

IS FASHION AN ART FORM THAT SHOULD BE PROTECTED
OR MERELY A CONSTANTLY CHANGING MEDIA
ENCOURAGING REPLICATION OF
POPULAR TRENDS?

I. INTRODUCTION

“In fashion, one day you’re in and the next you’re out.”¹ This renowned expression reflects the constant state of flux that is apparent in the fashion industry.² Designers continuously strive to produce new lines and products to represent society’s desires.³ These designers rack their minds each season hoping to create the new “it” products, which are ultimately prone to being copied.⁴ Numerous knockoffs inevitably emerge on the market, making designs available at low prices and allowing the knockoffs to amass high volume sales.⁵

The knockoff industry targets consumers who do not want to pay high prices for designer merchandise.⁶ This gives the average consumers a chance to own the “in” designs and trends at a bargain price.⁷ Despite most Americans’ familiarity with this vicious cycle, with some even considering it the norm, its occurrence in other “artistic” fields, such as cinema, music, or literature, would be appalling.⁸

1. *Project Runway* (Bravotv 2004).

2. *See id.* (representing fashion as constantly changing).

3. *See* James Surowiecki, *The Piracy Paradox*, THE NEW YORKER, Sept. 24, 2007, available at http://www.newyorker.com/talk/financial/2007/09/24/070924ta-talk_surow-iecki (recognizing designers’ constant need to create new ideas).

4. *See* Brandon Scruggs, Comment, *Should Fashion Design Be Copyrightable?*, 6 NW. J. TECH. & INTELL. PROP. 122, 134 (2007), available at <http://www.law.northwestern.edu/journals/njtip/v6/n1/7/Scruggs.pdf> (“Knock off fashion designs are typically of lesser quality than original fashion designs.”).

5. *See* Brian Hilton, Chong Ju Choi & Stephen Chen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 J. BUS. ETHICS 345, 345 (2004) (discussing mass sales of counterfeit industry). The counterfeit industry has been profitable because it provides cheaper versions of the “in” trends at inexpensive prices. *See id.* (discussing profitability of counterfeit industry).

6. *See id.* (defining appeal of knockoff industry as its ability to make high fashion trends readily available at low costs).

7. *See* Surowiecki, *supra* note 3 (“[Knockoffs] are, for the most part, targeted at an entirely different market segment—people who appreciate high style but can’t afford high prices.”).

8. *See* Fashion Police: Betty and Veronica on the Beat <http://counterfeitichic.com/2009/06/the-cover-may-suggest-a.html> (June 26, 2009) (noting that controversies over knockoffs in fashion industry are seeping into other facets of society).

Even though all aspects of the fashion industry imply that fashion is a form of art, fashion designers cannot escape an early identification, categorizing fashion as the work of artisans.⁹ Due to fashion products' artisan classification, historically designers did not receive intellectual property protections.¹⁰ Despite recent acceptance of fashion as an art form, fashion designers are still unable to escape the artisan stigma, preventing them from achieving the full breath of intellectual property (IP) protections afforded to other artistic fields.¹¹ In the absence of IP protection, the knockoff industry thrives.¹²

Although some commentators suggest that the knockoff and counterfeit industry hinder the fashion industry, this view neglects to consider that the knockoff industry reflects current socioeconomic trends within our culture.¹³ Harboring within the knockoff versus original debate are social undercurrents.¹⁴ This phenomenon reflects the storyline ingrained throughout history: the desire of the masses to enter into the world of the elite upper class.¹⁵ Knockoff fashion designs help those who yearn to fit into popular social models by providing the "in" trends at a reduced cost.¹⁶

Although a controversy exists over whether knockoffs truly harm the fashion industry, deterring sales of high priced original

9. See J. H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1149-52 (1983) (categorizing fashion as works of artisans despite apparent artistic elements). Fashion designers implement elements of art into their work; however, the original categorization of fashion as the work of artisans has prevented designers from achieving IP protections granted to other artists. See *id.* (implying fashion cannot escape artisans connotations). For a further discussion of the distinction between artists and artisans, see *infra* notes 69-78 and accompanying text.

10. See Peter K. Schalestock, Comment, *Forms of Redress for Design Piracy: How Victims Can Use Existing Copyright Law*, 21 SEATTLE U. L. REV. 113, 131 (1997) ("The line between art and apparel can be a fine one;" however, due to fashion's artisan classification, fashion designers were denied traditional IP protections).

11. See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1689 (2006) (noting fashion designers do not receive full intellectual property protections over their designs).

12. See *id.* (illuminating knockoff products' ability to produce high volume sales).

13. See *id.* at 1718-20 (describing clothing as status-conferring good).

14. For a further discussion on the influence of socioeconomics in the fashion industry, see *infra* notes 148-156 and accompany text.

15. For a further discussion of fashion trends trickling down the social ladder, see *infra* notes 148-156 and accompany text.

16. See Raustiala, *supra* note 11, at 1687-1776 (detailing impact of knockoff fashion in society); see also Lawrence C. Lockley, *Styles in Fashion and Marketing Scholarship: A Cautionary Note*, 32 J. MARKETING 52, 52-54 (1968) (examining effects of knockoff fashion within society).

items, piracy has become an undeniably prominent force in the industry.¹⁷ Fashion magazines seemingly promote knockoffs by devoting sections to enlighten readers on ways to acquire the latest trends at the lowest prices.¹⁸ Marie Claire's "Splurge vs. Steal" section is one such example.¹⁹ In this section, readers are told where they can purchase the hottest looks without spending the high prices of the high-end designer merchandise.²⁰ In fact, according to the Worldwide International Chamber of Commerce Department, the knock-off clothing industry's estimated sales equate to \$350 billion, or five percent of total United States clothing market.²¹

If the fashion industry was afforded greater IP protection, individuals who cannot afford the high-end original products would be without recourse.²² This would ultimately result in a greater social divide between the upper and lower classes.²³ Adopting the proposed regulation to outlaw knockoff merchandise will be an "uphill battle, since many shoppers see nothing wrong with knock-offs, especially as prices for designer goods skyrocket. Some even argue

17. See Raustiala, *supra* note 11, at 1687-1776 (discussing piracy paradox). The piracy fashion industry is blamed for hindering sales of original designs; however, piracy is also a positive function within society, allowing individuals to purchase the "in" trends at affordable prices. See *id.* (tracking effect of fashion piracy in society); see also James D. Nguyen & Heidi L. Belongia, *Copyright in Vogue: The Proposed "Design Piracy Prohibition Act,"* FOLEY & LARDNER LLP, 2006, http://www.foley.com/files/tbl_s31Publications/FileUpload137/3557/Copyright%20in%20Vogue.pdf (last visited Mar. 28, 2010) (illuminating conflict over design piracy).

18. See MarieClaire.com, "Splurge vs. Steal," <http://www.marieclaire.com/fashion/tips/splurge-vs-steal/> (last visited Mar. 28, 2010) (comparing prices of pricey originals and cheaper knockoffs).

19. See *id.* (displaying originals and knockoffs side-by-side to illuminate comparisons of products).

20. See Christine Cox & Jennifer Jenkins, *Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property*, NORMAN LEAR CENTER/ENTERTAINMENT, Jan. 9, 2005, at 4-5, available at <http://www.learcenter.org/pdf/RTSJenkinsCox.pdf> (suggesting acceptance of knockoff fashion); see also Raustiala, *supra* note 11, at 1705-15 (depicting splurge versus steal merchandise).

21. See Hilton, *supra* note 5, at 345 (discussing knockoff retailers accounting \$350 billion worth of sales); see also Iccwbo.org, What is BASCAP?, International Chamber of Commerce, <http://www.iccwbo.org/bascap/id883/index.html> (last visited Mar. 28, 2010) ("[T]he total magnitude of counterfeiting and piracy worldwide is well over US\$ 600 billion."). Business Action to Stop Counterfeiting and Piracy (BASCAP) was organized by the International Chamber of Commerce as a means to help counteract piracy and counterfeiting within the international world. See *id.* (explaining need for BASCAP). It hopes to strengthen IP protections as well as promote awareness of counterfeiting and piracy within society. See *id.* (defining objectives of BASCAP).

22. See Surowiecki, *supra* note 3 (looking at potential impact of increased IP protection).

23. See *id.* (pointing out possible effects of greater IP protections on social classes).

copies improve fashion, because they encourage designers to continuously invent new wares to stay ahead of the game.”²⁴ The knockoff versions provide fashion followers with the ability to maintain their allegiance to fashion trends, especially in the current economic crisis, where individuals do not have spare money to spend on the elite fashion designers like Christian Louboutin, Chanel, Herve Leger and Dior.²⁵

This Comment analyzes the impact of piracy within society.²⁶ Section I outlines the debate surrounding the demand for increased IP protection within the fashion industry.²⁷ Section II expands on this debate by discussing the background of IP

24. Eric Wilson, *Cut and Copy*, BRISBANETIMES.COM.AU, Sept. 13, 2007, <http://www.brisbanetimes.com.au/news/fashion/cut-and-copy/2007/09/11/1189276718079.html>. Buyers enjoy finding affordable trends and neglect to consider the intellectual property rights which are at risk. *See id.* (asserting consumers value ability to buy trends at reduced prices and do not consider IP laws).

25. The 2008-2009 economic crisis has left individuals trying to conserve money and cut back on purchases. Individuals have become less willing to frivolously spend large sums of money and have caused sales in many stores to dwindle. *See What Sells During An Economic Downturn*, JC REPORT, Nov. 4, 2008, <http://www.jcreport.com/intelligence/wwwkirnazabetecom/041108/what-sells-during-economic-downturn> (“Women’s Wear Daily reported that US retailers are cutting orders by an average of 10-15% due to the economic climate.”). *See generally Why Louis Vuitton Handbags will survive the Economic Downturn*, Sept. 2, 2009, <http://www.six-star-replicas.com/Articles/Why-Louis-Vuitton-handbags-will-survive-the-economic-downturn.htm> [hereinafter Louis Vuitton Article].

In the current economic condition, you see job cuts and falling stock prices everywhere you look. Everyone is scrambling to cut back on their monthly spending We have convincing reasons to believe that the Louis Vuitton handbag, consistently a hallmark of quality and prestige, will certainly survive this economic crisis.

. . . .
 . . . [S]tatus is not optional even during bad times.

. . . .
 Other less prestigious brands will suffer because they are unable to draw sales dollars from consumers, rich or middle class

Id. *See also* Michael Howie, *World’s First ‘Digital Recession’ Set To Create Explosion in Online Fakes*, NEWS.SCOTSMAN.COM, Apr. 16, 2009, <http://news.scotsman.com/uk/World39s-first—39digital-recession39.5174808.jp> (discussing increase of counterfeiting during recession).

Some of the UK’s biggest brands are facing an explosion in fake goods as online counterfeiters cash in on the recession

. . . .
 The research, by intellectual property firm Marks & Clerk, found that 97 per cent of businesses believe that counterfeiting will increase in the recession, while 80 per cent believe businesses will be at “much greater risk” than in previous downturns due to the growth of the internet.

Id.

26. For a further discussion of piracy, see *infra* notes 98-212 and accompanying text.

27. For a further discussion of the introduction to the piracy debate, see *supra* notes 2-25 and accompanying text.

regulations within the fashion industry, looking at current application of IP laws within this field.²⁸ Next, Section III examines the effect of piracy.²⁹ By examining piracy's impact on the fashion industry, Section III introduces an analysis of the piracy debate and addresses the pros and cons of piracy in the fashion industry.³⁰ Section IV concludes this Comment with a look at whether piracy harms society, thus requiring improved regulation, or whether increased IP protections would place a toll on individuals attempting to follow fashion trends.³¹ Section IV ultimately asserts that we should not merely view piracy within the microcosm of the fashion world, but should extend our perception to include a look at piracy's effect on the world as a whole, illustrating the impact piracy has on society.³²

II. BACKGROUND: UNDERSTANDING CURRENT INTELLECTUAL PROPERTY REGULATIONS IN THE FASHION INDUSTRY

A. The Beginning of IP Law in Fashion

When drafting the Constitution, the founding fathers included protections for artists' creations.³³ Article I, Section 8, Clause 8 spe-

28. For a further discussion of background information of intellectual property law in the fashion industry, see *infra* notes 33-97 and accompanying text.

29. For a further discussion of effect of piracy, see *infra* notes 98-212 and accompanying text.

30. For a further discussion of the harm which piracy causes in the fashion industry, see *infra* notes 98-212 and accompanying text.

31. For a further discussion of the toll piracy has on society, see *infra* notes 213-218 and accompanying text.

32. For a further discussion of the ultimate effects of fashion piracy, see *infra* notes 213-218 and accompanying text.

33. See generally U.S. CONST. art. I, § 8, cl. 8 (creating intellectual property law). It is apparent that IP rights were important concepts for our founding fathers. See *id.* (suggesting importance of IP protection within Constitution); see also Norman L. Balmer, Note, *Fashionable IP or IP for Fashion?*, 65 WASH. & LEE. L. REV. 275, 275-76 (2008) (discussing Constitutional intent to protect intellectual property rights); U.S. Supreme Court Center, Copyrights and Patents, JUSTIA.US, <http://supreme.justia.com/constitution/article-1/40-copyrights-and-patents.html> (last visited Mar. 28, 2010) (addressing background aspects, including scope and purpose, behind creation of Article I, Section 8, Clause 8 of the U.S. Constitution).

This clause is the foundation upon which the national patent and copyright laws rest, although it uses neither of those terms. So far as patents are concerned, modern legislation harks back to the Statute of Monopolies of 1624, whereby Parliament endowed inventors with the sole right to their inventions for fourteen years. Copyright law, in turn, traces back to the English Statute of 1710, which secured to authors of books the sole right of publishing them for designated periods. These English statutes curtailed the royal prerogative in the creation and bestowal of monopolistic privileges, and the Copyright and Patent Clause similarly curtails congressional power with regard both to subject matter and to the purpose and duration of the rights granted. Its power is limited with regard both

cifically states that Congress must “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.”³⁴ This constitutional protection gives rise to IP rights protecting the work and endeavors of artists.³⁵

IP, “a form of intangible property,” safeguards ideas that are “unlike other property, in that, when the originator passes the ideas to a second party, both can enjoy its benefits.”³⁶ This aspect of property protection ensures that innovative ideas and concepts are rightly credited.³⁷ Congress grants IP protections through patents, trademarks, trade dress, and copyrights.³⁸

Due to the lax application of IP law within the fashion industry, designers’ works are constantly copied and replicated.³⁹ Current IP law protections for the fashion industry only afford “protection to surface decoration, fabric design, and labels, U.S. law is woefully incomplete when it comes to protection of the ‘soul’ of the clothing design, the cut, and overall appearance.”⁴⁰ Because of this low level of IP protection, IP law in the fashion industry does not ensure pro-

to subject matter and to the purpose and duration of the rights granted. Only the writings and discoveries of authors and inventors may be protected, and then only to the end of promoting science and the useful arts. The concept of originality is central to copyright, and it is a constitutional requirement Congress may not exceed. While Congress may grant exclusive rights only for a limited period, it may extend the term upon the expiration of the period originally specified, and in so doing may protect the rights of purchasers and assignees.

Id. (footnotes omitted).

34. U.S. CONST. art. I, § 8, cl. 8.

35. See Hal R. Varian, *Why that Hoodie Your Son Wears Isn’t Trademarked*, N.Y. TIMES, Apr. 5, 2007, <http://www.nytimes.com/2007/04/05/business/05scene.html> (last visited Mar. 28, 2010) (granting innovators exclusive right to writing and discoveries, Congress hoped to provide incentives for individuals to engage in innovation).

36. John D. Mittelstaedt & Robert A. Mittelstaedt, *The Protection of Intellectual Property: Issues of Origination and Ownership*, 16 J. PUB. POL’Y & MARKETING. 14, 15 (1997).

37. See U.S. CONST. art. I, § 8, cl. 8 (giving rise to intellectual property protections within artistic fields). The Constitution values individuals’ works and affords them adequate protection. See *id.* (affording intellectual property protections to creators).

38. See 17 U.S.C. Ch. 1-13 (2008) (outlining copyright protections).

39. See Lisa Pearson, Lauren Estrin & Ling Zhong, *In Vogue: IP protection for Fashion Design*, COPYRIGHT WORLD ISSUE 169, (2007), available at <http://www.kilcody.com/publications/downloads/LisaPearsonCopyrightWorld.pdf> (expressing fact that fashion designs are constantly copied).

40. Anne Theodore Briggs, *Hung out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT L.J. 169, 213 (2002); see also Scruggs, *supra* note 4, at 129 (discussing copyrights of fabric patterns such as Burberry plaid).

tections against pirated and knockoff products.⁴¹ Despite this, some designers have found ways to use copyright,⁴² trademark,⁴³ and patent⁴⁴ as mechanisms to prevent copies of their designs from appearing in the mass market.⁴⁵

1. *Copyright*

Copyright protections were traditionally denied to the art of apparel designs.⁴⁶ They were limited to the protection of “‘useful articles’ that makes the article’s appearance attractive or distinctive to the buying public.”⁴⁷ These useful articles were defined to have an intrinsic utilitarian function that went beyond the mere appearance of the article.⁴⁸ Therefore, copyright laws have only been able to translate to protection of fabric patterns, drawings and photographs on clothes, as they were believed to constitute useful designs.⁴⁹ The Copyright Act of 1976 extended copyright protection exclusively to “literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures, other audiovisual works, and

41. See Raustiala, *supra* note 11, at 1695 (discussing that current IP law grants little protection against knockoffs).

42. For a further discussion of copyrights, see *infra* notes 46-52 and accompanying text.

43. For a further discussion of trademarks, see *infra* notes 53-59 and accompanying text.

44. For a further discussion of copyrights, see *infra* notes 60-63 and accompanying text.

45. See Susan Scafidi, *F.I.T.: Fashion as Information Technology*, 59 SYRACUSE L. REV. 69, 82-87 (2008) [hereinafter Scafidi, *F.I.T.*] (“[T]he fashion industry has instead over the past century turned to existing areas of intellectual property law that can be extended to some of the individual elements related to a fashion design.”); see generally, Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELL. PROP. INFORMATION WEALTH 115 (Peter K. Yu ed., 2006) (illustrating current intellectual property protection at work).

46. See Scafidi, *F.I.T.*, *supra* note 45, at 83 (noting copyright protection is available for labels and logos but traditionally denied for underlying fashion design of garment).

47. Biana Borukhovich, Note, *Fashion Design: The Work of Art That Is Still Unrecognized in the United States*, 9 WAKE FOREST INTELL. PROP. L.J. 155, 164 (2008) (citing 17 U.S.C. § 1301(a)(1) (2008)).

48. See 17 U.S.C. § 101 (2008) (detailing effect of copyright protections). “A useful article is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” *Id.* See Borukhovich, *supra* note 47, at 2 (discussing useful articles); see also Shelley C. Sackel, *Art Is In The Eye Of The Beholder: A Recommendation For Tailoring Design Piracy Legislation To Protect Fashion Design And The Public Domain*, 35 AM. INTELL. PROP. L. ASS’N; Q.J., 473, 494-95 (2007) (suggesting copyright protection did not extend to fashion industry).

49. See Sackel, *supra* note 48, at 495 (comparing artistic fields protected by copyright against those that are not).

sound recordings.”⁵⁰ Nevertheless, copyright protections have been extended to works that have not been traditionally protected.⁵¹ Congress, however, has yet to apply full IP protections to the fashion industry.⁵²

2. *Trademark*

Generally, trademarks do not protect the goods themselves, but rather serve to protect the brand, preventing individuals from outright counterfeiting – passing products off as other brands.⁵³ Fashion designers have found some safe haven in recognizing trademarks’ ability to hinder copying.⁵⁴ In using visible logos, designers are able to achieve heightened IP protection to prevent against copyist.⁵⁵ Thus, designers have been known to implement their trademarks on their clothing, which will help ensure protection against knockoff merchandise.⁵⁶ Consumers are still willing to

50. Safia A. Nurbhai, *Style Piracy Revisited*, 10 J.L. & POL’Y 489, 494 (2002) (quoting 17 U.S.C. § 102 (2008)).

51. *See* Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980) (allowing designer to obtain copyright for belt-buckle because buckle was viewed as separable from buckle’s utilitarian function). The Second Circuit concluded that the belt buckle employed by Kieselstein-Cord was able to be copyrighted because it has a separate identity from its mere design, allowing Kieselstein-Cord to be victorious in a copyright lawsuit. *See id.* (illustrating Second Circuit’s logic in granting copyright protection to Kieselstein). *See* Lisa Hedrick, Note, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215, 238-39 (2008) (asserting Congress enacted Vessel Hull Design Protection Act in 1998 providing protection to design of vessel hulls).

52. *See generally* 17 U.S.C. Ch. 1-13 (2008) (overlooking IP protection to fashion design). *But see* Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009) *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=h111-2196> [hereinafter Design Piracy Prohibition Act, H.R. 2196] (seeking to amend title 17 of U.S.C. to extend IP protection within fashion industry).

53. *See* Schalestock, *supra* note 10, at 116 (defining trademark protection).

54. *See, e.g.*, Louis Vuitton Malletier v. Dooney & Bourke, 454 F.3d 108 (2d Cir. 2006) (alleging Dooney & Bourke infringed upon Louis Vuitton’s monogrammed initial multicolored handbag with initials); Coach Leatherware Co. v. Ann Taylor, 933 F.2d 162 (2d Cir. 1991) (finding trademark infringement against Ann Taylor for replication of hang tag); River Light V, L.P. v. Wanted Stores, Inc., No. 1:07-cv-02038-WHP (2007) (declaring Tory Burch filed suit for trademark infringement, false designation of origin, false advertising, common law trademark infringement and unfair competition in violation of laws of United States and New York laws).

55. *See* Scafidi, *F.I.T.*, *supra* note 45, at 83 (suggesting visible logos enhance protections against copyists).

56. *See id.* (acknowledging designers employ trademarks on their clothing in hopes to better protect their designs from infringements). Most designers have achieved this through implementing specific logo or images on their designs which allows buyers to easily identify the brands. Examples of trademarks include the polo player on the horse for Ralph Lauren, the double Cs for Chanel, and Burberry plaid for Burberry.

pay for a trademarked version even after knockoffs emerge on the market.⁵⁷ Additionally, designers have also been able to use trade dress, a subset of trademark protections, to assert protection over “the total image of a product . . . such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.”⁵⁸ The use of trade dress has enabled designers to incorporate distinct elements into their work that allows their products to maintain individuality and enhance one’s desire to purchase the original product.⁵⁹

3. Patents

The use of patents in the fashion industry has been sparse as they are limited to “utilitarian inventions or ornamental designs” that are novel and non-obvious.⁶⁰ Patent protection for fashion designs is usually achieved via utility patents and design patent protections.⁶¹ Although patents enhance protections against copies, patents within the fashion industry are rare, as many apparel designs are re-workings of original designs and unable to meet the “new” standard that is required by patent law.⁶² Additionally, the

57. See Cindy Clark, *Christian Louboutin’s Red-Soled Shoes are Red-Hot*, USA TODAY, Dec. 25, 2007 available at http://www.usatoday.com/life/lifestyle/fashion/2007-12-25-louboutin-shoes_N.htm (increasing desirability of shoe by using red soles). “The red sole ‘has given him an edge, because it’s a visible touch that brands him. Women tend to feel others notice, and it’s a way of saying you’ve got the shoe.’” *Id.* See also Louis Vuitton Article, *supra* note 25 (predicting that prestigious fashion items, such as Louis Vuitton handbag, will continue selling throughout economic downturns, unlike less high-status brands); *Lawyering up Louboutin*, http://www.counterfeitchic.com/2007/07/lawyering_up_louboutin.php (July 16, 2007, 12:01 EST) (discussing Louboutin’s trademark application for signature red soles in 2007).

58. Raustiala, *supra* note 11, at 1702 (citing *Harland Co. v. Clarke Checks*, 711 F.2d 966, 980 (11th Cir. 1983)).

59. See generally Scafidi, *F.I.T.*, *supra* note 45, at 83 (discussing trade dress protection as providing grounds for designers to protect their designs). In using trade dress designers can assert protection over their clothing’s individuality; however, jurors have been unable to shake their own biases pertaining to knockoff merchandise, making it hard for designers to be victorious in trade dress infringement law suits. For a further discussion of jurors’ reluctance to find trade dress infringement, see *infra* notes 125-130 and accompanying text.

60. Schalestock, *supra* note 10, at 116. See Scruggs, *supra* note 4, at 133-34 (describing patents within fashion industry as being limited); see also Lynsey Blackmon, Comment, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 PEPP. L. REV. 107, 159 (2007) (discussing growth of counterfeiting and need for greater protection and addition of laws such as Design Piracy Prohibition Act).

61. See Briggs, *supra* note 40, at 171 (noting types of patents for fashion designs).

62. See Hedrick, *supra* note 51, at 223 (discussing limited use of patents in fashion because many apparel designs do not meet required patent law standards);

patent application process is a lengthy one, which discourages designers from seeking patent protection because “the time consumed in obtaining a patent would often exceed the commercial life of the design.”⁶³

B. Tracking Pirating in the Fashion Industry

Fashion, now seen as a glamorous industry that dictates the trends and the social currents of our time, did not always have this positive connotation.⁶⁴ Scholars have pointed out that historically, “garment designers were looked down upon as servants,” and only since the 1850s, has the status of fashion designers been steadily improving.⁶⁵ Despite fashion’s current status as a profitable, competitive, and tremendously creative industry, debates still exist over whether fashion is a form of art.⁶⁶ This is evident as fashion designers are denied the same IP protections granted to other artistic mediums, including music, film, painting, sculpture, and industrial designs industries.⁶⁷ Fashion is traditionally “characterized as a low intellectual property protection regime,” meaning the fashion industry does not receive the full scope of IP protections.⁶⁸

see also *Vanity Fair Mills, Inc. v. Olga Co.*, 510 F.2d 336 (2d Cir. 1975) (determining whether Olga Company’s patent could not be sustained). Olga Company brought a patent infringement claim against Vanity Fair for its almost identical brief used to flatten the abdomen without causing discomfort. *Id.* at 337. The court determined that the patent should not be upheld because “[g]iven the prior art and the availability of assorted stretching materials, a skilled undergarment designer could by some concentrated thinking and experimentation arrive at the same results.” *Id.* at 340. *But see, e.g.*, *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117 (Fed. Cir. 1993) (holding tennis shoe design satisfied design patent requirements); *Avia Group Int’l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557 (Fed. Cir. 1988) (upholding patents for athletic shoes claiming ornamental design). *See also* Pearson, *supra* note 39 (referencing patent protection of fashion designs).

63. *Unfair Competition - Appropriation of Another’s Labor - Copying of Fashion Designs Actionable on the Ground of Commercial Immorality*, 70 HARV. L. REV. 1117, 1118 (Apr. 1957) [hereinafter *Unfair Competition*]. *See also* Scruggs, *supra* note 4, at 134 (discussing patents as being lengthy and expensive).

64. *See* Sackel, *supra* note 48, at 490-91 (“[T]he popularity and frequency of collaborations between artists and designers further support the notion of fashion as a form of art.”).

65. Briggs, *supra* note 40, at 187-88.

66. *See id.* at 188 (“Now in the Twenty-First Century, we are still attempting to define the value of clothing design and much controversy has erupted over the display of fashion retrospectives in traditional art museums.”).

67. *See* Nurbhai, *supra* note 50, at 494-99 (addressing range of copyright protection of artistic mediums).

68. Pearson, *supra* note 39.

Ultimately, this line of reasoning suggests that differences exist between the work of artisans and that of artists.⁶⁹ This divide centers around the belief that artisans make objects designed for use and convenience, whereas, artists create non-instrumental work.⁷⁰ Because fashion designers are artisans and not artists, a lower level of IP protection exists within the fashion industry.⁷¹

The division between artisans and artists is “ceaselessly renegotiated,” implying that the perception of this industry is continuously changing; however, IP laws have not followed suit.⁷² In recent years, “public perception of fashion design as a form of art is evident in the culture surrounding fashion events.”⁷³ Museums have begun to include fashion exhibits, showcasing designs as works of art.⁷⁴ As fashion makes its way into artistic acceptance, it still maintains its own unique identity.⁷⁵ Fashion is unlike other artistic fields, as it can express the novel tastes of both the creator and the purchaser.⁷⁶ Thus, fashion is a multifaceted art.⁷⁷ Even though society has begun to accept fashion as a form of art, fashion’s original perception as a field for artisans inhibits fashion from receiving the full scope of IP protections.⁷⁸

This classification implies that there exists a clear distinction between copying the works of fashion designers and copying the

69. See Briggs, *supra* note 40, at 187-88 (defining conflict between artisans and artists).

70. See *id.* (noting artisans create object with utility value, while artists create non-instrument works of art).

71. See Scruggs, *supra* note 4, at 131-32 (proposing fashion industry should be accepted as art due to it being \$100 billion industry).

72. See Briggs, *supra* note 40, at 187-88 (explaining evolution of fashion from view of artisanal to artistic).

73. Anya Jenkins Ferris, Note and Recent Development, *Real Art Calls For Real Legislation: An Argument Against Adoption of the Design Piracy Prohibition Act*, 26 CARDOZO ARTS & ENT. L.J. 559, 578 (2008).

74. See Sackel, *supra* note 48, at 490 (noting how museums, including Metropolitan Museum of Art, which displayed items depicting First Lady Jacqueline Kennedy’s fashion, now have fashion displays).

75. See Scafidi, *F.I.T.*, *supra* note 45, at 79-80 (alluding to fashion’s unique identity).

76. See *id.* (describing ability of fashion to represent both maker and wearer). The fashion designer begins by making an artistic statement in the form of a new garment The wearer who subsequently acquires the garment gives it dimension and movement, at the same time using the garment to represent her physical body to the world and to broadcast a message about herself

Id. at 79.

77. See Hedrick, *supra* note 51, at 222 (asserting fashion expresses both designer and wearer).

78. See Briggs, *supra* note 40, at 187-88 (suggesting artisan connotation inhibits fashion from receiving full effects of intellectual property protections).

works produced in other artistic fields.⁷⁹ Some scholars find justification in this categorization by asserting that copies of computer software produce exact replicas, whereas fashion copies have their own distinct individuality, which does not hinder purchases of the original designs.⁸⁰ Unlike the exact replications of a computer copy, “[i]n the garment industry the copy is seldom perfect. It is usually a vulgarization of the original. Often it is frankly called a ‘copy’ or an ‘adaptation,’ and is sold to a different income group.”⁸¹ Thus, a distinction can be drawn between fashion copies and those of bootleg computer copies, which are considered to be “a near-perfect substitute for the genuine article.”⁸² While “Sony and Microsoft worry about piracy because they fear the copies will directly displace sales. Designers, however, seem at least as concerned about dilution as displacement: They worry couture consumers will flee goods that lose their aura of exclusivity”⁸³ The profitability of fashion merchandise, despite the appearance of knockoffs, suggests that fashion designers of original goods can maintain a profit.⁸⁴

The phenomenon of knockoffs and counterfeit goods has been long recognized.⁸⁵ In 1957, one scholar suggested that “because of the lack of adequate statutory or common-law protections against the activities of ‘style pirates,’ it is not uncommon for inexpensive copies of designs created by leading fashion houses to appear on the market shortly after the introduction of higher-priced models by the original designer or authorized licensees.”⁸⁶

Style piracy, “the linchpin of counterfeiting—it is counterfeiting without the label,” can be accredited to the extremely low level of IP protections guaranteed to the fashion world.⁸⁷ Style piracy,

79. See Julian Sanchez, *Thou Shalt Not Knock Off: Will Congress Move to Increase Copyright Protection for Fashion Designs? Should it?*, J. AM. ENTER. INST. Sept. 14, 2007, available at <http://american.com/archive/2007/september-0907/thou-shalt-not-knock-off> (discussing difference between works of fashion designers and works of other artistic mediums).

80. See *id.* (comparing IP protections within fashion industry and other artistic fields).

81. Paul M. Gregory, *Fashion and Monopolistic Competition*, 56 J. POL. ECON. 69, 72 (1948).

82. Sanchez, *supra* note 79.

83. *Id.*

84. See *id.* (arguing fashion industry does not need increased protection).

85. See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1152-55 (2009) (discussing process of flocking which causes individuals to desire to follow fashion trends).

86. Unfair Competition, *supra* note 63, at 1118.

87. Alain Coblenz, *Design Piracy Prohibition Act: The Proponents' View*. CAL. APPAREL NEWS, Aug. 24-30, 2007.

the practice of copying a designer's original designs, is a "way of life in the garment business" and has been declared to be the "standard operating procedure for many [companies] both large and small."⁸⁸ While this lower standard of IP protection does not adequately protect designers' intellectual exclusive rights in their products, this standard does allow for the emergence of fashion trends.⁸⁹ As designers seek to find the new "it" product, they frequently borrow ideas from their peers enhancing the availability of certain styles, resulting in trends.⁹⁰ It has been suggested that "[f]ashion design copying is ubiquitous. Designs are frequently copied by retailers, such as H&M, which offers cheap facsimiles of expensive ready-to-wear clothing in over 1000 stores, including in the United States."⁹¹

Inherent in this concept of trend imitation is a reflection of society's socio-economic divide.⁹² Even though fashion designers have been continuously concerned about protection of their designs, current laws have not reflected the designers' yearns and desires for increased IP protection.⁹³ Instead, the current regulations make it easier for pirating to exist, allowing individuals from the lower spectrum of society to imitate the prestige and taste of the upper crust of society.⁹⁴ The wealthy class, in an effort to distinguish itself, sets trends, which are ultimately replicated and sent trickling down the social structure, producing numerous cheap ad-

88. Nurbhai, *supra* note 50, at 489.

89. See Faking It: What Designers Should Know About Piracy, Purse Parties, and Parking Lots, <http://www.fashionapparelblog.com/2007/11/articles/ip-brand-protection/faking-it-what-designers-should-know-about-piracy-purse-parties-and-parking-lots/> (Nov. 16, 2007) (illustrating concepts of trends result from low intellectual property protections).

90. See *id.* ("[C]opying propels trends forward, promotes creativity in the industry, and democratizes fashion.").

91. Raustiala, *supra* note 11, at 1705 (footnote omitted).

92. See Surowiecki, *supra* note 3 (discussing ideas established by Raustiala and Sprigman).

Copying bring[s] about what [Raustiala and Sprigman] call 'induced obsolescence.' Copying enables designs and styles to move quickly from early adopters to the masses. And since no one cool wants to keep wearing something after everybody else is wearing it, the copying of designs helps fuel the incessant demand for something new.

Id. See also Faking It, *supra* note 89 (reflecting upon socioeconomic atmosphere).

93. See Surowiecki, *supra* note 3 (discussing designers' constant battle for increased intellectual property protection).

94. See *id.* (noting existence of pirating enabled by low intellectual property protections within fashion industry); see also Faking It, *supra* note 89 (acknowledging lower class's desire to copy styles of upper class).

aptations.⁹⁵ Although the masses constantly seek to imitate the fashions of the upper class, when the trends become commonplace, the upper class quickly abandon them as “[p]eople of prominence, taste, and affluence do not want to dress as everyone is dressing.”⁹⁶ Even though this concept of trend imitation is commonplace, questions exist over the legality of this practice.⁹⁷

95. See Nurbhai, *supra* note 50, at 492 (depicting socioeconomic influence in fashion).

The wealthy class sets the fashion trends because they wish to be distinctive. A second group of consumers emulates the first group and so on down the chain. The lower classes buy cheaper adaptations of the styles. Presumably, by the time a style reaches the masses, the trend has become commonplace and has already become abandoned by the trendsetters.

Id. See also Lockley, *supra* note 16, at 52 (describing emergence of copies).

[S]tyle leaders, look at the offerings of the designers who have a reputation for good style sense . . . these styles are copied by consumers of comfortable means, they become fashionable and are offered by the stores concentrating on higher-priced merchandise. The styles are soon made of cheaper materials and offered for sale at lower-priced stores. At this point, the original style leaders have already sought new changes for distinction, and the large group of patrons of the higher priced stores begin to discard the style.

Id. at 52. See also Jennifer Smith, *Flattery or Fraud: Should Fashion Designs be Granted Copyright Protection?*, 8 NC JOLT ONLINE ED. 1, 4-5 (2007), available at http://jolt.unc.edu/sites/default/files/8_nc_jl_tech_online_ed_1.pdf (tracking trends from runway to masses); Wolfgang Pesendorfer, *Design Innovation and Fashion Cycles*, 85 AM. ECON. REV. 771, 771 (1995) (stating fashion is merely product of social demands).

96. Lockley, *supra* note 16, at 52. See also Georg Simmel, *Fashion*, 10 Int'l Quarterly 130, 133 (1904) (“[F]ashion represents nothing more than one of the many forms of life by the aid of which we seek to combine in uniform spheres of activity the tendency towards social equalization with the desire for individual differentiation and change.”); Dwight E. Robinson, *The Economics of Fashion Demands*, 75 Q. J. ECON. 376, 382 (suggesting social elite, “is at one and the same time repelled and flattered by majority imitation, while the latter simultaneously shows empathy in seeking self-identification with the former and antipathy in trying to nullify its distinctiveness”); Gregory, *supra* note 81, at 72 (describing process of pirating within classes of society).

The *haut couture* prepares originals which are sold to the rich, which the garment industry on Seventh Avenue, New York, capitalizes on the imitative tendency of the lower-income groups and taps a different segments of the demand curve by emphasizing price appeal as well as (an often superficial) style appeal.

Id.

97. See Laura C. Marshall, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305, 307-22 (2007) (questioning legality of IP protections within fashion industry). Although this practice is commonplace there is still a question about whether this is legal or if greater IP protections should be in place in the fashion industry. See *id.* (questioning legality of copying in fashion).

III. WHAT IS THE DEAL WITH PIRACY?: TO PIRATE OR NOT TO PIRATE—THAT IS THE QUESTION

A. The Fight Against Piracy

There is “a very fine line [between] what is a copy and what is inspiration” and the fashion industry has constantly tackled the question of whether increased IP protection should be applied.⁹⁸ Advocates for increased protection within the fashion industry believe that an “author of a design for a dress should be deemed to be on the same footing as the author of a drawing or a picture” and like their artistic counterparts’ their work should be afforded protection.⁹⁹ Since the early 1900s, individuals have constantly attempted to limit piracy in the field of fashion design.¹⁰⁰ According to scholarly reports, seventy-five percent of goods manufactured in the United States during this era were imitations of original designs.¹⁰¹

Congress has encountered numerous requests to strengthen IP rights in the fashion industry, which have been continuously denied.¹⁰² Specifically, there have been eighty-nine failed attempts to increase IP protection for the fashion industry.¹⁰³ At the 1914 National Design Registration League (NDRL), an argument for protection against piracy was presented at the Design legislative hearing.¹⁰⁴ An NDRL representative stated:

[Pirates] take that popular design of high-priced goods and reproduce it in cheap material and put it on the market, the result being that the ladies going into their laundries see the clothing of their colored cooks and wash girls trimmed with the same pattern of lace they use on their expensive garments . . . she will not wear the same style of

98. Sanchez, *supra* note 79.

99. *FASHION ORIGINATORS GUILD OF AM. v. FED. TRADE COMM’N.*, 114 F.2d 80, 83 (2d Cir. 1940).

100. *See id.* (discussing Guild’s acts to combat piracy).

101. *See Briggs, supra* note 40, at 205 (asserting prevalence of imitation goods in early 1900s).

102. *See Pearson, supra* note 39, at 24 (addressing Congress’s reluctance to increase IP protection in fashion industry).

103. *See id.* (noting 2007 DPPA did not pass because Congressional session ended before bill went to vote marking “89th failed attempt since 1914 to adopt US copyright legislation to protect fashion designs”).

104. *See Briggs, supra* note 40, at 204-05 (referencing legislative hearings advocating increased IP protection for fashion designs).

lace and embroidery that is used by the servant in her household.¹⁰⁵

Although the battle has been ongoing, Congress has been reluctant to apply increased IP protections to the works of fashion designers.¹⁰⁶ In supporting Congress's decision to deny the proposed 1914 piracy protection regulations, Representative Callaway of Ohio asserted that the bill would only serve to protect the rights of the rich.¹⁰⁷ Callaway believed the bill would serve to protect the rich as they sought to prevent the "ordinary riff-raff" from being able to wear the same designs.¹⁰⁸ In denying the increased protection of IP law within the fashion industry, Congress attempted to limit the adverse sociological impact.¹⁰⁹ Congress did not wish to increase the division between the wealthy and the poor.¹¹⁰

Despite the lack of Congressional support for the 1914 legislation to increase IP protections, designers nevertheless attempted to achieve greater protection for their creations by undertaking certain protective measures.¹¹¹ In the 1940s, designers formed guilds, such as the Fashion Originators Guild (Guild), uniting designers as a means to ensure protection over their creations.¹¹² In an attempt to limit style piracy, the Guild placed regulations upon its members requiring them to refuse sales to retailers who purchased, ordered, or manufactured dresses which the Guild found embodied copies of its designs.¹¹³ Techniques such as red-carding controversial

105. *Id.* (citing H.R. Comm. on Pat., Registration of Designs: Hearing on H.R. 11321, 63d Cong. 97 (May 27, 1914) (statement of E. W. Bradford, Esq., Representing the National Design Registration League, Washington D.C.)).

106. *See id.* at 205 (denying increased piracy protection). Congress continues to hear petitions to increase intellectual property protections within the fashion industry, but has been reluctant in passing these legislations. *See id.* (noting reluctance by congress to increase IP protections in fashion industry).

107. *See id.* (believing increased protection would harm lower class society).

108. *See id.*

The trouble with this bill is that it is for the benefit of two parties; that is, the enormously rich who want to display their splendid apparel that they can wear in this country that the ordinary riff-raff ought not to be allowed to wear, and those [sic] rich concerns who have these extra and selected designers to design these special patterns for those elite.

109. *See id.* (discussing potential societal impact which would ensue if intellectual property laws were increased).

110. *See id.* at 204 (noting Congress did not wish to intensify economic divide).

111. *See Fashion Originators Guild*, 114 F.2d at 82 (asserting designers proposed solutions to limit piracy).

112. *See id.* ("About twelve thousand retailers had signed the agreement by the end of the year 1935, and were cooperating with the Guild.").

113. *See id.* (detailing regulations and procedures placed upon Guild members to defeat piracy).

images were applied.¹¹⁴ These red-cards, similar to those used in sporting events, would draw attention to designs infringing upon another designer's work, which would then help to limit the piracy within the fashion field.¹¹⁵ In essence, this practice diminished the outright reproduction of similar designs, and was a step in the right direction toward combating the counterfeit industry.¹¹⁶ The Second Circuit ultimately found the practice to be invalid because it attempted to create a monopoly.¹¹⁷ In spite of the numerous failed attempts to achieve increased IP protections for fashion designers, designers continue to propose legislation that will help protect their creative ideas and designs.¹¹⁸

B. Piracy at Work in Society

Piracy does not have as great an impact in the high-end fashion world, but rather it is the labels like ABS and Banana Republic which are the targets of piracy litigation because these designers borrow heavily from high-end designers to create their lines.¹¹⁹ These companies are known to “‘rid[e] on another’s coat-tails’ or ‘rea[p] where he has not sown.’”¹²⁰ Their whole business is based on producing copies of the “latest runway fashions and selling them

114. *See id.* (describing practice of red-carding in fashion industry).

115. *See id.* (declaring red-carding was used as practice to combat piracy within fashion industry).

116. *See id.* (detailing Guild’s practice to fight piracy).

[The Guild] has set up a ‘Piracy Committee’ which decides which of the designs ‘registered’ by its members, are ‘originals’; it employs shoppers in various parts of the country who visit the shops of retailers and report delinquents; if a retailer is found to be selling ‘pirated designs,’ he must stop doing so, or he will get no more dresses of any sort from the Guild; nor will he be allowed to see the designs exhibited in its New York show rooms. Retailers who co-operate with the Guild must agree to accept the decision of ‘Piracy Committee,’ and must return to sellers any dresses that have been ‘pirated’; they must also agree to abide by the Guild’s regulations. Furthermore, in their sales they must warrant to the customer that the designs of the dresses they sell have not been ‘pirated.’ the Guild keeps a card index in which it enters upon red cards the names of those retailers who fail in any of these regards.

Id.

117. *See id.* at 85 (“[A] copyright for it-and a fortiori a design patent upon it-would be ranked as a monopoly.”).

118. *See Briggs, supra* note 40, at 207 (“[A] resistance to change entrenched business methods that have evolved due to the history of design piracy in the U.S.”). *But see* sources cited *infra* notes 140-144 (illustrating legislatures’ continuous advocacy to promote piracy protection legislation for fashion industry).

119. *See Smith, supra* note 95, at n.28 (quoting Ben Winograd and Cheryl Lu-Tien Tan, *Can Fashion be Copyrighted?*, WALL ST. J., Sept. 11, 2006, B1) (stating “Allen B. Schwartz notes, ‘my job is to bring trends to the consumers at a fair market price. Few people can spend \$4,000 on a dress.’”).

120. Pearson, *supra* note 39.

at a fraction of their original prices.”¹²¹ Despite the many attempts to prevent the appearance of knockoff products by low-end retailers, designers have had little success in obtaining increased IP protections for the fashion industry.¹²²

One infamous retailer that has made its fortune selling knock-offs of original designs at a low cost is Forever 21.¹²³ The company has been sued in recent years by over fifty designers.¹²⁴ In 2009, Trovata sued Forever 21 in a multi-million dollar lawsuit claiming that the button patterns and stripes on certain sweaters would cause consumer confusion with the Trovata products.¹²⁵ The jury was unable to come to an agreement and the case ended in a mistrial.¹²⁶ Even though the shirts appear to be exact replicas, the jurors were unable to determine that there was a trade dress infringement.¹²⁷ This suggests that even when there are appearances of IP violations, it is difficult for fashion designers to obtain a verdict in which knockoff retailers are held responsible for the outright copying of their fellow designers.¹²⁸ Lisa Hedrick notes that “[i]t may be difficult for jurors to discard their personal and subjective notions of fashion choice and fashion appeal when making an evaluation of registrability and infringement.”¹²⁹ Personal desires to keep up

121. *Id.*

122. See Hedrick *supra* note 51, at 269 (suggesting problem exists with jurors’ ability to decipher fashion infringement).

123. See Posting of Rachel Brown to WWDBLOGS, http://www.wwd.com/fashion-blogs/trovata_forever_21_return_to_s-09-05/ (May 29, 2009, 11:33 EST) (defining Forever 21 to be 1.7 billion dollar store).

124. See Posting of Emily G to PWblogs, <http://style.pwblogs.com/2009/04/13/is-forever-21-the-fashion-industrys-napster/> (Apr. 13, 2009, 13:09 EST) (listing Gwen Stefani, Anthropologie, Diane Von Furstenberg, Ann Sui as having filed suit against forever 21); Hemphill, *supra* note 85, at 1174 (listing Forever 21 lawsuits); see also Amy Duvall, *Stricter Copyright Rules for Fashion: A Faux Pas*, THE MTTLR BLOG (a production of MICH. TELECOMM. & TECH. L. REV.), available at <http://blog.mttl.org/2007/10/stricter-copyright-rules-for-fashion.html> (Oct. 22, 2007) (discussing Forever 21 law suits).

125. See Posting by Leslie Price on RACKED: N.Y., http://racked.com/archives/2009/05/27/jury_deadlocked_in_trovata_vs_forever_21_trial.php (May 27, 2009) (depicting shirts’ similarities). Top row depicts Forever 21 shirts and bottom row shows Trovata shirts with remarkable similarities in design and style. *Id.*

126. See *id.* (noting case ended in mistrial which illustrate difficulties of determining trade dress infringements even when shirts appear identical).

127. See *id.* (pointing to jurors’ trouble finding consensus). Although shirts appear very similar jurors were unable to reach the conclusion that a trademark infringement existed. See *id.* (detailing jurors’ inability to declare trademark infringement).

128. See Scruggs, *supra* note 4, at 132 (quoting Jacqueline Palank, *Congress Considers Fashion’s Copyrights*, WASH. TIMES, July 28, 2006) (addressing difficulty of gaining intellectual property protection for fashion industry).

129. Hedrick, *supra* note 51, at 269.

with the trends and the ability to buy the “it” trends at reduced prices might interfere with a juror’s willingness to impose high standards of IP protection within the fashion industry.¹³⁰ Just before the case was to be retried, Forever 21 and Trovata settled their dispute, adding support to the idea that our society is not ready to embrace judgments against knockoff fashion retailers.¹³¹

Similarly, the rise of the internet has created hiccups in the ability to manage piracy.¹³² The internet is considered one of designer’s biggest enemies.¹³³ The fast-paced world of the internet allows individuals to view the cutting edge fashion designs which are then produced as cheap knockoffs before the originals can even hit the mass market.¹³⁴ Designers’ sales of their original designs are threatened because these cheap knockoffs are readily available.¹³⁵ Fast fashion retailers quickly replicate current trends and provide products to the market at cheap prices.¹³⁶ This is because digital photography provides the ability for photos to be taken at runway shows or red carpet events and instantaneously uploaded on the internet.¹³⁷ These photos can then be viewed at factories where

130. *See id.* (noting jurors’ inability to separate themselves from personal desires).

131. *See* Lizzy Epstein, *Legal Eagles: Trovata & Forever 21 Reach Settlement in Alleged Copycat Clash*, HOLLYWOOD LIFE (Oct. 12, 2009), http://www.hollywoodlife.com/Article.aspx/style/fashion/RSS/Fashion/20091012/U_Legal-Eagles-Trovata-Forever-21-Reach-Settlement-in-Alleg?pcur=1&ipp=10&pageid=1 (last visited Mar. 28, 2010) (declaring Forever 21 and Trovata unable to settle their differences before appearing in court for second trial, but settlement details were undisclosed).

132. *See* Eric Wilson, *Before Models Can Turn Around, Knockoffs Fly*, N.Y. TIMES, Sept. 4, 2009, available at <http://www.nytimes.com/2007/09/04/us/04fashion.html> (asserting designs are photographed at fashion shows and quickly copied). “Copying, which has always existed in fashion, has become so pervasive in the Internet era it is now the No. 1 priority of the Council of Fashion Designers of America.” *Id.*

133. *See* Wilson, *supra* note 24 (declaring internet to be one of designers’ biggest enemies).

134. *See* Scafidi, *F.I.T. supra* note 45, at 87 (describing availability of internet makes it possible for knockoff off products to emerge in fashion market before those high quality original designs).

135. *See id.* at 88 (suggesting piracy threatens profitability and sales margins of original goods).

136. *See* Jacqueline Palank, *Congress Considers Fashion’s Copyrights*, Wash. Times, July 28, 2006, available at <http://www.washingtontimes.com/news/2006/jul/27/20060727-103421-5039r>. (“Digital photographs from a runway show in New York or a red carpet in Los Angeles can be uploaded to the internet within minutes, the images viewed at a factory in China, and copies offered for sale online within days” (quoting Susan Scafidi, associate professor of law at Southern Methodist University)).

137. *See* Coblenz, *supra* note 88 (“Via the Internet, counterfeiters and pirates in China and in undeveloped low-wage countries have immediate access to all fashion creations the minute they are viewed by the American public. As a result of

knockoff designs can be mass produced in a relatively short time frame.¹³⁸ These retailers amass large sales incomes by providing “haute couture” to individuals who do not wish to spend the costly prices of the original merchandise, but wish to keep up with the “in” trends.¹³⁹

C. Design Piracy Prohibition Act

Recently designers, with the support of a few Congressmen, have presented to Congress the Design Piracy Prohibition Act (DPPA), an act that seeks to protect designers’ original designs, hoping to limit and prevent counterfeits and copies.¹⁴⁰ The goal of the DPPA is to increase protection of fashion designs, granting designers increased IP rights.¹⁴¹ This proposed bill seeks to achieve this task by amending Title 17 of the United States Code.¹⁴² The bill is intended to “protect original, registered fashion designs for

these new technologies, knock-off garments are now often marketed weeks before the originals.”).

138. See Palank, *supra* note 136 (noting fast paced production of mass produced copies).

139. See Hemphill, *supra* note 85, at 1172-73 (mentioning H&M, Zara, and Forever 21 as fast fashion companies). Fast fashion retailers utilize the technologies available within society. See *id.* (discussing how technology has made it possible for fast fashion firms to quickly produce designs reflecting current trends and market them at low costs).

140. Congress has not been fast to act upon this bill. In fact numerous versions of the bill have been proposed within the past few years. For a further discussion of the previous attempts to pass increase piracy protection legislation in the fashion industry, see *supra* note 103 and accompanying text.

141. See Design Piracy Prohibition Act, H.R. 2196, *supra* note 52 (stating goal of bill is to increase IP protection within fashion industry). The proposed bill is based upon the vessel hull protection act passed in congress in 1998. See *id.* (incorporating aspects of vessel hull protection act in creating Design Piracy Prohibition Act). See also Press Release, Dehunt, Goodlatte, and Nadler Reintroduce Legislation to Combat Design Piracy (Apr. 30, 2009), http://www.house.gov/list/press/ny08_nadler/NadlerReintroducesLegToCombatDesignPiracy043009.html (last visited Mar. 28, 2010) (describing how bill was reintroduced to 111th Congress by Congressmen Bill Delahunt, Bob Goodlatte, and Jerrold Nadler). “Piracy is extremely harmful to our economy and, especially in the current recession, we must do everything in our power to reward creative enterprises.” *Id.*

142. See Design Piracy Prohibition Act, H.R. 2196 Summary, 111th Cong. (2009), available at, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2196&tab=summary> (detailing aspects of Design Piracy Prohibition Act) (last visited Mar. 28, 2010).

Design Piracy Prohibition Act - Extends copyright protection to fashion designs. . . . Applies the doctrines of secondary infringement or secondary liability to actions related to original designs. . . . Increases allowable damage awards for infringement of original designs and for false representation. Requires the Register of Copyrights to establish and maintain an electronically searchable fashion design database available to the public without charge.

Id.

[three] years via an amendment to the Copyright Act.”¹⁴³ Additionally, the bill seeks to improve the definition of a fashion design, strengthening the standard of infringement, increasing the penalties for false representation, providing a registration period of six months and creating a searchable database for registered designs.¹⁴⁴

D. Is Piracy Good for Society?

The practice of pirating designs has existed within American society for the past century.¹⁴⁵ Although piracy persists, designers have continued to reap profits, suggesting that counterfeiting of goods in such a status-driven industry actually benefits original designers.¹⁴⁶ One scholar, Jonathan Barnett, supports this viewpoint and asserts that:

[C]ounterfeiting will increase legitimate producers’ sales in two ways. First, the presence of cheap reproductions in the market allow original designers to charge a “snob premium” to “elite” consumers who are eager to be set apart from their lower-status knockoff-purchasing counterparts.

143. March on Washington 2: Project Beltway, <http://counterfeitichic.com/2009/05/march-on-washington-2-project-beltway.html> (May 6, 2009).

144. *See id.* (discussing details of Design Piracy Prohibition Act); *see also* Brian T. Yeh, Copyright Protection for Fashion Design: A Legal Analysis of the Design Piracy Prohibition Act (H.R. 2196) CONGRESSIONAL RESEARCH SERVICE (June 1, 2009), http://ipmall.info/hosted_resources/crs/RS22685_090601.pdf (providing information backing proposed protections) (last visited Mar. 28, 2010).

Proponents of legislation to protect fashion design assert that a three-year term is sufficient because its purpose is to protect high end “haute couture” designs when they are first sold at expensive prices—a time when the designs could be vulnerable to copies sold at substantially lower prices. Because trends arise and fade quickly, the shorter term is considered a sufficient time period for the designer to have exclusive rights. *Id.* (footnotes omitted). For a further discussion of the content of the proposed Design Piracy Prohibition Act, *see supra* note 142.

145. For further discussion of history of pirating in fashion industry, *see supra* notes 100-118 and accompanying text.

146. *See* Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1384-85 (2005).

[S]ales by counterfeiters advertise, and even exaggerate, the popularity of the relevant item, thereby arguably leading some nonelite consumers to adjust upward their estimate of the expected status benefits to be gained by visibly owning the original. Depending on existing wealth constraints, this upward adjustment may translate into a purchase of the original. Each of these effects suggests that legitimate producers may enjoy higher total returns with counterfeiting than without and may therefore rationally limit enforcement of intellectual property rights against counterfeiters even when the costs of doing so are low or nonexistent.

Id.

Secondly, knockoffs serve to promote and overstate the popularity of an item and may result in purchases of the original by “non-elite” persons who perceive increased status benefit of owning the original item.¹⁴⁷

Because “clothing is a status conforming good,” the socioeconomic trends within society are mimicked within the fashion industry.¹⁴⁸ Thus, the demand for products can be explained by the bandwagon and snob effect.¹⁴⁹ When a trend becomes popular, individuals wish to “bandwagon,” buying the trend and increasing the demand for the commodity.¹⁵⁰ This bandwagon effect is counteracted by the snob effect.¹⁵¹ The demand for the product decreases because the “snobs” do not like that other individuals are sporting the product.¹⁵² This illustrates a socioeconomic cycle which focuses on the lower class’s desire to imitate the upper class as the upper class strives to distinguish itself from the lower class.¹⁵³

Inherent in this argument is the concept that fashion merchandise constitutes positional goods, which are defined as “[t]hings that the Joneses buy.”¹⁵⁴ These positional goods are bought because of their intonation, i.e. the connotations which they create about the person who buys the goods.¹⁵⁵ These goods enable individuals “to establish or signal their status.”¹⁵⁶ Thus, the argument which follows is “that style piracy reduces the prestige of owning a ‘Dior’ and thereby the willingness of buyers to purchase expensive, fashion-leading clothes seems outweighed.”¹⁵⁷ It is outweighed on the basis that style piracy provides a public good, “making the latest fashion available to consumers who would otherwise be barred by prohibitive prices.”¹⁵⁸ In suggesting that piracy does not hinder the

147. Ferris, *supra*, note 73 at 580-81.

148. Raustiala, *supra* note 11, at 1718.

149. *See* Pesendorfer, *supra* note 95, at 773 (detailing Harvey Leibenstein analysis of demand curves).

150. *See id.* (discussing bandwagon effect as increasing demand for product because people wish to “bandwagon” and follow trend).

151. *See id.* (distinguishing lower class to bandwagon while upper class holds snob mentality).

152. *See id.* (outlining snob mentality held by elite upper class).

153. *See id.* at 774 (pointing to class influence in fashion industry and illustrating that upper class determines new trends while lower class follows).

154. Raustiala, *supra* note 11, at 1718 (quoting Economics A-Z, www.economist.com) (defining positional goods as goods which are constantly envied).

155. *See id.* (stating positional goods are bought because of connotation which goods hold).

156. *Id.*

157. Unfair Competition, *supra* note 63, at 1120.

158. *Id.* at 1120

sale of original goods within the fashion industry, the piracy paradox exists.¹⁵⁹

1. *Pro Piracy Protection*

Numerous designers and fashion icons support the DPPA as it would benefit their own individualized identity and protect their work.¹⁶⁰ These individuals have banded together to help counteract the piracy phenomenon present within our society.¹⁶¹ The Council of Fashion Designers of America, along with fashion designers such as Tory Burch and Tracy Reese, voiced their support for the newly proposed legislation.¹⁶² In addition, fashion magazine *Harper's Bazaar* has shown its support against piracy and counterfeits by staging an annual anti-counterfeiting summit to stop fashion fakes.¹⁶³

Underlying this battle is the belief that “[e]xtending copyright law to afford protection for apparel designs would benefit society, designers and consumers . . . [which implies that] copyright law needs to adapt to changes in society because ‘copyright protection for fashion works is crucial to competitiveness.’”¹⁶⁴ In these scholars’ view, “design piracy is unfair to designers and detrimental to competition” because it allows pirates to profit from another’s hard work.¹⁶⁵ This conviction asserts the theory that copying destroys

159. See Raustiala, *supra* note 11, at 1718 (quoting Economics A-Z, www.economist.com) (negating argument that piracy is harmful and illuminating piracy paradox).

160. See March on Washington 2: Project Beltway <http://counterfeitchic.com/2009/05/march-on-washington-2-project-beltway.html> (May 6, 2009) (naming some supporters of proposed Design Piracy Prohibition Act).

161. See *id.* (noting designers striving to influence Congress in increasing protection of intellectual property rights in fashion industry).

162. See March on Washington 3: All American Appeal, <http://counterfeitchic.com/2009/05/march-on-washington-3-all-american-appeal.html> (May 13, 2009) (indicating designers’ platform for IP protection in fashion industry).

163. See Pearson, *supra* note 39, at 23 (noting Harper Bazaar’s involvement to stop piracy); see also *From fake handbags to fake cars, the problem is real. At Harper's Bazaar, Fakes Are Never in Fashion*, HARPER'S BAZAAR, http://www.fakesaren-everinfashion.com/fakes_summit_09.asp

Harper's Bazaar is at the forefront of the global fight against counterfeiting, and on March 16, [2009] presented the fifth annual Anticounterfeiting Summit in partnership with the Italian Intellectual Property Right Desk at the Italian Trade Commission in New York City. Over 150 senior fashion and beauty executives, intellectual property lawyers, and law enforcement officials attended.

Id.

164. Nurbhai, *supra* note 50, at 524.

165. *Id.* at 491. “[D]esign pirates to reap the benefits of the original designer’s creativeness, labor and risk-taking.” *Id.*

the value of the copied product.¹⁶⁶ “Women will not buy dresses at a good price at one store if dresses which look about the same are offered for sale at another store at half those prices.”¹⁶⁷ Many believe that by passing this bill, both consumers and designers will enjoy benefits.¹⁶⁸

If stronger IP protections are granted to the fashion industry, designers will not have to charge outrageous prices to make a quick profit.¹⁶⁹ Under current policies which afford little IP protection, designers charge extraordinarily high prices to collect profits before the marketplace is flooded with knockoff designs at low costs.¹⁷⁰ By increasing IP protection, designers will not need to make quick profits, but will be relaxed, knowing that their designs and hard work will not be pirated.¹⁷¹ This would make the original products more affordable.¹⁷² Supporters of the bill believe that the price of many clothing lines will decrease in cost by affording piracy protection because low cost copies will be slow to hit the market.¹⁷³

166. *See id.* (suggesting piracy decreases value of original product); *see also* Yeh, *supra* note 144 (detailing proponent’s position on positive aspect of DPPA).

Those in favor of protection assert that the copyright law mistakenly views clothing as purely utilitarian in nature, and ignores the possibility that fashion design may be a form of creative expression deserving of protection. Proponents also highlight the effects of modern technology on the ease and speed of copying fashion designs, pointing to the ability for copiers to easily access images of runway photos posted on the Internet. Additionally, emphasis is placed on the particular vulnerability of young designers whose names and logos are not yet recognizable in the marketplace, and have difficulty promoting their work when it is quickly copied by established competitors. Supporters of the legislation also point to the protection granted to fashion design in other areas of the world.

Id.

167. Nurbhai, *supra* note 50, at 491 (quoting Leslie J. Hagin, *A comparative Analysis of Copyrights Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works Into the United States Copyright Regime*, 26 TEX. INT’L L.J. 341, 388 n.25 (1991)).

168. *See* Briggs, *supra* 40, at 210 (discussing bill’s ability to benefit both designer and consumer).

169. *See id.* (speculating prices will decrease if increased IP laws are applied).

170. *See id.* (illustrating need to charge high prices under current procedures).

171. *See id.* (suggesting increased piracy protection would lend to affordable prices of goods as designers would not need to make quick profits).

172. *See id.* (suggesting original designs would be more affordable due to increased piracy protection).

173. *See id.* (believing prices of designer goods will decrease with new piracy protection act).

Thus, the fashion industry would function under the intended IP protections established by the Constitution.¹⁷⁴

2. *Does Piracy Really Harm?*

In being able to constantly “re-invent themselves,” high-end designers maintain their status and reputation as creative and innovative.¹⁷⁵ They are then able to “limit the impact of copying and counterfeiting by changing designs from season to season and by limiting production and distribution.”¹⁷⁶ Therefore, the haute couture industry is able to provide the buyer with the “belief that he or she is purchasing something novel and exclusive.”¹⁷⁷

Although the DPPA has many supporters, the whole fashion industry is not behind this act.¹⁷⁸ The copyright office noted that there is no hard data showing that knockoffs result in a net harm to

174. See U.S. CONST. art. I, § 8, cl. 8 (hoping intellectual property law would apply to fashion industry as framers intended); see also Gregory, *supra* note 81, at 71 (showing how copies prevent monopolies).

To give legal design protection to the creator or owner of a model would encourage further differentiation of the product and would make the market less competitive; for imitation, copies and adaptations of ‘original creations’ blur the sharp differences which are the essence of monopoly power in the area of fashion goods.

Id.

175. See Surowiecki, *supra* note 3 (suggesting copying allows for innovation among designers).

The situation [of copying] is not necessarily easy on designers, who have to keep coming up with new ideas rather than being able to milk a trend for years. But it means that in the industry as a whole there is more innovation, more competition, and probably more sales than there otherwise would be. And the absence of copyrights and patents also creates a more fertile ground for that innovation, since designers are able to take other people’s ideas in new directions.

Id.

176. Hilton, *supra* note 5, at 347 (discussing designers limiting impact of copying).

177. *Id.*

178. See Gregory, *supra* note 81, at 71 (“Nor does the entire fashion industry object to design piracy, although they may appear to do so.”); see also Yeh, *supra* note 144, at 7-8 (addressing individuals concern in advocating increased piracy protection for fashion industry).

Those against offering copyright protection for fashion design generally point to the success of the marketplace as it is and note that copying is an integral and accepted part of the fashion industry. They claim that such interference into the fashion market would be harmful because of increased litigation over the standard for infringement. As a result, creative production of fashion designs would be stifled, ultimately resulting in less choice for consumers. Finally, these critics assert that foreign experience with fashion design protection has not had material effect because copying still occurs in nations that have design protection laws - to the same degree it occurs in the U.S. where there is currently no such protection.

Id.

the high fashion industry.¹⁷⁹ Furthermore, some opponents of the DPPA suggest that the bill is merely “a ‘lawyer-employment bill, not a fashion-industry protection bill’ and would result in harm to an otherwise healthy industry.”¹⁸⁰ Lawyers would be constantly involved at all stages of the production and manufacturing of a clothing line, increasing the costs of this laborious industry.¹⁸¹ Increased protection will increase litigation as designers will be forced:

[T]o expend large amounts of money and time to protect clothing with a limited shelf life. The better articulation of an argument against fashion design protection is a fear that courts will be unable to provide cost-effective, meaningful protection of registered designs given the cost of an attorney, court fees, and the time necessary to take a case to final adjudication.¹⁸²

While the Act seems reasonable on its face, the proposed “methods are insane.”¹⁸³ Designers would need to constantly consult with lawyers to ensure that the new designs are not “closely and substantially similar” to those already protected in the industry.¹⁸⁴ In addition, new designers might be scared off by the need for increased resources to fight legal challenges in court.¹⁸⁵

179. See Sanchez, *supra* note 79 (referencing copyright office’s analysis that no net harm has been observed to fashion industry due to knockoff fashion merchandise); see also Ferris, *supra* note 73, at 579 (discussing how knockoff designs do not hinder profits of original designs).

180. Ferris, *supra* note 73, at 583 (footnote omitted).

181. See *id.* (noting constant need for lawyers if DPPA is enacted).

182. Hedrick, *supra* note 51, at 255 (footnotes omitted).

183. Posting of Erika Journey to Try Handmade, <http://tryhandmade.com/beware-the-design-piracy-prohibition-act-hr-2196/> (June 6, 2009).

184. See Will the Design Piracy Prohibition Act Kill Fashion?, The Swelle Life, June 7, 2009, http://www.theswellelife.com/swelle_life/2009/06/design-piracy-prohibition-act-to-kill-fashion.html (describing need to consult lawyers).

[D]esigners will need to consult with a lawyer throughout the design process to ensure that every new design created could not subjectively be found at a later date to be ‘closely and substantially similar’ to one protected in the Copyright registry. Further, young, up-and-coming designers would be susceptible to legal intimidation from designing anything new at all, as they would likely not have the resources to fight a legal challenge in court.

Id.

185. See Journey, *supra* note 183 (asserting high costs of Design Piracy Prohibition Act); see also Posting by Mike Masnick on Techdirt, <http://www.techdirt.com/articles/20090608/0152355163.shtml> (June 8, 2009, 11:39 EST) (“The industry itself is massively successful, incredibly innovative, and involves plenty of competition . . . [and] . . . [t]he entire purpose of copyright is to encourage innovation. Yet, if the industry is thriving, competitive and innovative, *why* would you ever want to introduce new copyright?”).

Although proponents of the DPPA have valid points that IP laws should exist at the same level in fashion as they exist in other artistic fields, IP's loose application in the fashion industry throughout history illustrates the acceptability of piracy within fashion.¹⁸⁶ Furthermore, some have identified imitation as an essential component within the fashion industry.¹⁸⁷ By imitating and reproducing popular designs, trends emerge, which are then used as inspiration by other fashion firms.¹⁸⁸ As these trends catch on, they "have a moment of wide appeal, only soon to become overexposed and die," which illustrates the constant state of flux that embodies the fashion industry.¹⁸⁹

Just as fabric manufacturers in the early twentieth century used piracy to their advantage, many designers have found ways to increase their own profits through piracy.¹⁹⁰ Several designers have created low-end lines of their brand, taking piracy into their own hands and profiting.¹⁹¹ This introduces, "in essence, knocking off

186. See Raustiala, *supra* note 11, at 1722 (noting how copying has become accepted within fashion industry). For a further discussion of the historical acceptance of piracy within the fashion industry, see *supra* notes 39-63 and accompanying text.

187. See Duvall, *supra* note 124 (declaring imitation to be essential to fashion).

188. See Smith, *supra* note 95, at n.22. (quoting Ben Winograd & Cheryl Lu-Lien Tan, *Can Fashion be Copyrighted?*, WALL ST. J., Sept. 11, 2006, at B1) ("Let's say Versace does a pair of parachute pants. Then three months later, some other designers do versions of parachute pants, and a year later you go to Costco or Target and you see parachute pants there."); see also Scruggs, *supra* note 4, at 136 (discussing Joel Paris of Anyknockoff.com suggesting that knockoffs boost design house's profile).

189. Duvall, *supra* note 124 (quoting Kal Raustiala and Christopher Sprigman, *How Copyright Law Could Kill the Fashion Industry*, THE NEW REPUBLIC (Aug. 14, 2007). See also Giorgio Bernini, *Protection of Designs: United States and French Law*, 1 AM. J. COMP. L. 133, 133 (1952) ("[A]rticles of fashion have in general a very short life and may even lose their value in the course of a single season.").

190. See Raustiala, *supra* note 11, at 1725 (achieving profits even with piracy); see also Gregory, *supra* note 81, at 72 (describing practice of fabric manufacturers selling fabrics used by high-end fashion designers to knockoff retailers).

The fabric manufacturers know that such copying goes on all the time, and they realize that through copying come imitations which boost the sale of their fabrics to garment factories and large department stores. The Paris *couturiers*—Chanel, Patou, Vionnet, Molyneux, Schiaparelli—are the display windows for the great French fabric manufacture—Bianchini, Bucharne, Rodier—and are heavily subsidized by them. "For every good model of a given fabric designed and made by a top designer, the fabric house will sell many times the model's value in yardage."

Id.

191. See Scruggs, *supra* note 4, at 48 ("Many fashion houses have alternate lines that provide less-expensive versions of their original designs (while using a different name so that the designer is not associated with the lower quality version).").

one's own signature designs to price discriminate among consumers" into the fashion industry.¹⁹² Themes that are "developed in the premier lines are echoed in the bridge lines, but with cheaper materials, lower prices, and design variations pitched to the particular tastes of that bridge line's constituency."¹⁹³ In implementing this practice, designers are able to seek profits from all segments of society, not limiting themselves to a specific clientele.¹⁹⁴ These designers accept that piracy exists in the fashion world and, rather than complaining and filing lawsuits against individuals who copy their designs, they look to profit.¹⁹⁵

The availability of knockoff fashion designs at lower prices can be seen as a crucial aspect of fashion.¹⁹⁶ Scholars acknowledge copying in fashion as a necessary evil.¹⁹⁷ While the similarities between knockoff and original designs are evident, the "different designs themselves are not fungibles. Each has its own attraction for buyers; each is unique, however trifling the basis for preferring it may be."¹⁹⁸

Despite the lack of IP protection for fashion designers, fashion has flourished.¹⁹⁹ The low level of IP rules allow for "free appropriation of fashion designs [which] accelerate the diffusion of designs and styles" resulting in "induced obsolescence."²⁰⁰ Thus, copying can be seen as promoting innovation and benefiting the originality

192. Raustiala, *supra* note 11, at 1725.

193. *Id.* (footnote omitted).

194. See Posting by Mercedes on Global Purchasing Companies, <http://www.globalpurchasinggroup.com/blog/cheap-chic-do-knockoffs-actually-hurt-designers-sales/> (Aug. 11, 2008) (proclaiming Mizrahi knocks himself off to be brilliant). "[Mizrahi] sells both Bergdorf Goodman and to Target." *Id.*

195. See Eric Wilson, *The Knockoff Won't Be Knocked Off*, N.Y. TIMES, Sept. 9, 2007 (discussing designers knocking off themselves). "Further blurring the boundaries of what defines high fashion and low are the so-called cheap chic collections being sold by the marquee designers themselves, like Issac Mizrahi at Target; Karl Lagerfeld at H&M; and . . . Vera Wang at Kohl's." *Id.*

196. See FASHION ORIGINATORS GUILD OF AM. v. FED. TRADE COMM'N., 114 F.2d 80, 84 (2d Cir. 1940) ("[T]he exclusion of the 'piratical' dressmakers will reduce the supply and price is normally a function of supply.").

197. Gioia Diliberto, *Vive Le Knockoff: Knockoff Fuels the Industry But Robs Designers. Is Legislation the Answer?*, L.A. TIMES, Oct. 10, 2007, at A21 (quoting Christopher Sprigman, law professor at University of Virginia) ("Growth and creativity in the fashion industry depend on copying . . . It's the engine that drives the fashion cycle.").

198. *Fashion Originators Guild*, 114 F.2d at 85.

199. See generally Surowiecki, *supra* note 3 (asserting weak intellectual property laws work in fashion industry).

200. Raustiala, *supra* note 11, at 1722.

of designers, drawing attention to their designs.²⁰¹ Because copying has beneficial attributes, imposing copyright protections may, in effect, suppress creativity and originality in fashion designs.²⁰² Copyright for fashion designs could possibly negate the inherent evolutionary components of the fashion industry, as designers build off the work of others.²⁰³ Backing this view is the belief that “[t]he more an article becomes subject to rapid changes of fashion, the greater the demand for *cheap* products of its kind.”²⁰⁴

While the Act might serve to protect new designers’ original creations from “being pilfered by a bigger, more renowned design firm,” the bill might be counterproductive.²⁰⁵ The Piracy Act might “prevent widespread dissemination, without which a trend cannot occur.”²⁰⁶ The DPPA would also have a negative impact on the middle class consumer.²⁰⁷ It would penalize customers who cannot afford original designs, as well as harm copycat designers.²⁰⁸ These consumers would have significantly fewer options available within their price range, hindering them from competing in a material society.²⁰⁹ In turn, this would cause “an increase in counterfeiting and knockoffs available on the black market.”²¹⁰ Furthermore, Legislative history suggests:

[S]trong design protection will significantly increase the cost of ordinary consumer goods. This increase in cost will either arise as a result of higher royalties being paid to

201. See Hedrick, *supra* note 51, at 264 (pointing to benefits of copying in fashion industry).

202. See Surowiecki, *supra* note 3 (“Sometimes imitation isn’t just the sincerest form of flattery. It’s also the most productive.”).

203. See Hedrick, *supra* note 51, at 264 (quoting *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 14-15 (2006) (opening statement of David Wolfe, Creative Director, The Doneger Group), available at <http://judiciary.house.gov/media/pdfs/printers/109th/28908.pdf>.) (“[C]opyright for fashion design doesn’t make sense because it is a craft that is dependent on building from the past, ideas that came before. It’s evolutionary.”).

204. Simmel, *supra* note 96, at 151.

205. Smith, *supra* note 95, at 6.

206. *Id.* (footnote omitted).

207. See Surowiecki, *supra* note 3 (stating that “while knockoffs undoubtedly do steal some sales from originals, they are, for the most part, targeted at an entirely different market segment – people who appreciate high styles but can’t afford high prices,” thereby limiting knockoff damage).

208. See *id.* (suggesting increased piracy protection would actually harm consumers, hindering their ability to buy popular merchandise).

209. See Smith, *supra* note 95, at 6 (referencing H.R. 5055, an older version of DPPA).

210. *Id.*

designers, or in the form of increased costs for discount manufacturers to attempt to “design around” protected design and fend off lawsuits.²¹¹

Therefore, society must remain cautious of the negative outcomes that can arise as a result of increased piracy protection within the fashion industry.²¹²

IV. CONCLUSION: HOW WILL THIS BATTLE END?

There are multiple points of view to consider in determining the next step in this piracy debate.²¹³ While fashion designers should be granted stronger IP protection to discourage copying of their hard work, legislators also should recognize that piracy has been historically imbedded in the fashion industry and does not hinder a designer’s ability to produce new and creative designs.²¹⁴ Because piracy and the production of knockoff and counterfeit items might not be harmful to the fashion industry, it may be perceived that low IP protection, which affords the existence of piracy, has beneficial attributes.²¹⁵ Fashion is an industry which imitates the ideals and social values of an era, thus legislators must not forget to consider the impact increased piracy protection will have on society as a whole.²¹⁶ Specifically, examining the socioeconomics involved in the fashion industry because increased IP protection might cause a downward spiral, furthering the economic downturn and intensifying divisions among social classes.²¹⁷ Therefore, fash-

211. Briggs, *supra* note 40, at 202 (footnote omitted).

212. *See id.* (detailing possible negative effects of increased piracy protection in fashion industry).

213. *See* Marshall, *supra* note 97, at 307-22 (addressing controversy surrounding movement for increased IP protection within fashion). For a further discussion of the piracy debate, see *supra* notes 98-212 and accompanying text.

214. *See* FASHION ORIGINATORS GUILD OF AM. v. FED. TRADE COMM’N., 114 F.2d 80, 83 (2d Cir. 1940) (describing early practices designers used to counter piracy); *see also* Gregory, *supra* note 81, at 72 (describing process of pirating).

215. For a further discussion of whether piracy really harms, see *supra* notes 175-212 and accompanying text.

216. *See* Raustiala, *supra* note 11, at 1718 (discussing social classes and demands for fashion products); *see also* Pesendorfer, *supra* note 95, at 773 (analyzing demand curves within fashion). For a further discussion of piracy’s impact in society, see *supra* notes 196-198 and accompanying text.

217. For a further discussion of the 2008-2009 economic crisis, see *supra* note 25 and accompanying text.

ion, unlike other artistic industries, is unique and might not be able to be viewed through the traditional prism of IP application.²¹⁸

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218. For a further discussion of traditional application of IP law, see *supra* notes 33-45 and accompanying text.

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