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Third Time's a Charm - Why Congress Should Modify the Newest Incarnation of the Design Piracy Prohibition Act

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THIRD TIME’S A CHARM? WHY CONGRESS SHOULD MODIFY THE NEWEST INCARNATION OF THE DESIGN PIRACY PROHIBITION ACT

I. INTRODUCTION

This, “stuff?” Oh, ok. I see, you think this has nothing to do with you. You go to your closet and you select out, oh, I don't know, that lumpy blue sweater, for instance, because you're trying to tell the world that you take yourself too seriously to care about what you put on your back. But what you don't know is that that sweater is not just blue, it's not turquoise, it's not lapis, it's actually cerulean. You're also blithely unaware of the fact that in 2002, Oscar de la Renta did a collection of cerulean gowns. And then, I think it was Yves Saint Laurent, wasn't it? Who showed cerulean military jackets? . . . And then cerulean quickly showed up in the collections of eight different designers. And then it filtered down through the department stores. And then it trickled on down into some tragic Casual Corner where you no doubt fished it out of some clearance bin.

However, that blue represents millions of dollars and countless jobs, and it's sort of comical how you think that you've made a choice that exempts you from the fashion industry when, in fact, you're wearing a sweater that was selected for you by the people in this room. From a pile of “stuff.”

- Miranda Priestly, The Devil Wears Prada

Does Priestly, the ruthless editor of the fictional fashion magazine Runway, have it right? Is the influence of fashion so pervasive? When we get dressed, are we simply throwing clothing on or do we become a part of the creative expression that defines the fashion world? The current laws in

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1. THE DEVIL WEARS PRADA (Twentieth Century Fox 2006).
2. See A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 77 (2006), 79 [hereinafter Hearing I] (testimony of Prof. Susan Scafidi) (citing Jo-
the U.S. would have one believe that the former is true, since apparel currently only receives very minimal intellectual property protection.\textsuperscript{3} The legal system deems a piece of clothing to be a “useful article,” meaning that it has “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”\textsuperscript{4} But such a definition begs the question: is this enough? Is this truly an accurate description of what clothing does and how we perceive it?

Throughout American history, our legal system has tended to overlook the fashion industry.\textsuperscript{5} While the majority of creative products—such as films, music, and books—receive copyright protection, the overall design of an article of clothing receives none.\textsuperscript{6} A specific element of a piece of clothing—such as a graphic design or an appliquéd—may be eligible for copyright protection.\textsuperscript{7} However, under existing law, a manufacturer could legally reproduce the entire construction of a Dior dress, down to the very color and placement of each seam, as long as there is no counterfeit “Dior” label inside.\textsuperscript{8} Is such a practice just? In fact, fashion copyists are lauded.\textsuperscript{9} A prime example is how “network television morning shows publicize knockoffs of dresses worn by celebrities at red carpet events with a cheerfulness not likely to be in evidence if what was being copied was the network’s own programming.”\textsuperscript{10} Such double standards are unreasonable. Indeed, in the hopes of mitigating some of this contradiction in copyright law and putting an end to legalized design appropriation, many American fashion designers are lobbying for the passage of the Design Piracy Prohibition Act (DPPA).\textsuperscript{11} Meanwhile, copyists and major manufacturers who benefit from the loose copyright regime argue that extending more intellectual

\begin{thebibliography}{11}
\footnotesize
\item anne B. Eicher, \textit{Clothing, Costume, and Dress}, in 1 ENCYCLOPEDIA CLOTHING AND FASHION 270(2005) (defining “clothing” as a general term for “articles of dress that cover the body”);
\item Valerie Steele, \textit{Fashion}, in 2 ENCYCLOPEDIA OF CLOTHING AND FASHION 12, 12 (2005) (defining “fashion” as a form of creative expression)).
\item See, e.g., CounterfeitChic.com FAQs, http://faqs.counterfeitchic.com (last visited Feb. 25, 2010) [Hereinafter FAQs].
\item \textit{Hearing I}, supra note 2.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item See Judith S. Roth & David Jacoby, \textit{Copyright Protection and Fashion Design}, ADVANCED SEMINAR ON COPYRIGHT LAW 1081, 1084 (noting that “moral outrage over literary plagiarism” does not extend to fashion copyists).
\item Roth & Jacoby, supra note 9, at 1084.
\end{thebibliography}
property protection to fashion designs would result in harmful hyper-protection (and presumably lead to some market chaos).\textsuperscript{12}

Congress recently formulated a third version of the DPPA,\textsuperscript{13} and this article strongly supports the view that fashion designs should receive copyright protection. However, while the new bill has significantly improved prior introductions, it still falls short of the type of specificity necessary to enforce legal protection in an advancing creative field where distinctions can become difficult to draw.\textsuperscript{14}

Part II of this article examines the harm that design pirates inflict upon the fashion industry. With recent developments in technology, “fast-fashion” has become a bit of a mixed blessing.\textsuperscript{15} While fast-fashion designers challenge but enhance innovation, fast-fashion copyists pose a threat to this creative process.\textsuperscript{16} This section also explains the related problem of counterfeiting, and discusses the artistic value of fashion designs and how the present legal remedies in the U.S. are inadequate in protecting this form of expression.\textsuperscript{17}

Part III explores the policy arguments in favor of and against extending copyright protection to fashion design. This article supports a “differentiation within flocking” model of fashion, where consumers seek to express themselves as individuals while still participating in a group trend.\textsuperscript{18} This section also re-addresses the flaws in current legal protection afforded to fashion designs, and further explains why copyright protection would greatly benefit the highly artistic and creative fashion world.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{12} Susan Scafidi, Intellectual Property and Fashion Design, in \textit{1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH} 115, 115 (Peter K. Yu ed., 2006) [hereinafter \textit{INFORMATION WEALTH}].
\item \textsuperscript{13} Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).
\item \textsuperscript{14} \textit{See infra} Part V.
\item \textsuperscript{15} The term “fast-fashion” is illustrated in the following example: H&M has transformed the calculus of cheap chic. With an in-house staff of 120 designers and a nimble network of Asian and European factories, the Swedish retailer can move the latest look from runway to rack in three weeks. And H&M sells high style at crazy-low prices ($3.90 necklaces, $29.90 minidresses). America has become H&M’s fastest-growing market, ringing up $231 million in sales this year, up 30 percent over last year. Analysts believe H&M’s 129 U.S. outlets could eventually grow to 1,000 stores. “It’s in-and-out fashion,” says retail analyst Candace Corlett. “They’re raising shoppers’ expectations for fast, furious, new.”
\item \textsuperscript{17} C. Scott Hemphill & Jeannie Suk, \textit{The Law, Culture, and Economics of Fashion}, 61 \textit{STAN. L. REV.} 1147, 1170 (2009).
\item \textsuperscript{18} \textit{Hemphill & Suk, supra} note 16, at 1152.
\item \textsuperscript{19} Susan Scafidi on Copyrighting Fashion,
\end{itemize}
Part IV focuses on the DPPA itself, explaining its background and legal implications. This portion lays out the chronological history of the Bill and summarizes the industry arguments for and against the DPPA. Further, it explains the legal mechanisms of the DPPA, analogous to the Vessel Hull Design Protection Act that provides *sui generis* design protection for the hulls of boats. Finally, this section discusses the additional specifications of the newest DPPA.

Part V examines why, despite several key improvements, the newest version of the bill is still lacking in some respects. With more revision, the DPPA can become a powerful protector of the intellectual property engendered by the creative and expressive fashion industry. The DPPA has the potential to stimulate the creation of new works, while simultaneously striking a balance between “making existing works available to” both consumers and future innovators.

II. LEGALIZED PIRACY: EXAMINING THE PROBLEM POSED BY KNOCKOFF ARTISTS

While Marc Jacobs once called copying “fantastic,” because it implies that a design is highly desirable, the rapid advancement of technology has allowed copying to reach new levels at an incredibly quick pace. Copying has become particularly pervasive in the Internet era, thanks to digital photography and advanced software programs. Literally moments after a designer unveils a look, after spending thousands and thousands of dollars on producing their show, digital photographs end up online and are sent to workers in factories in China and other countries with cheap labor. These workers specialize in pattern making, design, and tailoring, and are further equipped with CAD (computer-aided design) programs that can determine the design of a garment from a photograph without the need to pull


21. See infra Part IV.
25. Id.
26. See Hearing I, supra note 2, at 12 (statement of Jeffrey Banks, fashion designer and representing the Council of Fashion Designers of America).
apart the seams.\textsuperscript{27} Within a matter of days, these factories can return finished samples of the copied designs and begin full-scale production within weeks.\textsuperscript{28} These extremely competitive networks of factories “reproduce designer looks with the impunity and speed of Robin Hood.”\textsuperscript{29} Thus, new and original designs are “stolen before the applause has faded.”\textsuperscript{30} Due to the lack of copyright protection in the United States, creative innovations launched on the runway and the red carpet are lifted in plain sight.\textsuperscript{31}

The designer production cycle moves much slower than these high-speed, technologically armed pirates.\textsuperscript{32} In line with decades-old tradition, designers display their collections several months in advance of a season.\textsuperscript{33} Fall fashion shows are held during consecutive weeks in February and March, and Spring shows are held during consecutive weeks in September and October.\textsuperscript{34} As a result, design pirates are able to produce knockoffs that can render originals obsolete before they are even offered for sale.\textsuperscript{35} Designer Anna Sui urges that she is concerned not only by the copying itself, but by the fact that “‘[t]hese copies are hitting the market before the original versions do.’”\textsuperscript{36} Thus, creative designers are left little opportunity to recover their monetary investment, not to mention creative input, before the item has already gone out of style.\textsuperscript{37} The knockoff artists “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,” are riding off the backs of original designers and their artistic visions.\textsuperscript{38} Without copyright protection for fashion designs, copyists are able to avoid the arduous and expensive processes of development and marketing, simply by producing knockoffs of the most commercially promising pieces.\textsuperscript{39} The fashion in-

\begin{thebibliography}{99}
\bibitem{} Wilson, supra note 24, at A1.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} Hearing I, supra note 2, at 9 (statement of Jeffrey Banks, fashion designer and representing the Council of Fashion Designers of America).
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} Hearing I, supra note 2, at 9 (statement of Jeffrey Banks, fashion designer and representing the Council of Fashion Designers of America).
\bibitem{} Wilson, supra note 24, at A1.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} Wilson, supra note 24, at A1.
\bibitem{} Id.
\bibitem{} Information Wealth, supra note 12, at 115.
\bibitem{} Portfolio, supra note 19.
\bibitem{} Hearing I, supra note 2, at 83 (statement of Susan Scafidi, Visiting Professor, Ford-
\end{thebibliography}
industry is already extremely competitive to begin with, and experimental designers face an even steeper uphill battle when they cannot compete with respect to price and quality. Their odds of success in this cutthroat climate are further weakened, and the legal system allows this to take place.

Though “fast-fashion” can threaten innovation, there is a distinction between the types of fast-fashion practices that is important here. Fast-fashion designers, such as Zara and H&M, challenge the fashion innovation process but also spur it along. Like copyists, these firms move their product to the marketplace very quickly. Their strategies, however, are very different. Zara and H&M employ in-house designers who develop adaptations and interpretations of current trends. By contrast, fast-fashion copyists threaten innovation by orienting fashion toward its status-conferring aspects and away from its expressive capacity. In addition to the ability to beat an original design to market, these companies are able to “see which designs succeed, and copy only those.” These design pirates massively undermine the value of original works. By reducing the profitability of originals, such copyists also reduce the incentive to create new designs in the first place. Thus, creativity is stifled, and fashion designers may seek either different modes of expression or more favorable venues for their work.

While famous designers with well established businesses make for less sympathetic victims, they too are vulnerable to the damage caused by design piracy. Designers who are well known for their haute couture pieces sell a very small number of these rather expensive designs. While these garments are very high priced, the designer often does not recoup his

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40. Id. at 82–83.  
41. Id.  
42. Naughton, supra note 15.  
44. Id. at 1173.  
45. Id. See also Keith Naughton, H&M’s Material Girls: The Retailer Speeds Ahead with Fast Fashions, NEWSWEEK WEB EXCLUSIVE, June 10, 2007, http://www.newsweek.com/id/33983 (quoting H&M’s chief designer: “We don’t copy the catwalks. . . . We take inspiration from what’s happening in the culture, with celebrities and on the catwalks.”).  
47. Id. at 1171.  
48. Id. at 1174.  
49. Id.  
50. See Hearing I, supra note 2, at 10 (statement of Jeffrey Banks, fashion designer and representing the Council of Fashion Designers of America).  
51. Id. at 9.
or her investment costs due to the extremely low volume of sales.52 Instead, designers turn to ready-to-wear lines, which are sold at lower prices and in greater quantity.53 Design piracy, however, presents a serious obstacle for designers moving from haute couture into ready-to-wear.54 These designers cannot gain the volume necessary to compete against the companies who pirate their designs, nor are they able to sell as many haute couture pieces when replicas are available in department stores for hundreds instead of thousands of dollars.55

There are countless tales of creative designers, from low to high-end, who have suffered as a result of piracy.56 For example, Jennifer Baum Lagdameo, co-founder of the label Ananas, was a young mother working from home.57 She had successfully marketed her handbags, which retailed between $200 and $400.58 A few days after placing a wholesale order, a buyer called to cancel because they had found virtually identical (albeit lower quality) copies of her bags at a lower price.59 Narciso Rodriguez, now a very prominent designer, has also been a victim of design pirates.60 In 1996, he designed the gown that Carolyn Bessette wore to marry John Kennedy Jr.61 At the time, Rodriguez was working for another label and had yet to launch his eponymous brand.62 Rodriguez estimates that seven or eight million copied dresses were sold.63 By the time he was able to commercially produce his own version of the dress, he only sold about forty of them.64 Absent the legal protection of copyright for fashion designs, particularly in the Internet era, nearly every designer faces this threat of piracy.65

52. Id.
53. Id. at 10.
54. Hearing I, supra note 2, at 10 (statement of Jeffrey Banks, fashion designer and representing the Council of Fashion Designers of America).
55. Id. at 9.
56. See, e.g., Givhan, supra note 6, at C2; Portfolio, supra note 19.
57. Hearing I, supra note 2, at 78 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).
58. Id.
59. Id.
60. Givhan, supra note 6, at C2.
61. Id.
62. Id.
64. Id.
65. Hearing I, supra note 2, at 79 (statement of Susan Scafidi, Visiting Profession, Ford-
A. The Comradery Between Counterfeiting and Piracy

Although not the focus of this article, the exacerbation of the counterfeiting problem through design piracy bears mentioning. While the production of counterfeit goods is illegal, knock-off artists are able to take advantage of the effective non-existence of design piracy protection in the U.S. Instead of smuggling in counterfeited products and risking customs violations, counterfeiters simply import pirated designs and apply the desired trademarked labels in the U.S., either during illicit operations or at the point of sale. Although storage unit raids can uncover thousands of counterfeited goods or pirated designs ready to make the transformation, such storage units are often difficult to locate.

Despite the dearly held belief that purchasing a counterfeit handbag doesn’t harm anyone—after all, those brands already make millions of dollars—quite the opposite is true. Organizations running the counterfeiting rackets are not just akin to white-collar criminals, these groups “also deal in narcotics, weapons, child prostitution, human trafficking and terrorism.” The secretary general of Interpol, Ronald K. Noble, testified before the House of Representatives Committee on International Relations that “profits from the sale of counterfeit goods have gone to groups associated with Hezbollah, the Shiite terrorist group, paramilitary organizations in Northern Ireland and FARC, the Revolutionary Armed Forces of Colombia.”

Thus, irrespective of intellectual property arguments favoring the protection of fashion designs, there are compelling reasons to prevent exploitation and criminal conduct on a mass scale. Moreover, it makes little sense to allow a practice that completely circumvents both federal policy and recent international efforts to further curtail the counterfeit goods trade.

66. Id. at 77–98.
67. Hearing II, supra note 63, at 20 (statement of William D. Delahunt, Rep.).
68. Id.; Hearing I, supra note 2, at 83 (statement of Susan Scafidi, Visiting Professor, Fordham Law School); Susan Scafidi, Sticking It to ‘Em, COUNTERFEITCHIC.COM, Oct. 4, 2007, http://www.counterfeitchic.com/2007/10/truth_in_labeling.php (describing how “smart counterfeiters are apparently taking ever greater advantage of their ability to import unlabeled goods, manufacture the small and easily hidden labels locally, and bring the two together when the coast is clear.”).
69. Hearing II, supra note 63, at 21 (statement of William D. Delahunt, Rep.).
70. Hearing I, supra note 2, at 10–13 (statement of Jeffery Banks, Designer).
71. See Hearing II, supra note 63, at 21 (statement of William D. Delahunt, Rep.).
73. Id.
74. See generally id.
while perpetuating a loophole in the U.S. intellectual property law system.  

B. Fashion as Creative Expression

U.S. copyright law treats fashion design as simply a utilitarian construct, but this perspective is at odds with individuals—professionals in the field and laypeople alike—who view clothing and accessorizing as a form of creative expression. While some people merely throw clothes on, like the character that Miranda Priestly addresses in the Introduction to this Comment, many others make very conscious decisions about how to adorn their bodies. Form, color, and texture are paramount. Individuals combine these elements to represent themselves, to make an artistic statement, to differentiate themselves, and to create something beautiful. As Miuccia Prada explains, “[e]ven when people don’t have anything . . . they have their bodies and their clothes.” That is, individuals assemble their identity “during the profound daily ritual of clothing oneself.” Thus, fashion is an amalgamation of personal choices and expression.

When a designer creates a piece, the end result is the product of an artistic vision and of trial and error to bring that concept to fruition. An article of clothing does not accidentally end up in the marketplace. Indeed,


76. See Copyright Act of 1976, 17 U.S.C. §101 (2006) (defining a “useful article” as one that has “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”).


78. Supra Part I.


81. Id.

82. See generally, Portfolio, supra note 19 (explaining the arduous creative and practical process of getting clothing to the marketplace).

83. Id.
fashion designers invest significant “time, money, and talent—R&D to any other industry—in realizing their visions, only to have their work stolen.”\footnote{84} As one designer explains, “[w]ith each new season, designers put their imagination to work, and they put their resources at risk.”\footnote{85} He emphasizes the incredible amount of dedication that designers must put forth:

> [E]very season when you go out to create, if you’re creating original prints, original patterns, original samples that you have to go through trial and error, you are talking about thousands and thousands of dollars. Then if you go to put on a show, you can spend anywhere from fifty thousand dollars to a million dollars just to put on a show to show buyers and press what you’re creating for that season. So, before you have even received your first order, you’ve spent thousands and thousands and thousands of dollars.\footnote{86}

Despite the United States’ historical failure to recognize the creative status of fashion design, modern attitudes regarding it as a creative medium have evolved quite a bit.\footnote{87} The show “Project Runway,” in which contestants are given a creative challenge—creating a garment from non-traditional materials such as food, or designing around a theme such as “cocktail party”—is one of the most popular reality shows on television.\footnote{88} The enthusiasm of viewers of the show is a testament to their appreciation for the creative process.\footnote{89}

Beyond just pop-culture, however, fashion has started to enjoy the same artistic respect afforded to other works of art, as fashion designs have made their way into museum after museum, in both exhibits and dedicated institutions.\footnote{90} A Pulitzer Prize for criticism was even awarded to a fashion

\footnote{84. Id.}

\footnote{85. Hearing I, supra note 2, at 11 (statement of Jeffrey Banks, fashion designer and representing the Council of Fashion Designers of America).}

\footnote{86. Id. at 11–12.}

\footnote{87. Id. at 81 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).}


\footnote{89. See Fink, supra note 88, at Extra 3.}

writer, Robin Givhan, of the Washington Post.\textsuperscript{91} Given these recent cultural developments, it is inconsistent for copyright law to protect certain forms of expression and yet deny fashion’s artistic form.\textsuperscript{92}

\textit{C. The Current, Inadequate Legal Protection for Fashion Designs}

Because intellectual property law covers a wide range of artistic works, inventions, designs, and images, but affords little protection for fashion designs, the fashion industry has been forced to seek protection under other statutes and common law theories.\textsuperscript{93}

Trademark law protects names, logos, marks, and other source identifiers.\textsuperscript{94} Trademarks are symbols that indicate the source of the goods.\textsuperscript{95} In fashion, trademarks are often logos, which may appear on packaging, as labels, or they may be incorporated into the item itself.\textsuperscript{96} Examples include the LV Louis Vuitton symbol or the Nike swoop.\textsuperscript{97} This is the strongest and least expensive protection available for luxury goods, particularly when the trademark is registered with the government.\textsuperscript{98} However, emerging designers cannot depend on this kind of brand recognition as their sole protection against design piracy.\textsuperscript{99} One young designer laments how estab-


\textsuperscript{92} Hearing I, supra note 2, at 77–78 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).

\textsuperscript{93} Roth & Jacoby, supra note 9, at 1091.


\textsuperscript{95} FAQs, supra note 3.

\textsuperscript{96} Id.

\textsuperscript{97} Id.

\textsuperscript{98} Id.

\textsuperscript{99} INFORMATION WEALTH, supra note 12, at 121.
lished fashion houses “can just sell their trademarks. We have to sell our designs.”

Trade dress protection is a subset of trademark law and relates to the overall appearance or image of a product as it is packaged or presented. An example of such an iconic item is the Hermès Birkin bag. In order to make out a trade dress claim, a plaintiff must show that the copied matter is a distinctive source identifier, that there is a likelihood of confusion between the original and the copy, and that the matter for which protection is sought is not functional. Items eligible for trade dress protection require some sort of established fan base or other consumer recognition—newly released designs, no matter how innovative or creative, would not qualify for such protection.

Trademark dilution claims can be brought under federal and state law, albeit within a narrow application. Federal law only provides protection for infringement of a “famous mark.” Further, to establish a trademark dilution claim, a plaintiff must show fame, distinctiveness, and actual dilution of that famous mark.

Patent law can also play a role in providing legal protection for fashion design, but serves a far more narrow function than trademark law. Design elements that serve a functional purpose can meet the exacting standards of a patentable invention if sufficiently innovative. Examples of patented fashion elements include Velcro, Lycra, and Kevlar. Despite the appeal of patentability, many designers find that the requirements of novelty, utility, and non-obviousness, coupled with the amount of time necessary to obtain a patent make the process “impractical if not impossible.”

100. Id. (quoting the author’s interview with designer Gabi Asfour on Sept. 27, 2005).
102. FAQs, supra note 3.
104. INFORMATION WEALTH, supra note 12, at 122.
105. Roth & Jacoby, supra note 9, at 1093.
108. INFORMATION WEALTH, supra note 12, at 122.
109. Id.
110. Id.
112. INFORMATION WEALTH, supra note 12, at 122. For 2008, the average total pendency for a patent application was 32.2 months. USPTO, Performance and Accountability
Design patents protect the “new, original, and ornamental design” of a functional item.\textsuperscript{113} Theoretically this is a good idea, but in practice, design patents are subject to many of the same restrictions as utility patents.\textsuperscript{114} While the patent system requires prior examination of items to determine eligibility for protection, fashion has a seasonal nature, which could render designs passé by the time a patent was granted.\textsuperscript{115}

While some designs are eligible for the above protections, the vast majority of creative fashion is left unprotected, thus falling “between the cracks of the intellectual property system.”\textsuperscript{116}

III. POLICY ARGUMENTS REGARDING COPYRIGHT PROTECTION FOR FASHION DESIGNS

Is fashion design worthy of copyright protection? The answer to this hotly contested issue often turns on one’s conception of the role that fashion plays in our society. Arguments opposing the extension of further intellectual property protection to fashion designs generally conceive of a status-based, economically-centered model,\textsuperscript{117} while those who favor copyright protection focus on the artistic and creative expression involved and how that in turn bolsters the intellectual property industry.\textsuperscript{118}

A. A Model of Differentiation and Flocking

Fashion can perhaps best be understood through a model of “individual differentiation within flocking.”\textsuperscript{119} “Differentiation” refers to the creative expression consumers engage in when they represent their individual style through their fashion choices.\textsuperscript{120} This can also be thought of as “differentiation of identity through fashion.”\textsuperscript{121} On the other hand, individuals also participate in “flocking”—a process by which consumers participate in a group movement, which can be understood as following a

\textsuperscript{114} INFORMATION WEALTH, supra note 12, at 122.
\textsuperscript{115} Id.
\textsuperscript{116} FAQs, supra note 3.
\textsuperscript{117} See, e.g., Piracy Paradox, supra note 33, at 1722; Surowiecki, infra note 150, at 90.
\textsuperscript{118} See, e.g., Hearing I, supra note 2, at 79 (2006) (statement of Susan Scafidi, Visiting Professor, Fordham Law School); INFORMATION WEALTH, supra note 12, at 115; Hemphill & Suk, supra note 16, at 1170.
\textsuperscript{119} Hemphill & Suk, supra note 16, at 1152.
\textsuperscript{120} Id. at 1164.
\textsuperscript{121} Id.
trend. While seemingly in tension with one another, differentiation and flocking within fashion coexist in a dynamic relationship. Anna Wintour, the famed editor of American Vogue, says it well when she notes that fashionable individuals are praiseworthy for at once “looking on-trend and beyond trend and totally themselves.”

This theory of differentiation within flocking promotes the legal protection of original designs against close copying. Close copying reduces the differentiation effect within flocking, while other trend-joining activities foster innovation and creative expression within that trend. Participating in a trend does not necessitate or usually entail copying, for designers may engage in interpretation, whereby “[t]hey may quote, comment upon, and refer to prior work.” Still, the line between “inspiration” and perceived plagiarism can be a thin one, as even the most famous and celebrated designers have not been exempt from criticism on this point.

In “draw[ing] freely upon ideas, themes, and styles,” the resultant design does not masquerade as the original; rather, it simply draws on the meaning of the earlier work. The important distinction between close copying and interpretive redesigning is the difference in goals and consequences. While close copies diminish the value of those initial designs and thus reduce the incentive to create, interpretations may even complement other on-trend pieces.

Trends are comprised of certain shared, recognizable features such as motorcycle-inspired gear, skinny jeans, or faux fur vests. But within trends, the differentiating aspects of flocking are present. For example, there may be many different types of motorcycle jackets available during a

122. Id.
123. Id. at 1166.
126. Id.
127. Id. at 1160.
128. See, e.g., Vanessa Lau, Can I Borrow That? When Designer “Inspiration” Jumps the Fence to Full-On Derivation, the Critics’ Claws Pop Out, W MAG., Feb. 2008, at 99, 102-04 (describing how, among others, Proenza Schouler’s Spring 2008 collection was criticized as copying Balenciaga, Derek Lam’s Fall 2007 collection was blasted for resembling Azzedine Alaïa too strongly, and Vera Wang is constantly admonished for lifting from Prada).
130. Id.
131. Id.
132. Id. at 1166. See also Susan Carpenter, Biker Boogie, L.A. TIMES, Nov. 8, 2009, at P1 (describing the current motorcycle-inspired trend in fashion).
given season: some in black leather, some with asymmetrical zippers, and others with studs. Yet all of these jackets are part of the collective trend. Thus, “the items within the trend [are] nevertheless different from each other.”

A trend is most likely to take off if three conditions are met: (1) the new trend stands out from other available articles; (2) individuals are convinced that others will also buy (and the trend appears at enough retailers at the same time for consumers to do so); and (3) consumers’ demand for differentiating details within the trend is met.

This model of trend building acknowledges the expressive, differentiating aspects of fashion, and does not simply lump reinterpretation or inspiration into the category of mere copying, as the all-too-common cliché does. Those who do not appreciate (or are simply not concerned with) the creative aspects of fashion tend to perceive the entire process as a continuation of copying, without much original creation taking place, but this view does not accurately or thoroughly represent the unique creative climate of fashion. Though there are clear similarities within and even between trends, individual differentiation within flocking is a crucial element to keep in mind.

B. Arguments Against Copyright Protection for Fashion Designs

In contrast to the “differentiation within a trend” model discussed above, the primary arguments against extending copyright protection to fashion design postulate a status-based concept of fashion and trends. Kal Raustiala and Christopher Sprigman, in their article The Piracy Paradox, argue that the peculiar nature of the fashion cycle undercuts the rationale for IP protection entirely. The authors explain their theory of a “status-conferring good” using The Economist’s definition for a “positional good”—urging that articles of clothing are goods that are valued by consumers because of how others perceive the value of those goods. Of

134. Id.
135. Id. at 1167–68.
136. See supra Part III.A.
137. See, e.g., Piracy Paradox, supra note 33, at 1718 (proposing that “[c]lothing is a status-conferring good”).
138. Id. at 1691 (arguing that copying is not actually harmful to fashion; rather, it may actually “promote innovation and benefit originators.” The authors refer to this phenomenon as the “piracy paradox”).
course, there is merit to this argument; virtually all consumers are aware of the status-conferring capability of clothing. Nevertheless, the fundamentally creative aspects should not be ignored.

Relying on this theory of fashion as primarily a marker of status, Raustiala and Sprigman propose a model of “induced obsolescence” whereby the low level of intellectual property protection for clothing designs actually serves to paradoxically foster the fashion cycle.140 The authors argue that the low-IP rules provide for the “free appropriation of fashion designs [and] accelerate the diffusion of designs and styles.”141 Copying accelerates the diffusion of those designs throughout the marketplace, thus “inducing” obsolescence as fashion-forward, status-conscious individuals seek the next new trend.142 Raustiala and Sprigman contend that the free appropriation of designs gives access to consumers who otherwise would be unable to afford those items; the “elite quickly becomes mass.”143 In a follow-up piece to their original article, the authors reiterate their point regarding the “induced obsolescence” process and maintain that copying produces a more rapid “creative cycle and more consumption of fashion due to the quicker deterioration of apparel’s status-conferring value.”144

Raustiala and Sprigman also address the issue of trend creation, a process they refer to as “anchoring,”145 the method by which trends are communicated and created. The authors argue that a low level of IP protection allows trends to be established through this process.146 According to the authors, because trend creation requires the convergence of themes and the participation of multiple actors, copying can help “anchor” the emerging trend by limiting it to a few design themes.147 From there, the low-IP regime that favors the free appropriation of designs allows these themes to become full-blown trends, and fashion firms are able to easily

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140. Piracy Paradox, supra note 33, at 1722.
141. Id.
142. Id.
143. Id.
145. Piracy Paradox, supra note 33, at 1728.
146. Id.
147. Id. at 1729.
work and rework the designs. Thus, the thrust of Raustiala and Sprigman’s argument is that piracy, while it intuitively seems harmful, in fact, paradoxically benefits the fashion industry.

Raustiala and Sprigman are not alone in their views. James Surowiecki, a financial and business journalist for The New Yorker, supports their theory of induced obsolescence and argues that the lack of extensive IP protection creates “more fertile ground for . . . innovation” because it allows designers to take existing ideas in other directions. Surowiecki, overstating the extent of potential IP protection, contends that if the creators of the pinstripe or the stiletto heel had barred others from using their original designs, “there would have been less innovation in fashion, not more.”

Additionally, Surowiecki argues that knockoff designs target a separate market from that of the original designs because the copied works are purchased by individuals who appreciate high style but can’t afford to pay premium prices for it. Surowiecki also believes that purchasing such knockoffs can serve as a “gateway drug” of sorts, for once consumers get a taste of the lower quality copies, they will be “all the more interested in eventually getting the real stuff.” This is an interesting proposition, but it also seems to conflict with his first assertion that purchasers of copied goods cannot afford high fashion prices; there is no guarantee that eventually they would be able or willing to pay more for the original design.

Still, Surowiecki insists “that fashion is one of few industries” in which consumers are “willing to pay a considerable premium to own [originals]” rather than settling for knockoff versions. He makes this point in an attempt to support the theory that the fashion industry as a

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148. Id.
149. Id. at 1727.
152. Id. Mr. Surowiecki’s examples exaggerate the intent and likely consequences of increased intellectual property protection for fashion designs. See id. Extending copyright protection to certain works would not include such ubiquitous components such as pinstripes or stilettos, instead it would prevent the copying of the design of an entire shoe or pantsuit, so that an artist’s original creation would remain properly attributed to them. It would serve no interests in the fashion industry if such basic ideas could be protected against use by others, as it would prevent any sort of trend creation or collective participation.
153. Id.
154. Id.
155. Id.
156. Id.
whole still thrives despite copying. Surowiecki points out that even despite the proliferation of knockoff designs, high fashion houses have been able to consistently raise their prices.

It is important to note that Raustiala and Sprigman, in addition to making this same point that copying paradoxically benefits the fashion industry, do not differentiate “between line-by-line copies and derivative [fashion designs].” The authors’ focus on their model of induced obsolescence precludes any reason to specifically differentiate between exact copies and inspired re-workings. According to Raustiala and Sprigman, “[b]oth forms of design copying fuel the fashion industry’s cycle of induced obsolescence.” This article, however, is specifically focused on the strikingly similar fashion pieces, if not exact copies, that currently saturate the market. Thus, the delineation between different forms of “copying” is an important one.

To Raustiala’s and Sprigman’s credit, in their follow-up work they do address the concept of differentiation within flocking. Although they continue to “find no reason to treat [line-by-line copies] differently from the copying done to create derivative fashion designs,” they do consider consumers’ desires to flock and differentiate. Raustiala and Sprigman package their take on the model in what they call the “D/F ratio”, the continuum on which individual consumers’ desires to flock and differentiate are located. The authors describe how some consumers, such as Bjork and her famous swan dress, are more oriented toward differentiation while “[o]thers, perhaps the vast majority, are dedicated flockers, who seek

157. Surowiecki, supra note 151.
158. Id. This does not take into account the fact that these brands are able to extensively rely on their trademarks. It is the strong branding of these high fashion houses that allows for continued premium pricing; it is not simply a lucky accident or proof that piracy does not harm the industry.
159. See Piracy Paradox Revisited, supra note 144, at 1210–12 (stating that the “market for new designs is driven by the ‘harm’ caused to one set of consumers[,] the purchasers of original designs[,] by purchases of copies” by a larger set of consumers.).
160. See id.
161. Id. at 1212.
162. Id.
164. Piracy Paradox Revisited, supra note 144, at 1210.
165. Id. at 1209–10.
166. Id. at 1210.
167. Id.
to stand out as little as possible.”169 The former type of consumer would have a high D/F ratio, while the latter would have a relatively low one.170

Raustiala and Sprigman hypothesize that one’s position on this continuum could likely change over time, according to his or her “age, wealth, marital status, and a host of other social circumstances.”171 This seems to be an accurate description of the differentiation within flocking model, but the direction of the analysis seems a bit misguided.172

C. The Vantage of Arguments Favoring Copyright Protection for Fashion Designs

Those who oppose copyright protection for fashion designs raise interesting and valid points, but the general arguments gloss over some key distinctions. For example, Raustiala and Sprigman do not differentiate between line-by-line copying and derivative designs;173 instead, they treat all degrees of “inspiration” alike.174 The result is that they have not truly determined whether complete appropriation harms the fashion industry, and their argument that piracy simply benefits the industry is therefore incomplete. Their analysis does not separately consider whether line-by-line copies pose a distinct harm to the fashion industry and creative innovation within it. It thus becomes difficult to argue the merits of the induced obsolescence model, as its scope remains a bit evasive.

Raustiala and Sprigman’s account of a “D/F ratio”175 is a useful way to think about the phenomenon of differentiation within flocking, but the authors use the model to support their view of induced obsolescence.176 The authors urge that these early adopters signify a trend, and soon the market is flooded with derivative and line-by-line copies.177 They afford too much power and influence to the consumers with a high D/F ratio. While some individuals are certainly viewed as “trend-setters,” this seems to be a gross over-simplification of the trend-building process.

Raustiala and Sprigman also propose that differences in quality as

169. Piracy Paradox Revisited, supra note 144, at 1210.
170. Id.
171. Id.
172. See infra Part III.C.
173. See supra Part III.B.
175. Id. at 1209–13.
176. See generally, Piracy Paradox Revisited, supra note 144.
177. Id. at 1210.
well as distinctive trademarks might serve as differentiators, but this theory restrains fashion to its status-conferring ability. If designers, particularly high-end ones, cannot protect their work through copyright, they turn to other means to keep copyists from pirating their designs. High-end designers have recently developed more complex construction methods, with “unusual shapes, extensive stitching and luxurious fabrics” that are harder to copy. Because of this development “the difference between high-end clothes and low-end copies is clearer than it has been in years.” This disparity directly contributes to the separation of the classes and the enforcement of fashion as a marker of status. The difference seems to create trends that are accessible only by those who can afford them, which segments the trend-building process and appears to be in conflict with the notion of induced obsolescence. Raustiala and Sprigman also mention that trademarks serve as differentiators. However, trademark protection is not helpful to fashion because trademarks only protect well-established brands. This limitation again tends to lead to status-based differentiation that segments rather than supports innovation and trend building.

There are further shortcomings within the model posed by Raustiala and Sprigman. The induced obsolescence proposition urges that trends are spurred along by rapid dissemination, but it assumes that copies emerge in succession. However, this assumption no longer seems valid in the Internet age, “as copies now [emerge] in the same season as the original designs,” and may even precede them.

Furthermore, the original Piracy Paradox argument emerged in the context of a robust U.S. and international economy. The present global recession necessitates consumer self-restraint, which is inconsistent with the insatiable demand for new designs proposed by the Piracy Paradox induced obsolescence analysis. An economic downturn would seemingly destroy the underpinning of the model proposing an accelerated and robust

178. *Id.* at 1214.
180. *Id.*
181. *Id.*
183. See supra Part II.C.
186. Roth & Jacoby, supra note 9, at 1099.
187. *Id.*
Surowiecki also believes that free appropriation of designs benefits the fashion industry as a whole. But this argument, like Raustiala and Sprigman’s, is incomplete. While Surowiecki points to the robustness of the fashion industry as a whole, he does not account for the mechanisms that make this possible. It is not simply induced obsolescence that happily drives profits upward. Strong branding also contributes to the increased revenues at the large fashion houses, according to Surowiecki. As Susan Scafidi quips, “big fashion houses do rely on trademark protection—you didn’t think that all of those repeated logos were just aesthetic choices, did you?” While she acknowledges that there may be other reasons for selling distinctly branded merchandise, the legal protection that accompanies this choice is a marked benefit. Surowiecki’s position does not take this reality into account and fails to address the consequences of this phenomenon. Without copyright protection, designers shift their attention to the promotion of trademarks and logos because of the legal protection they afford. Thus, designers spend time and money on promoting logos rather than on the creative process. Under a system where pervasive copying is permitted, the logical response is to focus on advertising, branding, and celebrity endorsements, not on owning one’s creative designs. Unfortunately, the model that criticizes and focuses on fashion’s status-conferring attributes ends up perpetuating that very problem.

Additionally, under the status-based conception of fashion design, upscale designers are not the only firms that may be harmed by design piracy. As previously discussed, knockoffs pose a threat to designers at both ends of the spectrum: neither high-end nor independent designers are immune. Yet the status-based model would continue to allow a regime where only the established fashion houses can legally protect their brands; meanwhile, new market entrants are left with effectively zero ability to shield their creative work from piracy and exploitation.

If the American legal system were to provide copyright protection

188. Id.
189. Surowiecki, supra note 151, at 90.
190. See generally Portfolio, supra note 19.
191. Id.
192. Id.
193. Id.
194. Roth & Jacoby, supra note 9, at 1100.
195. Id.
196. Id.
197. See supra Part II.
for fashion designs, it would do more than simply give designers a cause of action. This legal protection would curb the behavior of copyists “who stalk the runway and the red carpet.”\footnote{Portfolio, \textit{supra} note 19.} Faced with the threat of legal action, these pirates would have to innovate—which is the aim of intellectual property protection to begin with.\footnote{\textit{Id}.} A simple cease-and-desist letter should be effective, or even the possibility of a real lawsuit would be enough to prevent pirates from appropriating designs in the first place.\footnote{\textit{Id}.} Thus, copyright protection for fashion designs is desirable because it is both oriented toward and ultimately supportive of creativity in fashion.

IV. THE DESIGN PIRACY PROHIBITION ACT

The Design Piracy Prohibition Act (DPPA), through an amendment to Title 17 of the United States Code, fills the gaping hole in current intellectual property protection by providing three years of copyright protection for registered clothing and accessory designs.\footnote{Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).}

A. The Development of the Bill

The DPPA has gone through several evolutions, both in the House of Representatives and in the Senate.

1. House Bill 5055

The first version of the Design Piracy Prohibition Act was introduced in the 109th Congress in the House of Representatives in 2006.\footnote{Design Piracy Prohibition Act, H.R. 5055, 109th Cong. (2006).} The bill sought to increase protection for Vessel Hull Designs and provide three years of copyright protection for fashion designs.\footnote{\textit{Id}.} The DPPA was neither reported on nor voted upon, and unfortunately was cleared from the books when Congress changed sessions in 2007.\footnote{GovTrack.us, H.R. 5055: To Amend Title 17, United States Code, to Provide Protection for Fashion Design, http://www.govtrack.us/congress/bill.xpd?bill=h109-5055 (last visited Mar. 9, 2010).}

2. House Bill 2033

In April of 2007 the DPPA was again introduced, this time to the
110th Congress in the House of Representatives.\footnote{Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007).} It was presented to the House by Bill Delahunt (D-MA), Bob Goodlatte (R-VA), Carolyn Maloney (D-NY), and Mary Bono Mack (R-CA).\footnote{Id.} This virtually identical copy of H.R. 5055 was read and promptly referred to the Subcommittee on the Courts, the Internet, and Intellectual Property.\footnote{Id.; GovTrack.us, H.R. 2033: Design Piracy Prohibition Act, http://www.govtrack.us/congress/bill.xpd?bill=h110-2033 (last visited Mar. 9, 2010).} It remained in committee until Congress changed sessions once again—this time in 2009.\footnote{Id.}

3. Senate Bill 1957

Before entering summer recess, another bipartisan group, this time headed by Charles Schumer (D-NY), introduced a Senate version of the DPPA.\footnote{Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); Susan Scafidi, Matched Set: Senators Introduce Design Piracy Bill, COUNTERFEITCHIC.COM, August 6, 2007, http://www.counterfeitchic.com/2007/08/matched_set_senator_introduces.php.} Kay Bailey Hutchison (R-TX), Diane Feinstein (D-CA), Orrin Hatch (R-UT), Sheldon Whitehouse (D-RI), Lindsey Graham (R-SC), Herb Kohl (D-WI), Hillary Clinton (D-NY), and Olympia Snowe (R-ME) joined him in presenting the bill to the Senate on August 2, 2007.\footnote{Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).} The Senate version of the bill was nearly identical to the House bill, but it specified that a design would not be deemed as copied from a protected design “if it is original and not closely and substantially similar in overall visual appearance to a protected design.”\footnote{Id.} Like the unfortunate demises of its House counterpart and the first incarnation, this version of the DPPA was read to the Senate, referred to the Committee on the Judiciary, and stayed there until Congress changed sessions.\footnote{GovTrack.us, S. 1957: Design Piracy Prohibition Act, http://www.govtrack.us/congress/bill.xpd?bill=s110-1957 (last visited Mar. 9, 2010).}

4. House Bill 2196

Not to be deterred, proponents of extending copyright protection to fashion designs again reintroduced the Design Piracy Prohibition Act to Congress on April 30, 2009.\footnote{Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).} The newest iteration of the bill presents an expanded definition of “fashion design,” a higher standard of infringe-
ment—“closely and substantially similar”214—and “specific defenses to infringement, such as merely reflecting a trend and independent creation . . . .”215 The newest DPPA also provides “increased penalties for false representation, a registration period of 6 [rather than 3] months, and [the] creation of a searchable database [for] registered designs.”216 Once again, it is the subject of dispute and is currently in committee.217

B. Industry Arguments for and Against the DPPA

The proposed legislation is controversial, with both large industry representatives and individual designers coming out on different sides of the issue.218 The Council of Fashion Designers of America (CFDA) strongly supports the DPPA, urging that “the increasingly prevalent practice . . . [of] producing copies of original designs under a different label” floods the market with duplicate versions that “devalue the original[s] by their ubiquity, poor quality, [and] speed [with] which they reach the consumer.”219 The CFDA explains that the DPPA would serve the dual function of protecting both the established and new designers who contribute to the $350 billion U.S. fashion industry, as well as preserving intellectual property.220

In contrast, the American Apparel and Footwear Association (AAFA)—one of the largest fashion industry players that represents some of the brands that the DPPA would impact—opposes the legislation.221 The AAFA is concerned that though well intended, the bill would result in unclear definitions that will not actually provide the protection sought.222 The AAFA cautions that “the legislation will produce an environment of ubiquitous lawsuits between legitimate companies,” thus stifling creation, rais-

215. Scafidi, supra note 11.
216. Id.
220. Id.
222. Courtney, supra note 221.
ing prices of apparel and footwear, and limiting consumer choice.\textsuperscript{223}

The California Fashion Association (CFA) has expressed similar concerns and also opposes the DPPA.\textsuperscript{224} This association seeks to promote the image of the apparel and textile industries in California and foster business-to-business networking.\textsuperscript{225} In a position paper, the CFA argued that: (1) fashion is not harmed by copying; rather, it benefits from it; (2) creativity and innovation would be curbed by copyright protection; (3) the industry is thriving so there is no need for additional legislation; (4) fashion designs are no longer truly original to begin with; and (5) it will be both difficult and complex to enforce the law as well as defend against charges of copyright infringement.\textsuperscript{226}

C. Legal Mechanisms of the DPPA

The DPPA would amend the Vessel Hull Design Protection Act (VHDPA) of the Digital Millennium Copyright Act to add copyright protection for fashion designs in addition to the \textit{sui generis} design protection available for the hulls of boats.\textsuperscript{227} The statute sets forth broad protection for a “design” of a “useful article” that is “attractive or distinctive in appearance.”\textsuperscript{228} With respect to the designs of boats, the statute protects “[t]he design of a vessel hull, including a plug or mold.”\textsuperscript{229} The drafters of the DPPA recognized that clothing, also considered to be “useful,” could be amenable to a similar type of design protection, and thus the statute pro-

\begin{footnotesize}
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\item \textsuperscript{223} Id.
\item \textsuperscript{224} California Fashion Ass’n, The Design Piracy Prohibition Act Position Paper [Hereinafter Position Paper], Dec. 10, 2007 (on file with author).
\item \textsuperscript{225} California Fashion Ass’n, http://www.calfashion.org (last visited Mar. 9, 2010).
\item \textsuperscript{226} See Position Paper, supra note 224.
\item \textsuperscript{227} 17 U.S.C. §1301 (2000). The VHDPA was enacted in response a Supreme Court case in which the designer of a recreational boat was denied redress for alleged illegal duplication of the boat’s hull design under a Florida statute. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 144–45 (1989). The Supreme Court invalidated the Florida statute based on federal preemption. \textit{Id.} at 168. Under the VHDPA, a “vessel” is defined as a craft “(A) that is designed and capable of independently steering a course on or through water through its own means of propulsion; and (B) that is designed and capable of carrying and transporting one or more passengers.” 17 U.S.C. § 1301(b)(3) (2000). “A hull is the frame or body of a vessel, including the deck of a vessel, exclusive of masts, sails, yards, and rigging.” \textit{Id.} § 1301(b)(4) (2000).
\item \textsuperscript{228} \textit{Id.} § 1301(a)(1) (2000) ("The designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure the protection provided by this chapter upon complying with and subject to this chapter.").
\item \textsuperscript{229} \textit{Id.} § 1301(a)(2) (2000). A “plug” is “a device or model used to make a mold for the purpose of exact duplication, regardless of whether the device or model has an intrinsic utilitarian function that is not only to portray the appearance of the product or convey information.” \textit{Id.} § 1301(b)(5) (2000).
\end{itemize}
\end{footnotesize}
poses an amendment to the VHDPA to include fashion designs. Three subsections would also be added to VHDPA’s Definitions section:

(7) A ‘fashion design’—
   (A) is the appearance as a whole of an article of apparel, including its ornamentation; and
   (B) includes original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel.

(8) The term ‘design’ includes fashion design, except to the extent expressly limited to the design of a vessel.

(9) The term ‘apparel’ means—
   (A) an article of men’s, women’s, or children’s clothing, including undergarments, outerwear, gloves, footwear, and headgear;
   (B) handbags, purses, wallets, duffel bags, suitcases, tote bags, and belts; and
   (C) eyeglass frames.

Unlike prior introductions of the bill, the newest version of the DPPA also clarifies what a “trend” is by adding another subsection to Definitions:

(10) In the case of a fashion design, the term ‘trend’ means a newly popular concept, idea, or principle expressed in, or as part of, a wide variety of designs of articles of apparel that create an immediate amplified demand for articles of apparel embodying that concept, idea, or principle.

Thus, the DPPA would analogize to the protections offered to vessel hull designs under the VHDPA by adding “fashion design” to the type of designs subject to protection under the statute. Additionally, under the proposed legislation, a design must be registered within six months after the date that it is first made public, or the designer will not receive protection for their work. Prior versions of the bill only allotted three months

230. Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009); 17 U.S.C. § 1301(a)(2) would be amended by the DPPA by inserting "or an article of apparel" after "plug or mold" in addition to the added definitions discussed infra Part II.A.
232. Id.
233. Id.; 17 U.S.C. § 1301(a)(2) (2000) would be amended by inserting "or an article of apparel" after “plug or mold” in addition to the added definitions discussed supra Part II.A.
for registration, and though the reasons for the change were not expressly articulated, it can be inferred that the extra three months were added to give artists more opportunity to register their works.\(^{235}\)

The third incarnation of the DPPA also departs from prior versions by specifying a standard for what constitutes a copied design.\(^{236}\) This definition was adopted from the Senate version of the bill, which suggested a “closely and substantially similar” test.\(^{237}\) The current proposed standard specifies that a fashion design will not be considered copied from a protected design if it is “original and not closely and substantially similar in overall visual appearance” to that design.\(^{238}\) Furthermore, if a design merely reflects a trend or “is the result of independent creation,” it will likewise not be deemed copied.\(^{239}\)

The most notable difference in the third version of the DPPA is the introduction of a searchable database for fashion designs.\(^{240}\) This database would be an electronic system that “the Administrator” will establish and maintain.\(^{241}\) It would be available to the public without a fee and could be searched by “general apparel and accessory categories.”\(^{242}\) The database would also make available the status of designs; whether registered, denied registration, expired, or cancelled.\(^{243}\)

V. RECOMMENDATIONS AND CONCLUSION

The issue of copyright protection for fashion designs is complex, as there are both economic and intellectual property concerns at issue.\(^{244}\) At times, it may seem that copyright protection would simply protect what is arguably an old business model in dire need of an update.\(^{245}\) But the fash-
ion cycle is only part of what is at stake. Within this model—where designers prepare for shows months ahead of season—is embedded true intellectual property: works of authorship by artists. These works, just like books, films, and computer software, are deserving of copyright protection. Not providing such IP protection not only insults the creativity of fashion but also seriously damages American industry. Although New York and California were once strong forces in the garment manufacturing industry, their prominence is now shifting to “innovative design centers.” In joining France and Italy as major players in the fashion design world, it only makes theoretical and practical sense for U.S. copyright law to follow suit and expand as well.

The harsh reality is that “[n]o matter how inexpensively the U.S. can produce knockoffs, other countries can manufacture much cheaper ver-

ing a new business model, the music industry continued to try to fully control music files after the sale. This resulted in anti-competitive behavior that harmed both consumers and record labels. See generally Ali Matin, Digital Rights Management (DRM) in Online Music Stores: DRM-Encumbered Music Downloads' Inevitable Demise as a Result of the Negative Effects of Heavy-Handed Copyright Law, 28 LOY. L.A. ENT. L. REV. 265–66 (2008).


247. See Hearing I, supra note 2, at 79 (statement of Susan Scafidi, Visiting Professor, Fordham Law Sch.) ("Fashion . . . is about creative expression, which is exactly what copyright is supposed to protect.").


249. See Hearing I, supra note 2, at 80 (statement of Susan Scafidi, Visiting Professor, Fordham Law Sch.) ("Current U.S. IP law thus supports copyists at the expense of original designers, a choice inconsistent with America's position in fields of industry like software, publishing, music, and film. The most severe damage from this legal vacuum falls upon emerging designers, who every day lose orders—and potentially their businesses—because copyists exploit the loophole in American law.").


251. Id.

252. French law treats fashion designs the exact same as other IP works, and the EU provides a protection period of three years for unregistered and twenty-five years for registered fashion designs. Hearing I, supra note 2, at 84 (statement of Susan Scafidi, Visiting Professor, Fordham Law Sch.).
The import of this fact is that in order for the American fashion industry to compete in a meaningful way, U.S. law should focus on protecting the intellectual property in this field. Indeed, the U.S. economy overall now rests on our “ability to develop and protect creative industries, including fashion design.” Furthermore, because creative fashion is a fledgling industry in the U.S., it is especially in need of legal protection as there is a “growing interest among students choosing their careers.” As discussed above, there appears to be a cultural shift in which we see the American public increasingly embracing fashion as creative expression.

Our government policies should reflect these changes and protect the emerging fashion design industry by expanding our copyright laws.

The latest version of the Design Piracy Prohibition Act substantially improves upon prior introductions of the bill. However, it still falls short of the type of specificity that would make for clear guidelines in identification and enforcement. The standard of infringement has been tightened—the overall impression of an article is mentioned, rather than a mere measure of substantial similarity—but the bill should be more specifically concerned with direct copies. Modifying the language to fit this goal would prevent an onslaught of litigation over articles that are similar or that were designed independently.

This should also more thoroughly address the American Apparel and Footwear Association’s and California Fashion Association’s concerns over liability. The focus of the bill should be on original designs, not preventing derivative works. Thus, the standards for protection and infringement must strike that careful balance in both preventing close copies that dilute brands, while simultaneously not interfering

253. Id. at 82 (statement of Susan Scafidi, Visiting Professor, Fordham Law Sch.).
254. Id. at 82 (statement of Susan Scafidi, Visiting Professor, Fordham Law Sch.) (“[T]he future of the U.S. economy will rest on the ability to develop and protect creative industries, including fashion design . . . If this industry is to reach its full potential, now is the time to consider the impact of government policies, including intellectual property law.”).
255. Hearing I, supra note 2, at 82 (statement of Susan Scafidi, Visiting Professor, Fordham Law Sch.).
256. Id.
257. See supra Part II.B.
258. Supra Part IV.A.
259. Hearing I, supra note 2, at 85 (statement of Susan Scafidi, Visiting Professor, Fordham Law School) (“The level of generality at which fashion trends exist, moreover, is far too broad to be affected by the proposed bill.”).
261. Hearing I, supra note 2, at 85 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).
262. Supra Part IV.B.
with trend formation.

Even though the proposed term of three years of copyright protection for fashion designs is already much lower than other fields in which IP protection is available, this length of time still seems excessive. Because trends generally have a short life cycle, there is no pressing need to extend the term of protection. Furthermore, the main issue with respect to direct copies is the interference created when these pirated designs emerge within the same season as the originals. Thus, a period of one to one and a half years of protection should be sufficient to protect the value of original designs but allow for extensive derivation and inspiration in the future. By that point, even line-for-line copies would not devalue original works, but might even be perceived as paying homage to those creations.

Although the registration system appears to be a significant benefit of the newest incarnation of the DPPA, there may be cause for reconsideration on this point. In both the United Kingdom and the European Union, the registered design systems have been passed up in favor of the unregistered design rights. For these unregistered rights, protection is automatic upon the article being made available to the public. The DPPA, instead of establishing a system for registration that would require maintenance, registration fees, and other potential obstacles to efficient enforcement, might follow this model of automatic, unregistered design rights. Good documentation would be necessary in order for a designer to prove that

263. 17 U.S.C. § 302(a) (2006) (stating that in general the copyrighted item is protected for the life of the author plus 70 years).
264. Hearing I, supra note 2, at 84 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).
265. E.g., 2006's popular summer Crocs "Beach" shoes sold for $29.99 in stores, but copies were sold for as little as ten dollars. Hearing I, supra note 2, at 81 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).
266. Because fashion trends only last for a few months, a protection term of one to one and a half years is sufficient to protect creative fashion designs. See, e.g., Fashion Color Trends for Each Season, FASHION TRENDSSETTER, http://www.fashiontrendsetter.com/content/color_trends.html.
267. In a year’s time, the copy could no longer pass off as the original, and instead may emerge in order to highlight the particular genius of the original design. Such a system would also satisfy consumers who were unable to obtain the original but still lusted after a very particular cut or arrangement. This might strike that very delicate balance between industry, consumer, and innovation needs and desires.
268. Hearing I, supra note 2, at 84 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).
271. Myers, supra note 184, at 79.
their work was original or came first, but these requirements would still be needed for a registry.272 An unregistered rights system would eliminate the difficulty and expense of both running and trying to access an electronic database.273 Still, it may be useful for designers to be able to search an established database to have peace of mind, so this issue is perhaps best left open to further research and Congressional findings.274

The DPPA, if modified to provide a narrower definition of infringement—the prohibition of direct copies, a shorter period of protection, and possibly eliminate the electronic database in favor of an unregistered design right—would greatly benefit both the fashion industry and consumers.275 The bill would foster innovation without deterring further creative derivations and would meet consumers’ demand for differentiation within flocking.276 More importantly, a modified DPPA would provide much clearer guidelines for enforcement—crucial when legal protection is at issue.277

Creativity, industry, and consumers are all negatively impacted by the lack of copyright protection for fashion designs in the United States.278 Established fashion houses and emerging designers alike suffer from both the threat of and negative impact of design piracy.279 Intellectual property is routinely stolen,280 and, sadly, our present laws allow that to take place.281

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274. Id.
275. See generally Hearing I, supra note 2, at 78–85 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).
277. Hearing I, supra note 2, at 85 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).
278. See generally INFORMATION WEALTH, supra note 12, at 125–26.
279. Givhan, supra note 6, at C2; Hearing I, supra note 2, at 82 (statement of Susan Scafidi, Visiting Professor, Fordham Law School).
280. Hearing I, supra note 2, at 12 (statement of Jeffrey Banks, fashion designer and representing the Council of Fashion Designers of America).
281. See supra Part II.C.

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A modified Design Piracy Prohibition Act, by extending copyright protection to fashion designs, can provide the desperately needed panacea for our burgeoning fashion design industry.

Jacqueline Lechtholz-Zey

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