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## Overdressed & Underprotected: The Not-So Glamorous Side of the United States Fashion Industry Without Explicit Copyright Protection

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**OVERDRESSED & UNDERPROTECTED: THE NOT-  
SO GLAMOROUS SIDE OF THE UNITED STATES  
FASHION INDUSTRY WITHOUT EXPLICIT  
COPYRIGHT PROTECTION**

ANNA NOEL HUTTNER\*

ABSTRACT

The complexity of fashion designs goes far beyond what is currently trending in *Vogue*. Intellectual property laws should seek to provide designers with an opportunity to completely protect their work, as well as ensure that fashion designers' designs will not be replicated and sold for a fraction of the price. Inherent limitations with alternate forms of intellectual property protection emphasize the need for a bright-line rule for copyright protection over fashion designs. To best protect new designers and small brands within the U.S. fashion industry, there must be a standard that explicitly includes and defines accessibility to copyright protection for fashion designs. Developing a well-understood rule for copyright protection that can be consistently and unambiguously applied would grant many designers within the U.S. fashion industry an opportunity that they may never otherwise be able to obtain, simply because of the size and scope of fast fashion. Additionally, there would be copious benefits to the global environment and the national economy. Therefore, in order to promote the continued success and future evolution of fashion design within the United States, a bright-line rule must be established and dependably applied to cases regarding copyright protection in the fashion industry.

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\* J.D. Candidate, May 2022, Cleveland State University, Cleveland-Marshall College of Law; B.S.B.A. Economics, May 2019, The Ohio State University. I want to thank Professor Kristin Paulus for teaching me about the many complexities of the U.S. fashion industry, Professor Mark Sullivan for giving me the opportunity to learn about leadership and writing as a member of his book team, and Christine Myers for helping me unlock my true writing potential. I also want to thank Professor Sandra Kerber for teaching me legal writing when I first began law school, and Professor Brandon Stump for his continued support and guidance through editing this Note. Most importantly, I want to thank my Mom and Dad, Rachel, Rob, Sam, my darling cat Abby, my life-long roommate Shelby, and all my amazing family and friends, whose unconditional support throughout my education has been eminent beyond comparison. Thank you all for continuously believing in me and helping me achieve such abundant success!

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## I. INTRODUCTION

“Fashion is more art than art is” – Andy Warhol

When Coco Chanel uttered the famous words, “[i]n order to be irreplaceable, one must always be different,”<sup>1</sup> she had no idea the challenges that U.S. fashion designers would face when trying to protect their designs from copyists. Originally, clothing was created based on the utilitarian idea that the clothes you wear serve a functional, rather than fashionable, purpose.<sup>2</sup> At the turn of the twentieth century, women began to embrace the concept of personal style, and different fashion trends began to transpire throughout each decade.<sup>3</sup> In the late 1990s and early 2000s, another dramatic transformation in the fashion industry occurred with the emergence of “fast fashion.”<sup>4</sup> Fast fashion gave consumers the ability to wear designer-inspired apparel for a fraction

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<sup>1</sup> Julia Neel, *Best Coco Chanel Quotes*, BRITISH VOGUE (Aug. 18, 2017), <https://www.vogue.co.uk/gallery/coco-chanel-quotes-and-photos>.

<sup>2</sup> Jared Schroeder & Camille Kraeplin, *Give Me a (c): Refashioning the Supreme Court's Decision in *Star Athletica v. Varsity* into an Art-First Approach to Copyright Protection for Fashion Designers*, 26 UCLA ENT. L. REV. 20, 26 (2019); Robin M. Nagel, Comment, *Tailoring Copyright to Protect Artists: Why the United States Needs More Elasticity in its Protection for Fashion Designs*, 54 U. RICH. L. REV. 635, 635 (2020).

<sup>3</sup> See generally Alison G. Kass, *The 20th Century of American Fashion: 1900–2000* (May 10, 2011) (Thesis, Western Connecticut State University) (on file with the West-Collections Digital Repository).

<sup>4</sup> Leslie H. Simpson, *Exploration of The Perpetuating Fast Fashion Consumption Cycle: Young Women's Experiences in Pursuit of an Ideal Self-Image 1* (2019) (Ph.D. dissertation, Iowa State University) (on file with the Iowa State University Digital Repository, Retrospective Theses and Dissertations); see *Fast Fashion*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fastfashion> (last visited Oct. 20, 2021).

of the cost, within weeks of a designer's collection hitting the market.<sup>5</sup> While the U.S. fashion industry was thriving economically, the designers within the industry watched helplessly as their unprotected designs were taken from them and turned into profit by other brands. The rise in popularity of fast fashion quickly exposed one of the most detrimental limitations on U.S. fashion designers: the inability to obtain copyright protection over their designs.<sup>6</sup>

Intellectual property laws should both seek to provide designers an opportunity to completely protect their work, as well as ensure that designers' designs will not be replicated and sold for a fraction of the price.<sup>7</sup> Protections available through trademark, trade dress, and patents currently enable designers to protect some of the essential elements of their brands, but without obtainable copyright protection, the most important features of fashion designs can still be taken from designers without liability.<sup>8</sup>

Currently, there is no bright-line rule or explicit test to be applied to determine when fashion designs are eligible for copyright protection.<sup>9</sup> In 2017, when *Star Athletica v. Varsity Brands* reached the Supreme Court, U.S. designers hoped for a concrete decision to end this controversy.<sup>10</sup> Ultimately, the Court developed a standard two-part "imaginative separability" test to allow for copyright protection over certain aspects of designs.<sup>11</sup> Under this test, an artistic element of clothing is eligible for copyright protection if the element (1) can be perceived as a work of art separate from the useful article of clothing, and (2) would qualify for copyright protection as a work of art separate from the useful article of clothing into which it is

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<sup>5</sup> See Elizabeth Segran, *Zara Built a \$20B Empire on Fast Fashion. Now it Needs to Slow Down*, FAST CO. (July 24, 2019), <https://www.fastcompany.com/90379824/zara-built-a-20b-empire-on-fast-fashion-now-it-needs-to-dismantle-it> (addressing how Zara's model is selling fashion-forward clothing for cheap).

<sup>6</sup> See Julie Zerbo, *Protecting Fashion Designs: Not Only "What?" but "Who?"*, 6 AM. U. BUS. L. REV. 595, 596 (2017); see also Nicole Martinez, *How Fast Fashion Retailers Built Billion-Dollar Businesses by Stealing Designs*, ART BUS. J. (June 18, 2015), <https://abj.entrepreneur.com/fast-fashion-retailers-built-billion-dollar-businesses-stealing-designs/> (describing why copyright law does not generally protect fashion).

<sup>7</sup> Colonel Reggie Ash, *Protecting Intellectual Property and the Nation's Economic Security*, LANDSLIDE, May–June 2014, [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2013-14/may-june/protecting-intellectual-property-nations-economic-security/](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2013-14/may-june/protecting-intellectual-property-nations-economic-security/); see *What is Intellectual Property?*, WORLD INTEL. PROP. ORG., <https://www.wipo.int/about-ip/en/>.

<sup>8</sup> See Martinez, *supra* note 6 (explaining the limitations of trademark and patent protections available for designers).

<sup>9</sup> Ricardo Fischer et al., *Supreme Court Clarifies Availability of Copyright for Applied Art on Apparel*, ARENT FOX (Mar. 23, 2017), <https://www.arentfox.com/perspectives/fashion-counsel/supreme-court-clarifies-availability-copyright-applied-art-apparel>.

<sup>10</sup> David Jacoby, *'Star Athletica' Three Years On*, N.Y.L.J. (Aug. 28, 2020, 3:04 PM), <https://www.law.com/newyorklawjournal/2020/08/28/star-athletica-three-years-on/>.

<sup>11</sup> *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017).

incorporated.<sup>12</sup> The ambiguity created by the Court with this “imaginative separability” test leaves significant room for judicial discretion and completely avoids answering the question of if and when there can be complete design protection.

This Note argues that a bright-line rule must be created to explicitly define accessibility to copyright protection for designers, especially to protect new designers and small brands within the U.S. fashion industry, the environment, and the national economy. There are two ways a bright-line rule could be created. First, Congress could pass legislation that expands the protection granted under current copyright laws to explicitly encompass fashion designs and garments. Alternatively, the Supreme Court could develop and implement a clear and explicit test so that future designers can effectively understand the scope of what copyright protection within the U.S. fashion industry includes. Developing a well-understood standard for copyright protection that can be consistently applied would grant many U.S. fashion designers an opportunity that they may otherwise never be able to obtain, simply because of the size and scope of fast fashion.

Part II of this Note begins by providing a general overview of the U.S. fashion industry and examining the nexus between the U.S. fashion industry and U.S. intellectual property laws. Next, Part II describes the other intellectual property protection currently available to national designers. Part II then explains past case law and the key takeaways from those cases which led to the historic *Star Athletica v. Varsity Brands* case. *Varsity Brands* reached the U.S. Supreme Court to decide which circuit court test should be employed to determine whether designs on useful articles were eligible for copyright protection—a “conceptual” separability test, a “physical” separability test, or a variation of the two. Subsequently, Part II explains the *Varsity Brands* case in detail. Lastly, Part II explores one of the failed congressional proposals aimed at altering copyright protection eligibility for the U.S. fashion industry by amending Chapter 13 of Title 17 of the United States Code to include fashion designs.

Part III of this Note analyzes how the test established in *Varsity Brands* can be used to determine a bright-line rule for protection. Furthermore, Part III addresses the creation of fashion law, and the overall impact the lack of copyright protection has on both the national fashion industry and the independent designers within the industry. Part III also considers the negative impact the fashion industry has on the environment because of the limited intellectual property protection opportunities available to designers. The undesirable consequences resulting from the fast fashion process are prevalent from the production stage all the way to the quick turnaround of disposal.<sup>13</sup> Currently, the most widespread concerns include air and water pollution, depletion of nonrenewable resources, and consumption of mass amounts of water and energy.<sup>14</sup> Lastly, Part III explains the economic impact fast fashion has had and the beneficial effects of expansive copyright protection for the national economy.

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<sup>12</sup> *Id.*

<sup>13</sup> Rashmila Maiti, *Fast Fashion: Its Detrimental Effect on the Environment*, EARTH.ORG (Jan. 29, 2020), <https://earth.org/fast-fashions-detrimental-effect-on-the-environment/>.

<sup>14</sup> *Id.*

## II. BACKGROUND

“Style; all who have it have one thing: originality” – Diana Vreeland<sup>15</sup>

The U.S. fashion industry’s historic evolution and the application of other intellectual property laws within the industry bolster the argument that the United States should adopt a bright-line rule for copyright protection over fashion designs. This Part focuses on the progression of the U.S. fashion industry, the purpose of intellectual property laws, and the interests that these intellectual property laws seek to promote. In addition, this Part addresses the history of inconsistent judicial decisions that have resulted in confusion among the courts and designers alike. This Part concludes with the pinnacle *Star Athletica v. Varsity Brands* U.S. Supreme Court case and looks at one of the failed congressional proposals which sought for copyright expansion into the fashion industry. The principles detailed in this Part illustrate why there needs to be a bright-line rule for copyright protection within the U.S. fashion industry.

A. *The History and Evolution of United States Intellectual Property & the Fashion Industry*

United States copyright laws offer expansive protection to original works of authorship.<sup>16</sup> This protection is potentially applicable to many well-known traditional works of art including literary, dramatic, musical, and artistic works.<sup>17</sup> While the term “original works of authorship” is seemingly broad in scope, the U.S. fashion industry and fashion designs within the industry are one of the notable exclusions from the statutory language.<sup>18</sup> Because clothing was found to be invented somewhere between 100,000 and 500,000 years ago, it is no surprise that there is scant information to explain why humans started to wear clothing.<sup>19</sup> Though there is no way to ever know for sure, anthropologists believe humans created clothing as a layer of protection

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<sup>15</sup> Lisa Immordino Vreeland, *Diana Vreeland*, HARPER’S BAZAAR (Aug. 26, 2011), <https://www.harpersbazaar.com/culture/features/a775/diana-vreeland-bazaar-years-0911/> (detailing Diana Vreeland’s life and history in the fashion industry and how this particular quote was seen as her personal mantra).

<sup>16</sup> *What Does Copyright Protect?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-protect.html>; 17 U.S.C. § 102(a).

<sup>17</sup> 17 U.S.C. § 102. This section extended protection to “works of authorship” that include literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works; but bars copyright protection to ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries.

<sup>18</sup> Cassandra Baloga, Comment, *Copyright & Fashion: The Shoe That Does Not Fit*, 64 N.Y.L. SCH. L. REV. 265, 267–68 (2020); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1717 (2006) (“Fashion firms and designers in the United States have neither obtained expanded copyright protection applicable to apparel designs nor sui generis statutory protection.”).

<sup>19</sup> *History of Clothing – History of the Wearing of Clothing*, HIST. OF CLOTHING, <http://www.historyofclothing.com/> (last visited Oct. 22, 2021).

against weather and the elements.<sup>20</sup> Since clothing was created for usefulness and protection purposes, if all common clothing garments were subject to full copyright protection and potential infringement suits, the ability to freely design within the U.S. fashion industry would have been stifled early on.<sup>21</sup> The United States has kept general clothing designs out of the scope of copyright laws and has focused on the foundational principle that clothing exists solely for a functional purpose, regardless of the development of clothing worn for fashionable purposes.<sup>22</sup>

The historic evolution of clothing from functional to fashionable began at the start of the twentieth century and was thus a transitional period for fashion. Women began to embrace clothing for personal style, rather than just for its utilitarian purpose.<sup>23</sup> As trends evolved throughout the decades, ready-to-wear fashion replaced individually made-to-fit garments.<sup>24</sup> From July 1939 through June 1940, measurements were taken of American women to determine average sizing.<sup>25</sup> This average sizing was then used to promote the ready-to-wear clothing market.<sup>26</sup> Though ready-to-wear fashion expedited the shopping process from the previously individually made garments, clothing was still durable and well-made, thus lasting for years.<sup>27</sup> Different trends appeared as the decades transpired, from sportswear and an increased popularity of women's pants in the 1950s; to peace signs, tie-dye, and bell-bottom pants in the 1960s; to the disco style in the 1970s; and the neon colors and exercise clothing in the 1980s.<sup>28</sup>

When fashion retailer Zara entered New York City and the U.S. fashion industry in the 1990s, the *New York Times* described Zara's mission as "fast fashion."<sup>29</sup> Now an everyday term within the fashion industry, fast fashion companies are known for

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<sup>20</sup> *Id.*

<sup>21</sup> See Serena Elavia, *How the Lack of Copyright Protections for Fashion Designs Affects Innovation in the Fashion Industry* 29 (Apr. 10, 2014) (B.A. thesis, Trinity College) (on file with the Trinity College Digital Repository).

<sup>22</sup> See Jacoby, *supra* note 10; Nagel, *supra* note 2, at 666 ("Since wearing clothes until they fall apart is clearly not what the majority of society does, then, fashion serves another purpose other than utility – and that is artistic creation.").

<sup>23</sup> Kass, *supra* note 3, at 5.

<sup>24</sup> Dolores Monet, *Ready-to-Wear: A Short History of the Garment Industry*, BELLATORY (Sept. 30, 2021), <https://bellatory.com/fashion-industry/Ready-to-Wear-A-Short-History-of-the-Garment-Industry>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Anna Swatski, *The History of Fashion: From the 1900s to Today*, FASHION INNOVATION (Feb. 22, 2021), <https://fashioninnovation.nyc/the-history-of-fashion-from-the-1900s-to-today/>.

<sup>29</sup> Sophie Xue, *Ethical Fashion in the Age of Fast Fashion* 23 (2018) (B.A. Honors Study thesis, Connecticut College) (on file with Connecticut College Digital Commons).

their ability to produce clothing quickly and sell it cheaply.<sup>30</sup> These brands, such as Zara, H&M, and Forever 21, thrive on taking popular designs, reproducing them quickly, and selling them to consumers for a fraction of the price.<sup>31</sup> Unlike traditional fashion brands, which follow a standard six-month turnaround for designs to go from catwalk to consumer, fast fashion brands transform the production process by using low-cost materials and high-speed manufacturing so designs reach the consumer in a mere matter of weeks.<sup>32</sup> As a result of cheap materials and labor, prices are cut substantially.<sup>33</sup> For example, in 2015, designer Balmain created a white jumpsuit, seen on Taylor Swift, worth 2022 British Pounds, and fast fashion brand Nasty Gal was able to replicate the jumpsuit at a sale price of just 27 Pounds.<sup>34</sup>

Another example of blatant copying occurred when Kim Kardashian West posted a photo to her Instagram account wearing a brand-new gold dress, with the caption explicitly asking fast fashion brands not to create knockoffs until she actually wore the dress out.<sup>35</sup> Almost instantaneously, fast fashion mogul Missguided replied with a post of a nearly identical gold dress and the caption “Kim Kardashian you’ve only got a few days before this [dress] drops online!”<sup>36</sup> Technology and social media have contributed to the popularity of these fast fashion brands, completely altering the way consumers buy clothing.<sup>37</sup> Where consumers once contemplated purchases and shopped infrequently, they now make frequent, impulse purchases.<sup>38</sup> This evolution of clothing from a functional purpose to a fashionable, style-based purpose was not met with the simultaneous evolution of protection afforded to the U.S. fashion industry by copyright laws.

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<sup>30</sup> See Julie Zerbo, *Is the Internet Era Slowly Killing High Fashion?*, FASHION L. (May 8, 2014), <https://web.archive.org/web/20140511082652/http://www.thefashionlaw.com:80/is-the-internet-era-slowly-killing-high-fashion/> (explaining that the downsides of the instantaneous nature of modern-day fashion is the “increased speed of copying and the overall dilution of the essence of high fashion, which whether you like it or not is founded on exclusivity and unattainability”).

<sup>31</sup> *Id.*; see generally Julie Zerbo, *Kim K and the Copycats: Fast Fashion at Its Quickest or a Marketing Ploy in Disguise?*, FASHION L. (Feb. 19, 2019), <http://www.thefashionlaw.com/home/kim-k-and-missguided-fast-fashion-at-its-quickest-or-a-marketing-ploy-in-disguise> (discussing fast fashion companies, such as Missguided and Fashion Nova, knocking off looks that notable celebrities wear).

<sup>32</sup> Katherine Saxon, *This is What Fast Fashion Really Means—Definition, Problems, Examples, Solutions*, THE VOUE (Apr. 7, 2021), <https://thevou.com/fashion/fast-fashion/>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Chloe Foussianes, *What is Fast Fashion, and Why is Everyone Talking About it?*, TOWN & COUNTRY (Jan. 17, 2020), <https://www.townandcountrymag.com/style/fashion-trends/a30361609/what-is-fast-fashion/>.

<sup>38</sup> *Id.*

The traditional product life cycle (sometimes called the fashion life cycle) consists of five stages: introduction, rise, peak, decline, and obsolescence.<sup>39</sup> The “introduction” stage is when designs first enter the market, with limited consumer acceptance.<sup>40</sup> Most styles are classified as “fads,” which are designs and trends that reach their peak within the introduction stage.<sup>41</sup> Following introduction is the period of growth known as the “rising” stage.<sup>42</sup> The rising stage is when manufacturers, such as those in fast fashion, can capitalize on new and popular designs, copying them and producing them for less.<sup>43</sup> Immediately following the rising stage is the “peak” stage, which occurs when the style and design is most popular and copied by many.<sup>44</sup> At this point, designs either go on to become classic designs, such as the “little black dress,” or they reach the “decline” stage in the process.<sup>45</sup> In the decline stage, consumers begin to grow tired of the design and look for something new.<sup>46</sup> Finally, once a design reaches “obsolescence,” consumers are not interested in the product at all, and even with low prices the items will likely not be bought.<sup>47</sup>

The creation and rise in popularity of fast fashion has resulted in a drastic change to the traditional idea of a fashion cycle. Unlike the five-stage traditional fashion model, the fast fashion business model has three defining characteristics: (1) quick response; (2) frequent assortment changes; and (3) fashionable designs at affordable prices.<sup>48</sup> The fast fashion business model thrives on quickly producing smaller quantities of products, available for just a few weeks.<sup>49</sup> Frequent assortment changes and cheap prices implicitly encourage consumers to quickly dispose of their clothing

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<sup>39</sup> MARY WOLFE, *FASHION MARKETING & MERCHANDISING* 37 (Goodheart-Wilcox Co., 4th ed. 2015); see EVELYN L. BRANNON & LORYNN DIVITA, *FASHION FORECASTING* 294 (Fairchild Books, 4th ed. 2015) (using the terms “introduction,” “market development,” “maturity,” “saturation,” and “decline” for the stages).

<sup>40</sup> WOLFE, *supra* note 39, at 37; see BRANNON & DIVITA, *supra* note 39, at 293.

<sup>41</sup> See BRANNON & DIVITA, *supra* note 39, at 51.

<sup>42</sup> WOLFE, *supra* note 39, at 37.

<sup>43</sup> *Id.*; see BRANNON & DIVITA, *supra* note 39, at 295.

<sup>44</sup> WOLFE, *supra* note 39, at 37.

<sup>45</sup> *Id.*; see BRANNON & DIVITA, *supra* note 39, at 295.

<sup>46</sup> BRANNON & DIVITA, *supra* note 39, at 295.

<sup>47</sup> WOLFE, *supra* note 39, at 37.

<sup>48</sup> Felipe Caro & Victor Martínez-de-Albéniz, *Fast Fashion: Business Model Overview and Research Opportunities*, in *RETAIL SUPPLY CHAIN MANAGEMENT: QUANTITATIVE MODELS AND EMPIRICAL STUDIES* 237, 244 (Narendra Agrawal & Stephen A. Smith eds., 2d ed. 2015); see Martinez, *supra* note 6.

<sup>49</sup> See *Fast Fashion*, FASHION L. (Oct. 3, 2016), <https://www.thefashionlaw.com/resource-center/fast-fashion/>.

and purchase new.<sup>50</sup> Thus, the three characteristics of the fast fashion model considerably differ from the elongated five-stage traditional model.

To understand the importance of copyright protection within the U.S. fashion industry, it is essential to first understand the difference between a “trend” and a “copy.” A trend is simply a popular style at a given time, within a particular industry, often developed by a collective group of individuals.<sup>51</sup> Trends are established within the fashion industry as a “zeitgeist,” also known as “collective selection” or “spirit of time.”<sup>52</sup> Zeitgeists within the fashion industry are found to emerge from “a collective process wherein many people, through their individual choice among many competing styles, come to form collective tastes that are expressed.”<sup>53</sup> Often, trends are both consciously and unconsciously followed,<sup>54</sup> and though many associate the idea of a copy as a part of a trend, there is a notable difference between the two. An example of a trend from the 2010s was the increased popularity of “athleisure,” or the combination of athletic and leisure clothing.<sup>55</sup> Unlike an interpretation of a current trend, where an individual idea is integrated into a general concept that is popular at the present time, a “copy” or “knock-off” is direct replication—often to the extent that a consumer may struggle to discern between the copy and the original.<sup>56</sup> A copy is made when one designer or brand sees the design of another designer or brand, and directly reproduces that design—to the point that it would be near impossible to see the difference between the two at first glance.<sup>57</sup> Thus, participation in a fashion trend does not explicitly

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<sup>50</sup> *Id.* (“The continuous release of new, trend-drive products essentially makes the inventory a highly cost-effective marketing tool that drives consumer visits, increases brand awareness, and results in higher rates of consumer purchases.”).

<sup>51</sup> C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1157 (2009).

<sup>52</sup> *Id.* at 1157–59.

<sup>53</sup> *Id.* at 1157.

<sup>54</sup> Cassandra Elrod, Note, *The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability*, 24 IND. J. GLOB. LEGAL STUD. 575, 578–79 (2017) (using the movie *The Devil Wears Prada* to illustrate how consumers who claim to have no interest in the fashion industry still subconsciously follow trends developed from industry leaders).

<sup>55</sup> See Swatski, *supra* note 28.

<sup>56</sup> *Knockoff*, DICTIONARY.COM, <https://www.dictionary.com/browse/knockoff> (last visited Oct. 22, 2021); *Trend*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/trend> (last visited Nov. 30, 2020); see Felix Salmon, *Market Movers: Susan Scafidi on Copyrighting Fashion*, FELIX SALMON (Sept. 19, 2007), <https://www.felixsalmon.com/2007/09/susan-scafidi-on-copyrighting-fashion/> (listing examples in which initial or subsequent orders went to a copyist rather than the original designer).

<sup>57</sup> See *id.*

require exact copying, but rather creatively incorporating a unique individual adaptation into a collective movement within the fashion industry.<sup>58</sup>

The increased tendency of copying designs, rather than interpreting a trend, highlights the need for intellectual property protection over fashion designs. Intellectual property is “any product of human intellect that the law protects from unauthorized use by others.”<sup>59</sup> Opponents to expanding copyright protection within the U.S. fashion industry stress that there are alternative forms of intellectual property protection currently available to designers like trademark, trade dress, or patents.<sup>60</sup> Though these forms of protections exist, having copyright protection available to fashion designs provides a different benefit to designers than do the other forms of intellectual property.

Copyright protection includes “original works of authorship fixed in any tangible medium of expression” from which they can be perceived, reproduced, or communicated either directly or by aid of a device.<sup>61</sup> Alternatively, trademark protection aims to protect any “word, name, symbol, or design” that is used for identification of goods made by one seller from those of another.<sup>62</sup> Trademarks offer limited protection to brands that have achieved a high level of public recognition through extensive advertising and promotion.<sup>63</sup> Some examples of well-established brands with trademark protection include Adidas, Dior, Rolex, and Louboutin.<sup>64</sup> In addition to trademark protection, trade dress protection may be available to protect a product or packaging that is easily identified, so long as the design of the product shows “acquired distinctiveness” and is not considered a “functional” product.<sup>65</sup> Some of the most well-known brands that have acquired trade dress protection include Coca-Cola for its glass bottles, and Rolls Royce for its front grill.<sup>66</sup>

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<sup>58</sup> See Hemphill & Suk, *supra* note 51, at 1159–60 (“For example, a consumer can imitate the length of a skirt without necessarily purchasing a copy of that skirt.”).

<sup>59</sup> *Intellectual Property*, CORNELL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/intellectual\\_property](https://www.law.cornell.edu/wex/intellectual_property) (last visited Oct. 22, 2021).

<sup>60</sup> See Raustiala & Sprigman, *supra* note 18, at 1722 (“[P]iracy paradoxically benefits designers by inducing more rapid turnover and additional sales.”); *see also id.* at 1727 (“Our core claim is that piracy is paradoxically beneficial for the fashion industry, or at least piracy is not very harmful.”).

<sup>61</sup> 17 U.S.C. § 102.

<sup>62</sup> *Trademark*, CORNELL LEGAL INFO. INST., <https://www.law.cornell.edu/wex/trademark> (last visited Oct. 22, 2021).

<sup>63</sup> Barry R. Lewin, *Trademark Protection for The Fashion Industry*, THE CONNECTOR, July 2017, at 38, 39.

<sup>64</sup> ADIDAS, Registration No. 3686084; DIOR, Registration No. 3002132; ROLEX, Registration No. 0101819; LOUBOUTIN, Registration No. 4438425.

<sup>65</sup> Milton Springut, *Must-Know Basics of Trade Dress Law for the Luxury Goods Business*, LUXURY DAILY (July 14, 2020), <https://www.mosessinger.com/uploads/Must-KnowBasicsOfTradeDressLawfortheLuxuryGoodsBusiness.pdf>.

<sup>66</sup> *Id.*

Finally, patent law gives the exclusive right for an invention, defined by the World Intellectual Property Organization (WIPO) as “a product or process that provides, in general, a new way of doing something.”<sup>67</sup> Design patents protect the “ornamental” aspects of new designs, which means design protection is limited to the parts of a product that are visible to the user of the product.<sup>68</sup> Alternatively, utility patents seek to protect new and useful processes, machines, or manufactures, but fashion designs are rarely considered new and useful inventions. Ultimately, both utility and design patents present complications to designers that render patents unobtainable or impractical for protection.<sup>69</sup> Thus, while alternate forms of protection exist for fashion designers, they are relatively narrow categories that often do not offer the protection for which designers are looking.

B. *Relevant Case Law and a Failed Congressional Proposal to Amend Copyright Protection*

The history of copyright infringement cases within the U.S. fashion industry demonstrates how an ambiguous test grants the courts too much discretion and leads to unpredictable and inconsistent outcomes in future litigation of similar cases.<sup>70</sup> One of the first instances of a case presenting a potential copyright infringement claim was *Jack Adelman, Inc. v. Sonner & Gordon, Inc.* in 1934.<sup>71</sup> In that case, the court was presented with a claim alleging that the defendant infringed upon the plaintiff’s copyright of a dress drawing.<sup>72</sup> The defendant made and sold a dress just like the plaintiff’s drawing.<sup>73</sup> In its analysis, the court expressed that copyright law does not afford the “desired protection to those who create and manufacture novel designs.”<sup>74</sup> It further reasoned that bills had been introduced to Congress seeking to amend the copyright statutes to include patterns for dresses and designs, and though the bills had

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<sup>67</sup> *Patents*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/patents/en/> (last visited Oct. 22, 2021).

<sup>68</sup> Springut, *supra* note 65.

<sup>69</sup> Nicole Reifman, *Think Tank: Protecting Fashion Design in the World of Copycats*, *Fast Fashion*, WWD (Mar. 23, 2018, 9:00 AM), <https://wwd.com/business-news/business-features/think-tank-reifman-1202636700/>.

<sup>70</sup> See *The Supreme Court 2016 Term: Leading Case: Federal Statutes and Regulations: Copyright Act of 1976—Useful Articles—Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 131 HARV. L. REV. 363, 368–69 (2017) (discussing issues with subjectivity and the types of separability tests before *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468 (6th Cir. 2015)); *Id.* at 484–85 (describing nine different tests circuits and scholars created to address the useful article doctrine).

<sup>71</sup> *Jack Adelman, Inc. v. Sonners & Gordon, Inc.*, 112 F. Supp. 187, 188 (S.D.N.Y. 1934).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 190.

failed, it was ultimately a decision for Congress to make.<sup>75</sup> The court concluded that it possessed “no power to read into the present statutes [sic] provisions” which did not expressly include fashion designs within them.<sup>76</sup> Thus, the complaint was dismissed, and the defendant was free to copy the plaintiff’s designs.<sup>77</sup>

However, in the 1980 case *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the U.S. Court of Appeals for the Second Circuit came to a different conclusion. Kieselstein-Cord was a designer of belt buckles, an item that had originally been classified as a utilitarian object and was therefore not eligible for copyright protection.<sup>78</sup> When Accessories By Pearl, Inc. copied Kieselstein-Cord’s designs and sold them for cheaper to consumers, Kieselstein-Cord filed a complaint for copyright infringement.<sup>79</sup> Different from ordinary, utilitarian belt buckles, Kieselstein-Cord’s buckles were decorative in nature and worn as a form of jewelry by consumers.<sup>80</sup> Therefore, the court was able to find that the sculptural elements of Kieselstein-Cord’s belt buckles were conceptually separable from their utilitarian function, and thus, were eligible for copyright protection.<sup>81</sup> Through this conceptual separation, the court established these particular belt buckles were an ornamental aspect subject to copyright protection—raising the buckles to the level of original and creative art.<sup>82</sup> This decision narrowly limited protection to the conceptually separable pieces of Kieselstein-Cord’s belt buckle designs. The court held that without a statutory amendment, cases would have to be evaluated on a case-by-case basis to find elements that were “physically or conceptually separable and that were capable of existing independent of the article’s utilitarian aspect.”<sup>83</sup>

Years later, in 2012, Jovani Fashion filed a complaint against a competitor, Fiesta Fashion, alleging copyright infringement on a prom dress design.<sup>84</sup> Jovani Fashion argued that the prom dress it designed included a “a combination of features ‘that can be identified separately from and are capable of existing independently of, the

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<sup>75</sup> *Id.*; see Rocky Schmidt, Comment, *Designer Law: Fashioning a Remedy for Design Piracy*, 30 UCLA L. REV. 861, 865 n.30 (1983) (noting to seventy-three pieces of legislation that were introduced in Congress between 1914 to 1983 on the topic of fashion design protection; ultimately none of which ever became law).

<sup>76</sup> *Jack Adelman*, 112 F. Supp. at 190.

<sup>77</sup> *Id.*

<sup>78</sup> *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 990 (2d Cir. 1980).

<sup>79</sup> *See id.* at 990–91.

<sup>80</sup> *Id.* at 990.

<sup>81</sup> *Id.* at 993.

<sup>82</sup> *Id.* at 993–94.

<sup>83</sup> *Id.* at 994.

<sup>84</sup> *Jovani Fashion, Ltd. v. Fiesta Fashions*, 500 Fed. App’x 42, 43 (2d Cir. 2012) (citing 17 U.S.C. § 101).

utilitarian aspects of the article.”<sup>85</sup> This was the basic understanding used by the court in the decision of the case involving *Kieselstein-Cord*.<sup>86</sup> Here, *Jovani Fashion* was speaking to the specific arrangement of decorative crystals and sequins attached to the prom dress, the specific ruching at the dress waistline, and the way tulle was used within the skirt.<sup>87</sup> The court was not persuaded that the design of the dress was entitled to copyright protection. Conversely, the court held that the design features could not be separately identified from, or exist independently of, the utilitarian article of clothing itself and, therefore, were not subject to copyright protection.<sup>88</sup>

Prior to 2017, circuit courts and the Copyright Office applied conflicting tests for copyright eligibility.<sup>89</sup> When the United States Supreme Court took on the *Star Athletica v. Varsity Brands* case in 2017, designers hopefully awaited clarity on what specific designs were eligible for copyright protection.<sup>90</sup> In that case, *Varsity Brands* designed cheerleading uniforms and held over 200 copyright registrations for two-dimensional designs that were a part of its uniforms.<sup>91</sup> Some of these copyright registrations protected lines, shapes, and chevrons that appear on the uniforms designed and sold by *Varsity Brands*.<sup>92</sup> After competitor *Star Athletica* copied five of *Varsity Brands*' designs, *Varsity Brands* sued for copyright infringement.<sup>93</sup> First, the district court determined the designs did not “qualify as protectable pictorial, graphic, or sculptural works.”<sup>94</sup> The court reasoned that the designs had a useful function as cheerleading uniforms, and thus, there was no way to physically or conceptually separate the design itself from its utilitarian function.<sup>95</sup> The Court of Appeals for the

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<sup>85</sup> *Id.* at 44.

<sup>86</sup> *See Kieselstein-Cord*, 632 F.2d at 993.

<sup>87</sup> *Jovani Fashion*, 500 Fed. App'x at 44.

<sup>88</sup> *Id.* at 44–45.

<sup>89</sup> *U.S. Supreme Court Issues Decision in Star Athletica, L.L.C. v. Varsity Brands, Inc., et al.*, BRUTZKUS GUBNER, <https://www.bg.law/u-s-supreme-court-issues-decision-in-star-athletica-l-l-c-v-varsity-brands-inc-et-al> (last visited Nov. 29, 2021) (explaining how prior to this Supreme Court decision some circuits were using a “conceptual” separability test, other circuits were using a “physical” separability test, and there were circuits using variations of both tests); *see Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 484–87 (6th Cir. 2015) (describing nine different tests circuits and scholars came up with to deal with the useful article doctrine).

<sup>90</sup> *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1007–08.

<sup>95</sup> *Id.* at 1008; *see also* H.R. REP. NO. 94-1476, at 55 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5668 (“Unless the shape of an automobile, airplane, ladies’ dress, food processor, television set, or any other industrial product contains some element that, physically

Sixth Circuit reversed and found in favor of Varsity Brands, concluding that “the ‘graphic designs’ were ‘separately identifiable’ because the designs and a blank cheerleading uniform can appear ‘side by side’—one as a graphic design, and one as a cheerleading uniform.”<sup>96</sup> Additionally, the appellate court reasoned that the designs were able to independently exist, “because they could be incorporated onto the surface of different types of garments, or hung on the wall and framed as art.”<sup>97</sup>

Star Athletica appealed to the United States Supreme Court, who ultimately affirmed the appellate court, finding in favor of Varsity Brands and presenting a two-part test for eligibility of copyright protection: the two-step “imaginative separability” test.<sup>98</sup> Writing for the majority, Justice Clarence Thomas stated:

[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.<sup>99</sup>

This test was produced with virtually no accompanying guidance for application. One of the most important takeaways from this holding is that while certain aspects of designs can be eligible for copyright protection under the two-part “imaginative separability test,” the Supreme Court’s analysis grants excessive discretion to the courts when determining what particular items satisfy the requirements of this test.<sup>100</sup> Therefore, despite the designer’s hopes for clarity, the Court simply established an ambiguous test, leaving fashion designs susceptible to further inconsistent application of the copyright law.<sup>101</sup>

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or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted . . .”).

<sup>96</sup> *Star Athletica, LLC*, 137 S. Ct. at 1008.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1007; see Seth Appel, *Copyrights in the Fashion Industry – Tips for Protecting Designs*, LEXISNEXIS PRAC. GUIDANCE J. (Sept. 27, 2017), <https://www.lexisnexis.com/practicalguidance/the-journal/b/pa/posts/copyrights-in-the-fashion-industry-tips-for-protecting-designs>; *Mazer v. Stein*, 347 U.S. 201, 211–14, 217 (1954) (developing the original separability test, not used in a fashion setting, but holding that works of art embodied in a useful article were still copyrightable, but only their form, not any utilitarian aspects).

<sup>99</sup> *Star Athletica, LLC*, 137 S. Ct. at 1005.

<sup>100</sup> See Lili Levi, *The New Separability*, 20 VAND. J. ENT. & TECH. L. 709, 729–34 (2018) (discussing the problems, concerns, and possible questions courts may have going forward regarding the first prong).

<sup>101</sup> See *Star Athletica, LLC*, 137 S. Ct. at 1012–13 (referring to the dissent’s contention that the designs were not separable because imagining the designs in a separate medium resulted in the useful articles themselves to demonstrate how potentially opposing interpretations can arise from the decision); Levi, *supra* note 100, at 724–25.

Later in 2017, Puma filed a lawsuit against one of the largest fast fashion brands, Forever 21, with copyright infringement as one of its five causes of action.<sup>102</sup> Puma produced a line of designer footwear in a collaboration with Fenty, the brand created by singer, actress, and businesswoman Rihanna, and Puma filed for copyright registration for each design.<sup>103</sup> Puma alleged that Forever 21 sought to “trade on the substantial goodwill of Puma, Rihanna, and the Fenty shoes” when Forever 21 created knock-off copies to sell.<sup>104</sup> Forever 21 looked to dismiss the cause of action because Puma’s shoe designs were not copyrightable.<sup>105</sup> Puma cited *Varsity Brands*, stating that the “casually knotted satin bow” on top of a pair of slides could be “perceived as a two- or three-dimensional work of art separate from the [Fenty Shoes], and would [also] qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression.”<sup>106</sup> Ultimately the case was settled outside of court, and the Supreme Court’s “imaginative separability” test was never formally applied.<sup>107</sup>

While the United States Supreme Court has had a limited number of opportunities to determine a clear standard for copyright protection available to fashion designers, several legislative proposals have failed as well.<sup>108</sup> For example, in 2006, H.R. 5055, the Design Piracy Prohibition Act (DPPA), was proposed by Representative Robert Goodlatte.<sup>109</sup> The Design Piracy Prohibition Act would have “prevent[ed] anyone from copying an original clothing design in the United States and give[n] designers the exclusive right to make, import, distribute, and sell clothes based on their designs.”<sup>110</sup> This proposal sought to give a three-year period of protection to designers for both fashion designs and their ornamentation.<sup>111</sup> Despite the support of the New

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<sup>102</sup> Amended Complaint, *Puma SE v. Forever 21, Inc.*, No. 2:17-cv-02523-PSG-E, 2017 WL 3309169 (C.D. Cal. Apr. 4, 2017).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Puma SE v. Forever 21, Inc.*, No. CV17-2523 PSG Ex, 2017 LEXIS 211140, at \*1 (C.D. Cal. June 29, 2017).

<sup>106</sup> Amended Complaint, *Puma SE*, 2017 WL 3309169 (No. 2:17-cv-02523-PSG-E).

<sup>107</sup> Julie Zerbo, *Forever 21, Puma Settle Lawsuit Over Copied Fenty Footwear*, FASHION L. (Nov. 8, 2018), <https://www.thefashionlaw.com/forever-21-puma-settle-lawsuit-over-copied-fenty-footwear/>.

<sup>108</sup> See Schmidt, *supra* note 75, at 865 n.30; see also Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012); Design Piracy Act, H.R. 2196, 111th Cong. (2009); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); H.R. 5055, 109th Cong. (2006).

<sup>109</sup> Design Piracy Prohibition Act, H.R. 5055, 109th Cong. (2006) (seeking to amend Chapter 13 of title 17 of the United States Code so that the words “of apparel” at § 1301 (b) would include fashion designs within the scope of copyright protection).

<sup>110</sup> Henry Lanman, *Copycatfight: The Rag Trade’s Fashionably Late Arrival to the Copyright Party*, SLATE (Mar. 13, 2006, 2:59 PM), <http://www.slate.com/id/2137954/>.

<sup>111</sup> Louis Ederer & Maxwell Preston, *The Innovative Design Protection and Piracy Prevention Act - Fashion Industry Friend or Faux?*, LEXISNEXIS LEGAL NEWSROOM (Jan. 31,

York Council of Fashion Designers, the bill stalled in committee.<sup>112</sup> The DPPA was reintroduced in 2007 to the Senate, and then to the House in 2009, but the American Apparel and Footwear Association<sup>113</sup> lobbied to block the bill on concerns that the registration process would place a burden on the designers, and there would be an influx of lawsuits.<sup>114</sup> Additionally, other opponents argued that the availability of this kind of protection would curb innovation by designers, out of fear that a lawsuit would result.<sup>115</sup> Both lobbying by the American Apparel and Footwear Association, and what was found to be vague language within the proposed legislation, eventually led to the bill's failure.<sup>116</sup>

The history of complex decisions regarding copyright cases within the U.S. fashion industry illustrates the problem that arises when there is no bright-line rule for copyright protection. Even with the Supreme Court decision in *Varsity Brands* providing the “imaginative separability” test as applied to fashion, there is still too much ambiguity for the test's application, and the courts' boundless discretion continues to produce inconsistent results in litigation.

### III. ANALYSIS

“They say imitation is a form of flattery but honey, it's time to get your own ideas” – Anonymous<sup>117</sup>

The 2017 *Varsity Brands* Supreme Court case and past legislative proposals provide a foundation to effectively establish a successful bright-line rule for copyright protection of fashion designs. Parts of the Supreme Court's “imaginative separability” test and ideas from past failed congressional proposals provide for the best opportunity to create a bright-line rule that meets the requisite needs and desires of all designers seeking copyright protection against fast fashion brands. In theory, when an effective

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2011), <https://www.lexisnexis.com/legalnewsroom/intellectual-property/b/copyright-trademark-law-blog/posts/the-innovative-design-protection-and-piracy-prevention-act-fashion-industry-friend-or-faux>.

<sup>112</sup> *Id.*

<sup>113</sup> See Ronald R. Urbach & Jennifer Soussa, *Is The Design Piracy Protection Act a Step Forward for Copyright Law or is it Destined to Fall Apart at the Seams?*, CORP. COUNS. BUS. J. (Jul. 1, 2008), <https://ccbjournal.com/articles/design-piracy-protection-act-step-forward-copyright-law-or-it-destined-fall-apart-sea> (explaining what the AAFA is, and why they oppose the DPPA).

<sup>114</sup> *Id.*

<sup>115</sup> See generally Anya Jenkins Ferris, *Real Art Calls for Real Legislation: An Argument Against Adoption of the Design Piracy Prohibition Act*, 26 CARDOZO ARTS & ENT. L.J. 559, 574–75 (2008) (discussing why the DPPA should not be passed by Congress to grant greater copyright protection for fashion designs in the United States).

<sup>116</sup> Ederer & Preston, *supra* note 111.

<sup>117</sup> 64 *Best Originality Quotes and Sayings*, ASK IDEAS, <https://www.askideas.com/64-best-originality-quotes-and-sayings/they-say-imitation-is-a-form-of-flattery-but-honey-its-time-to-get-your-own-ideas/> (last visited Oct. 22, 2021).

bright-line rule exists, there will be a lower likelihood for potential lawsuits, with fast fashion brands recognizing that the consequences of copying outweigh the potential benefits. Lack of copyright protection has led to the creation and expansion of fashion law, countless years of damage to the environment by various forms of pollution through chemically intensive processes, and limited employment opportunities and innovation within one of the most creative industries. Intellectual property protection, existing in three main forms, copyright, trademark, and patents, serves the argument that they all have different purposes. Consequently, the availability of one, or even two, of the three forms of protection to the fashion industry is not adequate to serve each situational need a designer may encounter.

A. *Using Varsity Brands to Establish a Bright-Line Rule for Protection*

Plagiarism is widely accepted as an immoral act, but to date that same notion has not been formally applied to copying within the U.S. fashion industry. Though there is no legal recourse for plagiarism, an opportunity for recourse exists when an individual's original work is copied, and enforceable copyright protection exists. If new designers or small brands cannot obtain enforceable copyright protection for their designs, and they are approached with the dilemma of seeing their work copied, they have two choices: focus on creating new designs (subject to the same likelihood of copying) or pursue a timely and costly lawsuit that they have a good chance of losing.<sup>118</sup> The copyright protection obstacles new designers and smaller brands must overcome can be so financially burdensome and timely that these obstacles can naturally put a limit on the future existence of these brands.

The Supreme Court ruling in the *Varsity Brands* case sought to establish a single test for copyright eligibility in place of the previous, contradictory tests applied by the circuit courts and Copyright Office.<sup>119</sup> The Court's decision presented the "imaginative separability" test,<sup>120</sup> which many members of the fashion industry hoped would mitigate the obstacles that new brands and small designers face when seeking to obtain valid copyright protection. But even with the introduction of this test, new designers and small brands in the U.S. fashion industry still face complications when attempting to obtain copyright protection. Many designers and brands still struggle to obtain legally enforceable copyright protection for their designs because the "imaginable separability" test lacks the foundational clarity necessary to provide courts with direction for consistent application.

From the language of the test itself, there is clearly a lot of room for judicial discretion when deciding copyright cases related to the U.S. fashion industry.<sup>121</sup> The language establishes that the decision is left to the courts, rather than the designers

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<sup>118</sup> See Lisa Davidson, *As Fast Fashion Thievery is Making Headlines Again, We Explore the Sorry History of Mega-Brands Ripping off Independent Creatives . . .*, WE HEART (Mar. 25, 2019), <https://www.we-heart.com/2019/03/25/fast-fashion-rip-off-small-designers-creatives/>.

<sup>119</sup> See *supra* note 89.

<sup>120</sup> *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017).

<sup>121</sup> Christopher Buccafusco & Jeanne C. Fromer, *Forgetting Functionality*, 166 U. PA. L. REV. ONLINE 119, 119 (2017); Trenton J. Davis, *A Missed Opportunity: The Supreme Court's New Separability Test in Star Athletica*, 33 BERKELEY TECH. L. J. 1091, 1091–92 (2019).

themselves, to determine if the designs satisfy the two requirements of the test.<sup>122</sup> If the test is interpreted by a court too broadly, there is a risk that general creativity and innovation can actually be hindered by the excessive use of copyright protection. Alternatively, if the test is interpreted by a court too narrowly, there is still a risk that many designers will be left vulnerable to having their designs copied with no legal recourse. Thus, in order to establish consistent copyright protection for small brands and new designers, and limit the currently uncontrolled judicial discretion, a bright-line rule for copyright protection within the U.S. fashion industry must be established.

Puma suing Forever 21 was the first fashion copyright case to follow the *Varsity Brands* decision, and therefore, the first case to potentially put the “imaginative separability” test to use.<sup>123</sup> Though the case ended in a settlement,<sup>124</sup> it indicates that brands are still comfortable with voluntarily copying others’ designs in their entirety and that fast fashion brands continue to believe that they can successfully copy designs with no consequences. Fast fashion brands are likely comfortable taking this risk because they understand the discretion the court has to determine if the “imaginative separability” test is satisfied. With such broad discretion, these brands feel confident in their ability to successfully argue that the design is not protected by copyright, and lawfully they can continue to profit off of other’s ideas. However, if courts adopt a bright-line rule for copyright protection within the U.S. fashion industry, copyists will understand the penalties they will legally face if they choose to copy a competitor who is in possession of valid copyright protection. Ultimately, in order to truly stop the consistent copying of designs within the U.S. fashion industry, establishing a bright-line rule for copyright protection is necessary.

While the Supreme Court provided a narrow and ambiguous holding in *Varsity Brands*, the Court did correctly conclude in favor of *Varsity Brands* by way of its “imaginative separability” test. Though the “imaginative separability” test is ambiguous, it can be used as solid groundwork to develop a more concrete test for copyright protection eligibility. In order to be consistently effective, the “imaginative separability” test needs more specific language as to when and what types of designs are eligible for protection, thus putting limits on the amount of judicial discretion applied to each individual case. Additionally, the bright-line rule should define a specific time frame of protection to firmly establish how long designers’ designs will be protected. Beyond just the minimization of the judicial discretion, new designers and small brands will be able to enter the U.S. fashion industry with confidence that their hard work and designs will stay protected from a ruthless fast fashion world. Without enacted or amended legislation from Congress to protect fashion designs, the creation of a bright-line rule by the Supreme Court will eliminate the dangerous amount of discretion the courts currently have when deciding these cases.

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<sup>122</sup> See Davis, *supra* note 121, at 1091 (“[T]he holding fails to give sufficient guidance on how to apply the test, and raises more questions than it answers.”).

<sup>123</sup> Catherine Holland, Jonathan Hyman, & Loni Morrow, *Puma Treads New Territory Hitting Forever 21 with Copyright Allegations after the Supreme Court’s Star Athletica Decision*, JDSUPRA (Apr. 6, 2017), <https://www.jdsupra.com/legalnews/puma-treads-new-territory-hitting-51095/>.

<sup>124</sup> See Zerbo, *supra* note 107.

B. *The Impact of Lacking Copyright Protection on the National Fashion Industry*

Fashion law emerged as a new field of law in 2008 when Professor Susan Scafidi created the first fashion law course in an American law school.<sup>125</sup> Two years later, in 2010, Professor Scafidi established The Fashion Law Institute.<sup>126</sup> The notable increase in the existence of fashion law since the rise of fast fashion innately explains the need for stronger copyright protection for fashion designs. Speaking about the importance of fashion law, and the true cost of being copied as a young designer, Scafidi stated that “often customers don’t even know that they’re buying copies, because they have never seen [or heard of] the emerging designers whose work has been stolen.”<sup>127</sup> Additionally, new designers are often not aware of all their legal rights or the processes required to obtain protection.<sup>128</sup> In the United States, where legislation does not explicitly extend copyright protection to cover fashion designs, the need for experienced fashion lawyers is imperative.

Following the *Varsity Brands* case, which intended to clarify the general applicability of copyright protection within the U.S. fashion industry, there have been numerous lawsuits by designers in attempt to regain possession of their original designs.<sup>129</sup> The current state of the law and the “imaginative separability” test

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<sup>125</sup> *About*, FASHION L. INST., <https://fashionlawinstitute.com/about> (last visited Nov. 29, 2021) (introducing and interviewing Professor Susan Scafidi, the founder of The Fashion Law Institute).

<sup>126</sup> Obi Anyanwu, *Fordham University Announces First Fashion Law Degree Program*, FASHIONNETWORK (June 24, 2015), <https://www.fashionnetwork.com/news/Fordham-university-announces-first-fashion-law-degree-program,543051.html>.

<sup>127</sup> Helena Pike, *The Copycat Economy*, BUS. OF FASHION (Mar. 14, 2016), <https://www.businessoffashion.com/community/voices/discussions/what-is-the-real-cost-of-copycats/fashions-copycat-economy> (showing image examples of knockoffs made from 2015 and 2016); see *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Cts., the Internet & Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 78–85 (2006) (statement by Susan Scafidi, Professor, Fordham Law School) (distinguishing clothing as useful articles that cover the body from fashion, a form of creative artistic expression).

<sup>128</sup> Rebecca May Johnson, *Role Call: Susan Scafidi, Professor of Fashion Law*, BUS. OF FASHION (Feb. 19, 2015), <https://www.businessoffashion.com/articles/workplace-talent/role-call-susan-scafidi-lawyer> (explaining the foundation of Fashion Law and the importance of creating accessibility to legal education possible to people within the fashion industry).

<sup>129</sup> See Jacoby, *supra* note 10; Julie Zerbo, *Versace is Suing Fashion Nova for “Brazenly” Copying its Designs, Infringing its Trademarks*, FASHION L. (Nov. 26, 2019), <https://www.thefashionlaw.com/versace-is-suing-fashion-nova-for-brazenly-copying-its-designs/>; Julie Zerbo, *Mara Hoffman Files Suit Against Notorious Copycat Forever 21 – Again*, FASHION L. (June 3, 2017), <https://www.thefashionlaw.com/mara-hoffman-files-suit-against-notorious-copycat-forever-21-again/>; Thomas Barrabi, *Designer Sues Nike, Michael Jordan for Copyright Infringement Over Alleged Stolen Logo*, FOX BUS. (July 1, 2020), <https://www.foxbusiness.com/retail/designer-rocco-giordano-nike-michael-jordan-lawsuit-logo>; Barbara Grzincic, *9th Circuit Revives Lace Pattern Copyright Cases Against H&M, Others*, REUTERS LEGAL (Apr. 24, 2019), <https://1.next.westlaw.com/Document/Ib262630066ef11e9967b915c1fd9eb48/View/FullText>.

highlight the importance of lawyers who understand both fashion law and intellectual property law.<sup>130</sup> Especially without a bright-line rule, designers will depend on their lawyers (if they can afford counsel) to argue that their designs fit within the ambiguous guidelines of the “imaginative separability” test in order to hopefully win their case and receive protection for their designs.

Fast fashion brands have capitalized on the lax copyright protection granted to United States designers for their designs, creating a strenuous uphill battle for success for new designers and small brands.<sup>131</sup> In 2016, designer Tuesday Bassen accused fast fashion mogul Zara of stealing her designs, and Zara’s response spoke to the heart of the copyright problem: big fast fashion brands know they can get away with stealing the designs and face little to no repercussions.<sup>132</sup> In a spiteful reply to copyright infringement claims, Zara rejected the notion of stealing the ideas simply on the grounds that Bassen was not a famous enough designer to have her work stolen.<sup>133</sup> When Zara responded, “We reject your claims . . . the lack of distinctiveness of your client’s purported designs makes it hard to see how a significant part of the population anywhere in the world would associate the designs with Tuesday Bassen,” it was a slap in the face for a designer who put years of money, time, and dreams into creating a brand.<sup>134</sup>

Designer Adam Kurtz also had his designs stolen by Zara, this time through a subsidiary company called Bershka. Understanding the unlikely success of a lawsuit, Kurtz took a new approach to bring awareness to the difficulties designers face.<sup>135</sup>

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html?transitionType=SearchItem&contextData=(sc.Search); Ross Todd, *H&M Gets Another Shot at Challenging Validity of Pattern Copyright*, THE RECORDER (May 29, 2020), <https://www.law.com/therecorder/2020/05/29/hm-gets-another-shot-at-challenging-validity-of-pattern-copyright/>.

<sup>130</sup> See Steff Yotka, *What the Supreme Court's First Ruling on Fashion Copyrights Means for the Runway*, VOGUE (Mar. 23, 2017), <https://www.vogue.com/article/supreme-court-star-athletica-varsity-brands-ruling-fashion-industry>.

<sup>131</sup> See Chavie Lieber, *Why the \$600 Billion Counterfeit Industry is Still Horrible for Fashion*, RACKED (Dec. 1, 2014), <https://www.racked.com/2014/12/1/7566859/counterfeit-fashion-goods-products-museum-exhibit> (quoting the assistant curator of the New York City Fashion Institute of Technology, Arielle Elia, explaining that copying hurts the industry and makes it difficult for new designers to successfully emerge).

<sup>132</sup> Mallory Schlossberg, *The Top Retailer in the World Has a Dirty Little Secret—And It's Spiraling Out of Control*, BUS. INSIDER (July 26, 2016), <https://www.businessinsider.com/zara-accused-of-copying-artists-and-designers-2016-7>; see Urbach & Soussa, *supra* note 113.

<sup>133</sup> Bethany Biron, *Zara Comes Under Fire for Allegedly Stealing Artist's Designs*, GLOSSY (July 20, 2016), <https://www.glossy.co/platform-effect/zara-comes-under-fire-for-allegedly-stealing-artists-designs/>.

<sup>134</sup> *Id.*

<sup>135</sup> Thea de Gallier, *Independent Artists Claim High Street Chain Zara is Copying Their Designs*, BBC NEWS (July 26, 2016), <https://www.bbc.com/news/newsbeat-36884063>; see Dayna Evans, *Talking with Tuesday Bassen About Her David Vs. Goliath Battle Against Zara*, THE CUT (July 29, 2016), <https://www.thecut.com/2016/07/tuesday-bassen-on-her-work-being-copied-by-zara.html>.

Kurtz launched a website to expose fashion theft and educate consumers on the lack of design protection within the United States.<sup>136</sup> Showcasing original designs, side by side to their copies, Kurtz encouraged consumers to purchase the original works, rather than the fast fashion copies.<sup>137</sup> Without established copyright protection eligibility, new designers and small brands know they have minimal options to put up a fight against big name fast fashion competitors. In order to foster the creation and success of these new designers within the United States, it is essential to create limitations on fast fashion's ability to copy through a bright-line rule for copyright protection.

One of the main arguments against expanding intellectual property protection in the U.S. fashion industry to include copyright protection is that there are other avenues of protection available through trademarks, trade dress, or patents.<sup>138</sup> With multiple alternative forms of intellectual property protection available, many do not see the need for a bright-line rule including copyright protection. Though this seems like a logical explanation, there are inherent limitations that exist within these alternate forms of intellectual property protection.

In order for a designer to obtain a trademark, a party must prove "acquired distinctiveness," which is a functional equivalent of consumer recognition.<sup>139</sup> This form of protection does not protect the entire article of clothing, but rather just the name, logo, or slogan for a particular brand.<sup>140</sup> The goal of trademark protection is to avoid consumer confusion as to the identity of the seller.<sup>141</sup> As a result, this form of protection is most valuable to a brand that is well-known and contains well-recognized logos.<sup>142</sup> Additionally, this protection is inapplicable to solve the problem of copyists

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<sup>136</sup> de Gallier, *supra* note 135.

<sup>137</sup> *Id.*

<sup>138</sup> See Nicole Giambarrese, Comment, *The Look for Less: A Survey of Intellectual Property Protections in the Fashion Industry*, 26 *TOURO L. REV.* 243, 247–77 (2010) (discussing the various levels of intellectual property protection afforded to the fashion industry and the differences between them).

<sup>139</sup> Mary Hanbury, *Zara and Forever 21 Have a Dirty Little Secret*, *BUS. INSIDER* (Mar. 6, 2018, 8:45 AM), <https://www.businessinsider.com/zara-forever-21-fast-fashion-full-of-copycats-2018-3>; see 15 U.S.C. § 1052(e)–(f) (discussing that descriptive marks are not eligible for trademark protection and that distinctive marks are eligible for trademark protection); see also *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790–91 (5th Cir. 1983) (discussing the four classifications of potential trademarks and the inherent rights of each).

<sup>140</sup> Brette Sember, *Should You Trademark Your Name Separate from the Slogan?*, *LEGALZOOM*, <https://info.legalzoom.com/article/should-you-trademark-your-name-separate-slogan> (last visited Oct. 19, 2021).

<sup>141</sup> U.S. Patent and Trademark Off., *Protecting Your Trademark: Enhancing Your Rights Through Federal Registration* (Feb. 15, 2020), [https://www.uspto.gov/sites/default/files/BasicFacts\\_1.pdf](https://www.uspto.gov/sites/default/files/BasicFacts_1.pdf).

<sup>142</sup> See Lisa C. Johnson, *The Value of a Trademark: What it Can Do for Your Business*, *LEGALZOOM* (July 7, 2017), <https://www.legalzoom.com/articles/the-value-of-a-trademark-what-it-can-do-for-your-business>.

because trademark protection does not extend to protect the designer's actual designs.<sup>143</sup>

Trade dress is another protection available to designers, and it protects the packaging or product configuration.<sup>144</sup> To register for a trade dress to protect product configuration, there must be proof of a secondary meaning.<sup>145</sup> The limitation of trade dress is similar to that of trademarks; trade dress requires extensive promotion and funding to build up consumer recognition eligible for trade dress protection.<sup>146</sup> A designer may only have a viable trade dress claim if they can articulate that their brand trade dress is inherently distinctive, and that the copied design is likely to cause customer confusion.<sup>147</sup> The most well-known example of trade dress protection granted for product configuration is Christian Louboutin's iconic red-bottom heels.<sup>148</sup> In addition, some famous handbag designers have obtained trade dress protection for woven patterns, such as Bottega Veneta, as well as for overall look, such as Hermès Birkin Bags.<sup>149</sup> In both the case of Louboutin heels and Birkin Bags, there is at least one characteristic of the products that have become synonymous with the brand themselves. For Louboutin, it is the iconic red sole of their heels, whereas for Birkin Bags it is their distinct shape.<sup>150</sup> Ultimately, in order for a product to have a characteristic distinct enough to be protected by trade dress, first the brand must be

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<sup>143</sup> Alex Wickens, *Design Piracy in the United States; Time to Fashion a Remedy*, World Intell. Prop. 55, EARLS CROOME COURT (2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/jwip.12179>.

<sup>144</sup> *Trade Dress*, CORNELL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/trade\\_dress](https://www.law.cornell.edu/wex/trade_dress) (last visited Sept. 28, 2021) (defining trade dress as “[t]he design and shape of the materials in which a product is packaged. Product configuration, the design and shape of the product itself, may also be considered a form of trade dress.”).

<sup>145</sup> Thomas Daly & Drew Wilson, *How to Determine the Best Form of Protection for a Product's Appearance*, WORLD TRADEMARK REV. (Sept. 23, 2020), <https://www.worldtrademarkreview.com/brand-management/how-determine-the-best-form-of-protection-products-appearance>.

<sup>146</sup> Glynn S. Lunney Jr., *The Trade Dress Emperor's New Clothes: Why Trade Dress Does Not Belong on the Principal Register*, 51 HASTINGS L.J. 1131, 1135, 1164 (2000).

<sup>147</sup> Lunney Jr., *supra* note 146, at 2.; *Trade Dress*, JUSTIA, <https://www.justia.com/intellectual-property/trademarks/trade-dress/> (last visited Oct. 29, 2021).

<sup>148</sup> Lauren Effron & Nikki Battiste, *Louboutin Entitled to Protect Signature Red Sole, Court Rules*, ABC NEWS (Sept. 5, 2012, 5:03 PM), <https://abcnews.go.com/Business/louboutin-entitled-protect-signature-red-sole-court-rules/story?id=17163269>; see Anne H. Hocking & Anne Desmousseaux, *Why Louboutin Matters: What Red Soles Teach Us About the Strategy of Trade Dress Protection*, 105 L.J. INT'L TRADEMARK ASS'N 1337, 1338, 1362–64 (2015).

<sup>149</sup> Reifman, *supra* note 69.

<sup>150</sup> Amy L. Wright, *Passion for Fashion: Protecting Your Rights Through Intellectual Property*, TAFT STETTINIUS & HOLLISTER LLP, [https://taftlawpr.blob.core.windows.net/taft/linked\\_documents/0000/1716/Passion\\_for\\_Fashion\\_ChIPs\\_presentation.pdf](https://taftlawpr.blob.core.windows.net/taft/linked_documents/0000/1716/Passion_for_Fashion_ChIPs_presentation.pdf) (last visited Oct. 20, 2021).

built up to a level of undeniable recognition. Therefore, this protection does not exist to prevent the copying of designs, but rather to protect consumers and ensure they know from which source they are purchasing products.

Finally, patent protection seeks to protect novel, non-obvious, designs or ornamentations.<sup>151</sup> Designers looking to obtain patent protection can do so either with a utility patent or a design patent.<sup>152</sup> Utility patents require ideas to be both functional and new.<sup>153</sup> This is an ideal form of protection for designers who seek to protect products such as new high-performance fabrics, for example a new wet suit, or a new jacket clasp with a different working mechanism.<sup>154</sup> Because most often clothing designs are not considered “novel,” they often do not meet the requirements of what utility patents seek to protect.<sup>155</sup>

Design patents can be procured to protect the ornamental designs of functional clothing items, though these patents come with their own obstacles.<sup>156</sup> Design patents protect a narrower scope than utility patents because only certain features can be protected by design patents.<sup>157</sup> If a designer obtains a design patent, complications can still arise with enforcement and calculation of damages if the patent protection only covers a single element of an entire design, or if the copier changes the design just enough to avoid liability. Following the 2016 United States Supreme Court case between Apple and Samsung, design patent infringement claims may be even more difficult to enforce within the U.S. fashion industry. In that case, Apple sued Samsung claiming Samsung had infringed on three of Apple’s design patents for various ornamental features of a cell phone.<sup>158</sup> The Court concluded in favor of Apple that several of the Samsung designed smartphones infringed on Apple’s design patents, but held that depending on the particular facts, the relevant “article of manufacture” could potentially be the entire product infringed upon, or just a portion of the product.<sup>159</sup>

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<sup>151</sup> 35 U.S.C. § 103.

<sup>152</sup> See Sheppard Mullin, *Patent Your Patent Leather: Patent Protection for the Fashion Industry*, FASHION & APPAREL L. BLOG (Jan. 28, 2008), <http://www.fashionapparelweblog.com/2008/01/articlesipbrand-ptection/patent-your-patent-leather-patent-protection-for-the-fashion-industry/> (explaining the differences between design patents and utility patents used within the fashion industry).

<sup>153</sup> *Patent Laws, Regulations, Policies & Procedures: § 1502.01 Definition of a Design*, USPTO (June 25, 2020), <https://www.uspto.gov/web/offices/pac/mpep/s1502.html>.

<sup>154</sup> See Reifman, *supra* note 69.

<sup>155</sup> Note, *The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment*, 127 HARV. L. REV. 995, 998 (2014).

<sup>156</sup> 35 U.S.C. § 171.

<sup>157</sup> See Mullin, *supra* note 152.

<sup>158</sup> *Samsung Elecs. Co., Ltd. v. Apple Inc.*, 137 S. Ct. 429, 433 (2016).

<sup>159</sup> *What’s in Your “Article of Manufacture”?*, JONES DAY (June 2018), <https://www.jonesday.com/files/Publication/790827d9-9a51-4a89-9504->

The Court's 2016 decision established that in design patent infringement cases, plaintiffs are sometimes only able to recover the profits from the infringement that resulted from the sale of the "article of manufacture" where the design is used.<sup>160</sup> As a result, damages may be complex to calculate because courts will have to determine whether the patent protects the entire item or just a component.<sup>161</sup> In terms of fashion, if a court determines a design patent simply covers a part of an article of clothing, it would be difficult to determine the profit that stems from just the part of the article protected, therefore making it difficult to allocate damages. Additionally, design patents can take upwards of eighteen months to obtain,<sup>162</sup> and with the speed capabilities of fast fashion this is not usually a practical solution.

General copyright protection gives an author protection for their lifetime plus an additional 70 years; corporate authors are given an additional 95 years from publishing or 120 years from creation, whichever expires first.<sup>163</sup> One past congressional proposal for copyright protection within the U.S. fashion industry included a detailed time frame for protection afforded to designers who were granted copyright protection.<sup>164</sup> This rejected 2006 congressional proposal suggested a three-year time period for design copyright protection.<sup>165</sup> While this seems like a short and potentially ineffective time period for protection, the rationale behind the idea goes back to the understanding of the fashion cycle and evolution of trends. Most fashion trends are classified as "fads" and their popularity tends to last around only a year.<sup>166</sup> Fads have a history of reappearing around every twenty years.<sup>167</sup> Thus, while a three-year protection for designs seems too short to be meaningful, a developed understanding

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<sup>160</sup> *Samsung*, 137 S. Ct. at 435–36 (determining that the "article of manufacture" in the analysis could refer to the end product sold to a consumer or to a component of that product, rejecting the Federal Circuit's interpretation that the article always must be the infringer's entire product).

<sup>161</sup> Ami Shin & Dara Brown, *Samsung Electronics Co. v. Apple*, CORNELL LEGAL INFO. INST., <https://www.law.cornell.edu/supct/cert/15-777> (last visited Oct. 22, 2021).

<sup>162</sup> 35 U.S.C. § 171; 35 U.S.C. § 122 (1952); *see generally* GUILLERMO C. JIMENEZ & BARBARA KOLSUN, *FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, AND ATTORNEYS* 55–65 (2014); Bradley Knepper & Sheridan Ross, *Provisional Patents: Cost-Effective Protection*, LAW W. COLO., <https://www.sheridanross.com/wp-content/uploads/2018/09/LWC-Bradley-Knepper-Provisional-Patents-Dec-2-13.pdf> (last visited Oct. 14, 2021).

<sup>163</sup> 17 U.S.C. § 302.

<sup>164</sup> *See* Design Piracy Prohibition Act, H.R. 2033, 110th Cong. § 2(c) (2007); Design Piracy Prohibition Act, S. 1957, 110th Cong. § 2(c) (2007).

<sup>165</sup> *See* H.R. 2033; S. 1957.

<sup>166</sup> Stephen Smith, *The Life Cycle of a Fashion Trend*, MEDIUM (Feb. 3, 2017), <https://medium.com/@tradeguide24/the-life-cycle-of-a-fashion-trend-ad2d2c52411>.

<sup>167</sup> *Id.*

of the fashion cycle shows how short-term copyright protection can actually afford designers the security necessary to protect from copyists for the likely duration of the design's popularity.

Opponents fear that copyright protection will create countless legal problems related to copyright infringement when trends come back years later under a new interpretation.<sup>168</sup> This is why the concept of a short time period of protection following design creation has both short-term and long-term benefits. In the short run, designers would be able to protect their new designs from being stolen while those designs are new and popular. In the long-run, designers would be able to establish their own spin on a reoccurring trend years later without facing legal implications. The idea of creating a short time period of copyright protection for fashion designs via legislation or a Supreme Court decision helps demonstrate the value in a bright-line rule for easy application of copyright protection. Not only will designers have clarity on what is protected (by virtue of a clear test to be used by courts), but also for how long their design will be protected.

From the increased prevalence of the field of fashion law to the limitations of the alternate forms of intellectual property protection, the need for a bright-line rule for copyright protection becomes more apparent. Though the idea of general copyright protection can be seen as too expansive and lasting in length, past failed congressional proposals highlight the fashion industry's willingness to compromise on copyright protection for a pre-established term. Having a specified window of protection promotes the success of new designers and small brand designs while the current trends are still relevant, without the risk of copyists running them out of business. Moreover, this protection would allow for future legal variations of designs when trends cycle back into popularity in the years to come. Thus, a bright-line rule for copyright protection promotes filling the gap in intellectual property protection that currently exists within the fashion industry, but also encourages future trend and design evolution.

### C. *The Environmental Impact of the Fashion Industry*

The implications of limited copyright protection within the U.S. fashion industry go beyond just an influence on designers themselves. Fast fashion capitalizes on the fashion industry's limited copyright protection, appealing to consumers who are interested in quantity over quality, and the environment pays the extreme price which is rarely acknowledged.<sup>169</sup> Younger generations tend to be more environmentally conscious, but as consumers, they fail to recognize their frequent garment purchases contribute to the climate crisis as well.<sup>170</sup> Recognized as the second largest polluter in

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<sup>168</sup> U.S. Copyright Off. – Prot. for Fashion Design: Hearing on H.R. 5055 Before the H. Comm. On the Judiciary, 109th Cong. 2 (2006) (statement of the United States Copyright Office before the Subcommittee on Courts, the Internet, and Intellectual Property).

<sup>169</sup> See *Fast Fashion*, supra note 49 (defining “fast fashion” as “the practice of rapidly translating high fashion design trends into low-priced garments and accessories by mass-market retailers at low costs”).

<sup>170</sup> See *Environmental Impact*, THE TRUE COST (June 30, 2015), <https://truecostmovie.com/learn-more/environmental-impact> (discussing the environmental

the world, following only the oil and gas industry, the fashion industry is historically known for being a “dirty” industry.<sup>171</sup> Fast fashion clothing is produced through an expedited production process, and uses materials that have been saturated in some of the toxic chemicals most harmful to the environment.<sup>172</sup> The damage to the environment does not stop following completion of product production, but rather continues through the end-consumer. Whether the consumer’s garment has fallen apart as a result of cheap production, or consumers are enticed by the next immediately available designs, fast fashion products have a final destination in landfills, where they can take 200 years or more to decompose. Thus, a bright-line rule for copyright protection available to designers in the U.S. fashion industry is essential, not only to protect the existence of new and emerging designers, but to also benefit the environment.

The current popularity of fast fashion and demand for the quickly-produced, cheap clothing pushes for expedited globalization.<sup>173</sup> No longer used as a simply utilitarian and useful article, clothing has become a way of life, and to some even an addiction. Fast fashion has revolutionized the way that consumers shop, and by default, the way that consumers frequently dispose “out of style” clothing.<sup>174</sup> Production of a single cotton shirt takes nearly 700 gallons of water, and production of a single pair of jeans takes about 2,000 gallons. Contrary to traditional fashion brands, fast fashion brands have a design-to-retail cycle of little over a month, and they upload between 100 and 4,500 products each day to their websites.<sup>175</sup> Therefore, when fast fashion companies

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impact textile waste creates and explaining that the United States alone contributes more than 11 million tons of textual waste annually).

<sup>171</sup> Nancy Szokan, *The Fashion Industry Tries to Take Responsibility for Its Pollution*, WASH. POST (June 30, 2016), [https://www.washingtonpost.com/national/health-science/the-fashion-industry-tries-to-take-responsibility-for-its-pollution/2016/06/30/11706fa6-3e15-11e6-80bc-d06711fd2125\\_story.html](https://www.washingtonpost.com/national/health-science/the-fashion-industry-tries-to-take-responsibility-for-its-pollution/2016/06/30/11706fa6-3e15-11e6-80bc-d06711fd2125_story.html); James Conca, *Making Climate Change Fashionable—The Garment Industry Takes on Global Warming*, FORBES (Dec. 3, 2015, 6:00 AM), <https://www.forbes.com/sites/jamesconca/2015/12/03/making-climate-change-fashionable-the-garment-industry-takes-on-global-warming/#598a9a6979e4>.

<sup>172</sup> *Toxic Fashion: What Chemicals are Used in Clothing?*, COMPARE ETHICS (Jan. 14, 2021), <https://compareethics.com/chemicals-in-clothing/> (“It is estimated over 8000 synthetic chemicals are used in the fashion manufacturing process, this includes carcinogens and hormone disruptors. Carcinogens are substances that are linked to the formation of cancerous cells. Other harmful materials used include flame retardants, AZO dyes, chromium and formaldehydes.”).

<sup>173</sup> Jahnavi, *Globalized Fashion*, JD INST. OF FASHION TECH. (Jan. 2, 2020), <https://jdinstitute.co/globalized-fashion/> (“[F]ashion trends have become more readily available to consumers all over the world. Globalization has thus changed both the way fashion trends are transmitted and the way the clothes are produced.”).

<sup>174</sup> See Shannon Whitehead, *5 Truths the Fast Fashion Industry Doesn’t Want You to Know*, HUFFINGTON POST (Aug. 19, 2014, 5:02 PM), <http://www.huffingtonpostom/shannon-whitehead/5-truths-the-fast-fashion-b5690575.html>.

<sup>175</sup> Deborah Weinswig, *Fast Fashion Speeding Toward Ultrafast Fashion*, FUNG GLOB. RETAIL & TECH. (May 19, 2017), [https://www.deborahweinswig.com/wp-content/uploads/2017/05/Fast-Fashion-Speeding-Toward-Ultrafast-Fashion-May-19\\_2017-DF.pdf](https://www.deborahweinswig.com/wp-content/uploads/2017/05/Fast-Fashion-Speeding-Toward-Ultrafast-Fashion-May-19_2017-DF.pdf).

continually mass-produce clothing with shorter-than-normal production periods, they drastically contribute to the climate crisis.

While these companies promote cultivation of greener and more sustainable business practices, there is only so much they can alter without changing their business model. Though there has been development in the process of clothing production, such as the use of water-based dyes, this technology is expensive and only works on certain fabrics.<sup>176</sup> Not only does the fashion industry produce the second largest amount of pollution, but it is the second-largest consumer of the world's water supply and producer of ten percent of all of humanity's carbon emissions.<sup>177</sup> For reference, every second the equivalent of one full garbage truck of clothing is burned or dumped into a landfill. The initial appeal of fast fashion is the cheap prices and quick production, but in order to mitigate the toxic environmental results, consumers should look for more environmentally conscious alternatives. Though they typically come with a slightly higher cost, clothing made in countries with stricter environmental regulations and brands that use organic and natural fibers rather than chemically treated fibers are better, more durable alternatives that will remain in consumers closets for longer. In theory, while it sounds good for fast fashion companies to express concern for the environment and explain the procedures they are attempting to implement, their actual practices remain very harmful to the environment.

The entire process related to fashion has an environmental effect. Among the process includes "spinning, dyeing yarn, weaving, finishing and tailoring," all of which use "chemical products, create waste, [and] use up water and energy."<sup>178</sup> Cotton, the most commonly used natural fiber, makes up for approximately 40 percent of clothing.<sup>179</sup> The fashion industry has promoted cotton to be both wholesome and clean, when in reality it is one of the "most chemically dependent crops in the world."<sup>180</sup> Thus, no matter the amount of green technology developed, the price of the technology paired with the mission of fast fashion results in the "greener" technology to have minimal influence. In order to curb the environmental effect of the fashion

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<sup>176</sup> Glynis Sweeney, *Fast Fashion Is the Second Dirtiest Industry in the World, Next to Big Oil*, ECO WATCH (Aug. 17, 2015, 3:15 PM), <https://www.ecowatch.com/fast-fashion-is-the-second-dirtiest-industry-in-the-world-next-to-big--1882083445.html>.

<sup>177</sup> *The Environment Impact of Fast Fashion*, GUILFORD CNTY. (Oct. 28, 2020, 4:31 PM), <https://www.guilfordcountync.gov/Home/Components/News/News/2207/>.

<sup>178</sup> Paulina Książak, *The CSR Challenges in the Clothing Indus.*, 3 J. CORP. RESP. & LEADERSHIP 51, 56–57 (2016); see Elisha Teibel, *Waste Size: The Skinny on the Env't Costs of the Fashion Indus.*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 595, 597 (2019).

<sup>179</sup> SAP BrandVoice, *Can 'Fast Fashion' Be Sustainable?*, FORBES (Nov. 21, 2019), <https://www.forbes.com/sites/sap/2019/11/21/can-fast-fashion-be-sustainable/?sh=17be5d062c9c>; see generally *Cotton & Wool Overview*, U.S. DEP'T AGRIC., ECON. RES. SERV., <https://www.ers.usda.gov/topics/crops/cotton-wool/> (last updated June 25, 2016) ("The United States is the world's third-largest cotton producer and the leading cotton exporter . . . . The U.S. cotton industry accounts for more than \$21 billion in products and services annually . . . .").

<sup>180</sup> Maria Nasta Bittar, *Let's Make Sure There's Water to Quench Our Thirst for Fashion*, SYDNEY ENV'T INST. (Nov. 23, 2017), <https://sei.sydney.edu.au/opinion/lets-make-sure-theres-water-quench-thirst-fashion/>.

industry, fast fashion brands need to focus less on quickly copying and reproducing others' designs and focus more on environmentally conscious innovation and production. The successful nature of fast fashion currently does not lend to these brands making this change on their own. Therefore, by implementing stronger copyright protection availability for designers, fast fashion will be forced to reexamine their current business model.

From 2000 to 2014, the average consumer purchased 60 percent more garments each year, and yet they kept the garments for only half as long.<sup>181</sup> Increasing consumer demand for trendy, yet affordable, clothing naturally results in a shorter lifetime for each garment. Fast fashion brands appear to be producing to meet consumer wants, but it has been highly contested which came first, "the desire for fresh looks at an alarming rate or the industry's top players convincing us that we are behind trends as soon as we see them being worn."<sup>182</sup> Regardless of where the problem began, the fast fashion processes are dangerously resource-and-emissions-intensive.<sup>183</sup> For example, the production of a pair of jeans produces the equivalent amount of greenhouse gases as a car driving over 80 miles.<sup>184</sup> As of 2019, the United Nations Environment Program determined the clothing industry was responsible for around 10 percent of greenhouse gas emissions and consumes more energy than aviation and shipping combined.<sup>185</sup>

While fast fashion brands are to blame for environmentally unconscious production processes, in order to alter production methods utilized by fast fashion brands, the problems attributable to the end consumer must also be addressed. Currently fast fashion brands, such as Zara, thrive on hyper-consumption tendencies.<sup>186</sup> Known and created to be quickly discarded, fast fashion "represent[s] a consumption hysteria that far exceeds human needs and planetary boundaries."<sup>187</sup> The rapid production of new clothing and highlighted new trends leads to clothing reaching a consumer's trash just as quickly as it was produced. Beginning with Zara's

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<sup>181</sup> Nathalie Remy et al., *Style That's Sustainable: A New Fast-Fashion Formula*, MCKINSEY & Co. (Oct. 20, 2016), <https://www.mckinsey.com/business-functions/sustainability/our-insights/style-thats-sustainable-a-new-fast-fashion-formula>.

<sup>182</sup> Audrey Stanton, *What is Fast Fashion, Anyway?*, THE GOOD TRADE (2018), <https://www.thegoodtrade.com/features/what-is-fast-fashion>.

<sup>183</sup> Deborah Drew & Elizabeth Reichart, *By the Numbers: The Economic, Social and Environmental Impacts of 'Fast Fashion'*, GREENBIZ (Jan. 17, 2019), <https://www.greenbiz.com/article/numbers-economic-social-and-environmental-impacts-fast-fashion>.

<sup>184</sup> *Id.*

<sup>185</sup> Samantha Masunaga, *Does Fast Fashion Have to Die for the Environment to Live?*, L.A. TIMES (Nov. 3, 2019, 5:00 AM), <https://www.latimes.com/business/story/2019-11-03/fast-fashion-sustainable>.

<sup>186</sup> Książak, *supra* note 178, at 55.

<sup>187</sup> Mônica Cavalcanti Sá de Abreu, *Perspectives, Drivers, and a Roadmap for Corporate Social Responsibility in the Textile and Clothing Industry*, in TEXTILE SCIENCE AND CLOTHING TECH. 1–22 (Subramanian Senthilkannan Muthu ed., 2014).

bi-weekly delivery of new merchandise, consumer's purchasing tendencies have adapted so much that it is said that there are 52 "micro-seasons" per year within fast fashion<sup>188</sup>—all based on consumer desires to "stay trendy."

While consumers are to blame for continually paying into this industry and purchasing the products, they are incessantly influenced by advertisements and influencers who are paid to promote fast fashion brands and a continuous consumption cycle.<sup>189</sup> Thus, in order to change the rate at which consumers purchase clothing, these fast fashion brands must commit to a change in their business process. The success of fast fashion brands under their current production model means that they are unlikely to alter their model unless there is a stop to their unlimited ability to quickly copy the designs of small brands and new designers.<sup>190</sup> To help protect the environment there must be a decrease in fast fashion consumption, promoted by a change in the fast fashion model, which is only likely to occur with the introduction of a bright-line rule for copyright protection eligibility within the United States.

While there will inevitably always be a price the environment pays for the production of clothing, that is not an excuse to produce in excess. One example of an idea to minimize the environmental impact of fashion is through a circular economy.<sup>191</sup> This model looks to minimize resource consumption, waste production, pollution, and emissions.<sup>192</sup> The four-phase model includes using high-quality materials to minimize the negative impact on the environment, designing durable products, focusing on recycling products and technology, and increasing the use of renewable resources.<sup>193</sup> This model highlights the way that the U.S. fashion industry can limit its carbon footprint. Notable differences to the fast fashion model include the use of high-quality materials and designing durable products.<sup>194</sup> The appeal of fast fashion comes from the quick production and cheap price, in order to encourage quick discarding and frequent purchasing. While this circular economy model is an excellent idea for environmental protection, without copyright protection limiting the presently successful copying capabilities of fast fashion, it is unlikely to be adopted. Therefore, in order to start the conversation about how to minimize the environmental impact of fashion, there first needs to be a bright-line rule established as to when copyright protection extends to fashion designs so that the currently successful quick and continuous copying is halted. Though other designers and clothing manufacturers will still produce waste, that amount can be substantially lessened by limiting fast fashion

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<sup>188</sup> Stanton, *supra* note 182.

<sup>189</sup> Elizabeth Vulaj, *Will Fast Fashion Go Out of Style Soon? How Couture Designers, Celebrities, and Luxury Brands Fighting Back May Change the Future Legal Landscape for Mass Affordable Retailers*, 36 SANTA CLARA HIGH TECH. L.J. 197, 202–03 (2020).

<sup>190</sup> Caro & Martínez-de-Albéniz, *supra* note 48, at 2.

<sup>191</sup> SAP BrandVoice, *supra* note 179.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

from easily copying and consequently limiting the amount of “micro-seasons” that exist at a given time.

By protecting designers with the use of a bright-line rule for copyright protection and naturally altering the existing fast fashion model, the U.S. fashion industry would be able to reduce their environmental impact. Encouraging the existence of small brands and new designers through broader copyright protection will support a more environmentally conscious culture through clothing. Small brands and independent designers work on a made-to-order schedule, focusing on durable, high-quality clothing intended to last.<sup>195</sup> Currently, Zara’s fast fashion model enables it to release approximately 500 new designs per week and produce around 450 million garments annually.<sup>196</sup> As a direct result of no longer being able to automatically copy others, fast fashion brands will be able to curtail their negative influence on the environment. Adapting to a made-to-order production process and lessening mass-production will eliminate the abundance of clothing just hanging on racks. Additionally, rise in popularity and existence of durable clothing over cheap, valueless alternatives will minimize the amount of clothing going to landfills shortly after purchase. Consequently, this will demonstrate that fast fashion brands copying designs is not an accurate reflection of the existing consumer demand for those particular designs, but rather the result of products being so widely available for cheap prices.

A bright-line rule for copyright protection within the U.S. fashion industry would not only promote new designers and small brands’ fashion industry existence but would also benefit the environment. Though it is inconclusive whether consumer demand or producer supply has spurred the popularity of the consistently made-new products by fast fashion, one thing is for certain: the environment is paying the price. To effectively minimize the negative environmental influence of fast fashion, a bright-line rule for copyright protection must be established. A bright-line rule will naturally curb the hyper-consumption hysteria both the consumers and producers have been thriving on and serve as a cultural reset to promote environmentally conscious yet trend-inspired consumption going forward.

#### D. *The Economic Impact of the Fashion Industry*

Just as the fashion industry affects the environment, it affects the national economy as well. The purpose behind copyright law is to protect the creation of new works.<sup>197</sup> Proponents of fast fashion argue the United States economy thrives from the relaxed copyright protection laws for fashion designs within the U.S. fashion industry.<sup>198</sup> One of the strongest arguments against more expansive copyright protection to the U.S. fashion industry is that copying within the industry increases both productivity and

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<sup>195</sup> Anika Kozlowski, *Fast Fashion Lies: Will They Really Change Their Ways in a Climate Crisis?*, CONVERSATION (Aug. 1, 2019, 4:04 PM), <https://theconversation.com/fast-fashion-lies-will-they-really-change-their-ways-in-a-climate-crisis-121033>.

<sup>196</sup> *Id.*

<sup>197</sup> U.S. COPYRIGHT OFF., INFORMATION CIRCULAR 1A, UNITED STATES COPYRIGHT OFFICE: A BRIEF INTRODUCTION AND HISTORY (2005), <https://www.copyright.gov/circs/circ1a.html>.

<sup>198</sup> See Jacqueline Lampasona, *Discrimination Against Fashion Design in Copyright*, 14 J. INT’L BUS. & L. 273, 291 (2015).

revenue.<sup>199</sup> It is said that without copyists, consumers would have to pay more for current styles or high fashion designs.<sup>200</sup> In addition, it is argued that a bright-line rule for copyright protection would hinder the economy because third parties would not be able to use already created content.<sup>201</sup> Here, the ultimate question revolves around the protection itself. Is the goal to protect the fashion designers and their designs, or simply the U.S. fashion industry as a whole and when, if at all, is the environment considered?<sup>202</sup>

Those in favor of limiting the availability of copyright protection for designs generally believe success within the U.S. fashion industry stems from the theory of trickle-down fashion.<sup>203</sup> Trickle-down fashion is the hierarchical process of fashion making its way from high-status buyers to the masses of lower-status consumers.<sup>204</sup> The existence of trickle-down fashion began in the early 1800s when society shared the collective desire to imitate those with wealth and status.<sup>205</sup> Designs were created by the upper class and were then mimicked by the lower class to copy those who had the desired social status and wealth.<sup>206</sup> Until around the twenty-first century, many believed that the world of fashion still predominantly existed under a trickle-down model.<sup>207</sup> Luxury designers produced quarter-annual collections, and New York's

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<sup>199</sup> See Raustiala & Sprigman, *supra* note 18, at 1689; KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY* 3–8 (2012); Brittany West, *A New Look for the Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Protection Act (IDPPA)*, 5 J. BUS. ENTREPRENEURSHIP & L. 58, 69 (2011).

<sup>200</sup> See *Should Fashion be Protected by Copyright Laws?*, FREAKONOMICS BLOG (March 12, 2010, 12:00 PM), <https://freakonomics.com/2010/03/12/should-fashion-be-protected-by-copyright-laws-a-guest-post/>.

<sup>201</sup> *Id.*

<sup>202</sup> See Note, *Should Fashion Design Be Given Copyright Protection?*, MICH. TECH. L. REV. BLOG (Jan. 25, 2013), <http://mtlr.org/2013/01/should-fashion-design-be-given-copyright-protection/>.

<sup>203</sup> Elavia, *supra* note 21, at 10.

<sup>204</sup> *Id.*; See BRANNON & DIVITA, *supra* note 39, at 62–63; Susan Kaiser, *Trickle-Down*, LOVE TOKNOW, <https://fashion-history.lovetoknow.com/fashion-clothing-industry/trickle-down> (last visited Dec. 29, 2021).

<sup>205</sup> See BRANNON & DIVITA, *supra* note 39, at 62–63; see Will Kenton, *Trickle-Down Effect*, INVESTOPEDIA (Jan. 12, 2020), <https://www.investopedia.com/terms/t/trickle-down-effect.asp>; Yhe-Young Lee, *Controversies About American Women's Fashion, 1920-1945: Through the Lens of The New York Times* (2003) (Ph.D. dissertation, Iowa State University) (on file with the Iowa State University Digital Repository, Retrospective Theses and Dissertations).

<sup>206</sup> See BRANNON & DIVITA, *supra* note 39, at 62–63; Mollie Edwards & Makayla Wallace-Tidd, *Trickle-Up Theory: How Digital Culture Is Changing the Way Fashion Trends Develop*, IDEALOG (Sept. 6, 2018), <https://idealogue.co.nz/design/2018/09/trickle-theory-how-digital-culture-changing-way-fashion-trends-develop>.

<sup>207</sup> See BRANNON & DIVITA, *supra* note 39, at 62–63; Raustiala & Springman, *supra* note 18, at 1693–94; Whitney Potter, Comment, *Intellectual Property's Fashion Faux Pas: A Critical*

Fifth Avenue continuously presented the highest fashion, at the highest prices.<sup>208</sup> Smaller labels then picked up the general idea of the style to provide clothes for the masses.<sup>209</sup> Under this model, copying was an essential element along the path to success for many brands and department stores.<sup>210</sup>

Those seeking to halt the expansion of copyright protection often do not realize that the twenty-first century has brought forward a new movement of fashion: the trickle-up effect.<sup>211</sup> Trickle-up fashion works in reverse of that of trickle-down, thanks to the increase in technology and social media. Now, rather than style trends beginning at the top with the upper class and luxury brands, trends and innovation begin with the streetwear of lower-income groups and end with luxury designers basing their collections on these everyday trends.<sup>212</sup> Knowledge of the prevalent role trickle-up fashion plays in the modern fashion industry is part of the understanding of who copyright protection within the U.S. fashion industry *actually* seeks to protect.

The question of why copyright protection is essential begins with the understanding of who is most affected by the lack of copyright protection. Many think the push for copyright protection is to protect the famous brands and fashion conglomerates.<sup>213</sup> This misunderstanding likely results from confusing current fashion trends as part of a trickle-down effect rather than trickle-up. Luxury brands are actually the most well-protected within the fashion industry; their name and likeness are established enough to take advantage of the existing trademark, trade dress, and patent law protection.<sup>214</sup>

The designers who face the largest threat with the lack of copyright protection are the new and independent designers trying to break into the industry, many of whom are a foundation for the trickle-up effect.<sup>215</sup> These designers are less protected because their name and likeness are not as well-established, and therefore they can easily be

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*Look at the Lack of Protection Afforded Apparel Design Under the Current Legal Regime*, 16 INTELL. PROP. L. BULL. 69, 83 (2011) (discussing consumer behavior under the piracy paradox theory).

<sup>208</sup> See generally BRANNON & DIVITA, *supra* note 39, at 62–63; Tina Martin, *Fashion Law Needs Custom Tailored Protection for Designs*, 48 U. BALT. L. REV. 453, 473 (2019).

<sup>209</sup> See BRANNON & DIVITA, *supra* note 39, at 62–63.

<sup>210</sup> See *id.*

<sup>211</sup> See *id.* at 76; Edwards & Wallace-Tidd, *supra* note 206.

<sup>212</sup> See BRANNON & DIVITA, *supra* note 39, at 76.

<sup>213</sup> See generally Godfrey Deeny, *Lauren Fined by Paris Court, and So is Berge*, WOMEN'S WEAR DAILY (May 19, 1994, 12:00 AM), <https://wwd.com/fashion-news/fashion-features/lauren-fined-by-paris-court-so-is-berge-1162425/> (quoting Karl Lagerfeld saying, copying “can be very damaging for small firms, though for a house like Chanel, it means a lot less”).

<sup>214</sup> Nagel, *supra* note 2, at 656. See generally Deeny, *supra* note 213.

<sup>215</sup> Nagel, *supra* note 2, at 656.

ripped off by fast fashion brands as the trends travel in reverse up the hierarchy.<sup>216</sup> These small brands and independent designers face the previously mentioned choice of rapidly having to create and produce new ideas or enter into a long, expensive, and likely unsuccessful lawsuit.<sup>217</sup> The addition of a bright-line rule for copyright protection would allow for more new and emerging designers to enter the market with knowledge of the exact test to be applied in a case regarding copyright protection. Therefore, a bright-line rule for copyright protection within the U.S. fashion industry would encourage a more prosperous national fashion industry by supporting a vast array of new designers and smaller brands.

Innovation is one of the vital keys to success and profitability within the fashion industry. Those against a bright-line rule for copyright protection fear a threat to innovation may result from more expansive protection availability.<sup>218</sup> Encouraging innovative designs that fit within a trend is not the same as taking a design and directly copying it. An exact copy, or a knock-off, is a direct replication of another's innovative design from within a trend, without the addition of any independent creative modifications to the design.<sup>219</sup> One of the main features of a copy is that the consumer is not able to distinguish between the original and the copy.<sup>220</sup> The use of copies takes away from the profitability of the original designers, and when they are unable to receive protection for their designs, their incentive to produce new designs is diminished.<sup>221</sup> As a direct result of a bright-line rule for copyright protection, investment within the U.S. fashion industry would be shifted towards new design innovation for a particular trend, rather than mere copying. The biggest challenge when presenting a bright-line rule for expansive copyright protection to the U.S.

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<sup>216</sup> Zerbo, *supra* note 30.

<sup>217</sup> See Lisa Davidson, *As Fast Fashion Thievery is Making Headlines Again, We Explore the Sorry History of Mega-Brands Ripping off Independent Creatives*. . . , WE HEART (Mar. 25, 2019), <https://www.we-heart.com/2019/03/25/fast-fashion-rip-off-small-designers-creatives/>.

<sup>218</sup> See Alexandra Manfredi, Note, *Haute Copyright: Tailoring Copyright Protection to High-Profile Fashion Designs*, 21 CARDOZO J. INT'L & COMP. L. 111, 152 (2012) ("Although introduction of a new intellectual property protection may inspire an increase in anticompetitive behavior and could have some negative implications, the benefits of this proposed provision would likely outweigh its drawbacks."). See generally Edward Lee, *Copyright-Exempt Nonprofits: A Simple Proposal to Spur Innovation*, 45 ARIZ. ST. L.J. 1433, 1441 (2013) ("[H]ow infringement of copyright is enforced—lead[s] to many potentially great business models being blocked.").

<sup>219</sup> Julie Zerbo, *Hey Fashion, Not Everything That is Similar is "Copied,"* FASHION L. (May 24, 2017), <https://www.thefashionlaw.com/hey-fashion-not-everything-that-is-similar-is-copied/>.

<sup>220</sup> See generally Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And It's Completely Legal*, VOX (Apr. 27, 2018, 7:30 AM), <https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m>.

<sup>221</sup> Elavia, *supra* note 21, at 53 (explaining that if one product is protected, it would provide an incentive for other individuals to think more creatively and create additional new products).

fashion industry is helping those against the protection understand innovation is not harmed by copyright protection, but rather embraced.<sup>222</sup>

While the idea of copying within the fashion industry has been around forever, fast fashion changed our understanding of how copying works. Without adequate copyright protection, consumers support brands that are only surviving by copying other designers or brands, simply because consumers are either not aware the garments are copied or are looking to purchase at the cheapest available price. By providing attainable copyright protection, consumers will be less likely to mindlessly purchase cheaper copies because copies within fast fashion would likely be less prevalent. Fast fashion increased both the speed and scale with which copying is attainable.<sup>223</sup> Sometimes, fast fashion brands capitalize on designs that have reached the market and have shown success in sales, but just as often, fast fashion brands produce designs that beat even the original designer's designs to the market.<sup>224</sup> With their ability for quick and mass reproduction, copyists can both find and target retailers with products consumers have already showed a liking to and have copies on the market before the trend has ended.<sup>225</sup> Fast fashion brands use lower quality materials and have no innovation or design expenses, so their copies are sold for a lower market price to consumers.<sup>226</sup> Naturally, cost-conscious buyers recognize they can get the same product for a lower price than what the original designer is offering and shift their purchasing to fast fashion.<sup>227</sup> In some instances, consumers may not even recognize that they are purchasing a fast fashion copy; fast fashion thrives on copying small or new designers with minimal brand recognition because they are least likely to have any form of intellectual property protection or funds to bring a lawsuit.<sup>228</sup> Therefore, by creating a bright-line rule for copyright protection and increasing the availability

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<sup>222</sup> See WENDY MALEM, CENTRE FOR FASHION ENTERPRISE, INTELLECTUAL PROPERTY IN THE FASHION DESIGN INDUSTRY 12 (2012).

<sup>223</sup> Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 834–35 (2010).

<sup>224</sup> See Martin, *supra* note 208, at 453; Lynsey Blackmon, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 PEPP. L. REV. 107, 112 (2007) (stating that many designers in the fashion industry have voiced their concerns and desires for copyright protection because of this problem).

<sup>225</sup> See Stanton, *supra* note 182.

<sup>226</sup> See *Fast Fashion*, *supra* note 49 (defining “fast fashion” as “the practice of rapidly translating high fashion design trends into low-priced garments and accessories by mass-market retailers at low costs”). See generally Zerbo, *supra* note 6, at 596.

<sup>227</sup> See Vertica Bhardwaj & Ann Fairhurst, *Fast Fashion: Response to Changes in the Fashion Industry*, 20 INT'L REV. RETAIL, DISTRIBUT., & CONSUMER RSCH. 165, 166 (2010) (discussing the buyer's desire to keep up with varying fashion trends and the instant gratification felt by the consumer who finds desired products at cheaper retail stores).

<sup>228</sup> See Hemphill & Suk, *supra* note 51, at 1153 (“The main threat posed by copyists is to innovation by smaller, less established, independent designers who are less protected . . . . Affording design protection would level the playing field with respect to protection from copyists and allow more such designers to enter, create, and be profitable.”).

of legally enforceable copyright protection for fashion designs, many new designers and small brands would be able to halt the vicious copying cycle to which they are currently susceptible.

Though fast fashion brands are known for their quick and cheap copies, this is not the model on which their entire existence depends. Fast fashion finds its success by focusing on trend replication, rapid production, and low-quality materials.<sup>229</sup> An important takeaway from the fast fashion business model is that the ideas of trend replication and frequent assortment changes are not the same as just copying someone else's new emerging designs.<sup>230</sup> Frequent assortment changes are necessary for garments and fashion items to keep up with the current trends, but there is no explicit rule requiring fast fashion brands to take the designs used for their frequent assortment changes from other designers.<sup>231</sup>

A key consideration when expanding copyright protection is understanding that the fast fashion model likely does not need to copy to survive.<sup>232</sup> This means that if designers are protected by a bright-line rule for copyright protection, fast fashion brands will not automatically cease to exist. Rather, fast fashion retailers will be given the option of innovating their processes or accepting their nonexistent fate. Forcing fast fashion brands to innovate will incentivize fast fashion brands to hire, rather than simply rip off, new and independent designers. Additionally, these brands could alter business models to one that is inclusive of more durable products and slower-scaled production. No longer being able to survive on rapidly copying designs, employment opportunities for new and emerging designers would likely expand within fast fashion, giving many new designers a chance to succeed—a chance they may never have otherwise received. Thus, a bright-line rule for copyright protection would not be the ultimate demise for fast fashion brands, but rather would likely lead to increased employment opportunities within the U.S. fashion industry.

A bright-line rule for copyright protection will naturally disarm fast fashion of the hypnotizing trance they currently have on consumers, and thus promote the existence of small brands and the employment of new designers. Acknowledging that a large part of the U.S. fashion industry is based on a trickle-up effect helps to highlight who is most vulnerable when there is no bright-line rule for copyright protection.<sup>233</sup> Not only would a bright-line rule encourage the emergence of new independent designers, but it would also promote consistent innovation and design. By eliminating the ability to solely survive on directly copying others' designs, fast fashion retailers would have to rebrand their model, likely increasing the employment of new designers to focus on

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<sup>229</sup> See Stanton, *supra* note 182; Suzy Hansen, *How Zara Grew into the World's Largest Fashion Retailer*, N.Y. TIMES (Nov. 9, 2012), <https://www.nytimes.com/2012/11/11/magazine/how-zara-grew-into-the-worlds-largest-fashion-retailer.html>.

<sup>230</sup> See Elavia, *supra* note 21, at 12 (“Interpreting a design or trend does not necessarily mean that it will result in an exact copy. Interpretations can be seen as complements or derivatives of current trendy, fashionable items.”).

<sup>231</sup> *Id.*

<sup>232</sup> Hemphill & Suk, *supra* note 51, at 1153.

<sup>233</sup> Nagel, *supra* note 2213, at 656. See generally Deeny, *supra* note 213.

innovation within current trends. Therefore, the development of a bright-line rule providing more expansive copyright protection within the fashion industry would likely benefit, not hinder, the United States economy long-term.

#### IV. CONCLUSION

“The difference between fashion and art is that fashion is art in movement” –  
Carlina Herrera

The evolution of style and fashion throughout history has not been met with the equal implementation of copyright law coverage within the U.S. fashion industry. Failed congressional proposals and cases with contrasting outcomes demonstrate the lack of clarity surrounding when fashion designs are protected by copyright laws. The Supreme Court’s ambiguous holding in *Star Athletica v. Varsity Brands* allows too much discretion to future courts when determining copyright protection eligibility, thus endangering designers to potentially unfavorable and inconsistent decisions. In order to best protect new designers and small brands within the U.S. fashion industry, there needs to be a comprehensive bright-line rule creating explicit standards for accessibility to copyright protection for fashion designs.

The growth of fashion law additionally highlights the need for more detailed copyright protection within the U.S. fashion industry. Without a bright-line rule for copyright protection, fashion lawyers will be of utmost importance to successfully argue cases in favor of new designers and small brands. Even with the addition of a bright-line rule for copyright protection within the U.S. fashion industry, fashion law will be important for new designers. Lawyers with a knowledge of fashion law and intellectual property law will be best able to advise these designers of their legal rights and the requirements for obtaining design protection.

Creating a bright-line rule for copyright protection will not be the automatic demise of fast fashion brands. Rather, those brands will be given the option of amending their current business model to one that is likely more environmentally conscious in order to survive in the evolving fashion industry. Trickle-down and trickle-up theories of fashion help exhibit who is most likely to be injured by the current, ambiguous copyright protection available. Small brands and new designers are among those most likely to be taken advantage of by successful fast fashion companies who notice the early success of designs. These new designers and small brands do not have the brand recognition, finances, or manufacturing speed to compete with popular fast fashion brands. Additionally, the distinct difference between trends and downright copying ensures that trend evolution and innovation will continue within the U.S. fashion industry, even with the creation of a bright-line rule for copyright protection. Thus, in order to promote the continued success and future evolution of fashion design, a bright-line rule must be established and consistently applied to cases regarding copyright protection within the U.S. fashion industry.