Copyright and the Fashion Industry

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Abstract

This paper seeks to discuss the relationship, or lack there of, between copyrights and the fashion industry. Although fashion designs are works of authorship, and comply with originality requirements of § 102 of the Copyright Act, the structure and nature of the industry do not compel the need for this protection, enabling it to run efficiently without it. Despite past attempts through legislation and litigation to enact protection for designers, the result has consistently been the same.

In order to prove the stated claim, this article will look to past cases, some of which reached Supreme Court level, for insight on the judiciary’s stance on protection for the fashion industry. Next, prior legislation, such as that implemented by the Fashion Originator’s Guild of America and other similar agencies will be examined. Their rise and fall will provide support for the lack of protection in such a profitable industry. This will also include comparisons of fashion designs to that of architecture, for example, which recently received its own protection under copyright law as well as other specially copyrighted areas. Third, the paper will look at other articles and scholarly writings about the fashion industry and its ability to thrive, despite the challenges faced in the prevalence of knock-offs and disloyalty from retailers. Lastly, the article will take a brief look at the effect on consumers and their role in shaping such a successful, yet unprotected industry.

The article seeks to argue that although fashion designs, like many other creative works, could viably secure protective rights from Congress, the nature of the industry is such that it does not need it. The fashion industry, unlike many other protected areas, changes yearly, if not even seasonally. This constant change not only makes the issuance of copyrights difficult, but also saturates the market. Also, it would open a floodgate for over-protection because of the ease in securing protection sourcing from indefinite statutory requirements. This paper also takes the
stance that protection in the fashion industry would have the potential to counter the intent of the Copyright Act. Because of the open-ended parameters on “originality”, provided in the statute, designs would be more and more similar, merely for the sake of receiving protection and a limited monopoly. The market would be flooded with look-alikes, originality being less and less of a factor.

Further, as a result of the volatile character of the industry, innovation is encouraged by the lack of protection. Designers must remain on their toes to keep up with trends, yet stand out among so many competitors. In spite of being disconnected from the Copyright Act, the fashion industry is directly linked to the Commerce Clause, in its ongoing promotion of competition and novelty. It is also this competition and novelty that separates the industry from other, remotely similar industries, and keeps it alive and well.

This article continues in arguing that the implementation of guilds and unions as a good idea to an extent, but not necessarily to the level of other industries. Union-like groups in this industry are great assets as supports for designers and their craft, but come close to interfering with the competition that flourishes the industry. Past their supportive nature, these organizations can take costly steps in harming fashion’s compliance with antitrust regulation. Fashion, like its products, is too unique of a market to call for the same restrictions and protections of others like it.

In closing, the paper will argue that retailers and consumers are the main driving factors in the state of the fashion market. Retailers take their position in promoting competition because of the availability of knock-offs, forcing designers to use low prices or exceptional quality as their weapon. Just the same, consumers drive innovation in the market, as they determine the trends which designers cater their products to. Although the originals derive from the designers, their mortality is in the hands of the consumers. Ultimately, the three parties create a pyramid of
dependency, where each part falls subject to the others in some way. With the options of knock-offs versus “originals”, consumers and their economic status are critical to the existence and staying power of each season’s products. Retailers also play a key role, as some have taken part in selling both originals and copies, in addition to using originals as a means for producing their own private labels. Knock-offs are also making their way from the runway to the sales floor faster and faster, which could pose problems and change the route in which the industry had been taking in regards to copyright protection. The link between the three has a great impact on the fashion industry and its distinctive makeup.

These issues are worth addressing because of the ever changing state of copyrights. As time evolves and technology advances, the utility of the Copyright Act changes as well. Like its affect on the music industry, copyright has an impact on fashion as well. The impact felt by the fashion industry is one of growth and encouragement, while its effect on other markets may be losing its quality. The issues contained in this paper will make clear the position of copyright and its use, despite not actually utilizing the Act. While society continues to advance in ways unheard of ten or twenty years ago, the adaptability of special markets will be important when determining their distinctive nature and means of feasibility. By and large, the fashion industry is its own trendsetter.

The findings of this paper will bring about answers to many questions regarding the mortality of the fashion industry. The way in which it continues to survive without statutory protection will become apparent. The impact that this unconventional market has on the condition of the Copyright Act will be clarified, in addition to its service as progeny for future, similar markets.

Additionally, the rising issues that may change the way the industry runs will be addressed. While established as the source of a necessity, the fashion industry has come alive as a reputable market, and continues to take serious strides each and every season.
I. Introduction

For longer than any of us can remember, clothing has been one of life’s most bare necessities. The need for clothing is somewhere in the realm of the need for water, and its utility is basically unmatched by any substitute. Unlike some of the other necessities in our society, clothing has blazed its own trail. It has taken on a business structure and become an economy. Although it is a necessity, designers of this life essential have built their own industry, complete with variety, innovation and market savvy. The only thing absent in this social empire, is legal protection.

Although fashion designs are works of authorship under the definition provided in the Copyright Act, these creations are not protected by statute. Different from other markets, such as literature or music, the nature and structure of the fashion industry does not require legal sanction. The trade runs efficiently without it. Over the last 70 years industry constituents have outwardly tried their hand at getting protection for their work, to no avail. What many may not realize is that such a guard could do more harm than good.

Fashion, in its highest form, is derived through inspiration and creativity. The creativity component is what allows it to fall under copyright’s legislative parameters, but the inspiration is a different story. The inspiration that exists in the fashion industry is sourced mostly from others in the trade and their designs. One designer sees what another has done, and finds a way to put their own creative spin on it. Or, seeing what worked for one design in one season is later completely revamped in another season, only better. Seasonality is another issue that greatly affects the fashion industry. The changes are just that rampant.

With every change of the sun and moon, so come changes in fashion. Not only must fashion change because of the weather, but it must also change to fit the utility of the social climate as well. When one design is hot during the winter, quickly preparing a counterpart for
the spring becomes an immediate task. The volatility of the market calls for ideas and
inspiration to be available at all times.

This volatility also puts a hindrance on legal protection for designs. In spite of fashion
designs being creative and original in their own right, the movement of the market would make
execution and enforcement more difficult that it is worth. The protection for this industry comes
in other forms, from other areas, not requiring this empire to need statutory assistance.

Encarta dictionary defines “empire” as territory, realm, kingdom, domain; lands ruled by
single authority; a large far-flung business; supreme or absolute power. This definition fits the
fashion industry perfectly and describes its autonomy in the market, yet its power in other trades.

This paper will discuss the ins and outs of the fashion industry in regards to protecting its
contents. The claim made here, is that the trade does not require statutory protection, as the
nature and success of the market do not depend on it. In fact, protection could do more harm
than good in an industry that continues to build and reinvent itself, largely through recycling.
From decade to decade, trends are reused and reworked to better fit the times, however still
provide a vintage appeal.

Further, the industry receives forms of protection because of its innate necessity and
function in other areas, such as music, theatre, television and film. Through these avenues, the
industry attains protections like trademark and trade dress. Even more so, the fashion industry
obtains protection in the way it is marketed through other means, such as commercials, and print
ads. Surviving on its own accord and practices, the practices of the fashion industry give it an
autonomy that does not command constitutional regulation. As a supreme and absolute power,
especially centered around one of the most needed useful articles, the business cannot be subject
to the rules. It makes them. Fashion is no longer a mere life requisite; it is its own social entity.

The purpose and philosophy behind copyright is “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.”\(^2\) The fashion market aligns perfectly with this sentiment, without directly receiving the protection. As designs are created, they are used as inspiration for later creations, thus promoting the progress of the craft. Furthermore, the trade obliges the limited times provision, mainly because of the speed in which trends flow through the market. They enter, leave, and return for the next generation. Designers are given exclusive rights to their works through trademark, and broader exploitation, like fashion shows and other media outlets. It is evident that the fashion business governs itself without constitutional preemption.

Part II will discuss the history of the fashion industry and its progression over the last 100-plus years. The history will be followed by information on the rise of the industry to its present position in society and overall market, even internationally. Here, the article will discuss past and present fixtures in the fashion industry, from the Fashion Originators’ Guild of America to today’s Counsel of Fashion Designers of America.

Part III will begin by discussing provisions of the copyright clause as they compare to fashion-type designs. The originality requirement of the Act will also be discussed here. Further, this section will address separability and its application to fashion designs. Additionally, this part of the article will talk about the current legislation, H.R. 5055, proposed to include fashion among the industries protected under statute. This will also be compared to other industries which currently have their own copyright provisions.

Moving on, Part IV will lay out what the scholars think. Law professor Chris Sprigman continues to make adamant stances on keeping protection out of the fashion industry; he and co-writer, Professor Kal Raustiala, expressed these sentiments in their own fashion and copyright

\(^2\) U.S. Const., art. 1, § 8, cl. 8.
article. In contrast, Susan Scafidi, also a law professor, has dedicated a website to the state of the fashion industry and its many battles with knockoffs. She, conversely, supports the legislation, and makes viable claims for her position on the matter. Moreover, the writings of other journalists and reporters will be addressed, as the state of the fashion industry and its future, are widely covered.

Next, Part V will discuss the consumer effect of an unprotected industry and the impact it has on other markets. This section will examine current trends in the market and the distinctive business model that makes the industry so adaptive and successful.

Finally, the article will conclude by summarizing the parts above and their piece in the fashion industry puzzle. Each part will reinforce the stance of fashion not requiring protection beyond that of trademark. Despite the plausible claims for protecting the industry, statutory guards for such a unique market could do damage, rather than provide benefit.

II. From Useful Articles to A Social Empire

The expression “fashion design” is termed as the applied art dedicated to the design of clothing and lifestyle accessories, created with the cultural and social influences of a specific time.\(^3\) The industry itself is considered to have begun in the mid 19\(^{th}\) century with Mr. Charles Fredrick Worth. Worth was the first known to sew his own label into the garments that he created.\(^4\) Rather than make what was requested by his customers, Worth dictated what his clients wore.\(^5\) It was also during this pivotal time that many design houses began hiring artists to sketch or print designs for garments, creating not only an industry, but also a market.

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\(^4\) *Id.*
\(^5\) *Id.*
A. *Humble Beginnings; No Protection*

At the start of this industry, fashion designs were just that, designs, but received no protection from the federal government. This could be due to the market’s birth following the 1831 revision of the Copyright Act, but no one is certain. In the early 1900s, all high fashion was in Paris. It was also at this time, that international copyrights were not recognized in the United States, making recognition of fashion designs a far cry. During this era, all fashion magazines and department stores used Paris as their information hub, as it was the Mecca for the industry. The early 20th century showed no separation between haute couture and ready to wear (RTW) selections, as conspicuous waste and consumption defined the fashions of the time. Outfits were extravagant, elaborate, ornate and painstakingly made.

During the mid 20th century, Paris’ reputation in fashion began to deteriorate after the war. Mass-manufactured fashions became increasingly popular, especially with new textiles and eventually synthetics surfacing. The traditional gap between high society and blue collar consumers became less wide. The younger generation wanted to make their own statement in society and still reap the benefits of a booming consumer culture. This created and fed the need for something to dwell in the middle ground between off-the-rack and couture. The need was even more urgent at this time because of great increases in overhead and raw material costs, which began pushing handmade fashions to the side. New technologies resulting from the overall industrial revolution made it easier to manufacture an ever-improving high quality product.

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6 French for “high sewing” or “high dressmaking”; Fashion History, Costume Trends and Eras, http://www.fashion-era.com/
7 *Id.*
8 *Id.*
9 *Id.*
At this time, there was still no protection for fashion designs, but the market was growing more and more each year. The only trade organization in existence was the short-lived Fashion Originators Guild of America.

The group served as an organization controlled by designers, manufacturers and sellers of clothing until its demise in 1941. To deter copying, the Guild prohibited its members from participating in retail advertising, regulated discounts, and denied membership to retailers who participated with dress manufacturers in promoting fashion shows. Mainly, it boycotted selling to retailers who sold garments copied by other manufacturers from designs put out by Guild members. After being sued by the Federal Trade Commission, the Supreme Court found the practices of the Guild to be out of compliance with antitrust regulations and dissolved the organization.

B. The Empire Emerges

As the twentieth century progressed, fashion did the very same. The industry looked to the past as haute couture endured somewhat of a rebirth and generated a plethora of star designers that profited greatly from the growth of the media. Designers of Hollywood created glamour for film stars and as the 60s rolled around, the range of possibilities made fashion even more of a personal statement. The 70s saw brands increasing their share of the international market, with film and television as strong supports. Music was no weak contributor either. Fashion reflected the times of society, yet that of previous decades, too. By the 1980s, the trade had become more self-conscious. Fashion shows were media-saturated events and the industry continued to look to the past to reinvent older styles. It was also by this time that another revision to the Copyright Act was made, but still no protection for fashion designs was

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11 *Id.*
13 *Id.*
implemented. In the 90s, promotion in the media became crucial to success and image. As the century ended, fashion tackled themes which it did not in decades past, such as religion and body modification.\textsuperscript{14} The industry moved away from sexy styles to those of comfort, mainly supplied by such RTW retailers as Gap and Banana Republic.\textsuperscript{15} Much of the retro-inspired clothing of the 60s and 70s was popular and the new millennium approached with a bang.

\textit{C. Zero Protection, Billion Dollar Profits}

The 21\textsuperscript{st} century is seeing fashion again look to the past for inspiration, now almost more than ever. Designers look to imitate departed styles, even those of less than a generation ago. Many celebrities have launched their own lines, bringing fashion into the same realm as music, television and film, as a proven entertainment industry. Throughout the last 100-plus years, the fashion market has evolved constantly, but continued to revert back to past trends.

The Council of Fashion Designers of America is somewhat reminiscent of the Fashion Originators’ Guild of America, without the Guild’s strict attempts at industry regulation. Today, the CFDA seeks to advance the status of fashion design as an American art form, and raise artistic and professional standards.\textsuperscript{16} It also works to promote growth of the industry as a whole, through philanthropy and education. This practice of reverting back is support for the industry not needing formal protection, as well as a method for success, that works. It works in the designs as well as in the way of the business.

\textit{III. Copyright, Fashion; Copyright and Fashion?}

\textit{A. The Core of the Act}

In spite of not having formal statutory protection, fashion designs do align with the definitions of the Copyright Act. § 101 describes pictorial, graphic and sculptural works to

\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Council of Fashion Designers of America, www.cfda.com
include two-dimensional and three-dimensional works of fine, graphic and applied art, among other selections, as protectable. It later goes on to provide that “the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of exiting independently of, the utilitarian aspects of the article.” This is where fashion begins to lose out. Fashion designs clearly qualify as pictorial, since they begin as drawings, before converting into useful fabrics. But, according to the Copyright Act, a “useful article” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. “An article that is normally part of a useful article is considered a useful article.”

Fashion designs fall directly into this category, as their core function is to clothe the body. § 113(c) of the Act provides that in the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distributing, or displaying of pictures or photographs of such articles in connection with media outlets related to the distribution or display of such articles, or in connection with new reports. This lack of exclusive rights makes way for designs to be copied with no penalty. With the emergence of technology, the speed of photographs reaching design tables and warehouses is like never before.

B. Fashion’s Function

Being a useful article is the main strike against protecting the fashion trade. Many of the designers and proponents of protective legislation create works that are somehow out of the ordinary, or at minimum “couture”. It would be easy to compare them to costumes, rather than

17 Copyright Act, 17 U.S.C. § 101
18 Id.
19 Copyright Act, 17 U.S.C. §113(c)
simple attire designs, which are not as hotly “copied”. Costumes are defined as the clothing appropriate for a particular activity; clothes worn to make a person look like somebody or something else.\textsuperscript{21} They serve the function of allowing one to alter their appearance for the sake of making a statement, as is done at costume parties. This is similar to what is done when a model adorns a design on a runway. Here, the main function of the article is to display the artistic work of the designer, just as costumes represent the work of the character or persona’s author. In many cases, costumes can be worn without the need for clothing the body and solely for the purpose of art. This is often the case in theater productions. Fashion designs are distinct in this regard.

As noted by the Copyright Office, “Costumes serve a dual purpose of clothing the body and portraying their appearance. Since clothing the body serves as a useful function, costumes fall within the literal definition of useful article.”\textsuperscript{22} In \textit{Whimsicality, Inc. v. Maison Joseph Battat}, 27 F.Supp.2d 456 (S.D.N.Y. 1998), the court rejected the assertion that a costume’s utility of allowing its wearer to portray an animal did not make them “useful articles”.\textsuperscript{23} Because of these stances, the attempts to protect clothing designs are unsuccessful. No matter how creative or original, the core purpose of fashion serves a useful function.

The separation of clothing as a useful article and an art form also walks a fine line. The question arises of where the line should be drawn between “clothing” and “fashion”. It is likely that designers of merchandise produced in bulk and sold at affordable prices, with low modicums of creativity are affected by the lack of constitutional protection. On the other hand, “fashion designers” believe that their creations are more than mere articles of clothing, but rather, works

\textsuperscript{22} \textit{Id.} at 229.
of art that can be worn. Unfortunately, the separation between “clothing” and “fashion” has not been great enough to convince Congress of any injustice in the market.

Separability is another detriment to the design protection campaign. § 101 proclaims that copyright only protects those features of a useful article that “can be identified separately from and are capable of existing independently of, the utilitarian aspects of the article”. In fashion, this feat is quite difficult, as the designs are within the garments themselves, and in most cases, cannot physically be separate.

Separability also offers two tests for applying protection. The first is physical separability. Physical separability refers to designs having the ability to exist independently of the useful article in which they are attached. For fashion designs, this is nearly impossible. The design itself creates the article, not allowing for separate existence. What does work in favor of the industry is conceptual separability. The second test refers to the logic that the work of art serves its own design function, apart from the useful function of its attached article. Seeing things this way, and through the eyes of some designers, fashion designs should be separate from their application to garments. In this regard, designs have their own existence as original works of art, rather than that of solely useful articles. Unfortunately, through the eyes of legislation, the separation is not helpful to the trade.

C. The Plea for Protection

The fashion industry recently attempted another push for design protection. H.R. 5055, also know as the Design Piracy Prohibition Act (DPPA) debuted on March 30, 2006 as a plea to add fashion designs to the subject matter of protected designs under § 1301 of title 17 in the United

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26 Id. at 230.
States Code. This legislation would call for a fashion design, defined as “the appearance as a whole of an article of apparel, including its ornamentation,” along with certain stipulated accessories, to have 3 years of copyright protection. This amendment would call for similar registration requirements and remedies afforded other, already protected works.

The main issue with this proposal and potential enactment is the volatility that constructs the market. The task in enforcing such a statute, with the designs and trends changing faster than copyright approvals, would not only be inefficient, but could lead to other industry issues as well. The labor and process of filing for protection would put a hindrance on marketing, promotion of the work, production and further, distribution. This would cause a chain reaction on what could happen to sales as well. Despite the uniqueness of their market, fashion has looked to the safeguards that other, similar markets have received, leaving protection supporters somewhat confused.

Fashion considers itself a unique market, similar to that of architecture and visual arts. All three allow for the expression of creativity by their authors, and all have their own niche in society. Fashion, clearly bears a niche not only in its useful function for clothing, but also in the overall culture. It is always a sign of the times. Architecture has a useful function as well. It serves as protection from the elements and housing, and provides aesthetic beauty to our many skylines and seascapes. Visual arts do not have as much of a useful function, but do contribute to the design of our homes and office structures. It is one of the main art forms depending heavily on moral rights. Despite their similarities, a strong difference lies among them. Architecture and visual arts are constitutionally protected, where fashion runs independently.

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28 Id.
D. But “they” have protection!

In 1990 architectural works were afforded their own protection under the Copyright Act. An amendment added architectural works as copyrightable subject matter under § 102(a) as well as certain stipulations in § 120.29 The motive behind the addition was architecture’s central role in our daily lives, not only as a form of shelter or an investment, but also a social purpose.30

Arguably, fashion could be seen in the same regard. Aside from being central to clothing the body for warmth and protection, clothes are also seen as an investment by “fashionistas” as well as designers creating the works for media exploitation and general distribution. Additionally, clothing, particularly the popular fashions of the time, serves social purposes. Beyond its position in media and entertainment, fashion has a place in the everyday lives of teenage girls, young professionals, and those making it a priority to look their best at all times. Looking closer, fashion and architecture do share similar functions in society, and could viably receive the same sort of statutory safeguard.

The caveat to the similar protection claim is the flow of the fashion industry. Although the design of a building is often repeated, usually in residential complexes or the like, such designs usually have a particular longevity and take years of research to change. Conversely, fashion changes every quarter, like clockwork, and must do so as an industry, for survival. The constant change in the fashion industry is what makes fashion, fashion, and separates it from the simple garments of plain pants, shirts and skirts. It is this stipulation that draws the line between fashion and architecture.

The visual arts industry also has its own protection. The Visual Artists Rights Act was also enacted in 1990, to protect paintings, drawings, pictures, sculptures and the like as a means of

30 Id. at 252.
guarding the “moral rights” of certain artists. These artists are viewed as those who produce works bearing underlying meanings, which require preservation of their original state. Fashion designers and their work can be compared to the visual arts market, as well. In many instances, fashion designs are inspired by personal circumstances or social happenings, which would be dear to the heart of the designer. Similar to visual artists, fashion designs begin in the same circumstances, on canvas, with emotions attached to the outcome. What separates the apparel industry in this regard is their motivation for production. True, there are some visual artists that produce for the monetary reward, but in reality, the market has no comparison to fashion. What sets fashion apart is primarily its service as a useful article, but further incentives exists.

The fashion industry is highly driven by marketing and media outlets, making it far more lucrative than visual arts. Because of the mass production of most fashions, it is difficult for legislation to see “moral rights” as a factor in the market, since there is so much opportunity for all wanting parties. Visual arts are the opposite, in that the industry is smaller, and the likelihood for success is far less than that of a clothing designer. Having such a vast arena for achievement, there is little sympathy for the apparel industry on Capitol Hill.

Further, in contrast to architecture and visual arts, fashion does not have the same immediate longevity. Despite sometimes reappearing every generation or so, the style returns altered. Whether it is the difference in fabric or slight alterations to match the times, no dress skirt or shirt style can equal the staying power of a building or sculpture.

Public choice theory is also relevant here. Interest groups with the best organization tactics make the loudest noise in Congress. Other than the recent pleas behind H.R. 5055, the fashion industry has had little endurance in lobbying. The outcome of the present attempt still remains to

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be seen. This trade has found other ways to endure and despite not having formal protection, serves the purpose of the Copyright Act in its own way.

E. Different Means, Same Ends

Copyright is meant to flood the public domain with works, after providing the author with efficient utility as compensation. That efficient utility includes the ability to benefit from the fruits of their labor in as many ways as possible, “for limited times”.\textsuperscript{33} For conventional authors, this usually runs the full extent of their life-plus-70 year terms, after various forms of exploitation are utilized. Movies take years to make, books take years to write, and music catalogs take time to build. The utility from these works often span decades of labor to achieve full utility, as each generation takes their turn at enjoying them.

Fashion designers, however, receive full utility immediately, and constantly. Current fashions are just that, current, and all of society is exposed to them at the same time. Once the public is done with them, they are put to rest until the next designer reworks the fad, usually 15-20 years into the future. Because of the quick turnaround from runway to retail rack, the market flow of content is continuous; supplying works for inspiration and redesign. With this natural cycle in the industry, there is no room for regulation. The trade is self-governing.

IV. What the Scholars Think

Self-governance is one of the claims made by Professors Chris Sprigman and Kal Raustiala. The authors of \textit{The Piracy Paradox: Innovation and Intellectual Property in Fashion Design} have taken the stance that fashion does not need statutory protection. Further, they claim that the industry naturally concurs with the lack of protection, as its own form of governance. They make claims about the failure to fashion from design patents, the industry’s acquiescence about the state of IP protection and, share their theory of the two-pronged “Piracy Paradox”. In these

\textsuperscript{33} U.S. Const., article 1, § 8, cl. 8 – “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.”
arguments, they make a strong posture for the lack of safeguards needed in such a unique industry.

A. Couture Claims

The professors argue that the design patent provision fails to shelter fashion design for two principal reasons. First, design patents are available only for designs that are truly “new” and does not extend to designs that are merely reworkings of previously existing designs.\(^{34}\) Reworkings are a staple in the fashion industry, making something “new” extremely hard to come by. This is even more difficult for a useful article. Second, because of the process of preparing a patent application, its high expense and long waiting period with uncertain verification of protection, the cost and task is not conducive to the flow of the fashion industry.\(^{35}\) In the time it takes to complete the patent process, a new season of designs will have emerged while the confirmation of protection could still be pending.

Next, Sprigman and Raustiala claim that the industry is acquiescent about the lack of statutory regulation. In regards to this position, they assert that the lack of design protection in fashion is not especially harmful to fashion innovators, and hence they are not incentivized to change it.\(^{36}\) Additionally, they claim that copying fails to deter innovation in the fashion industry because, counter-intuitively, copying is not very harmful to originators; it may actually promote innovation and benefit originators.\(^{37}\) They state that the low-IP system may paradoxically serve the industry’s interests better than a high IP system, which led to their two-pronged theory.

The first prong of the theory is induced obsolescence. Their argument is that fashion’s low-IP regime is paradoxically advantageous for the industry. IP regulations for free appropriation of

\(^{35}\) Id. at 1704
\(^{36}\) Id. at 1718
\(^{37}\) Id. at 1691
designs speed the diffusion of designs and styles.\textsuperscript{38} This further benefits designers as it promotes faster turnover and increased sales. The professors posit that copying often results in the marketing of less expensive versions, thus pricing-in consumers who otherwise would not be able to participate in the market. What was elite quickly becomes mass.\textsuperscript{39} Moreover, the many selections made possible by unrestricted exploitation of derivatives contribute to product differentiation that induces consumption by those who prefer a particular variation to the original. More variety for consumers means more spending and ultimately, more profits.

The second prong of the theory is anchoring. This relays important information to consumers about the current styles, further encouraging consumption. For this to occur, the trendy need to be able to identify the trends. Via this process, the fashion community converges on seasonal themes, which fashion firms exploit by copying from one another, spinning out derivatives and variations, diffusing the themes widely, and finally driving them toward exhaustion.\textsuperscript{40} In the midst of this process, each designer puts their own twist on designs, always accompanied by their name or label.

Another of the professors’ comments was the comparison of American regulation to that in Europe. Although designs are eligible for registration overseas, the percentage covering fashion designs is minimal. In spite of this option for protection, there is still rampant copying in both Europe and America.\textsuperscript{41} That fashion firms do not exhibit marked differences in behavior despite these very different legal environments is consistent with their claim that the industry operates profitably in a stable, low-IP equilibrium.\textsuperscript{42} Their 25-year protection provision is hardly something European designers want to dabble into.

\textsuperscript{38} \textit{id.} at 1722
\textsuperscript{39} \textit{id.} at 1722
\textsuperscript{40} \textit{id.} at 1729
\textsuperscript{41} \textit{id.} at 1743
\textsuperscript{42} \textit{id.} at 1743
This paradoxical approach to protection, or lack there of, is not solely due to the character of the fashion industry. The disparity is also attributed to the fact of America being a more litigious country. Being that, having protection for fashion designs, an already volatile industry, would have a strong hand in flooding the judicial system. Sprigman and Raustiala assert that it is unlikely that a statutory change to American IP law would produce more innovation in the fashion industry, and innovation is the since quo non for IP protection in the United States.\textsuperscript{43} They support this stance through their belief that the industry is already creative and innovative. Also, they maintain that a legislative change would have minimal impact on the market because of the experience of Europe.\textsuperscript{44} Despite having their own form of protection, it is hardly used as much as American protection advocates believe it would be here. The temporary protection proves not to be worth the drawn out process.

\textbf{B. An Opposing View}

In contrast to the stance of Sprigman and Raustiala comes that of Susan Scafidi. A law professor herself, she has created a website dedicated to the current state of the fashion industry, and its constant battle with counterfeits and knockoffs. In conjunction with her site, she is also a major proponent of the Design Piracy Prohibition Act. In a recent interview with Portfolio.com columnist Felix Salmon, Scafidi expresses her sentiments and outlines her view on the need for statutory protection in the fashion industry.\textsuperscript{45}

On top of her overall support for legislation in the fashion industry, Scafidi emphasizes the need, more so for smaller designers. She asserts that small emerging designers, who cannot yet hide behind their trademarks, continue to suffer from the copying of their designs, as do

\begin{footnotesize}
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  \item Id. at 1744
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designers whose artistic vision doesn’t include giant logos or repetitive elements of trade dress.  

This paper sees that argument is valid.

True, smaller designers do not have the market power to protect against counterfeits or knockoffs, but, there is more to this stance. Despite this lack of leverage, many designers, big and small, are primarily selling the same or very similar designs. What separates them is the label inside. Therefore, the design of the small designer is often like that of a large designer, or previous designer, without a well-known tag. So, it is the smaller designers who need greater trademark protection, not protection for designs common to numerous parties contributing to a temporary trend.

Next, Professor Scafidi argues that the culture of fashion is not just remixing, and the pending DPPA will not hinder that element. She states that creative designs are complete, original works. The proposed legislation, she says, applies only to garments “as a whole”, so it won’t prevent original remixes anyway. Additionally, she claims that copying occurs at all price points, finding that our buying habits now blend high and low. She mentioned a recent study that showed 20% of consumers who buy counterfeits make over $100,000 per year. This aids and refutes her argument.

The aiding point is that copying is clearly affecting all levels of the design industry, not just those with the highest price tags, greatest bargaining power and visibility. Where such a great number are suffering, a solution might be in order. Conversely, the caveat to this is it simply being the way that the market works. High fashion is no longer solely for those in that social class, but rather for those that prefer to support that brand name. Buyers in any economic class, especially the most fashion savvy members, will not always buy based on a particular design, but

46 Id.
47 Id.
48 Id.
49 Id.
more so on a particular label. The fact of consumers making over $100,000 yearly, yet still purchasing counterfeits is the perfect support for that argument. The same stands for those making half as much, or creating no income at all, as teenage consumers. Many find it a great deal to discover the same dress at Forever 21 for 75% less than the one in Christian Dior; others would never set foot in Forever 21, making Dior their dresser of choice. It is just the way the far-flung business works.

Scafidi sites many benefits to the DPPA, for all levels of designers. She stresses that “it would change the behavior of the large companies who stalk the runway and the red carpet, waiting to copy everyone’s favorite look – without spending a dime on sketches, samples, fittings, patterns, models, hair, makeup, stylists, presentation space photographers, etc.”50 Again, this declaration is plausible in the fact that there is a stream of free-riding within the industry. Contrary to that, free-riding is the self-authorizing nature of the business. All designers know the likelihood of their creations being copied, but they also know the source of their own inspiration. The question, then, is whether that source would make them a “copier”, too.

There is no argument for the fact that a majority of designs are entirely original works of authorship. In most areas, taking from new works is not permitted, highly frowned upon and protected by the constitution. In fashion, things are different. True, many designers dislike seeing their creations being misappropriated, but there is another side, too.

For as long as the industry has existed and grown, designs and styles have resurrected themselves for almost every generation. That said, a number of today’s designers have taken encouragement from designers past and creatively made it their own. Fashion has flooded the public domain with works to be altered, remade, recycled, and reinvented. But, despite the

50 Id.
reuse, each creation still has its own life and “newness”. As a conglomerate, the market takes this unique business model to profit internally and externally as well.

V. The Consumer Effect and Empire Status

A. Single Authority and Doing Fine

“Fashion is show business—so that’s what the shows are about: who is the hot designer,” said Steven Linder, a professor in design and management at Parsons, the New School for Design. “It’s not the clothing from the catwalk that’s important; it’s the publicity. The hype from the catwalk gets the buyers excited and it gives the designer a name.” Many onlookers support the fact of fashion being its own empire and working in a style, all its own. Opponents to the DPPA argue that it would be difficult to copyright designs that are already inspired by earlier trends. The thought of being able to copyright a dress nears the line of monopoly and pushes the limits of the antitrust laws. This is what led to the downfall of the Fashion Originator’s Guild. Further, the business of fashion is just that, business.

Experts have noted that the American apparel market is a $181 billion industry. This certainly could not be the case without a strong business model. As a producer of useful articles, fashion has found other ways to gross dollars, and continue to be successful at it. Constitutional regulation is not needed. While many people dismiss fashion as trivial and ephemeral, its economic importance and cultural influence are enormous; the industry supports 80,000 garment factories and fashion is a major force in music, entertainment and other creative sectors. Clearly, the actual creative design of garments is not owned by anyone; the couturier dress worn

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52 Id.
by a Hollywood starlet on the red carpet can be knocked off immediately and legally appear days later on department store racks.\(^{55}\) This is just one of the avenues that fashion takes being an empire.

**B. Credit, Control and Compensation**

Fashion consistently shows up in music, film and television, which vicariously gives protection to the participating designers. This also allows for them to rightfully receive the three C’s important to copyright; credit, control and compensation.\(^{56}\) At the start of each major award show, stars are questioned about their attire, and the creator that made them look so glamorous. This, in its own right is credit and protection for the creator. All of America knows the designer that clothed the biggest celebrity of the night, and it is certain that the presentation was not free. Even more than protection, designers want compensation; the two are not always one in the same. Fashion also takes stake in music, where artists are often not only visual, but vocal about their favorite designers. On countless occasions, brand names have come up in song lyrics, while their styles have appeared in videos and live performances. This, neither, is free; fashion again profits. Additionally fashion has taken the television world by storm. It is no longer too common to see brand names and labels blurred out on TV programs. Nowadays, the labels are celebrated, and the designer enjoys a share in the success of the show. Without the constraints for formal protection, the concern of transfers of ownership and control over the work is not a factor.

**C. Crossing Industry Lines**

A step further in the empire of fashion, behind its crossover to different markets, is the open entry into it. Over the years, a number of fashion’s customers have joined the vendor ranks.

\(^{55}\) *Id.*

themselves. There is consistent entry and plenty of room. Retailers are creating their own designs and private labels, while designers have taken their trade to the streets, joining the retail market directly. The number of direct designer retail outlets has continued to rise. Major players in other industries are also trying their hand at fashion. Wal-Mart, American’s largest retailer, has created some of its own private labels and continues to profit.\(^\text{57}\) Additionally, creators like Armani, Burberry and various others, have set up their own retail outlets, giving them vertical integration in the market.\(^\text{58}\)

Outside of the retail industry music moguls like Russell Simmons and Sean Combs have created their own fashion lines, using all areas they embark on to further their businesses. Simmons, founder of Def Jam Records, and other family members have branched off his original Phat Farm line into a women’s line, Baby Phat, as well as mens and ladies athletic wear in Run Athletics and Pastry.\(^\text{59}\) Combs not only styles men in casual and dressy attire, but also provides entertainment in the music and television markets. He is founder and CEO of Bad Boy Records, and produces a successful television show on MTV, under the *Making the Band* brand.\(^\text{60}\) It is evident that each of his businesses connects with one another; Sean John fashions appear in his music videos, and the stars of his TV series make music.

Fashion has also been found on various design-focused series, and even fashion-based television networks. With the expansion of cable television, internet streaming and satellite programming, the options continue to be endless. This industry does more than provide a necessity, it serves as a conglomerate.


The main argument here is not only fashion being a major entertainment business in its own right, but also the fact of it not suffering from a lack of formal protection. Designers are “protected” when they lend their creations to other outlets and sign their names onto various projects and joint ventures. As many have said, it is not always the design or name consumers are after; it’s both, separately.

D. New Trends, Same Volatility

Although there are loyal consumers to particular brands, this loyalty can waver. It can also waver among designers, who work like businesspeople, taking advantage of any opportunity to exploit their work and cash in. In recent years, designers have sought to serve consumers at all price points. This trend has not only seen retailers creating their own designs, but also designers breaking longtime ties with their traditional retail partners. This competition has given consumers more variety and aptitude in the marketplace. Just recently, the high fashion designer at a low cost, Isaac Mizrahi, left the confines of Target to be creative director at Liz Claiborne. This move is not the only or first of its kind, as their original venture was.

In 2003, Mizrahi was one of the first major designers to set up shop in a mass-retail space. This move gave consumers at all levels more options; expensive taste at a low price, and high class at a convenient location. To follow, designers like Vera Wang and Stella McCartney crossed the luxury line, selling lines in budget conscious stores like Kohl’s and H&M. These moves have given retailers and designers at all levels balanced power in the market. It is also moves like these that attribute to the uniqueness of the fashion industry, allowing self-governance to be the preferred business form.

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62 Id.
63 Id.
As Susan Scafidi stated, consumers have mixed buying habits. This variety makes the copying from higher level designers “ok” because of the variation in market trends. Designers are now looking to please all customers at all income and purchasing levels, without existing as exclusive providers. Clothing manufacturers are responding to a seemingly insatiable appetite for fashion across every income bracket. Unlike the times of Charles Frederick Worth, consumers are now taking part in dictating the trends of the market, with the response by designers profiting both sides. Consumers get the convenience and selection of styles and price levels, while designers get the recognition and income they deserve. “I am not stuck on one kind of retailer, or one kind of customer. It’s a big country and everyone wants fashion,” said Dana Buchman, Saks Fifth Avenue turned Kohl’s designer. Who needs statutory protection when the compensation is innate? The industry is independent. Everyone wins.

Today’s fashion trade has inherently become a place for everyone. Not only traditional designers, music and film stars, but even customers and retailers are getting a new benefit from the business as well. For some retailers, the introduction of upscale names offers a handy means of reinvention, and building buzz among customers. Just as Wal-Mart and other mass-retailers are making partnerships with high-end designers, traditional stores are revamping the lines that they offer as well. Again, this provides the consumer with a win and retailers with profit. Consumers can reflect the character of the industry, making their own style unique. Having a mix of high and low priced choices is somewhat a sign of the times, allowing both sides to feed off and gain from the other. “Nearly a decade ago, only 31% of shoppers would admit to shopping mass retail stores in addition to department stores. Today, that number is 67%,” said

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64 Id.
65 Id.
66 Id.
Marshal Cohen, author of the book “Why Customers Do What They Do”. It is now more of a thing of the past for a majority of the fashion-savvy to shop solely at one place or status level.

Now, consumers look for what the current trend is, and make their own determination of what the price should be. Designers have noticed this sentiment, and reacted accordingly. “Mixing and matching is the key. The really stylish shopper is the one that puts it all together,” asserted Jaclyn Smith, the former television star who has also created her own line in the mass retail market. To Smith’s point, it is common that many style-conscious consumers will remain loyal to certain brands or price points for certain garments or accessories, and fill in the rest with low-priced compliments. This is not wholly far-fetched, especially with the flow of the industry moving at such a fast pace. Items made to last longer see higher investment and loyalty from customers, whereas trendy fix-ins are swapped out constantly. The loyalty there is in the constant updating.

When the trends change, so simultaneously does the market. Designers have found ways to navigate around price point woes and status barriers to serve all levels of the consumer base without compromising their own image. Consumers find comfort in the selection of high and low end fashions, but still remain conscious of where particular purchases are made. These practices, on both ends of the register, have made the fashion industry truly one of a kind. Designers, retailers and consumers have built a partnership that includes an underlying understanding of the way the market works. Designers produce trends for a range of consumers, and in return, consumers dictate where they want to see these trends; whether it's in its original off the runway form, or off the rack. With this, retailers and designers enjoy their piece of the pie at all levels, exclusive, traditional and mass.

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VI. Conclusion – The Recipe for Success

Unlike music and film, where copyright is a form of protection for authors, the fashion empire runs efficiently without such protection. There are no distributors or publishers to be cautious of, and there are no transfers of ownership that require legislation or constitutional guard. Designers do not necessarily require retailers but desire them as a conduit. Retailers do not need designers, as they too, can create original useful articles to fit the times. The way that fashion works is a manner of subconscious acquiescence that provides credit, compensation and control to all participants. This is what makes the empire unique.

Over the years, legislation has seen no need for federal protection in the fashion industry. Despite this sentiment, the trade has pressed on. From dependence on Paris for direction, to its own emergence in America, the fashion industry has positioned a distinct place in economic history. Contrary to many other industries in our social construct, the fashion business has the ability to run independently of statutory regulation, yet still meet the goals of the constitution.

In compliance with the Copyright Act, the fashion industry floods the public domain with works for further inspiration. The products of this flood also give their sources credit, compensation, and control, which are three of the primary components under the copyright umbrella. Designers are able to immediately enjoy the fruits of their labor in a market that reaps instant rewards. The rapid turnaround in the apparel industry contrasts to that of music, film and literature, where authors wait uncertain amounts of time to see returns. With immediate gratification already in place, the lengthy labor of formal legislation would only hinder the valuable volatility of fashion.

Further, the arguments made by Professors Sprigman and Raustiala strongly support the claim of the fashion industry not requiring formal protection because of its construct as an empire. Their two-pronged approach, induced obsolescence and anchoring, proves that the
industry has innate supports instituted as a means of sustaining their self-governing nature. Constant movement and consumer awareness keep the market fresh and encourage continued innovation. As they additionally argue, comparing the atmosphere of American fashion to that of Europe is not as relevant or necessary as it once was. Even with formal protection in place, European designers still experience copying and reluctantly take advantage of the protection available to them. It is doubtful to think that anything would be different on this side of the Atlantic. Even more so, America has enough weighing in on its judicial system, without adding the burden of highly profitable useful articles to the load.

With her converse argument, Susan Scafidi pointed out some arguments that actually support the fashion market as an autonomous authority. She addressed the need for protection for small designers, but in all actuality, beyond trademark security, smaller designers are creating for the same social trends as the major players. Next, she asserted the need for protection because of fashion being more than just remixing. This point is true, but does not sustain the need for formal legislation. Instead, the idea of fashion not being just remixing supports its position as a far-flung business that continues to use past trends, reuses and reworks to create new material, to be reinvented and improved at a later social situation in time.

Her statement regarding the buying habits of American consumers was perhaps the strongest support for fashion as an empire. With Americans being choosier about each article they buy, and self-determining whether or not it will be high-end couture or mass merchandized, the income level of shoppers is not much of a factor in the plight of copying. Consumers look to serve their fashion fetishes in the best way each of them sees fit, not welcoming restrictions on designs resulting from a formally constrained market. Despite “copying” occurring, the outcome seems to be induced purchasing on the part of consumers, leading to increased sales for
designers. Consumers seek variety and with statutory holds on this type of industry, the suffering would quickly follow.

The type of market fashion has come to be is one with space for all participants. Consumers get the variety they desire, while designers receive notoriety as a result. Many designers set up their own retail outlets, benefiting from the open vertical integration of the self-governing trade. Additionally, retail-specific participants equally gain from the market, as they regularly join forces with designers, to meet the needs of their consumers of choice. Furthermore, retailers are taking their turn at designing, creating their own lines and private labels. All parties support and influence one another.

Outside of the three main components of the market, lie greater business opportunities for fashion. Music industry notables have crossed over into the fashion business, bringing the benefits of each trade to both sides. Once again, there is room for everyone. Fashion, too is taking the journey across its borders into other markets, like television and film, where the opportunities for marketing, joint venturing, competition, and further creation are endless.

As time continues, there is no doubt that the fashion industry will continue to grow with society. Finding new ways to adapt to the business and creating new outlets has been a trait of fashion since its infant years. This industry has had no problem in the field of success, and does not look to any time soon. With a history of self-governance and unprecedented monetary achievement, there are no signs of a need for constitutional interference. Thanks to the unique character of this stylish economic console, it can continue to flourish from within, not requiring external authority.
Bibliography


22) U.S. Const., art. 1, § 8, cl. 8.
