

6

Intellectual Property and Fashion Design

Susan Scafidi

After decades on the margins of legal scholarship, fashion law is once again in style. The rise of digital technologies that facilitate copying, increased attention to the counterfeiting of trademarked goods, changes in the global locus of production following the elimination of textile import quotas, diffusion of original efforts across all levels of the industry, and growing recognition of fashion design as a form of creative expression—all of these have contributed to a new interest in the relationship between intellectual property and clothing.

In particular, the lack of protection under U.S. law for fashion designs themselves, as opposed to the trademarks or logos affixed to them, has come under scrutiny. Neither copyright law nor our societal norms against plagiarism allows an individual to copy this book verbatim and put his or her own name on it, but line-for-line knockoffs of the clothing that you are presumably wearing while reading it are perfectly legal. While some of those garments may be generic—a standard, white button-down shirt, perhaps?—others may be the result of a designer's unique vision.

Whether or not the United States should fill this gap in the law through an amendment to the Copyright Act or some other mechanism is a subject of ongoing debate, especially in light of recent developments in the European Union and other countries. American fashion designers are lobbying to put an end to what they perceive as legalized piracy, while copyists assert that any extension of intellectual property protection to fashion design would be yet another instance of harmful hyperprotection. To put this issue in context, a particularly important task given efforts to harmonize intellectual property protection across national boundaries, this chapter offers an overview of both the current state of the law and the historical factors leading to the protection, or lack thereof, for fashion design.

FROM RAW TEXTILES TO FAST FASHION

Although fashion design does not enjoy the same intellectual property protection as original works in other media, the field is not a legal blank slate. Clothing itself is a universal human phenomenon, and anthropologists have recently cited 100,000-year-old shell necklaces as the first evidence of symbolic thought.¹ Predictably, where there is human behavior, there are laws regulating it.

In the West, sumptuary laws governing the consumption and use of material goods, including clothing, date back at least to classical Greece.² Over the centuries, legislation aimed at regulating luxury placed limits on a plethora of physical adornments, from silks to furs to precious stones.³ In addition to curbing perceived excesses, sumptuary laws have also served to police the boundaries of social class. For example, English law long restricted the wearing of any silk of the color purple to members of the nobility.⁴ Similar laws were designed to identify specific professions, notably professors, prostitutes, and priests, or to identify characteristics like marital status or gender.⁵ Like modern laws regulating the copying of various forms of expression, both the letter and the spirit of these sumptuary laws were difficult to enforce.⁶ In one case the great fourteenth-century jurist Bartolo de Sassoferrato, often referred to simply as Bartolus, reportedly granted the appeal of a woman convicted of wearing prohibited pearls on the grounds that hers were actually fake.⁷

Despite the complexities of regulating dress, sumptuary laws continued to multiply during the late medieval and early modern period as changes in the distribution of wealth combined with new technologies to provide greater access to luxury clothing. Among these new technologies was the printing press, which not only facilitated the distribution of Bibles and political tracts, but also produced the forerunners of modern fashion magazines, thus disseminating images of new styles beyond the narrow circle of the elite. More advanced technology also provided a less expensive way to place images on fabric, as compared with labor-intensive hand painting or embroidery.⁸ At the same time, improvements in the means of textile weaving increased the availability of affordable fabrics—and thus the opportunities for copying fashionable garments. Ever cheaper copies of innovative new fabric designs soon followed.

These advances in the technologies of textile production and decoration, and the consequent growth of the textile industry, heralded a shift from laws focused on limiting consumption to laws focused on facilitating production—in other words, from sumptuary laws to intellectual property laws. In the early eighteenth century, the silk weavers of Lyon, France, became the first to demand intellectual property protection of their original designs, and by 1787 a royal decree had extended the protection to silk manufacturers nationwide.⁹ Not to be outdone, competing British textile manufacturers that same year secured protection for several types of fabric—namely linen, cotton, calico, and muslin—along “much the same lines as earlier Acts relating to engravings and prints.”¹⁰

Following the industrialization of textile production, the nineteenth century witnessed both the establishment of the modern *haute couture* in Paris and the rise of the ready-to-wear clothing industry. These two facets of apparel production would ultimately develop a complex legal and practical relationship, but at the outset only the couture had any significant influence on the development of new styles. When Charles Worth, generally acknowledged as the first couturier, established his atelier in the late 1850s, most garments were the unique creations of an individual sewing at home or giving instructions to her seamstress. Worth instead developed a system of presenting a series of new designs each season and then taking orders for the designs from individual clients, for whom the clothes were made to measure. This system, which exists to the present day, established the influence of professional clothing designers over the direction of fashion.¹¹ It also spawned an industry of knockoff artists eager to manufacture and sell less expensive versions of Paris originals.

The French couture industry responded to the rise of design piracy in two ways: first, by seeking intellectual property protection for original fashion designs; and second, by licensing those designs to reputable manufacturers, both domestic and foreign. In their quest for inclusion in the intellectual property system, French designers were able to rely on both the 1793 copyright law, as amended in 1902, and the 1806 industrial design law, as amended in 1909.¹² Both types of protection arguably applied to fashion design, an interpretation that the courts confirmed in lawsuits brought by in the early decades of the twentieth century well-known designers like Jeanne Paquin, Madeline Vionnet, and Gabrielle “Coco” Chanel.¹³

Thus armed with a legal weapon against blatant copyists in their own domestic market, couturiers exported French fashion to women around the world. The most affluent customers traveled to Paris for personal fittings and received their garments first, the middle classes bought licensed copies from local department stores and boutiques, and the relatively impecunious either sewed their own versions at home or waited for cheap ready-to-wear copies to become available.¹⁴ Apart from a brief hiatus during the Second World War, this top-down fashion system remained virtually unchanged until the 1960s, and it still exerts significant influence on current trends in fashion. Modern “fast fashion” chains, the sartorial equivalent of the fast food industry, are adept at quickly reinterpreting the innovations of the couture for the mass market; however, those items that stray too close to the original versions may find themselves subject to legal action.¹⁵

While French intellectual property law has by no means eliminated design piracy, at home or abroad, the protection enjoyed by designers working in Paris contributed to the strength of the industry and its global influence throughout the twentieth century and into the twenty-first. Today, the haute couture serves primarily as an advertisement for its designers’ own ready-to-wear styles, and the hierarchical structure of creativity in the realm of fashion has been replaced with a far more democratic diffusion of influential ideas. Even so, France has

the world's strongest legal protections for fashion design, and Paris remains the world's fashion capital.¹⁶

THE STARS & STRIPES OR THE JOLLY ROGER?

While France was developing a creative fashion industry and intellectual property laws to protect it, the United States instead became a haven for design pirates who strenuously resisted efforts to introduce laws protecting fashion. As noted, some of this copying was the product of legitimate licensing arrangements with French couture houses, but New York's Seventh Avenue generally thrived instead on the manufacture and sale of cheap knockoffs.

In historical terms, the pattern of industrial development in the United States and more recent emerging economies often commences with a period of initial piracy, during which a new industry takes root by means of copying.¹⁷ This results in the rapid accumulation of both capital and expertise. The late eighteenth- and early nineteenth-century development of textile manufacturing in New England was a perfect example of this economic growth through intellectual property theft, as aspiring industrialists memorized and transported proprietary technologies across the Atlantic.¹⁸ Ideally, the pirate country begins to develop its own creative sector in the industry, which in turn leads to enactment of intellectual property protection to further promote its growth. This was the pattern followed in the music and publishing industries, in which the United States was once a notorious pirate nation but is now a promoter of intellectual property enforcement.

In the case of the American fashion industry, however, the usual pattern of unrestrained copying followed by steadily increasing legal protection is not present. An examination of the cultural factors that have contributed to the denial of specific intellectual property protections for fashion design is beyond the scope of this chapter.¹⁹ In order to understand the current state of U.S. intellectual property law with respect to clothing, however, a brief tour of past legal efforts is in order.

Textile and clothing designs, which are aesthetic creations that also serve useful functions, could theoretically be eligible for protection under either a copyright regime or an industrial design regime. France, as indicated, opted for both types of protection from at least the early twentieth century; the United States effectively elected neither. While U.S. law provided for design patents starting in 1842, the strict standards precluded registration of most fashion designs.²⁰ The 1882 denial of a patent to a silk manufacturing firm galvanized the industry, which began lobbying for protection, but to no avail.²¹ The copyright route was no more successful for creative designers, despite the Register of Copyright's explicit call in 1913 for amendment of the Copyright Act to follow the French model and allow registration of fashion designs alongside the "fine arts" then afforded protection.²² Indeed, the only U.S. legislative or judicial concession to protection of textiles or clothing during the early decades of the twentieth century

was the 1913 Kahn Act, which was intended to protect European designers who had refused to send their works for the impending Panama-Pacific International Exhibition without first receiving assurances against American piracy.²³

Fashion designers were not without allies in Congress, however. Over the following two decades, a series of bills sought to extend protection to fashion design and related or similarly situated industries. The most nearly successful of these, the Vestal Bill, was introduced in 1926. After a series of amendments, it passed the House in 1930 only to languish in the Senate until Congress adjourned the following year.²⁴ Even Judge Learned Hand's dictum regarding the necessary injustice of his decision in *Cheney Brothers v. Doris Silk Corp.*, a case in which one textile manufacturer admitted to deliberately copying another's original design despite the warning printed every few inches on the selvedge of the goods, was insufficient to provoke legislative action. In Judge Hand's words:

True, it would seem as though the plaintiff had suffered a grievance for which there should be a remedy, perhaps by an amendment of the Copyright Law, assuming that this does not already cover the case, which is not urged here. It seems a lame answer in such a case to turn the injured party out of court, but there are larger issues at stake than his redress. Judges have only limited power to amend the law; when the subject has been confined to the legislature, they must stand aside, even though there be a hiatus in completed justice.²⁵

Although there were several more attempts to pass a design protection law following defeat of the Vestal Bill, including one that cleared the Senate, textile and clothing manufacturers elected to supplement their lobbying efforts with more direct forms of action.²⁶

Chief among these self-help efforts to control design piracy was the establishment of the Fashion Originators' Guild of America in 1932. The Guild began as a voluntary organization of clothing manufacturers who agreed among themselves to sell exclusively to retailers who in turn formally committed to buy only original designs. In order to ensure compliance, the Guild created a system of design registration, policed retailers, engaged in arbitration proceedings, and notified its membership of violations by means of a card index. If a retailer either refused to eschew pirated designs or agreed to the Guild's rules but then cheated, the offender was listed on a red card sent out to Guild manufacturers. If a manufacturer ignored this boycott and sold merchandise to a red-carded retailer, the manufacturer was subject to a fine. The National Federation of Textiles soon developed a similar system of design registration and joined forces with the Guild, whose members agreed to incorporate only original textile designs into their finished garments.²⁷

These industry efforts might have been effective in controlling the distribution of pirated designs, at least among reputable retailers, had it not been for the intervention of antitrust law. Although the Guild survived a series of lawsuits by red-carded retailers, the Federal Trade Commission decided to investigate and

ultimately issued an injunction against the Guild. The question finally reached the Supreme Court, which upheld the decision of the Commission that the Guild had acted in unreasonable restraint of trade.²⁸ Although the manufacturers were still free to take action against copyists who obtained access to original designs through fraud or other forms of unfair competition, their private system of design protection had lasted less than a decade.

In the 1950s, the development of the doctrine of conceptual separability in copyright advanced the cause of a number of design-related industries. While the landmark case of *Mazer v. Stein* involved decorative lamps, the decision made reference to “works of artistic craftsmanship” more generally, including “artistic jewelry.”²⁹ So long as the artistic form of an otherwise utilitarian object was independent of its function, that form became potentially eligible for copyright protection. Subsequent cases clarified that this protection extended to costume jewelry (and much later to sculptural belt buckles),³⁰ although the same reasoning was not applied to clothing designs as a whole. That era also saw the end of textile manufacturers’ long battle for protection, as courts quietly decided that printed designs on fabric were indistinguishable in copyright terms from other printed designs.³¹

Renewed lobbying efforts in the late 1950s and the 1960s, this time under the auspices of the National Committee for Effective Design Legislation, proved no more effective in securing protection for fashion designs than their forerunners of thirty years earlier.³² Although the popular press publicized the complaints of both Parisian and New York fashion designers and exposed the various strategies of knockoff or “bump off” houses who plagiarized them, the opposition of the National Retail Merchants Association ultimately defeated the new generation of design protection bills.³³ Even the wide-ranging negotiations that culminated in the Copyright Act of 1976 did not generate protection for fashion design. In fact, the legislative history of the act specifically excluded “ladies’ dress” from the subject matter of protection.³⁴

After this series of legislative defeats, the fashion industry turned its attention to other potential avenues of protection. While individual designers continued to test the limits of conceptual separability in copyright,³⁵ the more widespread and successful strategy was the appeal to trademark (and to a lesser extent trade dress) protection. The design of a shirt or a handbag might be beyond the scope of U.S. intellectual property law, but a logo appearing on the outside of that garment or accessory enjoys the full protection of the trademark system. Thus, as fashion designers indulged the status-conscious consumers of the 1980s with conspicuous logo designs and exterior labels, the industry simultaneously cultivated the cooperative relationships with law enforcement officials that still play an important role in anticounterfeiting efforts.³⁶

Although intellectual property protection for fashion design remains the holy grail of industry lawyers in the United States, the absence of such protection does not reflect an indifference to design piracy or a lack of effort on the part of creative designers over the past century. Rather, history reveals a series of public

and private attempts to address the issue that, while falling short of their ultimate goal, have nevertheless carved out limited areas of protection ranging from textile patterns to designer logos.

AN AMERICAN QUILT: THE CURRENT PATCHWORK OF PROTECTION

As a result of the fashion industry's persistent legal efforts, American designers today have a range of intellectual property law options that, taken together, offer partial protection for innovative articles of clothing and accessories. The overall appearance of most items is still vulnerable to the encroachments of copyists; however, certain elements of a design may be protected through the application of U.S. trademark, patent, or copyright law. Enforcement of such rights, like in other creative industries, nevertheless remains a challenge.

The most universally applicable and flexible mechanism for the protection of fashion design is trademark law. Whether on an interior label or as an exterior design element, virtually all apparel items incorporate trademarks in some form. The ease of trademark registration, combined with limited protection for even unregistered marks, assures that virtually all designers have access to protection for the names and logos affixed to their goods.³⁷

The ready availability of trademark protection, as compared with the difficulty in establishing protection for the underlying designs, creates an interesting incentive for fashion houses, however. The more easily visible the logo is, the greater the intellectual property protection for the item, and the better the chance of successful actions against counterfeiters. Thus, designers, to the extent that they are influenced by legal concerns, are likely to feature their logos as prominently as possible and incorporate them into their designs to the greatest degree that customers are willing to accept. While this is a matter of taste and marketing as well as legal strategy, it remains an observable phenomenon that current styles are more likely to incorporate prominent external logos than their vintage counterparts. The more subtle approach of a luxury label—like Bottega Veneta, whose signature *intrecciato* or woven leather handbags were originally advertised with the slogan, “When your own initials are enough”—is the exception rather than the rule.³⁸

In addition, the primacy of trademark law as a means of protection for fashion designs offers a competitive advantage to more established companies with better-known logos. Even if a famous designer's new line is knocked off, consumers may still be willing to pay higher prices for the trademarked version. Emerging designers, by contrast, cannot depend exclusively on brand recognition for protection against design piracy. As one young designer expressed the problem, “They can just sell their trademarks. We have to sell our designs.”³⁹

The advantage enjoyed by more established companies is further amplified within the small category of designs that have become so iconic as to qualify for trade dress protection. This subcategory of trademark law grants protection not

only to the usual discrete symbols or devices that comprise a trademark, but also to product packaging or even product designs that serve to indicate the source of the goods. According to the Supreme Court's unanimous opinion in *Wal-Mart Stores v. Samara Brothers*, product designs like the children's garments at issue in the case are never "inherently distinctive" or intrinsically capable of source identification.⁴⁰ Instead, the Court assumes that product designs are primarily the result of aesthetic or functional considerations and only point to their origin if they have developed "secondary meaning" in the minds of consumers.⁴¹ In other words, a never-before-seen handbag or shoe may appeal to consumers as chic or practical, but only later become instantly recognizable as an Hermès Birkin or a Converse Chuck Taylor All Star. The result is that even without registration famous designs with an existing fan base receive more protection, in the form of trade dress, than new arrivals on the fashion scene. In the event of design piracy, the successful owner of a famous design is therefore in a stronger legal position than a fledgling designer, and often in a stronger financial position as well.

Patent law, too, can play a role in the protection of clothing, albeit a much smaller one than trademark. Fashion designs or design elements that are not merely aesthetically pleasing but also functional can, if sufficiently innovative, meet the exacting standards of a patentable invention. Fasteners like Velcro or zippers, high-performance textiles like Lycra or Kevlar, protective garments like hazmat gear or spacesuits, and even more whimsical items of apparel have all been the subject of utility patents.⁴² For most fashion designs, however, the patentability requirements of novelty, utility, and nonobviousness,⁴³ the expense of prosecuting a patent, and above all the amount of time required to obtain a patent make this form of protection impractical if not impossible.⁴⁴

Design patents, which protect ornamental rather than functional design elements, are also theoretically available to fashion designs.⁴⁵ In practice, however, they share the same limitations as utility patents. The temporal constraints of the patent system as a whole, which requires prior examination of items to determine eligibility for registration, are particularly incompatible with the seasonal nature of fashion. In this context, it is important to recognize the distinction between the general category of clothing and the subcategory of fashion, which may be understood as a seasonally produced form of creative expression.⁴⁶ While some fashion designs are intended to last more than a season or two, most are available for only a short time before trends change and fashion-conscious consumers move on to new styles. By the time a fashion designer could obtain either a utility patent or a design patent, the item at issue (and even its copies) would already be passé.

Copyright law in the United States, as previously noted, does not permit the registration of fashion designs. The somewhat artificial distinction within intellectual property law between nonfunctional literary and artistic works, which are the subject matter of copyright, and useful inventions, which are the domain of patents, has generally excluded clothing from the subject matter of copyright on the grounds of its utilitarian nature. Only in limited circumstances have

courts invoked the doctrine of conceptual separability in copyright to distinguish between the artistic elements of a new fashion design and its basic function of covering the human body.⁴⁷

In a recent case involving a Halloween costume design, for example, the court noted that elements of a costume like a head or tail are at least in theory separable from the main body of the garment and thus potentially subject to copyright protection.⁴⁸ Similarly, the doctrine of conceptual separability can result in copyright eligibility for an original design on the front of a T-shirt or for an innovative textile pattern.⁴⁹ In addition to this limited accommodation for designs that are both aesthetic and functional, copyright law can apply to the two-dimensional representations of fashion designs, such as photographs or drawings, that often play a role in design piracy.

The U.S. intellectual property system, while deliberately excluding fashion designs from direct protection, is nevertheless adaptable to provide original clothing and textile designs with a degree of legal recognition.

MODEL BEHAVIOR: EXTRALEGAL MEANS OF PROTECTION

In the absence of more than a limited pastiche of intellectual property protection, and in the face of persistent enforcement difficulties with regard to existing laws, fashion designers have developed extralegal means to either limit the copying of original styles or mitigate its effects. These efforts fall into the categories of social control, mechanical or technological means, and exploitation of the fashion cycle. Each of these categories represents an attempt to influence or leverage the behavior of a different set of actors: fashion insiders, professional copyists, and consumers, respectively. While the utility of such efforts is limited, especially in light of the ever-increasing speed of information transfer, they nevertheless form part of the industry's efforts against knockoff artists.

Among fashion designers, editors, and cognoscenti, there are established social norms against copying. Designers, like artists who work in other media, regularly seek inspiration from earlier styles, as well as from visual artworks and from nature. When an ostensibly creative designer imitates another too literally, however, he or she takes a reputational risk. In 2002, for example, Balenciaga's rising star Nicolas Ghesquiere made a virtually identical copy of a 1973 patchwork vest by little-known designer Kaisik Wong and presented it as part of his spring collection.⁵⁰ Although members of the fashion community acknowledged that copying is not uncommon, the news still caused a scandal. Even three years later, influential fashion critic Cathy Horyn noted that the event "definitely did not help [Ghesquiere's] reputation as fashion's new messiah."⁵¹ The importance of this type of social disapprobation is underscored by the decision in a French lawsuit brought by Yves Saint Laurent against Ralph Lauren and involving a copy of a sleeveless tuxedo gown. The American designer was not only fined, but also ordered to advertise the court's decision in ten separate publications.⁵² A designer

who imitates another's style perhaps not as literally but too soon after the original innovation appears is similarly vulnerable to public censure.

As in other communities, the social norms of the fashion world are subject to change over time. Whereas in the past creative fashion design had, or was at least perceived to have, a strongly hierarchical structure, with true innovation occurring only among a small cadre of elite designers and at the highest price points, modern creativity exists at all levels of the industry. Many designers who would formerly have dressed only the elite few and perhaps licensed some of their designs to exclusive retail establishments now find it either necessary or desirable to create diffusion lines or enter into agreements with mass market retailers, thus disseminating their ideas at a range of retail levels. Isaac Mizrahi has an ongoing relationship with Target, for example, and Chanel designer Karl Lagerfeld has also produced a line for the fast fashion chain H&M.⁵³ While haute couturiers are still held to a higher standard of creativity, designers at all levels are expected to exercise their imaginations. Moreover, design originators prefer to have the opportunity to reinterpret their own work for the general public.

While some designers, faced with the impossibility of eliminating all knock-offs, publicly claim to be flattered by the tacit acknowledgement that their work is worth copying, these statements rarely reflect the whole story. Often the same designer's legal team is simultaneously taking whatever action may be available against copyists. Coco Chanel, for example, is sometimes quoted as having said, "Fashion should slip out of your hands. The very idea of protecting the seasonal arts is childish. One should not bother to protect that which dies the minute it is born."⁵⁴ In the 1930s, however, Chanel herself joined fellow designers as a plaintiff in a landmark French lawsuit that shut down a notorious design pirate.⁵⁵ Even today, the norms governing public relations and the reality of designers' responses to copying of their own work are sometimes at odds with one another. Creativity is nevertheless the stock in trade of the fashion world, and the professional disdain that designers express with respect to excessively derivative work by others is unmistakable.

In addition to social controls on copying, which operate primarily among established designers or those hoping to develop a reputation for creativity, fashion designers rely on mechanical or technological means to combat knockoff artists. These methods range from efforts to maintain secrecy and prevent potential copyists from previewing new styles to the creation of complex and difficult to replicate designs to the use of high quality materials and craftsmanship. In an attempt to bolster consumer confidence and clearly distinguish real from fake, generations of designers have also incorporated cutting-edge indicators of authenticity into the finished goods. In the 1920s and 1930s, the labels on garments issuing from Madeline Vionnet's atelier bore her thumbprint.⁵⁶ Today, designers are experimenting with holographic labels and RFID tags.⁵⁷ As in other creative industries, however, self-help measures directed at professional pirates are at best a match of wits between creators and imitators.

Less a method of discouraging copyists than a means of mitigating their effect, the fashion cycle is essentially a pattern of consumer behavior that luxury goods industries can under limited circumstances leverage to create desire for new products. Commentators identified this pattern at least as early as the nineteenth century,⁵⁸ and successive generations of scholars have repeated their analysis.⁵⁹ Described in modern sociological and economic terms, the cycle begins when high-status individuals or early adopters acquire an item. That item becomes a social signaling device, provoking demand among lower status individuals or outsiders who wish to emulate and perhaps interact with the original purchasers. As more consumers purchase the item, however, it loses its signaling value. This loss of value may be further exacerbated by third-party production of knockoffs, which make a version of the item accessible and affordable to still more aspirational consumers. Thus, the original individuals move on to new expensive or rare objects of desire in order to differentiate themselves, and a fashion cycle is complete.⁶⁰

Today, however, this fashion cycle scenario is rendered obsolete by the fact that poor-quality knockoffs can be manufactured and distributed even more quickly than the originals, leaving creative designers little opportunity to recover their investment before the item is already out of style. Even if the fashion cycle were ever sufficient to support the design industry in general and individual designers in particular, a questionable assertion, that is no longer the case.

In the absence of comprehensive or effective intellectual property protection, the denunciation of non-normative behavior and the use of extralegal methods to halt or limit the effects of copying have arguably helped maintain the ability of fashion designers to exercise their talents. Modern challenges to these mechanisms have nevertheless increased pressure on the industry and prompted a reinvigorated quest for legal support.

FASHION LAW'S CUTTING EDGE: RECENT DEVELOPMENTS AND FUTURE DIRECTIONS

In the first decade of the twenty-first century, the fashion industry has renewed its designs on intellectual property law. From the WTO to WIPO, clothing-related issues have become part of the global agenda.⁶¹ As a result, the United States and other nations are reexamining the relationship between law and fashion.

New challenges to the industry are manifold, stemming from both technological change and global economic shifts. The speed and accuracy of information flow in the Internet era disseminates images of new styles instantly, piquing consumer interest but also aiding in the production of knockoffs. At the same time, the movement of textile and clothing production to centralized production centers in Asia, a trend that increased dramatically after the dismantling of sector import quotas on January 1, 2005, has facilitated the manufacture of high-quality

fashion counterfeits—sometimes in the same factories licensed to produce legitimate merchandise.

At the same time, greater cultural recognition of fashion as a form of creative expression and the diffusion of original design efforts across all levels of the industry have increased sympathy toward fashion designers. At a time when aspiring young designers appear in independent documentaries and on reality television shows,⁶² it is no longer credible to claim that legal protection for fashion design is somehow elitist, especially in light of the expansive copyright protection enjoyed by other industries.⁶³

The European Union's legislative reaction to these changed circumstances has captured the attention of fashion designers in the United States and around the globe. In addition to the protection that countries like France and Britain already afforded designers,⁶⁴ the European Union in 2002 established community-wide protection for original designs, including apparel and accessories.⁶⁵ All original designs now receive three years of automatic, unregistered protection. Moreover, since 2003, creators may register their designs in order to receive a five-year term of protection, renewable for up to twenty-five years.⁶⁶

In the United States, the Council of Fashion Designers of America has responded to changed circumstances in the industry by seeking passage of the Design Piracy Prohibition Act.⁶⁷ In its current form this bill, if enacted, would amend the Copyright Act to provide three years of protection for registered fashion designs, after which they would enter the public domain.⁶⁸ The measure parallels the ten-year protection already available for boat hulls;⁶⁹ the shorter term of years for fashion reflects its seasonal nature, as well as a desire to respect designers' interest in their own creations while stopping short of full inclusion in the copyright system. Indeed, this bill arguably represents the triumph of the current low-protectionist orthodoxy within American intellectual property law scholarship, providing neither the expansive copyright protection of the French system nor the unregistered or longer-term registered design protection available in the European Union. Unlike the proposed legislation of previous decades, there has been little industry opposition to the bill to date, a circumstance that may result in part from a greater cultural emphasis on creativity rather than copying as an economic strategy. Nevertheless, it remains to be seen whether Congress will choose this particular means of addressing the challenges of a new era in fashion.

As art historian Anne Hollander has observed, "Clothes, even when omitted, cannot be escaped."⁷⁰ Intellectual property law, it would appear, is no exception to this maxim.

NOTES

1. Marian Vanhaeren et al., *Middle Paleolithic Shell Beads in Israel and Algeria*, 312 Sci. 1785 (2006).

2. Alan Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law* 18–19, 140 (1996).
3. Reed Benhamou, *Sumptuary Laws*, in *Encyclopedia of Clothing and Fashion* 238 (Valerie Steele ed., 2005) [hereinafter *Encyclopedia*].
4. See, e.g., *Enforcing Statutes of Apparel*, 16 *Eliz.* (1574).
5. See, e.g., Marjorie Garber, *Vested Interests: Cross Dressing and Cultural Anxiety* 21–37 (1992); Hunt, *supra* note 2, at 71–72, 214–272.
6. See Fred Davis, *Fashion, Culture, and Identity* 58–59 (1992); Ann Hollander, *Seeing Through Clothes* 362 (1978).
7. Hunt, *supra* note 2, at 354.
8. For a comprehensive overview of textile technology, see *The Cambridge History of Western Textiles* (David Jenkins ed., 2003).
9. Jeanne Belhumeur, *Droit International de la Mode* 70 (2000).
10. A.D. Russell-Clarke, *Copyright and Industrial Designs* 3 (2d ed. 1951).
11. Philippe Perrot, *Fashioning the Bourgeoisie: A History of Clothing in the Nineteenth Century 184–188* (Richard Bienvenue trans., 1994).
12. Belhumeur, *supra* note 9, at 71–73.
13. Didier Grumbach, *Histoires de la Mode* 67–72 (1993); Mary Lynn Stewart, *Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900–1930s*, 28 *French Hist. Stud.* 103, 118–30 (2005).
14. Teri Agins, *The End of Fashion: How Marketing Changed the Clothing Business Forever* 23–25 (2000).
15. Although few such disputes result in litigation, copyists who are challenged under French law frequently pay financial settlements to the original designers. Interview with Didier Grumbach, President of the Fédération Française de la Couture, du Prêt-à-Porter des Couturiers et des Créateurs de Mode (Aug. 2, 2006). Perhaps the best-known recent piracy trial in France involved a prominent American designer, Ralph Lauren, whose tuxedo dress was found to have infringed the Yves Saint Laurent original. *Société Yves Saint Laurent Couture S.A. et al. v. Société Louis Dreyfus Retail Mgmt. S.A. et al.*, [1994] E.C.C. 512 (Trib. Comm. (Paris)).
16. Article L112–2(14) of France’s Intellectual Property Code includes the following in its list of “works of the mind” that comprise the subject matter of copyright:

Creations 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.

Articles of fashion may also qualify for protection as registered industrial designs, for a more limited term of up to twenty-five years. See Article L511 of the Intellectual Property Code, available at <http://www.legifrance.gouv.fr/html/codes/traduits/cpi/text.htm>.

17. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 *Am. U. L. Rev.* 131, 180–182 (2000).

18. See generally Robert F. Dalzell, Jr., *Enterprising Elite: The Boston Associates and the World They Made* (1987); Barbara J. Tucker, *Samuel Slater and the Origins of the American Textile Industry, 1790–1860* (1984).

19. For a summary preview of forthcoming work on the cultural factors contributing to the deliberate exclusion of fashion design from the U.S. intellectual property regime, see *Law Profs, Part 2*, Posting of Susan Scafidi to *Counterfeit Chic* (Jan. 8, 2006 12:06 PM), http://www.counterfeitchic.com/2006/01/law_profs_part_2_1.php.

20. Maurice A. Weikart, *Design Piracy*, 19 Ind. L.J. 235 (1944).

21. Sylvan Gotshal, *The Pirates Will Get You: A Story of the Fight for Design Protection* 10 (1945).

22. *Id.* at 11.

23. *Id.* Many U.S. designers opposed the Kahn Act, arguing, inter alia, that it would allow European designers to steal American designs, register them in their home countries, and file complaints against the original American manufacturers. *Differ on Way to Fight Kahn Act*, N.Y. Times, Nov. 22, 1913; *Kahn Law Needs Change*, N.Y. Times, Dec. 19, 1913.

24. Weikart, *supra* note 20, at 246, 250.

25. *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 281 (2d Cir. 1929).

26. See Weikart, *supra* note 20, at 251–256; Note, *Self-Protection of Design Creation in the Millinery Industry*, 49 Yale L.J. 1290 (1940).

27. Fed. Trade Comm'n, Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1939, at 102 (1939).

28. *Fashion Originators' Guild v. Fed. Trade Comm'n*, 312 U.S. 457 (1941).

29. *Mazer v. Stein*, 347 U.S. 201, 212–213 (1954).

30. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980); *Trifari, Krussman & Fishel v. Charel Co.*, 134 F. Supp. 551 (S.D.N.Y. 1955).

31. *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142 (S.D.N.Y. 1959).

32. See Nat'l Comm. for Effective Design Legislation, *Protection for Designs* (1959); Nat'l Comm. for Effective Design Legislation, *Summary of the Provisions of Design Protective Bills S. 2075 and H.R. 9525*, 86th Congress (1960); *Silk's Potential Held Unrealized*, N.Y. Times, Oct. 24, 1957.

33. Robert E. Dallos, *The Fashion Pirates: Their Booty Is the Treasure of Design*, N.Y. Times, Jan. 25, 1966; Leonard Sloane, *Design Pirating Sets Off Battle*, N.Y. Times, Jan. 4, 1964.

34. H. Rep. No. 94–1476, at 55.

35. See, e.g., *Galiano v. Harrah's Operating Co.*, 416 F.3d 411 (5th Cir. 2005) (uniform design, like most clothing design, does not qualify for copyright protection); *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996 (2d Cir. 1995) (applique design on sweater qualifies for copyright protection); *Poe v. Missing Persons*, 745 F.2d 1238 (9th Cir. 1984) (clear rock-filled bikini protected as soft sculpture); *Whimsicality, Inc. v. Rubie's Costumes*, 721 F. Supp. 1566 (E.D.N.Y. 1989), *aff'd in part, vacated in part* by 891 F.2d 452 (2d Cir. 1989) (costumes fail to meet separability standard); *Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348 (S.D. Ca. 1988) (Halloween costume contains separable artistic elements); *Animal Fair, Inc. v. Amfesco Indus.*, 620 F. Supp. 175 (D. Minn. 1985) (bear paw slippers contain separable artistic elements); *Knitwaves, Inc. v. Lollytogs Lt. (Inc.)*, *Policy Decision*, Copyright Office, 65 Fed. Reg. 66530 (Nov. 5, 1991) (addressing inquiries as to copyright protection for garment and costume design).

36. See, e.g., *Barbara Kolsun: Counterfeit Cop*, *Women's Wear Daily*, May 25, 2006, at 12; Meredith Derby et al., *Vendors Step Up Efforts in Counterfeit War*, *Women's Wear Daily*, Apr. 11, 2005, at 13; Martha Groves, *In Jeans Business, Trademark Suits Are in Style*, *L.A. Times*, Apr. 13, 1986, § 4, at 5; Patricia Hurtado, *Louis Vuitton, Coach Fight \$23 Bln Flood of Fakes in New York*, *Bloomberg.com*, http://www.bloomberg.com/apps/news?pid=10000103&sid=aaTetDaRc_fQ&refer=us# (last updated Jan. 26, 2006); *Putting the Teeth in Trademark Laws*, *Bus. Wk.*, Oct. 8, 1984, at 75; Peter Wilkinson, *Federal Court Convicts 5 Men in Louis Vuitton 'Sting' Scheme*, *Women's Wear Daily*, May 25, 1984, at 2.

37. 15 U.S.C. §§ 1051–1052, 1125 (2004); U.S. Patent & Trademark Office, *Basic Facts About Trademarks*, <http://www.uspto.gov/go/tac/doc/basic/> (last modified Nov. 8, 2004). This is not to imply, however, that all trademark claims are straightforward or necessarily resolved in favor of the claimant. See, e.g., *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 340 F. Supp. 415 (S.D.N.Y. 2004) (denying injunction to plaintiff on the grounds that allegedly infringing handbags were not likely to cause consumer confusion or trademark dilution).

38. Kate Betts, *The Height of Luxury*, *Time*, May 1, 2006, 67. In the case of Bottega Veneta, the *intrecciato* style also arguably serves as a trademark surrogate or a form of trade dress.

39. Interview with Gabi Asfour (Sept. 27, 2005). Asfour is one of the designers for the label ThreeAsFour (formerly AsFour).

40. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000).

41. *Id.* at 209–215.

42. U.S. Patent No. 7,089,995 (issued Aug. 15, 2006) (space suit); U.S. Patent No. 7,062,786 (issued June 20, 2006) (Hazmat suit); U.S. Patent No. 6,473,908 (issued Nov. 5, 2002) (garment having a buttocks cleavage revealing feature); U.S. Patent No. 3,819,587 (issued June 25, 1974) (Kevlar); U.S. Patent No. 2,717,437 (issued Sept. 13, 1955) (Velcro); U.S. Patent No. 2,692,874 (issued Oct. 26, 1954) (LYCRA); U.S. Patent No. 50,4038 (issued Aug. 29, 1893) (zipper clasp locker or unlocker for shoes).

43. 35 U.S.C. §§ 101, 103 (2004).

44. For 2005, the average total pendency for a patent application was 29.1 months. USPTO, Performance and Accountability Report for Fiscal Year 2005, at 2 (2005), <http://www.uspto.gov/web/offices/com/annual/2005/2005annualreport.pdf>.

45. See 35 U.S.C. § 171.

46. Joanne B. Eicher, *Clothing, Costume and Dress*, in 1 Encyclopedia, *supra* note 3, at 270; Valerie Steele, *Fashion*, in 2 Encyclopedia, *supra* note 3, at 12.

47. H. Rep. No. 94–1476, at 55.

48. *Chosun Int'l., Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005).

49. See *Eve of Milady v. Impression Bridal, Inc.*, 957 F. Supp. 484 (S.D.N.Y. 1997) (bridal dress lace designs qualify for copyright protection); *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759 (2d Cir. 1991) (textile design protected as writing); *Peter Pan Fabrics v. Candy Frocks, Inc.*, 187 F. Supp. 334 (S.D.N.Y. 1960) (finding copyright infringement of floral pattern textile design).

50. Cathy Horyn, *Is Copying Really a Part of the Creative Process?*, *N.Y. Times*, Apr. 9, 2002, at B10; Miles Socha, *The Luxury Hangover: Designers Struggling with Harsher Reality*, *Women's Wear Daily*, July 1, 2002, at 1.

51. Cathy Horyn, *How Nicolas Got His Groove Back*, Women's Fashion Mag., Aug. 28, 2005, at 261.

52. *Société Yves Saint Laurent Couture S.A. v. Société Louis Dreyfus Retail Mgmt. S.A.*, [1994] E.C.C. 512 (Trib. Comm. (Paris)). It is interesting to note that the eventual settlement of the case resulted in a lower fine and elimination of the publication requirement altogether. Agins, *supra* note 14, at 43–44.

53. Adam Jones & Elizabeth Rigby, *A Good Fit? Designers and Mass-Market Chains Try to Stitch Their Fortunes Together*, Fin. Times, Oct. 25, 2005.

54. Edmonde Charles-Roux, Chanel and Her World: Friends, Fashion, and Fame 377 (Daniel Wheeler trans., 2005).

55. Stewart, *supra* note 13, at, 129–130.

56. Bettye Kirke, Madeline Vionnet 223 (1998).

57. Christina Passariello, *Holograms Tell Fake from Fendi*, Wall Street J., Feb. 22, 2006.

58. See, e.g., William Hazlitt, *On Fashion (1818)*, reprinted in William Hazlitt: Selected Writings 148 (Jon Cook ed., 1991).

59. Among the more innovative contributions to this line of scholarship are Paul H. Nystrom, *Economics of Fashion* 18–54 (1928); Georg Simmel, *The Philosophy of Fashion* (1905), reprinted in translation in Simmel on Culture: Selected Writings 187 (David Frisby & Mike Featherstone eds., 1997); Lawrence C. Lockley, *Styles in Fashion and Marketing Scholarship: A Cautionary Note*, J. Marketing, Oct. 1968, at 52; Wolfgang Pesendorfer, *Design Innovation and Fashion Cycles*, 85 Am. Econ. Rev. 771 (1995); and James M. Treece, *Copying Methods of Product Differentiation*, 38 Notre Dame Law. 244 (1962–1963).

60. Note that the term “fashion cycle” is also used more generally to describe the periodic return of certain style trends, such as short or long hemlines, to the forefront of fashion, as well as the length of time between such stylistic revivals.

61. See, e.g., World Intellectual Prop. Org., *WIPO-Italy International Symposium on Intellectual Property and the Competitiveness of Small and Medium-Sized Enterprises in the Textile and Clothing Sectors*, <http://www.wipo.int/meetings/2005/smes-qtc/en/> (Nov. 30–Dec. 2, 2005); World Trade Org., *WTO Trade Topics: Textiles Monitory Body (TMB)*, http://www.wto.org/english/tratop_e/textile_e/textintro_e.htm (last visited Aug. 23, 2006).

62. See, e.g., *Project Runway* (Miramax Television 2004–present); *Seamless* (Douglas Keeve Studios 2005).

63. See 17 U.S.C. §§ 302–305 (2004).

64. For current French law, see *supra* note 16. Under the U.K. Copyright, Designs, and Patents Act of 1988, textiles and artistic works qualify for copyright protection, while clothing may qualify for a more limited term of protection as either an unregistered (three years) or registered (up to twenty-five years) design. See U.K. Copyright, Designs, and Patents Act, 1988, c. 48, §§ 4, 12, 51 (copyright); *id.* §§ 213, 216 (unregistered design right); *id.* § 269 (registered design right). For recent analyses of U.K. law regarding the protection of fashion design, see, for example, *Lambretta Clothing Co. Ltd. v. Teddy Smith (UK) Ltd.*, [2004] EWCA (Civ) 886; Ulla Vad Lane-Rowley, *Using Design Protection in the Fashion and Textile Industry* (1997).

65. Council Regulation 6/2002/EC, 2002 O.J. (L 003) 1.

66. *Id.*

67. See Design Piracy Prohibition Act, H.R. 5055, 109th Cong. (2006).
68. *Id.*
69. 17 U.S.C. § 1305(a) (2004).
70. Hollander, *supra* note 6, at 87.