A Musical Cue For Fashion: How Compulsory Licenses And Sampling Can Shape Fashion Design Copyright

Caroline Olivier

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/njtip

Part of the Intellectual Property Law Commons

Recommended Citation
https://scholarlycommons.law.northwestern.edu/njtip/vol19/iss2/3

This Note is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Technology and Intellectual Property by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.
A MUSICAL CUE FOR FASHION: HOW COMPULSORY LICENSES AND SAMPLING CAN SHAPE FASHION DESIGN COPYRIGHT

Caroline Olivier
A MUSICAL CUE FOR FASHION: HOW COMPULSORY LICENSES AND SAMPLING CAN SHAPE FASHION DESIGN COPYRIGHT

Caroline Olivier*

ABSTRACT—The fashion industry is the Wild West of intellectual property law. Fashion design protection is essentially non-existent, and designers take what they want when they want in the form of inspiration or complete copying. As technology advances and enables fashion designs to disseminate at high-tech speeds, there is no longer room for an apathetic approach to fashion intellectual property. If the law is a means for protecting the hard work of up-and-coming artists and providing incentives for innovation, changes must be made.

This note demonstrates how the fashion industry can adopt a copyright and licensing scheme similar to that of the music industry to protect designers’ intellectual property while conserving industry norms of creative inspiration and fleeting trend cycles.

PART I ............................................................................................................................................. 220
   A. Design Piracy and Social Media ......................................................................................... 220
   B. The Effectiveness of Self-Help ....................................................................................... 222
PART II ............................................................................................................................................. 224
   A. The Current State of Fashion Design Protection ............................................................... 224
PART III .......................................................................................................................................... 227
   A. Intellectual Property in the Music Industry ................................................................. 227
   B. Why Music Copyright Evolved ...................................................................................... 231
PART IV ........................................................................................................................................ 232
   A. Shifting Copyright for Fashion ..................................................................................... 232
CONCLUSION .............................................................................................................................. 237

* Northwestern University Pritzker School of Law, J.D., 2022. I would like to thank Professor Michelle S. Falkoff for all her help and guidance through the writing process.
A. Design Piracy and Social Media

While social media becomes an essential component of the fashion industry, it also creates a host of problems for designers’ intellectual property rights. It would be difficult, if not impossible, to find a successful fashion house that does not incorporate social media into its marketing plan.\(^1\) “Tweets, blogs, and social networks like Facebook, Twitter, YouTube, Instagram, and Pinterest offer fashion brands ways to connect with audiences.”\(^2\) Instagram, in particular, is a cost-effective method of advertising, where designers can access millions\(^3\) of potential purchasers as quickly as they can upload a photo to the Internet. Enhanced features that allow designers to link directly to their shop websites from their Instagram photos\(^4\) make selling products directly to consumers easier than ever.

Widespread access to fashion designs is a double-edged sword though and bears a significant cost in the form of design piracy—a cost that is more likely to harm up-and-coming designers.\(^5\) Easily accessible designs on Instagram allow well-resourced designers to find a design they like, order a sample directly from the original designer, and then recreate the item for

\(^{1}\) See generally, Joel Mathew, Understanding Influencer Marketing and Why It is So Effective, FORBES (June 30, 2018, 8:00 AM), https://www.forbes.com/sites/theyec/2018/07/30/understanding-influencer-marketing-and-why-it-is-so-effective/?sh=2c67e4fa71a9 [https://perma.cc/E8GQ-63LL] (explaining how influencer marketing has increased in popularity over the years and companies are “shift[ing] focus to influencer marketing to propel their brand through social media”); see also Iris Mohr, The Impact of Social Media on the Fashion Industry, 15 J. OF APPLIED BUS. & ECON. 17, 18 (2013) (stating that “[f]ashion is everywhere, mostly due to the [i]nternet[,]” and the emergence of new means of distribution via blogs, fashion apps, and other technology).

\(^{2}\) Mohr, supra note 1, at 18.

\(^{3}\) Instagram surpassed one billion monthly active users in June of 2018. See Josh Constine, Instagram Hits 1 Billion Monthly Users, Up from 800M in September, TECH CRUNCH (June 20, 2018), https://techcrunch.com/2018/06/20/instagram-1-billion-users/ [https://perma.cc/AJR4-MQSY].


\(^{5}\) When designs are copied and distributed to a larger consumer base, “[t]he situation is not necessarily easy on designers, who have to keep coming up with new ideas rather than being able to milk a trend for years,” which is a costly process. James Surowiecki, The Piracy Paradox: Fashion Copyright, NEW YORKER (Sept. 17, 2007), https://www.newyorker.com/magazine/2007/09/24/the-piracy-paradox [https://perma.cc/TKV2-PX3R]; see also Julia Bruculieri, How Fast Fashion Brands Get Away with Copying Designers: There Are Some Loopholes in the Law and Other Extenuating Circumstances that Typically Prevent Legal Action, HUFF POST (Sept. 4, 2018, 5:45 AM), https://www.huffpost.com/entry/fast-fashion-copycats_n_5b8967f9e4b0511db3d7def6 [https://perma.cc/2QNF-LPAT].
substantially less. Large, corporate name-brands and smaller “influencer” brands are equally guilty of the practice.

In 2018, Old Navy appropriated a t-shirt design from Carrie Ann Roberts, who sells clothing through a website advertised on her Instagram. After using Instagram to call out Old Navy for misappropriating her design, Roberts received a letter from Old Navy claiming their use of her design was completely legal. This assertion was unfortunately correct. No legal mechanism existed to stop Old Navy from using Roberts’s design as their own, and Old Navy is not the only company to take advantage of this gap in intellectual property protection.

Some fashion companies are notorious for creating business models from design piracy. The online retailer Fashion Nova regularly misappropriates designs with cheaper fabric, cheaper labor, and non-existent development costs, resulting in significantly lower prices for identical designs. In August 2020, a similar online retailer, Shein, took a design from the family-owned brand Maison Cleo and sold a nearly identical blouse for a fraction of the original price.

If seeing a design online and deciding to copy it were not enough, some companies order samples of garments from the original designer to better recreate them. In 2019, an associate buyer at Victoria’s Secret ordered over $12,500 worth of lingerie from Fleur du Mal. Shortly after, a replicate set of lingerie became available on Victoria’s Secret’s website for half the price.

One would assume influencer brands would have a greater appreciation for up-and-coming designers, but even they partake in design piracy.

---

8 Id.
9 Id.
10 Id.
13 Maison Cleo only makes a limited number of each of their designs from deadstock fabric. See id.
14 See Luu, supra note 6.
15 See id.
Danielle Bernstein of the fashion blog and clothing line WeWoreWhat asked the small business Second Wind for samples of their face masks with detachable chains in June of 2020. Three days later, Bernstein messaged Second Wind to inform them of her plans to release similar masks for her own brand but made assurances that she did not intend to copy their designs. The color, fabric, and shape of Bernstein’s masks were all virtually identical to that of Second Wind’s.

High-end designers who are the epitome of creativity and have a multitude of resources to invest in design development are not exempt from the misappropriation trend either. After meeting with a representative of Moschino to show her original sketchbooks, Edda Gimnes was shocked to see a strikingly similar concept to her designs on Moschino’s Spring/Summer ‘19 runway. While Moschino’s designs were not as much of a copy and paste misappropriation as many of the other examples, it was clear that Gimnes’s work provided liberal inspiration without receiving any credit.

B. The Effectiveness of Self-Help

Social media makes fashion design piracy easier for companies looking to copy, but it also provides a key solution to the problem. Shaming copycats in a public forum offers a “self-help” mechanism for designers. The Internet’s ability to quickly grab people’s attention and spread information via re-posts and site shares establishes some level of deterrence. Growing “cancel culture” amplifies that deterring effect and makes public shaming a legitimate concern for the viability of a brand subject to it. This type of social media shaming provides results past mere embarrassment, including “financial remuneration, cessation of further appropriation, attribution of the original work accordingly, and avoidance of misattribution of the appropriation to the originator.”

17 See id.
18 See id.
19 See EDDA (@edzgimnes), INSTAGRAM (Sept. 21, 2018), https://www.instagram.com/p/Bn_S8CHAD5u/?utm_source=ig_ [perma.cc/YLG3-NE3A].
21 See generally Nanci K. Carr, How Can We End #CancelCulture—Tort Liability or Thumper’s Rule?, 28 CATH. U.J.L. & TECH. 133 (2020) (explaining how cancel culture has disrupted the celebrity standing of many individuals).
22 Adler & Fromer, supra note 20, at 1480.
@Diet_Prada is one of the most well-known Instagram accounts that consistently calls out designers for their misappropriation of other designers’ work.\textsuperscript{23} The account has over two million followers and disseminates an array of fashion industry news,\textsuperscript{24} including side-by-side comparisons of misappropriated designs.\textsuperscript{25}

This form of public shaming has proved successful in certain situations. When Gucci made an almost exact replica of a Dapper Dan jacket for its 2018 cruise collection, the cries of misappropriation\textsuperscript{26} led to a collaboration between the two brands.\textsuperscript{27} That same year, Gucci and Dapper Dan partnered to open an appointment-only boutique in a Central Harlem brownstone.\textsuperscript{28} The pieces from the luxury collaboration can now be found on numerous celebrity red carpets, showcasing a fortunate result for both parties.\textsuperscript{29}

However, the self-help mechanism only goes so far. It is all too easy for a large company like Old Navy to defend complaints from a smaller one by claiming that it has copied a design legally, because that assertion is usually correct under current law.\textsuperscript{30} Carrie Ann Roberts did not trademark the phrase nor have an established right to copyright protection.\textsuperscript{31} After receiving backlash, Old Navy removed images of the copycat design from its website but continued to sell the shirt in stores.\textsuperscript{32}

Self-help remedies arise when judicial remedies are inadequate.\textsuperscript{33} As intellectual property law stands, the only way a design could be wholly protected would be through complete restraint from dissemination. That is obviously an inviable option for any fashion business.

\textsuperscript{23} See generally Diet Prada (@diet_prada), Instagram, https://www.instagram.com/diet_prada/ [https://perma.cc/7XJL-WXTL] [hereinafter Diet Prada III].

\textsuperscript{24} See generally id.

\textsuperscript{25} See generally id.

\textsuperscript{26} Kevin Harry (@mrkevinharry), Instagram (May 30, 2017), https://www.instagram.com/p/BUuGSvrD59w/?utm_source=ig_embed [https://perma.cc/ZX52-MTC8].


\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Lieber, supra note 7.

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} Adler & Fromer, supra note 20, at 1505.
PART II

A. The Current State of Fashion Design Protection

Intellectual property law does not currently prevent the continuation of design piracy. The three possible avenues of protection are trademark, copyright, and design patent, which each lack any meaningful way of effectuating change in their present form.

1. Trademark Law

While the USPTO includes “a design” in its explanation of a trademark, this design reference does not include an entire fashion design. Trademark protection for fashion designs is limited to brand-related elements, since the purpose of a trademark is primarily to “identify[] and distinguish[] the source of the goods of one party from those of others.” The function of a trademark does not comport with the intellectual property concerns of fashion designs.

Trademark law combats consumer confusion, which is not a primary concern with design piracy. The risk that consumers may be confused as to the source of a copycat design may exist but remains low because a consumer would likely need to purchase the original and its copy from different retailers. The issue with design piracy is instead that a new designer spends time and resources creating a unique design that embodies a part of who they are, only for another to scoop it up and likely sell it at a lower price.

Some argue this does not actually steal sales away from the original designer because copiers may have other qualities desirable to a particular purchaser, such as lower price or luxury brand affiliation. But, design piracy hinders new designers’ ability to establish recognizable brands. If a purchaser can obtain the same design from multiple sources, the buzz around the original product will quickly vanish. Discovering a new designer and going back to them for more is difficult when the designer becomes just one of the many offering the same designs.

Trade dress is another form of trademark law available to designers, but it requires product designs to achieve secondary meaning before they are

35 Id.
36 Id. at 3.
38 See id.
eligible for protection. Secondary meaning is a monumental hurdle for new designers because it requires “that a significant number of potential buyers associate the trade dress with a single source of the product.”

Only famous aspects of a design are protected, such as the red sole of a Christian Louboutin shoe. The time it takes to establish secondary meaning can negate any benefit from eventual trade dress recognition. Nothing would protect a design from piracy in the meantime, which would chip away at any notoriety the design manages to gain.

2. Design Patent

Another unsatisfactory method of protection for fashion designs is design patent law. Design patents are available for “new, original and ornamental design[s] for an article of manufacture.” This area of law presents challenges from the utilitarian nature of fashion designs, the novelty requirement, and the time involved in obtaining a design patent.

Design patents only protect ornamental designs, excluding many, if not most, parts of fashion designs for being utilitarian. A unique sleeve could not obtain a design patent if the sleeve itself is considered a functional part of the garment. Designs must also be novel and cannot be obvious to a person having ordinary skill in the art of fashion design. Courts find it difficult for fashion designs to meet such a vague and hard to apply standard.

The design patent prosecution process further deters their use for fashion designs. The filing process lacks clarity, and the USPTO even recommends applicants “seek the services of a registered patent attorney or agent,” which are costly. After an application is filed, it must then be

---

44 See Baloga, supra note 39, at 267.
48 Id.
examined by the USPTO. This can be a very lengthy process lasting two or more years. Fast-fashion companies produce items “in as little as two weeks,” so it is infeasible for a designer to prevent piracy with a two-year lag in protection.

3. Copyright

Copyright law is the most promising form of protection for the fashion industry but requires changes to be effective. Fashion designs have long been excluded from copyright under the useful article doctrine, which precludes items of a useful nature from protection. This doctrine poses clear problems for clothing and accessories.

The Supreme Court made progress towards opening the copyright door to fashion in Star Athletica. The Court held that features within a useful article which can be perceived as “some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities,” and is “able to exist as its own pictorial, graphic, or sculptural work . . . once it is imagined apart from the useful article” are suitable for copyright protection. Yet, only the patterned lines on a cheerleading uniform were protectable, since the remaining elements were useful. Combatting design piracy would be much more effective if designs were considered as a whole rather than as individualized parts.

While copyright is not the right solution to design piracy in its current form, it is the right building block. Copyright protection attaches to works “the moment [they are] created and fixed in a tangible form” and does not require registration unless and until a rightsholder files an infringement suit. Such immediacy and lack of formalities are essential to protecting fashion designs.

49 Id.
51 Lieber, supra note 7.
52 A useful article has “an intrinsic utilitarian function.” See 17 U.S.C. § 101.
54 Id.
55 Id. at 1010.
56 Id. at 1016.
57 COPYRIGHT.GOV, Frequently Asked Questions: Copyright in General, https://www.copyright.gov/help/faq/faq-general.html#:~:text=When%20is%20my%20work%20protected,of%20a%20machine%20or%20device [https://perma.cc/8MEQ-XAWL].
PART III

A. Intellectual Property in the Music Industry

The fashion industry should adopt an intellectual property regime that emulates the music industry’s use of copyright law. The music industry faced similar obstacles to the fashion industry when technological advances led to an uptick in piracy. The Internet allowed unlimited access to music, and technology provided efficient, high-quality copies. Unlike the fashion industry, music was primed to combat piracy. Long-standing copyright laws protected musicians, and there was a strong system of licensing in place.

1. Music Copyright

To understand how intellectual property in the music industry is effective, it is important to know its history and underlying policy goals. Musical compositions were first recognized as a copyrightable category of work in 1831. This categorization allowed musical copyright owners the exclusive right to distribute and reproduce works for their lifetimes plus seventy years. The limited monopoly policy guiding music benefits both artists through financial incentives to create and the public through “the assimilation of artistic works into society.”

This balance between interests was a driving force behind the reworking of the Copyright Act of 1976, which has undergone further amendments and alterations at the hands of music industry leaders.

2. Compulsory Licenses

Compulsory licenses were implemented in the 1909 Act and push this balance further towards public benefit by “allowing immediate public access

---

63 Id. at 382–83.
64 See Wagman & Kopp, supra note 60, at 274.
65 Id. at 276.
66 Id. at 278-79.
67 Id. at 284.
to creative works.”68 Anyone can record a copy of a pre-existing, non-dramatic musical work for only a nominal fee,69 subject to their compliance with statutory limitations.70 The scope of such licenses only encompasses phonorecords, so slight deviations in form, such as karaoke recordings accompanied by visual lyrics, will not fall within the compulsory license purview.71

Additionally, such phonorecords may not be mere duplicates of the original recording.72 The licensee must re-record the song with other performers to satisfy the statutory requirements.73 Compulsory licenses only apply to works that have already “been distributed to the public in the United States by or on behalf of the copyright owner.”74 Any work distributed without the rightsholder’s authorization cannot be the subject of a compulsory license.75

Compulsory licenses allow changes to the “musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work.”76 While what constitutes a “necessary” change is not straightforward, “only the most innocuous changes in the melody,” and similar changes to lyrics,77 such as changing “her” to “him” have been deemed appropriate. Compulsory licenses typically apply to “cover version[s]” of songs. When a copy strays into the field of a derivative work, it is no longer allowed a compulsory license.78 Derivative works are “based upon one or more pre-existing works, such as . . . a musical arrangement.”79

While prices set by statute give way to downsides, such as “unreasonably low” rates,80 compulsory licenses all but eliminate transaction
costs. Some artists are unhappy with the current system for obtaining music sample licenses, which gives complete discretion to the originating artist. Some have even advocated for a statutory rate system to ensure that copyright holders could not “charge outlandish licensing fees” to sample their songs. A statutory rate system, like that of compulsory licensing, allows “up-and-coming artists [to] enter on an equal-playing field when it comes to negotiating” and “has won over support from many interested parties, including up-and-coming artists.”

3. Music Sampling

Another facet of music copyright protection is digital sampling. Obtaining a sample license from the original copyright owner allows the use of “any portion of [an] existing recording in a new sound recording.” Licenses for digital samples do not fall into the category of compulsory licenses because the new song using the sample has changed the song’s melody or fundamental character.

Digital sampling bridges the gap between using an entire composition under a compulsory license and fair use, which exempts an artist from liability even absent a license. Using a sample to create a new song falls squarely into the category of derivative works. The copyright owner of the work sampled has the exclusive “right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” Any song sampling requires authorization from the copyright owner, who retains the ability to deny a

---

81 Jacob Victor, Reconceptualizing Compulsory Copyright Licenses, 72 STAN. L. REV. 915, 932 (2020).
82 Id. at 955.
84 Id.
85 Id.
86 Tomer S. Stein, Copyright and Dissent, 28 TEX. INTELL. PROP. L.J. 157, 168 (2020).
88 Id. at 26.
90 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 810 n.10 (6th Cir. 2005).
91 17 U.S.C. § 114(b).
license. The law requires permission for any use of a song, no matter how small.

Digital sampling creates costs, as well as a “robust marketplace for licenses.” Some musicians fear that overly strict enforcement of sampling licenses may curb creativity and experimentation in the industry. Industry practice is to infringe first while experimenting with a sample, then obtain permission later because “rights holder[s] do[] not want to simply approve a use in the abstract.” Rightsholders prefer approving a finalized product over giving free rein to sample their song however one likes.

Overall, music copyright owners deserve compensation when a sample of their work is approved and commercialized, and musicians recognize this as well. Kanye West’s manager even “views sampling . . . as a regular expense of the business.”

4. Fair Use

Compulsory licensing and music sampling are both restrictions on the proliferation of music into the public domain where it is fair game for anyone else to use. Fair use, on the other hand, untethers works from a rights holder’s grasp. It offers a statutory exception for particular uses of copyrighted works that would otherwise be considered infringement.

Whether a particular use infringes a copyright or is fair use depends on four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the copyrighted work used; and (4) the effect on potential markets or the value of the original copyrighted work. This ability to bypass a rightsholder’s

---

93 Howell, supra note 87, at 24.
94 Id. at 28.
96 Id.
97 Id.
99 Id.
101 Id.
approval before creating a derivative work ensures education, commentary, and “transformative works” are never stifled.102

Transformative works themselves are an exception within the exception. As applied to musical compositions, fair use has generally only protected parodies, which are viewed as transformative works, even though transformative-ness is not a requirement of fair use protection.103 Parodied songs are typically commercial in nature,104 use a substantial amount of the original copyrighted work to “evoke recognition” of the original,105 and arguably disrupt potential markets for the original work.106

However, allowing transformative works such as parodies to flow freely into the market serves broader policy goals embedded in copyright law, such as promoting science and arts.107 Fair use carves out additional real estate for derivative use of works sans licensing requirements, pushing music copyright further towards a limited monopoly equilibrium that benefits both creators and the public.108

B. Why Music Copyright Evolved

Music copyright law has evolved significantly since protection for musical compositions was originally instated in 1831. The shift grew from the “significant changes in technology [which] have affected the operation of the copyright law.”109 Internet, digital subscription services, illegal downloading, and online radio all escalated the ways in which consumers could instantaneously access and distribute music.110 Congress recognized that intellectual property law was the proper forum to combat “unauthorized duplication of sound recordings bec[oming] widespread”111 and changed the law to accomplish just that.

If change to copyright law is an obvious necessity for the viability of the music industry, it begs the question: why has this same need been

102 Id. “Transformative works” refers to alteration of the original in such a way that the new work is considered a “new expression, meaning, or message.” Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994).
103 Campbell, 510 U.S. at 579.
104 Parody songs are still commercially released in the same way that original songs are, as evidenced by the subject matter of the dispute in Campbell. Id.
105 Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).
106 Campbell, 510 U.S. at 593 (stating that the rap-parody “Pretty Woman” by 2 Live Crew derived from Roy Orbison’s “Oh, Pretty Woman” potentially affected the original song’s market for rap derivative works).
107 Id. at 579.
108 Bach, supra note 62, at 383.
110 Wagman & Kopp, supra note 60, at 271.
consistently ignored in the fashion industry, which faces similar technologically oriented challenges?

PART IV

A. Shifting Copyright for Fashion

Copyright law requires another shift to strengthen the protection of fashion designs. Without a strong foundational base of protection, there is no way to tailor protection to the ever-changing challenges within the industry. While Star Athletica currently protects aspects of fashion designs, there must be protection for the entire design to effectively prevent copying and protect designers’ interests.

The primary hurdle in obtaining broader copyright protection for fashion designs lies in the useful nature of clothing itself. Many aspects of a clothing design serve dual functional and nonfunctional purposes. For instance, a designer’s decision to put various pockets on a garment may serve aesthetic purposes along with the functional utility a pocket offers.

Such an intensely utilitarian focus ignores other fundamentals of copyright law, such as the constitutional prerequisite that a work be an “original work[] of authorship.” This “necessitates independent creation plus a modicum of creativity.” A simple, solid-black, crew-neck t-shirt is arguably completely functional, rather than dually functional and nonfunctional, and could never pass the modicum of creativity threshold.

Clothing and accessories are too staunchly pigeon-holed into this useful article categorization when most fashion designs with the ability to pass the modicum of creativity requirement are far from your average plain-black t-shirt. If an entire fashion design received copyright protection, there would be no need to filter out and distinguish between utilitarian and solely aesthetic elements of the design as the Star Athletica test requires.

\* \* \*

115 Id.
1. *Sui Generis Protection*

Due to this conflict between the functional and aesthetic features of clothing, granting fashion designs their own *sui generis* category of protection within existing copyright law is the best option for protecting an entire design. Boat hulls\(^{120}\) and computer software\(^{121}\) were each granted *sui generis* categories of copyright protection and are arguably much more utilitarian than fashion designs.

*Sui generis* protection would enable slight alterations in the application of standard statutory copyright rules to fashion.\(^{122}\) As it stands, the length of the term of protection for copyrights is too long for the fashion industry. The life of the designer plus seventy years\(^{123}\) would seriously undermine the ability for designers to take creative inspiration from one another and hinder the trend-driven seasonality deeply embedded within the industry.\(^{124}\)

The fashion industry previously proposed the Innovative Design Protection and Piracy Prevention Act ("IDPPPA"), which suggested a three-year term of protection for original designs to assuage those same concerns.\(^{125}\) Even a term of protection so drastically less than that of general copyright protection confers measurable benefits on a designer’s ability to recoup their investment in a particular design.\(^{126}\)

2. *Compulsory Licensing*

Rewarding short-term copyright protection for fashion designs creates a foundational system of protection from which compulsory licensing may grow. Compulsory licenses within the fashion industry would create a mandate for copycats to pay the original designer a fee for the use of their design, just as similar licenses operate in the music industry.\(^{127}\) As a policy consideration, “compulsory licenses are desirable because they communicate the message that a ‘copyright has its price’ and users . . . [must] pay when accessing work that was generated by others.”\(^{128}\)


\(^{120}\) See 17 U.S.C. § 1301(a)(2).

\(^{121}\) See 17 U.S.C. § 117.

\(^{122}\) Raustiala & Sprigman, *supra* note 37, at 1745.

\(^{123}\) 17 U.S.C. § 302(a).


\(^{125}\) Id.

\(^{126}\) Id.

\(^{127}\) Richards, *supra* note 59, at 423.

The existing limitations on compulsory musical licenses can carry over to fashion designs by only allowing exact or slightly altered copies to fall within the compulsory license realm.129 Similar to the acceptability of “conform[ing] [a song] to the style or manner of interpretation of the performance involved,”130 equivalent minor changes to fashion designs could include color or fabric selection.

A lower-cost fabric, in particular, aligns with the “style or manner of interpretation” of fast fashion companies that drive down costs of clothing to reach a specific consumer base. The same applies to the color of a clothing design. One brand may prefer a muted palette while another prefers vibrant colors. Such minute details in the design reflect the genre of the retailer in the same way they do a genre of music, without transforming the original creator’s design into something new.

The music industry oftentimes considers statutory rates for compulsory licenses to be too low.131 While this may raise concerns of the same fate for the fashion industry, low compulsory licensing fees are likely more beneficial to the industry as a whole. Kal Raustiala and Christopher Sprigman argue a “piracy paradox” exists within the fashion industry, since “the absence of protection for creative designs and the regime of free design appropriation speeds diffusion and induces more rapid obsolescence of fashion designs.”132 Rampant copying drives rapid turnover in trends, which registers more sales for designers.133 Low statutory rates would allow for the same “pricing-in [of] consumers who otherwise would not be able to consume the design.”134

Any pre-prescribed rate offers monetary incentives and general recognition to an original designer who otherwise derives no benefit for their design investment. The costs of compulsory licenses will likely pass to consumers,135 but it is hard to believe low statutory rates would have much effect, if any, on the buying habits of trend-seeking fashion consumers.

The fact that compulsory licenses are obligatory also aids the industry’s interests overall. Mandatory and automatic licenses eliminate all negotiating costs,136 which is critical for new designers lacking excess resources to spend on negotiating licensing terms. Compulsory licenses establish efficiency and

130 Id.
131 Bach, supra note 62, at 393.
132 Raustiala & Sprigman, supra note 37, at 1722.
133 Id.
134 Id.
136 See Mangal, supra note 128, at 275.
certainty for a rights owner while also promoting access to works.\textsuperscript{137} Unavoidable, pre-set rates also guard against the power imbalances between up-and-coming designers and well-resourced companies that are the likely design licensees.\textsuperscript{138} Fashion has morphed into a divided industry characterized by an imbalance of power, with big businesses on one end and small businesses on the other.\textsuperscript{139} Universal compulsory licensing could level this playing field.

Enabling compulsory licenses for fashion designs would not cause any major disruptions to the industry because it would allow a system of copying to continue while also compensating designers for their creativity and contributions to the field. The inherent proliferation of copying in fashion can be seen as beneficial to the industry because “more fashion goods are consumed in a low-IP world than would be consumed in a world of high IP protection.”\textsuperscript{140} However, “low-IP” and “high-IP” should not be the only options when a middle-ground is readily accessible.

Granting \textit{sui generis} copyrights and establishing a compulsory licensing system would still allow brands to incorporate other designers’ works into their own inventories at low costs. The fast-fashion brands most likely to copy designs, as seen from current practices, have the ability to pay compulsory license fees.\textsuperscript{141} Since statutes set the rates, they are guaranteed to be reasonable as opposed to an unpredictable free-market system.

Requiring copycats to pay a statutorily set fee to an original designer may not be the perfect solution, but it offers an opportunity to consider the competing interests of designers and consumers and to work towards a bilateral solution. While technology and dissemination methods race forward, the current copyright system is ineffective in protecting fashion designs and leaves hardworking designers to bear the brunt of that imbalance.

3. \textit{Sampling}

Sampling does not have as broad of benefits for the fashion industry as compulsory licensing does, but it could be an effective remedy in certain

\begin{footnotesize}
\begin{enumerate}
\item See \textit{id.} at 275–76.
\item See \textit{generally}, Victor, \textit{supra} note 81, at 977 (noting how compulsory licenses have the potential to restore the power balance between copyright owners and streaming services).
\item Raustiala & Sprigman, \textit{supra} note 37, at 1733.
\end{enumerate}
\end{footnotesize}
circumstances. In situations like that of Edda Gimnes, where Moschino did not exactly copy any particular design of Gimnes’ but rather incorporated various distinct elements from her designs, sampling could be a viable solution. Digital music sampling “recycle[s] sound fragments originally recorded by other musicians.” Once particular sound waves from a song are converted into binary digital units, “that sound can be manipulated and altered to produce a desired effect on playback, such as changes in pitch, speed, and dynamics.”

When a designer takes specific, distinct elements from another design and incorporates them into their own work, this is akin to manipulating and altering a digital sound sample. They are apportioning part of the work but not its entirety. The appropriating designer alters this portion to incorporate the look and feel of their brand identity, just as music samples change pitch and speed to better reflect the artist’s genre of music.

While no silhouettes of Gimnes’ designs were completely identical to those that appeared on Moschino’s runway, the “inspiration” for many distinct elements was readily apparent. The large pink and black sharpie-esque marks on the garments are strikingly similar, not to mention so unique that it seems improbable each was the product of independent creation.

Moschino took that distinct element and incorporated it into a new work that was not quite transformative nor a complete duplicate. Still, that element turned into garments that would appeal to the tastes of Moschino’s particular consumer base. This is not to say that one design was better or worse than the other, nor that the existence of both is a bad thing. However, Gimnes should have received recognition for the inspiration she provided in the form of licensing compensation while her designs were still on the market vying for sales as well.

4. Fair Use

Implementing both compulsory and sampling licenses will not encroach on the ability of designers to take influence from other designs because of the fair use doctrine. Fair use exceptions to copyright infringement would preclude liability for individuals recreating designs for personal use. Designs merely influenced by prior works will not necessarily infringe, since

---

142 See Edda Gimnes (@edzgimnes), INSTAGRAM (Sept. 21, 2018), https://www.instagram.com/p/Bn_S8CHAD5u/.
143 26 AM. JUR. PROOF OF FACTS 3d 537 (Originally published in 1994).
144 Id.
145 See Gimnes, supra note 142.
146 Infringing use that is not commercial in nature is much less likely to be found not fair use under the statutory considerations. 17 U.S.C. § 107.
they may be considered transformative. Influence is much different than replication or even appropriation of a distinct element. Designers often take inspiration from the past, and this would not be encumbered by a limited, three-year term, *sui generis* category of copyright protection.

**CONCLUSION**

Intellectual property law should not exile fashion designers to a lesser realm of protection and respect for their creations than artists of other mediums. Designs capable of meeting the minimum statutory requirements to qualify for copyright protection are no easy, creative feat. Providing an opportunity for copyright protection of these works in the form of a *sui generis* category of protection would enable minimum levels of protection while also allowing variation from the statutory norms that do not comport with the unique needs of the fashion industry.

Short-term protection of fashion designs as a whole is the ideal foundation for a fashion intellectual property regime. Protecting the entire design permits licensing structures, which can address varying needs within the industry. Compulsory licenses protect the creator’s interests and provide for continued low-cost copying, whereas sampling offers unique protection from unauthorized use that sits somewhere between a full-fledged replica and inspiration that morphs into something completely new.

Technology has far outpaced the available protections for fashion designs. More efficient and accessible means of sharing and distributing information are available now than ever before, and this has a direct impact on designers. The easier it becomes to see and purchase fashion, the more intellectual property law needs to step in and protect the investments of its creators.

---