

# Eyes off the Runway: How to Prevent Piracy in Fashion

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## I. INTRODUCTION

Fashion is an ubiquitous force in daily life. What to wear (and certainly what not to) is a deliberate choice for most individuals. The thrill to embrace what is in vogue, or the desire to reject it, inevitably forms a part of one's identity. This decision is a manner of self-expression or self-design that plays an ineluctable role in how one socially presents oneself and how one is perceived by others.<sup>1</sup> As humans subconsciously and consciously react to visual cues, they judge others based on the clothing they wear. The Oxford English Dictionary captures the ambidexterity of the word fashion: it is to "make, build, shape; [so] in [a] wider sense, [it includes] visible characteristics [and] appearance [which can be] said both of material and of immaterial things."<sup>2</sup> Packed inside this definition, is an awareness that fashion is a form of art.<sup>3</sup>

Why then have fashion designs been denied the same protection under United States' intellectual property laws that other art forms, such as painting, sculpture, and even architecture, have been granted? The most prominent argument is that fashion design cannot be protected by copyright because clothing is strictly a "useful article"<sup>4</sup> that serves the purpose of covering and protecting one's body and copyright does not protect utilitarian works.<sup>5</sup> Others might argue that fashion trends are fleeting and are recycled too often in order to warrant any period of protection.<sup>6</sup> However, these and similar arguments do not adequately address the present text of the newest legislative proposal, the Innovative Design and Protection and Piracy Prevention Act (IDPPPA).

Fashion is a critical component of the United States economy and one of the most pervasive features of American culture. Every designer and consumer is affected by the implications of this debate. The United States must amend its current statutes or propose new regulations to grant property rights to designers, and as a result, legal protection to their original ideas. The cycle of creativity which has nourished the spirit of fashion risks waning because of this void in American law. This article intends to offer proponents of design protection, and those who criticize it, a framework for reaching an agreement. The piece is meant to offer suggestions, for those involved in this contentious debate, on how to reframe their positions in order for a solution to be reached so a design copyright bill, like the IDPPPA, can be passed successfully. This article will examine the current laws that provide limited rights to designers in the United States, and evaluate the arguments that are made against the extension of copyright law proposed in the IDPPPA. We then seek to demonstrate the negative effect that the lack of design right has on the economy, and proceed to examine

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<sup>1</sup> *The Value of Style*, PSYCH. TODAY (July 1, 2005), <http://www.psychologytoday.com/articles/200507/the-value-style>.

<sup>2</sup> *Fashion*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com.ezp-prod1.hul.harvard.edu/view/Entry/68389?rskey=1MFaOV&result=1#eid> (last visited Sept. 25 2014).

<sup>3</sup> Art is "The expression or application of creative skill and imagination, typically in a visual form such as painting, drawing, or sculpture, producing works to be appreciated primarily for their beauty or emotional power." *Art*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com.ezp-prod1.hul.harvard.edu/view/Entry/11125?rskey=tgrlPJ&result=1&isAdvanced=false#eid> (last visited Sept. 25 2014).

<sup>4</sup> Useful article is defined in 17 U.S.C.S. § 101 as one with "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."

<sup>5</sup> *Boyd's Collection v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 661, (M.D. Pa. 2005).

<sup>6</sup> See Xiao, Emma Yao, Note, *The New Trend, Protecting American Fashion Designs Through National Copyright Measures*, 28 CARDOZO ARTS & ENT. L.J. 417, 436 (2011).

European laws, subsequently making recommendations to amend current U.S. law based on European precedent.

## II. PROTECTION UNDER THE CURRENT U.S. REGIME

The cultural significance of fashion in the United States, and around the world, as a symbol of social class is rarely contested. Those possessing a higher income and/or celebrities generally wear high-end fashion conglomerates like Louis Vuitton, Chanel, or Christian Dior. Often, the fabric quality used by these luxury brands and the intricacies of their final designs render their works immune to the plagiarism of “fast-fashion” merchandisers like Topshop.<sup>7</sup> While the aforementioned material differences offer protection against copyists of these high-end designers, the American legal system also proffers additional protection, albeit limited, through trademark law and patent law.<sup>8</sup> For example, Louis Vuitton’s well-known monogram print is shielded from potential infringement by copyists because this print is considered a trademark.<sup>9</sup> However, as trademark law seeks to “protect source-identifying marks from being used on unrelated goods in a way that would cause confusion among consumers,” it only protects a designer’s logo rather than the design of the garment itself.<sup>10</sup> Unfortunately, this leads many well-known designers to abandon creativity for the assurance of legal protection, resulting in an influx of purses, blouses, and shoes patterned with logos rather than establishing new innovative designs. While not all creativity is lost in the absence of design protection, this dearth of rights may prevent investment in originality; and currently, it seems that protection under trademark law is minimizing this creativity. As Susan Scafidi, Fashion Law Professor at Fordham University summarizes:

“[creativity is] not a byproduct of the intellectual property system. [...] [F]ashion designers [would continue] to sew even if all copyright protection were eliminated tomorrow. [...] The goal of the IP system, however, is not merely to ensure that authors put pen to paper or needle and thread to fabric, but to encourage and reward individuals so that they can continue to develop their ideas and skills in a productive manner. In other words, intellectual property law ideally serves as a tool for harnessing and directing creativity.”<sup>11</sup>

Fashion designs can also receive protection under the trade dress doctrine. Trade dress, like trademark, seeks to protect a design, or rather a packaging that indicates the origin of a product rather than its mere design.<sup>12</sup> Historically, the doctrine covered the packaging of a product, and was defined as “the total image of a product and may include features such as size, shape, color, or color combinations, texture, graphics, or even particular sales

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<sup>7</sup> C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1178 (2009).

<sup>8</sup> *Id.* at 1185.

<sup>9</sup> C. Scott Hemphill & Jeannie Suk, *Schumer’s Project Runway*, WALL ST. J (Aug. 24, 2010), <http://online.wsj.com/news/articles/SB10001424052748704504204575445651720989576>.

<sup>10</sup> Cohen, Arielle K., *Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma*, 11 CHI.-KENT J. INTELL. PROP. 172, 174 (2012).

<sup>11</sup> *A Bill to Provide Protection for Fashion Designers: Hearing on H.R. 5055, The Design Piracy Prohibition Act Before H. Subcomm. on Courts, the Internet, and Intellectual Property*, 109th Cong. (2006) (written statement of Susan Scafidi, Visiting Professor, Fordham Law School, Associate Professor, Southern Methodist University), <http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg28908/html/CHRG-109hhrg28908.htm>.

<sup>12</sup> See *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 215 (2000).

techniques.”<sup>13</sup> Presently the doctrine encompasses distinctive designs such as True Religion’s pocket stitching and the Asics sneaker pattern, as these details signal to consumers that a product is made by the respective designer.<sup>14</sup> However, the design in question must be distinctive or have acquired secondary meaning or in other words, “in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself.”<sup>15</sup> However, it takes time for a particular design to be associated with a particular brand, leaving relatively unknown and new designers without protection. The designer must also show that the proposed feature is not functional in order to be protected under trade dress; thus limiting the types of items that warrant protection under law.<sup>16</sup> The decision in *WalMart v. Samara*, 529 U.S. 205, ultimately prevented the use of trade dress in connection with fashion designs.<sup>17</sup> In *WalMart*, the Supreme Court analogized design and color stating that neither is distinctive in order to warrant trade dress protection. In fact, the Court held that design is never meant to indicate the source of a garment or accessory, but rather “to make the product itself more useful and appealing.”<sup>18</sup>

Finally, patent law offers minimal protection as well. Design patents offer fourteen years of infringement protection for the “novel ornamental design elements of functional and useful items.”<sup>19</sup> In fact, design patents cover such items as Jimmy Choo’s “With a Twist” and Lululemon’s “Astro” pants, with its waistband of overlapping panels.<sup>20</sup> However, the process is expensive and slow, taking ten months to a year to receive a patent ample time within the fashion industry for a proliferation of knock-offs.<sup>21</sup> Infringement occurs with a design patent when a court deems that a member of the public, who is familiar with the protected designs, would mistakenly identify the infringing designs as the property of the former.<sup>22</sup> However, patent law’s novel and non-obvious requirements are problematic, because they have been interpreted quite strictly in the field of fashion, requiring the design to demonstrate “some exceptional talent beyond the skill of the ordinary designer.”<sup>23</sup> Courts have not found fashion designs to be sufficiently inventive to warrant the grant of a design patent.<sup>24</sup>

That being said, many view copyright law as the best legal device to protect designs. It is the preferred method of protection by most designers because it does not protect designs indicating source only, as in trademark and trade dress laws, nor does it have the strict requirements of novelty and non-obviousness of patent law. Rather, copyright immediately protects any “original works of authorship fixed in any tangible medium of expression, [...] from which they can be perceived, reproduced, or otherwise communicated, either directly or

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<sup>13</sup> *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 (1992).

<sup>14</sup> Marsh, Michelle Mancino and Natasha Sardesai-Grant, *Safe Protection/Safe Inspiration: An Introduction to Intellectual Property Law for Fashion Designs*, KENYON & KENYON, November 2012.

<sup>15</sup> *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 851, n. 11, (1982).

<sup>16</sup> 15 U.S.C. § 1125(a)(3) (2012).

<sup>17</sup> See *Wal-Mart*, 529 U.S. at 216.

<sup>18</sup> *Id.* at 209.

<sup>19</sup> Marsh, *supra* note 15.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Neufeld-Furst & Co v. Jay-Day Frocks*, 112 F.2d 715 (2d Cir. 1940).

<sup>24</sup> Cohen, *supra* note 11, at 175.

with the aid of a machine or device.”<sup>25</sup> However, current copyright law encounters two main obstacles in fashion design protection. Firstly, as previously mentioned, copyright does not cover useful articles, or those with a utilitarian function.<sup>26</sup> Secondly, in a few exceptional cases, copyright will protect useful articles if there is “conceptual separability;”<sup>27</sup> in other words, that the design element must be a separate distinguishable element from the functional aspect of the item in question.<sup>28</sup> This concept is best demonstrated by Halloween costumes, where the “artistic element ‘invokes 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.’”<sup>29</sup> However, this is an insurmountable roadblock to fashion designers, as a well-designed garment is one that combines function and form seamlessly.<sup>30</sup>

Therefore, in 2006, the Design Piracy Prohibition Act (DPPA) was proposed to provide copyright protection to fashion designs. The proposed Act would have amended chapter 13 of title 17 of the United States Code. Proponents pointed to the Title V of the Digital Millennium Copyright Act, also known as the Vessel Hull Design Protection Act (VHDPA), as precedent for granting copyright protection to designs. In fact, the VHDPA offers copyright to “an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public.”<sup>31</sup> However, a useful article is defined as a vessel hull and protection is only offered for actual hulls rather than mere designs, models, or drawings.<sup>32</sup> Protection begins only upon registration or, if earlier, when the design is made public; however, registration must be made within two years of the latter there is no automatic protection as in ordinary copyright law.

The DPPA proposed to modify this Vessel Protection Act to include apparel under the definition of a useful item, to offer three years of protection, and to require that registration for fashion designs be made within three months of their public debut. The Act also included secondary liability for publishing photographs of new designs for counterfeit purposes; established that infringement can occur from a drawing as well as from the actual physical design; and stated that an alleged infringer cannot have reasonable grounds to be aware that protection is claimed for the design.<sup>33</sup> However, the Bill failed to pass. In the wake of its rejection, New York Senator Charles Schumer, proposed a modified version of the DPPA, the Innovative Design Protection and Piracy Prevention Act (IDPPPA). The chief differences of the IDPPPA from the DPPA include a “substantially identical” standard rather than a “substantially similar” standard for infringement; exemptions for those who create solely for personal rather than commercial use; a higher pleading standard meant to limit the

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<sup>25</sup> 17 U.S.C. § 102 (2012).

<sup>26</sup> 17 U.S.C. § 101 (2012).

<sup>27</sup> Monseau, Susanna, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 AM. BUS. L.J. 27, 40 (Spring 2011).

<sup>28</sup> *Id.*; See also 17 U.S.C. 102(a) (2012).

<sup>29</sup> Monseau, *supra* note 28, at 41 (citing *Chosun Int’l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324, 330 (2nd Cir. 2005)).

<sup>30</sup> Monseau, *supra* note 28, at 42.

<sup>31</sup> 17 U.S.C. § 1301(a)(1) (2012).

<sup>32</sup> *Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, 109<sup>th</sup> Congress (2006). (Statement of the United States Copyright Office), available at [http://www.copyright.gov/docs/regstat072706.html#N\\_24\\_](http://www.copyright.gov/docs/regstat072706.html#N_24_).

<sup>33</sup> *Id.*

number of actions brought (which requires the copyist to have had made the knock-off with knowledge of the original design<sup>34</sup>); and a lack of a registration requirement.<sup>35</sup>

### III. ARGUMENTS AGAINST COPYRIGHT AND THE IDPPPA

Despite these modifications, the IDPPPA still has been met with resistance. However, the arguments offered to prevent its passing do not adequately address the present text of the Bill. One argument establishes that the nature of the fashion industry makes copyright protection superfluous. Alexis Stevens discusses that unlike other industries, such as publication, fashion designers do not need incentive to create new designs and to publish quickly.<sup>36</sup> Whereas an author may not choose to publish his work (if it is financially feasible), until he is certain his work will receive copyright protection, designers must create new designs quickly to remain profitable.<sup>37</sup> Similarly, others debate that the fashion industry thrives on the idea of a “status good.”<sup>38</sup> This relates back to fashion and social status—certain items indicate to the public that one belongs to a certain income or social bracket; and thus, individuals choose to buy based on the “status benefits conferred.”<sup>39</sup> New status goods are spurred into creation when knock-offs are sold. According to the argument, if these knock-offs are regulated or outlawed, the fashion cycle would slow because once high fashion design is replicated and sold en masse to the general public, haute couture designers must create something fresh and original. The claim is that once designers have greater protection, they may not choose to design as quickly or as often.

However, these arguments do not take into account the restlessness of human nature. Even if knock-offs were not readily available, consumers would still demand new fashions. Individuals shopping at these stores would be displeased to find a low turnover in stock, and the same items on sale several months after their initial purchase. Therefore, consumer demand will ensure that the fashion cycle stays competitive and current, and new items will remain as desirable. Furthermore, while copyright protection may not be required to spur creation, it should inspire much more creativity. As previously discussed, well-known designers often turn to the creation of logo-bearing items to ensure trademark protection at the expense of generating a new, more creative design. If these designers can be guaranteed that their newly inspired creations will be protected under law, there will be a greater possibility for more originality in design.

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<sup>34</sup> Davis, Jasmine, *Fourth Time's the Charm: Fashion Designs May Soon Receive Copyright Protection*, PATTISHALL MCAULIFFE IP BLOG, 3 December 2010, <http://blog.pattishall.com/2010/12/04/fourth-times-the-charm-fashion-designs-may-soon-receive-copyright-protection/>.

<sup>35</sup> Ederer, Louis S. and Maxwell Preston. *The Innovative Design Protection and Piracy Prevention Act*, LEXISNEXIS LEGAL NEWSROOM INTELLECTUAL PROPERTY, 31 January 2011, available at <http://www.lexisnexis.com/legalnewsroom/intellectual-property/b/copyright-trademark-law-blog/archive/2011/01/31/the-innovative-design-protection-and-piracy-prevention-act-fashion-industry-friend-or-faux.aspx>.

<sup>36</sup> Stevens, Alexis N., Note, *Not Designed to Fit: Why the Innovative Design Protection and Piracy Prevention Act Should Not Be Made into Law*, 32 PACE LAW REVIEW 856, 892 (Summer 2012).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 887.

<sup>39</sup> *Id.* at 886 (citing Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1386 (2005)).

Another common contention proposes that the IDPPPA would destroy the “fast fashion” market, including stores like H&M and Zara.<sup>40</sup> Stevens believes that these stores would have three options if the Bill were passed: “shut down; begin to design non-inspired pieces; or wait until the three-year protection [period] expires and then proceed on copying and disseminating the trends.”<sup>41</sup> This argument ignores the modification of the Bill to include a “substantially identical” standard; this higher standard makes it unlikely that there will be many cases brought for infringement, as it is more difficult to establish a true copy. Yet, if H&M’s designs are considered identical, there are other potential ways to prevent a complete destruction of the fast fashion business model. Firstly, these stores could employ designers to create more “inspired” looks rather than mere copies, which would help to promote creativity in the fashion industry as an increased number of lower level designers would be creating more original or semi-original looks. The requirement for slightly modified designs also creates more jobs for beginning designers at these fast fashion retailers.<sup>42</sup> The IDPPPA is not disregarding the collaborative and derivative nature of the fashion industry; rather, it encourages it. As Susan Scaffidi noted in her written statement to Congress regarding the DPPA, copyright protection serves to prevent identical copies; it does not prevent similar recreations.<sup>43</sup> She analogizes the fashion industry to the book industry:

“nor does the [copyright] protection of Dan Brown's DaVinci Code prevent a spate of novels involving Mary Magdalene or the Knights Templar from appearing in bookstores. When an author writes a bestseller, imitators of his or her style tend to follow—but they are not permitted to plagiarize the original. Copyright in this sense is merely a legal framework that supports an existing social norm; neither reputable authors nor creative fashion designers engage in literal copying of one another.”<sup>44</sup>

Similarly, as Arielle Cohen notes, well known designers can choose to collaborate with these chain stores to create a “limited edition collection for the store under the designer’s name.”<sup>45</sup> This is very much like the world of publication, where a novel first can be published in hardcover, and later, after it has gained in recognition, can be sold at a lower cost in paperback.<sup>46</sup> In the field of fashion, this paperback would be the equivalent of a designer collaboration or even a new, less-expensive line by the designer. The latter may raise the concern of a monopolization of the market, with a glut of individuals purchasing these discounted versions from fast fashion stores. However, consumers choose to purchase knock-offs for the status associated with the original designers’ name. In this sense, the monopoly is already in effect and realized in the creation of a limited number of designs. Moreover, if designers do not wish to have their name associated with these lower-end stores or do not wish to produce a lesser quality line for fear of brand dilution, licenses can be signed with retail outlets for the reproduction or mock version of their fashions. This practice would be similar to procedures used by other copyright infringed industries, including film and music,

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<sup>40</sup> *Id.* at 888.

<sup>41</sup> *Id.*

<sup>42</sup> *A Bill to Provide Protection for Fashion Designers*, *supra* note 12.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Cohen, *supra* note 11, at 183.

<sup>46</sup> *A Bill to Provide Protection for Fashion Designers*, *supra* note 12.

which allow for reproduction of a song or character's image via a prearranged requisite payment. While this may limit the availability of certain designs to a majority of the public, the socio-economic hierarchy of designer fashion has always existed and a designer's creativity should never be sacrificed to accommodate the general public.

A related consideration is the possibility of cost increases as a result of designers copyrighting their fashion concepts. If the cost of reproducing a designer collection increases dramatically the cost to the customer increases as well; which in turn, could decrease the high levels of consumer consumption that drives the industry. "Fast fashion" merchandisers like Forever 21 thrive on their ability to imitate designs and sell them at considerably lower costs because they do not incur one of the largest expenses of fashion—designing.<sup>47</sup> It may be argued that if these retailers have to employ designers to create mock collections, cost of production increases, and therefore, the cost of clothing. Yet, H&M, a competitor of Forever 21 as a "fast fashion" retailer, keeps its prices in a range comparable to that of Forever 21 without the higher rate of design infringement.<sup>48</sup> This suggests that the cost of clothing might remain static, as H&M is able to keep prices analogous to those of Forever 21 even with the additional costs of design. While increased costs may result from license fees as well, licensing fees could be avoided by creating interpretative works. While the design cost cannot be totally avoided, hiring unknown designers with a lesser salary base will keep costs down. These cost cutting measures could present a real opportunity for innovation in the fashion industry, providing more opportunities for unknown designers to achieve recognition.

Also, these retailers could purchase clothes directly from designers. If the IDPPPA is passed, it has the potential to incentivize retailers to employ designers or pay them for their ideas. A designer can then be given credit and compensated fairly while the retail giant remains able to reproduce the design. The IDPPPA model inspires creativity as designers are encouraged to create fresh ideas because they are motivated by proper incentives: to receive name recognition and compensation by featuring their collections at retail stores.<sup>49</sup> The clothing industry could become considerably less expensive and more expansive if new designers are offered legal protection.

Additional concerns regarding design competition include the worry that courtrooms might become flooded with frivolous lawsuits regarding judicial administrability.<sup>50</sup> However, if the IDPPPA offers design protection to established designers, these designers will have an incentive to share their ideas with unknown, emerging designers. The passage of the IDPPPA could potentially lead to the development of a website (like the SSRN for academics), where designers could share their design ideas in order to create a timeline which could be used as evidence in a courtroom. This could be a way of establishing "who designed what first" when enforcing decisions,<sup>51</sup> with the Federal Trade Commission directly regulating the website. Moreover, the heightened pleading standard of the IDPPPA, which requires knowledge of the original design, also is meant to deter litigation. And further, in Europe, where there is extensive copyright protection, few infringement cases are brought. With this precedent, it is unlikely that European designers will change their behavior in the United States.

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<sup>47</sup> Hemphill & Suk, *supra* note 8, at 88.

<sup>48</sup> *Id.* at 91.

<sup>49</sup> *Id.*

<sup>50</sup> Hemphill & Suk, *supra* note 8, at 1.

<sup>51</sup> *Social Science Research Network (SSRN)*, EUROPEAN UNIVERSITY INSTITUTE (20 May 2103), <http://www.eui.eu/Research/Library/ElectronicResources/E-Resources/2013/05-20-SSRN.aspx>

A final argument surrounds the IDPPPA's infringement language. According to the Bill, infringement has occurred when "an article of apparel [...] is so similar in appearance as to be likely [...] mistaken for the protected design, and [therefore] contains only those differences in construction or design which are merely trivial."<sup>52</sup> Some have found this standard problematic as the court is given discretion to determine what is similar and what is or is not infringing on a work, as well as what is considered a trivial modification in a design.<sup>53</sup> While this is a fault in the current version of the Bill (see *infra* Section VI), this is not a novel legal obstacle—it is found in almost all areas of law with the "reasonableness" standard. What is reasonable to one judge may not be reasonable to another; and therefore, this defect cannot be a valid reason for denying the IDPPPA's passage.

#### IV. INFRINGEMENT'S EFFECT ON SALES

While the lack of design protection is most keenly felt by the fashion industry through a decrease in creativity—the knock-offs and counterfeits resulting from this deficiency also affect U.S. Customs' efforts to combat trademark counterfeiters and greatly impact the bottom line financially for designers.<sup>54</sup> Without protection, replicas of various garments and accessories can be shipped and later attached to counterfeit labels and logos before sale.<sup>55</sup> If the design itself were protected under copyright, then greater action could be taken against these counterfeiters. Moreover, the financial consequences for designers present an even larger impediment toward development in the industry. Three effects emanate from the production of knock-offs: (1) acceleration (increased awareness of a design), (2) substitution (lost sales due to sales of the copied design), and (3) uniqueness (decreased sales due to a loss of exclusivity as a result of a saturation of the market from knock-offs).<sup>56</sup> On the whole, substitution and uniqueness negatively affect fashion designer's profits more than acceleration's positive results having a 5.5% and 18.1% negative effect on profits respectively.<sup>57</sup> One may counter that the massive volume of sales of fast fashion designs neutralizes negative profits realized by a single designer; thus benefiting the U.S. economy as a whole. However, this loss of profits is an important factor to consider when determining if fashion designs should be given copyright protection. If the industry becomes less profitable, fewer designers will choose to enter the market, especially entry-level designers who will incur large sunk costs for fabric and other materials. If there is little opportunity to recoup these costs due to the predominance of replication and lack of recourse, innovation in the profession will decline, which could ultimately lead to an industry slow-down in the United States. Similarly, when well-known retailers replicate relatively unknown designers, the latter lose their leverage and are often unable to sell their garments to department stores or

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<sup>52</sup> S. 3532, 112<sup>th</sup> Cong. § 2 (a)(11) (2012).

<sup>53</sup> Stevens, *supra* note 37, at 893.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Appel, Gil and Barak Libai, and Eitan Muller, *The Short and Long-term Impacts of Fashion Knockoffs on Original Items*, MARKETING SCIENCE INSTITUTE, 1–2 (2013).

<sup>57</sup> *Id.* at 5.

boutiques; and if they do receive rack space, consumers, instead, often choose to purchase a similar item from a well-known designer.<sup>58</sup>

Further, with the rise of technology in recent years, it has become much easier for designs to be copied. Now copyists can receive digital photos instantaneously from fashion shows, even before the last model leaves the runway, rather than waiting for results from encroaching sketch artists.<sup>59</sup> Therefore, design knock-offs can be made available before the originals even hit the shelves, and may actually lead the public to believe that the counterfeit was the original.<sup>60</sup> If designers were given protection, they could have more artistic autonomy and subsequently, be freer to create. As capitalism thrives on competition, designers need to continually manufacture new works. Therefore, protection is essential to allow for further creation, which begets further competition, and keeps pricing in check.

Copyright protection will sustain the attractiveness of the market to new designers, and will increase the number of entrants into the market. Along with increasing competition, copyright protection may inspire higher quality at more affordable prices, as in other competitive industries, such as technology; where original ideas are legally protected under current IP laws and competition in these arenas has led to higher quality products.<sup>61</sup> For example, Apple products such as the iPod, iPhone, and the Macbook Air have deeply impacted the quality and prices of products subsequently released by competitors like Google and Samsung.<sup>62</sup> Thus, with more designers and subsequent competition, there will be an influx of more affordable and innovative designs.

## V. DESIGN PROTECTION IN EUROPE

Unlike the United States, Europe has enacted a system of laws to protect designs, including fashion. While copyright and design protections vary country to country in the European Union, in 1998, the Design Directive (Council Directive 98/71) called for E.U. members to modify their existing laws to create a more coherent legal scheme. This meant the creation of a minimum of five years/maximum of twenty-five years design protection in each country.<sup>63</sup> The Directive defined design as “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.”<sup>64</sup> This definition is broad enough to protect ornamental and functional fashionable elements.<sup>65</sup> However, the Directive left the mode of protection to the discretion of each E.U. member. Then in 2002, the European Design Regulation was passed which grants rights to registered Community designs (RCDs)

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<sup>58</sup> Cohen, *supra* note 11, at 182.

<sup>59</sup> *A Bill to Provide Protection for Fashion Designers*, *supra* note 12.

<sup>60</sup> *Id.*

<sup>61</sup> B K Syngal, *No, competition will drive down prices*, *ECON. TIMES* (MAY 19, 2010), [http://articles.economictimes.indiatimes.com/2010-05-19/news/27604825\\_1\\_2g-operators-3g](http://articles.economictimes.indiatimes.com/2010-05-19/news/27604825_1_2g-operators-3g).

<sup>62</sup> *Slicing an Apple*, *ECONOMIST* (Aug. 10<sup>th</sup>, 2011), <http://www.economist.com/blogs/dailychart/2011/08/apple-and-samsungs-symbiotic-relationship> (Apple technology is forcing Samsung to make changes to their products to remain in demand).

<sup>63</sup> Monseau, *supra* note 28, at 60.

<sup>64</sup> Directive 98/71/EC of the European Parliament and the Council of 13 October 1998 on the Legal Protection of Designs, 1998 O.J. L 289/28, art. 1(a).

<sup>65</sup> Monseau, *supra* note 28, at 57.

and unregistered Community designs (UCDs) to provide protection throughout the E.U.<sup>66</sup> UCDs only receive three years of protection, while RCDs are granted for five years and can be renewed for five-year periods up to a maximum of twenty-five years.<sup>67</sup> Furthermore, RCDs will guard against copies that are made in good faith or without knowledge of the original design; but for an UCD infringement claim, the copyist must be aware of the initial design.<sup>68</sup> In addition, a design must be new and have individual character to warrant protection as a RCD or UCD. New denotes that the design is not identical to an existing design and “has been made available to the public.” Original character here implies that “the overall impression of the design [...to] the informed user [is different] from the overall impression [...of] any design that has previously been made available to the public.”<sup>69</sup> In this regard, design protection is similar to the copyright standard of protection in that “designs are only prohibited where an informed user can find virtually no difference between [the given] design and an earlier design;” infringement occurs if the design only is different in immaterial details.<sup>70</sup>

Yet, it is important to note that these design rights are separate from basic intellectual property rights. The Office for Harmonization in the Internal Market (OHIM), which regulates intellectual property rights in the E.U., succinctly summarizes the differences: “[d]esigns specify how products look[;] [t]rade marks signal the origin of products to consumers[;] [c]opyright relates to artistic creations, such as books, music, paintings, sculptures, and films[;] and] [p]atents protect technical inventions in all fields of technology.”<sup>71</sup> So while fashion designs still have not been deemed “art,” they have been given their own category of protection in Europe.

The 2002 Regulation’s goal was to provide equal protection to designers across E.U. member states.<sup>72</sup> For instance, UCDs gave equal protection to designers in countries that required registration to those in nations that provided rights through copyright without registration.<sup>73</sup> In addition, most designers do not register their designs through the OHIM as a RCD, because the process, like patent registration, is long and costly.<sup>74</sup> Further, with the fast pace of the fashion industry, twenty-five years of protection is not needed.<sup>75</sup> Therefore, most seek unregistered protection, which covers new designs with individual character for three years.<sup>76</sup>

However, when that three-year protection ends for unregistered designs, the differences between the individual states’ protection rights becomes evident.<sup>77</sup> For instance, in

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<sup>66</sup> *Designs in the European Union*, OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET, available at <https://oami.europa.eu/ohimportal/en/designs-in-the-european-union> (last visited Sept. 25 2014).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 58–59 (emphasis added).

<sup>70</sup> *Id.* at 59, 61.

<sup>71</sup> *Intellectual Property*, OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET, available at <https://oami.europa.eu/ohimportal/en/rcd-intellectual-property> (last visited Sept. 25 2014).

<sup>72</sup> Monseau, *supra* note 28, at 58.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 60.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 64–65.

Italy, fashion design is considered art and therefore granted copyright protection, lasting seventy years after the death of the designer.<sup>78</sup> To warrant protection the design must “have creative character or inherent artistic character.”<sup>79</sup> Italy also has a Jury of Design “consisting of ten experts in the fashion industry, to decide whether a design should be protected,” although the decisions it promulgates are not required to be followed.<sup>80</sup>

Similarly, France also provides copyright protection for designs.<sup>81</sup> France provides the most rights to its designers, granting them moral rights (to have the name of the designer and his work respected even after his death) and patrimonial rights (which allows the designer to monetarily gain from the ownership of the right in the work).<sup>82</sup>

Nonetheless, the United Kingdom, like the United States, does not provide copyright protection to fashion designs. However, there is an exception if the design “relate[s] back” to the original sketch.<sup>83</sup> Also, if the design can be classified as a work of artistic craftsmanship, it will be granted copyright protection.<sup>84</sup> However, the U.K. also provides for a separate design right that covers fashion designs. The Copyright, Design, and Patents Act of 1988 (CDPA) created a registered and unregistered right, that is very similar to that under the 2002 E.U. Regulation.<sup>85</sup>

## VI. ANOTHER SOLUTION: AMENDMENTS TO THE IDPPPA

It is clear that some sort of protection needs to be established in order to foster the profitability, and more importantly the creativity of the fashion industry. As modifying current copyright law has not garnered support, it is necessary to reframe the proposal. Looking to the United Kingdom as a model, the best solution may be to create a new body of law—a new protection framework strictly for designs. By doing so, Title 17 of the Copyright Act does not need to be amended. Presumably, many are hesitant to modify the current Act for fear that it might lead to the extension of copyright where it is unwarranted. The benefit of creating a design right, is in the flexibility of this new legal right; it can be modified to be as strict or malleable as needed for the world of design. This can be seen in the proposed three-year protection, which allows for designers to have a year of design development, a year of exclusive sales, and a final year for “diffusion sales or other mass-market sales.”<sup>86</sup> It is just long enough to ensure profitability for a designer, but not too long as to prevent the reincorporation of designs in future garments.

Along these lines, other suggestions to modify the IDPPPA include the incorporation of registered protection. This would provide longer-term protection for creations that

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<sup>78</sup> Xiao, *supra* note 7, at 427.

<sup>79</sup> *Id.* (citing *Law No. 633 of April 22, 1941, § 2(10), Protection of Copyright and Rights Related to its Exercise (It.)*, available at <http://www.wipo.int/clea/en/texthtml.jsp?lang=en&id=2582>).

<sup>80</sup> *Id.*

<sup>81</sup> See Code de la Propriete Intellectuelle and lists fashion as a protected work in Article L. 112- 2.7.

<sup>82</sup> Xiao, *supra* note 7, at 426.

<sup>83</sup> *Id.* at 427.

<sup>84</sup> *Design*, BRITISH COPYRIGHT COUNCIL, available at <http://www.britishcopyright.org/page/55/fashion-design/> (last visited Sept. 25 2014).

<sup>85</sup> Xiao, *supra* note 7, at 427- 28.

<sup>86</sup> *A Bill to Provide Protection for Fashion Designers*, *supra* note 12.

designers feel may be iconic and warrant a longer protection period. Furthermore, as the fashion industry thrives on derivation, the substantially identical standard should remain, which only eliminates blatant copies of works rather than interpretations. Finally, it may be recommended that a Board be established, as in Italy, to determine if the “informed user” would deem the proposed infringement “identical.” This Board could be composed of retired designers, fashion professors, and/or fashion critics (barring active designers to prevent bias). These individuals would have a better concept of what is an “immaterial” alteration. It may be argued that the average American is not such an “informed user” when it comes to fashion, and thus, this is the incorrect standard to use. This argument is flawed as most often, those who purchase counterfeit or knock-off items do so because they are aware of the more expensive original, and seek to purchase a less expensive version. In this sense, they are “informed,” not merely buying items based on aesthetics, but aesthetics and knowledge of the original and its status.

## VII. CONCLUSION

Essentially it is a question of whether we, as a country, want to respect and protect individual, unique ideas and promote creativity and competition in the fashion marketplace. To do so, we must grant protection for all artists’ ideas, including fashion designers. The best and most effective method, based on precedent in Europe, is protection under a design right, rather than copyright, which can be formatted to the specifics of this industry. And with a grant of protection, not only will creativity increase, but also more jobs and competition will be created, benefiting the overall economy. Ultimately, fashion is not merely clothing but an art; a form of expression that warrants the creation of property rights.<sup>87</sup>

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<sup>87</sup> *A Bill to Provide Protection for Fashion Designers*, *supra* note 12.