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# The High Price behind High Fashion

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## Executive Summary

Fashion is art. Fashion is a medium for designers to create new forms of expression and innovate ways to reflect on culture and society. Fashion is a reflection of culture, and like culture, it changes with time. It serves a utilitarian function and is part of our daily lives. Fashion is on the catwalk during a fashion show by one of the world's leading designers. Fashion is one's creative outlet to mix and match signature pieces to create a new way of personal expression.

This paper will explore the nature of the fashion industry and whether we, as a society, should grant design protection under copyright law. Congress is currently considering the Design Piracy Protection Act, which would extend a form of copyright protection to fashion designs.

The industry is divided on whether the legislation will impede creativity and prevent the industry from changing and evolving over time. This decision really comes down to one question; will the benefit of extending protection outweigh the negative effects? This paper will attempt to answer this question through public policy, legislative history, and industry opinion.

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## INTRODUCTION

This paper will begin by giving a brief overview of the fashion industry and some of its unique characteristics that will be impacted by legislation. One industry characteristic that will be enormously impacted by design protection is the trickle-down effect, which occurs every season when companies translate runway designs into mass-produced, low cost, products.

Next, existing design law is discussed under the three traditional federal intellectual property protection regimes: copyright, trademark, and patent law. All three offer some form of protection, but only apply in a limited number of cases and can be extremely costly and time consuming. Then, the Design Piracy Prohibition Act is discussed in great detail beginning with the 2006 version and the amendments to the latest-proposed version. The goals for the revisions were to narrow the infringement standard and create more clarity on what conduct constitutes infringement.

Finally, an analysis about those who support and oppose the Design Piracy Prohibition Act is given, which looks to public policy, legislative history and industry opinion to give a recommendation as to whether or not the legislation should be enacted into law.

**1. The Fashion Industry**

Fashion serves an important function within our culture and society. It is a vehicle for personal expression because it plays a role in our everyday life, unlike conventional art forms that are not typically accessible to the general public.[1] Fashion communicates a society's culture and beliefs.[2]

The fashion industry is a complex network with various markets, actors, and institutions that contribute to create a cultural flow of global fashion.[3] In 2008, the global apparel industry had a value of $1,108 billion.[4] By 2013, it is expected to grow 16.6 percent to $1,291 billion.[5] The United States represents 34.3 percent of the global market, which is valued at $304.1 billion.[6] The cultural producers, such as trend analysts, fashion magazines, and designers, create and define fashion because they are endowed with such status within the industry and construct what we call fashion.[7] These individuals traditionally came from couture houses and brands that produced luxury products marketed to a small, affluent segment of society. Other cultural

[1] Khadija Hassan, *Why Fashion Matters,* CHOWK (Feb. 19, 2005), available at: http://www.chowk.com/Views/History/Why-Fashion-Matters?print=1&tmpl=component.

[2] *Id*.

[3] Patrik Aspers and Lise Skov, *Encounters in the Global Fashion Business: Afterword,* 54 CURRENT SOCIOLOGY 801, 804 (September 2006), http://www.csi.sagepub.com.

[4] Industry Profile, Global Apparel Retail, DATAMONITOR, August 2009, at 3, http://www.datamonitor.com (last visited Nov. 14, 2009).

[5] *Id*.

[6] Industry Profile, United States Apparel Retail, DATAMONITOR, June 2008, at 3, http//:www.datamonitor.com (last visited Nov. 14, 2009).

[7] Hassan, *supra* note 1.

institutions that shape the fashion industry are trade fairs, the art world, design schools, catwalks, street fashion, and celebrities.[8]

Fashion houses create collections for two seasons per year, Spring and Fall, where designers exhibit their collections to the public during Fashion Week. New York, London, Milan, and Paris, the world's fashion capitals, host their own fashion weeks. Small-scale fashion weeks are held elsewhere in many cities across the world.

Traditionally, fashion was only accessible to the social elite, which may explain the pathological rush towards designer labels that takes place today.[9] Up until the late 19th Century, there were no fashion designers, only seamstresses and dressmakers.[10] The fashion hierarchy known today began in Paris during the 18th Century. Paris remained the center of the fashion world until WWII, when Germany invaded France.[11] With Paris' reputation faulting, a massive shift began with the rise of mass-produced clothing.[12] This gave the average consumer unprecedented access to fashionable clothing.[13]

At the top of this hierarchy is Haute Couture, or "high fashion," which is still produced in Paris today.[14] Haute Couture garments are made from the finest fabrics, are hand-sewn, and tailored to fit the patron. Charles Frederick Worth started the first couture house that produced these one-of-a-kind garments with many houses following, like Balenciaga, Vionnet, Chanel,

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[8] Hassan, *supra* note 1.

[9] *Id*.

[10] Fashion Design Services in the US: 54149, IBISWorld Industry Report, November 2, 2009, at 28, http://www.ibisworld.com/industryus/default.aspx?indid=1413 (last visited Dec. 14, 2010).

[11] *Id.*

[12] *Id*.

[13] *Id*.

[14] *Id*.

Schiaparelli, and Dior.[15] Sometimes haute couture is used to describe just French fashion, or it refers to "any unique stylish design made for wealthy, high-status clients."[16] (e.g.: vintage clothing, which started in Greenwich Village by a group of young people). A trend can also trickle-across when it is accepted

Each trend follows a life cycle. First, it is introduced to the market, then its acceptance rises, peaks, then declines, and finally it becomes obsolete. Today, the industry's globalization has made it inexpensive to produce high-quality clothing that can be shipped across the world in a matter of days. The industry changes from season to season and its trend-driven nature makes a product's life cycle short-lived.[17]

Traditionally, fashion trends trickle-down from the socially elite to the mainstream public.[18] Today, this is not always true; fashion can trickle-up from street fashion, which is started not by an elite designer, but by a group or individual among several socioeconomic classes at the same time.[19]

**1.1. The Trickle-Down Effect**

The trickle-down effect happens every season. A mainstream retailer's designer attends a catwalk show or views photos of the latest looks and imitates them by creating similar products, which retail for a fraction of the cost. Fashion week is viewed as the first wave of inspiration for the season and what is popular there filters down from upscale department stores to big-box

[15] Fashion Design Services in the US: 54149, IBISWorld Industry Report, November 2, 2009, at 28, http://www.ibisworld.com/industryus/default.aspx?indid=1413 (last visited Dec. 14, 2010).

[16] *Id*.

[17] Gaurav Doshi, *Fashion Industry: Ready to Face to Future*, available at http://ezinearticles.com/?Fashion-Industry:-Ready-To-Face-The-Future&id=359793&opt=p. (last visited Jan. 20, 2011)

[18] *Fashion Design Services in the US:54149*, *supra* note 4, p. 28.

[19] *Id.*

discounters.[20] For example, Julie Shone-Baker, a small boutique owner, says she makes 60-70 percent of her inventory purchases based on what is showcased during fashion week.[21]

There is much debate over whether this is an inspirational tool used by designers or if it is an act of piracy that should have legal consequences.[22] Harvard Law Professor, Jeannie Suk, says there is a difference between what are called "knockoffs" and "inspired-bys."[23] Knockoffs become available in stores within weeks of their debut on the runway thanks to factories abroad, digital cameras, the internet, and prompt transportation.[24] Inspired-bys are the same as knockoffs in the sense that they both are "of-the-moment" trends, but inspired-bys are noticeably different compared to the high-end designs.[25]

This process has been perfected by "fast fashion" retailers, most notably Zara, H&M, and Forever 21. These retailers can imitate a style and have it available in their stores within several weeks. This phenomenon runs against traditional trickle-down theory when the perceived lower social class adopts a trend, making it no longer desirable to the members of the highest social class.[26] Due to technological advancement, high fashion trends are available to the general consumer around the same time as they become available to the social elite who pay higher prices for designer products.

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[20] *Fashion Design Services in the US:54149*, *supra* note 4, p. 28.

[21] *Id*.

[22] Samantha Thompson Smith, *Drop by Drop: New York's Fashion Week will Trickle to the Triangle before Too Long,* KNIGHT RIDDER TRI. BUS. NEWS, (Washington): Jan. 29, 2007, at 1.

[23] C. Scott Hemphill & Jeannie Suk, *The Squint Test: How to Protect Fashion Designers like Jason Wu from Forever 21 Knockoffs,* SLATE MAGAZINE: May 13, 2009, at 1.

[24] *Id.*

[25] *Id*.

[26] Reach Information, *The Trickle Down Theory*, http://www.marketing.reachinformation.com/Trickle-down_effect.aspx (last visited Jan. 10, 2010).

**Haute Couture versus Fast Fashion**

Fast fashion garments are "affordable basics" and "disposable trends" modeled after the most recent fashion trends.[27] Fast fashion retailers purchase their merchandise closer to season and respond to trends throughout the season by staging their purchases as these trends emerge.[28] Most fast fashion retailers are vertically integrated, meaning they handle the product from design to sale at their stores. In general, a fast fashion system combines at least the following two components: (1) short production and distribution lead times, which allow the retailer to match supply with uncertain demand; and (2) highly fashionable product design.[29] The traditional retail model was season-based. A retailer made all its spring purchases during August or September, which gave no flexibility or reaction time for changing trends.

Fast fashion retailers are under high scrutiny from designers who have filed suit claiming they are stealing their designs. In the United States, the $2.3 billion fashion retailer, Forever 21, has been sued over fifty times in the last three-and-a-half years by designers such as Anna Sui, Trovata, Anthropoligie, BeBe and Diane von Fustenberg.[30] The only suit that wasn't settled outside court is the Trovata case. The case went to trial and was dismissed after the jury was unable to reach a decision.[31] For the first time, Forever 21 faced a jury charged with determining

[27] Apparel Search, Fast Fashion- Terms of Interest to the Fashion Industry, http://www.apparelsearch.com/Terms/F/Fast_Fashion.htm (last visited Feb. 14, 2010).

[28] *Id*.

[29] Gerard P. Cachon and Robert Swinney, *The Value of Fast Fashion: Rapid Production, Enhanced Design, and Strategic Consumer Behavior,* June 22, 2009, *available at* http://opim.wharton.upenn.edu/~cachon/pdf/FastFashion_Final.pdf.

[30] Rachel Brown and Anne Riley-Katz, *Mistrial in Trovata, Forever 21*, WWD, May 28, 2009.

[31] *Id*.

whether their high-fashion imitations infringed another designer's work under trade dress.[32] Most other lawsuits allege violations of copyright.

However, couture designers and fast fashion retailers have begun to collaborate together to create what has been termed "capsule collections."[33] These collections include some signature pieces and are only available for a limited time.[34] These collections allow the average consumer to purchase designer clothing.[35] One of the first collaborations was between Karl Lagerfeld, best known as the head designer and creative director at the House of Chanel, and H&M in 2004.[36]

Currently, both knockoffs and inspired-bys are legal in the United States, but this may change if Congress passes the Design Piracy Protection Act ("DPPA"). The DPPA is aimed at protecting original designs against copies that are "substantially similar," which is the standard for all creative works protected by copyright.[37] The DPPA would amend Chapter 13 of the Copyright Act. This section is not protected by traditional copyright law, but is considered sui generis, meaning of its own kind.

Sui generis legislation is used to protect works that do not fit within one particular area of law but need their own legislation crafted to their nature and characteristics. Sui generis legislation has been previously proposed where there is a lack of federal protection for the

[32] David Lipke, *Trovata, Forever 21Case Set for Trial*, WWD ISSUE, April 13, 2009.

[33] FIDM Museum Blog: Fast Fashion, http://blog.fidmmuseum.org/museum/2009/10/my-entry.html (last visited Nov. 20, 2009).

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*.

designs of useful articles.[38] A useful article is defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[39] Apparel products are considered useful articles due to their utilitarian function. The following section elaborates on current design protection and why it is insufficient to protect fashion designs.

**2. Design Protection under Existing Law**

All three federal intellectual property protection regimes, copyright, trademark, and patent law, protect certain aspects of useful articles. However, in the aggregate, they provide only limited coverage. Furthermore, fashion designs are not protected under any state law.[40]

**2.1. Copyright Law**

Copyright law is an attractive option for fashion design due to the duration of protection, the ease of the application process, and the nominal fee.[41] However, copyright protection for visual art is subject to an important limitation.[42] Copyright protection is not extended to useful articles, which are defined as "article[s] having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[43] Due to the utilitarian function inherent in all fashion items, they are deemed useful articles.

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[38] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, 109th Cong. 2 (2006) (statements by the United States Copyright Office), *available at* http://www.copyright.gov/docs/regstat072706.html.

[39] H.R. REP. NO. 94-1473, at 50 (2006).

[40] *Id*.

[41] Lisa Pearson, *IP Protection for Fashion Design: In Vogue*, COPYRIGHT WORLD, LAW AND BUSINESS FOR COPYRIGHT SPECIALISTS, April 2007, Issue 169.

[42] *Id*.

[43] 17 U.S.C. § 101(D)(3).

Protection for useful articles under copyright law is extended "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[44] The test is meant to draw a line between copyrightable works of applied art and uncopyrighted works of industrial design and can be met by showing either physical or conceptual separability.[45] The courts have followed congressional intent and applied the separability test, which excludes most industrial designs from copyright protection.[46] Some fashion designs are clearly protectable, such as some of the extreme and unwearable garments on the runways and at artwear galleries, but most designs are considered utility articles that are not protectable under current copyright law.[47]

**2.2. Trademark Law**

Trademark law only protects certain product configurations serving to identify the source of a product.[48] Trademark protection is desirable because it lasts indefinitely so long as the protected mark is used in commerce and used as an indicator of source.[49] The Lanham Act protects under federal law "any word, name, symbol, or device, or any combination thereof" used in commerce to identify indication of source.[50]

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[44] 17 U.S.C. § 101(D)(3).

[45] H.R. REP. NO. 96-1476, at 55 (1976).

[46] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, supra* note 38, at 2.

[47] Pearson, *supra* note 41.

[48] J. Thomas McCarthy, *Trademarks and Unfair Competition*, at 232 (1973).

[49] Pearson, *supra* note 41.

[50] 15 U.S.C. § 1125(a)(1).

Trade dress is a product's design or its overall appearance that serve to identify its source, which is also protected by the Lanham Act.[51] Only aspects of a design that serve as indication of source are protectable and that protection only extends where uses of the design lead to or create a substantially likelihood of consumer confusion.[52]

The Lanham Act offers a wide scope of protection to names, logos, and other insignia put on a designer's clothing or accessories. To protect other elements, a designer must prove that a mark or trade dress is "distinctive" and is the indicator of source to the consumer. For the actual fashion design itself, a designer must prove that the design is non-functional.[53]

Designers have successfully challenged traditional trademark law and succeeded in protecting nontraditional components of their designs. For example, Levi Strauss' tab and stitching designs on the rear pocket of their jeans are now protected by trademark.[54] Other companies have followed, such as North Face and Dooney & Burke. Both companies have sought to protect the unique placement of their logos. In 1995, the Supreme Court opened trade dress protection to include color, which requires secondary meaning. Many registrants have included color elements, like Burberry, which holds the trademark to its signature "red, brown, gray, black, and white plaid pattern."[55]

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[51] Pearson, *supra* note 41, at 22.

[52] McCarthy, *supra* 48, at 233-35.

[53] *See* Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 210 (2000).

[54] Pearson, *supra* note 41, at 23.

[55] *See* REG. NO. 2022789, registered on Dec. 17, 1996, http://tarr.uspto.gov/tarr?regser=registration&entry=2022789&action=Request+Status.

**2.3. Patent Law**

Designers can file either a utility or design patent. Patent law grants inventors the exclusive right to manufacture, use, and sell their inventions.[56] Utility patents are generally used to "protect processes, products, machines, and articles of manufacturing," and have three general requirements: usefulness, novelty, and non-obviousness.[57] Usefulness requires that the invention be functional.[58] The novelty requirement is satisfied when the invention is new and different from prior art.[59] Non-obviousness means that the invention was not an obvious improvement of the prior art to the inventor.[60]

Even if all requirements are satisfied, patents are expensive and entail a lengthy examination process, which can take several years and can exceed the life expectancy on the market for many designs.[61] Utility patents last for a term of 20 years. Fashion designers use utility patents to protect functional features of a design, such as a garment's material, fabric finishing methods and dyeing processes, and the underlying technology of their designs.

Design patents are subject to the same three requirements of patentability, but are only enforceable for a term of 14 years.[62] They are used to protect the appearance of dresses, fabric, handbags, watches, eyeglass frames, and footwear.[63] For instance, Burberry obtained a design

[56] Pearson, *supra* note 41.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61] Pearson, *supra* note 41, at 24.

[62] *Id.* at 23.

[63] *Id*.

patent on its signature trench coat, Dior for its saddle bag, and Gucci for their "GG" fabric design.[64]

Many countries provide protection for ~~its~~ fashion designs, including the European Union, the United Kingdom, Japan, South Korea, Australia, and India. The United States is the only major developed country, other than Canada, that does not offer protection to fashion designs.

**3. The Design Piracy Prohibition Act**

In 2006, Congressman Bob Goodlatte introduced the first draft of the DPPA. The DPPA legislation has been reintroduced into Congress for the last three consecutive terms and is now stalled. Since the bill's introduction, the industry has worked with members of Congress to make the bill more narrowly tailored.[65] The following is a brief overview on how the bill would impact current copyright law, legislative history on design protection, and relevant background information about current design protection.

The proposed legislation would amend Chapter 13 of the Copyright Act. Chapter 13, entitled "Protection of Original Designs," gives sui generis protection to useful articles in vessel hull designs. The DPPA would extend this protection to fashion designs.[66] The tentative view of the Copyright Office was that there is merit to extending protection, but there is insufficient information to reach a conclusion on the need for such legislation.[67]

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[64] Pearson, *supra* note 41, at 23.

[65] *See The Summary,* STOP FASHION PIRACY*, http://www.stopfashionpiracy.com/index.php/about_the_bill/, (last visited Oct. 28, 2010).*

[66] Pearson, *supra* note 41, at 24.

[67] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, supra* note 38, at 1.

Since 1914, Congress has regularly addressed design protection by passing bills in the 71st, 87th, 88th and 89th Congresses.[68] In 1965, during the Copyright Act's general revision, a separate title on design protection was considered.[69] The proposed new form of design protection was not passed because it would create a new form of protection that the Supreme Court held not copyrightable.[70] In *Mazer v. Stein*, the Supreme Court held that "works of art which are incorporated into the design of useful articles, but which are capable of standing by themselves as art works separate from the useful article, are copyrightable."[71] Therefore, the only elements in fashion merchandise that are capable of standing separate from their useful function are copyrightable.

The Department of Justice opposed the legislation because it "would create a monopoly that has not been justified by showing that its benefits would outweigh the disadvantages of removing such designs from free public use."[72] General design protection bills were introduced from the 96th to 102nd Congress, but no further action has been taken since.[73] This issue will be taken up again in greater detail in a subsequent section.

### 3.1. Sui Generis Protection for Vessel Hull Designs

Despite this general rule excluding design protection to useful articles, Congress extended copyright protection to the design of vessel hulls. In 1998, Congress passed the Digital

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[68] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, *supra* note 38.

[69] *Id*.

[70] *Id., see* H.R. NO. 94-1473.

[71] H.R. NO. 94-1473.

[72] *Id*.

[73] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, *supra* note 38.

Millennium Copyright Act ("DMCA"), which included the Vessel Hull Design Protection Act ("VHDPA").[74] The VHDPA gives sui generis protection to vessel hulls designs and is codified in Chapter 13 of the Copyright Act.[75] Chapter 13 is based on previous legislation, but narrows the protection from the designs of useful articles in general to just vessel hulls.[76]

By enacting the VHDPA, Congress aimed to address the problem of hull splashing.[77] Hull splashing occurs when a boat manufacturer invests significant resources into developing a boat hull design that is safe, structurally sound, and made for high-performance.[78] Then, a competitor steals a boat design by developing a mold of the finished boat hull. The consumer only benefits from the shape and does not receive other crucial features like safety and quality.[79] Consumers are defrauded because it is highly unlikely that they know that a boat has been copied from another design and this gives little incentive for boat designers to invest in developing new, innovative designs when the intellectual property rights are not protected.[80]

Prior to federal protection, boat designers were protected through state law.[81] In 1989, the Supreme Court declared that states were precluded from offering such protection under the doctrine of federal preemption due to Congress' decision to leave the subject matter in the public

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[74] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, *supra* note 38.

[75] *Id*.

[76] *Id.*

[77] *Id*.

[78] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, *supra* note 38.

[79] *Id*.

[80] *Id*.

[81] *Id*.

domain.[82] The DPPA would amend the VHDPA to extend protection it provides to unique and original articles of apparel.[83]

**3.2. DPPA, 2006**

The Design Piracy Prohibition Act ("DPPA") of 2006 only makes a few changes to Chapter 13. It amends both Section 1301(a) to provide that a fashion design is subject to protection under Chapter 13 and Section 1302(b) to include "an article of apparel" in the definition of "useful articles" subject to protection.[84] For purposes of Chapter 13, a fashion design is "the appearance as a whole of an article of apparel, including ornamentation."[85] Apparel is defined as: (1) an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear; (2) handbags, purses, and tote bags; (3) belts; and (4) eyeglass frames.[86]

The term of protection would only be 3 years rather than 10 years, which is given to vessel hull designs. The Copyright Office thought this term of protection appropriate because demand for a design is short-lived and a 3-year term is adequate for a designer's reasonable expectation of exclusivity.[87] Due to the shorter length of protection, the design must be registered within 3 months of it being made public.[88]

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[82] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, *supra* note 38.

[83] *Stop Fashion Piracy, supra* note 65, at 4.

[84] *Id*.

[85] *Id*.

[86] H.R. 5055, 109th Cong. Section 1301(b)(9) (2006).

[87] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, *supra* note 38, at 4.

[88] *Id.*

Section 1310(b) would be amended to clarify the meaning of "public" to include when a design is "offered for sale or sold to the public" and applies to "individual or public sale."[89] The purpose of these changes is to require prompt registration of protected designs, which gives notice to other designers and competitors.[90] The Copyright Office supports both these formality requirements because they are essential to any fashion design protection legislation.[91]

The DPPA also proposes amendments to Chapter 13 that would affect both fashion and vessel hull designs. Section 1309, which deals with infringement, would be amended to include that an alleged infringer must not have had "reasonable grounds to know that protection for the design is claimed."[92] Finally, Section 1309(e) would be clarified by including that an infringer need not copy directly from an article incorporating a protected design, but could have copied from an image of that protected design.[93] Doctrines of secondary liability, such as vicarious liability, contributory infringement, and inducement of infringement, would apply under The DPPA.[94]

The DPPA amends section 1313(a) to replace "subject to protection under this chapter" with "within the subject matter protected under this chapter." The Copyright Office requested this modification to clarify that it does not make judgments during examination as to whether a

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, *supra* note 38, at 5.

[93] *Id.*

[94] *Id.*

design is original or distinctive to qualify for protection.[95] This requirement is addressed by the courts where evidence and expert testimony is admitted.

Section 1323(a) allows the court to grant damages adequate to compensate for infringement and, in addition, the courts may increase damages as it determines is just. However, damages shall not exceed the greater of $50,000 or $1 per copy. The DPPA proposes to increase the cap for damages for infringement from "$50,000 or $1 per copy" to "$250,000 or $5 per copy."

The final amendment is to Section 1330, the savings clause, which states that nothing in Chapter 13 shall annul or limit "any rights that may exist under provisions of this title other than this chapter."[96] This means that a design may be given protection under both copyright law and Chapter 13.[97] The savings clause also applies to any common law or other rights and remedies available not under Chapter 13, and any rights under trademark law.[98]

**3.3. Amendments to the DPPA**

In spring 2009, Congressman Bill Delahunt proposed the latest version of the DPPA, which made substantive changes to the original bill. The goals in mind during the redrafting were to allow for inspiration and trends, while still keeping the language narrow enough to prevent someone from taking the actual design and making an identical copy.[99] A protected design will not be deemed copied unless it is "closely and substantially similar in overall visual

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[95] *Id.*

[96] *Id.* at 8.

[97] *Id.*

[98] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, *supra* note 38, at 8.

[99] *Stop Fashion Piracy, supra* note 65, at 4.

appearance to a protected design."[100] The following section looks at major changes to the bill and their purpose.

The bill includes an enhanced definition of fashion design, which extends protection to the original elements and the original arrangement or placement of both original and non-original elements incorporated into the overall appearance of an article of apparel.[101] A designer would not be able to protect a garment already in the public domain, like a plain button down shirt or a plain v-neck t-shirt.

The bill clarifies that copying a trend does not infringe the protection granted by the DPPA. A Trend is defined as a newly popular concept, idea, and/or principle expressed in, or as part of, a wide variety of designs for apparel that creates an immediate amplified demand for similar articles of apparel embodying that same concept, idea, and/or principle.[102] The amendments extended the number of months a designer has to register the design, once it has been made public, from 3 to 6 months.[103]

The bill changed the broadly stated infringement standard that banned "substantially similar" designs, lumping together both knockoffs and inspired-by designs, by narrowing the language to ban only "closely and substantially similar" designs.[104] The intent of this new language is to ban only knockoffs while still allowing companies to create inspired-by designs. The goal is to protect originality but still allow creativity. In order to accomplish this end,

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[100] *Id*. at 2.

[101] *Id.* at 2.

[102] *Id*.

[103] *Stop Fashion Piracy, supra* note 65, at 2.

[104] Hemphill and Suk, *supra* note 20, at 2.

inspired-bys must be allowed, which are not copying the design, but only using it as an inspirational tool.

Professor Suk of Harvard Law School argued that it is in human nature to flock towards a new trend.[105] This is very different from the traditional subject matter of copyright law, like music or movies, because creativity is not inextricably intertwined with flocking towards the latest trend.[106] Movies, for instance, may cluster, but dozens with the same plot and screenplay do not appear within the same season like fashion.[107] This is why fashion design cannot be protected under traditional copyright law or its substantially similar standard but must be treated differently through sui generis legislation.

Finally, the last major change to the DPPA is the creation of a computerized database for designs submitted for registration, which would be searchable by the public.[108] The database would include a substantially complete visual representation of all submitted designs listing whether they have been registered, denied registration, cancelled or expired.[109] The database serves as notice to designers about which designs are registered and when their registration will expire.

**4. The Potential Impact of the DPPA on the Industry**

The fashion industry is split on whether or not to support the DPPA. The two most prominent U.S. fashion associations are on opposite sides of the bill. The Council of Fashion Designers of America ("CFDA"), an invitation-only organization, strongly supports the DPPA

[105] *Id*.

[106] *Id*.

[107] *Id*.

[108] *Stop Fashion Piracy, supra* note 65, at 3.

[109] *Id*.

with many of its members vulnerable to copyists.[110] The CFDA argues that the worldwide fashion counterfeit market exceeds $200 billion and it is time the United States protects its designer's rights like Europe, the UK, Japan, Australia, and India. The American Apparel and Footwear Association ("AAFA") opposes the bill representing most of the retailers.

**4.1. Arguments Supporting the DPPA**

The CFDA argues that the fashion industry has been hit harder than most other sectors due to the economic downturn and it suffers from piracy of foreign imports.[111] The damage may be catastrophic because most American designers are independent business owners.[112] The DPPA would help these struggling designers by protecting their work, increasing the demand for creative new designers, and sustaining the need for high level training and education of fashion.[113] Since the internet's inception, everyone has immediate access to all fashion once it is released to the public.[114] Knockoff garments are marketed and sold to the public before the original designs become available for purchase.[115]

As previously stated, the United States is the only industrialized country that does not extend intellectual property protection to fashion designs, but we are the world's fashion leader.[116] Other countries, such as Europe, Japan, and India, offer protection for up to 25

[110] Proposed New Law Sparks Rift in U.S. Fashion Industry, http://www.zimbio.com/Maria+Cornejo/articles/u09U_BeyaBe/Proposed+new+law+sparks (last visited Jan. 25, 2010).

[111] *Stop Fashion Piracy*, *supra* note 65.

[112] *Id*.

[113] *Id*.

[114] *Id*.

[115] *Id.*

[116] *Stop Fashion Piracy, supra* note 65, at 4.

years.[117] The CFDA argues that the DPPA would place the United States on par with the rest of the fashion world.[118]

Those opposing the DPPA say that extended protection will cause a proliferation of lawsuits with catastrophic legal fees that independent designers cannot afford to pay. The DPPA supporters attack this assertion by pointing to low litigation statistics in Europe.[119] For example, out of 308 infringement appeal cases filed in the Court of Appeals of France in 2005, only 10 concerned registered fashion designs.[120] The DPPA supporters argue that litigation statistics are low because the highly protected legislation acts as a deterrent.[121]

Proponents of the DPPA assert the purpose of the legislation is to protect couture designs during the extended time period where such high-end products are sold at premium prices, which will prevent others from retailing those designs at substantially lower prices.[122] This practice of "knocking off" high-end fashion undercuts the market for hot new designs.[123] If fashion designs are given protection like what is already offered to entrepreneurs in other industries, such as film, music, fine art, and publishing, then there will be a higher financial incentive for designers to be more creative.[124]

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[117] *Stop Fashion Piracy, supra* note 65, at 4.

[118] *Id*.

[119] *Id.*

[120] *Id*.

[121] *Stop Fashion Piracy, supra* note 65, at 4.

[122] *Statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary*, *supra* note 38, at 4.

[123] *Id*.

[124] Ronald Urbach and Jennifer Soussa, *Is the Design Piracy Protection Act a Step Forward for Copyright Law or is it Destined to Fall Apart at the Seams?*, THE METROPOLITAN CORPORATE COUNSEL, July 2008, at 28.

Both Professor Suk and Hemphill, co-authors of *The Law, Culture, and Economics of Fashion*, support the amended the DPPA.[125] They argue that the DPPA will be used to stop copycats, but will not deprive bargain shoppers from purchasing fashionable clothing because companies like Zara and H&M will still be allowed to offer inspired-bys.[126] Companies who rely on stealing designs will be forced to employ their own creativity and talent by using high fashion designs as inspiration, rather than simply producing knockoffs.[127]

In a Counterfeit Chic posting, Scafidi, who supports and aided in drafting the DPPA, stated that the real reason why the AAFA will not support the DPPA is because some of the big companies they represent have become wealthy by copying "small-scale, creative designers, and they don't particularly want to stop."[128] She says the AAFA wishes to postpone this kind of legislation for as long as possible.[129]

Every time new legislation has been proposed in the past to protect useful articles, the powerful retailers and manufacturers have opposed it to the detriment of smaller designers.[130] Scafidi goes on to say that every counterfeit fashion item begins as a pirated design and the AAFA is voting with the past and not the future.[131]

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[125] C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion,* 61 STAN. L. REV. 1147 (2009).

[126] Hemphill and Suk, *supra* note 23, at 6.

[127] *Id*.

[128] Susan Scafidi, *Design Piracy Prohibition Act: Historical Regression*, http://www.counterfeitchic.com/2008/03/design_piracy_prohibtion_act_h.php, (last visited on Oct. 11, 2009).

[129] *Id*.

[130] *Id*.

[131] Susan Scafidi, *Design Piracy Prohibition Act: Historical Regression*, http://www.counterfeitchic.com/2008/03/design_piracy_prohibtion_act_h.php, (last visited on Oct. 11, 2009).

**4.2. Arguments against the DPPA**

Opponents of the DPPA argue that copying does not hinder creativity but promotes innovation.[132] Professors Kal Raustiala and Christopher Sprigman, coauthors of *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, argue that the fashion industry profits from setting the trends and their ability to do so is the result of designers' relative freedom to copy designs.[133] They contend that if the DPPA is adopted the industry will have a much harder time creating and adopting trends.[134]

The AAFA asserts that the DPPA would open the door to many frivolous lawsuits, which would place an enormous burden on companies.[135] The AAFA renounced their support of the DPPA because: "(i) it is inadequate to ensure that only original designs would receive copyright protection; (ii) there is a potential for significant disruption in trade and new liabilities with U.S. Customs in the form of civil detentions and criminal penalties; (iii) there are added costs associated with anticipated lawsuits and research of copyrighted designs; and (iv) it stifles the speed to market for legitimate companies."[136] This was an immediate setback for the DPPA and also ruled out any immediate Congressional considerations.[137]

American designer Isabel Toledo (hereinafter "Toledo") does not support the DPPA and fears that the legislation could widen the rift between the fashion and apparel industry, which

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[132] Urbach & Soussa, *supra* note 124, at 28.

[133] *Id*.

[134] *Id*.

[135] *Id*.

[136] Urbach & Soussa, *supra* note 124, at 28. (*See also* Kristi Ellis, *AAFA Rules Out Copyright Protection Deal*, WOMEN'S WEAR DAILY, March 11, 2008.)

[137] *Id*.

would leave consumers with fewer choices.[138] Toledo worries that the DPPA would create a monopoly for high fashion on trends making it more expensive; it would allow the top designers to own not only the top but also the bottom of the market.[139] It could also hurt the independent designers who the legislation is aimed at to protect due to the expense of copyright lawsuits.[140] The DPPA also requires designers to pay registration fees, which would be very expensive if a designer registered their collection or a selected number of pieces for both seasons each year.

The strongest argument against the DPPA is in the legislative history during the Copyright Act's revision of 1976. As mentioned previously, the Committee followed *Mazer v. Stein* and sought to draw a clear line between copyrightable works of applied art and uncopyrightable works of industrial design or useful articles.[141] Although the shape of an industrial product may be aesthetically pleasing and valuable, the Committee did not extend protection.

"Unless the shape of an automobile, airplane, *ladies' dress*, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separate from the utilitarian aspects of that article," the design is not copyrightable.[142] The test for separability from "the utilitarian aspects of the article" does not

[138] *Proposed New Law Sparks Rift in U.S. Fashion Industry, supra* note 110.

[139] *Id*.

[140] *Id*.

[141] H.R. REP. NO. 94-1476.

[142] *Id*.

depend on the nature of the design.[143] The test is satisfied when the useful article contains elements that can be identified separate from it; only those elements can receive protection.[144]

**5. Recommendations**

Based on the previous materials, it would be in society's best interest not to extend copyright protection to fashion designs. Congress specifically addressed this issue on numerous occasions and found that the benefits did not outweigh the disadvantages.[145] Congress followed Supreme Court precedent, which stated that works of art incorporated into useful articles must be able to stand alone to be copyrightable.[146] This means that fashion designs do not receive copyright protection unless you can separate elements of a design that are purely works of art and not functional.

Extending protection would create a monopoly for high-end designers, which would outweigh almost any advantage because it would allow those designers to both dictate the trends and control them for three years. It is, also, quite apparent when a person is wearing a £720.00 red, draped one-shoulder dress by Alexander McQueen versus someone wearing a $20 knockoff dress from Forever 21. The look and feel of the fabric and the way it drapes across the body are all noticeably different. Forever 21 customers sacrifice the higher quality of high-end fashion in exchange for a lower price.

Supporters argue that the small designer entrepreneurs suffer from big retailers copying their designs, but the legislation will not prevent a large retailer from continuing to copy. The

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[143] *Id*.

[144] *Id.*

[145] *Id.*

[146] *Id*.

small designer does not have the resources to sue a large retailer every time one of the retailer's designs looks substantially similar to one of the designer's own. The more profitable designers, Donna Karen, Tori Birch, etc., will be the only designers benefiting from this legislation.

Supporters argue that we are the only industrialized country who refuses to offer design protection and we do not value fashion as an art form. However, many of the countries that offer protection, historically, have social hierarchy systems where only the wealthy have access to luxury goods. Some of these countries, including Japan, South Korea, and India, still practice this tradition. One of the most prominent ways to identify one's social status is by their clothing and accessories. The United States has never endorsed such practice as a societal goal. We as a society want everyone to have access to fashionable goods.