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**Protecting the Seasonal Arts: Fashion Design, Copyright Law, and
the Viability of the Innovative Design Protection & Piracy
Prevention Act Note**

Meaghan McGurrin Ehrhard

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Note

PROTECTING THE SEASONAL ARTS: FASHION DESIGN, COPYRIGHT LAW, AND THE VIABILITY OF THE INNOVATIVE DESIGN PROTECTION & PIRACY PREVENTION ACT

MEAGHAN MCGURRIN EHRHARD

The Innovative Design Protection & Piracy Prevention Act of 2011 (“IDPPPA”) crafts a sui generis form of copyright protection for fashion designs. The IDPPPA is not a revolutionary attempt for the U.S. Congress; it is instead a reflection of the fashion industry’s unique history, the fashion industry’s unique economics, decades of heated academic debate, scores of previous legislative drafts, and hours of testimony during Congressional hearings. This Note argues that copyright protection should be extended to fashion designs, and that a viable extension of such protection is possible through the IDPPPA with two modifications. This conclusion is first supported by an analysis of the industry’s legal history; taken as a whole, this survey places in stark relief the arguments against blatant copying that have remained unchanged for over a century. This conclusion is also supported by an analysis of the economic and policy arguments that polarize the debate regarding the merits of protection. This Note strives to reconcile this debate—and quell the storm—with a succinct definition for “fashion” (the actual good that copyright law would protect), a definite and viable temporal window for copyright protection, and a reconciliation of the policy preoccupations that have continued to divide Congress and the fashion industry’s designers. This Note concludes with a review of the IDPPPA, suggestions for the further alleviations of critics’ fears, and a call to Congress to finally recognize American fashion designs as protectable art.

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PROTECTING THE SEASONAL ARTS:
FASHION DESIGN, COPYRIGHT LAW,
AND THE VIABILITY OF THE INNOVATIVE DESIGN
PROTECTION & PIRACY PREVENTION ACT

MEAGHAN MCGURRIN EHRHARD*

I. INTRODUCTION

A bill is currently pending in the U.S. House of Representatives that has the potential to extend copyright protection into an industry that has historically operated outside of the framework of American intellectual property law; consequently, the innovators of this industry have had to create and market their wares within an environment branded by blatant copying. Titled the Innovative Design Protection and Piracy Prevention Act (“IDPPPA”), H.R. 2511 carves into the United States Code a sui generis form of copyright protection for fashion designs.¹ For the first time in American history, the creations of fashion designers would be eligible for copyright protection and fashion designers would have a sword against the notorious knock-offs that plague the industry.² Furthermore, an

* The University of Chicago, B.A. 2009; University of Connecticut School of Law, J.D. Candidate 2013. I would like to thank Professor Steven Wilf for his advice, his edits, and his ability to organize my thoughts better than I personally could. I would also like to thank my parents, RoseAnn and Lawrence Ehrhard, for the understanding that when fashions fade, more than style is eternal.

¹ Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011). Hearings for H.R. 2511 were held on July 13, 2011 and the bill is currently awaiting official report from the House Committee on the Judiciary. Bill Overview of H.R. 2511, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2511> (last visited October 1, 2012).

² The only intellectual property protection currently available for fashion design is trademark and (very rarely) design patent. See Susan Scafidi, *Intellectual Property and Fashion Design*, in INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115, 121–23 (Peter K. Yu, ed. 2007) (summarizing the availability and practical application of other IP regimes to fashion design). The ineffectiveness of these available regimes is a primary motivation for the IDPPPA. See *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 1–2 (2011) (prepared statement of Rep. Goodlatte, Chairman, H. Subcomm. on Intellectual Property, Competition, and the Internet) [hereinafter Statement of Rep. Goodlatte] (summarizing the current state of intellectual property protection and concluding “[t]hus, a thief violates Federal law when he steals a creator’s design, reproduces and sells that article of clothing, and attaches a fake label to the garment for marketing purposes. But it is perfectly legal for that same thief to steal the design, reproduce the article of clothing, and sell it, provided he does not attach a fake label to the finished product. This loophole allows pirates to cash in on the sweat equity of others and prevents designers in our country from reaping a fair return on their creative investments.”).

American industry with annual sales of almost \$230 billion³ would be afforded a form of intellectual property protection comparable to that offered in the other fashion capitals of the world.⁴

The IDPPPA is the culmination of a 130 year movement by the fashion design industry to achieve a place within the American intellectual property framework. This history is marked by an inability to prevail over industry opponents before Congress, an incapacity to articulate a viable cause of action against copyists in the Courts, and practical and legal hurdles that have prevented the implementation of internal remedies. This is because fashion design is inherently difficult to reconcile practically with intellectual property law: An exact definition of the good we seek to encourage, “fashion,” is elusive and prone to multiple interpretations; the temporal window for the life of a fashion design is fleeting and cyclical; and finally, knockoffs within the industry are productive because they disseminate fashionable clothing to the masses, and yet are unproductive for the actual designers (the true innovators) within the industry. These contrarian characteristics of the fashion industry are what led Coco Chanel to observe: “Fashion should slip out of your hands. The very idea of protecting the seasonal arts is childish. One should not bother to protect that which dies the minute it was born.”⁵

The IDPPPA is a viable solution toward overcoming these intellectual barriers that have historically blocked the extension of intellectual property protection to fashion design. It crafts a definition of protectable designs that can reconcile the competing interests of designers, retailers, and consumers. The IDPPPA also creates a cause of action for infringement against only blatant copyists, thus encouraging innovation and dissemination of trends. Furthermore, the IDPPPA’s three-year window of protection is specifically tailored to the transitory lifetime of a fashion design.

³ U.S. DEPT. OF COMMERCE, CB12-03, ADVANCE MONTHLY SALES FOR RETAIL & FOOD SERVICES, DEC. 2011 (2012). This revenue is larger than that of music, books, and movies combined. See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1148 & n.1 (2009) (comparing the revenue of fashion to those of other industries afforded copyright protection).

⁴ For example, the European Union currently provides three years of protection for unregistered fashion designs, with five years of protection available if the designer chooses to register his design. Council Regulation 6/2002, art. 11 and 12, 2002 O.J. (L 3) 5 (EC); see also Laura C. Marshall, Note, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTEL. PROP. L. 305, 318–319 (2007) (describing the current protections available in the United Kingdom and France); Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 AM. BUS. L.J. 27, 56–62 (2011) (describing in detail the European Union scheme for design protection).

⁵ Lynsey Blackmon, Comment, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 PEPP. L. REV. 107, 112 (2007) (quoting Coco Chanel).

Part II of this Note will outline the disheartening history of the American fashion design industry's struggle to thwart copyists in Congress, the Courts, and via internal self-policing. The purpose of this Part is to present what pernicious effects of copying have remained unchanged for over a century, and what remedies have proven to be viable solutions to these unchanging problems. Part III will analyze the reasons why fashion designs are difficult to conceptually reconcile with intellectual property law. In particular, this Part will address three conceptual hurdles: first, articulating a precise definition of "fashion" for the purpose of discerning what should be protected under copyright law; second, reconciling the problem of public choice in that copyists both stifle innovation within the fashion design industry and yet promote the democratization of fashion for the American public at large; and third, articulating a temporal window of protection for a design that is both fleeting and cyclical. The purpose of Part III is to detail what legal remedies are feasible options for the unique demands of the industry. Part IV will critique the IDPPPA, specifically. The purpose of this Part is to articulate why the IDPPPA is a feasible remedy for fashion designers against blatant copyists, and also an exciting opportunity for an industry marked by pessimism.

II. FASHIONING A SYSTEM OF INTELLECTUAL PROPERTY PROTECTION FOR FASHION DESIGN: A HISTORY

The IDPPPA is not Congress's first attempt to extend American intellectual property law to fashion designs. The IDPPPA is the culmination of a 130 year movement within the fashion industry to seek redress in Congress, the American court system, and internally within the industry itself against the pernicious effects of blatant copyists. The IDPPPA is crafted in accordance with this extensive history; it embraces the successes of this past—particularly the fashion industry's attempt at self-regulation during the early twentieth century—while striving to alleviate those flaws that continually thwarted the success of past proposals. An analysis of this history will present what problems have and have not changed within the fashion industry and present what remedies can only be provided through Congressional action.

A. *The Rise of Western Fashion in France and England, and the Intellectual Property Protection That Accompanied this Ascension*

The twentieth century saw the rise of many metropolitan fashion capitols (such as New York, Chicago, London and Antwerp) yet Paris has nevertheless managed to maintain its pinnacle position within the industry. France has an early history of protecting its design industries with intellectual property law. A thriving silk industry in Lyons led to formal

recognition of a property right in a silk design by Louis XV in 1737, and this property right was extended to silk manufacture, generally, under Louis XVI in 1787.⁶ Louis XVI's decree also established a system of efficiently protecting this property right; the decree established a bureau of design registration, fixed terms of protection, and imposed penalties for copying and selling counterfeits.⁷ Notably, the French government paused during the turmoil of revolution to expand this copyright to all "industrial arts" in 1793, thus implicating the importance of the right to the country as a whole.⁸ Napoleon continued this legal tradition and further defined the scope of the fashion designer's right by creating commercial courts and developing compulsory arbitration for infringement suits.⁹ French law ultimately provided exclusive rights for up to three years.¹⁰

The nineteenth century witnessed the rise of modern *haute couture* in Paris.¹¹ Early twentieth-century advocates of copyright protection for American fashion design observed that "art [is] an economic history of the practical French" and linked Paris's ascension to its early recognition of the economic nature of industrial design, its categorization of industrial design as protectable art, and its dedication to providing adequate protection for that art.¹² As described by one scholar: "The steady steps whereby France nourished beauty made Paris a synonym for elegance. Art flourished in a hospitable climate. There was nothing racial about it; no gift especially French."¹³ Today, France continues to provide the strongest legal protection for fashion design and its capital continues to hold its title as the fashion capital of the world.¹⁴

A form of copyright protection similar to the French system came to England approximately fifty years later via the British Designs Act of 1839.¹⁵ This Act provided for copyright registration of the original designs of new patterns and shapes for any article of manufacture, and it provided protection for a term of twelve months.¹⁶ While this Act included designs in fabrics, it excluded linen and cotton.¹⁷ Nevertheless, British linen and cotton manufacturers continued to work for legal protection, observing:

[Piracy] interrupts and damages the entire economy of his

⁶ SYLVAN GOTSHAL, *THE PIRATES WILL GET YOU* 18–19 (1945).

⁷ *Id.* at 19.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 20.

¹¹ Scafidi, *supra* note 2, at 117.

¹² GOTSHAL, *supra* note 6, at 18.

¹³ *Id.* at 19.

¹⁴ Scafidi, *supra* note 2, at 117.

¹⁵ GOTSHAL, *supra* note 6, at 21.

¹⁶ *Id.*

¹⁷ *Id.*

business . . . destroying the demand for those articles on whose sale [the creator] relied to meet his payments—and undermining the confidence of his customers in his house by having imitations of his goods thrown into the market at lower prices than he had already supplied them.¹⁸

Legal acquiescence of this behavior is “to the prejudice of the art, as well as of the employment which would naturally be given to men of talent in design.”¹⁹ They denied opponents’ counterargument that the industry would economically falter should competitors be barred from copying, responding that “[a]ny printer desirous of competing with the proprietor of a successful design would still be competent to direct an artist to imitate it *in style* though not in identical pattern.”²⁰ This exact analysis continues to be articulated by the American proponents for intellectual property protection for fashion designs.²¹

The European Union today provides up to twenty-five years of protection for registered qualifying designs, and up to three years of protection for unregistered qualifying designs.²² Design rights extend to furniture, textiles, interior design, and any other creative industries in which there is a design element.²³ This right encompasses fashion designs.²⁴

B. *The American Fashion Industry’s Extensive Attempts to Achieve Similar Protection in the United States*

There is currently no statutory intellectual property protection for fashion designs in the United States. The fashion industry has tried, and failed, to achieve protection through proposed Acts in Congress, through litigation in court, and through the establishment of a self-regulating Guild. All of these attempts proved to be futile.

1. *Attempts to Fit Intellectual Property Protection for Fashion Design into the American Statutory Framework*

It was the silk industry that made the first call for copyright protection

¹⁸ *Id.* at 23.

¹⁹ *Id.*

²⁰ *Id.* at 24.

²¹ See, e.g., *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. 14 (2011)* (oral statement of Prof. Jeannie Suk) [hereinafter Oral Statement of Jeannie Suk] (“Current knockoff sellers would need to adapt their businesses to focus on selling inspired-bys instead. They would have to innovate and invest somewhat in design rather than only replicate others’ work in full.”).

²² Monseau, *supra* note 4, at 60–61.

²³ *Id.* at 57.

²⁴ *Id.*

in the United States—albeit at a much later date than its French counterpart. Beginning in 1882, the “old Silk Association of America rallied its members to indignation and frustration meetings.”²⁵ The industry heralded the message that their designs deserved legal protection, but no protection existed under common law.²⁶ In 1913 the industry secured the support of the Register of Copyrights, Thorvald Solberg, who announced to Congress:

[A]n amendment to the copyright law is called for . . . to secure the protection of ornamental designs for articles of manufacture, to provide suitable remedies in case of infringement, and to prescribe a sufficient but reasonably economical registration in behalf of the numerous American and foreign draftsmen engaged in the preparation of such designs.²⁷

The Register directed the attention of Congress to the “urgent need” for legislation; he advised that copyright protection was an adequate remedy and noted its success in France.²⁸ This declaration came during the decade when the American ready-made apparel industry was entering million-dollar proportions.²⁹

A first draft of proposed legislation was submitted to the House floor a year later,³⁰ and new drafts were submitted in 1916 and 1917.³¹ However, the final draft was laid aside in 1917 when “war was engulfing the designs of men and mice.”³² Unlike the French movement for copyright protection during the French Revolution, design right legislation was unable to claim the Congressional floor when the United States was at war. As one contemporary observed, “[p]erhaps the country [in 1917] was not yet ready to acknowledge that art was still art though applied to industry; for ‘Art’ stood for ‘Culture,’ something removed from workday life, and fundamentally a snobbish attitude persisted towards trade.”³³ This resignation also could have been a reflection of the simplistic attitude that Americans incorporated into their clothing designs, because a “factor indicating that American women adapted rather than copied French, German, or British fashions is the fairly simple nature of American

²⁵ GOTSHAL, *supra* note 6, at 10.

²⁶ *Id.*

²⁷ *Id.* at 10–11.

²⁸ *Id.* at 11.

²⁹ Maurice A. Weikart, *Design Piracy*, 19 IND. L.J. 235, 236 (1944).

³⁰ See GOTSHAL, *supra* note 6, at 15 (stating that Rep. William A. Oldfield introduced the first measure on design registration in Congress).

³¹ *Id.* at 16–17.

³² *Id.* at 17.

³³ *Id.*

life When seen in one of the[] elegant American centers, the newest fashions usually appeared somewhat outlandish.”³⁴ It is possible that American society inherently associated a practicality with the fashion it created; this consciousness created a hesitation toward legally recognizing the creations of fashion designers as art, and it shielded Congress’s eyes from the wrongs felt by the designers who had the superior ability to unite that consciousness with dress.

Once war ended and the United States economy strengthened, the “most nearly successful” design bill was submitted to the House in 1926.³⁵ This was the Vestal Bill, named after the bill’s designer, Chairman of the House Committee on Patents Representative, Albert H. Vestal.³⁶ An ardent supporter of the Vestal Bill was Secretary of Commerce Herbert Hoover, who had recently felt obliged to decline when the United States was invited to sponsor an American section in the International Exposition of Modern Decorative and Industrial Art in Paris because the United States “had no products of modern design fit to exhibit.”³⁷ The Vestal Bill did not simply cover fashion designs, but any “pattern, shape, or form of a manufactured product.”³⁸ After a series of amendments, the House passed the Bill in 1930.³⁹

The Vestal Bill received staunch opposition from department stores who feared that retailers as a whole would face liability for selling infringing goods.⁴⁰ They feared that good-faith purchasers would be hindered from selling their merchandise, that a copyright owner would “[u]se his claim to club them into buying his goods at his price,” and that a monopoly of fashion would develop in the hands of Paris designers.⁴¹ The Bill lost its support as each industry realized their possible liability and after numerous amendments, the Senate passed the Bill in 1935; however, it was never acted upon again in the House.⁴² This is the last noteworthy attempt at extending copyright protection to fashion designs before the

³⁴ CAROLINE RENNOLDS MILBANK, *NEW YORK FASHION: THE EVOLUTION OF AMERICAN STYLE* 19 (1989).

³⁵ Scafidi, *supra* note 2, at 119.

³⁶ See GOTSHAL, *supra* note 6, at 28 (noting that Rep. Vestal had introduced the Bill in 1924).

³⁷ *Id.* at 26.

³⁸ Weikart, *supra* note 29, at 247.

³⁹ *Id.* at 249.

⁴⁰ GOTSHAL, *supra* note 6, at 30. American retailers remain opposed to extending copyright protection to fashion design, including the IDPPPA. Cf. *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 130–32 (2011) (letter from Stephanie Lester, Vice President, International Trade, Retail Industry Leaders Assoc. to Rep. Goodlatte, Chairman, H. Subcomm. on Intellectual Property, Competition, and the Internet) [hereinafter Letter from Stephanie Lester] (expressing concerns for the IDPPPA on behalf of the Retail Industry Leaders Assoc.).

⁴¹ GOTSHAL, *supra* note 6, at 31.

⁴² Weikart, *supra* note 29, at 251.

twenty-first century.

2. *The Inability of the American Fashion Design Industry to Receive Legal Redress in Court*

One of the main proponents for the Silk Association's rally-cry brought a suit against a copier of one of their valuable silk designs under a claim of unfair competition in *Cheney Brothers v. Doris Silk Co.*⁴³ Every season, Cheney Brothers invested a significant amount of money into its designs, with the result that only about a fifth of its seasonal product proved popular; furthermore, its value only lasted for a single season of about eight or nine months.⁴⁴ Cheney Brothers argued that the defendant's copying of its design was an act of unfair competition that devalued the price of its goods.⁴⁵

On its face, *Cheney* appeared to be a classic case of unfair competition. In support of its claim, the plaintiff offered the Supreme Court's decision in *International News Service v. Associated Press*,⁴⁶ which held that news acquired through the efforts of the Associated Press did not become open to public use when posted on bulletin boards to such an extent that defendant International News Service, plaintiff's rival, was allowed to take such information and publish in competition.⁴⁷ This case was particularly relevant because news, like silk designs, was not copyrightable.⁴⁸ Here, the Court acknowledged that the seasonal nature of silk designs made an application for a design patent impossible and that the plaintiff's works were not granted protection under federal copyright law.⁴⁹

The Second Circuit, however, refused to extend the holding of *International News Service* into the realm of industrial design. It held that Cheney Brothers did not have an unfair competition cause of action against a counterfeiter.⁵⁰ Writing for the Court, Judge Learned Hand observed that without Federal copyright protection "it is easy for any one to copy such as prove successful, and the plaintiff, which is put to much ingenuity and expense in fabricating them, finds itself without protection of any sort for its pains."⁵¹ And yet, (seemingly) fearing a slippery-slope, Judge Hand quickly pushed aside the holding of *International News Service* by stating,

⁴³ 35 F.2d 279 (2d Cir. 1929).

⁴⁴ *Id.* at 279.

⁴⁵ *Id.*

⁴⁶ *Id.* at 280 (citing *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918)); see also *Int'l News Serv.*, 248 U.S. at 236 (reasoning that unfair competition must be viewed from a perspective within the industry at issue and concluding that newspaper corporations thus have a property right to the news they acquire).

⁴⁷ *Int'l News Serv.*, 248 U.S. at 240–41.

⁴⁸ *Id.* at 233.

⁴⁹ *Cheney Bros.*, 35 F.2d 279 at 280.

⁵⁰ *Id.* at 280–81.

⁵¹ *Id.* at 279.

“[w]e are to suppose that the court meant to create a sort of common-law patent or copyright for reasons of justice. Either would flagrantly conflict with the scheme which Congress has for more than a century devised to cover the subject-matter.”⁵²

Notably, Judge Hand did not end his opinion with the holding, but instead concluded with this statement:

True, it would seem as though the plaintiff had suffered a grievance for which there should be a remedy, perhaps by an amendment of the Copyright Law, assuming that this does not already cover the case, which is not urged here. It seems a lame answer in such a case to turn the injured party out of court, but there are larger issues at stake than his redress. Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice.⁵³

Judge Hand despairingly, and yet resoundingly, stated that this was a wrong which could only be amended by Congressional action.

3. *The Fashion Originators' Guild of America (FOGA): The Fashion Industry's Attempt at Self-Regulation*

After the failure of the Vestal Bill, and having been barred from relief in the Courts after *Cheney Brothers*, the dress and textile manufacturers developed internal means for solving their problem of copying. The most successful regime of self-policing was establishment of the Fashion Originators' Guild of America (“FOGA”). Members of FOGA were united by a “declaration of cooperation” under which signing retailers pledged to only buy dresses that were originals.⁵⁴ All protected designs were registered to a registration bureau that signaled to fellow members that the design received the Guild's protection.⁵⁵ The Guild ran a detective system that monitored retail sales, discovered copies, and alerted member retailers of possible violations.⁵⁶ It also maintained a “piracy committee,” under which an alleged copy would be “put on trial” and its manufacturer given an opportunity to defend the article.⁵⁷ By 1935, the “Declaration of Cooperation” had 12,000 signatories and the Guild controlled approximately 42% of sales of women's dresses wholesaling for more than \$10.75 (approximately \$175.83 today).⁵⁸

⁵² *Id.* at 280.

⁵³ *Id.* at 281.

⁵⁴ Weikart, *supra* note 29, at 252.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 253.

A resurgence of antitrust sentiment by the government toward monopolistic ventures during the late New Deal era ended FOGA's success.⁵⁹ In April 1936, the Federal Trade Commission ("FTC") began an investigation into FOGA and determined that FOGA's practices were a restraint of trade.⁶⁰ The FTC issued a cease and desist order against FOGA in February of 1939, compelling the Guild to cease "coercing" its members to only sell to signatories of their Declaration of Cooperation.⁶¹

FOGA appealed to the Second Circuit, where it was Judge Learned Hand who once again quashed their attempts at legal remedy.⁶² Citing *Cheney Brothers*, Judge Hand stated "until the Copyright Office can be induced to register such designs as copyrightable under the existing statute, they fall into the public demesne without reserve. The Guild has therefore no more excuse for preventing other dressmakers from copying one than the other."⁶³ Judge Hand held that their attempt to gather all possible reproductions of a dress design was an attempt to create a monopoly, and thus the Guild was breaking the law.⁶⁴ The United States Supreme Court affirmed Judge Hand's decision in 1941.⁶⁵

The intellectual property landscape has not changed for the fashion industry since this internal attempt at self-policing was shut down over seventy years ago. These seventy years "encompassed major changes within copyright law, including changes that significantly extended the reach and power of intellectual property protection. Against this backdrop, the relative absence of concern about intellectual property among fashion industry firms and the stability of the legal framework is remarkable."⁶⁶ And yet, as Judge Hand concluded in *Cheney Bros.*, "Congress might see its way to create some sort of temporary right, or it might not Our vision is inevitably contracted, and the whole horizon may contain much which will compose a very different picture."⁶⁷ Ninety years later, the dicta of Judge Hand has fallen upon deaf ears: the picture remains the same.

⁵⁹ See Steven Wilf, *The Making of the Post-War Paradigm in American Intellectual Property Law*, 31 COLUM. J.L. & ARTS 139, 152 (2008) (outlining the return of Progressive Era antitrust sentiments to the government by 1938 and observing, "the Roosevelt recession of 1937–1938 convinced some members of the New Deal brain trust that the large business combines were intentionally pushing the economy downward by laying off workers and limiting the extension of capital").

⁶⁰ Weikart, *supra* note 29, at 254.

⁶¹ *Id.*

⁶² *Fashion Originators Guild of Am., Inc. v. FTC*, 114 F.2d 80, 81 (2d Cir. 1940).

⁶³ *Id.* at 84.

⁶⁴ *Id.* at 85.

⁶⁵ *Fashion Originators Guild of Am., Inc. v. FTC*, 312 U.S. 457, 468 (1941).

⁶⁶ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1716 (2006).

⁶⁷ *Cheney Bros.*, 85 F.2d at 281.

III. THE CONCEPTUAL HURDLES THAT HINDER THE EXTENSION OF INTELLECTUAL PROPERTY LAW TO FASHION DESIGN

Today, the United States fashion industry has annual sales of almost \$230 billion.⁶⁸ This sales figure is the basis of the main arguments in support of, and also against, the IDPPPA. Does this immense revenue indicate that the industry thrives without intellectual property protection, and therefore Congressional intervention is unnecessary? Or does it instead signal the potential further impact that the industry could have on the American economy if designers received the traditional benefits afforded to copyright owners, i.e., the ability to recoup investment and control the creation of derivative works?

This dichotomy exists because innovation in fashion design is difficult to conceptually reconcile with the three primary tenets of intellectual property law. The purpose of this Part is to analyze these three conceptual hurdles, because the first step toward crafting a solution is articulating the problem. First, what exactly is the definition of “fashion?” It is not easy to apply intellectual property law in a practical setting when it is difficult to even articulate the good that society wants to encourage. Second, fashion design is intimately linked to the design’s functional purpose as an article of clothing (a characteristic that is rejected by copyright law). This relationship leads to problems of public choice: does society want to encourage and reward the innovators in the industry, or does society instead want to promote the “democratization” of fashion, which is the creation of cheap and easily accessible high fashion? Knockoffs are an integral part of that democratization, and are therefore at once productive and unproductive. Third, it is difficult to articulate a temporal window for fashion protection because fashion is both fleeting and cyclical. This characteristic has been further distorted and exacerbated by modern technology.

A. *The Elusive Definition of “Fashion”*

The definition of “fashion” is difficult to articulate because it depends upon the preoccupations of the definer. From the perspective of a clothing designer, a definition of “fashion” can be articulated as the actual designs created by designers within the industry. “Fashion” is not clothing; it is art. The original design itself embodies a “distinction between the general

⁶⁸ U.S. DEP’T OF COMMERCE, CB12-03, ADVANCE MONTHLY SALES FOR RETAIL & FOOD SERVICES, DEC. 2011 tbl. 1 (2012). Some have projected the total to be even higher, at \$340 billion. See *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 4 (2011) (testimony of Lazaro Hernandez, Designer and Cofounder, Proenza Schouler) [hereinafter Testimony of Lazaro Hernandez].

category of clothing and the subcategory of fashion, which may be understood as a seasonally produced form of creative expression.”⁶⁹ Historically, these are the designs of Europe that were imported and adapted by American stores.⁷⁰ Today, works of “fashion” are the creations of both the new talent and the professional designers who combine their talents, their imagination, and their interpretation of the world around them to create an article of clothing. Those who support the IDPPPA believe that these designers are the true creators of “fashion” and that their designs are the true innovations within the industry.⁷¹

If one widens the definitional lens, “fashion” can instead be defined according to its functional purpose as an article of clothing: “fashion” is simply the clothing that an individual chooses to wear. It is not an entity distinct from and above the individual, but is instead a representation of the individual herself.⁷² Historically, this definition can be traced to the traditional simplistic attitude felt by the American populace toward fashion design.⁷³

However, the American consciousness no longer maintains a snobbish attitude toward the clothing industry and no longer inherently associates fashion with practicality.⁷⁴ Furthermore, those who purport to express their individual character through their clothing have a propensity to buy new clothing because their current clothes feel outdated; clothing “can be a manifestation of a desire to partake in the collective moment, to be in step with society, or to be in touch with the present.”⁷⁵ Therefore, when trying

⁶⁹ Scafidi, *supra* note 2, at 122.

⁷⁰ See MILBANK, *supra* note 34, at 19 (“There is no doubt that American women followed European fashions throughout the nineteenth century, but the extent to which they relied on European styles . . . will never be fully known.”).

⁷¹ See Testimony of Lazaro Hernandez, *supra* note 68, at 4 (“Fashion is different from basic apparel. Our designs are born in our imaginations. We create something from nothing at all.”). Works of fashion can be both original designs and “basic garments that compliment . . . original designs in [a] collection.” *Id.*

⁷² See Hemphill & Suk, *supra* note 3, at 1164 (“Through fashion, people communicate and express themselves. Fashionable individuals’ personal style is often describes as ‘unique’ or ‘inimitable’ . . . Fashion goods provide a vocabulary. What consumers might value in fashion then is the availability of a variety of goods to choose from, a proliferation of the number of meanings that can be made.”).

⁷³ See MILBANK, *supra* note 34, at 19 (“Another factor indicating that American women adapted rather than copied French, German, or British fashions is the fairly simple nature of American life . . . By the middle of the nineteenth century it became very clear that the American version of European fashions suited American temperaments and habits far more than the originals.”).

⁷⁴ See Scafidi, *supra* note 2, at 126 (“[G]reater cultural recognition of fashion as a form of creative expression and the diffusion of original design efforts across all levels of the industry have increased sympathy toward fashion designers. . . . [I]t is no longer credible to claim that legal protection for fashion design is somehow elitist, especially in light of the expansive copyright protection enjoyed by other industries.”).

⁷⁵ Hemphill & Suk, *supra* note 3, at 1164; see also *id.* at 1165 (“Thus we identify differentiation as a desired goal in fashion. On the other hand, we also notice benefits of moving in a common

to define “fashion” from the perspective of the individual, the definition of “fashion” is actually the force that signals to an individual what they should wear.

If one widens the definitional lens further and focuses upon the industry as a whole, “fashion” can be defined as an element of consumer behavior. “Fashion” is that temporal point where a new design is expropriated by the masses and quickly turned into a “trend.”⁷⁶ “Fashion” is not the creative process of the fashion designer and it is not an individual mode of expression: fashion design is a market industry and “fashion” is the design that the consumer demands.

1. *Multiple Definitions of “Fashion” Caused Conflicting Goals for Intellectual Property Protection*

These differing definitions of “fashion” have led to differing conclusions about the relationship between fashion design and intellectual property law. As a result, these divergent conclusions have formed the primary arguments for and against the IDPPPA. Those who root their definition of “fashion” in consumer behavior are against the extension of any form of intellectual property law to fashion design. On the other hand, those who believe that “fashion” is the cumulative result of a professional’s creative process, and those who adhere to the definition that “fashion” is a design that motivates individual behavior, support the IDPPPA’s extension of copyright protection.

Those who support the existing unfettered right to copy root their argument in a fear that the industry will be harmed economically if copying was outlawed because they link the success of a design to the consumerism that it inspires.⁷⁷ They argue that the prevalence of copying in the fashion industry does not harm the industry financially but actually fuels its success.⁷⁸ These supporters of the status quo primarily argue that copying provides for accelerated diffusion of styles⁷⁹ and lays the foundation upon which a trend begins.⁸⁰ Copying is beneficial to the

direction and partaking of the same trend The idea is well captured by Anna Wintour, editor of *Vogue*, who noted that what is laudable in fashionable people is at once ‘looking on-trend and beyond trend and totally themselves.’”)

⁷⁶ See Raustiala & Sprigman, *supra* note 66, at 1722. While never providing an exact definition of “fashion,” Raustiala and Sprigman craft their “piracy paradox” upon the relationship between new designs and a degree of design coherence exemplified by trends. *Id.*

⁷⁷ See *id.* (“In short, piracy paradoxically benefits designers by inducing rapid turnover and additional sales.”).

⁷⁸ See *id.* at 1691 (“[C]opying functions as an important element of—and perhaps even a necessary predicate to—the apparel industry’s swift cycle of innovation.”).

⁷⁹ See *id.* at 1722 (coining the phenomena “induced obsolescence” and concluding that “IP rules providing for free appropriation of fashion designs accelerate the diffusion of designs and styles”).

⁸⁰ See *id.* at 1728–29 (coining the phenomena “anchoring” and concluding that “copying helps to anchor the new season to a limited number of design themes, which are freely workable by all firms in

fashion industry because it allows for more rapid turnover of styles and therefore yields additional sales; “the fashion cycle, in sum, is propelled by piracy.”⁸¹

This argument is first bolstered with data that the most expensive twenty percent of women’s dresses have grown more expensive since 1998 while all others have become cheaper or remained the same.⁸² Women’s apparel as a whole has similarly become cheaper.⁸³ This data can lead to the conclusion that price growth for a fashion design must be “very healthy” because one would normally expect cheap copies to depress the price of its high-end original.⁸⁴ Furthermore, the two forms of dresses lie in different markets and not simply different percentiles; there is no competition between the two because the woman who buys the \$50 Chanel copy would most likely be unable to afford the original if the copy did not exist.⁸⁵ Therefore, the availability of the copy fuels the desirability—and thus the price—of the original designer’s creation.

Conversely, those who support the IDPPPA argue that copying stifles innovation in the fashion design industry. They argue that there are actually two different forms of “copying” in the fashion industry: one is the general practice by designers of drawing freely upon the themes, styles and ideas of their culture (“borrowing”), and the other is blatant copying for the purpose of free riding on the design of another.⁸⁶ These two forms are distinguishable by their goals and effects.⁸⁷ Proponents of this argument advocate a form of copyright protection that prevents the blatant, free-riding copyists and protects the innovative members of the American fashion culture by allowing for borrowing.⁸⁸ This form of protection

the industry within the low-IP equilibrium” and that “[a] regime of free appropriation helps emergent themes become full-blown trends; trendy consumers follow suit”).

⁸¹ *Id.* at 1726.

⁸² *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 76 (2011) (oral testimony of Prof. Christopher Sprigman).

⁸³ *Id.*

⁸⁴ *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 82–83 (2011) (prepared statement of Prof. Christopher Sprigman).

⁸⁵ *Id.* at 84.

⁸⁶ See Hemphill & Suk, *supra* note 3, at 1153 (“The model makes visible an important analytic distinction that is useful for thinking about creative goods—the distinction between close copying on one hand and participation in common trends on the other. Design copying must be distinguished from other forms of relation between two designs, which may go by any number of names including inspiration, adaptation, homage, referencing, or remixing.”).

⁸⁷ *Id.* at 1160.

⁸⁸ See *id.* at 1153 (“Our theory leads us to favor a legal protection against close copying of fashion designs. The proliferation of close copies of a design is not innovation . . . It is importantly distinct from the proliferation of on-trend designs that share common elements, inspirations, or references but are nevertheless saliently different from each other. With respect to close copies, there is no reason to reject the standard justification for intellectual property, that permissive copying reduces incentives to

would not solely be a means of punishment but instead an incentive to create.⁸⁹ The only sellers who would have to adjust their businesses would be those who sell knockoffs, and the only thing that retailers have to monitor is that they are not selling knock-offs.⁹⁰

Also, those who support the IDPPPA do so because they believe the hypothesized pernicious economic effects are illusory and because the IDPPPA's extension of copyright protection, in their view, formally acknowledges that there is a distinction between clothing and artistic fashion.⁹¹ Such a change will allow for a period when a designer can receive recognition and exclusive use of their artistic innovation, will encourage the spread of ideas via borrowing while discouraging free riders, and will permit designers to choose who sells their designs and thus controls their image.

B. *Problems of Public Choice*

Just as a painting is in reality simply paint on a canvas, and a work of literature is words on a page, what is produced through fashion design is an article of clothing. This functional aspect of fashion design is the primary reason why there is no copyright protection for such designs in the United

create."); see also Oral Statement of Jeannie Suk, *supra* note 21, at 13 ("A key distinction to recognize is the distinction between products that are inspired by a designer's work and products that replicate or knock off a designer's work without any effort at modification. . . . This is a crucial difference as a matter of innovation policy because knockoffs cannot plausibly claim to be forms of innovation, whereas inspired-bys can. Knockoffs directly undermine the market for the original designs and reduce the designer's incentive to innovate in ways that inspired-bys do not.").

⁸⁹ See *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 15 (2011) (prepared statement of Prof. Jeannie Suk) [hereinafter Prepared Statement of Jeannie Suk] ("The goal of a law addressing copying in fashion design should indeed be to give an incentive to create, but also to safeguard designers' ability to draw upon a large domain of creative design influences to participate in fashion trends.").

⁹⁰ See Oral Statement of Jeannie Suk, *supra* note 21, at 13–14 ("The IDPPPA is therefore a highly moderate bill that only targets businesses that produce and sell knockoffs of original designs. The vast majority of the apparel industry will not be affected. If retailers are not selling knockoffs, they have nothing to fear from this bill. And even if they are, they are still safe if the design that they knock off is in the public domain or is not itself original, or if they are unaware that the items that they sell are knockoffs.").

⁹¹ See *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 8 (2011) (prepared statement of Lazaro Hernandez) [hereinafter Prepared Statement of Lazaro Hernandez] ("This bill will make it easier for all designers, not just the big names, to make their designs available at a variety of prices in a variety of stores. There are some in the industry who have become comfortable with the status quo. They see no need for a new law and fear that they might have to change the way they do business. To those companies I say, talk to all of the small designers put out of business by your current practices and business models.").

States.⁹² This functionality also raises a problem of public choice for legislators: knockoffs in the clothing industry hold the unique position of being both productive and unproductive. Copying in the fashion industry decreases a designer's return on investment, creates barriers of entry into the design market, and distorts innovation. However, copyists also make high-end fashion designs accessible to the general population. As a result, when Congress debates the extension of copyright protection to fashion design, the argument inevitably devolves into a debate over the best situation in a Catch-22: should American law encourage and reward the innovators in the fashion design industry, or does society instead want to promote the "democratization" of fashion?

Knockoffs are unproductive because they prevent designers from recouping the sizeable investment they put into creating the new design. This problem only grows as technology advances, for the investment costs alluded to in *Cheney Brothers* have reached million dollar proportions today. Lazaro Hernandez, co-founder of Proenza Schouler, testified before the House Subcommittee that it costs him \$3.8 million to produce one collection, and a single runway show typically costs about \$320,000.⁹³ These figures suggest that the "real issue [is] whether the law should allow designers to 'appropriate the benefit of their investment in research and development ('R&D') and product quality.'" ⁹⁴ Notably, data that the top twenty percent of women's dresses have increased in price has also led some to the opposite conclusion: that copying forces designers to increase their prices in order to recoup lost investment.⁹⁵

Proponents of the IDPPPA argue that these ever-increasing R&D costs particularly affect new designers and create a barrier to entry into the market.⁹⁶ Fashion products have traditionally been produced in a form

⁹² 17 U.S.C. § 113(b) (2006); *see also* 17 U.S.C. § 101 (2006) ("[A] 'useful article' is an article having an intrinsic utilitarian value function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'"); Raustiala & Sprigman, *supra* note 66, at 1699 ("[T]he lack of protection flows from a more general point of copyright doctrine: namely, the rule largely denying copyright protection to the class of 'useful articles,' that is, goods, such as apparel, furniture, or lighting fixtures, in which creative expression is compounded with practical utility.").

⁹³ Testimony of Lazaro Hernandez, *supra* note 68, at 4.

⁹⁴ Monseau, *supra* note 4, at 27, 33.

⁹⁵ *See, e.g.,* Safia A. Nurbhai, Note, *Style Piracy Revisited*, 10 J.L. & Pol'y 489, 491 (2002) ("Copying destroys the style value of dresses that are copied. Women will not buy dresses at a good price at one store if dresses which look about the same are offered for sale at another store at half those prices. For this reason, copying substantially reduces the number and amount of reorders which the original creators get. With this uncertainty with respect to reorders, original creators cannot afford to buy materials in large quantities as they otherwise would. This trend tends to increase the prices as which they must be sold." (internal citation omitted)).

⁹⁶ *See* Testimony of Lazaro Hernandez, *supra* note 68, at 4–5 ("The most severe damage from lack of protection falls upon emerging designers While salvage designers and large corporations with wide recognized trademarks can better afford to absorb these losses caused by copying, very few

described as a “fashion pyramid.”⁹⁷ The top of the pyramid is filled by *haute couture*, designer ready-to-wear apparel, “prestige collections” and lower priced “bridge collections.”⁹⁸ In the middle there exists the moderately priced apparel and at the bottom are basic commodities.⁹⁹ Therefore, a new designer must cope with both substantial R&D costs and the inherent need to define herself as a creator within the industry’s unique economic structure:

Every designer must develop their own DNA in order to make a lasting and recognizable impact on consumers. It’s like developing their “hit song” or anthem. Imagine if a starting songwriter’s first song was stolen and recorded by someone else with no credit to the songwriter and worse, it becomes a hit. They hear it on the radio every day and they are never credited. That’s what happens to many young designers whose ideas are stolen and rendered by others. It’s very hard to survive when you become the victim of this type of theft.¹⁰⁰

Proponents of the IDPPPA therefore contend that protection is needed because innovation in the industry does not only occur amongst those who sell the most expensive twenty percent of dresses.¹⁰¹ Copyists not only exploit the R&D investments of established designers such as Proenza Schouler but also have the ability to “wipe out young careers in a single season.”¹⁰²

Copyists also cut at the core of a fashion design because they dilute the prestige of the brand copied. In trademark law, dilution is the gradual erosion of the property value of the designer’s goodwill due to a similar (albeit not identical) use by another.¹⁰³ One form of a claim of dilution is

small businesses can compete with those who steal their intellectual capital. It makes it harder for young designers to start up their own companies. And isn’t that the American Dream?”).

⁹⁷ See, e.g., Raustiala & Sprigman, *supra* note 66, at 1693–94 & fig.A (summarizing the “fashion pyramid”).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Prepared Statement of Lazaro Hernandez, *supra* note 91, at 7.

¹⁰¹ See *id.* (“The most severe damage from lack of protection falls upon emerging designers While established designers and large corporations with widely recognized trademarks can better afford to absorb the losses caused by copying, very few small businesses can compete with those who steal their intellectual capital.”).

¹⁰² *Id.*; see also Oral Statement of Jeannie Suk, *supra* note 21, at 14 (describing the particular hardship lack of copyright protection causes upon emerging new designers).

¹⁰³ See *Mortellito v. Nina of Cal., Inc.*, 335 F. Supp. 1288, 1296 (S.D.N.Y. 1972) (“Dilution is an injury that differs materially from that arising out of the orthodox confusion. Even in the absence of confusion, the potency of a mark may be debilitated by another’s use. This is the essence of dilution. Confusion leads to immediate injury, while dilution is an infection, which if allowed to spread, will inevitably destroy the advertising value of the mark.”).

“blurring,” which occurs when two items are so similar that one seems less distinctive now that there are two of them.¹⁰⁴ The other form of dilution is “tarnishment,” which occurs when one mark is harmed by another use due to negative imagery.¹⁰⁵ Dilution is a particular problem in the fashion industry because of the industry’s current reliance on trademark protection and, combined with the advances in technology and interplay with Asia, often the “main value of high-end fashion good is their brands and not their design . . . particularly for accessories, the designer items may be no better made than the copies.”¹⁰⁶

An example of this problem was the situation that Burberry faced when its trademarked plaid was adopted by Britain’s “underclass ‘chav’ culture, described as ‘label-conscious football hooligans.’”¹⁰⁷ Sales in the United Kingdom dropped because elites did not want to be associated “with the person who mugged them.”¹⁰⁸ This led one author to conclude that “the core of the problem with fashion copying is not that exact copies are replacing the original, but that close copies are reducing the value of the original by reducing its prestige.”¹⁰⁹ Therefore, those who rooted their definition of “fashion” in consumer behavior were correct that copyists allow for the development of a trend; however, both the reputation and the revenue of the creator, Burberry, suffered a serious blow.

Finally, while the current intellectual property regime may not entirely stifle innovation, it nevertheless distorts innovation.¹¹⁰ The current intellectual property regime, which provides only trademark and trade dress protection, “tends, if anything, to push fashion consumption and production in the direction of status and luxury rather than more polyvalent innovation.”¹¹¹ Two distortions are ultimately observed: first, a trend toward the creation of designs that are legally more difficult to copy, notably designs that are dripping with logos and trademarked designs; and second, designs that contain unusual or expensive materials or difficult workmanship.¹¹²

¹⁰⁴ 15 U.S.C. § 1125(c)(2)(B) (2006).

¹⁰⁵ *Id.*

¹⁰⁶ Erika Myers, *Justice in Fashion: Cheap Chic and the IP Equilibrium in the United Kingdom and the United States*, 37 *AIPLA Q.J.* 47, 56 (2009). This was also a concern of the Subcommittee. See Statement of Rep. Goodlatte, *supra* note 2, at 2 (“And because these knockoffs are usually of such poor quality, they damage the designer’s reputation as well. Common sense dictates that we should inhibit this activity by protecting original fashion works.”).

¹⁰⁷ Myers, *supra* note 106, at 57.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 51.

¹¹⁰ See Hemphill & Suk, *supra* note 3, at 1179–80 (observing two ways in which the current intellectual property regime has distorted innovations in the fashion industry and concluding that “[t]he result of these distortions is to push creators toward the high-end realm of status and luxury, and away from devoting creative resources to design innovation”).

¹¹¹ *Id.* at 1179.

¹¹² *Id.*

These three detailed arguments for the passage of the IDPPPA are countered with the general assertion that copyists are a strong social equalizer. Copyists are able to quickly translate the designs of *haute couture* into cheaper fabrics for sale to the American masses through retail chains such as Forever 21. The elephant in the room with the House Committee is the fact that if a change in the law were to prevent the operation of stores like Forever 21, nothing would have changed for the poor law student who is unable to afford the Burberry original. A classic fear associated with the extension of copyright protection to fashion design is the argument that the majority of the American public will be denied a method of individual expression, and that such expression will instead be a privilege reserved only for those with the means to afford the originals.¹¹³ This is a frightening prospect for elected representatives.

Fashion designers have attempted to counter this fear with the assertion that designers do not seek protection in order to achieve isolation, but instead to gain the exclusive right “to have the chance to knock off their own designs before others do it for them.”¹¹⁴ Designers argue that they would never earn a profit by selling their designs only to a select few.¹¹⁵ Instead, the main profit is accrued from affordable ready-to-wear lines based upon their high-end originals. Copyists prevent this natural business model from evolving, however, since with copyright protection, “the average consumer can wear affordable new designs created by true designers rather than poor copies of the real thing made by pirates in China.”¹¹⁶

C. *The Unique Temporal Life of a Fashion Design*

“Fashion is made to become unfashionable.”¹¹⁷ A critical element of protection for fashion design is capturing the moment when a new design is original.¹¹⁸ For the designer, this entails the ability to capture the market

¹¹³ See, e.g., *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. 111 (2011)* (response to post-hearing questions from Prof. Jeannie Suk) (submitting for written answer of each individual testifying in support of the IDPPPA the question “[i]f H.R. 2511 becomes law, are there industry standards in place that would govern licensing agreements between newly empowered upstart designers and the manufacturers and retailers such that the consumers would continue to have affordable options?”).

¹¹⁴ Testimony of Lazaro Hernandez, *supra* note 68, at 5.

¹¹⁵ See *id.* (“Designers don’t make a profit selling a small number of high-priced designs, but only after they offer their own more affordable ready-to-wear lines based on their high-end collections.”).

¹¹⁶ *Id.*

¹¹⁷ ANTHONY ST. PETER, *THE GREATEST QUOTATIONS OF ALL TIME* 238 (2010) (quoting Coco Chanel).

¹¹⁸ See Scafidi, *supra* note 2, at 125 (detailing the fashion cycle according to both economic and sociological effects and observing that “[l]ess a method of discouraging copyists than a means of

for the design created.¹¹⁹ For the fashion industry as a whole, this entails the period when the design is not only marketable but also viewed by others as original.¹²⁰ The timing of fashion design piracy, which is the primary stimulus for passage of the IDPPPA,¹²¹ occurs right after the new design has been shown because that is when the design is most valuable.¹²²

The lifetime of a fashion design is temporally constructed in accordance with the design's ability to capture the trends of the season and then influence the style of new designs. The typical copyright standard of the lifetime of the creator plus one hundred years is impracticable for an industry that desires to encourage borrowing and cyclical trends, and therefore "given the highly seasonal and capricious nature of fashion, or public tastes, the term of copyright for garment designs should be limited."¹²³ A copyright regime for fashion design should be crafted to match the industry's unique temporal window, which is typically only a few months. Furthermore, because use of a new design via borrowing is what furthers innovation within the industry, a form of copyright protection that extends beyond the design creator's use could potentially stifle innovation within the design field. Therefore, a shortened window of protection is not only practicable, but also necessary for the economic and innovative viability of the industry. However, factors that support a longer term of protection are the existence of a time lapse between the first showing of a design and its subsequent retail designs, and also the sluggishness of some consumers to respond to new fashions.¹²⁴

Proponents of the IDPPPA further note that the temporal element of fashion design has been distorted by modern technology. The fashion industry today is no longer marked by the same investment and

mitigating their effects, the fashion cycle is essentially a pattern of consumer behavior that luxury goods industries can under limited circumstances leverage to create desire for new products.").

¹¹⁹ See, e.g., Statement of Rep. Goodlatte, *supra* note 2, at 2 ("The production lifecycle for fashion designs is very short. Once a design achieves popularity through a fashion show or other event, a designer usually has a limited number of months to produce and market that original design.").

¹²⁰ See Prepared Statement of Lazaro Hernandez, *supra* note 91, at 7 ("When designers produce basic garments to complement the original designs in our collections and create complete outfits, we know the difference between what is new and what is based on a common template—and so do design pirates.").

¹²¹ See Statement of Rep. Goodlatte, *supra* note 2, at 2 ("But it is perfectly legal for [a design pirate] to steal the design, reproduce the article of clothing, and sell it, provided he does not attach a fake label to the finished product. This loophole allows pirates to cash in on the sweat equity of others and prevents designers in our country from reaping a fair return on their creative investments.").

¹²² See Rocky Schmidt, Comment, *Designer Law: Fashioning a Remedy for Design Piracy*, 30 UCLA L. REV. 861, 877 & n.118 (1983) (proposing a one-year term of protection because "garment designs are still of most value when new, and therefore most design piracy occurs soon after a design has been shown").

¹²³ *Id.* at 877.

¹²⁴ *Id.* at 877 n.118.

development strategies that defined it in the past.¹²⁵ The outsourcing of clothing production to Asia has allowed for rather high-quality counterfeits to be produced rapidly and cheaply.¹²⁶ Furthermore, advancements in photography, television, and the Internet have accelerated the speed at which a new fashion design can evolve from the runway to the shelf of a counterfeiter.¹²⁷ All of this often occurs faster than the designer can stock their own shelf with Italian-made wares and inevitably undercuts the designer's investment costs.¹²⁸ This leads advocates to assert that if designers did not require protection in the past, they do now.¹²⁹

D. Resolving the Discrepancies

Copyright law does not extend only to those books that prove to be classics, and patent law does not protect only those inventions that prove to earn millions. These regimes strive to protect and encourage all forms of innovation. While some designers have found protection from blatant copyists with trademark law, trademark protection has had the effect of distorting innovation and alienating young talent. Therefore, "fashion" should be defined from the perspective of the industry's designers; it should not be defined according to the individual and consumer behaviors of the design's future market.¹³⁰

The pernicious effects of copyists are numerous and particularized; the status quo is supported by a singularized economic analysis and a generalized fear of change. There is no articulated reason for why Congress should assume that the democratization of fashion design would no longer occur should the original designers hold a temporary copyright. Therefore, the public policy concerns which have historically blocked the extension of copyright law to fashion designs should no longer hold the spotlight.

¹²⁵ See Scafidi, *supra* note 2, at 125 (describing how the traditional movement of high fashion trends from high-status individuals to a broader consumer base is "rendered obsolete" by modern capabilities of rapidly producing and distributing knock-offs).

¹²⁶ *Id.* at 125–26.

¹²⁷ *Id.* at 125.

¹²⁸ See Monseau, *supra* note 4, at 29 ("The most common criticisms are that Raustiala and Sprigman underestimate the new technologies of copying, and they misunderstand the effect of various other changes in the fashion business, especially the motivations and buying habits of customers. The speed of global communication with factories in China, which are ready and able to execute commissions from fashion design pirates, has significantly affected the dynamics of the business.").

¹²⁹ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430–31 (1984). ("Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.").

¹³⁰ See Jennifer Mencken, *A Design for the Copyright of Fashion*, 1997 B.C. INTELL. PROP. & TECH. F. 1, 6–7 (1997), available at <http://bcipf.org/tag/1997> ("The mere fact that an industry has been able to devise other methods of up-keeping its financial stability should not be a reason to deny creative expression protection.").

A copyright system that can effectively reconcile the competing interests of fashion designers, consumers, and retailers is one that does not define its boundaries according to either time or subject matter, but instead is limited by context. The divergent arguments of designers, retailers and consumers exemplify that the context of designs is numerous and often functional. However, a copyright system that carves out a form of protection for fresh art within the design context has the potential to protect the innovators of the fashion design industry, while also serving the public interest.

IV. THE POTENTIAL OF THE INNOVATIVE DESIGN PROTECTION & PIRACY PREVENTION ACT

H.R. 2511, titled the Innovative Design Protection & Piracy Prevention Act, was submitted to the House of Representatives' Committee on the Judiciary on July 13, 2011.¹³¹ If passed, this Act will create a sui generis copyright system for fashion design.¹³² Particularly, the Act will fit protection for fashion design into Chapter 13 of Title 17 of the U.S.C., which is a sui generis copyright system that was created for boat hulls in 1998.¹³³ The IDPPPA is the cumulative result of decades of lobbying and five years of prior attempted legislation in Congress.

The purpose of this Part is to outline the IDPPPA's proposed copyright regime. The IDPPPA effectively copes with the design industry's legal history and unique characteristics by carving out a form of contextualized protection for artistic innovation in the field of fashion design. The IDPPPA is a viable system of copyright protection for fashion designs; however, in order to alleviate the risk of increased litigation, the statute should shorten the two-year registration window established in 17 U.S.C. § 1310¹³⁴ instead of eliminating it altogether, and the statute should define what design alterations constitute changes that are "merely trivial," and thus infringing.

A. *Designs Protected*

As discussed earlier in this Note, there is a distinction between clothing and the seemingly nebulous, higher creation of "fashion."¹³⁵ If Congress is to successfully protect investment in fashion design and encourage innovation, it must protect those designers who move beyond the role of selling clothing to the masses and instead create and define what

¹³¹ Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011).

¹³² *Id.*

¹³³ *Id.*; Vessel Hull Design Protection Act, 17 U.S.C. §§ 1301–1310 (2006).

¹³⁴ Vessel Hull Design Protection Act, 17 U.S.C. § 1310(a) (2006).

¹³⁵ See discussion *supra* Part III.A.1.

the masses crave to buy. As the statute currently stands, H.R. 2511 applies an objective “entire package” approach to the protection of an article of clothing by extending protection only to the “appearance as a whole . . . including its ornamentation.”¹³⁶ Furthermore, for an entire appearance to be protected, it must have “original elements,” an “original arrangement,” or “non-original elements as incorporated in the overall appearance of the article of apparel that are the result of the designer’s own creative endeavor *and* provide a unique, distinguishable, non-trivial *and* non-utilitarian variation over prior designs for similar types of articles.”¹³⁷ The copyright protection proposed under the IDPPPA is therefore much more limited than the traditional copyright standard and also more limited than the *sui generis* system created for boat hulls.¹³⁸

Practical application of this standard to fashion design will leave a significant majority of clothing produced in the United States unprotected. The language that protection will be extended only to an “entire appearance, including ornamentation” entails that protection will only be provided to a garment in its entirety. For example, a novel use of buttons will not receive copyright protection. Such a creative design would only receive protection if it transformed the whole article of clothing that the buttons were used upon. Furthermore, it would only be that article in its entirety—not the buttons themselves—that would have protection against copyists. Therefore, one can infer from this standard that a fellow designer could incorporate those novel buttons into her own work so long as her final product does not resemble that of the copyright holder’s.

The definition of “originality” in the IDPPPA is also much narrower than the traditional copyright standard.¹³⁹ When taken in light of the general nature of fashion design,¹⁴⁰ and recent court decisions, it is very

¹³⁶ Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. § 2(a)(2)(B) (2011).

¹³⁷ *Id.* (emphasis added).

¹³⁸ See 17 U.S.C. § 102 (2006) (protecting with copyright any “original works of authorship fixed in any tangible medium of expression”); see also Vessel Hull Design Protection Act, 17 U.S.C. § 1301 (2006) (extending protection to all vessel hulls without any strict originality limitations).

¹³⁹ See H.R. Rep. No. 94-1476, at 51 (1976) (noting that the traditional copyright standard for “original works of authorship . . . does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them”).

¹⁴⁰ See Hemphill & Suk, *supra* note 3, at 1155 (“Fashions change. Styles emerge, become fashionable, and are eventually replaced by new fashionable styles.”); see also *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 128 (2011) (written testimony of Kurt Courtney, Manager, American Apparel & Footwear Association) [hereinafter *Written Testimony of Kurt Courtney*] (“Overall, original fashion designs are not very common, since most apparel and footwear companies reuse, recast and reformat older designs for new collections, especially in the mass market. . . . [G]eneric fashion articles, such as t-shirts, pleated pants and button-down collared shirts will not be considered as original or infringing, since they are very well-documented items that have been seen in fashion for decades.”).

likely that this standard will be interpreted as a requirement of extreme novelty, and therefore a wide majority of new designs will not be copyrightable. For example, the Southern District of New York stated in *Christian Louboutin, S.A. v. Yves Saint Laurent America*, that no creation in the fashion industry is truly “novel.”¹⁴¹ The court also articulated a genuine fear that courts may become “arbiters of fashion” and a pointed desire to avoid such a characterization.¹⁴² Therefore, designers will face a heavy burden should they seek to copyright their creations and a serious fight should they wish to bring a claim of infringement. The benefit of this specter, however, is that it cuts against the fears of the retail industry that the IDPPPA would lead to immense litigation.¹⁴³ It also has the potential benefit of spurring further innovation in fashion design.¹⁴⁴

The negative implication of this standard is that the initial burden placed upon designers disproportionately favors well-established designers with more economic resources than start-up designers with less economic resources.¹⁴⁵ This should be considered a serious issue because one of the main goals of the IDPPPA is to protect start-up designers, who suffer more dire consequences from copyists than designers who can fall back on

¹⁴¹ See *Christian Louboutin S.A. v. Yves Saint Laurent Am., Inc.*, 778 F. Supp. 2d 445, 447 (S.D.N.Y. 2011), *rev'd*, No. 11-3303, 2012 WL 3832285 (2d Cir. Sept. 5, 2012) (“Sometime around 1992 designer Christian Louboutin had a bright idea. He began coloring glossy vivid red the outsoles of his high fashion women’s shoes. Whether inspired by a stroke of original genius or, as competitor YSL retorts, copied from King Louis XIV’s red-heeled dancing shoes, or Dorothy’s famous ruby slippers in ‘The Wizard of Oz,’ or other styles long available in the contemporary market—including those sold by YSL Christian Louboutin deviated from industry custom.”).

¹⁴² See *id.* at 456 (“Or they could go to court and ask for declaratory relief holding that a proposed red sole is not close enough to Chinese Red to infringe Louboutin’s mark, thereby turning the judge into an arbiter of fashion design. Though *Qualitex* points out that in trademark disputes courts routinely are called upon to decide difficult questions involving shades of differences in words or phrases or symbols, the commercial contexts in which the application of those judgments generally has arisen has not entailed use of a single color in the fashion industry, where distinctions in designs and ideas conveyed by single colors represent not just matters of degree but much finer qualitative and aesthetic calls.”).

¹⁴³ See, e.g., Letter from Stephanie Lester, *supra* note 40, at 130 (expressing concerns for the IDPPPA on behalf of the Retail Industry Leaders Assoc. and stating that “[t]he so-called ‘heightened’ pleading requirements would not prevent lawsuits/trials”).

¹⁴⁴ See *Innovative Design Protection and Piracy Prevention Act: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 106 (2011) (response to post-hearing questions by Prof. Jeannie Suk) (“The reward of copyright protection for designs that meet the Act’s standard would likely spur some innovative designers to attempt to meet [the new] standard with some of their designs. These attempts in response to the new law may increase the percentage of such designs in the market, and thus increase the percentage of designs eligible for copyright protection. This would be a desirable result, as it would in effect mean an increase of design innovation in the fashion industry. Nevertheless, the standard under H.R. 2511 is demanding.”).

¹⁴⁵ See, e.g., Monseau, *supra* note 4, at 28, 52 (critiquing an earlier version of H.R. 2511 and observing in particular “House Bill 2196 gives too much power to the well-financed and legally savvy designer who has registered her design”).

trademark and trade dress protection. However, the designers who testified before the House Subcommittee predicted that the majority of protected designs would actually be found in small boutique stores, therefore suggesting that designers themselves do not fear such consequences.¹⁴⁶ Also, the issue arises when designers bring their copyrights to court in infringement suits, and unfortunately imbalanced access to the American court system is a problem that plagues the legal system beyond the realm of copyright infringement litigation.

B. *Infringement System*

The Congressional movements to extend copyright protection to fashion design have revolved around attempts to develop a *sui generis* infringement system comparable to the general copyright infrastructure.¹⁴⁷ The IDPPPA is no different. A major benefit of establishing an infringement system is that it harmonizes with the rest of Title 17, particularly Congress's most recent *sui generis* system, boat hulls.

The primary argument against the establishment of an infringement system in the United States is that a similar system established in the European Union has not proven very successful. EU members are afforded twenty-five years of design protection if the creator registers his design and three years of protection should the creator not register his design.¹⁴⁸ Designs are protected if they simply achieve a "copyright-like standard of originality,"¹⁴⁹ and designs are only prohibited when an informed user can find almost no difference between the two designs in question.¹⁵⁰ Since these low standards were implemented, there has proven to be very little changes to the EU's fashion industry, and copyists remain prevalent.¹⁵¹ This has led at least one academic to conclude that the fashion industry prefers the status quo to heightened intellectual property protection.¹⁵² The

¹⁴⁶ See Written Testimony of Kurt Courtney, *supra* note 140, at 128 ("I do not envision that you would find an original article of clothing or footwear . . . in a big retail establishment. I would expect most original items to be found in smaller boutique stores.").

¹⁴⁷ See *Copyright Registrations of Designs: Hearings Before the Comm. on Patents*, 71st Cong. 1–6 (1930) (creating a new statutory scheme for design protection similar to that of the existing copyright structure); H.R. 2196, 111th Cong. (2009) (extending copyright protection to designs by amending Title 17, specifically).

¹⁴⁸ Monseau, *supra* note 4, at 60–61.

¹⁴⁹ *Id.* at 59 ("A design has 'individual character' if the overall impression the design produces on the informed user differs from the overall impression produced on such a user by any design that has previously been made available to the public.").

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., Myers, *supra* note 106, at 71–72 (comparing the US-based company Forever 21 with the UK-based company TopShop). Myers observes that the two companies still have the same business model and that nothing has really changed in the UK compared to the U.S. even though the UK provides IP protection to the fashion industry. *Id.*

¹⁵² See Raustiala & Sprigman, *supra* note 66, at 1735 ("Yet, we do not see evidence, in either the form of lawsuits or the absence of design copying, that the behavior of the fashion industry firms

majority of fashion design advocates nevertheless promote some form of intellectual property protection for fashion design in the United States.¹⁵³

I propose the idea that the lack of change in the European Union may be a result of the fact that the United States does not participate in the protection. There exists little incentive for fashion designers to invest the resources in litigating against a fast-fashion chain in the UK, and little return on investment when the same design could continue to be copied in the American market.¹⁵⁴ Furthermore, this lack of activity in the UK could also serve as a signal to those against the IDPPPA who argue that increased litigation is an inevitable result of copyright protection. The right to litigate for infringement might actually be a secondary goal of fashion designers in their fight to achieve the right to copyright.

A factor indicating that an infringement system might work favorably for the American fashion industry, in comparison to the European fashion industry, is that it has significant similarities to FOGA. Under FOGA, an article of clothing that received protection under the Declaration of Cooperation was “put on trial” when an alleged infringer was accused.¹⁵⁵ This system received significant support within the fashion community and only ended on account of government intervention.¹⁵⁶ Therefore, imposition of a similar infringement system has the potential to once again prove successful.

1. *Practical Application Through the IDPPPA*

The IDPPPA specifically defines an infringing article as an article that is “copied” from the design itself or from an image of the design.¹⁵⁷ An article of clothing is deemed “not copied” if the article is “not substantially identical” or was “the result of independent creation.”¹⁵⁸ The majority of

changes much from one side of the Atlantic to the other. This observation suggests that the industry’s practices with respect to design copying are not sensitive to changes in legal rules, and that the industry chooses to remain within a low-IP regime even where the nominal legal rules are the opposite.”)

¹⁵³ See, e.g., Myers, *supra* note 106, at 74 (“Despite the much stronger IP protection, the responses of U.K. designer brands to cheap-chic chains have been similar to responses in the U.S.. Although IP protection does seem to have led to more innovation in U.K. cheap chic, as the chains have found ways around the legal protection, the IP laws have had no apparent effect on the overall level of innovation by designer labels. Indeed, such an effect would be somewhat surprising, given that the level of copying seems to be approximately as high in the U.K. as in the U.S.”).

¹⁵⁴ See also Monseau, *supra* note 4, at 34 (“Consumerism and the public appetite for named designers as well as brand-named clothing and accessories are the drivers of the increasingly global business of fashion. Many consumers buy clothing and accessories not so much out of necessity, but for those less tangible product attributes and benefits. . . . To survive, the global and complex business of fashion must constantly produce and determine how to market new designs.”).

¹⁵⁵ Weikart, *supra* note 29, at 252.

¹⁵⁶ *Id.* at 254.

¹⁵⁷ Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. § 2(e)(2) (2011).

¹⁵⁸ *Id.*

fashion litigation will presumably center on determining whether the alleged infringing work is “substantially identical” to the copyrighted design. H.R. 2155 defines “substantially identical” as an article that is “so similar in appearance as to be likely to be mistaken for the protected design” or only contains differences that are “merely trivial.”¹⁵⁹

Practically, this standard for determining infringement places a heavy burden on designers (similar to the standard for establishing the design itself as copyrightable). It is possible that this standard has the potential to achieve Congress’s goal and successfully prevent only blatant copying. There is no language narrowing the requirement “so similar in appearance as to be likely to be mistaken for the protected design” to the eyes of a professional designer.¹⁶⁰ It is instead a standard catered toward a traditional jury. This has the benefit of preventing a battle of the experts but also has the negative potential of leading to uncertainty and a broader spectrum of infringing designs.

C. Recommendations: A Need to Further Tailor the Scope of Protection

The IDPPPA copes with the unique temporal window of fashion designs by limiting copyright protection to three years.¹⁶¹ I believe that this sole adjustment is inadequate because it does not fully address the ways by which the temporal factor pervades all aspects of fashion design; a three-year window of protection neither signals to the industry what exactly is protected nor defines for a jury what is considered original within the industry.¹⁶² These weaknesses can be alleviated, however, if a registration requirement and a definition of “trivial” are incorporated into the IDPPPA.

1. Registered Design Right

The IDPPPA does not impose a registration requirement on fashion designers. The IDPPPA specifically removes the Vessel Hull Act’s two-year registration requirement from the purview of fashion designs.¹⁶³ In lieu of such a requirement, copyright protection is afforded to any qualifying design the instant the design is “made public.”¹⁶⁴ A registration

¹⁵⁹ *Id.* § 2(a)(2).

¹⁶⁰ *See id.* (lacking language clarifying who would likely confuse article for its similarity).

¹⁶¹ *Id.* § 2(d).

¹⁶² *See supra* Part III.C.

¹⁶³ Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. § 2(d) (2011); 17 U.S.C. § 1305(a) (2006).

¹⁶⁴ Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. § 2(d) (2011); 17 U.S.C. § 1304 (2006); *see also* 17 U.S.C. § 1310(b) (2006) (providing that a design is made public “when an existing useful article embodying the design is anywhere publicly exhibited, publicly distributed, or offered for sale or sold to the public by the owner of the design or with the owner’s consent”).

requirement has the potential to adversely affect new designers,¹⁶⁵ and those who opine on these potential adverse effects tend to further note the existence of an unregistered design right in the EU.¹⁶⁶ However, the IDPPPA should include a short registration requirement because a registration system affords certainty that encourages borrowing and has the potential to alleviate the current fears of the American retail industry.¹⁶⁷

Required registration provides public notice that a design is copyrightable. This is a benefit for retailers because retailers will have notice of what designs to look out for when selecting their next season of apparel to stock, whether they import their products or produce them domestically.¹⁶⁸ Retailers would not be disadvantaged—as might be the case if unregistered designs could rise out of the ether—but instead would be on a level playing field with any designer or producer who sought to create inexpensive and stylish clothing. Also, the IDPPPA's goal of maximizing innovative borrowing could be stifled if designers are uncertain that the design they are adapting is protected by copyright. A registration requirement allows a designer to proactively capture access to the design's future market and signal to other designers that the work is original.

The IDPPPA should instead shorten the two-year registration requirement as reflected in the Vessel Hull Act. A two-year window for registration is comparable with neither the limited three-year protection granted under the IDPPPA,¹⁶⁹ nor with the fast and cyclical nature of the fashion industry.¹⁷⁰ The purpose of a three-year window of protection is that it is comparable with the fleeting and cyclical nature of the use of a fashion design; it is a reflection of the short amount of time it takes for a design to debut, be sold, and retire to non-use. Providing a two-year window for registration has the potential to make the scope of protection

¹⁶⁵ See Monseau, *supra* note 4, at 48 (“One of the main difficulties of drafting a law to protect innovation in fashion design is to ensure that, while it protects investment in new design, it avoids the Court’s concern about competition and so does not preclude others from designing products that follow a new trend.”).

¹⁶⁶ See *id.* at 71 (outlining possible negative effects of a copyright system dependent upon registration).

¹⁶⁷ See Letter from Stephanie Lester, *supra* note 40, at 131 (“Most major apparel, footwear, and accessories retailers also have a hand in the design process on many of the products they purchase, including, but not limited to, products bearing the brands they own and license. Even minor involvement in the design process would likely trigger claims that the retailer induced its supplier to produce the allegedly infringing product.”).

¹⁶⁸ *Id.*

¹⁶⁹ Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. § 2(d) (2011).

¹⁷⁰ See, e.g., Statement of Rep. Goodlatte, *supra* note 2, at 2 (“The production lifecycle for fashion designs is very short. Once a design achieves popularity through a fashion show or other event, a designer usually has a limited number of months to produce and market that original design.”).

too uncertain and too long.

An amendment requiring registration within a couple months of showing a new fashion should be feasible for designers because they typically only show their collections for one season. A shortened window would also alleviate the retail industry's fear of unanticipated and unpredictable liability.¹⁷¹ Furthermore, there is little risk that a short registration period will prove to be a trap for the unwary because designers should know better: when designers display their work in a show or a store, they are opening it up for the world to see and therefore are inviting copyists.

2. Definition of "Trivial"

Congress should define "trivial" within the IDPPPA. The IDPPPA has no definition for this key term and its current uncertainty has the strong potential to lead to jury confusion and increased litigation—a problem that preoccupies Congress.¹⁷² It is also very likely that courts would interpret "trivial" very narrowly if left to their own devices.¹⁷³ I suggest that the definition for a "trivial" change is "a change that is not the product of creative skill and endeavor as reflected by the state of the art at the time the design was created, such that a jury is unable to discern a modicum of creativity to distinguish the two editions." This language is borrowed from the IDPPPA's definition of "fashion design."¹⁷⁴ This definition is also a reflection of precedent in the field of copyrightable music, which is an

¹⁷¹ See Letter from Stephanie Lester, *supra* note 40, at 131 ("Retailers would potentially have to devote significant time, costs and research to ensure that each product they sell would not infringe upon a protected design—not only at the time of design, but again when the garments are imported and sold (which generally occurs several months later).").

¹⁷² See Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. §§ 2(a)(2), (e) (2011) (using the qualifying language "trivial" in both the proposed definition for a protected fashion design and standard for infringement); see also Statement of Rep. Goodlatte, *supra* note 2, at 2 (providing extensive examples for why the IDPPPA "does not encourage harassing or litigious behavior").

¹⁷³ The Second Circuit's reversal of the lower court's holding in *Christian Louboutin* indicates the tumult that even the issue of color can cause in the courts. Compare *Christian Louboutin S.A. v. Yves Saint Laurent Am., Inc.*, 778 F. Supp. 2d 445, 449–50 (S.D.N.Y. 2011), *rev'd*, No. 11-3303, 2012 WL 3832285 (2d Cir. Sept. 5, 2012) (holding that Louboutin's red sole is not entitled to trademark protection "even if it has gained enough public recognition in the market to have acquired secondary meaning" because "in the fashion industry color serves ornamental and aesthetic functions vital to robust competition"), with *Christian Louboutin S.A. v. Yves Saint Laurent America Holdings, Inc.*, No. 11-3303, 2012 WL 3832285, at *13–14 (2d Cir. Sept. 5, 2012) ("We hold that the lacquered red outsole, as applied to a shoe with an 'upper' of a different color, has come to identify and distinguish the Louboutin brand, and is therefore a distinctive symbol that qualifies for trademark protection. We further hold that the record fails to demonstrate that the secondary meaning of the Red Sole Mark extends to uses in which the sole *does not* contrast with the upper—in other words, when a red sole is used on a monochromatic red shoe." (citations omitted)).

¹⁷⁴ Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. § 2(a)(2) (2011).

industry that contains elements of borrowing.¹⁷⁵ As an example, the inherent nature of clothing retail leads to the conclusion that a “trivial” change would be a change of fabric (most likely for a cheaper fabric).

V. CONCLUSION

Almost a century ago, courts told Congress that copying was unfair and economically harmful to the industrial design industries. They sent a message to the fashion industry, copyists, and Congress that only Congress could provide an equitable remedy under the Constitution. Almost seventy years ago, Congress and our courts told the fashion industry that they couldn’t police and protect their designs internally. Today, the fashion industry’s hands are tied. This situation is particularly damaging for those trying to enter the industry.

Congress should extend a limited form of copyright protection to fashion design. The victory of achieving the Congressional recognition that fashion design is worthy of copyright protection, and signaling to the world that the United States will now step in to stop blatant copying in the industry, weighs against the opposition’s counter-arguments. The status quo has proven imperfect for those who actually participate in the industry, the hypothesized pernicious economic effects are merely speculative, and the fear of increased litigation is unjustified when the exact words of the statute are analyzed.

The IDPPPA provides a viable solution to the problem of copying in the fashion industry because it has the potential to limit protection to only those works that are truly considered novel. I propose that two changes should be made to the IDPPPA in order to make it a more viable statute: first, the window for registration should be shortened instead of eliminated altogether; and second, Congress should define “trivial” change.

It was a fashion designer, Coco Chanel, who once observed, “those who create are rare; those who cannot are numerous. Therefore, the latter

¹⁷⁵ See, e.g., *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681, 683 (S.D. Cal. 1958) (“His contribution consists of an introduction; a repetition of the same theme in the breaks; several bars of harmony; and an ending. All this involved was the addition of certain inconsequential melodic and harmonic embellishments such as are frequently improvised by any competent musician. One expert testified that the introduction added by plaintiff was as commonplace among musicians as the fairy story beginning, ‘Once upon a time.’ These same bars and developments thereof were repeated throughout the song as breaks and as an ending. Such technical improvisations which are in the common vocabulary of music and which are made every day by singers and other performers, are *de minimis* contributions and do not qualify for copyright protection.”); see also *Grove Press Inc. v. Collectors Publ’n Inc.*, 264 F. Supp. 603, 605 (C.D. Cal. 1967) (“Plaintiff made approximately forty thousand changes from the Verlag copy in producing its edition. These changes consisted almost entirely of elimination and addition of punctuation, changes of spelling of certain words, elimination and addition of quotation marks, and correction of typographical errors. These changes required no skill beyond that of a high school English student and displayed no originality. These changes are found to be trivial.”).

are stronger.”¹⁷⁶ The goal of American intellectual property law is to protect those who create, to foster their success, and to provide an incentive for others to share their creations with the rest of American society. American fashion designers have long been considered artists within American culture. In a Congressional term marked by revolutionary changes in intellectual property law, the time is ripe for Congress to finally acknowledge that a problem exists within a major economic industry and to provide the limited remedy that has been made available through the IDPPPA.

¹⁷⁶ CAROL TURKINGTON, *THE QUOTABLE WOMAN* 46 (2000) (quoting Coco Chanel).

