REDEFINING FASHION: FROM CONGRESS TO THE RUNWAY

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Cite as 11 J. High Tech. L. 93 (2010)

"The difference between a good designer and a real designer is to be in tune to what is there in the moment and define it before anyone else."
- Fabien Baron, *Loving and Hating Marc Jacobs*, N.Y. TIMES, Nov. 15, 2007.

I. Introduction

Every year, notable fashion designers and fashion houses unravel beautifully-crafted creations for Hollywood starlets who are walking the red carpet for the Annual Academy Awards.[1] Millions of viewers watch the unveiling of these designs on television, most of whom do so to admire the beauty and quality of the gowns.[2] But, other viewers, like designer Allen B. Schwartz, have teams that begin sketching a gown the moment it graces the red carpet for the purpose of mass-producing replicas of these

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1. *See About the Academy Awards*, THE ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, *archived at* http://www.webcitation.org/5mtu2zqAI. The Academy Awards, also referred to as the Oscars, are held every January where the entertainment community and film fans come together to celebrate cinematic achievements. *Id.* A red-carpet procession of the award nominees precedes the award show. *Id.*

2. *See* Bill Gorman, *Academy Awards Show Ratings*, TV BY THE NUMBERS (Feb. 17, 2009), *archived at* http://www.webcitation.org/5mtx7KKhL. The televised broadcast of the Academy Awards was forty million viewers in 2007 and thirty-two million viewers in 2008. *Id.*

gowns for an affordable price.[3] For some consumers, purchasing a $300 replica rather than a $3,000 original is a bargain.[4] For advocates of fashion design reform, however, this bargain equates to fashion design piracy.[5]

The permeation of fashion into every aspect of culture blurs the line distinguishing fashion design as a work of art from a vehicle for mass production.[6] For instance, in Bravo's TV Series, Project Runway, fashion designer Michael Kors criticized participant Kenley Collins for creating designs that substantially resembled the work of iconic designers.[7] Fashion designers must have full knowledge of seasonal trends and styles to appeal to consumers while also retaining originality and creativity in design creation. Maintaining this balance between original

3. *See* Tatiana Morales, *Oscar Dresses You Can Wear*, CBS NEWS (March 3, 2003), *archived at* http://www.webcitation.org/5mtzAiL5V. The article looks at fashion designer, Allen B. Schwartz and his notoriety for replicating designer gowns from "the ultimate fashion show". *Id.* Schwartz has copied dresses designed by Valentino and Gucci and worn by the winners of the Best Actress award, such as Julia Roberts and Halle Berry. *Id.*

4. *See* Morales *supra* note 3 (explaining that A.B.S. provides designs with the average customer in mind). When asked whether Schwartz is concerned that his competitors might be engaging in the same practice of replicating designer dresses for affordable prices, he replies, "If they are, they've all dropped out … No one can do this like me, nobody." *Id*.

5. *See Design Piracy*, COUNCIL OF FASHION DESIGNERS OF AMERICA, *archived at* http://www.webcitation.org/5olep4uXh (asserting that flooding the market with replicas devalues the original garment). The CFDA is a non-profit organization that advocates protecting a designer's intellectual property. *Id.* The organization defines piracy as a "prevalent practice of enterprises that seek to profit from the invention of others by producing copies of original designs under a different label." *Id.*

6. *See* Sally Weller, *Fashion's Influence on Garment Mass Production: Knowledge, Commodities and the Capture of Value,* CENTRE OF STRATEGIC ECONOMIC STUDIES, MELBOURNE, VICTORIA UNIVERSITY, 136 (2004), *archived at* http://www.webcitation.org/5olgZ4zfW (discussing the idea of copying as interpretation thereby demonstrating the fluidity between high fashion and mass production).

7. *See* PROJECT RUNWAY: WEDDING WARS (Bravo television broadcast Oct. 18, 2009). The contestant's challenge was to design a wedding dress that resembled her individual style and aesthetic. *Id.* Kenley Collin designed a short, white wedding dress with feathers and puffed, square shaped shoulders which Michael Kors claimed is much too similar to a dress seen in the Alexander McQueen collection from the past runway season. *Id.*

innovation and economic success in the fashion industry distinguishes an iconic designer from a copycat designer.[8]

Such isolated instances of copying have aggregated into a controversy that has provoked much debate in the fashion industry.[9] Unlike virtually every other form of art, U.S. law has consistently denied copyright protection to fashion designs on the basis of functionality, even though society has historically viewed such designs as forms of wearable art.[10] More importantly, since 2006, representatives have repeatedly introduced fashion design legislation into Congress, yet the reform has failed to generate enough friction to become new law.[11]

With regard to fashion design, Congress has struggled balancing two aspects of copyright law — an author's incentive to innovate with freedom of expression and accessibility to the public.[12] Advocates of a free market economy have expressed strong opposition to extending copyright protection to fashion designs, claiming that such protection will hinder competition in the industry.[13] Other opponents have expressed concern

8. *See* Eric Wilson, *Loving and Hating Marc Jacobs*, N.Y. TIMES (Nov. 15, 2007), *archived at* http://www.webcitation.org/5oqQtR2IO. Fabien Baron, an art director observing Marc Jacobs career since its inception, categorizes Jacobs as a real designer because Jacobs defines fashion before anyone else while putting his soul into his runway shows. *Id.*

9. *See Debating Fashion Law: The Design Piracy Act (DPA)*, FASHION LAW CENTER (April 8, 2010), *archived at* http://www.webcitation.org/5om7Dmymp (narrating a debate between Guillermo C. Jiminez, Professor at the Fashion Institute of Technology, and Lara Corchada, Attorney, regarding the pros and cons of adopting copyright legislation for fashion designs).

10. *See Debating Fashion Law*, *supra* note 9 (debating the legality of the copying the designs of another fashion house).

11. *See* Design Piracy Prohibition Act, H.R. 5055, 109th Cong. (2006); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).

12. *See* Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1306 (2003) (noting that "[t]he power to create a balance between the author and the public may be the most significant philosophical distinction between a natural rights theory of copyright and an economic rationale.)

13. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1775 (2006) (arguing that the lack of copyright protection in the fashion industry has not hindered its economic growth).

regarding whether the use of congressional time and resources in adhering to the copyright standards will prove to be beneficial for the designers.[14]

The element linking the prior versions of fashion design reform and the current version of the Design Piracy Prohibition Act introduced into Congress is that the reforms seek to protect designers from having design pirates usurp their intellectual creativity.[15] The concern for fashion design advocates, however, is determining how the current version of the Design Piracy Prohibition Act will use copyright law to protect fashion designs to a similar extent that other countries, such as India and France, grant protection.[16]

The issue remains whether the current version of the Design Piracy Prohibition Act will be a sufficient engine for extending copyright protection to fashion designs. Based on legislative history, the legislation will probably not withstand congressional review. Nevertheless, for fashion advocates combating the rapid growth of design piracy, they must rethink their strategy for appealing to Congress. The important elements to focus on include clarifying the language of the bill to harmonize it with international countries, the policy standpoint behind fashion as wearable art, and the harmful economic effect

14. *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. 18-19 (2006) [hereinafter *Hearing*] (statement of David Wolfe, Creative Director, Doneger Creative Services).

15. *See* Press Release, Delahunt, Goodlatte And Nadler Reintroduce Legislation to Combat Design Piracy (May 2, 2009) (on file with Jerrold Nadler website), *archived at* http://www.webcitation.org/5oodchwSI. The statement explains the need for fashion design reform to "safeguard legitimate designers from being undermined by opportunistic knockoffs." *Id.*

16. *See* The Design Act, 2000, No. 16, Acts of Parliament, 2000 (India), *archived at* http://www.webcitation.org/5omB4b5qm. In 1958, India codified its copyright law, however, protection was not granted to fashion designs until India consolidated its laws regarding designs with the Design Act, 2000. *Id. See also* Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle [Law No. 92-597 of July 1, 1992 on the Intellectual Property Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 1, 1992 (amended by Loi 97-283 du 27 mars 1997 [Law No. 97-283 of March 27, 1997]), *archived at* http://www.webcitation.org/5omBgNg3q.

design piracy has on individual designers. By addressing these factors, fashion advocates may be able to persuade Congress to pass legislation in their favor — albeit fashionably late.
Part II of this Note discusses the economic background of the fashion industry as it relates to the evolution of copyright law, the public policy arguments behind fashion as wearable art, the presence of modern-day fashion monopolies and the current version of the Design Piracy Prohibition Act. Part III of this Note argues for the copyright protection of fashion designs by parsing the economic arguments, focusing on public policy and addressing the strategic changes that will push fashion design reform forward.

II. History

A. The Supply and Demand of Fashion

Historically, the fashion industry has generated billions of dollars of revenue by maintaining the constant supply of designs for the high demand of consumers.[17] With the recent push towards extending copyright protection to fashion designs, the debate of whether design piracy is actually beneficial to the fashion industry has materialized.[18] The idea that the fashion industry has been successfully operating without copyright protection is premised on two arguments: (1) imitation drives production and (2) the costly process of litigation will disrupt the economic stability of the industry.[19]

With an economic outlook of the fashion industry, Kal Raustiala and Christopher Sprigman introduced the term "piracy paradox" by positing that rather than hindering innovation, copying promotes it and benefits the originator.[20] The economic

17. *See* Raustiala & Sprigman, *supra* note 13, at 1693 (noting that in a year, the global fashion industry sells more than $750 billion worth of apparel).
18. *See e.g.* Steven I. Weisburd, Dawn Rudenko Albert, & Brian M. Kudowitz, *The Design Piracy Prohibition Act: In style, but fashionably late?*, N.Y. L.J., Jan. 20, 2009, *archived at* http://www.webcitation.org/5snO8UAjc (providing two distinctive views on copyright protection for fashion design).
19. *See* Raustiala & Sprigman, *supra* note 13, at 1718-19; *see also Hearing*, *supra* note 14, at 18-19.
20. *See* Raustiala & Sprigman, *supra* note 13, at 1719 (noting that the

perspective defines clothing as a "positional good" by highlighting the close relationship between the value of the good and the perception of such value by society.[21] For instance, a study of Ugg boots illustrates that although they were a popular fashion item in 2003 and 2004, the widespread copying and distribution of these boots eroded its value to the consumer.[22] Put simply, the once popular "fashion item becomes anathema to the fashion-conscious."[23]

Raustiala and Sprigman expanded upon clothing as a positional good by illustrating that when fashion designs are mass-produced to the public, the desirability for a high fashion consumer to purchase such a design immediately diminishes.[24] Fashion designers respond to this decreased demand by creating new innovative designs thereby stimulating production in the fashion industry.[25] Thus, design piracy not only fuels production in the fashion industry, but it also stimulates a designer's innovation.[26]

Aside from deterring the innovative nature of the fashion industry, there is the argument that the cost and resources involving a copyright infringement lawsuit will result in foreseeable litigation delays.[27] Instead of developing new

spread of fashion dooms the industry because "piracy paradoxically benefits designers by inducing more rapid turnovers and additional sales.").

21. *See* Raustiala & Sprigman, *supra* note 13, at 1719 (discussing how the positionality of a particular good is two-fold because "its desirability may rise as some possess it, but then subsequently fall as more possess it.").

22. *See* Raustiala & Sprigman, *supra* note 13, at 1721 (describing consumer viewpoints on failing trends by stating that "[w]hen the people who really have their fingers on the pulse of fashion, the retail workers, think you're fashion road kill, you have to accept it. The trend is over.").

23. *See* Raustiala & Sprigman, *supra* note 13, at 1721 (discussing the popularity of Ugg brand boots).

24. *See* Raustiala & Sprigman, *supra* note 13, at 1720 (illustrating that the wide dissemination of a fashion design detracts from its status and "what is initially chic rapidly becomes tacky as it diffuses into the broader public, and for true fashion junkies, nothing is less attractive than last year's hot item.").

25. *See* Raustiala & Sprigman, *supra* note 13, at 1722 (contending that the lack of copyright protection speeds diffusion and induces innovative turnovers in design creation by fashion designers).

26. *See* Raustiala & Sprigman, *supra* note 13, at 1722.

27. *See Hearing*, *supra* note 14, at 18, 19 (statement of David Wolfe, Creative Director, Doneger Creative Services). (noting that litigation and injunctions

designs, a fashion designer will be "trapped in the perpetual chaos of trying to defend the copyright on existing designs."[28] As a result, the fashion industry's long-standing economic stability will suffer as the demand for designs surpasses the existing supply.[29]

However, it is important to distinguish that this idea of stagnant innovation is in stark contrast with the promotion of innovation granted by the Copyright Clause in the Constitution.[30] The public policy argument behind the Clause is to allow individual authors to reap the benefits of their creativity.[31] Perhaps the controversy between the economic arguments against fashion design reform and the public policy arguments for copyright protection stems from the interpretation of the Copyright Clause. The issue then is whether the purpose of the Clause is to protect industries as a whole or to protect individual authors.

B. Unraveling of Copyright Law

The Copyright Clause of the United States Constitution empowers legislators to promote creative innovation by securing for innovators the "exclusive Right to their Respective Writings and Discoveries."[32] In the beginning, Congress merely regulated copyrights on books and maps, but later broadened the

resulting from copyright protection will slow the industry and therefore be detrimental because it is the rapid nature of the fashion industry that allows it to thrive).

28. *Hearing*, *supra* note 14, at 18 (statement of David Wolfe, Creative Director, Doneger Creative Services).

29. *See Hearing*, *supra* note 14, at 19 (statement of David Wolfe, Creative Director, Doneger Creative Services) (suggesting that the by the time the courts determine whether a fashion design is infringing, the marketplace will have moved on because the resulting limited supply of the design is unable to satisfy the current demand).

30. *See* U.S. CONST. art. I, § 8, cl. 8 (stating: "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive RIGHT to their respective Writings and Discoveries.") (emphasis adeded).

31. *See* Garon, *supra* note 12, at 1306 (noting that "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors").

32. U.S. CONST. art. I, § 8, cl. 8.

interpretation of the language to include musical compositions, photographs and motion picture films.[33] These regulations soon became codified in Title 17 of the United States Code.[34]

In 1954, the Supreme Court interpreted the meaning of "useful article" in *Mazer v. Stein*[35], a case regarding the use of male and female dancing figurines as the base for table lamps.[36] The Court struggled over whether artistic statuettes fall under protection when the statuette is for industrial use.[37] The Court clarified that "[copyright] protection is given only to the expression of the idea — not the idea itself."[38] With this decision, the Supreme Court gave meaning to the legislative power granted by the Constitution.[39] The Court also distinguished the function of a design from its aesthetic nature by ruling that separate elements of art embedded in manufactured items are still copyright-protected.[40]

In 1978, Congress codified the *Mazer* opinion that stated copyright protection extended only to the expression of the idea, and initiated the idea of separation from utilitarian use with the Copyright Act of 1976 (the "Act").[41] The Act essentially serves three purposes: (1) broadening the scope of protection from published works to original works that are "fixed in a tangible

33. *See* 17 U.S.C. § 101 (2000).
34. *See id.*
35. 347 U.S. 201 (1954).
36. *See Mazer*, 347 U.S. at 205 (1954) (explaining the meaning of "article of manufacture having utility").
37. *See Id.* at 202 (noting that although the statuettes are copyrighted as works of art, they are used as bases for table lamps and consist of functional elements such as electric wiring and sockets).
38. *Id.* at 217.
39. *See id.* at 219. The Supreme Court uses the opinion as a vehicle to address the philosophy behind the Clause by stating that "empowering Congress to grant … copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'. Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *Id.*
40. *See id.* at 218 (defining the dichotomy of protection as "art for the copyright and the invention of the original and ornamental design for design patents.").
41. *See* 17 U.S.C. § 102 (2000); *Mazer*, 347 U.S. at 218 (holding copyright protection is applicable only to the expression of an idea).

medium of expression"[42]; (2) extending the term of copyright protection from twenty-eight years[43] to the life of the author plus seventy years[44]; and (3) illustrating which forms of authorship deserve copyright protection, while overlooking fashion designs.[45]

1. The Idea of Separates

In the 1980s, the fashion industry became a victim of the mass production of goods in the middle market.[46] During this time, the courts identified clothing as a useful article and thus not copyrightable.[47] In an attempt to capitalize on and develop the scope of the recent passage of the Act, the task before the courts was to define what constituted a "pictoral, graphic, or sculptural work" that could exist separately from a useful article.[48] By testing theories of artistic separation, the courts developed

42. *See* 17 U.S.C. § 102. Copyright protection under this title is for "original works" that are "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

43. The Copyright Act of 1909 provided federal statutory copyright protection for twenty-eight years with the possibility of an extension for an additional twenty-eight years (later amended at 17 U.S.C. § 101 [2000]).

44. *See* 17 U.S.C. § 302 (2000) (stating that copyright protection "endures for a term consisting of the life of the author and 70 years after the author's death.").

45. *See* 17 U.S.C. § 102 . This title defines the works that are applicable under copyright protection as "(1) literary works; (2) musical works, including any accompanying music; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictoral, graphic and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." *Id.*

46. *See* Dana Thomas, *Made in China on the Sly*, N.Y. TIMES (Nov. 23, 2007), *archived at* http://www.webcitation.org/5onAttasr. The article explains how "the late 1980s" were filled with business tycoon buying up luxury fashion business and turning them into "billion-dollar global brands producing millions of logo-covered items for the middle market". *Id.*

47. *See* Fashion Originators Guild of America, Inc. v. FTC, 114 F.2d 80, 85 (2nd Cir. 1980) (holding that when an article of clothing, embodying a design in the fabric, is offered for sale, it becomes part of the public domain until the Copyright Office declares such designs copyright protected).

48. *See* 17 U.S.C. § 101. The code defines pictoral, graphic and sculptural works as "such works that include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned". *Id.*

multiple standards used to enforce copyright infringement actions.[49]

For instance, in *Esquire Inc. v. Ringer*[50], the D.C. Circuit articulated a strict standard, stating that an object, regardless of its artistic detail, is not entitled to copyright protection if its main function is utilitarian.[51] However, in *Kieselstein-Cord v. Accessories by Pearl, Inc.*[52], the Second Circuit disagreed with this ruling and issued a prominent decision allowing the copyright protection of utilitarian objects, such as belt buckles, because the ornamentation of the belt buckles were conceptually separate from the utilitarian function.[53]

A few years later, in *Carol Barnhart, Inc. v. Economy Cover Corporation.*[54], the dissenting opinion asserted that a design is copyrightable if it elicits a concept that is distinct from the utilitarian function.[55] Two years later, in *Brander Intern, Inc. v. Cascade Pacific Lumber Company*[56], the Second Circuit proposed another conceptual separation test, focusing on whether the design elements reflected the designer's artistic judgment.[57]

49. For a discussion regarding the multiple standards see *infra* notes 51-58.

50. 591 F.2d 796 (D.C. Cir. 1978).

51. *See Esquire Inc.*, 591 F.2d at 801. The court illustrated the reasoning behind the strict standard by looking at geometric shapes and claiming that: [T]here are only a limited amount of basic shapes, such as circles, squares, rectangles and ellipses. These shapes are obviously in the public domain and accordingly it would be unfair to grant a monopoly on the use of any particular such shape, no matter how aesthetically well it was integrated into a utilitarian article. *Id.*

52. 632 F.2d 989 (2d Cir. 1980).

53. *See Kieselstein-Cord*, 632 F.2d at 993 (holding that belt buckles used primarily for ornamentation purposes constitute creative art and therefore copyrightable). The court focuses on the policy behind copyright by highlighting that the evidence showed that the belt buckle was seen as ornamentation because it was accepted by museums and consumers were wearing the buckle as a necklace. *Id*. at 991.

54. 773 F.2d 411 (2d Cir. 1985) (Newman, J., dissenting).

55. *See Carol Barnhart, Inc.*, 773 F.2d at 421(noting that "[i]f the design engenders a concept of the utilitarian function, the design is copyrightable. That is a reward for the special creativity shown by the designer of such article.").

56. 834 F.2d 1142 (2d Cir. 1987).

57. *See Brander Intern, Inc.*, 834 F.2d at 1144 (holding that an object is conceptually separate if the design elements are portrayed to reflect the designer's artistic judgment).

These standards blurred the lines for enforcing copyright infringement to the extent that courts provided copyright protection to fabric designs on the dress but not to the dress designs themselves.[58]

Over the years, Congress has expanded the interpretation of "useful articles"[59] to include boat vessels[60], semi-conductor chips for electricity[61], and sound recordings in music videos.[62] Still, in spite of pragmatic expansions for other thriving industries, Congress has yet to allow copyright law to include fashion designs.[63] Under current U.S. copyright law, a designer's creation of bear-paw slippers[64] and animal masks[65] are copyrightable. Yet, a variation of uniforms[66] or Halloween costumes[67] fall short of protection. These judicial inconsistencies are still prevalent as courts continue to recognize the difficulty in establishing a strict standard for copyright infringement.[68] The

58. *See* Eve of Milady v. Impression Bridal, Inc., 957 F. Supp. 484, 489 (N.Y.S.2d 1997) (holding that lace designs on a bridal gown are a form of fabric design and, therefore, copyright protected); *see also* Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759, 767 (2d Cir. 1991) (holding that rose-shaped textile patterns created with clip-art were copyright protected); Knitwaves Inc. v. Lollytags Ltd. (Inc.), 71 F.3d 996, 1009 (2d Cir. 1995) (holding that the interpretation of "writings" under the Constitution is broad enough to extend to fabric designs).

59. *See* 17 U.S.C. § 1301(b)(2) (2000) A useful article is defined as an article, "which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." *Id.*

60. *See* 17 U.S.C. § 1301(a)(2) (2000).

61. *See* 17 U.S.C. § 901(a)(1) (2000).

62. *See* 17 U.S.C. § 1101(a)(1) (2000).

63. *See* 17 U.S.C. § 102 (noting the works of authorship, which does not include fashion designs, that fall under copyright protection).

64. *See* Animal Fair, Inc. v. AMFESCO Indus., Inc., 620 F. Supp 175, 188 (D. Minn. 1985) (holding that the exterior designs of the slipper is copyright protected because the unique design features are unrelated to the function).

65. *See* Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663, 670 (3rd Cir. 1990) (holding that the masks are not useful articles because their utilitarian function does not derive from the appearance of the mask).

66. *See* Galiano v. Harrah's Operating Co., Inc., 416 F.3d 411, 422 (5th Cir. 2005) (holding that the designs on casino uniforms are not separate from their function as casino uniforms and therefore not copyright protected).

67. *See* Whimsicality, Inc. v. Rubie's Costume Co., Inc., 891 F.2d 452, 456 (2d Cir. 1989) (holding that a costume does not reflect a soft sculpture, which is copyright protected but rather, is representative of an article of clothing because the depiction of the costume is only revealed when the costume is worn).

68. *See Galiano*, 416 F.3d at 419 (summarizing the chronic difficulty of the

intricacies involved in defining these standards in light of artistic judgment may have evolved from the fashion industry's historical relationship with the art world at large.[69]

2. Wearable Art is the New Black

The fashion industry's influential relationship with art began with Art Deco, a decorative style encompassing vivid colors and geometric architecture that applied to clothing.[70] This stylistic approach not only laid the foundation for an amalgamation between fashion and art, but also remains apparent in the twenty-first century vibrant crossovers between fashion designers and artists.[71]

In the twentieth century, French fashion designer Paul Poiret, who was known for designing constricting corsets, reconstructed the modern outlook of fashion with the art of draping fabric.[72] As his fascination with Middle Eastern art increased, he began to create harem pants and tunics.[73] This intertwining relationship between art and fashion, with a focus on the architectural appeal of the garment, played an integral role in inspiring fashion designers.[74]

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court as "conduct[ing] the conceptual separation test is, in turn, what continues to flummox federal courts.").

69. *See e.g.* Susan Elizabeth Ryan, *What is Wearable Technology Art?*, INTELLIGENT AGENT VOL. 8 ISSUE 1, *available at* http://www.webcitation.org/5onFzD2iz (demonstrating that clothing can be art through items such as wearable technology art).

70. *See* Valeria Kouznetsova, *Art Deco Style,* ART DECO WOMEN (Sept. 23, 2010), *archived at* http://www.webcitation.org/5sxu98phk (describing Art Deco as clean shapes and elegant lines that have influenced fashion worldwide).

71. *See infra* note 79 (discussing the relationship between designer Marc Jacobs and artist Takashi Murakami).

72. *See* Harold Koda & Andrew Bolton, *Paul Poiret (1879–1944): In Heilbrunn Timeline of Art History*, NEW YORK: THE METROPOLITAN MUSEUM OF ART (Sept. 2008), *archived at* http://www.webcitation.org/5onHa1OTh (noting that Poiret laid the foundation for the modern fashion industry through draping, which hung from the shoulders and opened a window of possibilities for fashion design structure).

73. *See* Koda & Bolton, *supra* note 72 (explaining that the Middle Eastern influence on designs with an emphasis on flatness dramatically altered the optical effects of fashion by turning three-dimensional art to two-dimensional abstraction).

74. *See* Ryan, *supra* note 69, at 4 (noting that "garments and fashion — as

In the 1920s, fashion designers such as Coco Chanel and Elsa Schiaparelli were avid participants in the use of avant-garde techniques to redefine fashion.[75] During this time, female fashion designers developed their designs by embracing the emancipation of women and progression of liberalism.[76] For instance, Coco Chanel combined two-dimensional art with her desire for casual clothing to create garments ranging from casual blazers to women's trousers.[77] Elsa Schiaparelli, on the other hand, was influenced by surrealist art to design a more feminine look of black sweaters with large white bow motifs on the front.[78]

The interplay between fashion designers and artists is still apparent in the twenty-first century.[79] In 2008, designer and artistic director of Louis Vuitton, Marc Jacobs, collaborated with Japanese artist Takashi Murakami.[80] This "ultimate crossover" resulted in a fashion line showcasing a vibrant combination of the original Louis Vuitton monogram splashed with Takashi's Japanese art influence of bold colors and expressions.[81]

Moreover, museums, including the Metropolitan Museum of Art and the Guggenheim, house fashion design exhibits from notable fashion designers.[82] For instance, the Metropolitan Museum of Art includes exhibits of the original bikini, cocktail

facts or ideas — occur constantly in art, and in an act of aesthetic sleepwalking we continuously forget how persistent their presence is. . .").

75. *See* Valeria Kouznetsova, *Fashion,* ART DECO WOMEN (Sept. 29, 2010), *archived at* http://www.webcitation.org/5t6zQtbqD (discussing the style of Art Deco had on women fashion designers).

76. *See* Kouznetsova, *supra* note 75 (attributing a change in style to the new role women experienced and their reluctance to part with it).

77. *See* Kouznetsova, *supra* note 75.

78. *See* Kouznetsova, *supra* note 75.

79. *See* Marc Jacobs, *Takashi Murakami,* TIME MAGAZINE (April 30, 2009), *archived at* http://www.webcitation.org/5onJDsYaN.

80. *See* Jacobs, *supra* note 79.

81. *See* Jacobs, *supra* note 79.

82. *See* Harold Koda & Andrew Bolton, *Haute Couture: In Heilbrunn Timeline of Art History*, NEW YORK: THE METROPOLITAN MUSEUM OF ART (Oct. 2004), *archived at* http://www.webcitation.org/5onXUHuNe; *see also* Press Release, Guggenheim Museum, Exploration of Seminal Designer's Vision, With More than 400 Objects Filling the Frank Lloyd Wright Rotunda and Tower Galleries (Oct. 19, 2000), *archived at* http://www.webcitation.org/5onYKiA0m.

hour dresses and the works of designers ranging from Christian Dior to Balenciaga to Coco Chanel and finally Paul Poiret.[83] Further, in 2000, the Guggenheim hosted an exhibition involving approximately 400 garments created by fashion designer Giorgio Armani.[84] These exhibits provide additional support for the classification of fashion as art by reflecting the art culture in the nineteenth and twentieth centuries.[85]

In addition to societal recognition, and perhaps more importantly, the court in *Poe v. Missing Persons*[86] was willing to consider a fashion design in the realm of wearable art.[87] In a lawsuit regarding a designer's creation of a crystal-encrusted swimsuit, the court denied summary judgment because an issue of material fact existed as to whether the swimsuit was a useful article or a work of art.[88] Despite the foundation of the garment being a standard swimsuit, the court acknowledged the separability of the crystal and the minute design features.[89] The court also suggested relevant factors in assessing artistic expression including the designer's intent and the marketability of the article as a work of art.[90] Thus, although fashion designs

83. *See* Beth Duncuff Charleston, *Christian Dior (1905-1957): In Heilbrunn Timeline of Art History*, NEW YORK: THE METROPOLITAN MUSEUM OF ART (Oct. 2004), *archived at* http://www.webcitation.org/5onYQ9qb9; *see also* Beth Duncuff Charleston, *Cristobal Balenciaga (1895 – 1972): In Heilbrunn Timeline of Art History*, NEW YORK: THE METROPOLITAN MUSEUM OF ART (Oct. 2004), *archived at* http://www.webcitation.org/5onYXv20X; *see also* Jessica Krick, *Gabrielle Coco Chanel (1883-1971): In Heilbrunn Timeline of Art History*, NEW YORK: THE METROPOLITAN MUSEUM OF ART (Oct. 2004), *archived at* http://www.webcitation.org/5onYdeEG8; *see also* Koda & Bolton, *supra* note 72.

84. *See* Press Release, *supra* note 83 (describing the exhibit as displaying clothing from various periods that represent thematic motifs and cultural significance).

85. *See* Ryan, *supra* note 69, at 1-2 (tracing the origins of wearable art back to the 19th and 20th centuries).

86. 745 F.2d 1238 (9th Cir. 1984).

87. *See Poe*, 745 F.2d at 1241 (observing that the even though the foundation of the article is a swimsuit, there is evidence that it is not useful article of clothing but rather artwork).

88. *See id.* at 1243.

89. *See id.* at 1241.

90. *See id.* at 1243. The court cites relevant factors as "1) expert evidence may be offered concerning the usefulness of the article and whether any apparent functional aspects can be separated from the artistic aspects; 2) evidence of [designer's] intent in designing the article may be relevant in

may categorically fall within wearable art, a question still remains as to whether any collaborative attempts to prevent piracy of this art form affect the competitive nature of the fashion industry.

C. Fashion Faux Pas: Anti-Competitive Behavior

1. Fashion Boycotts

History reveals many methods of preventing fashion design piracy including advocacy, lobbying for reform or the establishment of fashion guilds.[91] However, the danger of these collaborative methods is a potential anti-competitive effect on the fashion industry.[92] The Supreme Court has established that despite the good intentions behind preventing design piracy, any collaborative scheme to do so restricts the flow of free competition.[93]

In *Fashion Originators Guild of America v. Federal Trade Commission*, textile and garment manufacturers came together under the umbrella of the fashion guild to produce a clothing line.[94] Due to the popularity of this line, the guild began to notice that other manufacturers were copying its designs.[95] Acknowledging that copyright law provided them no protection

determining whether it has a utilitarian function; 3) testimony concerning the custom and usage within the art world and the clothing trade concerning such objects also may be relevant; and 4) the district court may also consider the admissibility of evidence as to [the design's] marketability as a work of art." *Id.*

91. *See Design Piracy*, *supra* note 5; *see also* STOP FASHION PIRACY, *archived at* http://www.webcitation.org/5t8YCFrmL (April 6, 2010) (claiming that fashion design piracy has become a prevalent way of life in the United States).

92. *See* PHILLIP AREEDA, LOUIS KAPLOW & AARON EDLIN, ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 114 (Aspen Publishers 6th ed. 2004) (noting that "competitors would like to join together to eliminate competition among themselves, restricting output and raising prices . . . societal wealth falls because the high prices decrease purchases (and hence production) below efficient levels.").

93. *See Fashion Originators Guild*, 114 F.2d at 85 (asserting that it is unlawful to restrict in free market economy and that implying reasoning that it benefits consumers or the current producers is not a sufficient justification).

94. *See id.* at 82.

95. *See id.*

against such piracy, the members of the guild fashioned their own remedy by collectively refusing to deal with any retailers who consistently sold copies of the members' original designs.[96] The Supreme Court held that the guild engaged in anti-competitive behavior and was therefore subject to an antitrust violation.[97] The Court further noted that the purpose of regulating the practice of design piracy was not a sufficient justification to restrict the free flow of competition and consumer accessibility in the marketplace.[98]

In 1985, the Supreme Court further discussed the issue of anti-competitive behavior in the fashion industry in *Millinery Creators' Guild Inc. v. Federal Trade Commission*.[99] This case involved hat designers and manufacturers, who were members of an association that adopted a scheme to combat design piracy by persuading retailers to refrain from purchasing pirated versions of their original hat creations.[100] Using the holding in *Fashion Originators Guild of America* as authority for its decision, the Court held that this behavior was anti-competitive because it deprived the public of having access to normal price competition within the industry.[101]

However, unlike *Fashion Originators Guild of America*, the Court did recognize the lethal affect design piracy has on designers.[102] The Court explained that designers are the ones who incur the loss because copying allows "the imitator [to reap] a substantial gain by appropriating for himself the style innovations produced by the creator's investment."[103] The Court

96. *See id.* The guild set up a Piracy Committee which employed shoppers to visit the shops of the pirates and determine which stores were copying designs. *Id.*
97. *See id.* at 85.
98. *See Fashion Originators Guild*, 114 F.2d at 85.
99. 109 F.2d 175 (2d Cir. 1940), *aff'd,* 312 U.S. 469 (1941).
100. *See Millinery Creators' Guild*, 109 F.2d at 176.
101. *See Millinery Creator's Guild*, 312 U.S. at 472.
102. *See Millinery Creators' Guild*, 109 F.2d at 177 (noting that a designer "suffers a real loss when the design is copied as soon as it appears").
103. *Id.* at 177.

further noted that the law's failure to grant a remedy places a designer at a disadvantage.[104]

2. Forever 21, Inc.: Wal-Mart of the Fashion Industry?

Antitrust law seeks to preserve the competitive nature of an industry by enforcing the balance of power between economic actors of all sizes.[105] However, general retailers, such as Wal-Mart, and fashion-specific retailers, such as Forever 21, Inc., aggravate this purpose of antitrust law by restraining private economic power.[106]

The business plan of such retailers is to provide consumer goods at a higher quantity and lower price than other suppliers in the industry.[107] Although beneficial for consumers, these pricing mechanisms result in monopolistic tendencies of establishing artificial barriers to the production of a product.[108] Therefore, competition within an industry becomes skewed because consumers prefer to purchase goods from these suppliers at the detriment of other suppliers.[109]

104. *See id.*

105. *See* AREEDA, KAPLOW & EDLIN, *supra* note 92, at 10 (illustrating that antitrust law "assumes that market forces – guided by the limitations imposed by antitrust law — will produce good results or at least better results than any of the alternatives that largely abandon reliance on market forces.").

106. *See* Barry C. Lynn, *Breaking the Chain: The antitrust case against Wal-Mart*, HARPERS MAGAZINE, July 2006, *archived at* http://www.webcitation.org/5t8dak8SY (arguing that Wal-mart's success will actually undermine the free market system); *see also* Josh Loposer, *Forever 21: Knocking it off?,* STYLIST, (Feb. 16, 2008), *archived at* http://www.webcitation.org/5ooSbX10v (suggesting that a proposed designed piracy legislation could force Forever 21 to stop producing knock offs) .

107. *See* Lynn, *supra* note 106; *see also* Loposer, *supra* note 106.

108. *See* AREEDA, KAPLOW & EDLIN, *supra* note 92, at 10-15 (noting that monopoly firms are aware that consumers will not purchase more of a product except at a lower price and that by controlling price and supply, these firms might also control the distribution channels or other factors thereby making it impossible or impractical for new firms to enter the marketplace based on a relative cost advantage).

109. *See* AREEDA, KAPLOW & EDLIN, *supra* note 92, at 12 (comparing monopoly firms with perfect competition firms, indicating that unlike in monopolies, where the output affects the market price, in perfect competition, the output is so small relative to total demand that the output variations do not affect market price).

Since 2007, Forever 21 has been the subject of a myriad of copyright infringement lawsuits for its blatant copying of a fashion designer's original work.[110] For instance, in 2007, Forever 21 copied a women's smock dress created by designer Diane Von Furstenberg.[111] Filing a lawsuit for copyright infringement, Von Furstenberg alleged that Forever 21 copied the colors, measurements, and patterns of her dress.[112]

Similarly, in April of 2007, fashion designer Anna Sui also filed a lawsuit against Forever 21 claiming copyright infringement for designs that were substantially similar to Sui's designs that New York Fashion Week just displayed on the runway.[113] Sui alleged that Forever 21 was already selling these garments in stores while the manufacture and release of her runway designs were not yet complete.[114] Moreover, in September of 2007, retail designer Anthropologie added to the lawsuits against Forever 21 by alleging copyright infringement in a skirt featuring copyrighted patterns derived from Anthropologie's original artwork and color cards.[115]

Despite these lawsuits, Forever 21 has managed to maintain a growing business of 300 retail stores throughout North America.[116] The constant booming business of an establishment that produces blatant recreations of high-end fashion for a much cheaper price is disturbing to designers who

110. *See infra* notes 111-115 (discussing the copyright infringement lawsuits filed against Forever 21).
111. *See* Complaint, Diane Von Furstenberg Studio v. Forever 21 Inc., Case No. 02413 (2007), *archived at* http://www.webcitation.org/5ooUaBxpL.
112. *See id.*
113. *See* Complaint, Anna Sui v. Forever 21, Inc., WL 4386747 (S.D.N.Y. 2008) (No. 07 Civ. 3235), 2007 WL 2252646.
114. *See id.*
115. *See* Trial Motion Memorandum, Anthropologie v. Forever 21, Inc., No. 07-CV-7873 (RJS) (S.D.N.Y. dismissed Dec. 30 2009), 2008 WL 5596060.
116. *See* Jeff Koyen, *Steal This Look, Will a wave of piracy lawsuits bring down Forever 21?*, RADAR MAGAZINE (no longer published) (Feb. 22, 2008), *archived at* http://www.webcitation.org/5ooXGbBHr (explaining Forever 21's revenue topping $1 billion in 2006 and while other stores such as Gap were suffering losses, Forever 21 showed 64 percent increase in revenue because of its new store openings).

have poured their intellectual creativity into their designs.[117] Perhaps more disturbing is the lack of relief that U.S. copyright law is granting to these fashion designers.

D. Design Piracy Prohibition Act

1. Vintage Reform

Since 2006, lobbyists of fashion design reform such as the Council of Fashion Designers of America have actively advocated for a fashion designer's right to copyright protection.[118] Legislation focusing on fashion design reform can provide a strong foundation for addressing design piracy by alleviating the uncertainties in the multiple separability standards created by courts.[119] Without it, fashion designs are left without copyrights and fashion designers are left without protection from design pirates.[120]

In 2006, Representative Robert Goodlatte (R-VA) introduced the Design Piracy Prohibition Act into the House of Representatives.[121] Goodlatte proposed the reform as a reaction to the rapid growth of fashion design piracy by recognizing that "once a design is made public, pirates can now virtually immediately offer an identical knock-off piece on the Internet for distribution."[122] Congress referred the reform to the House Committee on the Judiciary followed by a hearing held by the House Subcommittee on Courts, the Internet, and Intellectual Property, but the legislation failed without a floor vote.[123] In 2007, Representative William Delahunt (D-MA) re-introduced a

117. *See* Koyen, *supra* note 116 (stating that top fashion designers feel cheated by Forever 21's strategy).
118. *See Design Piracy*, *supra* note 5.
119. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).
120. *See Design Piracy*, *supra* note 5 (advocating that Congress' introduction of new legislation would help address the threat that piracy poses to American designers).
121. Design Piracy Prohibition Act, H.R. 5055, 109th Cong. (2006).
122. *Hearing*, *supra* note 14, at 4-5.
123. *See Hearing, supra* note 14.

newer version of the legislation in the House, along with an identical bill in the Senate.[124]

In its original form, the Design Piracy Prohibition Act provided fashion designers with a maximum of three years of protection for registered original designs, a reasonable time in light of the seasonal trends of fashion.[125] The bill would have also protected a spectrum of fashion designs ranging from outerwear, gloves, and footwear to handbags, tote bags and eyeglass frames.[126] Despite the Design Piracy Prohibition Act receiving tremendous support from the prominent designers in connection with the Council of Fashion Designers of America, the bill died while in Congress and fashion designs were still left without copyright protection.[127]

2. The Return of Reform

On April 20, 2009, Representative Goodlatte, Representative Delahunt and Representative Jerrold Nadler (R-NY) introduced an improved Design Piracy Prohibition Act into the House of Representatives.[128] The bill still provides fashion designers with protection for a maximum of three years; however, new elements have modified the bill to separate it from the previous act introduced in 2007.[129] For instance, the bill enhances the definition of a fashion design to include original elements of the designs along with the overall appearance of the apparel.[130] Furthermore, the revised reform heightens the standard of infringement from a "reasonable grounds to know

124. *See* Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).
125. *See* Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).
126. *See* Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).
127. *See* Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).
128. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).
129. *See infra* notes 130-135 (discussing the changes from prior versions of the bill).
130. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).

the protection for the design is claimed"[131] to an original that is "closely and substantially similar in overall visual appearance."[132]

The reform also creates a limitation by clarifying that a design is not infringed if it merely reflects a current trend in the fashion industry.[133] Moreover, if infringement occurs, the reform provides increased monetary penalties for infringement of false representations.[134] Lastly, a searchable database of registered designs that is available to the public initiates a broader deterrent to piracy.[135]

If passed, the proposed bill would amend the underlying language of Chapter 13 by extending copyright protection to original fashion designs or articles of apparel.[136] By copyrighting fashion designs, the owner of the copyright would have the power of instituting a cause of action for infringement.[137] Thus, in determining whether infringement occurred, courts would no longer assess the separability theories but rather would utilize the tests for determining substantial similarity.[138]

3. Substantial Similarity

Assuming fashions designs would be subject to copyright protection, owners of the copyright, presumably the fashion designers, would have the right to establish a prima facie case for infringement.[139] The two-prong elements of such a case include: (1) proving ownership of a valid copyright and (2) showing that

131. *See* Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007).
132. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).
133. *See id.*
134. *See id.*
135. *See id.*
136. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009); 17 U.S.C. § 1301 (2000) (discussing protection of original designs).
137. *See* 17 U.S.C. § 106 (2000) (discussing exclusive rights); *see also* 17 U.S.C. § 501 (2000) (discussing infringement of a copyright).
138. *See infra* notes 143—145 (discussing the tests for substantial similarity).
139. *See* Castle Rock Entertainment, Inc. v. Carol Pub. Group, 150 F.3d 132, 137 (noting that the two main components of the prima facie case for infringement as: "a plaintiff must first show that his work was actually copied . . . . [and] then must show that the copying amounts to an improper or unlawful appropriation.").

the pirate has engaged in direct copying through direct or circumstantial evidence and then utilizing the substantial similarity tests to show improper misappropriation.[140]

To prove harm, the copyright owner must first show access by introducing direct or circumstantial evidence that the second-comer, or in this case the pirate, has come into contact with the original copyrighted work.[141] If the evidence is persuasive, then the copyright owner must show that the second comer's work is substantially similar to the original work and therefore the second-comer is the infringer.[142]

In *Krofft Television Productions Inc. v. McDonald's Corporation*[143]*, Nichols v. Universal Pictures Corporation*[144]*,* and *Arnstein v. Porter*[145], the courts created tests for determining the substantial similarity of two copyrighted works. Each test assesses the similarity of ideas between the two works by calling for expert testimony to dissect the similarities between the original work and the alleged infringing work.[146] The question behind the substantial similarity approach is not whether copying alone is wrong but whether too much copying has occurred to thereby infringe another's work.[147] Essentially, the

140. *See id.* at 137 (highlighting that "[a]ctual copying may be established 'either by direct evidence of copying or by indirect evidence, including access to copyrighted works, similarities that are probative of copying between the works, and expert testimony.'").
141. *See id.*
142. *See id.*
143. 562 F.2d 1157 (9th Cir. 1977) (defining the substantial similarity test as intrinsic and therefore based on the response of an ordinary reasonable person).
144. 45 F.2d 119 (2d Cir. 1930) (acknowledging that when the abstract instead of a part is taken from a work, it is more difficult to gauge how substantial of a role the abstract played).
145. 154 F.2d 464 (2d Cir. 1946) (noting that to prove copying, the similarities must be so striking as to preclude the possibility that the plaintiff and the defendant independently arrives at the same result).
146. *See Krofft*, 562 F.2d at 1164; *see Nichols*, 45 F.2d at 123; *see Arnstein* 154 F.2d at 468.
147. *See Castle Rock Entertainment*, 150 F.3d at 137 (explaining the difference between de minimis copying, which is not sufficient enough to withstand a legal cause of action, and actionable copying, which concerns a sufficient amount of copying that has occurred, thus rising to the level of infringement).

main premise of these tests is to focus on the protectable expression that is substantially similar.

III. Analysis

A. Economies of Scale vs. The Plight of Individual Designers

Although the fashion industry may evoke an image of glamour and fame, it is still a multi-billion dollar industry that is subject to the supply and demand of goods.[148] Kal Raustiala and Christopher Sprigman's piracy paradox argument suggests that design piracy drives production in the fashion industry.[149] Furthermore, Raustiala and Sprigman posit that design piracy actually sparks designer innovation by forcing designers to respond to the diminished value of mass-produced designs.[150] The underlying flaw in the piracy paradox argument is that it has a narrow view of the relationship between imitation and production.[151] The theory focuses on how imitation stimulates the production of goods while ignoring the detractive effect imitation has on a designer's profit.[152] The sectors of the fashion industry capitalizing on the mass production of goods are doing so at the expense of those designers showcasing original creations.[153]

For instance, when a pirate copies and sells a designer's original creation, the pirate is retaining a profit based on the

148. *See* Koyen, *supra* note 116 (describing that since the 1990s, consumers were willing to purchase passably constructed garments so long as the garments evoked the fashionable haute couture image).
149. *See* Raustiala & Sprigman, *supra* note 13, at 1719.
150. *See* Raustiala & Sprigman, *supra* note 13, at 1722.
151. *See Hearing*, *supra* note 14, at 10 (statement of Jeffrey Banks, Fashion Designer) (explaining that design innovation enables designers to grow and provides consumers with more choices thereby stimulating the economic growth of American businesses).
152. *See Hearing*, *supra* note 14, at 10 (statement of Jeffrey Banks, Fashion Designer) (stating that designers cannot compete with the discounted prices of the low-cost copied designs).
153. *See Hearing*, *supra* note 14, at 9 (statement of Jeffrey Banks, Fashion Designer) (illustrating that designers often lose money by holding runway shows because the copied designs will be available in stores before the originals are).

designer's creativity.[154] Not only is it incredibly difficult for a fashion designer to capitalize on her original creation before it is mass-produced, but it is also problematic for a designer to maintain economic stability when design pirates consume her profits.[155] Regardless of how much innovation results from piracy, it is unlikely to be a substitute for a designer who has lost the aggregated profits from each instance of design piracy.[156]

There is also an argument that copies of an original creation promote the name of the original designer because the copy is a direct reflection of the designer's style.[157] But for designers, this absurd theory of promoting their name or brand is not enough to justify piracy.[158] Furthermore, most designers who are victims of design piracy have already established sufficient name recognition in the industry.[159] Therefore, this faulty promotion of the designer's name only sells the personality of the designer and not the creative design of the dress.[160]

Lastly, the idea that imitation is the most productive form of flattery eschews the public policy idea behind copyright law.[161] The Copyright Clause in the U.S. Constitution secures the rights for innovators to protect their respective writings and

154. *See Hearing*, *supra* note 14, at 11 (statement of Jeffrey Banks, Fashion Designer) (noting that fashion design piracy "robs American [designers] of their livelihood").

155. *See Hearing, supra* note 14, at 12 (statement of Jeffrey Banks, Fashion Designer) (describing his personal experience to highlight the monetary risk involved in being a fashion designer and the importance of being able to recoup on investments).

156. *See Hearing, supra* note 14, at 13 (statement of Jeffrey Banks, Fashion Designer) (proclaiming that fashion designers cannot compete against piracy "so the creativity and innovation that has put American fashion in a leadership position will dry up.").

157. *See Hearing, supra* note 14, at 183 (statement of Jeffrey Banks, Fashion Designer) (discussing the difference between a designer's desire for brand recognition and dress recognition).

158. *See Hearing, supra* note 14, at 183 (statement of Jeffrey Banks, Fashion Designer).

159. *See Hearing, supra* note 14, at 183 (statement of Jeffrey Banks, Fashion Designer).

160. *See Hearing, supra* note 14, at 183 (statement of Jeffrey Banks, Fashion Designer).

161. *See* Garon, *supra* note 12, at 1307 (citing the economic rationale as allowing for a "balancing between the interests of the public in accessing the good and the right of the author to receive an economic reward.").

discoveries.[162] While analyzing the language and placing an emphasis on "respective," a narrow reading of the Copyright Clause illustrates protection of the rights of individual innovators rather than an industry as a whole.[163] Despite the economic arguments remaining true with respect to the financial success of the whole industry, the defect in the argument is failing to examine the plight of individual designers.[164] Although the industry as a whole may be flourishing from the alternative market sales generated by design pirates, the success of the industry negatively affects those designers who are victims of piracy.

B. Fashion and Copyright: The Perfect Mis-Match

Many opponents to reform view fashion designs as nonrival public goods because using intellectual property in the fashion design does not interfere with another designer's use and reproducing a design in no way depletes the original.[165] Copyright law provides a viable solution to a majority of works that are subject to the public goods problem by granting a legal entitlement to the copyright owner to exclude others from enjoying certain benefits of the work.[166] Since copyright law does not provide fashion designs with this virtual fence, designers are left advocating for the social policy arguments behind defining fashion as wearable art.[167]

162. *See* U.S. CONST. art. I, § 8 cl. 8.

163. *See* U.S. CONST. art. I, § 8 cl. 8.

164. *See Hearing, supra* note 14, at 78 (statement of Susan Scafidi, Visiting Law Professor, Fordham University Law School) (describing an anecdote of a young designer, who created handbags, receiving a phone call from a buyer canceling her entire order because the buyer had found similar handbags at a lower price).

165. *See* Henry H. Perrit, Jr., *Property and Innovation in the Global Information Infrastructure*, 1996 U. CHI. LEGAL F. 261, 267 (1996) (noting that "[p]ublic goods are those demonstrating the characteristics of nonrivalness or nonexhaustiveness" … it is impossible for a public good to "exclude any one person from benefiting from that good.").

166. *See* Garon, *supra* note 12, at 1316 (illustrating that Congress' inherent task in maintaining copyright policy is that it is "intended to motivate the creative activity of authors and inventors by the provision of a special reward").

167. *See* Ryan, *supra* note 69, at 5 (stating that "[a]s opposed to actual fashion, which is unabashedly commercial, art . . . has long maintained a

By failing to provide protection from the public goods problem, the question then becomes whether wearable art arises from mass production or from inimitable and distinctive designs. For years, protection of useful articles has straddled the line between functionality and artistic separation.[168] However, with the historical background of appreciating fashion as a form of artistic expression, society now classifies fashion designs as wearable art.[169] In addition to the historical precedent, the courts have implicitly suggested fashion as wearable art by recognizing belt buckles as artistic ornamentation.[170] This decision opened the gate for legislation to extend copyright protection to jewelry, including broaches, pendants and pins.[171]

Although Congress still treats fashion designs as pariahs in the world of intellectual property, many fashion advocates recognize wearable art as strong public policy evidence for copyright protection.[172] If wearable art were a product of mass production, then every woman's blouse with just five buttons, two sleeves and one collar would fit the description.[173] Yet, similar to the styles of Elsa Schiaparelli and Coco Chanel, the blouse can also have a built in bow at the neck with asymmetrical stitching down the front and cuffed sleeves.[174] Thus, from the perspective of an average consumer, the blouse with the

fantastical existence behind a mask of disinterested aesthetics, while being madly and schizophrenically market driven.").

168. *See Mazer*, 347 U.S. at 210 (highlighting that the 1909 Amendment changing "fine arts" to "works of art" as copyrightable material removed all verbal disparity between purely aesthetic works and functional works).

169. *See* Ryan, *supra* note 69, at 3 (commenting that "[f]ashion and art have always had a close connection").

170. *See Keiselstein-Cord*, 632 F.2d at 990 (commenting on the belt buckles as not being ordinary but rather as sculptured designs of jewelry for ornamental purposes).

171. *See* Ann K. Wooster, *Application of Copyright Law to Jewelry*, 30 A.L.R. FED. 2D 577 (2008) (codifying the application of copyright law to jewelry).

172. *See* Ryan, *supra* note 69, at 4 (observing that although the human figure constrains fashion's obsession with beauty, "[t]his constraint gives the art of fashion its vitality, its optimism and its inventiveness.").

173. *See* Ryan, *supra* note 69, at 4 (asserting that wearable art has maintain its uniqueness because the art form is not yet mainstream).

174. *See* Kouznetsova, *supra* note 75 (explaining how "the arts and dress nourished each other, one acting as an inspiration, the other as a medium.").

embellished and innovative design is more likely to identify with wearable art rather than the basic blouse.

Moreover, designers, such as Marc Jacobs, continue to redefine fashion by recognizing it as artistic work and intertwining it with their avant-garde visions.[175] The strongest piece of evidence for the industry to define fashion as wearable art is the financial success of such collaborations between artistic work and avant-garde visions.[176] Essentially, these designers recognize the importance of the meticulous art relics that adorn their body rather than view fashion designs as another bland product of an industry.

C. Antitrust Law Fails to Live Up to the Glamour

The manner in which the fashion design industry operates requires designers to be cunningly innovative to be noticeable. Ranging from fashion guilds to the Council of Fashion Designers of America, designers have a history of collaborating with one another to lobby against pirates.[177] However, to prevent anti-competitive behavior, such collaborations are subject to the scrutiny of the judicial system.[178]

Where it is a restraint of trade to implement policies to purposely boycott sales to retailers who are selling copied designs, we look to the Supreme Court to regulate such collaborative methods that result in anti-competitive behavior.[179] Although the Court has been steadfast in its decisions to regulate

175. *See* Jacobs, *supra* note 79 (discussing the marriage of art and fashion as "[t]he ultimate crossover — one for both the fashion and art history books.").
176. *See* Jacobs, *supra* note 79 (observing the positive outcome of inviting an artist to help redesign an iconic fashion symbol).
177. *See Fashion Originators Guild*, 114 F.2d at 82 (discussing the Guild's collective refusal to purchase or sell designs that have been copied from the Guild's original designs); *see also Millinery Creator's Guild*, 312 U.S. at 472 (comparing the similarities between the collective refusal practices of the Millinery Creator's Guild and the Fashion Originator's Guild).
178. *See* AREEDA, KAPLOW & EDLIN, *supra* note 92, at 50 (noting that both the Sherman Act and the Clayton Act confer jurisdiction upon the federal courts to "prevent and restrain [anticompetitive] violations.").
179. *See e.g. Fashion Originators Guild*, 114 F.2d at 85; *see also Millinery Creator's Guild*, 312 U.S. at 472.

anti-competitive behavior in the fashion industry, one could argue that a clandestine monopoly exists today in the retail store of Forever 21, Inc.

Since its inception, Forever 21 has copied designs and sold these recreations at a much lower price than its competitors' originals.[180] Moreover, as of 2007, more than a dozen copyright infringement lawsuits have been filed against Forever 21 for its display of design piracy, with many more being filed under trademark and trade dress infringement.[181] Even with the plethora of lawsuits it is facing, Forever 21 is growing in popularity with North American consumers.[182] Yet, for many fashion designers, engaging in a lawsuit against this design piracy tycoon is as ineffective as small business owners combating Wal-Mart.[183]

The similarities between Forever 21 and Wal-Mart are illustrated by the monopolistic structures of its business plans that act as artificial barriers to the production of a product.[184] In the case of Wal-Mart, small business owners struggle to enter the market because of the higher quantities of low cost products that Wal-Mart has to offer.[185] For fashion designers, once their goods

180. *See* Koyen, *supra* note 116 (characterizing Forever 21 as a dispenser of semi-disposable clothing with recent designs on the runway, such as a Gucci design priced at $24.80, being immediately available on the shelves before the originals).

181. *See* Complaint, *supra* note 111 (setting out designer Diane Von Furstenberg's lawsuit against Forever 21 for copyright infringement); Complaint, *supra* note 113 (setting out designer Anna Sui's lawsuit against Forever 21 for copyright and trademark infringement); Trial Motion Memorandum, *supra* note 115 (demonstrating retail store Anthropologie's lawsuit against Forever 21 for copyright and trade dress infringement).

182. *See* Koyen, *supra* note 116 (summarizing Forever 21's revenue in 2006 as topping $1 billion thereby pushing the retail store into the forefront of the top 500 private companies held in the United States).

183. *See* Lynn, *supra* note 106 (addressing Wal-Mart's growth as a monopoly power thereby forcing small businesses and consumer retailers to surrender their market place decisions to the largest retailer).

184. *See* AREEDA, KAPLOW & EDLIN, *supra* note 105, at 15 (reasoning that barriers to entry "may obstruct not only the entry of new firms but also the expansion of smaller incumbents.").

185. *See* Lynn, *supra* note 106 (delineating the list of small business owners who have collapsed due to Wal-Mart's power, such as Vlasic Foods, Pillowtex, Schwinn and Lovable Garments).

are introduced into the market, they struggle to compete with Forever 21's mass production of their product.[186] By acting as a barrier to entry into the marketplace, Forever 21 aggravates an essential condition of the perfect competition model in antitrust —every producer has equal access to all input markets.[187]

Although both businesses have a market for mass production, the differences between Wal-Mart and Forever 21 result in a fairly weak antitrust argument. For one, Wal-Mart's focus is on providing mainstream products at a higher quantity with a cheaper price whereas Forever 21 provides high fashion products at a cheaper price.[188] Also, the mainstream commerce of Wal-Mart is in stark contrast with the fashion industry of Forever 21 because competition in the fashion industry is based on the value of the design as it appears to consumers rather than the price.[189]

The antitrust argument fails because the creative independent labor inherent in fashion designs is much different than the mass production of goods. Furthermore, past judicial consistency indicates that, as a matter of public policy, courts have been wary to grant monopolies to uncopyrighted works.[190] These failures in the antitrust argument suggest that for adequate protection, designers must rely on copyright law. Fashion designs must first be copyrighted if designers have any hope in prevailing on an antitrust claim against Forever 21 in the future.

186. *See Hearing*, *supra* note 14 (statement of Susan Scafidi, Visiting Law Professor, Fordham University Law School) (recognizing the plight of aspiring designers as struggle each season to create and promote their designs before they are copied by established design pirates).

187. *See* AREEDA, KAPLOW & EDLIN, *supra* note 105, at 5 (defining a prong of perfect competition as "[e]very producer [having] equal access to all input markets....").

188. *See* Lynn, *supra* note 106; *see also* Lopser, *supra* note 106.

189. *See* Lynn, *supra* note 106; *see also* Lopser, *supra* note 106.

190. *See Fashion Originators Guild*, 114 F.2d at 85 (finding that the Guild, in preventing retailers from purchasing goods they deemed pirated by withholding their members' goods, created an unlawful monopoly and the Commission properly disbanded it).

D. Design Piracy Prohibition Act: Almost Runway Worthy

Legal fashion advocate Susan Scafidi once observed that the "Design Piracy Prohibition Act represents the cutting edge of intellectual property protection, narrowly tailored to suit a seasonal industry."[191] By allowing fashion reform legislation to materialize, Congress suggests that it is willing to discuss the effects that extending copyright protection to fashion designs will have on intellectual property and the fashion industry.[192] The role of Congress in the realm of copyright is to strike a balance between creating an incentive to innovate for authors and allowing access to ideas and expressions.[193] In the past, Congress has utilized its power to expand the interpretation of useful articles and with persuasive arguments; therefore, it is likely to include fashion designs in its definition.

Since fashion designs are not copyrightable, advocates of fashion reform legislation lament that the United States does not adhere to the same level of copyright protection for fashion designs that other countries, such as France and India, are granting.[194] During the congressional hearings, the arguments that fashion moves much faster than the procedural demands of copyright law persuaded the congressional committee to dismiss

191. *See* Susan Scafidi, *March on Washington 2: Project Beltway*, COUNTERFEIT CHIC BLOG, *archived at* http://www.webcitation.org/5tSIjGRbh (May 6, 2009) (highlighting the role of fashion in the legal realm with a blog by Susan Scafidi, Visiting Law Professor, Fordham University Law School).

192. *See* Design Piracy Prohibition Act, H.R. 5055, 109th Cong. (2006); *see also* Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); *see also* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).

193. *See* Garon, *supra* note 12, at 1358-59 (focusing on the idea that education and clarifying ideas are the primary components for adopting a widespread copyright policy).

194. *See Hearing, supra* note 14, at 11 (statement of Jeffrey Banks, Fashion Designer) (explaining that "[o]ther countries have recognized the problem and provided protection for fashion design to help counter design piracy. The United States is the only developed country that does not protect fashion in its laws."); *see also Hearing*, *supra* note 14, at 84 (statement of Susan Scafidi, Visiting Law Professor, Fordham University Law School) (stating that "[t]he 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.").

prior versions of the reform.[195] Furthermore, the time spent determining the substantial similarity of the designs and assessing the overall originality of the design outweighed the policy arguments behind extending copyright protection to fashion designs.[196]

While Congress should be wary of allocating the suggested time-consuming resources to protecting fashion designs, the contrary argument is that the tests for determining substantial similarity of the designs and determining overall originality have already been set forth by the judicial system.[197] Assuming that Congress grants copyright protection to fashion designs, case law describes the two-prong prima facie case for copyright infringement that can address the enforcement of design piracy issues.[198]

Based on the prima facie case, the courts would utilize the substantial similarity tests described in the case law to determine whether there has been copying in fact of the design and whether the designs are substantially similar.[199] Furthermore, the substantial similarity standard set forth in the Design Piracy Prohibition Act is consistent with this case law thereby alleviating some of the concern surrounding the time restraint.[200]

There is another argument that failure of the legislation is a result of the speculation surrounding the language used in the reform. Despite the testimonial hearings proposed by both

195. *See Hearing, supra* note 14, at 18 (statement of David Wolfe, Creative Director, Doneger Creative Services) (suggesting that the time and expense of depositions and injunctions would slow the rapid pace of the fashion industry thereby reducing profitability of the industry).

196. *See Hearing, supra* note 14, at 19 (statement of David Wolfe, Creative Director, Doneger Creative Services) (noting that "[b]y the time a design is determined to be or not be infringing, the market place will have moved on and new trends will have emerged.").

197. *See Krofft*, 562 F.2d at 1164; *see also Nichols* 45 F.2d at 123; *see also Arnstein* 154 F.2d at 468.

198. *See Castle Rock Entertainment*, 150 F.3d at 137 (noting that the two main components of the prima facie case for infringement as: "a plaintiff must first show that his work was actually copied …. [and] then must show that the copying amounts to an improper or unlawful appropriation.").

199. *See id.*

200. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).

opponents and advocates of fashion design legislation, members of Congress dismiss the reform, in part, for its lack of specificity in the language. Even with legal scholars affirming that the substantial similarity standard described in the reform is consistent with case law, Congress still implies that these judicially-constructed definitions are unclear standards because the scope of interpretation is broad.

This implication further suggests that although the current version of the Design Piracy Prohibition Act provides new elements to the legislation that are more effective than those in previous versions, the language of the current legislation may still not be enough for copyright protection. This begs the question that if the language of the bill were more detailed, precise and unambiguous, would Congress be more willing to include fashion designs under the protection of copyright law?

E. Letting the Legislative Seams Out: Going Global

The 2009 version of the Design Piracy Prohibition Act narrowly defines the term fashion design.[201] This differs from the definition of fashion design in France's copyright law that defines the scope of the term in relation with the entire fashion industry.[202] Rather than referencing specific portions of the

201. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009) (defining fashion design as "the appearance as a whole of an article of apparel, including its ornamentation; and includes original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated into the overall appearance of the article of apparel.").

202. *See* Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle [Law No. 92-597 of July 1, 1992 on the Intellectual Property Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 1, 1992 (amended by Loi 97-283 du 27 mars 1997 [Law No. 97-283 of March 27, 1997]), *archived at* http://www.webcitation.org/5omBgNg3q The French law defines fashion design as:

[C]reations of the seasonal industries of dress and articles of fashion. Industries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of articles of fashion and of footwear and the manufacture of fabrics for upholstery shall be deemed to be seasonal industries. *Id.*

fashion industry such as clothing, handbags and eyeglass frames, a fashion design is more likely to receive broader protection if defined within the scope of the entire industry.[203]

For example, France provides a more nuanced definition of fashion design by including the element of high fashion dressmaking.[204] The U.S. reference to high fashion couture in its description of fashion would provide further support for the policy argument behind fashion as wearable art.[205] There is strong evidence that the emergence of wearable art in France furthered the strength of the copyright protection granted to French designers and this evidence illustrates the benefit U.S. designers will achieve with this policy argument.[206]

Furthermore, the current standard of infringement for the Design Piracy Prohibition Act is "reasonable grounds to know that protection for the design is claimed."[207] Still, one could argue that the current standard of infringement would fare better

203. Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009) (defining apparel within fashion design in a separate section indicating the meaning as "an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear; handbags, purses, wallets, duffel bags, suitcases, tote bags, and belts; and eyeglass frames.").

204. *See* Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle [Law No. 92-597 of July 1, 1992 on the Intellectual Property Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 1, 1992 (amended by Loi 97-283 du 27 mars 1997 [Law No. 97-283 of March 27, 1997]), *archived at* http://www.webcitation.org/5omBgNg3q.

205. *See* Ryan, supra note 69, at 3 (articulating that today's fashion has become wearable art); *see also* Hearing, *supra* note 14, at 81 (statement of Susan Scafidi, Visiting Law Professor, Fordham University Law School) (noting the dramatic attitude change toward fashion designing by proclaiming that "[i]nstitutions from the Smithsonian to Sotheby's take fashion seriously, and organizations like the National Arts Club and the Cooper-Hewitt National Design Museum have recently added fashion designers to their annual categories of honorees.").

206. *See* Amy M. Spindler, *Company News; A Ruling by French Court Finds Copyright in a Design*, N.Y. TIMES (May 19, 1994), *archived at* http://www.webcitation.org/5oqNoNBcv. The article describes the controversy surrounding fashion designer Yves Saint Laurent's copyright infringement lawsuit against Ralph Lauren for a black tuxedo dress. *Id.* The court held that there was a copyright in the design and therefore awarded Yves Saint Laurent a total of $395,090 in damages as well as the seizure and impoundment of the infringing goods. *Id.*

207. Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).

under India's standard that defines infringement as "knowing that the design or any fraudulent or obvious imitation of [the design] has been applied to any [class]" where the design is protected.[208]

Although both standards focus on factors including copying for the purpose of sale, importing and a degree of knowledge, India's standard with the element of knowledge serves as a much higher standard of protection in comparison with the proposed U.S. standard of reasonable grounds.[209] In light of its historical skepticism of granting copyright protection to fashion designs, perhaps advocates believe that a middle ground standard of infringement would be more appealing to Congress. However, the most dramatic evidence is the number of copyright infringement lawsuits that fashion designers have won under India's high standard of infringement.[210]

On the other hand, the Design Piracy Prohibition Act does extend liability to secondary infringers.[211] Due to the significant labor of mass-producing goods in the fashion industry, most pirates are not individual designers but rather large corporations such as Forever 21.[212] Under this standard, these corporations would be held liable as secondary infringers and would be

208. *See* The Design Act, 2000, No. 16, Acts of Parliament, 2000 (India), *archived at* http://www.webcitation.org/5omB4b5qm.

209. *See id.*; *see also* Rajesh Masrani v. Tahiliani Designs, I.A. No. 393/2008, *archived at* http://www.webcitation.org/5oqOClRos. Tarun Tahiliani also filed a lawsuit against designer Rajesh Masrani claiming copyright infringement of his fabric prints. *Id.* The Dehli High Court compared Masrani's fabric swatches to Tahiliani's and held that the color, design and distinctive details of the print upon the lace background were far too similar for Masrani to have created his designs independently. *Id.*

210. *See* Tahiliani Design v. Renu Tandon, I.A. No. 12813/2008, *archived at* http://www.webcitation.org/5tTnZHYad. The case describes how fashion designer Tarun Tahiliani filed a copyright infringement lawsuit against designer Renu Tandon for selling and manufacturing garments that were copies of his original collection for 2006. *Id.* The Delhi High Court acknowledged the similarities between the garments as illustrated in the photographs and ordered Renu Tandon to refrain from further reproduction and distribution of these garments. *Id*

211. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).

212. *See* Koyen, *supra* note 116 (describing the fashion production cycle by comparing the three month design-to-rack process of retailers such as Old Navy and Urban Outfitters with the few weeks it takes Forever 21).

subject to monetary penalties if infringement were proven.[213] Since we have noted the failures in issuing an antitrust claim against corporations of this nature, it is beneficial protection for fashion designers to have the added advantage of exercising secondary liability claims.

Whether Congress will extend copyright protection to fashion designs is unclear; but there is a strong argument that Congress will be less wary of reform if the language adopts elements from countries with strong copyright law. Furthermore, with the dramatic evidence of successful copyright infringement lawsuits in countries with clarified reform law, it is becoming clear that higher standards of infringement and specificity in defining terms is advantageous to fashion designers without detrimentally affecting the industry.

V. Conclusion

Fashion designs have not yet been granted the right of copyright protection, allowing design pirates to continue capitalizing on a designer's creativity. In the past few years, the many attempts to pass fashion design legislation illustrates that Congress will eventually respond to lobbyists efforts. Nevertheless, to prevent further delay and before drafts of another form of legislation reach Congress, it is important to acknowledge why the previous versions have failed and what changes could be made.

Similar to other forms of copyright protection, the uncertainty in the standards is inevitable. More importantly, since the introduction of fashion design legislation, these uncertainties are the prime source of wariness and confusion for Congress. Two main concerns in legislation are language and interpretation. Clarifying both of these aspects with clear definitions and explanatory standards will alleviate some of the confusion. Moreover, utilizing elements from countries with

213. *See* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).

strong copyright protection for fashion designs may be the evidentiary push that Congress needs.

The end product of copyright protection is statutory but the means are very much policy- based. Recognizing the policy aspects of granting such copyright protection will not only harmonize U.S. copyright law with international law but will also give fashion designers the protection they deserve. The economic arguments positing the piracy paradox are persuasive; however, a nuanced understanding of these recommendations demonstrates that copyright protection will not damage the industry as a whole but rather create a balance between originators. As fashion advocates move forward with fashion design reform, it is important to maintain a balance between appealing to Congress and accommodating social policy.