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Brandon Scruggs



Should Fashion Design Be Copyrightable?

By Brandon Scruggs*

I. OVERVIEW

¶1 This paper discusses whether or not fashion design should be copyrightable. In Section II, this paper discusses the role of the fashion industry in the economy and compares the US and European legal approaches to copyright protection for fashion design. In Section III, this paper will discuss whether or not fashion design currently is or could be protected under the current copyright statute, highlighting existing doctrines on useful articles and separability. In Section IV, this paper will propose that US law should be modified to accommodate fashion design, highlighting the driving forces of economic considerations and international harmony as well as discussing the inadequacy of alternatives. In Section V, this paper will summarize conclusions.

II. INTRODUCTION

A. *Fashion Industry in the Economy*

¶2 The women's fashion industry is a \$100 billion industry.¹ Prominent fashion designers in the US are pushing for federal legislation that would offer copyright protection for fashion designs, covering things from dresses to shoes to belts and eyeglass frames. Presently, there is effectively no such protection. This leads to rampant copying in the fashion design industry. Many fashion designers invest time and money into designs only to see the rewards of their efforts quickly dissipate into the hands of knockoff designers.²

¶3 Many argue that knockoffs counter-intuitively benefit the industry as a whole, pushing the fashion cycle forward by creating trends that spur fashion houses to move forward to the next big idea more quickly in what some have termed the "piracy paradox."³ Others argue that knockoffs can actually boost a design house's profile or that knockoffs are just a way to make fashion design affordable to average customers who cannot afford high-fashion designs. However, fashion designers argue that copying is not the only way to bring fashion to the masses, suggesting that with creativity it is possible to design original clothing that is affordable.⁴ With so much money on the table,

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¹ Retail sales were \$101 billion in 2005. See Ben Winograd & Cheryl Lu-Lien, *Style & Substance: Can Fashion Be Copyrighted? --- Designers Want to Halt Knockoffs But Some Say They Spur Sales*; 'Few People Can Spend \$4,000', WALL ST. J., Sept. 11, 2006, at B1.

² *Id.*

³ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

⁴ Winograd & Lu-Lien, *supra* note 1.

the answers to these questions can have a significant impact on the economy and the everyday lives of many Americans.

B. Divergence of U.S. and International Law

¶4 The European Union now grants three years' protection to original fashion designs and allows creators to apply for 25-year extensions. However, in the US, no such legal protection seems to exist at present.⁵ A proposed US law is somewhat more modest than the European version and has been introduced in the House of Representatives.⁶ A companion bill has not yet been introduced in the Senate, but its chances of passing are somewhat doubtful.⁷ Is fashion design an art worthy of legal protection or just a craft that others should be free to copy?

III. FASHION IS NOT COPYRIGHTABLE UNDER CURRENT U.S. LAW (BUT COULD BE)

¶5 Under the conventional wisdom of current copyright law, fashion design is not copyrightable. In the statutory and case law doctrine of copyright, a useful article can only be copyrighted if the aspect of its original design can be separated from its utilitarian function. Most cases hold or seem to imply that clothing is a useful article whose function cannot be separated from its original elements and therefore cannot be protected by copyright. However, some of these cases are wrongly decided and others simply do not stand for such a strong proposition.

A. Statutory Language — Useful Article and Separability

¶6 Under the current US copyright statute, fashion design would likely fit most appropriately under the category of “pictorial, graphic, or sculptural work” which includes two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.⁸ Works of artistic craftsmanship are included “insofar as their form but not their mechanical or utilitarian aspects are concerned.”⁹ Copyright of pictorial, graphic, or sculptural works is subject to certain statutory limitations:

the design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work [and thus afforded copyright protection] 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.¹⁰

⁵ *Id.*

⁶ *Protection for Fashion Design: Statement of the U.S. Copyright Office to the Subcommittee on Courts, the Internet, Intellectual Property*, <http://www.copyright.gov/docs/regstat072706.html> (2006).

⁷ Wikipedia.com, Design Piracy Prohibition Act, http://en.wikipedia.org/wiki/Design_Piracy_Prohibition_Act (last visited Feb. 9, 2007).

⁸ 17 U.S.C.A § 101 (2005).

⁹ *Id.*

¹⁰ *Id.*

A “useful article” is further defined as an “article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”¹¹ Thus, the copyright statute itself limits the protection potentially afforded to fashion design by covering only those elements that are essentially separate and independent from the utilitarian aspects. The key question then becomes whether or not fashion design elements are separate and independent from the utilitarian aspect of clothing.

B. Current Case Law — Useful Article

¶7 The seminal “useful article” case is *Mazer v. Stein*.¹² In fact, the reason for the current “useful article” language in the copyright statute was that the Copyright Act of 1976 simply intended to restate and legislatively affirm the rule of *Mazer*.¹³ In *Mazer*, small statues of nude human figures were used for the base of lamps and registered for copyright. The Supreme Court held that works of art are still copyrightable when they are embodied in useful articles, but only the aesthetic form can be copyrighted, not their mechanical or utilitarian aspects.¹⁴ The Court dismissed the idea that such a work could be precluded from copyright due to the availability of a design patent.¹⁵ The Court also dismissed arguments that the lamp should not be copyrightable because of its mass-produced and commercial nature and the aesthetic value of its design (or lack thereof).¹⁶

¶8 Another illustrative case is *Masquerade Novelty*.¹⁷ In *Masquerade Novelty*, at issue were “nose masks” designed to resemble the noses of a pig, elephant, or parrot.¹⁸ The district court held that the masks were “useful articles” that could not be protected under copyright law.¹⁹ The Third Circuit reversed, reasoning that “the only utilitarian function of the nose masks is in their portrayal of animal noses.”²⁰ The Third Circuit also reasoned that “nose masks have no utility that does not derive from their appearance.”²¹

¶9 In *Whimsicality I*, copyright protection for Halloween costumes was at issue.²² The plaintiff characterized their Halloween costumes as “soft sculptures.”²³ However, the Second Circuit rejected this characterization and found the costumes to be uncopyrightable clothing.²⁴ In *Whimsicality II*, the district court ruled that the costumes’ utility of enabling its wearer to portray an animal made them “useful articles.”²⁵

¶10 In *Chosun International*, the work at issue was a tiger costume.²⁶ The district court held that the body of the tiger costume was not separable from its useful function as

¹¹ *Id.*

¹² *Mazer v. Stein*, 347 U.S. 201 (1954).

¹³ H.R. REP. NO. 94-1476, at 105 (1976).

¹⁴ *Mazer*, 347 U.S. at 201.

¹⁵ *Id.* at 205.

¹⁶ *Id.* at 218.

¹⁷ *Masquerade Novelty Inc. v. Unique Indus.*, 912 F.2d 663 (3d Cir. 1990).

¹⁸ *Id.*

¹⁹ *Id.* at 664.

²⁰ *Id.*

²¹ *Id.* at 670-71.

²² *Whimsicality, Inc. v. Rubie’s Costume Co.*, 891 F.2d 452 (2d Cir. 1989).

²³ *Id.* at 455.

²⁴ *Id.*

²⁵ *Whimsicality, Inc. v. Maison Joseph Battat*, 27 F. Supp 2d 456, 463 (S.D.N.Y. 1998).

²⁶ *Celebration Int’l, Inc. v. Chosun Int’l, Inc.*, 234 F. Supp 2d 905 (S.D. Ind. 2002).

clothing, but that the head was separable and thus copyrightable.²⁷ However, the court also concluded that the realistic head was an independent creation that was based on a real tiger head rather than the plaintiff's tiger head and therefore did not infringe.²⁸ In a related suit, the Second Circuit held that the hands of the same costume had artistic elements which were separable from its useful function and thus may be copyrightable.²⁹

C. Current Law — Separability Requires Physical or Conceptual Separability

¶11 From the statute and the case law, we are thus left with the proposition that in order to be copyrightable, the original design elements must be separable from the useful nature of the article. Two types of separability have evolved: physical separability and conceptual separability. While physical separability is a relatively straightforward concept, the conceptual separability has been both elusive and confusingly applied.

1. Physical Separability

¶12 The most simple and straightforward test for separability is physical separability — whether the artistic elements can be physically separated from the useful elements. This is illustrated best by the example in *Mazer v. Stein*.³⁰ In that case, the artistic element was a statuette of a human figure and the useful element was the lamp itself.³¹ Since the artistic statuette could simply be detached from the light bulb and shade above it, the statuette was clearly physically separable.³²

2. Conceptual Separability

¶13 The test for conceptual separability has been far more confusing than the test for physical separability. In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, a jewelry designer created a line of decorative belt buckles inspired by works of art and obtained copyright registrations on the designs.³³ When the line was successful, a competitor copied the designs and marketed its own versions.³⁴ The copying competitor argued that the belt buckles were not copyrightable because they were “useful articles” with no pictorial, graphic, or sculptural features that could be identified separately from and were capable of existing independently of the utilitarian aspects of the buckles.³⁵ The Second Circuit dismissed this argument.³⁶ While the Second Circuit did not establish a specific test for conceptual separability, the court focused on the primary and subsidiary elements of the article and concluded the belt buckles had “conceptually separable” elements since the wearers had used them as ornamentation for parts of the body other than the waist

²⁷ *Id.* at 916-17.

²⁸ *Id.*

²⁹ *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005).

³⁰ *Mazer*, 347 U.S. at 201.

³¹ *Id.*

³² *Id.* at 217.

³³ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 990 (2d Cir. 1980).

³⁴ *Id.* at 991.

³⁵ *Id.* at 993.

³⁶ *Id.*

(i.e., they had also been used for necklaces).³⁷ Thus, their primary function was ornamental and their secondary function was utilitarian.³⁸

¶14 One of the more detailed discussions of “conceptual separability” can be found in Judge Newman’s dissenting opinion in *Carol Barnhart*.³⁹ In *Carol Barnhart*, a provider of retail display items developed mannequin torsos for the display of shirts and jackets. The Second Circuit held that the designs were not copyrightable since “the aesthetic and artistic features of the [mannequin torsos] are inseparable from the forms’ use as utilitarian articles.”⁴⁰ The Second Circuit distinguished *Kieselstein-Cord* as a case where “the ornamented surfaces of the buckles were not in any respect required by their functions” as opposed to the mannequin torsos where all of their aspects were essentially required by their function.⁴¹

¶15 Judge Newman’s dissent in that case proposes a test for conceptual separability: in order to be conceptually separate, the “article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function . . . the requisite ‘separateness’ exists whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously.”⁴²

¶16 Another illustrative case is *Brandir International*, a case in which a more process-oriented test is used.⁴³ In *Brandir International*, an artist created a sculpture of thick wire that a friend suggested with some modification could serve as a bike rack.⁴⁴ The “Ribbon Rack” design that resulted can be seen in bicycle-friendly cities and college campuses across the world. The Copyright Office rejected the attempted copyright registration and the Second Circuit agreed.⁴⁵ The Second Circuit’s reasoning essentially accepted the test for conceptual separability proposed by Professor Denicola.⁴⁶ Denicola argued that copyrightability should “turn on the relationship between the proffered work and the process of industrial design.”⁴⁷ The Second Circuit agreed and determined that the Ribbon Rack was “in its final form essentially a product of industrial design.”⁴⁸

¶17 Another more recent illustrative case is *Morris*, in which the design of an apron and dress was held to be not copyrightable since there were no copyrightable elements.⁴⁹ The Fifth Circuit in *Galiano* provided a survey and summary of other cases.⁵⁰ In *Galiano*, the Fifth Circuit held that the design of casino uniforms was not copyrightable under a “likelihood-of-marketability” standard since there was no showing that uniforms were marketable independently of their use as uniforms.⁵¹

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 419-26 (2d Cir. 1985).

⁴⁰ *Id.* at 418.

⁴¹ *Id.* at 419.

⁴² *Carol Barnhart*, 773 F.2d at 421 (Newman, J., dissenting).

⁴³ *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983).

⁴⁷ *Id.* at 741.

⁴⁸ *Brandir Int’l*, 834 F.2d at 1147.

⁴⁹ *Morris v. Buffalo Chips Bootery, Inc.*, 160 F. Supp 2d 718 (S.D.N.Y. 2001).

⁵⁰ *Galiano v. Harrah’s Operating Co., Inc.*, 416 F.3d 411 (5th Cir. 2005).

⁵¹ *Id.*

¶18 One of the most recent decisions incorporating some of the previously mentioned cases is *Pivot Point*.⁵² In *Pivot Point*, the issue of copyrightability was a mannequin head used for training hair stylists which was designed with the “hungry look” of runway models. After discussing *Kieselstein-Cord*, *Carol Barnhart*, and *Brandir International*, the Seventh Circuit concluded that the proper test was:

If the elements do reflect the independent, artistic judgment of the designer, conceptual separability exists. Conversely, when the design of a useful article is “as much the result of utilitarian pressures as aesthetic choices” [Brandir citation omitted], the useful and aesthetic elements are not conceptually separable.⁵³

¶19 The Seventh Circuit then concluded that the mannequin head in question was subject to copyright protection since it was the product of an artist’s judgment (i.e., the artist was given *carte blanche* to implement the vision of the “hungry look” as he saw fit) rather than a product constrained by functional considerations.⁵⁴ The Seventh Circuit, in essentially applying the process-oriented test of *Brandir*, reasoned that *Brandir* was not inconsistent with *Carol Barnhart* since, once Judge Newman’s dissenting gloss is taken into account, they were both driving toward a principle of conceptual separability based on the influence of industrial design.⁵⁵

D. Current Law Applied to Fashion Design

1. Conventional Wisdom

¶20 The conventional wisdom, based largely on the preceding cases, holds that: clothing is a useful article; its useful nature cannot be separated from its artistic nature; and therefore clothing design cannot be copyrightable.

¶21 Using the straightforward physical separability test, it is clear that most aspects of fashion design would not be physically separable from the useful aspect of clothing and thus could not claim copyrightability based on this test. Allowable exceptions would be a painting or a picture depicted on an article of clothing — the image could clearly be physically separated from the useful aspects and thus could be copyrighted. Manufacturers of T-Shirts, rejoice! If the other requirements of copyrightability (originality, fixation in tangible medium, non-exclusion under 17 U.S.C. § 102, etc.) are met, at least the image on your T-Shirt can be copyrighted, if not the T-Shirt itself. (Of course, pithy slogans cannot be copyrighted due to an explicit bar from 17 U.S.C. § 102, so perhaps rejoicing would be premature.) Hypothetically, if fashion designers began designing pants and dresses with sculptures dangling from the sides, these sculptures could potentially be copyrighted as well. As is apparent from these examples, the physical separability test does not hold much potential for the copyrightability of fashion design.

⁵² *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913 (7th Cir. 2004).

⁵³ *Id.* at 931.

⁵⁴ *Id.*

⁵⁵ *Id.*

¶22 Most have concluded that fashion design does not fare well under the more opaque conceptual separability test either. The *Whimsicality* cases implicitly assume that clothing is per se uncopyrightable. The *Celebration International* and *Chosun International* cases seem to take the same condescending view towards clothing design. The true results of the process-oriented approach in *Carol Barnhart*, *Brandir International*, and *Pivot Point* lead to a somewhat murky result. These cases seem to suggest that if fashion design was dictated by utilitarian pressures rather than aesthetic choices, then it would not be copyrightable.

¶23 While it is not entirely clear what overall impact this process-oriented approach should have, musings about hypotheticals lead to amusing results. Under this standard, a “cutting edge” dress design consisting of wrapping a model (perhaps with a “hungry look”) in cellophane and Popsicle sticks may be copyrightable. It certainly would have the doctrinal advantage that the design was not dictated by utilitarian pressures (is there anyone that would consider such a dress design useful?). However, it would also have the significant disadvantage that while perhaps it could be copyrighted, the copyright would be virtually worthless since there is little or no economic market for a dress made of cellophane and Popsicle sticks. Conversely, the new line by Tommy Hilfiger or Gucci which someone would actually wear may evidence utilitarian pressures in the design, such as the utilitarian pressure to prevent indecent exposure liability, provide pockets for carrying useful items such as money or gum, or provide warmth. Thus, clothing design that fit into a viable and attractive economic market would be less likely to fare well under the process-based approach.

2. Possible Alternative Interpretation

¶24 However, there are alternative interpretations to the preceding cases. For example, while clothing is a useful article, the artistic elements actually *can* be separated from the useful elements, making the artistic elements copyrightable.

¶25 *a) The pleat in pants.* — Imagine for a moment we live in a world without pleated pants (since pleats have been around quite long enough to have passed into the public domain even if they were copyrightable). Then suddenly one morning a young genius fashion designer awakes from a dream and is inspired to create pleated pants. (Later this genius realizes that the pleat can also be used in dresses, skirts, and other items, but we will stick with pleated pants for the present hypothetical.) The pleated pant phenomenon takes the world by storm. Soon knockoff pleated pants are everywhere and the young genius sues for copyright infringement. The courts laugh in the genius’s face, saying the pleat cannot be copyrighted because the artistic element of the pleat cannot be separated from the utilitarian element of the pants.

¶26 However, if the artistic element is the pleat and the useful element is simply the pants, perhaps these two elements *are* separable. In one sense, they may be physically separable. A pleat can certainly exist without pants (take, for example, a skirt or even a simple swatch of fabric). Pants can likewise exist without pleats. Much as the statuette could have been physically detached from the lamp in *Mazer v. Stein*, the pleats could be physically removed from pants.

¶27 In another sense, they may be conceptually separable as well. Many consider a belt to be a clothing item and yet an artistic belt buckle was held to be copyrightable in

Kieselstein-Cord largely because some of the wearers of the buckles had used them as ornamentation for parts of the body other than the waist. (Would this mean if I began wearing pleated pants as a sash or on my head as a hat that they would become copyrightable?) Much as the belt buckle was deemed to be primarily ornamental and secondarily useful, perhaps pleats would be considered primarily ornamental and secondarily useful. (This naturally raises the question of whether or not pleats are actually useful at all which would likely be decided in the negative. On the other hand, perhaps an argument could be made that the illusion of puffiness generated by pleats is somehow useful.) Using the more process-driven reasoning of *Brandir* and *Pivot Point*, one could conclude that if the genius designer were given free artistic range to create the pleat rather than being pressured by industrial design processes or utilitarian pressures, perhaps the pleat is a copyrightable element.

¶28 These interpretations may sound ridiculous or comical. This may be because they actually are ridiculous or it may be that this simply exposes how judicial interpretation has failed to produce a compelling test for conceptual separability. Unfortunately, by reading some copyright opinions, the cynical observer gets the sense that the true question the judges ask is whether or not they want someone to obtain a limited monopoly for the item in question and then, once the result is determined in this matter, they proceed to an obtuse legal rationalization in order to achieve the result that they desire.

¶29 *b) The example of fabric patterns.* — Fabric patterns can be copyrighted.⁵⁶ This is true not just of a fabric that has the equivalent of a painting or photo, but also distinctive patterns like Burberry plaid.⁵⁷ If fabric patterns can be copyrighted, why not copyright the garments which fabric is used to make?

¶30 *c) The analogy of architecture.* — Architectural design can be copyrighted.⁵⁸ The Copyright Act of 1976 gave architecture some protection as a “pictorial, graphic, or sculptural work” by including “technical drawings, diagrams, and models” in the statutory definition.⁵⁹ However, this protection — extended prior to 1990 — was somewhat limited as the plans could not be copied but the building itself could be copied.⁶⁰ In 1990, under international pressure to comply with the Berne Convention, Congress amended the Copyright Act by specifically adding “architectural works” as protectable subject matter under 17 U.S.C. § 102(a), defined that term in § 101, and set forth certain limitations in § 120 (e.g., pictorial representations are permitted if the

⁵⁶ See, e.g., *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960) (Hand, J.) (accepting the extension of *Mazer v. Stein* to textile prints).

⁵⁷ *Winograd & Lu-Lien*, *supra* note 1.

⁵⁸ See, e.g., *Hunt v. Pasternak*, 179 F.3d 683 (9th Cir. 1999) (architectural work is protectable against infringement even though it exists only in the form of two-dimensional plans and has not yet been constructed); *Yankee Candle Co. v. New England Candle Co.*, 14 F. Supp 2d 154 (D. Mass. 1998) (enclosed shopping mall may be a building whose design can be protected under the Copyright Act, but the individual units are not); *Richmond Homes Mgmt., Inc. v. Raintree, Inc.*, 862 F. Supp. 1517 (W.D. Va. 1994) (copyright protection extended to the dimensions and location of the family room, the placement of doors and windows, and the sizes and locations of rooms and closets), *aff'd in part and rev'd in part*, 66 F.3d 316 (4th Cir. 1995).

⁵⁹ 17 U.S.C. § 101 (1976).

⁶⁰ See, e.g., *Demetriades v. Kaufmann*, 680 F. Supp. 658 (S.D.N.Y. 1988) (holding that traced copies of architectural plans infringed but that construction of the offending residence did not).

building is ordinarily visible from a public place, the owners of a building are permitted to alter or destroy the building without consent for the architect, etc.). Copyright protection does not extend to individual standard features like common windows, doors, or other staple building components.⁶¹

¶31 Buildings are, of course, one of the most useful things we as a society have developed. Part of the importance of creating a separate category for architectural works (and thus differentiating them from pictorial, graphic, and sculptural works) is that the separability requirement for useful aspects that applies to pictorial, graphic, and sculptural works would no longer apply to any architectural works created on or after December 1, 1990.⁶²

¶32 Fundamentally, Congress in the 1990 amendments recognized that “architecture plays a central role in our daily lives, not only as a form of shelter or as an investment, but also as a work of art.”⁶³ Thus, the Congressional Committee concluded that

[t]he design of a work of architecture is a “writing” under [Article I, Section 8 of] the Constitution and fully deserves protection under the Copyright Act. Protection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the Constitutional goal [to promote the progress of science and the arts.]⁶⁴

¶33 It is not difficult to see that an analogy between fashion design and architecture is possible. As there was in architecture, there is increasing global pressure for the US to cover fashion design under some type of copyright law in order to conform to global standards. Also as in architecture, fashion design could be included under “pictorial, graphic, or sculptural works,” but this categorization is a bit like a shoe that does not quite fit, running into issues with the somewhat ill-defined doctrinal law of separability. As in architecture, some statutory adjustments to copyright law for fashion design are likely warranted (e.g., 95 years or so is probably an excessive copyright duration for fashion design). Another similarity is that the law has been a bit slow to recognize the artistic nature of architecture, much as the artistic nature of fashion design is often scoffed at. However, many today feel that “fabric is a means of expression, just like pen or ink.”⁶⁵

IV. COPYRIGHT LAW SHOULD BE MODIFIED TO INCLUDE FASHION

¶34 The architecture analysis has led to an obvious idea. Perhaps the slight interpretational wiggle room discussed in Section II of this paper is not quite broad enough for fashion design to slip through. However, as was the case with architecture, Congress likely has the authority to tailor copyright law more appropriately for fashion design via statute. Although perhaps the current state of the law does not include fashion

⁶¹ H.R. REP. NO. 101-735, at 18-21, 24 (1990).

⁶² *Id.*

⁶³ *Id.* at 12-13.

⁶⁴ *Id.*

⁶⁵ Winograd & Lu-Lien, *supra* note 1.

design under copyright, perhaps Congress can and should modify copyright law to include fashion design.

A. *Underlying Copyright Policy*

1. Policy Is to Promote Art and Science

¶35 Congress’s authority to create and modify copyright law falls under a grant of authority by the US Constitution. The Constitution grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶⁶ Thus, in order for Congress to have authority to include fashion design in copyright law, it must further the policy of promoting the useful arts and it must be considered to some extent writing.⁶⁷ Of course, if architectural design can legitimately be considered a useful art and writing, then perhaps it is not such a stretch to consider fashion design in the same light. After all, our idea of art has certainly expanded over the course of human history.⁶⁸ Thus, at the core of the debate over whether copyright law should include fashion design is the question of whether fashion design is an art and whether a temporary monopoly over the design would stimulate fashion design if it is indeed art.

2. It’s the Economy, Stupid

¶36 Many skeptics simply take a condescending view towards fashion design and do not consider it art. However, much as it “would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits,”⁶⁹ perhaps a similar attitude should be taken toward the definition of art itself.

¶37 To a certain extent, the condescending view of fashion design as non-copyrightable is an implicit statement that fashion design is (or should be) of little value or importance to society. Thus, there is no need for a system that will spur innovation or promote this field of creation. However, a more pragmatic economic-based approach may take a different view. As previously mentioned, the fashion design industry is a \$100 billion industry.⁷⁰ From this statistic and drawing upon experience from everyday life, it is apparent that fashion design is in fact something that many consumers put a very high

⁶⁶ U.S. CONST. art. I, § 8, cl. 8.

⁶⁷ Most interpretations of the U.S. Constitution have read the authority for patent law as stemming from the “progress of science,” securing for “inventors” rights to their “discoveries” and read the authority for copyright law as stemming from the progress of the “useful arts,” securing for “authors” the rights of their respective “writings.” Although, as may be the case with scientific textbooks and articles, perhaps some overlap is acceptable.

⁶⁸ Consider for a moment the famous piece of Dada art entitled “Fountain” by Marcel Duchamp which is comprised of a urinal on its side. A field trip to the nearest Museum of Modern or Contemporary Art should be an enlightening experience in this regard.

⁶⁹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) (holding that a lithograph advertisement for a circus could be copyrighted despite its commercial nature and despite the dissenters’ [Harlan and McKenna, JJ] view that a work must have some connection with the fine arts to give it intrinsic value).

⁷⁰ Winograd & Lu-Lien, *supra* note 1.

value on, choosing to spend more of their scarce resources on this than other alternatives. If the public places this high of a value on fashion design, perhaps innovation in this field is not such a bad thing. Indeed, from a purely financial perspective, copyright in this area could potentially be a lucrative affair for the United States and Europe, which many countries choose to emulate in the realm of fashion design. According to the U.S. Chamber of Commerce, the production, distribution, and sale of unauthorized goods costs U.S. companies \$200 to \$250 billion each year as well as 750,000 jobs to date (although extending copyright to fashion design would likely not make those numbers zero since the number likely also includes unenforced trademark infringement).⁷¹ Although it is not rational to say that anything profitable is art, certainly this is an aspect of policy consideration that should not be glossed over or ignored.

3. International Harmony (What's so Funny 'Bout Peace, Love and Understanding?)

¶38 The current legal framework for fashion design in the U.S. is obviously in tension with the European system. Lessons from the past suggest that the U.S. may eventually conform under pressure in order to provide greater international harmony. The 1990 Amendments to the Copyright Act granting specific and improved protection for architectural works were driven in large part by pressure to conform to the Berne Convention.⁷² Additionally, the previous imposition of formalities (strict conformities of notice, deposit, and registration; noncompliance resulted in the draconian loss of copyright rights altogether) distinguished the United States from most of the other major publishing nations of the world. Congressional amendments in the Copyright Act of 1976 and the Berne Convention Implementation Act of 1988 finally brought American copyright standards more in line with those of the rest of the world, making compliance with the formalities advantageous but not mandatory.⁷³ In today's growing global economy, it is increasingly less likely that the United States will indefinitely continue a legal trend in conflict with the rest of the world over a lucrative arena.

¶39 Since the proposed changes to U.S. law are already in place to a large extent in Europe, an examination on the effects of the European fashion industry would appear to be beneficial to this analysis. Critics of fashion design copyright acknowledge that the law has in fact had little effect in Europe, where many firms still appear to freely engage in design copying. However, Professor Sprigman argues that the same may not hold true in the United States, where a stronger civil litigation system lends us more likely to settle disputes through litigation.⁷⁴ Thus, while the sky clearly has not fallen in Europe, the potential impact of similar legislation here in the United States is far from clear.

B. Alternatives to Copyright for Fashion Design

¶40 A survey of alternative legal protection is appropriate. To some extent, in order to argue that fashion design should be copyrightable, it is necessary to argue that existing

⁷¹ Jacqueline Palank, *Congress Considers Fashion's Copyrights*, WASH. TIMES, July 28, 2006.

⁷² H.R. REP. NO. 101-735, at 18-21, 24 (1990).

⁷³ ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT CASES & MATERIALS 464-66 (7th ed., Found. Press 2006).

⁷⁴ Mary Wood, *Sprigman Urges Congress to Keep Fashion Copyright-Free* (July 31, 2006), http://www.law.virginia.edu/html/news/2006_spr/sprigman.htm.

legal protections like trademarks or design patents are inadequate. Additionally, another alternative to copyright protection for fashion design is to simply do nothing, arguing that fashion design is an area where innovation will result without copyright protection. All three of these alternatives to copyright protection will be explored further.

1. Trademark

¶41 Trademark law is an obvious alternative to copyright protection for fashion design. Unlike patent or copyright, the authority for trademark law is based not in the patent and copyright clause of the Constitution but in Congress’s constitutional authority to regulate interstate commerce. Another dissimilarity between copyright and trademark law is that trademark law also has a different theoretical basis — trademark law protects the goodwill associated with a mark and its usefulness as a source-identifier.⁷⁵ Trademark law as applied to fashion design would have some fairly logical advantages and disadvantages.

¶42 *a) Advantages of trademark law.* — An advantage of trademark law is that it is a relatively well-established area of the law. Also, in part because it has its constitutional foundation in the commerce clause rather than the patent and copyright clause, it is potentially unlimited in duration.⁷⁶ In fact, many fashion designers already use trademark law to protect their goods. Trademarks for Gucci and Louis Vuitton are common on purses and some clothing; trademarks for Tommy Hilfiger and Ralph Lauren are common on many menswear items such as golf shirts.

¶43 *b) Disadvantages of trademark law.* — The most critical problem with using trademark law to protect fashion design is that trademark law protects use of the trademark as a source-identifier; trademark does not protect the design of the garment itself.⁷⁷ Thus, the world is free to knock off every aspect of the design of a dress as long as it does not copy the actual trademark of another firm. This is further complicated by the fact that for many fashion items, consumers do not like to have a trademark symbol on the item itself — consider for example the fact that while men are willing to buy golf shirts with a logo, it would appear that most women are not willing to buy formal dresses with any type of logo on them. Thus, protecting fashion design through trademark law would appear to be a poor solution.

2. Design Patents

¶44 Under the design patent portion of the patent statutes, a design patent is available for a “new, original and ornamental design for an article of manufacture.”⁷⁸ In order to be protected by a design patent, however, an article must comply with the patent statute requirements of being novel, ornamental, non-obvious, and meet the test of invention.⁷⁹

⁷⁵ BEVERLY W. PATTISHALL ET AL., TRADEMARKS AND UNFAIR COMPETITION 4 (2005).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 35 U.S.C.A §§ 171-173.

⁷⁹ *See* W. Elec. Mfg. Co. v. Odell, 18 F. 321, 322 (N.D. Ill. 1883) (design patents require a high degree of inventive or originaive faculty). *See also* Gold Seal Imps. v. Morris White Fashions, Inc., 124 F.2d 141, 142 (2d Cir. 1941) (denying patent for handbag design, Court stated: “it is not enough for patentability to

Garment designs have been held not to meet these requirements.⁸⁰ Additionally, even if they met these requirements, the patent process is often a lengthy and expensive proposition. In the world of fashion, this may be too cumbersome a process to be effective.⁸¹ Thus, design patents would appear to be a poor fit for fashion design.

3. Do Nothing (Status Quo)

¶45 Kal Raustiala and Christopher Sprigman argue that fashion design is an industry that has grown up and thrived without the need for copyright protection. In what they call the “piracy paradox,” they argue that copying in the fashion industry makes trends saturate the market quickly and force fashion designers to search for newer looks. They argue that if copying were illegal, the fashion cycle would occur very slowly, if at all.⁸²

¶46 To some extent, the same argument was made with regard to books. Copyright skeptics have noted that intellectual property was produced in considerable quality and quantity long before there were any copyright laws. However, the better question is not whether or not these works could be produced in the absence of copyright law, but whether the creators would have efficient incentives.

¶47 Landes and Posner comment on several factors that would limit copying even in the absence of copyright law: inferior quality and hence imperfect substitute, copying has a positive cost of expression, time to copy, contractual alternatives, technological fixes, copyability enhancing the value of the original, benefits beyond royalties, reduction of production costs, and falling cost of expression.⁸³ The foregoing factors essentially constitute a case against an incentive-motivated need for copyright protection. Going through each of these factors with regard to fashion design is a useful exercise.

¶48 *a) The copy may be of inferior quality and hence not a perfect substitute for the original.* — Conventional wisdom may suggest that this factor militates against copyright for fashion design. Knock-off fashion designs are typically of lesser quality than original fashion designs. Many defend fashion copiers by arguing that they make affordable knockoffs or red-carpet and runway looks to serve average customers who cannot afford high-fashion designs.⁸⁴ However, why should a copier reap these benefits of providing the design to the masses? Many fashion houses have alternate lines that provide less-expensive versions of their original designs (while using a different name so that the designer is not associated with the lower quality version). Why not let the alternate lines or legitimate licensees serve this function rather than copiers who are abusing a free ride?

show that a design is novel, ornamental and pleasing in appearance . . . it must be the product of invention; that is, the conception of the design must require some exceptional talent beyond the range of the ordinary designer familiar with the prior art.”)

⁸⁰ See e.g., *Belding Heminway Co. v. Future Fashions, Inc.*, 143 F.2d 216 (2d Cir. 1944) (per curiam); *White v. Leanore Frocks, Inc.*, 120 F.2d 113 (2d Cir. 1941) (per curiam); *Neufeld-Furst & Co. v. Jay-Day Frocks Inc.*, 112 F.2d 715 (2d Cir. 1940); *Nat Lewis Purses, Inc. v. Carole Bags*, 83 F.2d 475 (2d Cir. 1936) (per curiam).

⁸¹ Jennifer Mencken, *A Design for the Copyright of Fashion*, 1997 B.C. Intell. Prop. & Tech. F. 121201, ¶ 7 (1997), available at http://www.bc.edu/bc_org/avp/law/st_org/iptf/articles/index.html.

⁸² Raustiala & Sprigman, *supra* note 3.

⁸³ WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003).

⁸⁴ Winograd & Lu-Lien, *supra* note 1.

Perhaps this factor does not weigh as heavily in favor of holding back copyright protection from fashion design as a first glance would suggest.

¶49 *b) Copying may involve some original expression and so may have a positive cost of expression.* — Posner and Landes mention that copying may involve some original expression — as when the copy is not a literal copy but involves paraphrasing, deletions, marginal notes, and so on — and so may have a positive cost of expression. Thus, the copier may incur his or her own fixed costs.⁸⁵ In fashion design, this is at best a minor deterrent for copiers. Modern technology has greatly increased the speed and accuracy of copying technology and lowered its costs. In this case, the copier’s cost will still be significantly lower since it will not include the designer’s time or research, nor will focus groups help determine if it will be successful. The copier also avoids the deadweight cost of designs that turn out to be unpopular. Thus, the copier is still able to take a free ride in fashion design.

¶50 *c) Copying takes time, so there will be an interval during which the original publisher will not face competition.* — Posner and Landes suggest that for works that are faddish or ephemeral, copyright protection may not be needed to assure the creator of the work a fully compensatory return.⁸⁶ However, in fashion design, as with many areas of copyright, the “lead time” advantage has diminished greatly due to technology. “Digital photographs from a runway show in New York or a red carpet in Los Angeles can be uploaded to the internet within minutes, the images viewed at a factory in China, and copies offered for sale online within days.”⁸⁷ At this year’s Golden Globes, the coral dress worn by “Desperate Housewives” actress Marcia Cross (designed by young New York fashion designer Marc Bouwer) showed up days later at department stores across the nation.⁸⁸ Thus, this factor would clearly weigh in favor of copyright protection for fashion design. In fact, this factor may actually explain why the fashion industry has been able to thrive for so long without copyright protection — before more recent technological improvements, the “lead time” advantage could provide designers with sufficient profit for a return on their investment without the need for copyright protection. It is clear, however, that those days have passed.

¶51 *d) There are contractual alternatives to copyright protection for limiting copying.* — Landes and Posner mention that contractual alternatives — such as licensing the original work on condition that the licensee not make copies of it or disclose it to others in a way that would allow them to make copies — could potentially prevent copying even in the absence of copyright law. They acknowledge that it may be costly to enforce and feasible if there are only a few licensees; where broad distribution is necessary, contractual prohibitions may not prevent widespread copying since the author will likely not be able to establish a contract with each of the potential buyers due to the excessive transaction costs.⁸⁹ In the case of fashion design, this alternative would be too costly to

⁸⁵ LANDES & POSNER, *supra* note 83.

⁸⁶ *Id.*

⁸⁷ Palank, *supra* note 71 (quoting Susan Scafidi, associate professor of law at Southern Methodist University).

⁸⁸ *Id.*

⁸⁹ LANDES & POSNER, *supra* note 83.

enforce and not feasible due to the number of licensees and the nature of the goods (what good is a great red carpet dress if you can't wear it in public where someone can take a picture from which it can be copied?).

¶52 *e) Technological fixes can limit copying.* — Landes and Posner mention this factor since the advent of encryption software can potentially provide greater protection for software than copyright can since it can significantly increase the cost of copying to the point where it is cost prohibitive.⁹⁰ However, there appears to be no parallel in fashion design for encryption. Thus, this factor does not limit copying in fashion design.

¶53 *f) "Copyability" may enhance the value of the original, so that the copyright owner indirectly appropriates some of the value of the copies.* — In some contexts, the ability to copy the original provides more value to the consumer who is willing to pay more and thus appropriates some of the value of the copies to the originator. Landes and Posner's best example of this is the fact that a CD is more valuable to the purchaser if he can upload it into his computer and transmit it over the web to a friend.⁹¹ While this may work for music, it almost certainly does not work for fashion design. Thus, this factor will not limit copying in the absence of copyright protection.

¶54 *g) Many authors derive substantial benefits from publication that are over and beyond any royalties.* — Posner and Landes list prestige, celebrity, and other nonpecuniary income (higher salary, greater consulting income, income from lectures and product endorsement, etc.) as substantial benefits that may inure to creators whether or not copyright law affords protection.⁹² This element is certainly a factor in fashion design. Joel Paris, who offers handbags resembling designer models on his Anyknockoff.com Web site, maintains that knockoffs can actually boost a design house's profile:

Let's say Versace does a pair of parachute pants. Then three months later, some other designers do versions of parachute pants, and a year later you go to Costco or Target and you see parachute pants there. Everybody's going to know that it was Versace that kicked off the trend. It's great for the high-end fashion designer.⁹³

However, the critical question is whether or not this is sufficient to justify fashion design innovation in the absence of copyright protections. While this factor may ameliorate the need for copyright protection, it is not clear that it eliminates it.

¶55 *h) Reductions in the cost of copying help copyright owners by reducing their own production costs.* — The technological improvements that have reduced the cost of copying have also helped fashion designers by reducing their own production costs. However, it is likely that this is not a significant factor for fashion design.⁹⁴

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Winograd & Lu-Lien, *supra* note 1.

⁹⁴ LANDES & POSNER, *supra* note 83.

¶56 *i) The cost of expression had fallen in many areas of intellectual property.* — The cost of expression includes all the fixed costs of an expressive work, i.e. the costs incurred before the first copy is sold. Landes and Posner suggest that if this has fallen enough to make the cost trivial, then perhaps the use of copyright protection to recoup this cost is simply unnecessary.⁹⁵ While it is true that technological advances have likely decreased the fixed costs of fashion design, this is only partially true for fashion design. The fixed costs are still significant, especially when successful designs must subsidize the failed designs. Most designers incur significant risks with each new investment while copiers are able to copy only the successes and thus take a free ride on the investments of others.

¶57 Overall, simply doing nothing (continuing to afford no copyright protection to fashion design) does not appear to be the optimal solution given the current state of technology.

V. CONCLUSIONS

A. Current Law Is Inadequate to Support the Inclusion of Fashion Design in Copyrightability

¶58 As we have seen, there is possibly some wiggle room within the current legal interpretation of pictorial, graphic, and sculptural works that fashion design could potentially slip through. However, the law surrounding pictorial, graphic, and sculptural works is not a good fit for fashion design. Complicated legal questions and incomprehensible legal doctrines like conceptual separability would lead to uncertainty and inconsistent decisions in litigation. Additionally, the one-size-fits-all approach to copyright duration would leave fashion design with copyrights that are likely excessive in length (life of author plus 70 years or 95 years for a corporation versus the shorter 3 years provided by the current European laws and the proposed U.S. law).

B. Modified Law Could Serve the Public Better Through Copyrightability of Fashion Design

¶59 With the foregoing points in mind, the approach taken with architecture is likely the best approach for fashion design. Congress can amend the statute to tailor the copyright protection of fashion design to meet realistic needs and provide a realistic duration. Copyright protection appears to be a better alternative for protection of fashion design when compared to design patents, trademarks, or simply doing nothing and allowing the status quo to continue. This would be a substantial step toward protecting a \$100 billion dollar industry and allowing the industry to recoup its investments rather than watching in silence while fashion pirates sail quietly away into the sunset with undeserved booty.

⁹⁵ *Id.*