existed, who wanted the piece of apparel simply to hang on a wall or be displayed in some fashion, but not worn on the body, the fashion item would be deemed protectable under copyright law. Some fashion designs are “conceptually independent of the human form beneath,” and some are displayed in museums (although so are many cultural artifacts not fitting the traditional definition of art). However, due to the utilitarian nature of clothing many fashion designers would not be protected by copyright law from copyists and imitators under this test.

The Second Circuit, however, in a case involving Halloween costumes, held that conceptual separability could be shown if artistic elements “invoke in the viewer a concept separate from that of the costume’s clothing function, and that their addition to the costume was not motivated by a desire to enhance the costume’s functionality.” This is obviously an easier test to pass than the Fifth Circuit test. Under this broader test artistic elements could be protected as

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103 Galiano v. Harrah’s Operating Co., 416 F. 3d 417 (5th Cir. 2005). There are at least six distinct variations of (the conceptual separability) test.
104 Id. at 421.
105 Lisa J. Hedrick, Tearing Fashion Design Apart at the Seams, 65 Wash. & Lee L. Rev. 215 at
106 See H.R. 5055 Hearings supra note 1 above, prepared statement of Susan Scafidi at *3.
107 Chosun Int’l, Inc. v. Christa Creations, Ltd., 413 F.3d 324, 333 (2nd Cir. 2005).
long as they are not functional. A Supreme Court decision is urgently required to deal with the conflicting authorities on the test for conceptual separability and bring some consistency and clarity to the copyright law.

3. Design Patents

Congress has protected industrial designs through patent law since 1842.\textsuperscript{108} There are several problems with design patents which make them generally unsuitable for the protection of fashion designs. The first is that a design patent application is a lengthy and costly process. An application must be made and reviewed by a patent examiner to determine if it is eligible for protection; This process takes approximately two years,\textsuperscript{109} and protection is not retroactive.\textsuperscript{110} Most fashions are too fast moving for this protection to be helpful. Second, since design patents protect “any new, original and ornamental design for an article of manufacture,” design patents must be examined for novelty. This is a higher standard than “originality” required by copyright. Designs/patents must meet the generally applicable standards for inventions. They must involve a new and inventive step. Many fashion designs which are distinguishable and appealing will nevertheless not be sufficiently different from the prior art to meet this standard. Third, design patents also do not protect features dictated solely by function which, of course, brings into doubt whether a design patent would cover features of clothing that are required for the garment to fit the human form. In determining whether a design patent is infringed. Courts look from the perspective of an “ordinary observer” to determine if designs are “substantially similar.”\textsuperscript{112} Unfortunately, various circuits have created confusion by applying other tests along with the “ordinary observer” test.

For some enduring and particularly innovative fashion items design patents may be worth the time, expense and other disadvantages. The biggest category of design patent applications is for furniture, but over the last thirty years, Patent and Trademark Office figures show that design patents in the jewelry and apparel categories have consistently been in the top fifteen categories of applications for design patents,\textsuperscript{113} do clearly, they must provide benefits for some types of design. Designs can be protected for up to 14 years on registration.\textsuperscript{114} During this period of exclusivity a designer can focus on developing “secondary meaning” in order to protect the article as a trademark once design patent protection runs out. Some categories of fashion, notably

\textsuperscript{110} Id.
\textsuperscript{112} Door Master Corp. v. Yorktown, Inc. 256 F.3d 1308, 1313 (Fed. Cir. 2001).
\textsuperscript{113} U.S. PATENT AND TRADEMARK OFFICE REPORT, categories D2 apparel and D11 jewelry.
athletic shoe manufacturers, have used design patents to protect their merchandise. Apple used design patents very successfully as part of its strategy to protect the iconic design of the iPod, which, while it is not a fashion item, is certainly a well-known design. Once Apple had been granted a design patent, the company spent time and money on advertising to link the product and its design in the minds of consumers before going on to use this advertising to register the shape of the iPod as a non-traditional trademark.\footnote{David Orozoco & James Conley, The Shape of Things to Come, MIT Sloan Management Review, May 12, 2008.} Thus, for some enduring fashion items acquiring a design patent might be a useful strategy. However, it is understandable that the time and expense of design patent applications together with the strict requirement of originality and non-functionality preclude many fashion designs from qualifying for design patent protection.

In a recent case, Egyptian Goddess v. Swisa, Inc.\footnote{543 F. 3d 665 C.A. Fed (Tex) (2008).} the Federal Circuit sought to eliminate confusion about which of the various tests for patent infringement to apply, by creating “the modified ordinary observer” test. The court held that the standard to consider whether a design patent has been infringed is “that a purchaser familiar with the prior art would be deceived by the similarity between the claimed and accused designs.”\footnote{Id. at 672.} This test is more like the test for trade dress infringement. Possibly, the simplified test might encourage more use of design patents by fashion designers.

### 4. Trademark Law Protections

#### a. Trademarks

Trademark law protects symbols that identify a product and distinguish it from other products. A trademark can be a very powerful tool in protecting a design because a trademark, assuming payment of renewal fees, will never expire unlike either a copyright or a design patent. The function of a trademark is to act as a source identifier and so protect customers from confusion.

In protecting the source-identifying function of a trademark the law focuses on false designations of origin and the standard is not whether the customer is actually confused or mistaken as to the origin of particular goods, but whether, given all the circumstances, such confusion is likely. For example, an infringement action may be brought when a person uses (1) any word, term, name (2) in connection with goods … which (3) is likely to cause confusion, or to cause mistake, or to deceive…(4) as to the origin, sponsorship of approval of his goods by another person.\footnote{15 U.S.C. § 1115.} It is clear that the consumer does not actually
need to know who made the goods or services in question (the anonymous source rule) but he must think that both the real and the copied goods emanated from one source.

Trademarks assist consumers to accurately identify the source of the goods they buy. Trademark protection can assist designers in two ways. Designers can register their brand names and other insignia as traditional trademarks. They can also, in certain circumstances, assert that the actual shape of an article has become, through association in the customer’s mind, a non-traditional trademark or trade dress.

The registration of traditional trademarks enables designers to sue counterfeit producers who directly copy their trademarks in order to deceive the public into believing they are purchasing a genuine article. However, trademark law does not generally provide any assistance against the counterfeiter who makes exact copies of a design but leaves out the trademark (as do many sellers of counterfeit merchandise in places like Canal Street in New York City). Designers complain that traditional trademarks help fashion designers only where the trademark is visible (and copied), or where the product has come to have such a strong association with the design that the design itself is capable of being a trademark.

For example, after obtaining its design patent on the iPod, Apple went on to register the shape of the product itself as a non-traditional trademark. It had to first build recognition of the shape as signifying the product so that it achieved “secondary meaning” in consumers’ minds. Fashion design trends tend to move quickly and it may be more difficult for a fashion design to achieve the necessary “secondary meaning” to qualify for trademark protection.

b. Trade Dress

In Wal-Mart v. Samara, the Supreme Court held that, “(T)o prevail on a trade dress infringement claim, the plaintiff must prove two elements. First, plaintiff must prove that its trade dress is protectable by showing that the trade dress is distinctive. To do so, plaintiff must show that the dress is either “inherently distinctive” or has acquired distinctiveness through “secondary meaning.” Second, plaintiff must prove infringement by showing that the defendants’ trade dress has caused or is likely to cause consumer confusion.”

In this case about children’s clothing, a unanimous Supreme Court determined that clothing designs that are “inherently source identifying” can

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119 See Orozoco and Conley, supra note 112.
ordinarily be protected with design patents, so to obtain trade dress protection, designs must have acquired some secondary meaning.\textsuperscript{121} In Scalia's opinion, competition would be deterred if a product design was entitled to protection without a showing that it had acquired secondary meaning.\textsuperscript{122} In other words, the designer must prove that the primary importance of the clothing design is to identify the source of the product.\textsuperscript{123} Samara alleged that Wal-Mart had copied their seersucker children's clothes designs. The Supreme Court held that the design of the clothing had not acquired the necessary "secondary meaning" for it to function as a source identifier, such that a consumer could recognize from looking at the clothing where it came from.

Obtaining trade dress protection is also problematic for designers who wish to protect their designs because design aspects that are functional do not qualify for trade dress protection. The purpose of the "functionality doctrine" is to ensure that no one can control useful product features.\textsuperscript{124} Fitting clothing to the human body is part of the function of clothing which can make it difficult for a fashion design to achieve secondary meaning.

\textit{In Henri Bendel Inc. v. Sears, Roebuck and Co. et al}\textsuperscript{125} the plaintiff, Henri Bendel, a retailer of "upscale" women's clothes and accessories, claimed that its cosmetics bags were protected by trademark law. Bendel claimed that because its bags had certain distinct characteristics since 1936, such as brown and white stripes, plastic coating, and shiny gold, rectangular zipper pulls, customers associated those characteristics with Bendel. Sears, which was selling a very similar green and white striped bag, filed a motion for summary judgment, arguing that Bendel's trade dress was merely functional. The New York district court granted Sears' motion on the grounds that Bendel could not claim exclusive rights to use vertically striped, plastic coated fabric and gold zipper pulls on cosmetic bags since all those features were clearly functional.\textsuperscript{126} "There are only a limited number of designs available for cosmetics bags and these features, vertical stripes, plastic coating and gold zipper pulls must remain available to competitors."\textsuperscript{127} The result might have been different if Sears had directly copied the color of Bendel's bag, not just the stripes, but the features that Bendel complained had been copied were all features that were related to the function of the bags. The court used the functionality doctrine to prevent Bendel being able to stop its competitors from making something with a similar

\begin{itemize}
\item \textsuperscript{121} Id. at 212.
\item \textsuperscript{122} Id. at 213.
\item \textsuperscript{123} Raustiala and Sprigman, supra note 5, at 1703.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id. at 202.
\item \textsuperscript{127} Id.
\end{itemize}
style or motif, which, in the court’s view, would have had an anti-competitive effect on industry competition.\footnote{128}

However, more recently, in 2002, in the case of Adidas Inc. v. Target Inc., Adidas alleged that Target was selling shoes very similar to Adidas shoes which were confusing to the customers. Adidas asserted its claim as a violation of trademark law alleging that the trade dress of its original Superstar shoe was based on four elements: the trademarked three stripes on the side of the shoe, a flat sole, a rubber toe with a shell design ("shell toe,") and a "heel patch" including a trefoil design. Target argued the toe piece was functional and therefore not protectable.

The judge accepted the Adidas evidence that the toe portion of the original superstar shoe was strictly ornamental, adding neither durability nor performance to the shoe, and was therefore part of its trade dress which could acquire secondary meaning.\footnote{130} The court also agreed with Adidas that the shell toe had gained a significant amount of fame, and thus secondary meaning, because it was worn by several famous basketball players and had been around since the 1960s.\footnote{131} The Oregon district court carefully analyzed the differences between the Original Superstar Adidas shoe and the Target B.U.M. shoe and found the two to be very similar even though the BUM shoe had four stripes as opposed to three.\footnote{132} The court therefore denied Target’s motion for dismissal and summary judgment.\footnote{133}

Although the case was not concerned with the merits of Adidas’s trademark/trade dress case, if a fashion design were to have a non-functional ornamental characteristic, from this case, that design could be protected by trademark law if the ornament in question had an acquired distinctiveness or secondary meaning.

In 2004, a New York district court refused to grant an injunction for trade dress infringement in the case of Louis Vuitton Malletier v. Dooney & Bourke.\footnote{134} At issue in this case was Louis Vuitton’s wildly popular multicolored monogram “look,” which consists of its famous LV logo and “geometric shapes in an array of bright, crisp colors on white and black handbags.” To capitalize on this new trend, Dooney & Bourke launched its own handbags which featured a multicolored “DB” monogram affixed in a similar manner to white and black handbags.

\footnotesize
\begin{itemize}
\item \textit{Adidas-Salomon AG v. Target Corp.}, 228 F Supp. 2d 1192 (2002) D. Ore.
\item \textit{Id.} at 1195.
\item \textit{Id.} at 1196.
\item \textit{Id.} at 1196.
\item \textit{Id} at 1197.
\end{itemize}
handbags. Louis Vuitton sued Dooney & Bourke and alleged that the Dooney & Bourke handbag would create customer confusion and trademark dilution. Louis Vuitton further stated that its ‘toile’ design had achieved fame and thus secondary meaning and asked for a preliminary injunction. It was agreed by the court from the evidence that the Louis Vuitton bag had created a fashion sensation. “Everybody wanted to copy them and we had a counterfeit industry before we launched them.”

The court denied the injunction and reasoned that if Louis Vuitton was successful in its lawsuit, it would create an anticompetitive result, the “objective of trademark law is not to harm the competition,” It held that trademark law did not exist to reward a manufacturer for innovation, (that is the purpose of patent law, according to the court) but to prevent competitors from copying source-identifying marks and confusing consumers. In a comparison of the two marks, the court decided that Dooney & Bourke’s mark was not confusingly similar to Louis Vuitton’s. Each manufacturer used its own logo. Dooney & Bourke also did not use geometric shapes interspersed with its monogram. The main similarity between the two bags was the choice of color scheme – multicolored logos printed on a white or black background. Accordingly Louis Vuitton failed to demonstrate that the similarity between the two marks was going to lead to customer confusion. The court agreed that Louis Vuitton had created a new look but held that it should not be allowed to preclude others from following its lead.

5. Comparison of Current Legal Protections for Designs in U.S.
There are a number of areas of U.S. law which can be used to protect designers’ work. A copyright may be sought for art or ornamentation which can readily be separated from the underlying design. For truly new and inventive work a design patent may be obtained, but there is a significant disadvantage in the time and expense this requires. Finally, trademarks are important source indicators in the status symbol conscious world of fashion. Both traditional trademarks and trade dress (if it has acquired sufficient distinctiveness) may be used to protect a designer’s work. U.S. law can provide effective relief for those whose designs are appropriated by competitors. For example, in January 2009, women’s fashion designer and retailer, Brighton Collectibles, Inc. used trade dress and copyright claims to bring a successful action against fashion retailer Coldwater Creek, Inc. in respect of several of its designs. A jury awarded damages of over seven million dollars, and because the jury deemed Coldwater’s conduct “willful,” the court ordered the defendant to pay the

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135 Id. at 415.
136 Id. at 450. quoting from Barbault testimony.
137 Id. at 416.
138 Id. at 440.
plaintiff’s costs of bringing the action which it felt would further the aims of the Copyright Act of private enforcement.139

6. Specific Laws Protecting Designs

Rather than create a logical and comprehensive scheme of protection for industrial design as was possibly the hope of some after Berne 1948, and perhaps in the U.S. after the Mazer v. Stein case, Congress failed to pass a comprehensive design protection, yet it also did not expand copyright law. Over time, three particular design industries have been singled out for more specific legal protection. ‘Architectural works’ were added to the list of categories of work protected by copyright law in the Architectural Works Copyright Protection Act, enacted by Congress in 1990.140 This Act provides direct protection to the design of buildings and design blueprints.

Congress also created two forms of sui generis copyright protection with respect to design: one for the semiconductor industry; and one for the vessel hull industry. In 1984, Congress adopted the Semiconductor Chip Protection Act141 which afforded protection for “mask works,” which enable the etching of circuitry onto silicon wafers. The Vessel Hull Design Protection Act (VHDPA) was passed by Congress in 1998, as Title V of the Digital Millennium Copyright Act.142 This act came about because the Supreme Court struck down a Florida statute protecting boat hulls on the basis of federal preemption.143 The federal act gives copyright-like rights for a period of 10 years for the design of vessel hulls, so long as the design is registered within two years of the date it was made public.144 The bill was enacted in an effort to stop “hull splashing” which is the copying of a boat producer’s hull design simply by buying the boat and making fiberglass molds to produce the same shape hull.145 This protection was enacted as a result of heavy pressure from boat manufacturers who complained of having their popular hull designs copied immediately by competitors.146 The bill defines a boat hull as a “useful article,” suggesting that Congress has not entirely given up on passage of a comprehensive design law. It must have been envisaged the act could be relatively easily extended in the


146 Id.
future to cover other articles of industrial design simply by amending this definition.

Under the VHDPA, a hull design needs to be “original” in order to be registered and protected by copyright. Original designs are defined as those that are “the result of the designer’s creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source.” \[147\] Once the design is registered, the owner has the exclusive right to make or import hulls which incorporate the protected design for a period of 10 years.

Since the VHDPA was enacted in 1998, there has been only one reported infringement case based on the law. In *Maverick Boat Company Inc. v. American Marine Holdings Inc.*, \[148\] the Eleventh Circuit Court found that the allegedly infringing design was different enough from the Maverick hull design and was not in fact an infringement. As of October 2003, only 156 designs had been registered under the act. \[149\] A second review of the Act, due out in November 2008, has not, at the time of writing, been made available by the Copyright Office, so it is possible the Act has been used more in its second five years than in its first.

7. Proposed Legal Protections for Fashion Design

The proposed Design Piracy Prohibition Act is a simple and short bill, which expands the Vessel Hull Design Protection Act to include fashion designs. Under the current bill, H.R. 2033, the copyright-type protection for boat hulls would be extended to original apparel designs including those for undergarments, outerwear, gloves, footwear, and headgear, handbags, purses, totes, belts, and eyeglass frames. \[150\]

Originality for a fashion design would be subject to the same test as currently used under the VHDPA for boat hulls. Section 130(b)(1) requires that the design “provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source.” \[151\] The law would contain the same prohibition against protecting generic designs as does the VHDPA. Section 1302 makes clear that a work is not protected if it is staple or commonplace, such as a standard geometric figure, a familiar symbol, an emblem, or a motif, or another shape, pattern, or configuration which has become standard, common, prevalent, or

\[147\] Id. at 10.


\[149\] See supra note 130 above.


In the fashion bill, applications for registrations of fashion designs would have to be made within three months after the date on which the design is first made public, amended from the two year period under the VHDPA. If a design is registered successfully, it would be protected for three years from the date of registration, shorter than the 10 years of protection that vessel hull designs receive under the current act. Proponents of H.R. 2033 argue that designers are most likely to be harmed by the sale of infringed goods within three years of the design’s release, and that by demanding this short time period for protection they are showing restraint and not requesting a huge expansion of IP law into the public domain. The Copyright Office in its statement on the proposed Design Piracy Prohibition Act stated that it had been informed that legal protection would only be sought for a small proportion of fashion designs, “primarily designs of haute couture for apparel sold at prices of four figures or more.” The statement does not say from where this assurance came. No such assurances are made by designers in their testimony.

H.R. 2033 also extends secondary infringement beyond the VHDPA provisions. The categories of potential infringers would include not only those with actual knowledge that a design is protected, but also those with “reasonable grounds to know that protection for the design is claimed.” The penalties for infringement of a registered design under H.R. 2033 are high. H.R. 2033 would increase the compensatory damages available under the VHDPA, from $50,000 (or $1 per copy) to $250,000 (or $5 per copy).

There are numerous difficulties with H.R. 2033 as currently drafted. Given the modus operandi in the fashion industry of referencing or copying prior work, the definition of original design, who defines original, and who decides what constitutes copying are all problematic. David Wolfe made the point, in his testimony on the almost identical prior bill, that the absence of copyright protection frees designers to incorporate unquestioningly all influences in their repertoire including recycling old ideas without fear of infringement claims.

In terms of original design under section 1302(B) the list of possible items of
apparel which constitutes original design is limited. For example, concerning what is protected from copying, it is fairly obvious that all fashion articles are not on list of what constitutes “apparel.” Are umbrellas (often fashion items) to be covered? They are not listed. Or, does the list provide examples of some fashion items which is intended to be interpreted more broadly? Next, there is little guidance in the bill on the question of who determines what is original. There is no protection for designs that are “staple or commonplace.” This requires a distinguishable variation over prior art, but it is not clear who decides this, designers, experts, ordinary purchasers or a judge.

Registration under the act does not include a substantive review. It is certainly possible to imagine that big design houses will already routinely use attorneys and may decide to register many of their designs, whether or not they contain an original element, simply because they can, forcing smaller designers to be careful and less innovative about what they create for fear of infringing a registered design and triggering the expense of a lawsuit.

There is no guidance in the bill as to what is required for infringement. Is evidence of copying required? Must an exact copy be produced to infringe, or is a product with minor variations sufficient? Of course, many of these problems with the bill would gradually be solved through case law but these type of questions about originality and infringement would always pose particular problems for the fashion industry because of the way its designers operate. Finally, some of the fashion industries most problematic copyists are based in China and other jurisdiction, and therefore probably cannot be sued anyway.

B. European Scheme of Legal Protections

American fashion designers unfailingly point to the European legal regime for design protection as justification for the position that they require the passage of H.R. 2033 to compete in the global fashion business. However, there are some important differences between European design laws and the proposal before Congress. Most importantly European design laws do not focus exclusively on one industry.

Most European Union member states are long standing members of the Berne Union, and thus were part of the decision in 1948 to accord protection to design. Since Berne left open to individual countries how to protect design in their laws, the laws of E.U. member states protecting design were, until recently, varied. Recently the E.U. has done a good job of harmonizing the types of

\[17 \text{U.S.C } \S 1301(9) \text{ will be amended to read, } "\text{The term apparel means an article of men’s women’s or children’s clothing, including undergarments, outer-wear, , , gloves, footwear and headgear; handbags, purses and tote bags, belts and eye glass frames."} \]
protection provided to designs under the laws of the E.U. and the member states. Laws in Europe generally provide legal protection for all types of industrial designs. Unlike the proposal before Congress which is limited to fashion, European design rights apply to furniture, textiles, interior design and other creative industries where there is a design element. In the U.S. design patents fulfill this function, although there are important differences between European design right law and U.S. design patent laws. The European system provides several types and levels of protection at both the European level, through the E.U. Community Design Regulation, and at the individual country level through national legislation. In some European countries designs are protected under both design right laws and copyright law.

1. E.U. Laws

E.U. Design Directive

In 1998, the European Parliament and the Council of 13 adopted Directive 98/71/EC which was designed to harmonize the various design right laws of the member states. This Directive called for an approximation of the national laws to one another in order to create a more smoothly functioning internal market which would eliminate the distortion of Community-wide competition and decrease fees for applicants. It required all E.U. countries to enact laws, if not already in place, to protect designs by registration, and confer exclusive rights on holders for a period of five years from filing which can be renewed for further five year intervals up to a maximum term of 25 years.


The E.U. remained concerned by the continued substantial differences between the laws of some E.U. member states, and so, after four more years of debate at the European level, the E.U. succeeded in creating Council Regulation (EC) 6/2002, (the Design Regulation), an E.U. wide law which gave legal rights to citizens of Europe without the need for the enactment of individual national laws, to protect designs through one Europe-wide registration. The registration also provided for the first time for the E.U. wide protection of unregistered design rights. The Regulation defines ‘design’ as

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162 See e.g. Copyright Designs and Patents Act, 1988, c. 48 (Eng.).
164 Id.
166 Id. at art. 3
167 Id. at art 10.
168 Id. Preamble (3).
169 Id.
170 Id. at art. 11.
``the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation,” a definition which allows for the protection of both ornamental as well as functional aspects of the design.

The Design Regulation protects only designs that are ‘new’ and have ‘individual character’. A design is considered ‘new’ if no identical design has been made available to the public and designs are deemed to be identical if their features differ only in immaterial details. A design has ‘individual character’ if the overall impression the design produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public.

A design registered with the Office of Harmonization for the Internal Market (OHIM) under the Design Regulation receives up to 25 years of Europe-wide protection (the owner may renew the protection up to 5 times every 5 years). A registered design provides a patent-like right, protecting the rights holder as the exclusive creator and user of that design for the time period. It “confers on its holder the exclusive right to use the design and to prevent any third party not having his consent from using it” across the E.U. This means there is no need to provide evidence of copying. The registration protects against even independent creation of the same design. Article 80 of The Design Regulation mandates that member states designate a court in their territories to hear disputes involving design infringement and validity cases. Sanctions available in actions for infringement include injunctions, seizure of goods, and other sanctions provided by law.

Raustiala and Sprigman’s research indicates that there has been little use of registered designs in the fashion industry in Europe. This makes sense because fashion is a seasonal industry and designs may not have a long enough shelf life for registered designs to be a useful tool. In this respect, the disadvantages of

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171 Id. at art. 3(1).
172 Id. at art 4.
173 Id.
174 Id. at art 5.
175 Id. at art 6.
176 Id. at art 12
177 Id. at art 19.
178 Id. at art 80.
179 Id. at art 89.
180 Id. at art 89.
181 See Raustiala and Sprigman supra note 5 at 1740.
registered designs for fashion are somewhat similar, although not as insurmountable, as the disadvantages in the U.S. of design patents for fashion design.

A design does not need to be registered with OHIM in order to receive protection; Unregistered designs receive 3 years of copyright protection from the date the design was first made public within the EU.\(^{184}\) Fashion can, of course, be protected by unregistered designs and there would not be a way to measure how many unregistered designs are claimed for protection of fashion articles. An unregistered design provides a shorter protection, similar in duration to the length of the proposed protection under the Design Piracy Prohibition Act. Also, in order to succeed in an action for infringement of an unregistered design right, actual unauthorized copying must be proven.\(^{185}\) Again, the penalties for infringement are decided by the Community design court where the alleged infringement took place.\(^{186}\)

It is the designer’s option whether to protect the design through registration or not. Registered designs obtain a longer period of protection, and the protection is available to prevent any similar design. However, there are costs associated with registration. An unregistered design has a lesser period of protection and to bring a claim for infringement there must be evidence of copying. It is clear that Mr. Banks in his testimony confused the duration of protection for registered designs – up to 25 years – with the lesser period of three years available to protect unregistered designs in Europe.\(^{187}\)

In a recent British case concerning a registered E.U. design, Jimmy Choo v. Towerstone Ltd., Jimmy Choo, a handbag designer, designed a handbag called the “Ramona” which was described as a bucket bag with a double row of large eyelets threaded with a belt and interrupted by a clasp strap appearing to run along the bag longitudinally, and with handles which terminated in a lozenge shape integral with the eyelet design.\(^{188}\) This Ramona bag was considered a very fashionable item and received much fashion media attention.\(^{189}\) The defendant, Towerstone Ltd., a retail store, began selling very similar bags soon after the launch of the Ramona bag. Jimmy Choo filed suit and alleged that the Towerstone copy infringed on his Community registered

\(^{185}\) Id. at art. 19.
\(^{186}\) Id. at art 19(2).
\(^{187}\) See H.R. 5055 Hearings supra note 1 above, prepared statement of Jeffrey Banks at *1.
\(^{189}\) Id. at 347.
design rights and sought summary judgment. Jimmy Choo focused on the design of the front part of the bag and described the similarities between its Ramona bag and the ‘copy’ bag sold at Towerstone. Towerstone claimed numerous differences between the bags. In addition, Towerstone stated that it had bought its bags from a third party, and had no reason to believe the bags were infringing copies (innocent infringer). Under U.K. design law, there is a defense of innocent infringement for a registered or unregistered infringement of the Community registered design held by Jimmy Choo, and there was no defense of innocent infringement for a UK-registered design, but not with a Community registered design.

The English High Court of Justice granted summary judgment for Jimmy Choo and spent much of its reasoning on the definition of an ‘informed user’ and the meaning of ‘overall impression.’ The Court concluded that the overall impression of the Jimmy Choo design formed by an informed user (someone who would have more knowledge of handbag design than the average purchaser, but not an industry expert) at an appropriate level of generality was of a bucket bag with a double row of large eyelets threaded with a belt and interrupted by a clasp strap appearing to run along the bag longitudinally, and with handles which terminated in a lozenge shape integral with the eyelet design. The court decided that the differences cited by Towerstone between their bags and the Jimmy Choo bags were insignificant and did not influence the impression given by the bag as a whole. Since the defendant’s bag was an infringement of the Community registered design held by Jimmy Choo, and there was no defense of innocent infringement for a registered or unregistered Community design, Jimmy Choo was entitled to an inquiry as to damages or, at its option, an account of profits.

This is the type of case that proponents of fashion design protection in the U.S. contend would be decided differently in the U.S. Certainly, if the copied features of the bag were held to be functional (as in Bendel) they could not acquire the “secondary meaning” necessary for protection under trademark law. They would also probably fail to be considered separable from the bag as a “useful article” to achieve protection under U.S. copyright law. Under design patent law in the U.S. a “new and original” handbag design could be registered as a design patent and would gain three years protection. Although the term of

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190 Id.
191 Id. at 346.
192 Id. at 348.
193 Copyright Designs and Patents Act 1988, c.22, §233 (Eng.).
195 Id. at 349.
196 Id. at 347.
197 Id.
protection is shorter, design patents in the US. are not dissimilar to the protection Jimmy Choo obtained through a registered design under E.U. law. He obtained this protection because his bag was “new” and had “individual character.” The standards in the U.S. to obtain design patents are non-obviousness and inventiveness. If the bag was sufficiently different to be “new” and have “individual character,” under E.U. law, it might have met the requirements for a design patent under U.S. law. The disadvantages of U.S. law are the longer time necessary to obtain protection, and the fact that it is not retroactive to the date of the application.

The protection that Jimmy Choo could have used in Europe, but that is not available to him in the U.S. is the protection of an unregistered design right. In order to obtain any protection in the U.S. he would either need to apply for a design patent, or to attempt to protect the bag as trade dress, assuming it had acquired secondary meaning.

2. National Laws

Under the Design Directive, member states of the E.U. are required to provide protection for designs by registration under their national laws also, and the registration of a design in accordance with the law, confers exclusive rights upon the holders to use the design and to prevent any third party not having his consent from using it. The Design Directive was supposed to harmonize European law, but it does not prevent any country from providing greater protection under its own laws. The Directive specifically allows member states to protect designs also through unregistered design rights, trade marks or other distinctive signs, patents and utility models, typefaces, civil liability or unfair competition. Some countries provide higher levels of protection than is required by E.U. law and thus the protection available for fashion designs European Union member states differs. The protections provided by the laws of the U.K, France and Italy are considered in more detail below. Since the passage of the Design Regulation, national laws have diminished in importance because, having been harmonized, they basically protect the same aspects of a design, but only in one market. U.K. law is most like the base level of E.U. protection.

a. U.K. Law

U.K. law does not follow a unity of art thesis, choosing to protect design through design right law rather than copyright law. It provides two types of

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201 See British Leyland Motor Corp. v. Armstrong Patents Company Ltd. (1986) RPC 279 in which the English High Court refused to grant copyright protection for the designs of spare parts for cars which could not be protected by registered design rights, reasoning that it should not be
protection for designs: registered and unregistered. The Registered Designs Act 1949, as amended by the subsequent E.U. design directive,\textsuperscript{202} protects registered designs.\textsuperscript{203} The Copyright Designs and Patents Act 1988\textsuperscript{204} introduced protection for unregistered designs, a type of protection that was copied by the E.U. in the Design Regulation. The rights of the designer, duration of protection, and other factors differ depending on whether a design is registered or unregistered.

The Registered Designs Act 1949 has been amended to contain similar language to the E.U. law. Like E.U. law it protects both functional and aesthetic features of a design, defining a design as “the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the products or its ornamentation.”\textsuperscript{205} In order for a design to be registered under the Act, the design must, as in the E.U. Design Regulation, be “new” and have “individual character.”\textsuperscript{206} Under the Act, “a design is new if no identical design or no design whose features differ only in immaterial details has been made available to the public before the relevant date”\textsuperscript{207} and it possesses individual character if “the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the relevant date.”\textsuperscript{208} If a design is new and has individual character, it can be registered and the registered proprietor holds “the exclusive right to use the design and any design which does not produce on the informed user a different overall impression,”\textsuperscript{209} which means she has the exclusive right to engage in “the making, offering, putting on the market, importing, exporting or using a product in which the design is incorporated or to which it is applied or stocking such a product for those purposes.”\textsuperscript{210} A registered design in the U.K. is valid for an initial period of five years from the date of the registration of the design.\textsuperscript{211} The registration may be extended for four more five-year periods as long as the registered proprietor pays a prescribed renewal fee.\textsuperscript{212} As with the E.U. design right the owner of a registered design right does not need to prove the design was directly copied in order to enforce the rights, merely that a design with a similar overall impression has been put on the market. Unsurprisingly, since they

\begin{footnotesize}
\textsuperscript{203} The Registered Designs and Patents Act 1949, c. 88 (Eng.).
\textsuperscript{204} The Copyright Designs and Patents Act 1988, c. 22 (Eng.).
\textsuperscript{205} The Registered Designs and Patents Act 1949, 1(2), c. 88 (Eng.).
\textsuperscript{206} Id. at section 1(B)(1).
\textsuperscript{207} Id. at section 1(B)(2).
\textsuperscript{208} Id. at section 1(B)(3).
\textsuperscript{209} Id. at section 7(2)(a)(b).
\textsuperscript{210} Id. at section 7(1).
\textsuperscript{211} Id. at 8(1).
\textsuperscript{212} Id. at 8(2).
\end{footnotesize}
provide basically the same legal protection, U.K. registered design applications have experienced a decline since the identical Europe wide Community registered design right came into force.\textsuperscript{213}

The Copyright Designs and Patents Act 1988 provided for the first time for the protection of unregistered designs under British law. It defines a design as "any aspect of the shape or configuration (whether internal or external) or the whole or part of an article."\textsuperscript{214} The design must be original and the Act states that if a design is "commonplace in the design field in question at the time of its creation," it is not considered original and will not receive protection.\textsuperscript{215} The U.K. unregistered design right expires "fifteen years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design, whichever first occurred."\textsuperscript{216} Under section 226, "the owner of design right in a design has the exclusive right to reproduce the design for commercial purposes by making articles to that design, or by making a design document recording the design for the purpose of enabling such articles to be made."\textsuperscript{217} Any individual who, without the license of the design right owner does, or authorizes another to do, anything which is the exclusive right of the design right owner, is considered to be a primary infringer.\textsuperscript{218} A secondary infringer is one who, without the license of the design right owner, "imports into the U.K. for commercial purposes, has in his possession for commercial purposes, or sells, lets for hire, or offers or exposes for sale or hire, in the course of a business, an article which is, and which he knows or has reason to believe is, an infringing article."\textsuperscript{219} If a U.K. design right owner believes his design has been infringed, he can bring an action and seek relief by way of damages, injunctions, accounts, or other forms of relief available for the infringement of any other property right.\textsuperscript{220}

An unregistered design right under U.K. law protects the shape or configuration of a marketable (or potentially marketable) product, and may be used to prevent unauthorized copying of an original design. An unregistered design right protects only three-dimensional aspects of design, excluding surface ornamentation (which can be protected by copyright law). In order to enforce this right, the owner must prove that the design was directly copied. An unregistered design is protected for fifteen years and is not renewable.\textsuperscript{221}

\begin{flushright}
\textsuperscript{213} See Raustilia and Sprigman supra note 5 above at 1720.
\textsuperscript{214} The Copyright Designs and Patents Act 1988, section 213 (2), c.22 (Eng.).
\textsuperscript{215} Id. at section 213 (4).
\textsuperscript{216} Id. at section 216.
\textsuperscript{217} Id. at section 226.
\textsuperscript{218} Id. at section 226.
\textsuperscript{219} Id. at section 227.
\textsuperscript{220} Id. at section 229.
\textsuperscript{221} Id. at section 216.
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mentioned, the U.K. unregistered design right provided the blueprint for the unregistered design right introduced into European community law by the Design Regulation.222

b. French Law

France has a long history of protecting design, in fashion and other industries. Unlike in the U.K., unity of art is important. Specific protection for fashion is provided in French copyright law, as well as in the form of design right protection, implemented to comply with EU Design Directive. Part I of the French Intellectual Property Code covers “Literary and Artistic Property.”223 Protected works under the Copyright chapter details the types of creation which receive copyright protection; as well as books, plays and other artistic works accorded copyright protection in the U.S., French law includes in Part I: creations of the seasonal industries of dress and articles of fashion. Industries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of articles of fashion and of footwear and the manufacture of fabrics for upholstery shall be deemed to be seasonal industries.224

Thus, in France, fashion creations receive the same level of copyright protection as books and music. During his or her lifetime, the author enjoys “the exclusive right to exploit his work in any form whatsoever and to derive monetary profit therefrom.”225 After the author’s death, the right subsists for his successors in title for the following 70 years.226

Under French law, fashion, along with all other designers, are also offered a sui generis form of protection for their designs. Part II of the French Intellectual Property Code covers Industrial Designs, and Book V in that section specifically addresses Designs and Models.228 Under this section of French law, “the protection conferred by the registration of a design or model shall be extended to any design or model which does not produce on the informed observer a

224 C. PROPRIÉTÉ INTELLECTUELLE, art. I, L112-2 (Fr.).
225 C. PROPRIÉTÉ INTELLECTUELLE, art. I, L123-1 (Fr.).
226 Id.
228 C. PROPRIÉTÉ INTELLECTUELLE, art. V, L511-1 – L521-7 (Fr.).
different overall visual impression.” Registration under the Designs and Models section lasts for a period of five years, which may be extended by periods of five years for a maximum term of protection of 25 years. Because of harmonization under the Design Directive this protection is similar to that provided under the U.K. Registered Designs Act 1949 and now also under the E.U. Design Regulation.

French law imposes high penalties for infringement of industrial property. Article L521-4 states that “any knowingly committed infringement of the rights guaranteed by this Book shall be liable to a three-year imprisonment and a fine of € 300,000. Where the offence is committed by an organised criminal group, the penalties shall be increased to five-year imprisonment and a fine of € 500,000. In addition, the court may order the total or partial, permanent or temporary closure, for a period not exceeding five years, of the establishment that has served for the commission of the offence.”

Despite the apparent very strong protection afforded to French designers, only one case is generally mentioned to illustrate the copyright protection French law provides to designers in France. In 1994, Societe Yves Saint Laurent Couture S.A. v. Societe Louis Dreyfus Retail Management S.A., Yves Saint Laurent filed suit against Ralph Lauren, alleging that Ralph Lauren had made an identical copy of a Yves Saint Laurent designed dress and was selling it at a fraction of the cost.

In 1970, Yves Saint Laurent had created a long black tuxedo evening dress which became an immediate worldwide success. In 1992, Yves Saint Laurent again released the dress for its Winter 1992 couture collection, the dress retailed at approximately $15,000, and the company was preparing to sell a shorter summer version of it under its ready to wear subsidiary, Diffusion Rive Gauche. In 1992, Yves Saint Laurent noticed that Ralph Lauren was selling a strikingly similar tuxedo dress for $1,000, and Yves Saint Laurent sued for copyright infringement and unfair competition. The company claimed that its dress was protected under the French law on Designs and Models as it had filed the dress design in 1970. It also noted that the dress enjoyed copyright protection for its cut (shape). Ralph Lauren responded by presenting “significant” differences between Yves Saint Laurent’s dress and Ralph Lauren’s dress.

The Paris Commercial court’s view on Yves Saint Laurent’s ownership of the

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229 C. PROPRIÉTÉ INTELLECTUELLE, art. V, L513-5 (Fr.).
230 C. PROPRIÉTÉ INTELLECTUELLE, art. V, L513-1 (Fr.).
231 C. PROPRIÉTÉ INTELLECTUELLE, art. V, L521-4 (Fr.).
The 1970 model dress was actually broader than the plaintiff’s own; the court noted that not only were the existing features of the dress protected, but the missing features such as ‘no sleeves’ and ‘bare shoulders’ also marked Yves Saint Laurent’s dress an original copyrighted creation. Yves Saint Laurent won the case in the Paris court and was awarded damages of $383,000 and an injunction.

This case would certainly have had a different outcome in the U.S. with no copyright protection likely for the shape and cut of a dress like this. Would we want to discourage legitimate designers like Ralph Lauren from providing clothing at different price points of the market? Yves Saint Laurent is a designer of haute couture and the price tag for its dress of $15,000 in 1992 demonstrates that only a tiny minority of woman had access to this design. Ralph Lauren caters to a different part of the market with its ready-to-wear fashion.

Even with France’s stronger design protections, this case was unusual. Many commentators have mentioned that the ubiquity of copying and relative lack of litigation in France and other European countries may not translate to a similar lack of litigation in the U.S. if fashion design law were to be enacted in this country, which has a history of dealing with disputes through lawsuits and is, by any measure, a much more litigious society.  

**c. Italian Law**

Italian law, like French law now accepts the unity of art, so protects design as part of copyright law. It does not have a specific provision in its copyright law that protects fashion designs as in France, but its copyright law does list as a ‘protected work’:

> industrial design works that have creative character or inherent artistic character

In Italy, any industrial design receives protection as a full copyright for the life of the author/designer plus 70 years.

Italian law, like the other E.U. member states, also protects designs through registered and unregistered design rights. The general sentiment in Italy is apparently not in support of EU design rights promulgated under the Design.

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233 See Raustiala and Sprigman supra note 5 above at 1743.

234 Law No. 633 of April 22, 1941, s. 2.10, Protection of Copyright and Rights Related to its Exercise.

235 Id. s. 25.
Regulation, Italian attorney, Mario Franzosi, criticizes the E.U. law, arguing that the terms "individual character" and "informed user" which are used in both the EU Directive and Regulation, have yet to acquire any real meaning. He contends that it is hard to define design in the way lawyers wish. In Mr. Franzosi’s view design is the “correct style for a utilitarian function.” Lawyers, according to Mr. Franzosi, classify things and protect them by trying to fit them into a particular type of protection, thus beautiful things are protected by copyright, new things by patents, but design is difficult to categorize. Franzosi believes that design cannot be separated into components of artistic value and utilitarian value. This is the Italian theory of inscindibilita, probably best rendered in English as unity of art. Franzosi objects that the phrases used in E.U. design law may be used to protect even ugly and commonplace design because “the construction of these terms does not have a rational foundation.” In his view, without a rational foundation, the result of attempting to define these terms through jurisprudence will not be satisfactory. He explains the unusual Italian approach to design protection – an alternative dispute resolution system which does not use the legal system or the courts. In 1991, the Italian association of designers (ADI) with the help of the central business association (Confindustria) established a private body, which consisted of 10 experts, jurists, designers, marketing experts, and entrepreneurs, to judge whether a design was deserving of protection. Though the decision of this body is not binding, almost all of the decisions made by the Italian Jury of Design have, according to Mr. Franzosi, been accepted by the losing party. Mr. Franzoni admits that this system, although it works well in Italy would probably not gain favor in the larger European Union.

III. A SYSTEM OF PROTECTION FOR INDUSTRIAL DESIGN

Although in theory European law provides several methods of protecting...
design that can be used by fashion designers, in practice, the fashion industry in Europe does not appear to avail itself often of legal protection. Because of the fast-moving and cyclical nature of the industry there are few registrations, using either E. U. or country level design rights, for the protection of fashion designs.\textsuperscript{247} Little litigation using copyright, registered or unregistered design rights, and just as much, if not more, activity by the mass market retailers like H&M, Zara and Top Shop about which the CFDA complains in the U.S.

The European experience with design rights laws does not seem to justify protecting fashion design as a unique industry in the U.S. E.U. design laws are not structured to protect one specific industry. In fact, the fashion industry in Europe apparently operates in much the same way in practice as the fashion industry in the U.S. Designers copy each other, themes filter down through the different segments of the market. The referencing, anchoring and “induced obsolescence” noted by Raustiala and Sprigman are used by European designers as much as by U.S. designers to sell more clothing. Design laws protections appear to be infrequently used by the European fashion industry to prohibit copying.

However, given that the U.S. is now a member of the Berne Union, and given the protection Berne mandates for design, it is strange that the U.S. continues to lack a law protecting design, whether under copyright or a separate design law. European design right laws have been harmonized for several years now and a review of these laws might provide some useful pointers for the protection of industrial design in the U.S. U.S. legal tradition, and the line of cases and Copyright Office notes interpreting “conceptual separability” since Mazer, make it unlikely that copyright can be fashioned into a tool to protect design. Protection in the U.S. for design would have to be achieved through a design law. The Design Piracy Prohibition Act could be this tool if it was expanded to include designs beyond the fashion industry. The passage of a general design law, would finally bring U.S. into greater harmony with the international system of design protection, and with its Berne obligations. The difficulty with advocating this approach is the awkward fact that while the fashion industry in the U.S. agitates for more protection, which industry statistics and industry practice suggest it does not need, there appears to be no major lobbying from other design industries, suggesting that they feel that legal protection for designers in the U.S. is, in fact, adequate.
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(PUT IN FOOTNOTE) In 20032, the womenswear market value grew by 1.40%; in 20043 this segment increased by 1.42%; in 20054 it increased by 2.3%, and in 20065 it increased again by 2.31.8%. The CAGR for this time period is 1.8% for the womenswear market. This market is expected to grow slowly but steadily over the next 5 years and the projected CAGR for 20076-20112 is 1.32.6%.

The menswear market has met with similar success in the U.S. market. In 20032, this segment experienced a 1.92.7% increase; in 20043 the menswear market increased by 1.62.2%; in 20054 it increased by 2.13%, and in 20065 it increased by 3.32.5%. The CAGR for the menswear market in the U.S. is 2.2% over the period 2002-2006. The menswear market growth is expected to accelerate in the coming years, and the projected CAGR for this segment is 2.79% from 20076-20121.

In the specific European countries housing the fashion capitals, growth in the clothing industry does not appear to be affected by the level of legal protection for the fashion industry.
3.90% increase in 2003, a 1.90% increase in 2004, a 4.70% increase in 2005, and a 3.50% increase during 2006. These growth rates yielded a CAGR of 3.7% for the period from 2003-2007. The U.K. womenswear fashion market is expected to continue flourishing in the coming years with a projected CAGR of 3.7% from 2007-2012.

The UK menswear market has followed a similar trend, increasing 2.70% in 2003, 1.6% in 2004, 2.10% in 2005, and 3.30% during 2006. The UK menswear fashion market is projected to continue growing at a CAGR of 2.7% from 2007-2012.

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3.90% increase in 2003, a 1.90% increase in 2004, a 4.70% increase in 2005, and a 3.50% increase during 2006. These growth rates yielded a CAGR of 3.7% for the period from 2003-2007. The U.K. womenswear fashion market is expected to continue flourishing in the coming years with a projected CAGR of 3.7% from 2007-2012.

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and the menswear market experienced the same growth rate of 0.7%.

By contrast, over the past 5 years, the French fashion market has fluctuated and has shown little overall growth. In 2002, the womenswear market value fell by 1.00%; in 2003 this segment rose by 1.50%; in 2004 it increased by 0.20%, and in 2005 it increased by 0.40%. The CAGR for the womenswear market for this time period was 0.3%. The French womenswear segment is not expected to flourish in the coming years; the projected CAGR for the time period from 2006-2011 is only 0.6%, with negative growth expected in the years 2007 and 2008.

The menswear market in France has performed similarly to the
womenswear market. In 2002, the menswear segment experienced a 0.30% decrease; in 2003 the market value increased by 1.00%; in 2004 it increased by 0.20%, and in 2005 it increased by 0.60%. The CAGR for this time period was 0.4% and the projected CAGR for 2006-2011 is 0.8%.

The Italian menswear market grew by 1.7% in 2007, while the womenswear market grew by 0.3% in the same period. The Italian womenswear market was doing quite poorly soon after the implementation of the European Union’s Community Design Regulation. From 2002-2003, the womenswear market value fell by 6.20% and from 2003-2004, the market value fell again, this time by 3.30%. During 2004, the menswear segment experienced a
0.60% increase, and during 2005, the market increased by 1.00%. The CAGR for the womenwear segment in Italy for the period 2002-2006 was -2.0%. The Italian womenswear market is expected to continue growing slowly with a projected CAGR of 1.3% for the period from 2006-2011.

The Italian menswear market followed a similar trend over the period from 2002-2006, with a CAGR of -0.8%. The menswear market is expected to grow by 2.7% from 2006-2007.

In the United States, where a low-IP equilibrium has existed for many years, both the womenswear and menswear markets have done quite well from 2002-2006, and the projection for the next 5 years is very promising. In 2002, the womenswear market value grew by 1.00%; in 2003 this segment increased by 1.40%; in 2004 it increased by 2.30%, and in 2005 it increased again by 2.30%. The CAGR for this time period is 1.8% for the womenswear market. This market is expected to grow slowly but steadily over the next 5 years and the projected CAGR for 2006-2011 is 2.6%.

The menswear market has met with similar success in the U.S. market. In 2002, this segment experienced a 1.90% increase; in 2003 the menswear market increased by 2.20%; in 2004 it increased by 2.30%, and in 2005 it increased by 2.50%. The CAGR for the menswear market in the U.S. is 2.2% over the period 2002-2006. The menswear market growth is expected to
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a registered design, on the other hand,

"prevents all unauthorized uses of the design within the scope of protection." 2

To qualify as a new design, the overall impression should be different from any existing design. REGISTERED OR UNREGISTERED DESIGN?

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This design right is very similar to the Community Design Regulation 6/2002. Both unregistered and registered designs are protected under different terms under UK law. An unregistered design right protects the shape or configuration of a marketable (or potentially marketable) product, and is used to prevent unauthorized copying of an original design. Design rights can also be bought, sold, or licensed in a similar manner to copyright. (UK P15 factsheet NEED TO CITE TO LAW) An unregistered design right protects only three-dimensional aspects of design, excluding surface ornamentation. In order to enforce this unregistered design right, the owner must prove that the design was directly copied in order to enforce rights. An unregistered design is protected for 15 years and is not renewable.

A designer can also register his/her design under the UK design right. A registered design right protects the overall appearance of the design, excluding features dictated by technical function. The owner of a registered design right does not need to prove the design was directly copied in order to enforce the rights. The term of protection is 5 years and is renewable up to 5 times for a total maximum length of protection of 25 years. (CASES) (DIFFERENT FROM EU LAW?)

France has both sui generis and copyright protection for designs (I don’t understand), so “the laws of literary and artistic property are expanded to protect the designs of such articles as plastic salad bowls, drinking glasses, fireplace grates, a hair brush, the luggage rack of a motor scooter, and the hexagonal head of a lubricating pump.” (AEB page 5 FN67)

Under the French Intellectual Property Code, a design is protected if it has “proper character.” The IPC? states that “A design shall be considered to have proper character if the overall impression it produces on the informed observant differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority. In assessing proper character, the degree of freedom of the designer in developing the design shall be taken into consideration.”

3 (http://www.ipo.gov.uk/design/d-applying/d-should/d-should-designright.htm)
4 (http://www.ipo.gov.uk/design/d-applying/d-should/d-should-designright.htm)
YSL won the case in a French court.
Italian law does not have a specific provision which protects fashion designs as in France, but its Copyright Law does list as a "protected work":

10. industrial design works that have creative character or inherent artistic character

In Italy, any industrial design receives protection as a full copyright for the life of the author/designer plus 70 years.

There appears to be no limited term for fashion design in Italian law. These are truly two extremes; the United States with no design rights protection and Italy with full copyright protection for fashion designs.

5 Italian Copyright Law (USB>Printed>Italian Copyright law)
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