

Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion Industry for the Better

**Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion
Industry for the Better**

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Introduction

Fashion isn't just about clothes; it's about expression, identity, and artistry.¹ Yet, in the eyes of the U.S. copyright law, fashion design is little more than a utilitarian exercise – a common perception that leaves fashion designers exposed to the detrimental cycle of copying without the protections granted to other forms of art.² Unlike painters or sculptors, fashion designers lack ownership over their work and are left in the dark to watch others freely copy and mimic their creative work. Critics often argue that the absence of legal protection actually promotes creativity in the fashion industry, as the lack of protection create incentives for innovation and accessibility while supporting fashion's rapid, consumer-driven business cycle.³ However, this narrative overlooks the reality of a fiercely competitive industry where designers – especially the emerging designers – struggle to protect the fruits of their labor against knockoffs and mass production.

This paper directly challenges this notion and argues for extending copyright protection to fashion design in the US to safeguard creativity by supporting emerging designers and ensure fair competition in an increasingly exploitative market. Part I outlines the historical and cultural background of the US fashion industry, examining existing IP protections, their limitations, and the argument that the industry thrives without copyright. To address the arguments, Part II lays out the foundation of the fashion industry's structure by categorizing the key players within the industry and highlighting how “indie” designers drive creativity and innovation. Part III counters the arguments against copyright by discussing the harmful consequences of operating in an

¹ Susan Scafidi, *Intellectual Property and Fashion Design*, in INTELLECTUAL PROPERTY AND INFORMATION WEALTH, 115 (Peter K. Yu ed., 2006).

² Shieva Salehnia, *A Golden Opportunity: Supporting Up-And-Coming U.S. Luxury Designers Through Design Legislation*, 42 BROOKLYN J. INT'L L. 367, 751 (2016).

³ Kal Raustiala and Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1722 (2009).

Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion Industry for the Better environment that lacks formal copyright protection. Finally, Part IV examines the “useful article” exception in US copyright law by drawing comparisons to other industries where copyright overrides the exception, ultimately proposing potential solutions for a more equitable IP framework.

I. Fashion’s Legal Journey: Protections and Limitations

a. Cultural Background

The fashion industry, a \$343.7 billion giant in the US as of 2023, thrives on creativity and the expectation of creating new trends every season.⁴ Yet, it stands at a puzzling crossroads: how can such a massive, innovation-driven industry lack basic copyright protections, leaving designers – particularly emerging designers – vulnerable to exploitation of their creative work? The fashion industry has long operated in a “low-IP regime,” where designers receive minimal legal protection for their creative work.⁵ Unlike other creative industries, such as film, music, and literature, fashion design remains largely unprotected because the US copyright protections do not extend to “useful articles”.⁶

However, the exclusion of fashion design from general copyright protections in the US stems from more than just the “useful article” exception within the Copyright Act. As Professor Susanna Monseau explains, the isolation is deeply rooted in a historical perception that views fashion as craft, rather than elevating it to the same level as other areas of fine art, such as literature and music.⁷ Thus, the US IP regime continues to reflect outdated distinctions that fail to

⁴ Sky Ariella, *28 Dazzling Fashion Industry Statistics [2023]: How Much Is The Fashion Industry Worth*, ZIPPPIA.COM (Jun. 15, 2023) <https://www.zippia.com/advice/fashion-industry-statistics/>.

⁵ Claire Guehenno, *Color War: The Louboutin Decision and Single-Color Marks in the Fashion Industry*, 4 HARV. J. OF SPORTS & ENT. LAW 225, 228 (2013).

⁶ Rachel Kim, *How Is Fashion Protected by Copyright Law?*, COPYRIGHT ALLIANCE (Feb. 10, 2022) <https://copyrightalliance.org/is-fashion-protected-by-copyright-law/>.

⁷ Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 AM. BUS. L.J. 27, 32 (2011).

Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion Industry for the Better recognize fashion design as a legitimate form of art deserving of the same protections afforded to other creative industries.

Fashion as craft is not an unfounded claim, especially when explaining away the exception to the copyright laws in the US. Historically, fashion, much like cooking, has largely been “a function of homemaking,” and thus, or so the argument goes, more functional than artistic.⁸ However, the industrial revolution drastically changed this dynamic, shifting clothing production from a domestic, utilitarian role to a mass market industry driven by innovation and design.⁹ Further, the rapid expansion of the internet and rise of global trade through e-commerce have changed the fashion industry into its modern, fast-paced state.¹⁰ Gone are the days where little girls learned how to “craft” clothing for the family from their mothers and grandmothers by learning running stitches. Today, students from around the world flock to prestigious design schools within the US to earn their Bachelor of Fine Arts degrees in fashion design – an ironic, but a clear acknowledgement of fashion as a legitimate art form, at least within the academia.

b. Legal Background

While fashion *design* lacks the same copyright protection granted to other creative industries, the industry benefits from other forms of IP protections in the US. Most notable among the limited options is trademark law, which arguably offers the most robust legal protection for designers. Trademark protects words, marks, and logos, and in the absence of *design* protection, many designers rely on protecting their brand’s label as a whole.¹¹ Significantly, trademark law provides brand protection through trade dress, where trademark protection is extended to product

⁸ *Id.*

⁹ Shlomit Yanisky-Ravid and Grace Monroy, *The Promised Land: Blockchain and the Fashion Industry*, 87 BROOKLYN L. REV. 609, 610 (2022).

¹⁰ *Id.* at 609.

¹¹ Mark K. Brewer, *Fashion Law: More than Wigs, Gowns, and Intellectual Property*, 54 SAN DIEGO L. REV. 739, 752.

Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion Industry for the Better packaging or even the product itself, if it serves as a source indicator of the brand through an established “secondary meaning.”¹² For example, in *Christian Louboutin S.A. v. Yves Saint Laurent Am. Inc.*, the Second Circuit Court held that Christian Louboutin’s signature red soles on the bottom of women’s shoes were protectable through trade dress because it “has acquired limited ‘secondary meaning’ as a distinctive symbol that identifies the Louboutin brand.”¹³

Patent law, including design patents, could theoretically offer some protection for fashion design. Design patents specifically protect the ornamental aspects of a product’s innovative design provided that it is new, original, and non-obvious.¹⁴ However, in practice, design patents are often impractical due to lengthy application process that can take anywhere from eight to twenty months to get approved, which is a timeline that does not exactly align for an industry that operates on cycling new collections every few months.¹⁵ As a result, in absence of copyright protections, trade dress remains the closest form of design protection currently available for fashion design.

However, it is important to recognize that while trade dress offers some level of protection for creative work within the fashion industry, the current legal framework as it exists today heavily favors luxury brands or brands with abundant financial resources. To receive the benefits of trade dress protection, design of a product must be widely recognized by the public as a source indicator for the brand.¹⁶ This requirement is nearly unattainable for emerging designers who lack the market exposure and resources needed to establish such recognition. Thus, within the context of copying, or “design piracy,” fashion brands with widely recognizable designs

¹² Scafidi, *supra* note 1, at 122.

¹³ *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012).

¹⁴ Tiffany din Fagel Tse, *Coco Way Before Chanel: Protecting Independent Fashion Designers’ Intellectual Property Against Fast-Fashion Retailers*, 24 CATH. U. J. L. & TECH. 401, 414.

¹⁵ *Id.*

¹⁶ Scafidi, *supra* note 1, at 122.

Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion Industry for the Better generally possess greater legal and financial leverage than emerging designers.¹⁷

c. Innovative Design Protection Act (IDPA) and the Prevailing Arguments

In 2012, the Innovative Design Protection Act (IDPA) was introduced as an effort to address the lack of IP protection for fashion design.¹⁸ The bill sought to fill the gap in US copyright law by offering a limited and specialized protection for original fashion designs through amending Title 17 of the United States Code, as a *sui generis* law.¹⁹ Specifically, the bill proposed a limited copyright duration of three years with the requirement that the alleged infringed work must be “substantially identical in overall visual appearance” to the original work.²⁰ The original work must have been a “unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.”²¹ This language aimed to ensure that only genuinely original and innovative fashion designs would qualify for protection, excluding common or generic products such as round neck t-shirts and pencil skirts.²² Additionally, the bill did not mandate registration, aligning with the automatic copyright protection provided at the time of creation under the general US copyright law, to address the issue of fashion’s fast-paced environment.²³

However, IDPA ultimately failed to pass, and its failure can be attributed to a combination of misunderstanding, industry resistance, and concerns about unintended consequences stemming from granting copyright protections to the fashion industry. Generally, the critics argued that the

¹⁷ *Id.*

¹⁸ Tse, *supra* note 14, at 404.

¹⁹ Emma Yao Xiao, *The New Trend: Protecting American Fashion Designs Through National Copyright Measures*, 28 CARDOZO ARTS & ENT LJ 417, 434 (2010).

²⁰ Innovative Design Protection Act of 2012, S. 3523.

²¹ *Id.*

²² *Id.*

²³ *Id.*

Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion Industry for the Better bill was vague and would likely lead to excessive litigation.²⁴ The American Apparel and Footwear Association (AAFA), for instance, cautioned that such legislation would stifle creativity, increase production costs, and limit consumer choice, thereby undermining the very innovation the bill aimed to protect.²⁵ Similarly, the California Fashion Association (CFA), argued that introducing copyright protections for the fashion industry would hinder creativity and innovation, asserting that copying does not harm the industry but instead drives accessibility and trend proliferation, thereby questioning the need for such measures.²⁶

The arguments made by the bill's opponents align with a widely supported theory among scholars, particularly those led by professors Kal Raustiala and Christopher Sprigman. Their arguments largely assert that fashion is a unique and distinctive sector within the creative industry that thrives in a low-IP regime.²⁷ According to their theory, the fast-paced nature of fashion compels designers to create innovative designs quickly, generating new trends before competitors can copy them.²⁸ Further, they contend that extending copyright to fashion design would harm the consumers by limiting access to more affordable alternatives to popular designs, arguing that fashion should serve a diverse consumer base at varying price points.²⁹ However, as this paper will later discuss, these arguments are counterintuitive as the lack of copyright protections for fashion design disproportionately disadvantages emerging designers who lack the resources to compete fairly, and thereby stifles creativity within the industry as a whole.

II. The Business of Fashion: Who is the Real Artist?

a. The Business of Fashion

²⁴ Jacqueline Lechtholz-Zey, *Third Time's a Charm? Why Congress Should Modify the Newest Incarnation of the Design Piracy Prohibition Act*, 30 LOY. L.A. ENT. L. REV. 511, 534.

²⁵ *Id.* at 534-535.

²⁶ *Id.*

²⁷ Raustiala et al., *supra* note 3, at 1728.

²⁸ *Id.* at 1722.

²⁹ *Id.*

Since the primary argument against extending copyright protections to fashion design often hinges on the belief that it would stifle creativity, it is crucial to first understand and recognize where such creativity and innovations come from. To do so, it is essential to distinguish the key players shaping the industry's landscape.

First, the high-end luxury brands are dominated by well-established brands, many of which are owned by luxury conglomerates.³⁰ Examples include Louis Vuitton under LVMH, Gucci under Kering, Calvin Klein under PVH, and Coach under Tapestry, while some independent luxury houses, such as Chanel and Hermès, remain exceptions.³¹ However, it is undeniable that most of these brands boast a significant market share due to their long-standing history that established their prominent market presence within the industry. This segment typically caters to a specific clientele with certain socio-economic statuses that affords them the financial means to access exclusive and limited products provided by the brands.³²

Next, mass market brands, that also represent the relatively new category of fast fashion, have been a rising star as a significantly profitable business model within the fashion space. Some examples of these companies include Forever 21, H&M, Zara, and department stores who produce their own lines such as Macys, Nordstrom, and Target. These companies are known to churn and mass produce affordable fashion at a rapid pace to keep up with evolving trends.³³ Typically, mass market brands operate as a publicly traded company or a private company with corporate investors as majority shareholders. For example, Simon Property Group and Authentic Brand Group equally own shares of Forever 21, whereas Macys, Nordstrom, and Target are all

³⁰ Peter Westberg, *The 13 Largest Luxury Companies in the World*, QUARTR (Nov. 20, 2024) <https://quartr.com/insights/company-research/the-13-largest-luxury-companies-in-the-world>.

³¹ *Id.*

³² Sotheby's Institute of Art, *Luxury Marketing: A Deep Dive into High-End Branding*, <https://www.sothebysinstitute.com/how-to-series/luxury-marketing> (last visited Dec. 3, 2024).

³³ Jillian Houle, *Reaping What You Sow: Holding Duty-Bearing States Accountable for the Disastrous Effects of the Fast Fashion Industry*, 13 CHI.-KENT J. ENV. ENERGY L. 30, 31 (2024).

Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion Industry for the Better publicly traded companies.³⁴ Mass market brands cater to the general public by offering budget-friendly versions of trendy designs with their business model derived in accessibility and affordability.³⁵

Third, occupying the space between the luxury and mass market, contemporary brands offer comparatively more elevated designs than mass market brands at a relatively more accessible price point than the luxury sector. These brands are often newer and less established but play a significant role in bridging the wide gap between exclusivity and affordability, with examples including brands such as Alexander Wang, The Row, Peter Do, and 3.1 Phillip Lim. Many of these brands are independently owned but may share stakes with larger players within the industry. For instance, Mary-Kate and Ashley Olsen hold a majority stake in The Row, while Chanel's Wertheimer family also owns a minority stake in the company.³⁶ Contemporary brands frequently attract younger consumers who are beginning to invest in higher-quality and aspirational fashion as they seek to transition into the luxury market.

Finally, at the heart of innovation are the indie designers with emerging talents and niche creators within the industry. This category encompasses emerging designers that are just entering the market, design students who publicly showcase their work, as well as other independent designers with a loyal, niche following. Some of these brands include Narciso Rodriguez, Gabriela Hearst, LII, and Gia Studios. These designers typically operate with small teams, produce in limited quantities, and have minimal exposure to mass media.

b. Identifying the Artists

³⁴ Rachel Warren, *Which Company Owns Forever 21?*, THE MOTLEY FOOL (Jul. 17, 2024) <https://www.fool.com/investing/how-to-invest/stocks/who-owns-forever-21/>.

³⁵ Houle, *supra* note 32, at 32.

³⁶ AFP, *The Row Receives Investment from Chanel and L'Oréal Owners*, FASHION UNITED (Sep. 13, 2024) <https://fashionunited.com/executive/management/the-row-receives-investment-from-chanel-and-loreal-owners/2024091361861>.

Fall 2024 was marked by a series of newly appointed high-profile creative directors within the high-end luxury market – Matthieu Blazy from Bottega Veneta to Chanel, Louise Trotter from Carven to Bottega Veneta, and Sarah Burton from Alexander McQueen to Givenchy, to name a few.³⁷ Often referred to as the “fashion musical chairs,” it has been a common practice for luxury brands to reshuffle a handful of creative directors from one brand to another.³⁸ While these changes generate considerable buzz and speculation about the new creative direction a brand might take, the role of a creative director in a luxury sector is deeply intertwined with the business of fashion, rather than focusing solely on the design and aesthetic of the brand. As a renowned fashion journalist Suzy Menkes observed, the most critical relationship for a newly appointed creative director is not just about artistry but about balancing “creative talent and business management.”³⁹ This dual focus often limits the tenure of creative directors as the industry’s profit-driven nature leaves little room for them to develop a new design direction for the brand, while the pressure to deliver immediate financial results takes precedence.⁴⁰

Moreover, as previously discussed, most luxury brands rely heavily on their established aesthetic, deeply rooted in the fashion house’s longstanding history and market presence. While the new creative directors may introduce subtle shifts in design, they can only deviate so far from the brand’s signature styles that have been meticulously cultivated over decades. As a result, creative directors are generally restricted in their creative freedom as designers, leaving little opportunity for true design innovation for the industry.

³⁷ Natalie Hughes, *Matthieu Blazy is Joining Chanel, Plus Other Major Industry Shake-Ups*, MARIE CLAIRE (Dec. 2024) <https://www.marieclaire.co.uk/fashion/luxury-fashion-houses-creative-directors>.

³⁸ *Id.*

³⁹ Alexandra Mondalek, *What Luxury Fashion Brands Want in a Creative Director*, VOGUE BUSINESS TALENT (Nov. 7, 2019) <https://www.voguebusiness.com/talent/articles/luxury-fashion-brands-creative-director-balmain-louis-vuitton-virgil-abloh/>.

⁴⁰ Bethanie Ryder, *What Fashion’s Creative Director Reshuffle Says About Luxury Today*, JING DAILY (Jul. 30, 2024) <https://jingdaily.com/posts/what-does-fashion-s-creative-director-reshuffle-say-about-luxury-today>.

The mass market, particularly fast fashion, presents a different set of issues in fostering innovation within the fashion industry. As Action for the Climate Emergency (ACE) describes, fast fashion’s business model is an exploitative one, that focuses on profit through “replicating and reproducing ‘high fashion’ trends and designs on a mass scale for cheap.”⁴¹ With rapidly advancing technology, design piracy for mass market has become easier than ever where even runway looks can be copied almost immediately as it comes down the runway, gets photographed, and uploaded online.⁴² For example, Forever 21, often regarded as “the most notorious copyist retailer” is the prime example of this business model.⁴³ In 2017, the company sparked significant debates amongst legal scholars and fashion enthusiasts when Gucci issued a series of cease-and-desist letters demanding Forever 21 to stop the sale of items featuring blue-red-blue stripes, a signature Gucci motif.⁴⁴ Forever 21 made a shocking move by bringing Gucci to court, claiming that the brand could not be afforded ownership over the blue-red-blue stripes under the US IP laws.⁴⁵

Naturally, fast fashion’s business model itself stifles opportunities for innovation. With an emphasis on churning out mass-produced products every few weeks, there is little incentive – or time – for in-house designers to create original styles.⁴⁶ The business model is driven by a rapidly changing consumer culture that favors a “see-now-buy-now” model, largely due to

⁴¹ Victoria Whalen, *Fast Fashion and Climate Change 101*, ACE (Jun. 17, 2022)

<https://acespace.org/blog/2022/06/17/fast-fashion-101/>

⁴² Irene Tan, *Knock It Off, Forever 21! The Fashion Industry’s Battle Against Design Piracy*, 18 J.L. & POL’Y 893, 900 (2010).

⁴³ C. Scott Hemphill and Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1172 (2009).

⁴⁴ Barbara Thau, *Gucci Versus Forever 21: Legal Fashion Experts Disagree On Alleged ‘Knockoff’ Drama*, FORBES (Jul. 11, 2017).

⁴⁵ *Id.*

⁴⁶ Hemphill et al., *supra* note 42, at 1189

Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion Industry for the Better massive consumer exposure through the rise of social media.⁴⁷ Such consumer behavior combined with the business model that requires a relentless production cycle that prioritizes profitability and rapid turnover inevitably further exacerbates the industry's reliance on imitation rather than creativity.

Contemporary and indie designers enjoy significant creative freedom as they are mostly independently owned and still in the process of building their brand aesthetic and history, much like the early stages of today's luxury brands. Thus, these two groups are crucial in fueling creativity and innovation within the industry as they remain largely unrestricted from adhering to a specific business model or brand aesthetics. However, contemporary designers differ from indie designers in terms of financial resources and market presence. Contemporary designers tend to be more established and frequently share stakes in their companies with business partners or investors. For instance, Phillip Lim launched his brand, 3.1 Phillip Lim, in 2005 during New York Fashion Week with the support of his business partner, Wen Zhou, who had reportedly invested \$750,000 into the company at its inception.⁴⁸

By contrast, indie designers rarely have access to such financial backing, with limited resources and exposure, making their business endeavors inherently more challenging. However, their operations are often smaller and are often free from the constraints imposed by dedicated sales teams or buyers demanding certain types of styles per season for profitability. This freedom allows indie designers to experiment extensively with both their design and business models. As a result, indie designers often serve as the driving force behind the fashion industry's innovation, consistently pushing boundaries with their artistic creativity.

⁴⁷ Suzanne Jacobs, *The Clothing Industry is Churning Out New Styles Faster and Faster*, GRIST (Dec. 16, 2015) <https://grist.org/business-technology/the-clothing-industry-is-churning-out-new-styles-faster-and-faster/>.

⁴⁸ Heidi Mitchell, *How Phillip Lim Created a \$100 Million Fashion Empire*, BLOOMBERG PURSUITS (Sep. 8, 2016) <https://www.bloomberg.com/features/2016-designer-phillip-lim/>.

III. When IP Law Fails: Who Pays the Price?

A crucial flaw with the “low-IP regime” theory is that it dangerously portrays design piracy as a positive “paradox” within the fashion industry, suggesting that it compels designers to constantly generate new and fresh ideas to stay ahead of the copyists.⁴⁹ Framing the detrimental culture of copying as the driving force of the fashion industry’s creativity unfairly focuses on the supposed benefits of a “low-IP regime” while ignoring the harmful consequences of design piracy.

a. Winner Takes It All

First, the argument dangerously overlooks the industry’s structure by failing to identify the source of creativity and innovation, while oversimplifying the idea of copying. The stark reality of a “low-IP regime” is that there are clear winners and losers: those who copy and those who create. Copying, appropriation, or design piracy – terms often used interchangeably – are prominent in almost all levels of the industry.⁵⁰ As the argument goes, proponents of the argument assert that nothing is truly original, as all designs draw inspiration from past creations.⁵¹ However, this perspective ignores the crucial distinction between referencing an existing design as inspiration and outright copying. Referencing a previous design as inspiration involves reimagining or adapting elements of a design to create something substantively new, whereas copying involves replicating a work without adding new value or creativity.⁵²

Distinguishing the two is not a new concept. In copyright law, this concept is well-established through the substantial similarity test. While there is a circuit split regarding the

⁴⁹ Raustiala et al., *supra* note 3.

⁵⁰ *Id.* at 1160.

⁵¹ *Id.*

⁵² *Id.*

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method for determining substantial similarity, courts will generally evaluate the “total concept and feel” of the original and allegedly infringing work to determine if there is a valid infringement.⁵³ Similarly, the IDPA sought to address the issue by stipulating that alleged infringement must exhibit substantial similarity to the designer’s original work, aiming to protect design innovation while also preserving the essential practice of drawing inspiration from prior works during a design process.⁵⁴ The requirement proposed by the IDPA closely aligns with the existing and well-established principle within US copyright law, and directly addresses the misconception that inspiration and copying are somehow equivalent.

Accordingly, the argument’s focus on continued innovation through the exploitative nature of copying is particularly damaging to indie designers, who are often entering into the market with limited resources and legal recourse. While their creative freedom allows them to experiment and introduce fresh, innovative designs into the industry, design piracy has devastating effects for indie designers as their creative work is quickly diluted within the market without compensation for their work. This harmful dynamic takes away incentives for designers to pursue constant innovation and instead encourages design piracy within the industry by rewarding copyists who face no legal consequences.

b. Criminals and Copycats

The argument also fails to account for the rapid technological advancements that have significantly influenced consumer behavior in recent years.⁵⁵ Particularly, the rapid evolution of information exchange through social media renders the argument increasingly outdated. The

⁵³ DLA Piper, *Substantial Similarity in Copyright: It Matters Where You Are*, INTELLECTUAL PROPERTY AND TECHNOLOGY NEWS (NORTH AMERICA), (Dec. 22, 2020) <https://www.dlapiper.com/en/insights/publications/intellectual-property-news/2022/ipt-news-q4-2020/substantial-similarity-in-copyright>.

⁵⁴ Innovative Design Protection Act, *supra* note 20.

⁵⁵ Jacobs, *supra* note 46.

Weaving Copyright into Fashion: How Copyright Protection Can Change the Fashion Industry for the Better industry’s rampant practice of copying enabled by the lack of copyright protection, coupled with the social media culture has now normalized copying, especially amongst the younger generations.⁵⁶

This normalization is problematic not only because it stifles innovation but enables a thriving counterfeiting market by driving consumer demand. While copying and counterfeiting differ in their legal definitions, they are deeply intertwined. Copying is a broad term tied to the claims of design infringement, which fashion design has no legal standing under the current US copyright law, whereas counterfeiting falls under trademark law and is categorically illegal.⁵⁷ Commonly referred to as the “dupe culture,” this phenomenon reflects a “generational shift in consumption of goods and media.”⁵⁸ Ultimately, this shift harms the industry as a whole by undermining the only IP protection the fashion industry has heavily relied on – trademarks – while allowing the exploitive practice of design piracy to flourish unchecked.

Further, it is important to remember that counterfeiting largely remains a luxury market problem as it is directly tied to trademark law. The counterfeit market is largely fueled by “consumer demand for products that are popular and brands that are famous.”⁵⁹ Luxury brands, being deeply connected to economic and social stratification through their reliance on exclusivity, further drives this demand, perpetuating the counterfeit economy.⁶⁰

While counterfeiting poses a serious problem for these prominent brands, design piracy is an

⁵⁶ The Guardian, *Counterfeit Goes Cool: Brands Urged to Embrace #Dupe*, BUSINESS OF FASHION (May 20, 2024) <https://www.businessoffashion.com/news/retail/counterfeit-goes-cool-brands-urged-to-embrace-dupe/>.

⁵⁷ Sara R. Ellis, *Copyrighting Couture: An Examination of Fashion Design and Why the DPPA and IDPPPA Are a Step Towards the Solution to Counterfeit Chic*, 78 TENN. L. REV. 163, 167 (2010).

⁵⁸ The Guardian, *supra* note 55.

⁵⁹ Aayushi Badhwar et al., *Frontiers, Blockchain, Exploring the Potential of Blockchain Technology within the Fashion and Textile Supply Chain with a focus on Traceability, Transparency, and Product Authenticity: A Systematic Review*, FRONTIERS, (Feb. 20, 2023) <https://www.frontiersin.org/articles/10.3389/fbloc.2023.1044723/full>.

⁶⁰ *Id.*

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equally critical issue for indie designers, who often have no legal recourse to protect their creative work. If we examine design piracy through the lens of substantial similarity test and the distinction between outright copying and drawing from an inspiration, design piracy is effectively equivalent to counterfeiting. The difference lies in the legal framework: copied work that lacks “secondary meaning” or is not trademarked logo are not protected by law.⁶¹ This undoubtedly creates systemic disparity between the different sectors of the industry, as indie designers lack the resources, and the necessary brand identity required to compete on a level playing field.

For instance, if an indie designer copied the design of a Birkin Bag, they would inevitably lose the legal battle against Hermès, as the Birkin Bag is protected under trade dress. While not directly fashion market related, this very issue was tested in court in *Hermès v. Rothschild*.⁶² There, Rothschild created a series of NFTs called “MetaBirkins,” which digitally replicated the Birkin bag.⁶³ As an artist himself, Rothschild argued much like an indie designer might, that their creation of the MetaBirkins was an exercise of creative freedom.⁶⁴ However, the Court upheld the trade dress protection of the Birkin bags, ruling that Rothschild had infringed on Hermès’ trademark, demonstrating the expansive power of trademark law that extends beyond the original market of the trademark owner.⁶⁵

What is interesting, however, is that imagining the reversal of this scenario exposes the stark systemic inequality in the current IP framework. Imagine a scenario where an emerging designer introduces a unique and innovative bag design, and Hermès substantially copies that design as

⁶¹ Scafidi, *supra* note 1, at 122.

⁶² *Hermès Int’l v. Rothschild*, 590 F. Supp. 3d 647 (S.D.N.Y. 2022).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

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their next signature bag. Hermès could easily secure trade dress protection by leveraging its existing market presence and established brand recognition through marketing, producing, and selling the copied bag. Meanwhile, the indie designer would have no legal claim, as their design would fall into the unprotected category of copyright infringement under the current IP framework.

This disparity highlights how the “low-IP regime” in the fashion industry disproportionately affects indie designers, leaving them especially vulnerable to exploitation while allowing larger brands to dominate the market with minimal accountability. The absence of legal protections for their creative work not only denies the designers’ ability to safeguard their designs, but also takes away the incentive to create.⁶⁶ Thus, the lack of copyright protection for fashion design perpetuates a harmful cycle of copying, and without indie designers – the driving force of creativity and innovation – the industry risks a significant decline in both.

IV. Overcoming the “Useful Article” Exception

a. Fashion as Art

Every first Monday in May, celebrities gather at the Metropolitan Museum of Art to attend the prestigious Met Gala, celebrating the opening of the Costume Institute’s annual fashion exhibit. These exhibits showcase carefully curated pieces selected for their aesthetic value, rather than their historical significance.⁶⁷ While some critics dismiss that the rise of fashion exhibits in museums as a “trend and seasonal flash of interest,” proponents for extending copyright protection for fashion design often point to fashion’s increasing presence in museums as

⁶⁶ Hemphill and Suk, *supra* note 42, at 1152.

⁶⁷ Amy L. Landers, *The Anti-Economy of Fashion; An Openwork Approach to Intellectual Property Protection*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 427, 486 (2014).

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evidence of the growing acceptance of fashion as an art form.⁶⁸ Of course, simply displaying a piece of clothing in a museum does not make it art. However, the growing recognition slowly blurs the line between functional craftsmanship and creative expression, challenging the historical perception that has long excluded fashion design from copyright protection within the US.

There is no denying that fashion's utilitarian purpose, such as covering the body or carrying items – is inseparable from its artistic qualities, but to claim that all fashion design is primarily functional is a deeply misguided notion. Fashion design often overlaps with fine art, challenging the idea that its functionality outweighs its artistic merit. For instance, Hussein Chalayan's melting dress evokes the essence of destructive contemporary art rather than a functional article of clothing.⁶⁹ Similarly, Iris van Harpen's 3D-printed collection from 2007, shown along with other sculptural works created with the same technique, resembled sculptural artworks on the body, rather than functional clothing.⁷⁰ Moreover, these pieces were carefully curated and displayed at the Musée des Arts Décoratifs in 2023, further highlighting the pieces' artistic nature.⁷¹ These examples, among many others, demonstrate that fashion often transcends mere utility, supporting the argument of accepting fashion as art.

b. Lessons from Other Industries – Architecture and Software

Even if fashion design cannot be considered as fine art under the law, US copyright law has already made exceptions in other creative fields with primarily functional or utilitarian purposes.

⁶⁸ Felicia Caponigri, *Ethics, Art, and International Law: The Ethics of the International Display of Fashion in the Museum*, 49 CASE W. RES. J. INT'L L. 135, 138 (2017).

⁶⁹ Dan Howarth, *Clothes Dissolve on the Catwalk During Hussein Chalayan's Spring Summer 2016 Show*, DEZEEN, (Oct. 2, 2015) <https://www.dezeen.com/2015/10/02/clothes-disintegrate-on-catwalk-hussein-chalayans-spring-summer-2016-show-paris-fashion-week/>.

⁷⁰ Stephanie Sporn, *For Iris van Harpen, Fashion's Intrepid Explorer, Anything is Possible*, ART BASEL, (Feb. 21, 2024) <https://www.artbasel.com/news/iris-van-herpen-dutch-fashion-designer-couture-musee-arts-decoratifs-paris-2024>.

⁷¹ *Id.*

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One example is the Architectural Works Copyright Protection Act of 1990 (AWCPA) which extended copyright protection to architectural designs.⁷² Under the AWCPA, protectable design is defined as being “embodied in any tangible medium of expression,” including the building itself.⁷³ When enacting this law, Congress clearly understood acknowledged certain useful works can also be “interpreted aesthetically” as a whole.⁷⁴

Another example is software, specifically “computer programs,” which also undeniably falls under the “useful articles” exception. Through the Computer Software Copyright Act of 1980, Congress extended the protections traditionally afforded to literary works to include software.⁷⁵ This marked a significant departure from the conventional view that copyright applied only to non-technological arts such as literature, paintings, and music.⁷⁶ Congress did not explicitly address the reasoning behind such exception, resulting in computer software’s copyright protections more *sui generis* in nature than others.⁷⁷ Nevertheless, computer programs now enjoy full copyright protection, balancing their functional purpose with their intellectual and creative elements.⁷⁸

Building on the precedents set by the AWCPA and the Computer Software Copyright Act, extending copyright protection to fashion design would align with Congress’s demonstrated willingness to protect creative works that blend functionality with artistic or intellectual expressions. Just as Congress acknowledged that architectural designs and computer programs can serve both utilitarian and artistic or intellectual purposes, it is equally valid to argue that

⁷² Architectural Works Copyright Protection Act of 1990 §§ 701-706, Pub. L. No. 101-650, 104 Stat. 5133.

⁷³ Copyright Act § 101

⁷⁴ Aleksandra Spevacek, *Couture Copyright: Copyright Protection Fitting for Fashion Design*, 9 J. MARSHALL REV. INTELL. PROP. L. 602, 613 (2009).

⁷⁵ 1 Nimmer on Copyright § 2A.10

⁷⁶ Dennis S. Karjala, *Oracle v. Google and the Scope of a Computer Program Copyright*, 24 J. INTELL. PROP. L. 1, 4 (2016).

⁷⁷ *Id.* at 6.

⁷⁸ Nimmer, *supra* note 74.

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fashion design – ranging from avant-garde runway pieces to intricately designed ready-to-wear collections – deserve comparable protections as a form of creative expression.

V. Conclusion

As argued throughout this paper, the lack of copyright protection for fashion design perpetuates systemic inequalities within the industry. Indie designers, who often drive innovation and creativity, remain the most vulnerable under the current framework, as their works are easily copied without any legal recourse. Thus, introducing copyright protections would provide these designers with a vital legal tool to protect their creations, fostering a more equitable and innovative fashion industry. Moreover, copyright protection would address the broader cultural implications of the current “low-IP regime.” The normalization of copying and its detrimental effects, such as the rise of “dupe culture” and the proliferation of the counterfeit market, undermine the industry’s integrity and sustainability, especially in creating incentives for designers to produce innovative and creative designs each season. In turn, protecting fashion designs would better incentivize original creations, reducing reliance on exploitative practices that erodes both consumer trust and the industry’s artistic value.