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## Copyrighting the "Useful Art" of Couture: Expanding Intellectual Property Protection for Fashion Designs

M. C. Miller

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COPYRIGHTING THE “USEFUL ART” OF COUTURE:  
EXPANDING INTELLECTUAL PROPERTY PROTECTION  
FOR FASHION DESIGNS

*“Fashion is not something that exists in dresses only. Fashion is in the sky, in the street; fashion has to do with ideas, the way we live, what is happening.”*

—Coco Chanel

TABLE OF CONTENTS

INTRODUCTION . . . . .	1618
I. DEFINING FASHION: A UTILITARIAN ART FORM . . . . .	1622
II. THE ART-UTILITY DICHOTOMY IN INTELLECTUAL PROPERTY LAW . . . . .	1625
A. <i>Patent Protection</i> . . . . .	1626
B. <i>Copyright Protection</i> . . . . .	1630
C. <i>Fashion: An Unprotected Object of Art and Utility</i> . . . .	1633
III. A HISTORICAL PERSPECTIVE THAT DISPELS THIS DICHOTOMY . . . . .	1634
A. <i>The Statute of Anne</i> . . . . .	1634
B. <i>The Constitution of the United States</i> . . . . .	1636
IV. EXTENDING COPYRIGHT PROTECTION TO FASHION DESIGNS . . . . .	1637
A. <i>The Architectural Design Amendment of 1990</i> . . . . .	1638
B. <i>Dispelling Miscellaneous Arguments in Opposition to     Extending Copyright Protection to Fashion Designs</i> . . .	1641
V. THE CHANGING LANDSCAPE OF FASHION DESIGN: FURTHER NECESSITATING THE NEED FOR FUTURE PROTECTION . . . . .	1644
CONCLUSION . . . . .	1646

## INTRODUCTION

To those unfamiliar with the fashion industry, the world of style—although a frivolous land of superfluous trends and ridiculous price tags—is a place where runway models pose, teen girls spend, and all participants coexist in superficial bliss. To fashion insiders, however, the elegant fashion shows and mall-rat-madness serve only to mask a long-brewing truth: the fashion industry is at war.

On one side of the battleground stand those who *create*—a group composed primarily of designers and creative directors working for couture fashion houses that service celebrities and the upper echelon of society.<sup>1</sup> For these individuals, the creative design process is a labor of both love and a commitment of time. On average, it takes approximately two years for a designer or creative team to turn a visionary concept into a physical object ready for wear.<sup>2</sup> The first step in this creative process requires designers to predict what trends will be popular nearly two years into the future when the final garment will be produced.<sup>3</sup> In addition to following color and textile trends, designers draw further inspiration from studying street fashion, visiting art museums, traveling to other nations, keeping track of other design industries, and, most importantly, using their imaginations.<sup>4</sup> Once a designer collects enough inspiration to begin crafting a new design, he uses his knowledge of garment construction and unique sense of creativity to create a two-dimensional sketch dictating the physical creation of the design.<sup>5</sup> After he is satisfied with this blueprint, the designer searches for fabrics and materials that will not only enhance the aesthetic appearance of the design but also will physically support the actual creation of the garment.<sup>6</sup> Once the designer selects the appropriate

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1. See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1156-57 (2009).

2. See Aleksandra M. Spevacek, Comment, *Couture Copyright: Copyright Protection Fitting for Fashion Design*, 9 J. MARSHALL REV. INTELL. PROP. L. 602, 604 (2009).

3. See *id.*

4. See *id.* at 604-05.

5. See *id.* at 605.

6. See *id.*

fabric, he uses his sewing skills and artistic knowledge to create a mock version of the garment, which is later inspected and tailored by the designer and his creative team.<sup>7</sup> Finally, after nearly two years of innovative effort and technical labor, the designer approves the article of clothing for public or private manufacture and begins seeking new inspiration to begin the lengthy design process all over again.<sup>8</sup>

Opposing these couture designers on the fashion industry battleground stand those who *copy*—mass-producing discount retailers who target fashion-forward twentysomethings on a budget.<sup>9</sup> Instead of creating unique designs and signature styles like their imaginative components, many of these discount retailers instead focus their efforts on providing their customers with the chance to purchase designer “knockoffs”—articles of clothing and accessories that are designed to look like high-end fashion pieces from the couture runway but are sold at a dramatically more affordable price.<sup>10</sup> Unlike the attention to innovation and careful production process valued by the designers described above, these fashion offenders are primarily concerned with strict replication and quick construction.<sup>11</sup> As a result, originality and creativity are often conspicuously missing from the discount retail production process.<sup>12</sup> Take, for example, Forever 21, an American-based mass retail chain that sells trendy clothing and accessories at an affordable price.<sup>13</sup> Instead of employing fashion designers, Forever 21 hires a team of “design merchants” who purchase inventory from a wide

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7. *See id.*

8. *See id.*

9. *See* Samantha L. Hetherington, *Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design*, 24 HASTINGS COMM. & ENT. L.J. 43, 45 (2001).

10. *See* Lauren Howard, Note, *An Uningenious Paradox: Intellectual Property Protections for Fashion Designs*, 32 COLUM. J.L. & ARTS 333, 333 (2009) (comparing the widely known problem of fashion counterfeiting, in which “amateur fashion followers can identify ‘luxury’ goods with glued-on phony labels spewing forth from garbage bags as counterfeits,” with knockoff fashion).

11. *See* Hetherington, *supra* note 9, at 45.

12. *See id.*

13. *See* Eva Wiseman, *The Gospel According to Forever 21*, THE OBSERVER, July 16, 2011, at 30, available at <http://www.theguardian.com/lifeandstyle/2011/jul/17/forever-21-fast-fashion-america> (detailing the chain’s “pile very high, sell very cheap” strategy).

variety of suppliers.<sup>14</sup> These suppliers also take a similarly unimaginative approach to the clothing they produce.<sup>15</sup> The owner of Simonia Fashion, one of the leading suppliers of Forever 21, described her “design method” simply, explaining, “If I see something on Style.com, all I have to do is e-mail the picture to my factory and say, ‘I want something similar, or a silhouette made just like this.’”<sup>16</sup> Another discount retail supplier, Faviana, routinely sends representatives to take photographs of the red carpet trends at runway shows and celebrity events and immediately submits these images to Chinese factories with the capacity to quickly mass-produce less expensive copies.<sup>17</sup>

As a result of this production process that values designer replication over original creativity, Forever 21 has become known for supplying low-end alternatives to popular designs from the runway.<sup>18</sup> But these designs do much more than draw general inspiration from the overall form of high-end pieces; they are true copies, purposefully indistinguishable from the originals they emulate.<sup>19</sup> Thanks to the striking similarities between many of Forever 21’s designs and the pieces on which they are so obviously based, the retail chain has become involved in much litigation concerning its designs.<sup>20</sup> In an attempt to put an end to the chain’s unapologetic copying, renowned designers like Diane von

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14. See Howard, *supra* note 10, at 341.

15. See *id.*

16. *Id.* at 343.

17. See Laura C. Marshall, Note, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTEL. PROP. L. 305, 310-11 (2007).

18. See Hemphill & Suk, *supra* note 1, at 1172; Howard, *supra* note 10, at 341-42.

19. See Howard, *supra* note 10, at 333 (“[T]here are not ersatz Prada logos to be found within the walls of Forever 21. Yet the intention of the knockoff manufacturer is to create a product to deceive.”).

20. See Hemphill & Suk, *supra* note 1, at 1173; Charlotte Cowles, *Forever 21 Has Never Been Found Guilty of Copyright Infringement*, NEW YORK MAG. (July 18, 2010, 6:30 PM), [http://nymag.com/thecut/2011/07/forever\\_21\\_copyright-infringement.html](http://nymag.com/thecut/2011/07/forever_21_copyright-infringement.html) (explaining that Forever 21 has “faced dozens of copyright infringement lawsuits from around 40 different designers,” but reiterating that these cases have all been settled out of court); Charlotte Cowles, *Forever 21 Faces Another Copyright-Infringement Lawsuit*, NEW YORK MAG. (Aug. 15, 2011, 9:45 AM), [http://nymag.com/thecut/2011/07/forever\\_21\\_faces\\_another\\_copyr.html](http://nymag.com/thecut/2011/07/forever_21_faces_another_copyr.html).

Furstenberg,<sup>21</sup> Betsy Johnson,<sup>22</sup> and Anna Sui<sup>23</sup> have filed suits against Forever 21, claiming that the store violated their intellectual property rights by copying their work.<sup>24</sup> Unfortunately for these designers, their fashion designs—the creative works to which they devoted time, labor, and imagination—receive little to no protection from America’s modern intellectual property regime. As it stands today, no meaningful legal recourse exists to put an end to Forever 21’s unabashed behavior.<sup>25</sup>

Whereas previous scholarship concerning this issue has focused primarily on the reasons fashion designs do or not deserve various types of intellectual property protection, this Note will attack the intellectual property framework as a whole in order to illuminate the reasons why fashion designs can and should receive intellectual property protection, namely copyright protection. More specifically, this Note will argue that the current distinction between different types of intellectual property protection should not present problems for fashion designs. Part I will explore the unique nature of fashion designs by considering the ways in which clothing pieces can be classified as fundamentally different types of objects to different people and in different situations. Part II will illuminate the ways in which the context-specific nature of fashion designs make it difficult for such designs to receive protection from America’s current intellectual property system. Part III will look to the historical underpinnings of American intellectual property law to argue that the unique nature of fashion designs should not serve as a strict bar to receiving protection. Part IV will examine the Copyright Act of 1976 along with the Architectural Design Amendment of 1990 to demonstrate why and how copyright protection could easily be extended to include fashion designs.

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21. See Michael Solomon, *Designer Lawsuits*, ELLE (Jan. 27, 2012, 12:00 AM), <http://www.elle.com/pop-culture/best/designer-lawsuits-614883-7#slide-7>.

22. See Julie Zerbo, *Betsy Johnson v. Forever 21?*, FASHION L. (Aug. 20, 2012), <http://www.fashion-law.org/2012/08/betsey-johnson-v-forever-21.html>.

23. See Amy O’Dell, *Forever 21’s Ability to Copy Designer Clothes Could Be in Jeopardy*, NEW YORK MAG. (Apr. 13, 2009, 9:45 AM), [http://nymag.com/thecut/2009/04/forever\\_21s\\_ability\\_to\\_copy\\_de.html](http://nymag.com/thecut/2009/04/forever_21s_ability_to_copy_de.html).

24. See Hemphill & Suk, *supra* note 1, at 1173-74; Cowles, *Forever 21 Faces Another Copyright Infringement Lawsuit*, *supra* note 20.

25. See Marshall, *supra* note 17, at 330 (exploring the “gap” in intellectual property protection and encouraging Congress to fill this “void”).

Finally, Part V will consider the ways in which the changing landscapes of world custom and technology now require fashion designs to receive intellectual property protection in order for the American fashion industry to continue to develop creatively and economically.

### I. DEFINING FASHION: A UTILITARIAN ART FORM

People typically stride through life clothed. Recent proclamations of equal protection and civil liberties aside,<sup>26</sup> clothes are an unavoidable part of everyone's life today.<sup>27</sup> However, clothes—"fashion"—mean very different things to different people, as a result of both situational factors and personal characteristics.<sup>28</sup>

To begin, clothes can mean different things or be classified as different types of objects depending on context.<sup>29</sup> On the one hand, imagine a farmer dressed in a flannel shirt, denim overalls, and work boots while preparing his land for the fall harvest. In this situation, the farmer's clothing serves a primarily utilitarian function.<sup>30</sup> The flannel keeps his body warm in the chilly morning hours, the thick denim of the overalls is both comfortable and protective, and the sturdy work boots allow the farmer to spend a long day easily traversing muddy terrain. His clothes are nothing more than physical articles designed to serve a purpose; they help him complete his daily tasks in a safe and efficient manner. On the other hand, imagine an A-list actress wearing a famous designer's

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26. One example of the rebellion against clothes is New York City's annual "Go-Topless" Day. See Jonathan Allen, "Go-Topless Day" in *New York Seeks Equal Rights to Bear Chests*, REUTERS (Aug. 26, 2012, 4:51 PM), <http://www.reuters.com/article/2012/08/26/us-usa-topless-idUSBRE87P0CT20120826>.

27. See Hemphill & Suk, *supra* note 1, at 1155 ("Nearly all of us inevitably participate in fashion, even if we do not try to follow it."); Marshall, *supra* note 17, at 307 (quoting Miranda Priestley's famous monologue from the 2006 Twentieth Century Fox film *The Devil Wears Prada*).

28. See Hemphill & Suk, *supra* note 1, at 1155-59.

29. See *id.* at 1155 ("Though one may need a replacement pair of jeans when an old pair gets holes from wear, or a warmer coat when the weather gets cold, for most people across the socio-economic spectrum, the purchase of clothing is far from limited to these kinds of situations.").

30. See Whitney Potter, Comment, *Intellectual Property's Fashion Faux Pas: A Critical Look at the Lack of Protection Afforded Apparel Design Under the Current Legal Regime*, 16 INTELL. PROP. L. BULL. 69, 75 (2011).

original creation while attending the annual Metropolitan Ball in New York City. The designs for this event are daring and strive to push the envelope of the fashion industry.<sup>31</sup> As bizarre as it may seem, it is not outside the realm of possibility that a designer would craft a creation that resembles the farmer’s attire described above. In this setting, however, the clothing serves little to no utilitarian function.<sup>32</sup> On the steps of the Metropolitan Museum of Art, the actress is merely a dress form or canvas, and the clothing stands alone—a piece of high Art on living display.<sup>33</sup>

In addition, personal characteristics of the wearer can affect the meaning or classification of a given article of clothing.<sup>34</sup> Take, for example, several students selecting an outfit for the first day of school. One student may intentionally avoid selecting an outfit for school and will instead simply grab the first thing she finds on the floor because she is not permitted to arrive at school naked and has to find something, *anything*, to cover her body.<sup>35</sup> Another student may diligently check the snowy weather report and consider her school’s blasting air conditioner before selecting a warm sweatshirt and woolen socks in an attempt to ensure that her clothes keep her protected from the elements—both natural and man-made.<sup>36</sup> Still another student may select a tailored oxford and traditional khakis in an attempt to appear responsible and intelligent to her conservative professor.<sup>37</sup> Finally, one last student may take an hour crafting the perfect combination of floral Alice + Olivia denim, oversized vintage chambray blouse, chunky Jeffrey Campbell platforms, and studded statement necklace because *fashion is art and it matters*.<sup>38</sup> In each of these cases, every student’s chosen outfit has a different meaning not only to the wearer but also to the world at large.<sup>39</sup>

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31. *See id.* at 74.

32. *See id.*

33. *See* Marshall, *supra* note 17, at 323 (“Fashion designers frequently describe themselves and their work in artistic terms; they speak of their vision, their inspiration, the craftsmanship of their clothing, and the theme or message of a particular collection.”).

34. *See* Hemphill & Suk, *supra* note 1, at 1151, 1157.

35. *See id.* at 1161.

36. *See id.*

37. *See id.* at 1158.

38. *See id.*

39. *See id.* at 1151.

Given both the situational and personal differences that can affect the characterization of a given fashion object or design, the true nature of the articles of clothing we drape over our bodies each day is difficult to describe. In order to arrive at an accurate description, one large, overarching question must be answered: are pieces of fashion useful, everyday objects or pieces of high art?<sup>40</sup> An important point to consider in answering this question is the utilitarian nature of these objects.<sup>41</sup> The articles in question can be classified anywhere on the spectrum of “clothes” (solely utilitarian objects that have secondary, aesthetic features but exist primarily to protect our bodies and avoid the exposure of indecent body parts) to “fashion” (art objects that may happen to serve utilitarian functions but are created for solely nonutilitarian reasons).<sup>42</sup> As the illustrations above demonstrate, the same object may fall at different places along this spectrum depending on both situational and personal contextual factors.<sup>43</sup>

Unfortunately, the answer to the question posed above has no effect on the amount of true protection afforded to fashion designs under America’s current intellectual property regime. Regardless of whether fashion designs are classified as utilitarian objects or pieces of art, fashion designers whose work has been copied receive little legal recourse from the three main branches of intellectual property law—patent, copyright, and trademark.<sup>44</sup> If an article of clothing is classified as a utilitarian object, patent protection<sup>45</sup> is unavailable for all practical purposes because this recourse applies only to certain types of true “innovations” and protects only individual elements of the overall design.<sup>46</sup> If, on the other hand, an article of clothing is classified as an art object, copyright protection is currently unavailable because fashion designs also serve unavoidable utilitarian purposes and are not widely accepted as

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40. See Potter, *supra* note 30, at 73.

41. See *id.*

42. See *id.* at 74.

43. See Hemphill & Suk, *supra* note 1, at 1157.

44. See Tedmond Wong, Comment, *To Copy or Not to Copy, That Is the Question: The Game Theory Approach to Protecting Fashion Designs*, 160 U. PA. L. REV. 1139, 1140 (2012).

45. See *id.* at 1144 (describing that in order to receive a patent, a design must be “truly novel and nonobvious”).

46. See *id.*

“original” in nature.<sup>47</sup> Finally, while designers are hypothetically able to receive trademark protection regardless of whether their work is classified as utilitarian or artistic, this type of protection mainly applies to identifiable logos, prints, and textiles, and does not offer protection for a full fashion design.<sup>48</sup>

## II. THE ART-UTILITY DICHOTOMY IN INTELLECTUAL PROPERTY LAW

The majority of the current scholarship concerning fashion and intellectual property protection has focused either on exposing the ways in which fashion designs *are not* art and, as a result, should be afforded only potential patent protection,<sup>49</sup> or on illuminating the ways in which fashion designs *are* art and, as a result, should receive copyright protection as well.<sup>50</sup> Trademark law aside,<sup>51</sup> intellectual property protection is structured around this functional dichotomy that forces objects with both utilitarian and artistic possibilities to “pick a side” on the usefulness spectrum created by current patent and copyright law.<sup>52</sup> If an object is placed on the utilitarian side of the spectrum, patent protection becomes the only potentially available recourse.<sup>53</sup> If, on the other hand, the object is placed on the artistic side of the spectrum, copyright protection becomes available.<sup>54</sup>

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47. *See id.* at 1145 (“Copyright would seem to apply to fashion designs because by statutory definition its subject matter includes ‘original works of authorship fixed in any tangible medium of expression’.... However, an article of clothing, which represents an original design in a fixed form, cannot receive copyright protection because clothing is ‘utilitarian’ in nature.” (quoting 17 U.S.C. § 102(a) (2006))).

48. *See id.* at 1142 (describing that while trademark protection can protect “certain elements” of a fashion design, the trademark does not extend “to the entire fashion design”).

49. *See* Kari Heyison, Comment, *If It’s Not Ripped, Why Sew It? An Analysis of Why Enhanced Intellectual Property Protection for Fashion Design Is in Poor Taste*, 28 *TOURO L. REV.* 255, 274-82 (2012).

50. *See* Marshall, *supra* note 17, at 322.

51. In order to receive trademark protection, the design in question must incorporate some sort of readily identifiable pictorial or graphic design that exists independently outside of the functional nature of the article (such as a logo or print like the famous Louis Vuitton monogram). *See* Potter, *supra* note 30, at 76-77. Logos of course can receive protection, but this sort of protection will rarely extend to full “designs.” *See id.* at 77.

52. *See* Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH* 115, 118 (Peter K. Yu ed., 2007).

53. *See id.* at 122.

54. *See id.* at 120.

### A. Patent Protection

On one end of the intellectual property spectrum is patent law, which provides protection to objects utilitarian in nature.<sup>55</sup> A patent is a set of exclusive rights granted by the state to an inventor for a limited period of time in exchange for the disclosure of his invention.<sup>56</sup> Although patents can be used to protect “any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used,”<sup>57</sup> patent law imposes strict requirements.

To acquire a patent, an invention or design must meet five requirements: the patentable subject matter requirement, the utility requirement, the novelty requirement, the description requirement, and the non-obviousness requirement.<sup>58</sup> Passing this initial threshold is difficult for any object, and is especially so for fashion designs.<sup>59</sup> While a fashion design may present a patentable subject that is novel, fulfills a utilitarian function, and is able to be clearly and concisely described, it is difficult to imagine a fashion design that meets the statutory test for “non-obviousness.”<sup>60</sup>

According to the section of the U.S. Code governing patent law, an invention or design is obvious, and thus must be denied patent protection, if “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.”<sup>61</sup> In *Graham v. John Deere Co.*, the Supreme Court addressed the non-obviousness requirement for the first time.<sup>62</sup> Interpreting 35 U.S.C. § 103, the Court held that the obviousness of an invention or design is determined by looking at

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55. See Elizabeth Ferrill & Tina Tanhehco, *Protecting the Material World: The Role of Design Patents in the Fashion Industry*, 12 N.C. J.L. & TECH. 251, 277 (2011).

56. Biana Borukhovich, Note, *Fashion Design: The Work of Art That Is Still Unrecognized in the United States*, 9 WAKE FOREST INTELL. PROP. L.J. 155, 163 (2009).

57. *Bilski v. Kappos*, 130 S. Ct. 3218, 3242 (2010) (quoting Act of Apr. 10, 1790, ch.7, 1 Stat. 109-10 (repealed 1793)).

58. See Borukhovich, *supra* note 56, at 163.

59. See *id.* at 164.

60. See *id.*

61. 35 U.S.C. § 103 (2006).

62. 383 U.S. 1, 17 (1966).

the “differences between the prior art and the claims at issue ... and the level of ordinary skill in the pertinent art resolved.”<sup>63</sup> The Court took a more nuanced approach to the non-obviousness requirement in *KSR International Co. v. Teleflex, Inc.*, holding that in determining obviousness “a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.”<sup>64</sup> These tests in mind, a nonobvious fashion design is difficult to conceptualize with respect to the established functionality of elements commonly used in the fashion industry.<sup>65</sup> While a design may be nonobvious in its aesthetic considerations or its overall appearance, fashion designs rarely fulfill nonobvious functions.<sup>66</sup> As fashion advocate Keri Heyison hypothesizes, in order to meet this requirement of non-obviousness, “[o]ne would have to create a completely new type of clothing; and unless the public is in the market for a fingernail warmer, one can imagine how difficult that would be.”<sup>67</sup>

In the rare case in which a fashion design is able to pass this five-part threshold test, it is protected by either a utility patent or a design patent. “[A] utility patent protects any new invention or functional improvements on existing inventions,” whereas a design patent protects an invention’s “ornamental design, configuration, improved decorative appearance, or shape.”<sup>68</sup> When seeking intellectual protection, most designers choose a design patent to protect their work.<sup>69</sup> Unfortunately, however, design patents extend protection only to the “non-functional” elements of a functional design.<sup>70</sup> In other words, a design patent may provide protection to

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63. *See id.*

64. 550 U.S. 398, 401 (2007).

65. *See Scafidi, supra note 52*, at 122.

66. *See id.*

67. Heyison, *supra note 49*, at 260; *see Scafidi, supra note 52*, at 122 (describing how Velcro, zippers, Lycra, Kevlar, hazmat gear, and spacesuits have all received patent protection).

68. Borukhovich, *supra note 56*, 163 (quoting R. Kayne, *What Is the Difference Between a Design Patent and a Utility Patent?*, WISEGEEK (2003), <http://www.wisegeek.com/what-is-the-difference-between-a-design-patent-and-a-utility-patent.htm>); *see* 35 U.S.C. §§ 101, 171 (2006).

69. Alissandra Burack, Comment, *Is Fashion an Art Form That Should Be Protected or Merely a Constantly Changing Media Encouraging of Popular Trends?*, 17 VILL. SPORTS & ENT. L.J. 605, 613 (2010). *But see* Heyison, *supra note 49*, at 261.

70. *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985).

an ornamental element of a fashion design, but these patents are unable to protect the garment design as a whole. As a result, although design patents have been used to provide protection for several accessory designs, such as “shoes, handbags, belts, ... headgear, and eyeglass frames, design patents are unable to provide fashion designers with the type of protection necessary to stop fashion copycats from replicating their garment designs.<sup>71</sup>

Even if a fashion design is able to meet the stringent patent requirements and is somehow able to benefit from the limited, nonfunctional protection afforded by design patents, there are other practical complications that make patents an incompatible mechanism for protecting fashion designs. For one, the process of obtaining a patent is lengthy in comparison to the time required to obtain other forms of intellectual property protection.<sup>72</sup> On average, it takes over two years for the Patent and Trademark Office (PTO) to officially grant a patent to a deserving applicant.<sup>73</sup> In a world as fast-paced and constantly evolving as the fashion industry, patents may prove largely obsolete in actually providing designers with meaningful protection from copycat retailers who are able to respond to runway shows and copy designs with astounding quickness.<sup>74</sup> By the time a patent is awarded to a couture designer, Forever 21 will have already provided consumers with exact replicas of the patented design and fashion followers will have already moved their eyes and wallets forward to the next big trend.<sup>75</sup>

In addition, the process of obtaining a patent is extremely costly.<sup>76</sup> Practically speaking, applying for and potentially obtaining patent protection is only available to well-established and successful

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71. Ferrill & Tanhehco, *supra* note 55, at 278.

72. See Julie P. Tsai, Comment, *Fashion Protection: A Note on the Protection of Fashion Design in the United States*, 9 LEWIS & CLARK L. REV. 447, 457 (2005). But see Ferrill & Tanhehco, *supra* note 55, at 281.

73. Heyison, *supra* note 49, at 260.

74. See Kristin L. Black, *Crimes of Fashion: Is Imitation Truly the Sincerest Form of Flattery?*, 19 KAN. J.L. & PUB. POL'Y 505, 507 (2010); Potter, *supra* note 30, at 76; Wong, *supra* note 44, at 1144-45 (“Even if a fashion designer can meet the statutory requirements, the patent system presents a further obstacle to protecting fashion designs: timing.”).

75. See Ferrill & Tanhehco, *supra* note 55, at 263 n.62 (quoting Nicole Giambarrese, Comment, *The Look for Less: A Survey of Intellectual Property Protections in the Fashion Industry*, 26 TOURO L. REV. 243, 243-244 (2010)). See generally Burack, *supra* note 69, at 623.

76. See Tsai, *supra* note 72, at 455.

designers and couture design houses who can afford covering both the upfront application expenses and shouldering the high risk that the PTO will refuse to grant a patent entirely. As a result of these procedural setbacks, design patents—even when available—provide an impractical and often unworkable method of providing intellectual property protection to fashion designs.<sup>77</sup>

If fashion designs are indeed deemed only utilitarian (and not artistic) in nature, the patent-protection system described in this section will constitute the only intellectual property recourse available to fashion designers whose work has been copied. As explained above, however, patent protection is clearly ill-equipped to adequately protect fashion designs. Why is this so? Why is patent law able to provide sufficient intellectual property protection to other utilitarian innovations, but not to “utilitarian” fashion designs? The answer to these questions is simple: fashion is also art.

While critics argue that it is fashion’s lack of artistry that makes patent protection more appropriate than other protective measures,<sup>78</sup> attempting to actually apply patent protection to fashion designs exposes the very ways in which every fashion design, taken as a whole, is unavoidably artistic. The difficulty that fashion designs face in overcoming the nonobvious requirement necessary to receive patent protection exposes the ways in which their aesthetic elements or artistic purposes are often more unique or nonobvious than their functional components. The fact that design patents are unable to protect the very wrongs fashion designers seek to right—the unauthorized copying of their overall design schemes—showcases the ways in which patent law’s ability to protect only truly original functions allows copycats to continue stealing designers’ artistic creations. Additionally, the ways in which the procedural complications associated with securing design protection practically inhibit designers from receiving meaningful relief highlight fashion’s place in the temperamental and trend-driven world of art.

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77. See Borukhovich, *supra* note 56, at 164-65 (describing the time-consuming process of getting a patent and the expensive fees necessary to even apply for patent protection).

78. See Jennifer E. Smith, *Flattery or Fraud: Should Fashion Designers Be Granted Copyright Protection?*, 8 N.C. J.L. & TECH. ONLINE 1, 3 (2007).

### *B. Copyright Protection*

On the other end of the intellectual property utility spectrum is copyright law, which provides protection to objects artistic in nature.<sup>79</sup> “[C]opyright protection extends to original works of authorship fixed in any tangible medium.”<sup>80</sup> As with patent protection, however, copyright protection extends only to specific kinds of artistic objects that possess certain prerequisite features.

In order to receive copyright protection, a given object must meet the requirement of separability and the requirement of originality.<sup>81</sup> Separability is a prerequisite that requires the functional and aesthetic elements of an object to exist independently of each other.<sup>82</sup> In essence, the separability requirement ensures that copyright protection does not extend to “useful articles,” or those having intrinsic utilitarian functions that go beyond portraying the appearance of an article or conveying information.<sup>83</sup> When making a determination as to whether a given article is a useful one, it is important to note that an article that is normally a *part of* a useful article is itself considered to be a useful article.<sup>84</sup> In other words, “if design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements.”<sup>85</sup> The other major requirement necessary for copyright protection, originality, is a prerequisite that requires a work to be sufficiently unique and different from previous works.<sup>86</sup> Heated debate surrounds the ability of fashion designs to meet both copyright requirements.<sup>87</sup>

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79. See Black, *supra* note 74, at 513.

80. Heyison, *supra* note 49, at 267 (quoting 17 U.S.C. § 102(a) (2006)).

81. Universal Furniture Int'l, Inc. v. Collezioni Europa USA, Inc., 618 F.3d 417, 429 (4th Cir. 2010) (per curiam) (summarizing the elements necessary to protect a copyright).

82. See Borukhovich, *supra* note 56, at 165.

83. See *id.* (defining a useful article as one that has “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information” (quoting 17 U.S.C. § 101 (2008))).

84. See *id.* at 165 (explaining that “pictorial, graphic, or sculptural’ features of a design” are “copyrightable if *those features* are physically or conceptually separable from the useful features of the product” (emphasis added) (quoting Marshall, *supra* note 17, at 315)).

85. Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1987); Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 414 (2d Cir. 1985).

86. See Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

87. See generally Potter, *supra* note 30.

In terms of the separability requirement, there are critics and case law to support both the proposition that utilitarian and aesthetic aspects of fashion designs are totally separable and the proposition that they are not.<sup>88</sup> Those who support the idea that fashion designs are separable from their utilitarian functions are vocal and passionate. As one such supporter, legal scholar and fashion advocate Susan Scafidi, remarked, “A ball gown is a work of art. What else are you going to do with it? Clean the house?”<sup>89</sup> Several circuit courts have also recognized fashion’s separability potential. In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the court held that a belt buckle was separable from its function as part of a belt designed to ensure that pants remain resting securely on one’s hips.<sup>90</sup> In a case easily analogizable to fashion design issues of separability, the court in *Universal Furniture International, Inc. v. Collezione Europa USA, Inc.* held that the form and ornamentation of a decorative piece of furniture were separable from its utilitarian function as a chair that people used to rest their bodies and sit.<sup>91</sup>

On the other hand, other scholars and courts have claimed that clothing is *inherently* utilitarian in nature, holding that the artistic and utilitarian aspects of fashion designs are not separable.<sup>92</sup> According to these critics, a garment placed on a human body inevitably fulfills the utilitarian functions of protecting and concealing the body regardless of the design’s aesthetic purpose or visual qualities. Whereas courts have openly granted copyright protection to both fabric designs<sup>93</sup> and to lace embroidery,<sup>94</sup> they have extended this protection along with the cautioning caveat that fashion designs, when taken as a whole, are utilitarian in nature and therefore should not be offered copyright protection.<sup>95</sup>

In terms of the originality requirement, arguments exist both in favor of and against the possibility that fashion designs may exist

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

89. Borukhovich, *supra* note 56, at 156 (quoting Laura Goldman, *Fashion Piracy*, BPCOUNCIL, 2007).

90. 632 F.2d at 993.

91. 618 F.3d 417, 426 (4th Cir. 2010) (per curiam).

92. See *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985).

93. *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995).

94. *Express, LLC v. Fetish Grp., Inc.*, 424 F. Supp. 2d 1211, 1224 (C.D. Cal. 2006).

95. *Knitwaves*, 71 F.3d at 1002; *Express*, 424 F. Supp. 2d at 1124.

as truly original objects. Fashion designs have the potential to be original, particularly when they are compared to other copyright-eligible objects.<sup>96</sup> The most widely drawn comparison is that between fashion designs and works of literature. Any piece of English literature, for example, is composed of words. These words (and sentence structures, rhetorical devices, etc.) are all drawn from a relatively finite “master list.” Authors draw from this unoriginal master list but are simultaneously able to combine unoriginal words in unique ways to create works of art that *as a whole* are remarkably original. Creating fashion designs operates much in the same way as creating pieces of literature. Designers draw from a preexisting vocabulary of color, pattern, form, and shape, and some talented designers are able to craft these elements together in ways that create works that are unmistakably original in overall design.

On the other end of the spectrum, similar logic can be employed to argue that fashion designs do not have the potential to be original.<sup>97</sup> In other words, because fashion designs necessarily involve drawing inspiration from an industry-wide vocabulary of color, form, and texture, some critics ignore similarly situated copyright-protected mediums and argue that it is inherently impossible for a fashion design to achieve the high level of originality required for copyright protection to apply.<sup>98</sup>

Despite the individuals and institutions that claim that fashion designs have the ability to be both separable and original, the overwhelming trend in copyright litigation today is to refuse to extend copyright protection to fashion designs.<sup>99</sup> With this in mind, the same questions that arose when exploring patent law’s applicability to fashion designs arise in the copyright context as well: why is copyright law able to provide sufficient intellectual property protection to other artistic innovations, but not to “artistic”

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96. See, e.g., D’Lesli M. Davis, *The Copyright Primer for the Lawyer Who Doesn’t Even Know How to Spell Copywrite, Er, Copyright*, *ADVOC.*, Winter 2008, at 31, 32 (describing other copyright-eligible objects).

97. See, e.g., Lori Schutte, *Copyright for Couture*, 2011 *DUKE. L. & TECH. REV.* 11, \*12, ¶ 22.

98. See Heyison, *supra* note 49, at 269.

99. Wong, *supra* note 44, at 1146 (“[F]ashion designs have not yet fallen within the ambit of copyright.”).

fashion designs?<sup>100</sup> The answer, once again, is simple: fashion is also useful.

Attempting to apply copyright protection to fashion designs exposes the very ways in which every fashion design is unavoidably utilitarian.<sup>101</sup> In their inability to meet the requirement of separability, fashion designs showcase the ways in which they can never truly divorce themselves from their utilitarian functions, no matter how contextually inconsequential they may be. In addition, the fact that the unoriginal fashion “dictionary” is composed of individual design elements—straps, skirt length, fabric choice, etc. that have come to exist within this vocabulary for functional reasons, such as supporting a garment or providing warmth—demonstrates the way in which the originality requirement is similarly constrained by fashion’s potential functionality.

### *C. Fashion: An Unprotected Object of Art and Utility*

As a result of the current intellectual property protection framework, fashion designers are left with no realistic legal defense with which to protect themselves against the growing mass-market trend of blatantly copying couture designs.<sup>102</sup> The modern system, which is designed around a strict dichotomy between useful and artistic objects, unfairly forces items that are useful in one context to suffer from the ways in which the same objects might be artistic in another context (and vice versa).<sup>103</sup> While fashion designs deemed primarily utilitarian in nature can never escape their artistic potential in order to receive a relevant design patent, fashion designs deemed artistic in nature can never escape their potentially utilitarian functions in order to receive copyright protection.

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100. See *supra* text accompanying notes 77-78.

101. But see Arielle K. Cohen, *Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma*, 11 CHI.-KENT J. INTELL. PROP. 172, 177 (2012).

102. See Katelyn Brandes, Note, *Design Protection in the United States and European Union: Piracy’s Detrimental Effects in the Digital World*, 37 BROOK. J. INT’L L. 1115, 1116 (2012) (describing how designers “face competition from large corporate entities that rapidly replicate their designs with minimal, if any, legal restraint”).

103. See *supra* Part I-II.B.

In order to combat this problem, fashion advocates have proposed various solutions to disincentivize mass retail chains from copying couture designs without permission.<sup>104</sup> The legal system, however, should not be forced to invent “solutions” like these when America already has a long-standing intellectual property framework in place.

### III. A HISTORICAL PERSPECTIVE THAT DISPELS THIS DICHOTOMY

By reviewing a brief history of the sources of intellectual property law, this Part will demonstrate that the strict notions of utilitarianism and artistry<sup>105</sup> that constrain modern intellectual property litigation are abstract, fictional, and truly unrelated to determining what objects or designs should be eligible to receive potential protection.

#### A. *The Statute of Anne*

The first major source of copyright protection is British copyright law.<sup>106</sup> The British Statute of Anne, enacted in 1710, was the first statute that granted the government the power to control copyright issues. The statute reads:

Whereas Printers Booksellers and other Persons have of late frequently taken the Liberty of printing reprinting and publishing or causing to be printed reprinted and published books and other Writings without the Consent of the Authors or Proprietors of such Books and Writings to their very great Detriment and too often to the Ruin of them and their Families For preventing therefore such Practices for the future, *and for*

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104. See Cohen, *supra* note 101, at 173, 183-85 (proposing a more widespread use of high-end designer collaborations with lower-end retail stores as a way to give designers control and discourage these chains from copying their couture works). However, this argument does not resolve the issue at hand. Requiring designers to design additional clothes—expending both time and resources—is not an efficient way to protect their preexisting designs. This process is both wasteful and insufficient to solve the actual problem.

105. See Potter, *supra* note 30, at 74-75 (explaining how the original purpose of the tapestry, a form of expression protected by the Copyright Act, was largely utilitarian).

106. Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 17 (1994).

*the Encouragement of learned Men to compose and write useful Books* May it please Your Majesty, that it may be enacted.<sup>107</sup>

Taken on its own, the language highlighted above demonstrates that eighteenth-century English lawmakers associated usefulness or utilitarianism with books, objects which are currently afforded (artistic) copyright protection in America’s intellectual property regime.<sup>108</sup> This illuminates the way in which almost every artistic object performs an arguably useful function. A book, for example, may inform its readers how to complete a technical project, may educate its readers about historical events or religious tenets, or may entertain its readers when they are finally able to take a break from a hard day’s work and spend a leisurely night immersing themselves in a good story. By using the word “useful” as an adjective to describe the modern-day, copyright-protected medium of books, the Statute of Anne expressly rejects that idea that utility and artistry are easily separable. Instead, the language of the statute recognizes that all arts are inherently useful in some way; that any separation between “art” and “utilitarian object” is necessarily abstract.

This language in mind, the historical underpinnings and purposes underlying the Statute of Anne further serve to break down the art-utility dichotomy that grounds American intellectual property law. For one, this statute was created primarily to protect authors, both financially and socially, by preserving their individual reputations.<sup>109</sup> With protection of authorship as a primary goal, a practical interpretation of this statute should honor this intent and err on the side of granting more—instead of less—protection to creators. Secondly, this statute was enacted to encourage innovation and “usefulness.”<sup>110</sup> And allowing creators of different types of objects, including those with both utilitarian and artistic functions, to receive protection will surely result in an increase of innovation across all fields of study and creation. The more types of innovations are allowed protection, the more innovators will expend time and

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107. 8 Ann., c. 21 (Eng.) (emphasis added).

108. See Black, *supra* note 74, at 513.

109. Oren Bracha, *The Statute of Anne: An American Mythology*, 47 Hous. L. Rev. 877, 884 (2010).

110. See *supra* text accompanying note 108.

resources to contribute to a given field in a significant way.<sup>111</sup> As a result of these general goals that the Statute of Anne seeks to advance, America's current trend of forcing objects to find their definitive place on the art-utility spectrum is clearly an exercise as artificial as is it unproductive.

### *B. The Constitution of the United States*

Drawing inspiration in both language and purpose from the Statute of Anne,<sup>112</sup> the section of the United States Constitution that grants Congress the ability to pass legislation aimed at protecting inventors and creators is Article I, Section 8, Clause 8,<sup>113</sup> which states that Congress shall have the power “[t]o 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.”<sup>114</sup>

In order to understand the language used by the Framers in drafting Clause 8, a brief history lesson is necessary regarding eighteenth-century meanings of both “Science” and “useful Arts.” Although it may appear counterintuitive, at the time of the Constitution's drafting, the term “useful Art[.]” was used to describe inventions and scientific or technological progress while the term “Science” was meant as a reference to human knowledge generally, presumably including the fine arts.<sup>115</sup> Although this disparity may initially tempt scholars and theorists to hold fast to the art-utility distinction, in truth this nomenclature mismatch demonstrates the easily blurred line that separates the not-so-distant realms of utilitarian “useful Arts” and artistic “Sciences.” In addition, Clause 8's twin terms are not limited by specific adjectives or accompanied by predetermined requirements. Interpreting this language, the Court in *Golan v. Holder* held that the Constitution gives Congress

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111. See Schutte, *supra* note 97, at \*13-14, ¶ 25.

112. Bracha, *supra* note 109, at 912; Walterscheid, *supra* note 106, at 36.

113. David R. Ellis, *Cyberlaw and Computer Technology: A Primer on the Law of Intellectual Property Protection*, FLA. B.J., Jan. 1998, at 34, 35 (describing the law of copyrights as a “statutory scheme of protection dating back almost 200 years in this country to the Constitution”).

114. U.S. CONST. art. I, § 8, cl. 8.

115. *Bilski v. Kappos*, 130 S. Ct. 3218, 3243-44 (2010); Walterscheid, *supra* note 106, at 51.

broad discretion to protect works generally, meaning that Congress can easily give *more* protection if need be.<sup>116</sup>

The purposes underlying Clause 8 are similar to those that motivated the Statute of Anne.<sup>117</sup> Much like the English statute, the express purpose of this provision is to promote the progress of “Sciences and the useful Arts.”<sup>118</sup> In addition, the Framers also intended the clause to protect and promote industry as a whole.<sup>119</sup> This in mind, history has proven that fashion is one of a handful of globally connected industries that has the ability to affect America’s economy.<sup>120</sup> Any distinction between utilitarian and artistically driven industries is therefore irrelevant in determining a given industry’s value to American culture and economy.

#### IV. EXTENDING COPYRIGHT PROTECTION TO FASHION DESIGNS

Given not only the primary historical sources of intellectual property law described above, but also the way in which both of these sources expose the deficiencies of an intellectual property system structured around a strict art-utility dichotomy, current American legislation dictating the specific requirements necessary to receive protection begins to appear unnecessarily concerned with forcing objects to “pick a side.” The next step in advocating for the extension of protection to fashion designs is to analyze current American legislation governing intellectual property in order to see how easily fashion designs may be incorporated into the preexisting system. With the procedural setbacks associated with obtaining a patent in mind, the best avenue for securing fashion designers with meaningful protection is the Copyright Act of 1976.

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116. See 132 S. Ct. 873, 884-85, 888 (2012).

117. William Cornish, *The Statute of Anne 1709-10: Its Historical Setting*, in *GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE* 14, 21-22 (Lionel Bently et al. eds., 2010).

118. U.S. CONST. art. I, § 8, cl. 8.

119. See Heyison, *supra* note 49, at 282 (“Expanding protection would have devastating effects on this country’s economy, the industry as a whole, the designer’s pockets, and most notably and visibly, our society.”).

120. See Potter, *supra* note 30, at 69 (describing the massive economic impact that the fashion industry, which sells approximately \$784 billion worth of apparel each year, has on America and the world economy at large).

The Copyright Act of 1976 proclaims, “copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>121</sup> The Act originally defined “works of authorship” as (1) “literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.”<sup>122</sup> Taken with the separability and originality requirements described above, this language ensures that only works on the far “artistic” end of the spectrum are able to receive copyright protection. However, even as the original Act continued to blindly adhere to the strict art-utility dichotomy, a major amendment to the Act showcases the ways in which such a rigid intellectual property framework is both artificial and unworkable.

#### *A. The Architectural Design Amendment of 1990*

The Architectural Works Copyright Protection Act was added in 1990 and amended the Copyright Act to include “architectural works” as works of authorship.<sup>123</sup> This new medium is defined in the amendment, which states that an “architectural work” is the “design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.”<sup>124</sup> Such a work includes “the overall form as well as the arrangement and

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121. 17 U.S.C. § 102(a) (2006).

122. Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. § 102(a) (Supp. 11 1976)).

123. Pub. L. No. 101-650, 104 Stat. 5133 (codified at 17 U.S.C. § 101-02(a) (Supp. 11 1990)) (“An ‘architectural work’ is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”).

124. *Id.* The leading case addressing architectural copyright protection is *Yankee Candle Co. v. New England Candle Co.*, 14 F. Supp. 2d 154, 159-60 (D. Mass. 1998) (holding that the Yankee Candle Co. store was an internal structure and did not qualify as a building).

composition of spaces and elements in the design, but does not include individual standard features.”<sup>125</sup>

Obvious comparisons can be made between architecture and fashion in terms of both separability and originality. In terms of separability, architectural works operate much like fashion designs—no matter how beautiful or ornamental an architectural design may be, it unavoidably has the capacity to fulfill the basic utilitarian function of providing shelter. In an attempt to sidestep this problem, the Architectural Design Amendment leaves separability largely unaddressed.<sup>126</sup> Artistic notions aside, works of architecture provide the unavoidable function of providing shelter regardless of their artistic value. Regardless, these works are now provided copyright protection despite their utilitarian nature.

In terms of originality, the same basic principles apply to the originality of works of architecture that apply to fashion designs. They are both a type of three-dimensional visual art that is comprised of various elements—color, shape, form, and texture—and is intensely detail-oriented. The Architectural Design Amendment handles the issue of originality directly; the statutory language clearly states that the term “architectural works” does not include individual standard features, but instead looks to the overall composition and form of the design and building.<sup>127</sup> This same standard could be used to determine the originality of fashion designs as well.

For example, imagine a four-story brick building centered around a spiraling staircase that leads to a pointed lookout needle. Many building designs may include each of these individual elements, but perhaps no building has combined the elements together to create the same overall effect. Under the Architectural Design Amendment to the Copyright Act, this type of *total uniqueness* is sufficient for a finding of originality. In the similarly situated world of fashion, take a long, flowy dress with thin straps, a plunging v-neck, an elaborate floral detail, and distinctive black borders. Each of these elements standing on its own may not be “original”: Many dresses are long and flowy. Many dresses have thin straps. Many dresses have

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125. 17 U.S.C. § 101(a).

126. See Spevacek, *supra* note 2, at 610 (explaining that courts considering architectural designs are not required to apply the separability test).

127. 17 U.S.C. § 101(a).

plunging v-necks. Many dresses have elaborate floral detailing. Finally (and not surprisingly at this point), many dresses have distinctive black borders. All of this unoriginality in mind, it is also possible that no other dress has combined the individual elements in this way before, so the dress taken as a whole design is original. It is important to note that not every fashion design would be original enough to garner copyright protection (just as not every architectural design would be original enough to receive protection); each design must be evaluated on its own merits. However, an important takeaway is that the legislature has already determined *that it is possible* to determine whether an object comprised of “unoriginal” elements can still be original when these elements are combined in a new and distinct way.

This comparison to original architecture in mind, it is important to consider the ways in which courts have construed the concept of originality. For example, in *Roth Greeting Cards v. United Card Co.*, the Court held that when a total concept is the same, copyright may be infringed.<sup>128</sup> This holding is significant because it implies that designs that, as a whole, are too closely identical to another design, can still be deemed to infringe upon the first design’s copyright even if there are small differences between the two (namely fabric or threading).

If these “prerequisites”—designed to keep objects with utilitarian characteristics from receiving the benefit of copyright protection—can so easily be forgotten when it comes to architectural designs,<sup>129</sup> why should critics constantly cite them as unavoidable bars against giving copyright protection to fashion designs? Clearly, the legislature has begun to realize the artificiality of the art-utility distinction underlying America’s intellectual property regime and started to carve out specialized exceptions to this general rule.<sup>130</sup> In order to argue that the current American intellectual property system should be expanded in order to make fashion designs copyright-eligible, the remainder of this Part will attack the

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128. See *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970).

129. See Spevacek, *supra* note 2, at 610. (“Despite the fact that architectural designs are generally composed of elements that cannot be separated from their utilitarian functions, architectural designs are still afforded protection.”).

130. See *id.* at 612-13.

nonutilitarian justifications most often cited in opposition to extending copyright protection to fashion designs.

*B. Dispelling Miscellaneous Arguments in Opposition to Extending Copyright Protection to Fashion Designs*

In light of the inclusion of the similarly-situated medium of architecture, it is necessary to consider other arguments—aside from the originality and separability arguments most often cited—advanced as justifications as to why fashion designs should be denied copyright protection.

One reason why fashion designs might still be given different protection concerns the role that socioeconomics play in the industry.<sup>131</sup> By providing copyright protection to fashion designers, some critics claim that the legislature will be facilitating a greater divide between American social classes.<sup>132</sup> If only extremely well-to-do people from the upper crust of society are able to buy couture designs and lower classes are unable to purchase corresponding knockoffs at a more affordable price, some critics claim that disparities in fashion choice will serve as a further divide between classes.<sup>133</sup> However, this argument relies on faulty stereotypes about both copyright protection and universal financial priorities. Many of the designs that would pass the originality test necessary to warrant copyright protection are not necessarily everyday outfits that common individuals from any class would wear. Providing copyright protection to original designs would not bar other designers or even discount retailers from drawing influence from these copyrighted designs.<sup>134</sup> While these designers would not be allowed to create direct *copies* of fashion designs, they could still draw inspiration from them and allow individuals to experience basic runway trends at a more affordable price point.<sup>135</sup> Copyright protection would also be available to lower-end designers. Although much of the current litigation is focused on low-end retailers copying

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131. See Hemphill & Suk, *supra* note 1, at 1149-51.

132. See Burack, *supra* note 69, at 607.

133. See *id.* at 605 (“The knockoff industry targets consumers who do not want to pay high prices for designer merchandise.”).

134. See Cohen, *supra* note 101, at 184.

135. See *id.* at 184-85.

the work of high-end designers, designers creating fashion designs with a lower price point also may be copied by designers from a similar market or even by higher-end designers. Additionally, people with different amounts of financial resources often spend their money in different ways. Sometimes people with large amounts of money refuse to buy expensive clothing, while sometimes people with less will skimp in other areas of their life to ensure that they can still purchase expensive clothing.<sup>136</sup> As a result, what type of clothing one wears—or how much it costs—is not always an accurate indicator of one's social class.

Other critics claim that fashion designs should be denied copyright protection because giving designs this protection might “contravene [] the basic principles of copyright.”<sup>137</sup> However, granting fashion designs protection will further, not compromise, the objectives of the Copyright Act.<sup>138</sup> The Copyright Act is designed to protect creative expression and encourage people to continue to use innovative thought in order to “promote the Progress of Science and useful Arts.”<sup>139</sup> Although some may argue that fashion designs are not totally separable or original, they still remain items of “creative expression.”<sup>140</sup> In other words, even if one does not believe that fashion designs should receive copyright protection for technical reasons, it does not necessarily follow that providing fashion designs this protection will go so far as to breach the broader principles upon which copyright protection is based.

A third reason often cited for denying copyright protection to fashion designs is that providing this protection could lead to increased complaints and litigation.<sup>141</sup> However, this argument is based on the faulty principle that providing more causes of action will necessarily lead to an increased number of complaints. In reality, providing additional copyright protection will likely not affect the amount of litigation brought to handle copyright issues.<sup>142</sup> As discussed earlier, there is already a substantial amount of

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136. See *id.* at 182.

137. See Jennifer E. Smith, *Flattery or Fraud: Should Fashion Designers Be Granted Copyright Protection?*, 8 N.C. J.L. & TECH. ONLINE 1, 1 (2007).

138. See Potter, *supra* note 30, at 85.

139. U.S. CONST. art. I, § 8, cl. 8.

140. See Potter, *supra* note 30, at 74.

141. See Schutte, *supra* note 97, at\*12, ¶21.

142. See Hemphill & Suk, *supra* note 1, at 1176, 1188-89.

litigation concerning fashion designs and copyright.<sup>143</sup> Although this litigation is not successful, this does not mean that it is not already in existence. In other words, many fashion designers are already bringing copyright claims against competitors, and this dismissed litigation is burdensome for the parties and courts alike. More intellectual property protection will give designers a chance to win already ongoing litigation; it would not create more.<sup>144</sup> Finally, because the same few retail brands are the copyists sued time and time again, it would take only one successful lawsuit against a chain like Forever 21 to put an end to their behavior and subsequently decrease future litigation.

The final nonseparable and nonoriginal reason often used to rationalize the exclusion of fashion designs from the Copyright Act is the hypothesis that knockoffs actually encourage creativity and innovation by forcing fashion designers to constantly reinvent their line in an attempt to stay relevant and original. Other scholars have directly rebutted this argument, explaining that knockoffs do nothing to boost creativity at any fashion price point.<sup>145</sup> In the world of high-end fashion, designers are in a constant state of innovation. Fashion Week, an industry-wide event that takes place twice a year, forces designers to constantly evolve and reinvent themselves in order to remain relevant in the eyes of the critical high-fashion community. Fashion Week is an ever-looming, biyearly event that forces creativity and innovation. Accordingly, any creativity thought to be inspired by the threat of knockoffs is misattributed. On the more affordable end of the fashion spectrum, the high prevalence of knockoffs has done the exact opposite of inspiring creativity. Instead of exploring their own ideas and original thought, designers not associated with couture houses haven given up and now spend their efforts and resources directly copying the creativity of others.

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143. *See supra* notes 14-25 and accompanying text (discussing briefly the various suits brought against Forever 21 over the past decade).

144. *See supra* notes 14-25 and accompanying text.

145. *See* Howard, *supra* note 10, at 354-55.

V. THE CHANGING LANDSCAPE OF FASHION DESIGN: FURTHER  
NECESSITATING THE NEED FOR FUTURE PROTECTION

With the oft-cited justifications against expanding copyright protection to fashion designs dispelled, the changing landscape of world custom and technology provide further justifications for extending copyright protection to fashion designs.<sup>146</sup> Legislation, copyright legislation included, is designed to provide a constant process of revision and amendment in order to accommodate changing norms and circumstances.<sup>147</sup> The Copyright Act of 1976 is itself a reformed version of the Copyright Act of 1909. The 1976 revision was enacted in large part as a response to new technologies and the new challenges these media created.<sup>148</sup> In addition to this type of complete overhaul, amendments have also been added to the Copyright Protection Act to respond to continually evolving technology and ideals.<sup>149</sup> One important and already-discussed example of this constant cycle of revision is the Architectural Design Amendment, which was enacted in response to the United States joining the Berne Convention and attempting to keep stride with important international copyright standards.<sup>150</sup>

In light of Congress's ability to revise and amend current legislation in response to changing norms, it is necessary to explore the advancements that have created a greater need for fashion design protection.<sup>151</sup> First, Congress has often looked to other countries' progress for inspiration, such as its inclusion of architectural designs into the Copyright Act through the United

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146. See Susan Scafidi, *F.I.T.: Fashion Information Technology*, 59 SYRACUSE L. REV. 69, 87-88 (2008).

147. See Elizabeth A. Brainard, Note, *Innovation and Imitation: Artistic Advance and the Legal Protection of Architectural Works*, 70 CORNELL L. REV. 81, 85 (1984).

148. See Herbert J. Hammond, *Intellectual Property*, 19 TEX. TECH L. REV. 707, 707-08 (1988) (explaining that when the 1909 Copyright Act was enacted, it was impossible to imagine scientific progress like computers and the Internet and the effect that these changing technologies have had on copyright protection).

149. See, e.g., *id.* at 708.

150. See Leonard D. Duboff & Sally Holt Caplan, *Creativity and Copyright*, OR. ST. B. BULL., Jan. 1989, at 4, 5.

151. See, e.g., Scafidi, *supra* note 146, at 73, 82.

States’ participation in the Berne Convention.<sup>152</sup> If Congress has already recognized the importance of expanding copyright protection in response to greater protections afforded by other countries and coalitions, it follows that the copyright protection currently provided to fashion designs by the European Union’s regulations now requires American lawmakers to afford copyright protections to fashion designs.<sup>153</sup>

In addition to this trend of looking to other nations who *do* provide copyright protection for guidance, changing technology and the expansion of the Internet have also made it necessary to further expand copyright protection to fashion designs.<sup>154</sup> Technological advancements in terms of both textile production and mass production of clothing have made it easier to copy designs in an inexpensive manner<sup>155</sup> and has exacerbated the problems traditionally faced by fashion designers.<sup>156</sup>

Congress has responded to technological advancements by providing different types of intellectual property protections.<sup>157</sup> For example, computer software programming is now able to receive both software patents and software copyrights.<sup>158</sup> Additionally, the Internet has better facilitated the rapid spread of information and images.<sup>159</sup> As a result, it has become easier for many diverse people to actually *see* fashion designs. Not only has the ease with which people view photographs from runway shows and images of designer clothing increased, but innovative and diverse fashion blogs have creatively illuminated the ways in which the same article of clothing

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152. See Duboff & Caplan, *supra* note 150; see also Emma Yao Xiao, Note, *The New Trend: Protecting American Fashion Designs Through National Copyright Measures*, 28 CARDOZO ARTS & ENT. L.J. 417, 424 (2010) (arguing that the U.S. should look to other countries for guidance in protecting fashion).

153. See Brandes, *supra* note 102, at 1130-31; Xiao, *supra* note 152, at 424-25, 442 (exploring the European Union’s trend of affording copyright protection in other countries’ intellectual property regimes).

154. See Schutte, *supra* note 97, at \*6-7, ¶11.

155. See *id.* at \*16, ¶ 30.

156. See *id.* at \*17, ¶ 34.

157. See Scafidi, *supra* note 146, at 74-75, 87.

158. See David R. Ellis, *Computer Law: A Primer on the Law of Software Protection*, FLA. B.J., Apr. 1986, at 81, 84.

159. See Schutte, *supra* note 97, at \*6-7, ¶11.

can mean something completely different on different wearers in different contexts.<sup>160</sup>

### CONCLUSION

As this Note has demonstrated, America's current intellectual property regime unfairly forces unique objects like fashion designs—objects that possess both utilitarian and artistic components, and which may appear more utilitarian or artistic depending on a context-specific analysis—to “chose a side” on the art-utility spectrum in order to receive some form of intellectual property protection. Once a fashion design is submitted for either patent or copyright review, the design's unavoidable artistic or utilitarian components stand as effective bars that prevent the design from actually receiving the desired protection. Given that both the historical underpinnings of American intellectual property law and the recent amendments to the Copyright Act of 1976 expose the artificiality that underlies granting intellectual property protection is based on such a rigid framework, it is necessary for lawmakers to abandon the art-utility dichotomy and allow fashion designs, much like architectural designs, to receive intellectual property protection. A brief analysis of the Copyright Act of 1976 and the changing norms of international custom and technology reveal that extending copyright protection to fashion designs is both workable and necessary.

Intellectual property is concerned with protecting objects that are either useful or artistic. Fashion designs, works that have far reaching effects on American lifestyles, culture, and economy, should not be denied this protection because they are both.

*M.C. Miller\**

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160. See Hemphill & Suk, *supra* note 1, at 1155 (discussing the meaning of fashion); Daryl Wander, *Trendsetting: Emerging Opportunities for the Legal Protection of Fashion Design*, 42 RUTGERS L.J. 247, 292 (2010) (describing how fashion blogs are a factor in establishing meaning in clothing).

\* J.D. Candidate 2014, William & Mary Law School; B.A. 2011, Yale University. Thank you to my family, for always encouraging me to write and sometimes encouraging me to shop, and to the members of the *William & Mary Law Review*, for their excellent edits and even better company.