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Note

The Sartorial Dilemma of Knockoffs: Protecting Moral Rights without Disturbing the Fashion Dynamic

Margaret E. Wade*

In the months leading up to the wedding of Prince William and Catherine Middleton’s wedding, the future Duke and Duchess of Cambridge kept Catherine’s gown a secret. But as soon as she stepped out to reveal Sarah Burton’s Alexander McQueen creation to the world, copycat designers began working on knockoffs available for a fraction of the price.¹ A similar phenomenon occurs every year during awards season, when film and television stars parade in couture gowns on the red carpet and copycat designers immediately manufacture replicas.² Beyond the glitz of high couture, an emerging designer’s worst nightmare is to discover copies of her original designs in “fast fashion” stores like H&M, Zara, and Forever 21.³ In a typ-

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3. Guillermo C. Jimenez, Fashion Law: Overview of a New Legal Discipline, in FASHION LAW 3, 8 (Guillermo C. Jimenez & Barbara Kolsun eds., 2010) (noting that the “fast fashion” model, pioneered by Spanish clothing re-
2011] FASHION PIRACY

ical case, designer Elle Sakellis’ Otrera “evil eye” scarves, priced at $190, were a huge success until her retailers began ordering a knockoff version that sold for only $30. Fashion piracy is not a new phenomenon, but with the rise of new technology and evolving consumer behaviors, copycat fashion is more common than ever before.

Unlike that of most other countries, U.S. copyright law does not extend to fashion designs. Although other forms of intellectual property protect fashion products, the cut of a garment is not protected. After nearly a century of lobbying from fashion designers, there are two bills—the Design Piracy Prohibition Act (DPPA) and the Innovative Design Protection and Piracy Prevention Act (IDPPPA)—that aim to reform the copyright system to include fashion designs. However, critics claim that protection for fashion designs is unnecessary because the fashion industry is thriving and copying drives innovation.

This Note evaluates whether the Copyright Act should be expanded to include fashion design. Part I provides an overview of fashion piracy, the current state of intellectual property protection for fashion, and the proposed legislation for a fashion tailor Zara, creates a “competitive advantage in speed to market” through the use of information technology).


7. E.g., Fashion Originators Guild of Am., Inc. v. Fed. Trade Comm’n, 114 F.2d 80, 84 (2d Cir. 1940) (stating that dress designs are not copyrightable and “fall into the public demesne without reserve”), aff’d, 312 U.S. 457, 460 n.1 (1941).


design copyright. Part II considers both sides of the debate, analyzing the pros and cons in the arguments of the proponents and the critics. Part III argues against current fashion legislation that would expand the Copyright Act and proposes a solution that balances moral rights and the benefits of copying. This Note asserts that the costs of sui generis\textsuperscript{11} copyright protection outweigh the benefits, and a certification or collective mark would be a better fit for the fashion industry.

I. FASHION PIRACY, INTELLECTUAL PROPERTY, AND LEGISLATION

The fashion industry is unparalleled in its social and economic significance.\textsuperscript{12} This Part illustrates the phenomenon of fashion piracy, including both the positive and negative aspects of copying. It then discusses the current state of intellectual property protections for fashion designers, including an overview of trademarks, trade dress, patents, trade secret, and copyrights. Finally, this Part provides background on recent and current legislation—the DPPA and the IDPPPA.


In order to understand the complexity of fashion piracy, there are several important distinctions to make regarding the act of copying, the designers, and the timing.

First, fashion piracy is a very difficult concept to define because it rests on subjective notions of copying.\textsuperscript{13} There is no bright line between copying and mere imitation, but fashion piracy is best illustrated by a spectrum of permissible to impermissible copying activity juxtaposed with ethics.\textsuperscript{14} However,
some designers find all copying permissible and other designers draw a line between inspiration and copying. According to the Council of Fashion Designers of America (CFDA), fashion design piracy "describes the increasingly prevalent practice of enterprises that seek to profit from the invention of others by producing copies of original designs under a different label." However, a degree of copying is inevitable since there are only a limited number of ways that material may cover the human form; whenever a designer creates, she must take old ideas and make them her own. Copying is beneficial in many respects because it allows for collaboration and creativity. Every season is marked by trends; designers are inspired by the work of other designers. In a highly vulnerable industry, when one fashion company's collection finds success, other companies will follow to capitalize on the trend. The key legal question is at what point does copying a trend go too far?

Although the terms "knockoff" and "counterfeit" are often used synonymously in ordinary discourse, there is an important intellectual property); Henry Hansmann & Marina Santilli, Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis, 26 J. LEGAL STUD. 95, 143 (1997) ("[T]he overlap between moral rights and copyright emphasizes the extent to which copyright itself serves to give authors and artists continuing control over the way in which their work is exploited and, hence, over their reputation.").

15. Ulla Vad Lane-Rowley, Using Design Protection in the Fashion and Textile Industry 17 (1997) (quoting Italian designer Mario Bellini as stating that "[w]hat makes me happy is when I am imitated in a rather clever way, that is the right way...[b]ut if someone copies the details, I feel robbed of money and of my inventive rights").

16. Design Piracy, COUNCIL OF FASHION DESIGNERS OF AM., http://www.cfdacom/design-piracy/ (last visited Oct. 15, 2011); see also Fashion Originators Guild of Am., Inc. v. Fed. Trade Comm'n, 114 F.2d 80, 82 (2d Cir. 1940), aff'd, 312 U.S. 457, 468 (1941); Sylvan Gotshall, The Pirates Will Get You: A Story of the Fight for Design Protection 2 (1945) ("Piracy was formerly associated with the high seas. We know that it takes place also on the highways of trade and doesn't call for a patch on the eye; only a faulty conscience and a sly hand...Piracy is unauthorized taking, none the less so when what is taken is a thing of beauty.").


20. See Wilson, supra note 13.

21. Jimenez, supra note 3, at 16 ("It is necessary to distinguish legal and acceptable forms of imitation from those that involve inappropriate use of another company's IP.").
legal distinction between these terms. Fashion design knock-offs are legal, as illustrated by a dress sold in Forever 21 that appears indistinguishable from the original Diane Von Furstenberg design. On the other hand, counterfeits of fashion names and logos are illegal, as seen by sunglasses with an unauthorized Dolce and Gabbana logo sold on Canal Street in Manhattan. Identifying this gap in protection, many designers are particularly upset when a copycat designer crosses the blurry line from inspiration to knockoff.

Second, fashion piracy has a disparate effect on designers. Fashion is a very hierarchical business, often illustrated by a value pyramid, placing the high-end garments at the top and the lower-priced garments at the base, indicating the “proportion of total sales earned respectively by fashion” and lower-priced basics. Established fashion designers and couture houses at the top of the pyramid have the resources and in-house legal teams to combat copycats with extralegal and intellectual property remedies. Moreover, these established designers often appreciate copycat designers because there is no threat, only flattery. Fashion houses have such strong brand recognition that copycat designs hardly faze them because their

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22. Id. at 16–17 (clarifying the distinctions between legal knockoffs, illegal knockoffs, and counterfeiting).
23. Id. at 8–9.
24. Id. at 16–17.
25. E.g., The Industry Speaks Out, STOP FASHION PIRACY, http://www.stopfashionpiracy.com/index.php/the_industry_speaks_out/ (last visited Oct. 15, 2011) ("My designs are known for their sophisticated shapes and feminine silhouettes. The fit, cut, and detailing of our clothes are as much a part of the Oscar de la Renta brand as our logo itself. They are just as recognizable to our customers and should be protected equally.").
26. Binkley, supra note 4 (lamenting on the burdens imposed on designers who are faced with piracy in the fashion market).
27. Jimenez, supra note 3, at 12–13, 13 fig.1.2; Raustiala & Sprigman, supra note 10, at 1693–94, 94 fig.A.
29. Cameron Silver, President, Decades, Inc., Presentation at Ready to Share: Fashion & the Ownership of Creativity 127 (Jan. 29, 2005), available at http://www.learcenter.org/pdf/RTSharetranscript.pdf ("Coco [Chanel] loved [the Fauxnel movement] because she said she always wanted to inspire the street . . . . She encouraged the copying . . . . She wasn’t threatened by the copies because the truth is the cut could not be replicated.").
loyal consumers identify the original garment and choose to buy the original over the knockoff. Fashion houses also have the resources to compete with copycat designers by knocking off their own brands, as seen by Isaac Mizrahi’s relationship with Target and Chanel designer Karl Lagerfeld’s line for H&M. Although fashion piracy is a concern for designers at all levels, there are many options by which an established fashion design house may protect its designs.

Many emerging designers, on the other hand, struggle to enter the market when they have to compete with copycats and established brands. “Everyone always says that imitation is the best form of flattery. But it happened too soon. . . . I’m not Louis Vuitton. It’s not like when someone buys a Raj scarf that they know it’s an Otrera knockoff,” Designer Elle Sakellis said. Since designers must fund the design process on their own, designers such as Sakellis risk losing their entire investment when a copycat steals their designs. Copying can short-circuit the fashion cycle by devaluing the designer’s garment before she can reap any return on the investment. Copying dilutes the brand and creates confusion as a young designer attempts to establish her label. Unlike the established brand, whose product is easily distinguishable from copycat versions, an emerging designer’s garment does not likely indicate a unique source, increasing its vulnerability. Unlike high-

30. See Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115, 121 (Peter K. Yu ed., 2007) (“Even if a famous designer’s new line is knocked off, consumers may still be willing to pay higher prices for the [original].”).
32. See, e.g., Raustiala & Sprigman, supra note 10, at 1724.
33. Scafidi, supra note 30 (noting that emerging designers “cannot depend exclusively on brand recognition for protection against design piracy”).
34. Binkley, supra note 4.
35. See id.
36. See Scafidi, supra note 30, at 125 (describing the “pattern of consumer behavior that luxury goods industries can under limited circumstances leverage to create desire for new products”).
37. See id.
38. Binkley, supra note 4 (elaborating on the unique difficulties that up-and-coming fashion designers face when confronted with knockoffs of their original designs).
fashion knockoffs, the scenario where emerging designers are knocked off results in great harm to the new designer.  

Third, the current call for fashion design legislation is nothing new: designers have fervently cried out against design piracy for decades.  

There is a long history of the American fashion industry copying other designers.  

For example, in 1964, more than 2,000 women flocked to Ohrbach’s “semi-annual fashion phenomenon” in search of “line-for-line copies” of Paris couture originals.  

The fashion world is notorious for its frenetic pace, demanding fashionistas, and strictly choreographed routine of spectacular performances.  

Amidst this atmosphere, copying is standard practice in the fashion business.  

Copycats snap photos of dresses on the red carpet or the catwalk and immediately send the photos to factories in China to reproduce identical garments.  

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39. Id. (“Small designers face a particularly large burden; often, they lack deep pockets to chase down versions they find similar, and their brands are so little-known that customers often aren’t aware they’re not buying an original design.”).  

40. See also Fashion Originators Guild of Am., Inc. v. Fed. Trade Comm’n, 114 F.2d 80, 82 (2d Cir. 1940) (establishing that members of a major fashion guild have gone as far as boycotting retailers who sold knockoffs), aff’d, 312 U.S. 457, 468 (1941). See generally Kenneth Collins, Style Piracy, WOMEN’S WEAR DAILY, Sept. 25, 1958, reprinted in INSIDE THE FASHION BUSINESS: TEXT AND READINGS 203, 203 (Jeannette A. Jarnow ed., 2d ed. 1974) (“As everybody knows, the latest Paris openings were marred by bitter charges of style piracy. No one claimed there was anything new about the situation except the speed with which the fashion thieves worked.”).  

41. E.g., BOLLIER & RACINE, supra note 18, at 8.  


43. See Jimenez, supra note 3, at 15–16 (describing how clothing manufacturers produce seasonal couture collections six times per year, including Spring, Summer, Transitional, Fall, Resort, and Holiday, which are shown at shows in New York, London, Milan, and Paris).  

44. See, e.g., INSIDE THE FASHION BUSINESS: TEXT AND READINGS, supra note 40, at 128 (“The late Norman Norell, considered the dean of American designers, expressed his philosophy about style piracy: ‘I don’t mind if the knock-off houses give me a season with my dress. What I mind is if they bring out their copies faster than I get my own dresses to the stores.”).  

However, despite the copying norm in the industry, piracy is heightened in the information age in which the Internet and digital technology allows copying to occur faster and faster.\textsuperscript{46} In 2006, lost revenue due to counterfeiting and piracy of fashion was estimated to be $12 billion.\textsuperscript{47} Consumer buying behavior has changed in response to e-commerce, shifting apparel sales to online retailers that employ new strategies like flash sales and membership-only benefits.\textsuperscript{48} Fashion has also exploded in pop culture through reality television shows that illustrate the trajectory of an emerging designer.\textsuperscript{49} The fashion blogosphere has expanded fashion consciousness far beyond New York City and Los Angeles, allowing people around the world to follow brands via more than 1000 fashion blogs.\textsuperscript{50} Fashion bloggers have assumed an increasingly more important role in fashion.\textsuperscript{51} For example, in 2009 bloggers were first seated in the front row at fashion shows, and Marc Jacobs created an ostrich bag named the BB after blogger BryanBoy.\textsuperscript{52} The exponential growth of mobile blogging is making a huge impact on the fashion world, speeding up the natural proliferation of trends.\textsuperscript{53} In the information age, fashion is venturing beyond the runway to

\textsuperscript{46} See, e.g., Scafidi, supra note 30, at 125–26.
\textsuperscript{47} Roth & Jacoby, supra note 5, at 1083.
\textsuperscript{48} See generally Andrew Rice, What’s a Dress Worth?, The Online Retailer Gilt Groupe Offers a Great Deal: Buy Designer Clothes at Deep Discounts. But is it Good or Bad for Fashion?, NEW YORK MAG., Feb. 14, 2010, at 76. Other examples of analogous retailers include HauteLook, Rue LaLa, and One Kings Lane.
\textsuperscript{49} See, e.g., Project Runway (Weinstein Co. broadcast Dec. 1, 2004–present).
\textsuperscript{51} See, e.g., Corcoran, supra note 50 (quoting another blogger as stating that “[f]ashion bloggers are a unique combination of publisher and talent,” and suggesting that “[t]his is part of the next evolution of advertising[—]a more integrated approach”).
explore new domains and reach new audiences, provoking a discussion of whether these changes are good or bad for the industry. Consequently, the call for protection of fashion designs resounds with greater urgency.

The unique features of copying, designers, and timing fuel the debate and reinforce the complex nature of the legal issue.

B. The Current State of Intellectual Property Protection for Fashion Designers

Although the fashion industry is a major economic presence in the United States, federal law protects fashion designers against only some forms of design piracy. The current intellectual property regime provides partial protection for fashion products through a combination of trademarks, trade dress, patents, trade secrets, and copyrights.

1. Trademarks

A trademark is most often a brand name or a logo that indicates the source of a particular product. For example, trademark law protects clothing and accessories adorned with a label, such as a Louis Vuitton purse with the renowned “LV” logo or the stitching pattern on a pair of Levis. To achieve trademark protection under the Lanham Act, the name or symbol on a fashion product must distinguish it from other goods in commerce. Trademark law serves dual purposes in preventing


55. Jimenez, supra note 3, at 5 (describing the increasing need for fashion executives to become more knowledgeable about the law as a function of the unique characteristics of the industry).

56. See, e.g., Malden Mills, Inc. v. Regency Mills, Inc., 626 F.2d 1112, 1113–14 (2d Cir. 1980) (holding that a copyright owner of a textile design was entitled to permanent injunction and damages against another design of substantially similar subject matter, representation, shading, composition, and relative size and placement of elements).

57. See, e.g., Scafidi, supra note 30, at 121–23.


59. Your Questions, supra note 28 (illustrating ongoing efforts to protect Louis Vuitton’s famous “LV” logo).


consumer deception in the marketplace and protecting a fashion company’s trademark from infringement. Although trademarks do not protect fashion designs, they play a vital role in preventing consumer confusion with counterfeit fashion products, namely bags and accessories.

2. Trade Dress

Trade dress, a subset of trademark law, protects “a product’s design, product packaging, color, or other distinguishing, nonfunctional element of appearance.” For example, trade dress protects the look of well-known products like a Coca-Cola bottle and a red-and-white pack of Marlboro cigarettes. In 2000, the Supreme Court narrowed the applicability of trade dress when it declined to extend trade dress protection to fashion design in *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.* However, like the greater body of trademark law, trade dress remains an option for famous accessories, such as the Longchamp Le Pliage tote.

3. Patents

Utility patents protect new and useful processes and inventions, and design patents protect the ornamental features...
of an invention.\textsuperscript{70} Although patent law primarily caters to scientists and inventors, fashion designers enjoy some patent protection.\textsuperscript{71}

Design patents protect the ornamental design of a product for a term of fourteen years.\textsuperscript{72} The most common fashion products to acquire this type of patent are accessories like eyeglass frames, jewelry, and footwear.\textsuperscript{73} In order to claim a design patent, the product must be novel, nonobvious, and ornamental.\textsuperscript{74} On the other hand, utility patents protect functional innovations for a term of 20 years.\textsuperscript{75} In order to claim a utility patent, a product must be novel,\textsuperscript{76} nonobvious,\textsuperscript{77} and useful.\textsuperscript{78} In fashion, utility patents protect inventions such as Velcro fasteners, Lycra high-performance textiles, and hazmat gear.\textsuperscript{79} Utility patents also protect processes, such as a technique for washing denim jeans to create a specific look.\textsuperscript{80} Although there are rare cases where fashion designers have successfully obtained utility patents, the threshold for patent protection is very difficult to meet.\textsuperscript{81} The novelty standard essentially prevents an inventor from patenting something that already has an identical form in the public domain.\textsuperscript{82} The nonobviousness requirement goes further, preventing an individual from obtaining a patent if it is similar enough to other products that people in the industry could have conceived it.\textsuperscript{83} These requirements prove difficult for a designer to meet because fashions evolve from prior fashions, and it would be nearly impossible to invent an entirely new and nonobvious garment.\textsuperscript{84}

\textsuperscript{70} Id. \S 171.
\textsuperscript{71} Jimenez, supra note 3, at 59–66 (describing various protections provided by and limitations inherent in design and utility patents).
\textsuperscript{72} 35 U.S.C. \S 173.
\textsuperscript{73} See, e.g., Jimenez, supra note 3, at 60.
\textsuperscript{74} 35 U.S.C. \S 171.
\textsuperscript{75} Id. \S 154(a)(2).
\textsuperscript{76} Id. \S 102.
\textsuperscript{77} Id. \S 112.
\textsuperscript{78} Id. \S 101.
\textsuperscript{79} Scafidi, supra note 30, at 122.
\textsuperscript{81} Cf. Jimenez, supra note 3, at 65 (noting that utility patent protection “is difficult and costly to obtain and costly to maintain”).
\textsuperscript{82} 35 U.S.C. \S 102 (2006).
\textsuperscript{83} Id. \S 103.
\textsuperscript{84} See, e.g., Vanity Fair Mills, Inc. v. Olga Co., 510 F.2d 336, 340 (2d Cir. 1974).
In addition to the steep threshold requirements for patent protection, there are practical concerns as a result of the short timeline to produce fashion apparel and the long timeline to process a patent application. For 2009, the average total pendency for a patent application was 34.6 months. Fashion designers produce at least three or four shows a year, and the commercial life of a piece of apparel is only a few seasons. Also, securing a patent is expensive because of fees charged by the USPTO for examination, as well as attorneys’ fees. Therefore, patent law does not provide a proper safeguard for fashion designs because the process of obtaining a patent is too time-consuming and expensive for most fashion designers.

4. Trade Secret

A trade secret is valuable information that maintains an economic advantage over competitors. For example, a trade secret may be a secret recipe, a manufacturing technique, or a customer list. Trade secret protection can theoretically last forever, but once it leaks out, it is gone. In the fashion world, designers may keep trade secrets for techniques, such as designer Miriam Carlson’s process for sewing flakes of the mineral mica on delicate fabric. However, even if the patterns for


86. See Wm. Filene’s Sons Co. v. Fashion Originators’ Guild of Am., Inc., 90 F.2d 556, 558 (1st Cir. 1937); Samantha L. Hetherington, Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design, 24 HASTINGS COMM. & ENT. L.J. 43, 47 (2001) (lamenting on the extensive investments of time and energy necessary for leading designers to continually update their fashion lines).

87. See 35 U.S.C. § 41(a)(3) (2006) (indicating the requirements to file a design patent application include a $310 fee, and then there is a $430 fee for the design patent to issue).

88. See Scafidi, supra note 30, at 115, 122.

89. George Gottlieb et al., An Introduction to Intellectual Property Protection in Fashion, in FASHION LAW, supra note 3, at 37.

90. E.g., Paula M. Weber, From Hire to Fire: Contracts During the Employment Relationship, in ADVANCED SEMINAR ON COPYRIGHT LAW 2009, supra note 5, at 280.

91. Gottlieb, supra note 89.

92. See Elizabeth Davies, Miriam Cecilia Carlson, ROCKFORD WOMAN (Apr. 23, 2010, 6:00 AM), http://www.rockfordwoman.com/content/miriam-cecilia
garment are kept secret, most clothing can easily be reverse-engineered, so trade secrets provide little protection for fashion designs.

5. Copyrights

Copyright law protects artistic creations—including literature, song, dance, sculpture, painting, photography, movies, and computer programs—but not “useful articles” like automobiles or clothing. Clothing may seem like art, but courts have classified it as a useful article because it provides warmth and covers nakedness. The legislative history from the enactment of the Copyright Act explains this separability rule, indicating that copyright protection would not be extended to useful articles that are not separable from utilitarian elements. In addition, copyright does not protect ideas like a sleeve, but it does protect the expression of ideas like a fabric pattern. Although fashion design is excluded from the copyright regime, fashion designers still use copyrights to protect fabric prints, and images on the surface of clothing and accessories.

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94. 17 U.S.C. §§ 101, 102(a) (2006); see Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411 (2d Cir. 1985).
95. See, e.g., Whimsicality, Inc. v. Rubie’s Costume Co., 891 F.2d 452, 455 (2d Cir. 1989); cf. The Industry Speaks Out, supra note 25 (musing that “the bestower of patents—who clearly missed McQueen’s fall 2006 giant gauze-wrapped deer antler headdress deems clothing ‘useful articles,’ not works of art”).
96. H.R. REP. NO. 94-1476, at 55 (1976), reprinted in 1976 U.S.C.C.A.N. 5667, 5668 (“[A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee’s intention is not to offer it copyright protection under the bill. Unless the shape of a[...ladies’ dress... contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.”).
98. E.g., Knitwaves, Inc. v. Lollytogs Ltd. 71 F.3d 996, 1002 (2d Cir. 1995); see, e.g., Hamil America, Inc. v. GFI, 193 F.3d 92, 98 (2d Cir. 1999).
Protocols for fashion designs slip through the cracks despite the plethora of potential copyright shields available to the fashion industry, leaving designers vulnerable to copyists. In response to this concern, fashion industry members have campaigned for fashion design legislation for years, culminating in the legislation currently pending in Congress.

C. FASHION DESIGN LEGISLATION

Congress has considered over 70 bills since 1914 to provide some sort of protection against fashion design piracy, but no bill has yet been passed. In recent years, there has been a new surge of legislative activity for fashion design protection. The evolution of these bills illustrates the concerns that proponents and critics have had with the idea of fashion design protection.

On March 30, 2006, Representative Bob Goodlatte introduced the first version of the Design Piracy and Protection Act (DPPA) in the House of Representatives. Despite support by prominent designers and the Council of Fashion Designers of America (CFDA), the bill faced opposition, most notably from the American Apparel & Footwear Association (AAFA), and stalled in committee. A second version of the DPPA was reintroduced by Representative William Delahunt on April 25, 2007. In the Senate, Senator Charles Schumer introduced the Senate version for the bill on August 2, 2007. Neither version reached a vote. The most recent DPPA was reintro-

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105. See Ferris, supra note 104 (indicating that no vote was taken); Scafidi, supra note 101; The Industry Speaks Out, supra note 25.
108. Id.; H.R. 2033.
duced in the house by Representative Delahunt on April 30, 2009,\textsuperscript{109} and on August 5, 2010 Senator Schumer introduced the Innovative Design Protection and Piracy Prevention Act (IDPPPA) in the Senate, which received support from both the CFDA and the AAFA.\textsuperscript{110} The IDPPPA passed the Senate Committee on the Judiciary on December 6, 2010 and later died in committee.\textsuperscript{111} On July 13, 2011, Representative Robert Goodlatte introduced the Innovative Design Protection and Piracy Prevention Act in the House, and it was subsequently referred to the House Committee on the Judiciary, and later referred to the Subcommittee on Intellectual Property, Competition and the Internet.\textsuperscript{112} The IDPPPA may be reintroduced in the Senate this year.

1. The Design Piracy Prohibition Act

The DPPA would amend Title 17 of the United States Code to extend protection to fashion designs.\textsuperscript{113} Instead of a direct amendment to the copyright act, the bill proposes an amendment to § 1301, which provides \textit{sui generis} protection only for certain facets of watercrafts.\textsuperscript{114} “Fashion design” is defined as “the appearance as a whole of an article of apparel, including its ornamentation” and “original elements . . . or the original arrangement . . . of . . . non-original elements” in “the article of apparel.”\textsuperscript{115} The term “apparel” is defined rather broadly, including, in addition to clothing, “gloves, footwear, and headgear; handbags, purses, wallets, duffel bags, suitcases, tote bags, and belts; and eyeglass frames.”\textsuperscript{116} To qualify for a three-year term of protection under the DPPA,\textsuperscript{117} the designer must apply for registration “within 6 months after the date on which

\begin{itemize}
\item \textsuperscript{109} Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).
\item \textsuperscript{110} Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010); Scafidi, \textit{supra} note 101.
\item \textsuperscript{111} S. 3728.
\item \textsuperscript{112} Innovative Design Protection and Prevention Act, H.R. 2511, 112th Cong. (2011).
\item \textsuperscript{113} H.R. 2196.
\item \textsuperscript{114} 17 U.S.C. § 1301 (2006); H.R. 2196; see also ROBERT P. MERGES ET AL., \textit{INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE} 472 (5th ed. 2010) (explaining that Congress has passed two design protection statutes, the Semiconductor Chip Protection Act of 1984 (17 U.S.C. §§ 901–14) and the Vessel Hull Design Protection Act (17 U.S.C. §§ 1301–32), that “create \textit{sui generis} forms of legal protection to fill in gaps in the intellectual property landscape”).
\item \textsuperscript{115} H.R. 2196 § 2(a)(7).
\item \textsuperscript{116} \textit{Id.} § 2(a)(9).
\item \textsuperscript{117} \textit{Id.} § 2(d)(a)(2).
\end{itemize}
the design is first made public.” The DPPA also includes a public, computerized database containing visual representations and information for all of the registered fashion designs.

An act of infringement occurs when a protected fashion design, or an image of the design, is copied “without the consent of the owner of the protected design.” However, there is no infringement under the DPPA if the allegedly copied design is: (1) “original and not closely and substantially similar in overall visual appearance to a protected design,” (2) “merely reflect[ing] a trend,” or (3) “the result of independent creation.” The DPPA sets the maximum damages at the greater of “$250,000 or $5 per copy.” Thus, the defining features of the DPPA are the “closely and substantially similar” standard, the proposed searchable fashion design database, and the three-year term of protection.

2. The Innovative Design Protection and Piracy Prevention Act

Like its predecessor, the IDPPPA would amend § 1301 of the Copyright Act to extend protection to fashion designs. The IDPPPA limits the term “Fashion design” to the original elements or arrangements of the article of apparel to those that “are the result of a designer’s own creative endeavor; and provide a unique, distinguishable, nontrivial and nonutilitarian variation over prior designs for similar types of articles.” The IDPPPA defines “apparel” nearly identically to the definition in the DPPA. The IDPPPA also provides for the same three-year term of protection as the DPPA.

However, the IDPPPA also differs from the DPPA in many respects. Most notably, there is no registration requirement

118. Id. § 2(f).
119. Id. § 2(j).
120. Id. § 2(e)(1).
121. Id. § 2(e)(3). The term “trend” is defined in § 2(a)(10) as “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.”
122. Id. § 2(g).
123. S. 3728, 111th Cong. § 2 (2010).
126. S. 3728 § 2(d)(a)(2); see also H.R. 2196 § 2(d)(a)(2).
under the IDPPPA, and consequently, no searchable database. In the IDPPPA, a design is not an infringing article if the design (1) “is not substantially identical in overall visual appearance to and as to the original elements of a protected design,” (2) “is the result of independent creation,” or (3) if the home sewing exception applies. This heightened standard of “substantially identical” requires a claimant to show that an article of apparel “is so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial.” The pleading requirements of the IDPPPA specify that the claimant must establish that (1) plaintiff’s design is protected, (2) defendant’s design is infringing, and (3) “it can be reasonably inferred from the totality of the surrounding facts and circumstances” that the defendant knew of the protected design. Damages under the IDPPPA are much less than those under the DPPA because the senate bill limits damages to the greater of $50,000 or $1 per copy. Also, the IDPPPA increases the penalties for false representation.

In consideration of the unique facets of the fashion industry, the ongoing problem of fashion piracy, and the current intellectual property protections available to designers, the proposed legislation can be thoughtfully analyzed. After “eighty-nine failed attempts to increase IP protection for the fashion industry,” discussion of fashion design piracy has evolved into a fervent debate, dividing designers, scholars, and industry stakeholders into two camps: those in favor of the fashion design legislation and those opposed to the fashion design legislation.

127. S. 3728 § 2(f)(2).
128. Compare id., with H.R. 2196 § 2(j).
129. S. 3728 § 2(e)(2)(e)(3).
130. Id. § 2(a)(2)(B)(10).
131. Id. § 2(g)(2)(e)(1).
133. S. 3728 § 2(h).
135. Compare Marshall, supra note 100, at 322–26 (urging Congress to adopt modified design protection), with Raustiala & Sprigman, supra note 10 (arguing that “[t]he fashion industry flourishes despite a near-total lack of protection for its core product, fashion designs”).
II. DRESS WARS: ANALYZING THE FASHION DESIGN DEBATE

This Part summarizes opposing views on protection of fashion designs. It considers the philosophical motivations, economic justifications, and pragmatic concerns, from both the perspective of the proponents and the critics. The current discussion echoes the historical debate following the Supreme Court’s 1941 decision in Fashion Originators’ Guild of America v. Federal Trade Commission that provoked Guild leader Maurice Rentner to lobby Congress to grant copyright protections for designers, claiming that “a failure to do so would put the fashion business in mortal danger.” In 1947, department store owner Leon Bendel Schmulen countered in The New York Times “that copying was ‘no danger to the business’ and a ‘natural consequence of fashion.’” The debate on whether fashion is in danger continues with the current sui generis copyright proposals.

A. ARGUMENTS IN FAVOR OF EXPANDING THE COPYRIGHT ACT TO INCLUDE FASHION DESIGN

Proponents of intellectual property protection for fashion design have supported direct amendments to the copyright act, trade dress protection, and various forms of sui generis copyright protection. While their conceptions of the ideal solution may differ, there are many arguments in common, including an interest in moral rights, efforts for international consistency, a parallel to architecture, and concern for the plight of emerging designers.

136. 312 U.S. 457 (1941).
138. Id.
1. Moral Rights: Fashion Designers Are Artists

At the root of nearly all of the arguments in favor of fashion design legislation is a concern for fairness. Although the law makes a clear distinction between knockoffs and counterfeits, proponents claim that design piracy is no different than “counterfeiting without the label.” They believe that fashion design creations are art—even if they have functional aspects—and deserve protection like paintings, music, and sculpture. For example, museums around the world display couture garments. Proponents identify the “growing acceptance of fashion designs as works of art” as an indication that designers are artists, worthy of the protections afforded by authorship status.

Legal scholars Hansmann and Santilla identify four distinct rights that are commonly referred to collectively as authors’ and artists’ “moral rights”: the right of integrity, under which the artist can prevent alterations in his work; the right of attribution or paternity, under which the artist can insist that his work be distributed or displayed only if his name is connected with it; the right of disclosure, under which the artist can refuse to expose his work to the public before he feels it is satisfactory; and the right of retraction or withdrawal, under which the artist can withdraw his work even after it has left his hands.

Although the United States generally does not recognize moral rights, Congress enacted the Visual Artists Rights Act (VARA) in 1990, indicating a willingness to consider a moral rights perspective. VARA protects the rights of integrity and attribution for visual artists. With this concern for the artist behind the dress, many proponents look to Europe, where moral rights have a greater presence than in the United States.

144. Tsai, supra note 93, at 461–63; The Industry Speaks Out, supra note 25.
145. E.g., Sara R. Ellis, Note, Copyrighting Couture: An Examination of Fashion Design Protection and Why the DPPA and IDPPPA Are a Step Towards the Solution to Counterfeit Chic, 78 TENN. L. REV. 163, 187 (2010); Tsai, supra note 93, at 461.
146. Ellis, supra note 145, at 186–87.
147. Hansmann & Santilli, supra note 14, at 96.
148. Id.
150. 17 U.S.C. § 106A.
151. See Hansmann & Santilli, supra note 14, at 97.
2. The United States Should Follow International Models

Proponents contend that a lack of design protection prevents American designers from reaping the rewards of their work and places them at a disadvantage in the global marketplace. They believe that the United States should follow the legal frameworks in other countries, which convey a greater appreciation for fashion. Countries with vibrant fashion industries—such as France, Japan, and Italy—provide legal protection for fashion designs. Even beyond the typical fashion circuit, countries like India protect the intellectual property of their fashion designers. In Europe, fashion designers enjoy both protection by national laws and protection by the individual European countries and the European Directive on the Legal Protection of designs (E.U. Directive). French designers have been protected since 1793 under the "doctrine of the unity of art." With the strongest legal protection for fashion designs in the world, France subjects copyright infringers to both civil suits for damages and criminal penalties, including a fine of 300,000 Euros and up to three years in jail for infringement.

152. See The Industry Speaks Out, supra note 25.
159. See Borukhovich, supra note 157, at 167; see also Scafidi, supra note 30, at 117.
160. See Borukhovich, supra note 157, at 168.
global market, there is a considerable gap in United States copyright protection.161

3. Fashion Design Should Parallel the Architectural Works Copyright Protection Act

Proponents of expanding protection to fashion design also draw a parallel to architecture copyrights.162 Until 1990, architectural buildings, unlike blueprints, had little protection: the physical structures could be copied, but architectural plans were protected.163 In 1990, President George H. W. Bush signed into law the Architectural Works Copyright Protection Act, which expanded the subject matter of the Copyright Act to include “architectural works.”164 Even though architectural designs are not physically separable from architectural works, this new category “does not implicate the ‘physical or conceptual separability’ conundrum that bedevils protection for useful pictorial, graphic, and sculptural (PGS) works.”165 Proponents may be attracted to this more direct route because the sui generis amendment appears like a “second class” copyright and they think fashion design is worthy of full copyright protection under § 102 of the Copyright Act.

161. See Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 84 (2006) [hereinafter Scafidi Statement] (written statement of Susan Scafidi, Professor) (“The global legal trend toward fashion design protection has rendered the U.S. an outlier among nations that actively support intellectual property protection, a position that is both politically inconsistent and contrary to the economic health of the domestic fashion industry.”).


164. 17 U.S.C. § 102(a)(8) (2006); see also Id. § 101 (defining “architectural works” as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings” and including “the overall form as well as the arrangement and composition of spaces and elements in the design” as protected elements of the work).

4. Barriers to Entry: Designers Are Harmed

Piracy creates an obstacle in the path of new designers in particular.\textsuperscript{166} Since knockoffs can enter the market faster, the consumer sees the copy before the original, creating confusion.\textsuperscript{167} Even if the consumer is not fooled by the knockoff, other consumers may be confused under the doctrine of post-sale confusion.\textsuperscript{168} When a pirate creates a knockoff of a designer’s work, the designer has economic loss from the lack of profits.\textsuperscript{169} As a result, the designer is economically hurt as the knockoffs replace sales and demand for the original garment declines.\textsuperscript{170}

B. ARGUMENTS AGAINST EXPANDING THE COPYRIGHT ACT TO INCLUDE FASHION DESIGN

The Piracy Paradox, with its economic approach to fashion piracy, is the most prominent voice of opposition in the debate.\textsuperscript{171} Critics contend that the pending legislation has great potential to negatively affect the multifaceted fashion industry, namely fashion designers, consumers, the courts, and other creative fields.\textsuperscript{172}

1. Utilitarian Theory

In the United States, intellectual property rights are premised on a utilitarian theory rather than a natural rights

\textsuperscript{166} Binkley, supra note 4.
\textsuperscript{167} E.g., Sara R. Ellis, supra note 145, at 188–90.
\textsuperscript{168} See Barton Beebe, Intellectual Property Law and the Sumptuary Code, 123 HARV. L. REV. 809, 851 (2010) (“This doctrine holds that even if consumers are not confused at the point of sale as to the true source of the goods that they are purchasing, other consumers may be confused as to the source of those goods after the sale.”).
theory. The Constitution grants Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Tension arises between a utilitarian approach, prioritizing society before individual, and a moral rights approach, prioritizing the individual. Under a utilitarian perspective, critics of the proposed legislation view isolated cases of fashion piracy as unnecessary reasons to change a thriving industry.

2. The Proposed Bill Will Harm Stakeholders

Critics claim that the fashion industry is thriving without protection for fashion design and this bill will upset the rituals and synchronized rhythm of the field. Many critics believe “there would be no fashion” with fashion design copyright laws. They contend that a sui generis amendment to the copyright act would create more harm to designers, consumers, and courts than any potential benefits of a fashion design copyright.

First, the bill will negatively affect fashion designers from established couture houses to young designers launching out of Parsons to Faviana knockoff designers. Trends create jobs, whereas a copyright monopoly on a style will prevent other designers from capitalizing on the idea. The knockoff houses

173. See Adam D. Moore, A Lockean Theory of Intellectual Property, 21 HAMLINE L. REV. 65, 65 (1997) (“Society seeks to maximize utility in the form of scientific and cultural progress by granting rights to authors and inventors as an incentive toward such progress.”).
175. Moore, supra note 173, at 66.
178. Videotape: The Ecology of Creativity in Fashion (The Norman Lear Center 2005), available at http://www.learcenter.org/html/projects/?&cm=ccc/fashionshed; see also Wolfe Testimony, supra note 172 (comparing the fashion industry to a balanced ecosystem of an ocean reef to emphasize the symbiotic elements of originality, creativity, and copying).
180. See Blackmon, supra note 179, at 142–43; see also Wolfe Testimony, supra note 172, at 16–19.
will suffer in particular, but job losses will occur throughout the industry because designers at every level engage in some degree of copying.\textsuperscript{181} Litigation will require designers to spend more time in court and less time creating.\textsuperscript{182} Designers will need to spend time and money enforcing their copyrights, and they will likely argue over whether copying occurred in the first place.\textsuperscript{183} Because of these hidden costs in the proposed legislation, critics contend that it will likely have a disproportionate impact on small fashion companies and emerging designers.\textsuperscript{184}

Second, the negative effects on designers will trickle down to hurt consumers.\textsuperscript{185} If the bill is passed, fashion companies will need to adjust for the increased costs of litigation and filing expenses, and they will likely pass these new costs on to consumers.\textsuperscript{186} In short, the cost of clothing will go up.\textsuperscript{187} If copycat designers are prevented from replicating couture styles, the variety in clothing will go down, and stylish clothing will be less accessible.\textsuperscript{188}

Third, the bill will burden the courts through excessive litigation over an ambiguous standard.\textsuperscript{189} The substantially similar, identical standard is problematic. Even after many tries at creating the bill, the language is still too vague; the standard of “substantially identical” will be time consuming and difficult for the courts to determine. The courts lack the expertise to decide disputes over imitation in fashion.\textsuperscript{190} To the average judge, two garments may look alike, but to industry insiders, they may see two entirely different pieces.

\textsuperscript{181.} See Blackmon, supra note 179, at 142–43.
\textsuperscript{182.} See Ferris, supra note 104, at 584.
\textsuperscript{183.} See Wolfe Testimony, supra note 172, at 16–20.
\textsuperscript{184.} See Ferris, supra note 104, at 584.
\textsuperscript{185.} See Blackmon, supra note 179, at 145–46.
\textsuperscript{186.} See id.
\textsuperscript{188.} See Wolfe Testimony, supra note 172, at 19–20.
\textsuperscript{189.} See Blackmon, supra note 179, at 144–45.
\textsuperscript{190.} See Wolfe Testimony, supra note 172, at 19–20.
Fourth, critics warn that the proposed legislation will be a slippery slope. The debate on whether to adopt fashion design legislation is much larger than fashion because it stems from the philosophical perspectives underlying intellectual property law. The outcome of the debate has the potential of making significant waves across various other arguably underprotected fields, such as magic tricks, stand-up comedy, hairstyles, tattoos, and cuisine.

3. The Piracy Paradox: Knockoffs Benefit the Fashion Industry

In a traditional intellectual property system, the incentive thesis “predicts that, absent intellectual property protection against third-party appropriation of sale proceeds, manufacturers and creators will limit or cease investment.” Although the presence of knockoffs is rapidly increasing, the American fashion industry has not been harmed by the lack of design copyright—in fact it has thrived. Unlike the traditional model, knockoff fashion designs have not harmed designers by taking away a considerable amount of sales. Raustiala and Sprigman use the phrase “low-IP equilibrium” to suggest “that the three core forms of IP law—copyright, trademark, and patent—provide only very limited protection for fashion designs, and yet this low level of legal protection is politically stable.” Fashion does not adhere to the orthodox understanding of IP law in which piracy is a “fatal threat to the incentive to engage in creative labor,” but instead “the lack of design protection in fashion is not especially harmful to fashion innovators, and hence

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197. Ferris, supra note 104, at 580.
199. Id. at 1717.
they are not incentivized to change it.” Barnett offers an explanation, hypothesizing that the presence of the knockoffs allows the designers to charge a “snob premium” for the original and popularizes the trend.

Raustiala and Sprigman offer an alternative explanation for why knockoffs benefit the fashion community: the piracy paradox, which rests on two principles. First, induced obsolescence is the process by which “IP rules providing for free appropriation of fashion designs accelerate the diffusion of designs and styles.” Second, anchoring occurs when “readily discernible trends nonetheless emerge and come to define a particular season’s style,” which ultimately drives consumption. The “piracy paradox” is the notion that “copying fails to deter innovation in the fashion industry because, counterintuitively, copying is not very harmful to originators [and]... may actually promote innovation and benefit originators.” The term “piracy paradox” refers to the manner in which copying “generate[s] more demand for new designs, since the old designs—the ones that have been copied—are no longer special” and results in “greater sales of apparel.” Knockoffs help drive the trend, which increases the value of the original and urges designers to innovate. Knockoffs also make designs more affordable, so more people can wear them because “Vera Wang and Allen B. Schwartz aren’t selling to the same crowds.” Finally, it spurs more innovation because designers have to stay ahead of copycats.

From a creative perspective, the lack of legal protection for fashion design has resulted in a rich bricolage that allows for “constant mixing and morphing of incongruous ‘found’ elements into a new synthesis.” Articulating the culture of copying among designers, fashion writer Holly Brubach once wrote,

\[200. \text{Id. at 1718.} \]
\[201. \text{Barnett, supra note 45, at 1385.} \]
\[202. \text{Raustiala & Sprigman, supra note 10, at 1687.} \]
\[203. \text{Id. at 1722.} \]
\[204. \text{Id. at 1728.} \]
\[205. \text{Id. at 1691.} \]
\[206. \text{Raustiala & Sprigman, supra note 137.} \]
\[208. \text{Id.} \]
\[209. \text{Id.} \]
\[210. \text{BOLLIER & RACINE, supra note 18, at 4.} \]
“Fashion is one of the means by which we dream collectively.” Reflecting on the importance of appropriation, designer Tom Ford once said, “You couldn’t design without [appropriation]—I mean, none of us invented the sleeve. We have two arms. You need two sleeves.” The Piracy Paradox explains both the economic and creative success in the fashion industry amidst rampant copying.

III. TAILORING A SOLUTION TO FIT FASHION DESIGN

The proponents and critics of the legislation present thoughtful arguments for the fashion design community, yet there are significant concerns about either adopting proposed legislation or maintaining the status quo. A solution that acknowledges the importance of attribution will address the concerns of the fashion design community, without creating more harm to stakeholders. The next Sections evaluate both sides of the debate on whether the proposed legislation is necessary, and propose a solution to protect attribution rights and to assure authenticity of original designs through certification and collective marks.

A. BOTH ARGUMENTS ARE FLAWED

While both sides of the debate present important concerns, neither side’s solution fully responds to the unique nature of the fashion design community. The proponents of sui generis protection advocate for an expansion of intellectual property rights to fashion that is dangerously broad. On the other hand, critics recognize the benefits of copying, but fail to see the value in protecting the moral rights of fashion designers.

1. Proponents Fail to Consider the Risks of Sui Generis Protection

Proponents of expanding the Copyright Act to include fashion design fail to consider three main concerns. First, adopting a fashion design copyright could create oppressive monopolies in the fashion community that would put an end to creativity for emerging designers and interrupt the delicate balance of

211. Id. at 19.
213. See supra Part II.
innovation.\textsuperscript{214} Second, the “substantially identical” standard will be difficult for courts to apply and will most likely result in frivolous litigation, increased costs for consumers, and fewer clothing styles on the market. And third, the negative impact would likely spread beyond fashion to result in a slippery slope problem for other creative industries.

Architecture provides the best analogy for a fashion design amendment to the Copyright Act, but there are pragmatic issues that would make a direct amendment highly unlikely. There is a disparity in volume—the apparel industry is considerably larger than that of architecture. Unlike architecture, the life of a fashion design is transitory. The artistic and functional elements are more easily separated in a building than a garment because a building may have an ornate exterior and a functional purpose inside. These differences chip away at the parallel and illustrate why fashion design does not fit neatly into the copyright act.

Compared to the rest of the world, the U.S. copyright system appears to have a major gap, but the proponents of the bill ignore the evolution of U.S. copyright law in favor of attractive models across the pond. The moral rights argument has merit, but it is problematic in light of the utilitarian system in the United States. Implementing a gradual form of moral rights, in line with VARA, would be more realistic than attempting to copy the French copyright system. Proponents of the bill astutely identify the significant concerns of the emerging designer who is cut out of the fashion cycle, but they champion the wrong solution.

In sum, the proposed \textit{sui generis} copyright protection for fashion designs is not a good solution for the knockoff dilemma because the costs outweigh the benefits. While the proponents are motivated by valid concerns for moral rights, the expansion will be problematic on multiple levels. First, the judicial system is not the best option for policing copying because the standard is difficult to apply and industry insiders will be better judges. Second, although the proponents make a strong argument for moral rights, the U.S. copyright system has an inherently utilitarian perspective that cannot be overlooked. Third, when analyzing the unique fashion design industry as a whole, there is no economic justification for a fashion design copyright.

\textsuperscript{214} See COX & JENKINS, \textit{supra} note 84, at 6.
2. Critics Fail to Consider Moral Rights

The critics aptly identify serious costs that would result from the proposed legislation, and they recognize the unique nature of fashion and the benefits of imitation and remix in the fashion world. While the economic explanation proves wise, it focuses on the large fashion designers, not the emerging designers. Vera Wang is barely harmed if Allen B. Schwartz copies her bridal gowns, but the young scarf designer Sakellis is economically and morally harmed if her scarf design is copied. The critics fail to acknowledge the considerable infringement of moral rights in the context of emerging designers. While the U.S. intellectual property system is founded on utilitarian motives, intangible motives play a large part in the fashion design community. Designers are concerned about their moral rights and the solution should reflect those concerns.

B. PROPOSAL: BALANCING MORAL RIGHTS AND CREATIVE FREEDOM

From within the fashion design debate emerges a convincing economic analysis from the critics and a significant concern for emerging designers from the proponents. The proposed legislation is not the best solution because it fails to reconcile these competing concerns. Instead of relying on the Copyright Act, proponents should shift their attention to trademark law—"the most universally applicable and flexible mechanism of the protection of fashion design." In general, copying in the fashion industry has beneficial effects, but there are situations where individual designers are hurt from copying. A solution that allows for copying but still recognizes the moral rights of designers will allow fashion design to continue to flourish, while recognizing the sincere concerns of the huge industry. While the costs of expanding the Copyright Act outweigh the benefits, carving out protection for the moral rights of fashion designers in the trademark act will benefit all fashion stakeholders.

216. See, e.g., Klein, supra note 207.
217. See, e.g., Scafidi Statement, supra note 161, at 79.
218. Scafidi, supra note 30.
1. The Right of Attribution

When celebrities walk down the red carpet, reporters routinely ask, “Who are you wearing?” Fashion designs are intimately connected with the designer, even if there are no logos. There are both intangible and tangible concerns related to protecting the designer’s name. Many designers create for the love of fashion and design, seeking only the reward of notoriety and a positive review in *Women’s Wear Daily*. In a fast-paced industry that rides trends, reputation and recognition is very significant.

Among the four well-known moral rights, attribution stands out as an ideal choice for fashion designers because it would not upset the system and it would achieve the goal of protecting the name of the designer. It would be impractical to apply a right of integrity to fashion design because consumers alter and tailor clothing to achieve a good fit. Similarly, the right of disclosure would not make sense since fashion is intended to be visible and worn in public. The right to withdraw is likewise inapplicable because of the public and functional aspects of apparel. Compared to the other moral rights, the right of attribution—the artists’ right to insist that her name continue to be associated with work she has produced and to insist that her name not be used on work she has not in fact produced—responds to the concern for emerging designers, and it would not radically change the current U.S. intellectual property regime.

A right of attribution specifically addresses the needs of fashion designers. In working on a collection, a designer must carefully mold her reputation and brand identity so the line communicates a unique source and authentic story. Throughout history designers have sought to protect their attribution rights in their collections. In the 1920s and 1930s, designers sought to create marks of authenticity, such as the thumbprint labels in Madeleine Vionnet’s atelier. Likewise, the period of logomania in the 1980s was an effort to guard

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220. Cf. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1986, S. TREATY DOC. No. 99-27, art. 6bis., 1161 U.N.T.S. 30 (stating that the author shall have the right “to object to any distortion, mutilation, or other modification” of the work).

221. E.g., Bollier & Racine, *supra* note 18, at 23 (“Designers have credibility, stature and profitability because their name comes to represent a look and an artistic standard.”).

garments through trademark law by adorning apparel with an abundance of exterior labels. These historical efforts underline the significance of attribution in the fashion design industry.

2. Fashion Mark Mechanism

A certification mark or collective mark would allow designers to opt in for protection of their moral rights without drastically changing the intellectual property regime. The Lanham Act provides for two types of marks that have not traditionally been used to protect fashion designs, but may solve the dilemma of source identification, without interrupting the copying dynamic. A certification mark is most often used by trade associations or other organizations “to identify a certain type of product.” For example, the “Underwriters Laboratory” or “UL” mark shows that a product meets specific safety standards, and the “Roquefort” mark indicates that cheese has been manufactured in a specific region of France and according to a particular process. Thus, “a certification mark is symbolic of a guarantee or the meeting of certain standards.” A mark may be registered as a certification mark, another subset of trademark law, pursuant to § 4 of the Lanham Act, and courts have found that common law certification marks can be protected without registration.

Another subset of trademark law, the collective mark, symbolizes membership in a group or organization. For example, the mark “CPA” indicates membership in the Society of Certified Public Accountants. Unlike trademarks, the collec-

223. See id. at 120.
225. Id.
ative mark does not indicate that the goods or services come from a particular source, but “indicate[s] that their source is affiliated with a particular group.” Whereas certification marks may be used by anyone who complies with the standards of the mark, collective marks may only be used by particular members of an organization.

However, in the vast majority of cases, there is no source confusion with fashion design marks. Most consumers can tell the difference between a blouse from Target and a blouse from Chanel. However, new designers do not have the same brand recognition as established designers. If an established designer copies an emerging designer before the emerging designer’s garments are on the rack, the consumer may not know which design is the original. In this scenario, there is a concern for attribution for the new designer. Without arbitration, the new designer may easily be cut out of the fashion cycle, harming the individual designer, economically and morally, as well as harming consumers by depriving the market of innovation and competition.

Certification and collective marks present attribution solutions that address this concern. A fashion design certification mark would allow designers to distinguish original designs from copied designs, while communicating a unique source to consumers. A term, such as “couture” or “original design” or “slow fashion” could be applied to apparel tags to indicate that the garment was originally designed without line-by-line copying. A fashion design certification mark would certify an authentic “mode of manufacture” and consequently “quality” and “accuracy” of an original design. This mark would not be owned by any designer in particular, but by the group and would be “available without discrimination to certify the goods of any person who maintains the standards or conditions which

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233. MARY LAFRANCE, UNDERSTANDING TRADEMARK LAW 99 (2005); see also 15 U.S.C. § 1127 (articulating a similar explanation regarding a collective mark’s expression of association).


237. Id.

such mark certifies.\footnote{\textit{Id.} § 1064(5)(D); see Cmty. of Roquefort v. William Faehndrich, Inc., 303 F.2d 494, 497 (2d Cir. 1962).} Fast fashion retailers will likely not be affected by a mark on original garments, but it serves a valuable purpose to prevent source confusion in the marketplace and to provide a limited moral rights protection for fashion designers.

In the alternative, a similar idea could be implemented through a collective mark. The Council of Fashion Designers of America could create a collective mark in which designers who are part of the organization would be able to join. The CFDA then could set standards for original designs, which may be similar to the proposed substantially identical standard in the IDPPPA.

The Fair Trade Mark for clothing and VARA provide valuable models for a fashion certification mark in order to craft a limited protection that will blend with the current intellectual property laws in the United States. Certification marks are most commonly applied to food,\footnote{\textit{E.g.}, Levy v. Kosher Overseers Ass'n of Am., 104 F.3d 38, 39 (2d Cir. 1997) (analyzing kosher certification marks, which “are used to designate food items that comply with Judaism's strict dietary laws”).} but Fair Trade USA recently launched a new fair trade certification mark for apparel.\footnote{\textit{E.g.}, Apparel & Linens Program, FAIR TRADE USA (Sept. 11, 2011, 4:40 PM), http://www.transfairusa.org/certification/producers/apparel-linens; Lorraine Sanders, Fashion First: Fair Trade Certification Finally Available for Apparel, SFUNZIPPED, S.F. CHRON. ONLINE (July 23, 2010, 2:00 PM), http://www.sfgate.com/cgi-bin/blogs/chronstyle/detail?entry_id=68495.} This Fair Trade certification indicates quality from farm to factory,\footnote{See Sanders, supra note 241; Ariel Schwartz, TransFair USA Introduces First Fair-Trade Clothing to the U.S., FAST COMPANY (July 19, 2010), http://www.fastcompany.com/1671772/transfair-usa-introduces-first-fair-trade-clothing-to-the-us.} and serves as a model for communicating design authenticity. Similarly, VARA serves as a guide, as a recent expansion of moral rights. Whereas VARA includes a right to attribution and integrity, the fashion mark would be limited to attribution, because clothing is functional and thus prone to accidental modifications.

The limited goal of preserving a right of attribution through a certification or collective mark responds to the needs in the fashion design community. This solution allows fashion victims to opt in for some protection, while maintaining the unique copying dynamic that fashion pirates enjoy.
CONCLUSION

In considering the legal conundrum of knockoffs, fashion emerges as an incomparable industry. Clothing is an anomaly because it is both artistic and functional, new and old, distinctive and indistinctive, and it does not fit neatly into a legal framework. Copying—whether considered design piracy or sharing—plays a vital role in the unique, creative culture of the fashion world, and any proposed intellectual property changes must consider the industry norms.

Although copying benefits the industry, the negative effect on emerging designers is a legitimate concern, but the proposed legislation is not the appropriate remedy. The costs of *sui generis* copyright protection greatly outweigh the potential benefits. Knockoffs are not harming the thriving fashion industry as a whole, but actually playing an important role in the cycle of trends. A solution that balances the desire for limited moral rights without disturbing the copying dynamic would be a better fit. A certification or collective mark that communicates authenticity to the consumer would allow designers to opt in to distinguish their original designs without forcing new rules on a thriving industry.