



WAKE FOREST
INTELLECTUAL PROPERTY
LAW JOURNAL

VOLUME 9

2008 - 2009

NUMBER 2

NOTE

**FASHION DESIGN: THE WORK OF ART THAT IS STILL
UNRECOGNIZED IN THE UNITED STATES**

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INTRODUCTION

“Fashion is not something that exists in dresses only. Fashion is in the sky, in the street; fashion has to do with ideas, the way we live, what is happening.”¹ For this reason, fashion designs are a work of art that should be granted protection. At the 2006 Academy Awards Show, actress Felicity Huffman wore a black gown created by twenty seven year old fashion designer Zac Posen.² Within weeks of the show, copies of the dress were being sold in department stores for a fraction of the original price.³ This type of routine is known as design piracy.

Design piracy is the practice of copying original fashion designs and selling the apparel under a different label. Counterfeiting

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¹ Thinkexist, <http://thinkexist.com/quotations/fashion/> (last visited Apr. 5, 2009).

² *Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet and Intell. Prop.*, 109th Cong. 12 (2006) [hereinafter *Hearings*] (statements of Jeffrey Banks, fashion designer); Ruth La Ferla, *Night of a Thousand Knockoffs*, N.Y. Times, Mar. 9, 2006, at G11.

³ Anne Bratskeir, *The Foldinspiring Dresses: Pathway to the Prom*, NEWSDAY, May 18, 2006, at A42.

is another form of copying designs. It is the practice of imitating fashion designs with the intent to deceive buyers of the apparel's true content or origin by mimicking the details of the design and the name brand logo. "Everyone is against counterfeiting. Design piracy is exactly that. One has to copy the design first before attaching the counterfeit label. Design piracy is counterfeiting without the label."⁴ However, while counterfeit articles are protected against in the United States within the Intellectual property field under trademark law, trade dress and copyright law, pirated designs receive no such protection.

Since copyright law in the United States does not protect useful articles,⁵ Congress has denied copyright protection to fashion designs because clothing garments have traditionally been viewed as useful articles rather than artistic creations.⁶ The author of counterfitchic.com takes an opposing view to the foregoing decision. "A ball gown is a work of art. What else are you going to do with it? Clean the house?"⁷ Unfortunately, Congress has not understood this fact yet.

Art is traditionally defined as the expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, in which the works produced are appreciated primarily for their beauty or emotional power.⁸ It stands to reason, therefore, that fashion design would be considered art because fashion designers apply creative skills when drawing designs for original apparel that are acknowledged for their aesthetic appearance.

Continuing this logic, it would seem to follow that fashion designs should be protected by laws similar to those that protect other kinds of original artistic creations such as paintings or sculptures.⁹ Unfortunately, the United States lags woefully behind other countries in this regard.¹⁰

⁴ Laura Goldman, *Fashion Piracy*, BPCOUNCIL, 2007, <http://www.bpcouncil.com/apage/178.php> (quoting Steve Kolb, executive director of the Council of Fashion Designers (CFDA)).

⁵ Emily S. Day, Comment, *Double-Edged Scissor: Legal Protection for Fashion Designs*, 86 N.C.L. REV. 237, 246 (2007).

⁶ Jessica G. Jacobs, *Copyright Protection for Fashion Design: A Legal Analysis of the Design Piracy Prohibition Act, H.R. 2033*, http://assets.opencrs.com/rpts/RS22685_20070628.pdf; *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 414 (2d Cir. 1985); *Esquire, Inc. v. Ringer*, 591 F.2d 796, 796 (D.C. Cir. 1978).

⁷ Goldman, *supra* note 4.

⁸ Dictionary.com, <http://dictionary.reference.com/browse/art> (last visited Apr. 5, 2009).

⁹ Academic Honesty and Integrity, http://consortiumlibrary.org/find/copyright_4.

¹⁰ Julie P. Tsai, Comment, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States*, 9 LEWIS & CLARK L. REV. 447, 468 (2005).

As a result of the following deficiency in our government, counterfeiting and design piracy cost the U.S. economy between \$200-\$250 billion dollars per year, and counterfeit merchandise, as a whole, is responsible for the loss of 750,000 American jobs.¹¹ In addition, the annual sales of pirated and counterfeit goods total around \$600 billion, 5-7% of world trade, as estimated by the World Customs Organization. As a result, global sales lost to counterfeit goods are estimated at \$512 billion.¹²

Furthermore, if copyright protection were to be granted to fashion designs, such protection would not only prevent pirates from copying designs, but would also diminish the sales of counterfeit goods. This domino effect would result from the fact that it would not only be illegal to mimic name brand logos, but also the designs. Therefore, the overall process of counterfeiting would be illegal.

In addition, major economic losses to the world economy are not the only consequence of counterfeiting. It is believed internationally that counterfeiting is used as a source of funds by the criminal world.¹³ “The Islamic Extremists linked to the World Trade Centre bombing in 1993 in New York reportedly raised cash for the outrage that caused death and millions of dollars worth of damage by selling counterfeit t-shirts.”¹⁴

Most people think that buying an imitation handbag or wallet is harmless, a victimless crime. But the counterfeiting rackets are run by crime syndicates that also deal in narcotics, weapons, child prostitution, human trafficking and terrorism. Ronald K. Noble, the secretary general of Interpol, told the House of Representatives Committee on International Relations that profits from the sale of counterfeit goods have gone to groups associated with Hezbollah, the Shiite terrorist group, paramilitary organizations in Northern Ireland and FARC, the Revolutionary Armed Forces of Colombia.¹⁵

¹¹ The Int'l. Anticounterfeiting Coal., *GET REAL - The Truth about Counterfeiting*, www.iacc.org/counterfeiting/counterfeiting.php (2008).

¹² *Id.*

¹³ *Counterfeit Clothing a Growing Problem*, <http://www.just-style.com/article.aspx?Id=101100> (June 17, 2008); *See also Consultant's Report on "Theft of Intellectual Property - Piracy and Counterfeiting"*, http://www.med.govt.nz/templates/MultipageDocumentPage_____1831.aspx (Oct. 28, 2005).

¹⁴ *Id.*

¹⁵ Mike Masnick, *If The Fashion Industry Doesn't Get Special Copyrights, The Terrorists Will Win*, <http://techdirt.com/articles/20080215/135455266.shtml> (Feb. 15, 2008).

If exploitation of talents is not enough for Congress to obtain protection for fashion designs, then maybe information about the underground world will help influence the United States government to make the final decision.

Such vindictive contributions to the underground world and enormous losses within the world economy should bring change to the governing laws of the United States; however, until now, Congress has let the talents of multiple designers continue to be exploited. On March 30, 2006, U.S. Representative Robert Goodlatte introduced the Design Piracy Prohibition Act (hereinafter, "DPPA") to provide copyright protection for fashion designs,¹⁶ and on August 2, 2007, New York State Senator Charles Schumer introduced the same bill in the Senate.¹⁷ Nevertheless, the bill is still pending in the United States Senate.¹⁸

This article follows the progression of protection offered for fashion designs within the United States. Part I discusses the attempts of fashion pioneers over the past century to establish protection for fashion designs as well as the present protection offered to fashion designers and the types of designs that merit protection. Part II discusses the intellectual property protection provided for fashion designs in other countries. Part III introduces and analyzes the proposed Design Piracy Prohibition Act and the newly passed bill, the Enforcement of Intellectual Property Rights Act of 2008. Part IV discusses the arguments that have been made against and for protection of fashion designs.

The discussion of the proposed bill will lead the article into the conclusion, which discusses the need to recognize that fashion designs are a form of art that need further protection within the intellectual property field.

HISTORY

¹⁶ H.R. 5055, 109th Cong. (2d Sess. 2006); *Goodlatte Introduces Legislation Granting Protection to Fashion Designs*, 71 PAT. TRADEMARK & COPYRIGHT J. 615; 615 (2006).

¹⁷ Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007). References throughout this Note cite to H.R. 5055, the bill introduced in the House of Representatives; however, since the two bills are identical the analysis applies equally to S. 1957, the bill introduced in the Senate. At this time, the House has not passed the Bill.

¹⁸ Elizabeth F. Johnson, Note, *Defining Fashion: Interpreting the Scope of the Design Piracy Prohibition Act*, 73 BROOK. L. REV. 729, 731 (2008).

The United States has a long history of fashion piracy,¹⁹ dating back to the copying of textile patterns in the nineteenth century.²⁰ However, for numerous cultural reasons, intellectual property law in the United States has yet to develop as it has in other countries.²¹ This result is not due to a lack of effort or compliancy by the designers, but rather is the consequence of the designers' inability to convince lawmakers to provide fashion designs the same protections given to other articles of intellectual property, such as books, movies, plays, and computer code.²² Due to these shortcomings, fashion designers have tried to combat the problem by creating their own procedures within the fashion field.

In 1932, a group of American fashion manufacturers formed the Fashion Originators Guild of America to monitor retailers and keep track of original designs in order to prevent counterfeiting and design piracy. For example, if one looks at vintage dresses from the thirties, they will be able to find labels reading "a registered original design with Fashion Originators Guild."²³ Retailers selling knockoffs were red-carded, and guild members would not sell their merchandise to red-carded stores.²⁴ This routine was unpopular with the retailers, but it restrained copying. However, in 1941, the Supreme Court ruled that the manufacturers' arrangement violated antitrust laws, and the knockoff artists stayed in business.²⁵

Nevertheless, in the late 1950s and the 1960s, another attempt to provide protection for fashion designs was made. The National Committee for Effective Design Legislation tried to enact special copyright law that offered limited protection to all types of ornamental and industrial designs.²⁶ As a result, these proposals eventually developed into the current version of the Copyright Act.²⁷ Since 1914, Congress has considered over seventy bills to give copyright or copyright-like protection to clothing designs; however, these attempts

¹⁹ Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115, 118 (Peter K. Yu ed., 2006).

²⁰ Susan Scafidi, *Design Piracy Prohibition Act: Historical Regression* (Mar. 10, 2008), http://www.counterfeitchic.com/2008/03/design_piracy_prohibition_act_h.php.

²¹ *Id.*

²² Bennu Interests, *Copyright Laws on Clothing*, Aug. 7, 2008, <http://bennuinterests.wordpress.com/2008/08/07/copyright-laws-on-clothing/>.

²³ James Surowiecki, *The Piracy Paradox*, THE NEW YORKER, Sept. 4, 2007, http://www.newyorker.com/talk/financial/2007/09/24/070924ta_talk_surowiecki.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Barbara Ringer, *Alan Latman: An Appreciation*, 59 N.Y.U. L. REV. 247, 248 (1984).

²⁷ Scafidi, *supra* note 20.

have been futile.²⁸ Currently, knockoffs are widespread and legal.²⁹

In addition, failure to provide protection for fashion designs is not only attributed to Congress's failure to recognize fashion designs as a form of art, but also Congress's concern about the consequences that may accompany such protection. These concerns include the belief that imitations help the fashion industry develop and that the pirates are doing the industry a favor by making these designs affordable and more wearable for the public, since most American consumers would not be able to afford the original garment.³⁰ Although these concerns may have some merit, any negative outcome that may accompany the addition of protection for fashion designs is not outweighed by the consequences that result from the practice of counterfeiting and design piracy.

Currently, if fashion designers in the U.S. want to protect their work from pirates, they can look to Copyright, Patent, Trade Dress or Trademark Law. Although these designers would not be able to find protection for their designs within these fields, they would be able to attain protection for their company's logos and other distinctive marks as well as fabric patterns.³¹

TRADEMARK PROTECTION UNDER THE LANHAM ACT

A trademark is a word, symbol, or phrase used to identify a particular manufacturer or seller's products and distinguish that product from the products of another.³² The trademark "Nike" and the Nike "swoosh," for example, are trademarks that identify the shoes made by Nike and "[distinguishes] them from shoes made by other companies" such as Reebok or Adidas.³³

Once a trademark qualifies for protection, "rights to a trademark can be acquired (1) by being the first to use the mark in commerce, or (2) by being the first to register the mark with the U.S. Patent and Trademark Office."³⁴ Because of such lenient requirements, trademark law is "the most practicable source of protection for fashion

²⁸ Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J., 169, 171-200 (2002).

²⁹ *People v. Rosenthal*, No. 2002NY075570, 2003 WL 23962174 (N.Y. Crim. Ct. Mar. 4, 2003).

³⁰ 110th Congress – A bill to amend Title 17, United States Code, to Provide Protection for Fashion Design, <http://www.maplight.org/map/us/bill/71288/default/committees/349> (2008).

³¹ Tsai, *supra* note 10, at 453.

³² 15 U.S.C. § 1127 (2008).

³³ *Overview of Trademark Law*, <http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm> (last visited March 25, 2009).

³⁴ *Id.*

designers” today.³⁵

Trademark law provides strong protection for company logos and other distinctive marks, which identify the source of the fashion design.³⁶ The Second Circuit recently found that the color and design combination constituting a Louis Vuitton mark on its handbag collection qualified for trademark protection because it was inherently distinctive and had acquired secondary meaning.³⁷ As a result, if a Louis Vuitton bag were counterfeited, the copycat would be liable for trademark infringement. However, using trademark law to protect anything more than counterfeit items has proven to be nearly impossible.³⁸ This is due to the fact that it is legal to sell merchandise that copies the design and style of a product; however, it is against the law to sell goods that bear a counterfeit trademark.³⁹

The foregoing concept is presented in the *Louis Vuitton Malletier v. Dooney & Bourke, Inc.* case, in which the court held that Dooney & Bourke’s imitation of a Louis Vuitton bag design was legal because it was not likely to cause confusion among consumers and had not reduced the capacity of the design. Conversely, in New York City, counterfeit Louis Vuitton bags are often seized from sellers because they are illegal.⁴⁰ Hence, the foregoing examples serve to prove that courts do not discriminate against design piracy, although they forbid counterfeiting.

TRADE DRESS PROTECTION UNDER THE LANHAM ACT

Trade dress is a subset of trademark law.⁴¹ The concept of trade dress, which formerly was limited to the packaging of a product,⁴² now encompasses “the total image of a product and may

³⁵ Lynsey Blackmon, *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, 123 (2007).

³⁶ Tsai, *supra* note 10, at 451-60.

³⁷ *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 116 (2d Cir. 2006).

³⁸ Blackmon, *supra* note 34, at 123.

³⁹ *Id.*

⁴⁰ Anthony Ramirez, *Undercover on Canal St., With Louis Vuitton Impostors in His Sights*, N.Y. TIMES, Jan. 29, 2006, available at <http://www.nytimes.com/2006/01/29/nyregion/29canal.html?fta=y>.

⁴¹ Susan Scafidi, *Counterfeit Chic FAQs*, <http://faqs.counterfeitchic.com/> (last visited Apr. 5, 2009).

⁴² JEROME GILSON & ANNE GILSON LALONDE, 1 GILSON ON TRADEMARK PROTECTION AND PRACTICE § 2A.01[1] (2006 ed.).

include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.”⁴³ To recover for trade dress infringement, the plaintiff must show that her design is nonfunctional and distinctive and that the infringer’s design is likely to cause consumer confusion as to the source of the design.⁴⁴ Thus, while trademark law provides sufficient protection for fashion designers’ marks and logos, trademark and trade dress law do not provide strong protection against knockoffs of overall clothing or accessory design.

In *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, the Supreme Court held that a product’s design is distinctive, and therefore protectable, only upon a showing of secondary meaning.⁴⁵ Similarly, in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, the Court held that designers prove “secondary meaning” by showing that “in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.”⁴⁶ These holdings have been applied in a recent case in which Louis Vuitton sued a small company named Haute Diggity Dog over a line of canine products called Chewy Vuitton.⁴⁷ These products are decorated with a pattern (intertwined “C” and “V”) that resembles that of the famous Louis Vuitton logo (intertwined “V” and “L”).⁴⁸ In the *Louis Vuitton* case, which involved both trademark and copyright infringement claims, the court began its trademark analysis by finding that the name “Chewy Vuitton” was an “obvious parody” of the famous Louis Vuitton mark.⁴⁹ Given the strength and recognizable mark owned by Louis Vuitton, the court ultimately found that it was unlikely that a consumer would become confused about the origin of the Chewy Vuitton dog toys.⁵⁰ Instrumental in the court’s decision was the fact that no actual confusion was shown by Louis Vuitton.⁵¹ The court was also persuaded by the fact of the obvious difference in degree of quality (or lack thereof in the case of the Chewy Vuitton dog toys and beds), as well as the fact that the substantial price on genuine Louis Vuitton goods creates an inherent sophistication naturally

⁴³ *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983).

⁴⁴ GILSON & LALONDE, *supra* note 42, § 2A.01[3].

⁴⁵ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 216 (2000).

⁴⁶ *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982) (*citing* *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 118 (1938)).

⁴⁷ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 464 F. Supp. 2d 495, 498 (E.D. Va. 2006).

⁴⁸ *Id.*

⁴⁹ *Id.* at 499-500.

⁵⁰ *Id.* at 499-503.

⁵¹ *Id.* at 502.

requiring the “buyers to exercise care before they part with their money.”⁵² The court found that the same facts that led to the finding of no trademark infringement weighted on the defendant’s side for the Fair Use analysis under the Copyright Act.⁵³

PATENT

Similarly, patent law hardly contributes to the protection of apparel. A patent is a set of exclusive rights granted by a state to an inventor for a limited period of time in exchange for a disclosure of an invention.⁵⁴ To obtain a patent, “an invention must meet the following five requirements: patentable subject matter, the utility requirement, the novelty requirement, the non-obviousness requirement, and the description requirement.”⁵⁵

If a garment passes all of the requirements needed to obtain a patent then it is protected with a design patent or utility patent. “A design patent protects the ornamental design, configuration, improved decorative appearance, or shape of an invention” for fourteen years.⁵⁶ This patent is appropriate when the basic product already exists in the marketplace and is being improved upon not in function, but only in style.⁵⁷ On the other hand, “a utility patent protects any new invention or functional improvements on existing inventions” and “lasts for twenty years from the date of filing.”⁵⁸ To ensure the utility and design patents do not expire, the owner of the patent must pay maintenance fees to the United States Patent and Trademark Office.⁵⁹ These fees are due at three and one-half, seven and one-half, and eleven and one-half years from the filing date and amount to roughly \$3500 U.S. dollars for individuals and small businesses.⁶⁰ Nevertheless, these fees do not encompass the filing fee, the issue fee, or the attorneys’ fees for processing the application.

Hence, the high cost of maintaining a patent is not the only negative aspect of obtaining a patent. The process of attaining a patent

⁵² *Id.* at 503 (quoting *Charles of Ritz Group, Ltd. v. Quality King Distributors, Inc.*, 832 F.2d 1317, 1323 (2d Cir. 1987)).

⁵³ *Id.* at 507.

⁵⁴ Cornell University Law School, *Patent Law: An Overview*, <http://topics.law.cornell.edu/wex/Patent> (last visited Mar. 25, 2009).

⁵⁵ *Id.*

⁵⁶ R. Kayne, *What is the Difference Between a Design Patent and a Utility Patent?* (2003), <http://www.wisageek.com/what-is-the-difference-between-a-design-patent-and-a-utility-patent.htm>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

is also extremely time-consuming. A “cautious estimate” of a patent-pending time span for a design is twenty-six months.⁶¹ Since designs and patterns are usually short-lived, obtaining a patent for a design becomes pointless because by the time a manufacturer receives a patent for the manufacturer’s item, there is a high likelihood that the item has already been imitated. Therefore, the world of fashion cannot make effective use of the patent system.

In addition, if there were an expedited patent statute enacted, patents would still be of no use to fashion designs. This is due to the utility requirement that is needed to obtain a patent. Since fashion designs are viewed as useful articles rather than utilitarian creations, fashion designs are unlikely to meet the utility requirement.⁶² As a result, an expedited patent statute would be futile for fashion designs because it would not extend protection to such creations. However, if fashion designs were to be viewed as utilitarian creations rather than useful articles, such a statute would be attainable and beneficial to the fashion world because it would provide protection for fashion designs similar to that proposed in the DPPA.

COPYRIGHT

On the other side of the spectrum is copyright law, which offers the most protection to fashion designs today but is extremely limited. Currently, copyright law only grants protection to the designer or other owners of an original design of a “useful article” that makes the article’s appearance attractive or distinctive to the buying public.⁶³ However, the statute restricts the definition of a useful article to a “vessel hull, including a plug or mold.”⁶⁴

In 1998, as part of the Digital Millennium Copyright Act, Congress enacted the Vessel Hull Design Protection Act, which provides limited protection to designs of vessel hulls.⁶⁵ “The Committee noted that protection for boat designers was important because consumers could possibly be defrauded because they might not receive the same ‘quality and safety’ that they would receive from

⁶¹ Laura C. Marshall, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305, 312 (2007).

⁶² Leslie J. Hagin, *A Comparative Analysis of Copyright 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, 349 (1991).

⁶³ 17 U.S.C. § 1301(a)(1) (2008).

⁶⁴ 17 U.S.C. § 1301(b)(2) (2008).

⁶⁵ Megan Williams, *Fashioning a New Idea: How the Design Piracy Prohibition Act is a Reasonable Solution to the Fashion Design Problem*, 10 TUL. J. TECH. & INTELL. PROP. 303, 314 (2007).

a boat with an originally designed hull.”⁶⁶ This begs the question: cannot the same argument be made for fashion designs? Without copyright protection, counterfeit or pirated goods may defraud consumers of apparel because they might not receive the same quality of goods they would receive from the initial design. Some of those who buy counterfeited goods are not aware of the poor quality of the articles because they assume that these items are just stolen goods.⁶⁷ Therefore, Congress should revise the limited definition of useful articles and extend protection to fashion designs.

Currently, the Copyright Act defines “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”⁶⁸ Under the useful articles doctrine, designs can be protected “only if and only to the extent that such designs incorporate pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article.”⁶⁹ This doctrine reflects Congress’s attempt to prevent manufacturers from acquiring monopolies on designs based only on the products function.⁷⁰

In portions of the Copyright Act of 1976, Congress tried to clarify the holding of *Mazer v. Stein*, that a statuette forming the base of a lamp could be copyrighted. Congress did this by enacting a “separability” test for distinguishing the artistic elements of an object from its utilitarian function.⁷¹ According to the “separability” test, “‘pictorial, graphic, or sculptural’ features of a design may be copyrightable if those features are physically or conceptually separable from the useful features of the product.”⁷²

Unfortunately, the vagueness of this test has led to inequitable results in many courts.⁷³ In 1978, the D.C. Circuit held that an object is not copyrightable if an intrinsic function of the object is utilitarian.⁷⁴ Additionally, in 1980, in a Second Circuit decision, the court held that a designer could obtain a copyright for his belt-buckle design because the “primary ornamental aspect” of the buckles was “conceptually separable from their subsidiary utilitarian function.”⁷⁵

⁶⁶ *Id.*

⁶⁷ Ramirez, *supra* note 40.

⁶⁸ 17 U.S.C. § 101 (2008).

⁶⁹ *Hearings*, *supra* note 2 (statement of the U.S. Copyright Office).

⁷⁰ Briggs, *supra* note 28, at 181.

⁷¹ Marshall, *supra* note 61, at 315.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Esquire, Inc. v. Ringer*, 591 F.2d 796, 804 (D.C. Cir. 1978).

⁷⁵ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980).

Within half a decade, the dissenting judge of another Second Circuit case, *Carol Barnhart, Inc. v. Economy Cover Corp.*, introduced a different separability test from the original one presented by Congress: “for the design features to be ‘conceptually separate’ from the utilitarian aspects of the useful article that embodies the design, the article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function.”⁷⁶ The Second Circuit has never adopted this test;⁷⁷ however, two years after the *Carol Barnhart* decision, the Second Circuit changed the separability test yet again. According to the court, “If design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements. Conversely, where design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences, conceptual separability exists.”⁷⁸

Although some aspects of clothing design, such as a particular fabric pattern or the lace and embroidery accents on a shirt, have passed the separability test without a problem,⁷⁹ copyright protection for fashion designs is still unavailable in the United States and is in high demand. In *Knitwaves, Inc. v. Lollytogs*, the court held that “Fabric designs . . . are considered ‘writings’ for purposes of copyright law and are accordingly protectible.”⁸⁰ In addition, in *Express, LLC v. Fetish Group, Inc.*, the court held that lace and embroidery accents that were totally irrelevant to the utilitarian functions of the manufacturer’s tunic were copyrightable.⁸¹ However, both of these cases upheld that clothing designs are not copyrightable and therefore are not offered any protection.

PROTECTION OF FASHION DESIGNS IN OTHER COUNTRIES

Protection for fashion designs, however, is available in most other countries that have strong fashion industries such as France, Italy, and Great Britain. Similarly, other countries that are hardly

⁷⁶ *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 422 (2d Cir. 1985).

⁷⁷ *Lim v. Green*, No. 99-16538, 2000 U.S. App. LEXIS 29291, *2 (9th Cir. Nov. 13, 2000).

⁷⁸ *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987).

⁷⁹ *Marshall*, *supra* note 61, at 315; *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995); *Express, LLC v. Fetish Group, Inc.*, 424 F. Supp. 2d 1211, 1215 (C.D. Cal. 2006).

⁸⁰ *Marshall*, *supra* note 61, at 315 n.67; *Knitwaves*, 71 F.3d at 1002.

⁸¹ *Express*, 424 F. Supp. 2d at 1215.

recognized for fashion designs, such as India, have also provided intellectual property protection for their designers. Although these forms of protection have not eliminated counterfeiting or design piracy around the world, they have helped to avoid the kinds of losses that plague designers and the economy in the United States.

In Europe, fashion designs are afforded double protection under the National Laws of the individual European countries and the European Directive on the Legal Protection of designs (“E.U. Directive”).⁸² The Directive requires countries to enact laws to protect fashion designs under the guidance of standards contained in the Directive.⁸³ For a design to be protected under the E.U. Directive, it must first be registered.⁸⁴ But before the item can be registered, a design must display novelty, and have individual character.⁸⁵ “The novelty element requires that no identical design, including one that differs only in immaterial details, has been made public before the date of registration.”⁸⁶ The individual character element requires that the design does not produce the same overall impression on an informed user as an already public design.⁸⁷ Once a design is registered, a registered owner has exclusive rights to his or her designs against even substantially similar designs.⁸⁸ The design registration is valid for up to twenty-five years in member states and includes the “lines, contours, colors, shape, texture and/or material” elements of the design.⁸⁹

NATIONAL LAWS OF THE INDIVIDUAL EUROPEAN COUNTRIES

France, the world’s fashion capital, has the world’s strongest legal protection for fashion designs.⁹⁰ French designers rely on the 1793 Copyright law, as amended in 1902, and the 1806 Industrial Design Law, as amended in 1909, to protect their designs.⁹¹ These acts provide the most liberal copyright protection to fashion designs under the “doctrine of the unity of art,” which forbids the exclusion of

⁸² Council Directive 98/71, 1998 O.J. (L 289) 28 (EC)(Implementation by the twenty-five Member States was required not later than October 28, 2001); *Id.* art. 19, §1.

⁸³ Williams, *supra* note 65, at 316.

⁸⁴ *Id.*

⁸⁵ Day, *supra* note 5, at 267.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Marshall, *supra* note 61, at 318.

⁹⁰ Susan Scafidi, *Intellectual Property and Fashion Design*, 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115, 117-18 (2006).

⁹¹ *Id.*

copyright protection solely on the basis of the work's utilitarian function.⁹²

France offers protection for fashion designs by "providing copyright protection once the design becomes popular with the general public."⁹³ When the design becomes popular with the general public, French copyright holders receive both patrimonial and moral rights at the moment they create an original work rather than at the point of public disclosure.⁹⁴ Patrimonial rights incorporate "the exclusive rights to represent, reproduce, sell or otherwise exploit the copyrighted work of art and to derive a financial compensation there from."⁹⁵ A moral right is "essentially the right for the author to see both his name and his work of art respected."⁹⁶ This right passes to the author's heirs or executor upon the author's death, but may not be otherwise transferred or sold under any circumstances, by either the author or his legal successors.⁹⁷

Copyright infringers in France are subject to both civil suits for damages and criminal penalties, including up to three years in jail and a fine of €300,000.⁹⁸ In 1994, Yves Saint Laurent Couture ("YSL") sued Ralph Lauren for infringement under French Copyright Law.⁹⁹ The court found that a YSL women's dinner-jacket dress, originally shown in 1970, then updated and returned to the runway in 1992, was sufficiently original to give the fashion house property rights in the design.¹⁰⁰ The court also held that Ralph Lauren's subsequent ready-to-wear dinner-jacket dress infringed the YSL design because the differences between it and the original were so slight that the average customer would not be able to distinguish them.¹⁰¹ YSL received a \$385,000 monetary judgment against Ralph Lauren for its "theft" of the original design.¹⁰²

In a more recent case from 2008, the French court found that a company known as Naf Naf was guilty of copying an Isabel Morant

⁹² Day, *supra* note 5, at 266.

⁹³ *Id.*

⁹⁴ Marshall, *supra* note 61, at 319.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Code de la propriété intellectuelle [C. Prop. Intell.], art. L111-1 (Fr.), available at http://www.legifrance.gouv.fr/html/codes_traduits/cpiatext.htm.

⁹⁸ LOVELLS & PAUL, HASTINGS, JANOFKY & WALKER (EUROPE) LLP, 2 DOING BUSINESS IN FRANCE § 17.06 (Release May 31, 2006).

⁹⁹ Société Yves Saint Laurent Couture S.A. v. Société Louis Dreyfus Retail Mgmt. S.A., [1994] E.C.C. 512, 514 (Trib. Comm. (Paris)).

¹⁰⁰ *Id.* at 520.

¹⁰¹ *Id.* at 521.

¹⁰² *Id.* at 514-16.

dress despite the minor differences between the designs.¹⁰³ The court ordered the “copycat” company to pay the designer €75,000, which is equal to approximately \$120,000.¹⁰⁴ Both of these cases introduce the severe punishments that were enforced by the French government due to the rise in design piracy.

Additionally, Italian copyright law extends protection to “works of industrial design displaying creative character and per se artistic value.”¹⁰⁵ Although, the Italian standard is much more stringent than the French one in that it requires not only registration, but also novelty, and individual character,¹⁰⁶ it nonetheless provides some level of protection for fashion designers. In 1993, “Italy enacted the ‘Made in Italy’ legislation to guarantee that only items made in the country may bear the label and put further laws into effect that fine consumers several times the retail price of the original item for buying copied goods.”¹⁰⁷

Furthermore, Great Britain is another European country that provides stringent protection for fashion designs. This protection applies to artistic works, unregistered design rights, and registered design rights.¹⁰⁸ In Spain, the registered designs receive up to twenty-five years of protection in contrast to unregistered designs that are offered three years of protection.¹⁰⁹ Under this scheme, a fashion design is granted copyright protection as long as it can be referenced back to a copyrighted drawing.¹¹⁰ “Infringement of a design right is determined by whether or not the second article, even if still in pieces not yet assembled, is an exact copy or substantially different from the original.”¹¹¹ According to the intellectual property law of Great Britain, if a design is copied, the designer is entitled to damages and injunctions similar to that of owners of other types of intellectual

¹⁰³ Susan Scafidi, *No, No, Naf Naf* (July 21, 2008) http://www.counterfeitichic.com/2008/07/no_no_naf_naf.php.

¹⁰⁴ *Id.*

¹⁰⁵ ALBERTY MUSSO & MARIO FABIAM, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, § Italy §2(4)(c)(i) (Matthew Bender & Co. ed., 2008) (quoting ITALIAN COPYRIGHT ACT, art. 2).

¹⁰⁶ MUSSO & FABIAM, *supra* note 105.

¹⁰⁷ Anya Jenkins Ferris, *Real Art Calls for Real Legislation: An Argument Against Adoption of the Design Prohibition Act*, 26 CARDOZO ARTS & ENT. L.J. 559, 586 (2008).

¹⁰⁸ Lionel Bently & William Cornish, *INTERNATIONAL COPYRIGHT LAW AND PRACTICE UK* §2(4)(c) (Paul Edward Gellar ed., 2006).

¹⁰⁹ Marshall, *supra* note 61, at 318.

¹¹⁰ *Id.*

¹¹¹ Kristen Soehngen, *Fashionably Late: The Evolution of Intellectual Property Rights for Fashion Design in the United States*, N.Y. ST. B.A. ENT., ARTS & SPORTS L.J., Summer 2008, at 33, 33-34.

property.¹¹²

Nevertheless, the protection afforded to fashion designs in countries in which the design has previously been introduced is irrelevant once the apparel reaches the United States, because the United States stands as one of few countries with a major intellectual property law regime that does not protect fashion works.¹¹³ As a result, fashion designers all over the world are affected negatively by this circumstance.

TRIPS AGREEMENT

In 1994, the United States and other members of the World Trade Organization (“WTO”) signed the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).¹¹⁴ The TRIPS Agreement was created to make international intellectual property rights uniform by setting a minimum level of protection that each country must provide.¹¹⁵ The Agreement’s provision on design rights, Article 25(2), states:

Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.¹¹⁶

However, the United States has not met its obligation through copyright or design law. The connotation of a textile is any cloth or goods produced by weaving, knitting, or felting.¹¹⁷ Hence, a textile design is a fabric design or fashion design. Since the United States

¹¹² *Id.* at 34.

¹¹³ 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 *AIPLA Q.J.* 473, 492-93 (2007).

¹¹⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 *I.L.M.* 81 (1994) [hereinafter TRIPS Agreement].

¹¹⁵ World Trade Organization, Intellectual Property: Protection and Enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Apr. 6, 2009).

¹¹⁶ Marshall, *supra* note 61, at 319.

¹¹⁷ Dictionary.com, <http://dictionary.reference.com/browse/textile> (last visited March 28, 2009) (TRIPS agreement does not include a definition for textile or textile design).

does not secure protection for fashion designs, designers' opportunity to seek protection is unreasonably impaired, and consequently, the United States is in breach of its duties under the Agreement. This dilemma is just another reason why the United States is obligated to adopt the Design Piracy Prohibition Act.

THE DESIGN PIRACY PROHIBITION ACT

Due to the fact that there is minimal protection for fashion, many designers face what are often impossible obstacles in obtaining protection for their designs.¹¹⁸ The lack of legal protection that is offered for fashion designs is greatly reflected in the fashion industry, in which there is a considerable amount of copying within and between many parts of the trade.¹¹⁹ Due to these inequitable dealings, the DPPA was introduced.¹²⁰

The DPPA is meant to extend copyright protection to fashion designs. Under this proposed bill, a fashion design is defined as “the appearance as a whole of an article of apparel, including its ornamentation.”¹²¹ In addition, the DPPA would “[e]xtend[] the definition of infringing article to include the design of any article that has been copied from an image of a protected design without the consent of the owner.”¹²² If the DPPA were enacted, it would “prevent anyone from copying an original clothing design in the United States and give designers the exclusive right to make, import, distribute, and sell clothes based on their designs.”¹²³ Courts would be able to provide this protection through the DPPA by “appl[ying] the doctrines of secondary infringement and secondary liability to actions related to original designs.”¹²⁴ These doctrines “provide an effective means of enforcement by placing liability on those who are benefiting from the infringement and are in a position to control or restrain it.”¹²⁵

Furthermore, the fashion designs included under the DPPA would not only encompass outer garments, but would also include gloves, underwear, footwear, headgear, handbags, purses, tote bags,

¹¹⁸ Johnson, *supra* note 18, at 733-35.

¹¹⁹ *Id.* at 732.

¹²⁰ *Id.* at 732-33.

¹²¹ Design Piracy Prohibition Act, S. 1957, 110th Cong. § 2(a)(2)(B) (2007).

¹²² U.S. CONG. RESEARCH SERV., S.1957: SUMMARY AS OF 8/2/2007—INTRODUCED, <http://thomas.loc.gov/cgi-bin/bdquery/D?d110:2:./temp/~bdmQly:@@@D&summ2=m&l/bss/110search.html> [hereinafter S. 1957: SUMMARY].

¹²³ Blackmon, *supra* note 35, at 132 (quoting Henry Lanman, *Copycatfight: The Rag Trade's Fashionably Late Arrival to the Copyright Party*, SLATE, Mar. 13, 2006, <http://www.slate.com/id/2137954>).

¹²⁴ S. 1957: SUMMARY, *supra* note 122.

¹²⁵ *Id.*

belts, and eyeglasses. However, the bill would exclude designs that have been in existence for more than three months before an application for copyright protection was filed and would limit available protection to a maximum of three years.¹²⁶ Under this protection designers can seek recovery in the form of statutory damages of \$250,000 or \$5 per copy.¹²⁷ Additionally, as is similar to other copyright protected articles, infringement would not be imposed on independently created fashion designs.¹²⁸

Although this proposed bill is noteworthy in the sense that it offers protection to fashion designs, it lacks certain legislation that is important to decreasing the widespread acts of design piracy and counterfeiting. The DPPA should further include a regulation that imposes a fine on consumers of copied goods. Such a harsh law would cause many people to think twice before purchasing a knockoff and as a result people would be discouraged from buying pirated items. In addition, the Bill should also include a law that requires those who pirate a design to pay the original designer a fee for using the design after the proposed copyright protection expires. This type of law would compensate the designers for their hard work and would discourage pirates from copying designs. Accordingly, if the DPPA were to include the foregoing proposals, it would provide stronger protection against design piracy as well as counterfeiting.

RECENTLY APPROVED BILL

On October 13, 2008, the Enforcement of Intellectual Property Rights Act of 2008, a “companion bill” to the DPPA, became law. The purpose of this piece of legislation was to enhance remedies for violations of intellectual property laws.¹²⁹ This act amends federal copyright law to: (1) authorize, in lieu of a criminal action, civil copyright enforcement by the Attorney General; (2) provide that copyright registration requirements apply to civil (not criminal) infringement actions, and (3) provide a safe harbor for copyright registrations that contain inaccurate information.¹³⁰ This act also amends the Trademark Act to: (1) revise treble damages provisions and double statutory damages in counterfeiting cases, and (2) prohibit

¹²⁶ Williams, *supra* note 65, at 311.

¹²⁷ Marshall, *supra* note 61, at 310.

¹²⁸ Williams, *supra* note 65, at 311.

¹²⁹ S. 3325, 110th Cong. (2008), available at <http://www.publicknowledge.org/pdf/110-s3325-20080926.pdf>.

¹³⁰ Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat 4256 (2008), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN03325:@@L&summ2=m&>.

the transshipment and exportation of goods bearing infringing marks.¹³¹ This bill gives our government the additional tools necessary to protect intellectual property by enhancing the civil and criminal penalties for intellectual property violations, thereby discouraging criminal organizations from entering the business of counterfeiting and piracy.¹³²

These enhancements, brought about by the Enforcement of Intellectual Property Rights Act of 2008, help the fashion world to deter pirates by increasing the penalties imposed on pirates who infringe on articles already receiving protection within the intellectual property field for features such as marks and design logos. However, this act does not provide further protection for fashion designs themselves because fashion designs are not protected within the intellectual property field.

Then again, this law does provide hope for fashion designers within the United States. If Congress passes the DPPA, in the same manner as it passed the Enforcement of Intellectual Property Rights Act of 2008, designers will not have to worry that copycats might profit from their toil and hard work. Most designers put in long hours to earn their salaries. A designer typically requires eighteen to twenty-four months to take a design from beginning sketches to final manufacture.¹³³ After such long periods of dedication, “a designer can have the fruits of her labor stolen in a flash.”¹³⁴

ARGUMENTS AGAINST PROTECTION FOR FASHION DESIGNS

Although it is obvious from the previous statements that protection for fashion designs is necessary, some scholars in the United States argue that the framework of free copying in this country actually benefits the fashion industry as a whole more so than the stricter laws in Europe.¹³⁵

In a recent article, Professors Kal Raustiala and Christopher Sprigman argued that copying in the fashion industry does not impinge on creativity and may, in fact, produce greater innovation among

¹³¹ *Id.*

¹³² Patrick Leahy, *Leahy, Specter, Bayh, Voinovich Introduce Intellectual Property Rights Enforcement Legislation* (2008), <http://leahy.senate.gov/press/200807/072408a.html>.

¹³³ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: FASHION DESIGNERS (2008-09 ed.), *available at* <http://www.bls.gov/oco/ocos291.htm>.

¹³⁴ Marshall, *supra* note 61, at 310.

¹³⁵ *Id.* at 309.

designers.¹³⁶ They note that the fashion industry stays stable in “low-IP equilibrium” and suggest that this stability is the outcome of two connected features of the industry: “induced obsolescence” and “anchoring.”¹³⁷ Induced obsolescence is the phenomenon by which trends become distasteful to their initial, wealthy customers while knockoffs of these trends “diffuse to a broader clientele” at cheaper prices.¹³⁸ Widespread copying forces the upscale fashion designers to create more new designs as the trend-of-the-moment becomes outdated.¹³⁹ For this reason, the authors argue that design piracy actually works in designers’ favor “by inducing more rapid turnover and additional sales.”¹⁴⁰

Another Professor, James Duesenberry, noted that the urge to acquire the prestige benefits earned by imitating the prevailing standard of living drives middle-class consumption behavior, which therefore is based not on the satisfaction of intrinsic wants but on wants generated as a result of observing the purchasing behavior of other consumers.¹⁴¹

However, even if these arguments are legitimate, they do not solve the primary problem, which is that “pirates cash in on other’s efforts and prevent designers in our country from reaping a fair return on their creative investments.”¹⁴² At the end of the day, in most cases, these copycats cause more damage to designers than anticipated. Or to put it another way: “Because these knockoffs are usually of such poor quality, these reproductions not only steal the designer’s profits, but also damage his or her reputation.”¹⁴³ Due to these inequitable consequences, diminishing counterfeiting and design piracy must be a priority.

CONCLUSION

Although Congress has yet to enact legislation affording protection for fashion designs, such developments seem near at hand. Modern day fashion design has been increasingly perceived as art. In 2002, artist Takashi Murakami collaborated with designer Marc

¹³⁶ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1691 (2006).

¹³⁷ *Id.* at 1699.

¹³⁸ *Id.* at 1719.

¹³⁹ *Id.* at 1721.

¹⁴⁰ *Id.* at 1722.

¹⁴¹ Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1388 n.12 (2005).

¹⁴² Williams, *supra* note 65, at 310.

¹⁴³ *Id.*

Jacobs to design four handbags and accessory collections for Louis Vuitton, a luxury fashion firm.¹⁴⁴ These designs made for the Louis Vuitton collection are works of art and should be granted protection, since there is no difference between an artist drawing a painting or a design. Under this framework, one wonders if protection would be granted to fashion designs if designs were sketched on a canvas.

In addition, the popularity and frequency of collaborations between museums and designers further support the notion of fashion design as a form of art. In 2001, the Metropolitan Museum of Art (the “Met”) in New York City displayed over eighty items of clothing and accessories representing the fashion of First Lady Jacqueline Kennedy.¹⁴⁵ The Met also has a permanent collection in its Costume Institute of over 75,000 costumes and accessories from seven centuries and five continents.¹⁴⁶ Furthermore, museums dedicated to fashion have emerged in cities such as London, England and Kobe, Japan.¹⁴⁷ The growth of fashion in museums demonstrates that fashion designs are a form of art. Museums in general are known as “places where works of art, scientific specimens, or other objects of permanent value are kept and displayed.”¹⁴⁸ Since apparel is not a scientific specimen or an article of permanent value, it must be a work of art.

Ever since I was a little girl, fashion has been my life because my best friend and mentor, my mother, has worked as a technical designer. I have always loved going to work with her because it is like walking through a colorful museum filled with beautiful items that I cannot touch. I have spent years walking through the show rooms that are filled with unique garments that the world has yet to see, and I have witnessed hard-working designers in their cubicles who are stressed out about the mistakes that Chinese manufacturers have made. These scenes are etched into my memory and have given me a true appreciation for the fashion world. The designs that my mother

¹⁴⁴ *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 340 F. Supp. 2d 415, 424-25 (S.D.N.Y. 2004).

¹⁴⁵ The Metropolitan Museum of Art, *Jacqueline Kennedy: The White House Years - Selections from the John F. Kennedy Library and Museum*, http://www.metmuseum.org/special/Jacqueline_Kennedy/Kennedy_more.htm (last visited Apr. 5, 2009); Tsai, *supra* note 10, at 461.

¹⁴⁶ Tsai, *supra* note 10, at 461. A similar exhibit featuring the work of Gianni Versace was displayed at the Met in 1997 and a Chanel exhibit was displayed in 2005. In addition, a “wildly successful” Giorgio Armani exhibit was displayed at the Guggenheim Museum in 2000. Samantha L. Hetherington, *Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design*, 24 HASTINGS COMM. & ENT. L.J. 43, 45-46 (2001).

¹⁴⁷ Tsai, *supra* note 10, at 461-62.

¹⁴⁸ Dictionary.com, <http://dictionary.reference.com/browse/museum> (last visited Apr. 5, 2009).

produces are truly art, and I hope that one day the United States government will also realize this fact.