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Protecting Fashion Designs: Not Only "What?" but "Who?"

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PROTECTING FASHION DESIGNS: NOT ONLY "WHAT?" BUT "WHO?"

JULIE ZERBO*

"Design piracy can wipe out young careers in a single season. The most severe damage from lack of protection falls upon emerging designers, who every day lose orders, and potentially their businesses, because copyists exploit the loophole in American law."[1]

– *Lazaro Hernandez, Fashion Designer & Co–Founder, Proenza Schouler*

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* Copyright © 2017 Julie Zerbo. The author would like to thank Barbara Kolsun, Benjamin Landry, Jennifer Williams, and Robert A. Destro for their guidance and valuable comments. She would also like to thank her parents, Dr. and Mrs. Joseph Zerbo.

1. *Innovative Design Protection & Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intell. Prop., Competition and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 4 (2011) [hereinafter *Hernandez Statement*] (statement of Lazaro Hernandez, Fashion Designer & Co–Founder, Proenza Schouler).

COLE HAAN LLC, EXHIBIT 2013, Page 2
Top Glory Trading Group Inc. and DP Dream Pairs, Inc. v. Cole Haan LLC, IPR2025-01394

INTRODUCTION

The focus of this paper is on design piracy, the rampant copying of fashion designs by "fast fashion" retailers — those in the business of rapidly manufacturing and selling inexpensive copies of others' original designs — and the most fitting form of protection to shield against such piracy.[2] Due to the structure of intellectual property laws in the United States (copyright law, in particular), such copying often falls within the parameters of legal activity, allowing retailers to engage in the manufacture and sale of fast fashion without consequence.[3]

While both patent and trademark laws provide noteworthy protections for fashion designs, as discussed below, both doctrines contain significant procedural and substantive complications with respect to protecting garments and accessories against blatant fast fashion copying.[4] As a result, scholars and lawmakers, alike, have turned to copyright law in their quest to defend fashion designs from piracy. Copyright law, however, is similarly not without its own insufficiencies.[5] Historically, fashion designs have fallen outside of the scope of copyright protection because — as garments and accessories — they have an "intrinsic utilitarian function,"[6] and copyright law does not protect such useful articles. The underlying policy that drives copyright law in the United States is the encouragement creativity so that the public can benefit. Thus, the doctrine aims to strike a balance between (1) awarding "authors"[7] enough rights to incentivize them to continue to create,[8] (2) making those rights limited enough so that the

2. Julie Zerbo, *Fast Fashion*, FASHION L. (Oct. 3, 2016), http://www.thefashionlaw.com/learn/fast-fashions-green-initiatives-dont-believe-the-hype (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").

3. *See* Nicole Martinez, *How Fast Fashion Retailers Built Billion–Dollar Businesses by Stealing Designs*, ART L.J. (June 18, 2015), http://artlawjournal.com/fast-fashion-retailers-built-billiondollar-businesses-stealing-designs/ (explaining why fashion is not generally protected by copyright law).

4. *See id.* (describing how patent and trademark laws provide only limited protections for fashion designers).

5. *Id.*

6. 17 U.S.C. § 101 (2012); *see also Useful Articles*, U.S. COPYRIGHT OFF., https://www.copyright.gov/register/va-useful.html (last visited May 9, 2017) (defining "useful articles" as those objects which have an "intrinsic utilitarian function" and explicitly stating that "clothing" is an example of "an object having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information").

7. Burrow–Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (defining "author" as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature").

8. Specifically, giving them the ability to control how a work is initially distributed.

public may eventually utilize such creations, and (3) furthering the social benefits that arise from the widespread use of creative works.[9]

This Article asserts that the existing intellectual property protections in the United States fail to adequately protect garments and accessories. While others have written extensively on the subject, none have been able to suggest a viable approach capable of gaining enough traction in Congress to result in adopted legislation. As a result, this Article proposes an alternative that permits a designer to protect the "value–added" to a useful item, while not unduly restricting the freedom of the fashion industry to simultaneously manufacture clothing, and create and sustain trends. Fashion is, after all, largely predicated on the use and reworking of existing design elements and staples. This proposed approach markedly differs from existing literature on this subject, as it calls attention to and places substantial value in the intangible asset of reputation, an element that proves essential to the establishment and maintenance of high fashion and luxury brands.

Part II of this Article speaks to the widespread issue of design piracy and the detriment it poses for the fashion industry, especially emerging design talent. Part III concentrates on where the existing laws fall short of adequately protecting against design piracy. This includes an examination of the concept of useful articles, a key classification in the understanding of copyright protection and the corresponding doctrine of separability. Both of these principles serve as barriers to truly sufficient copyright–specific protection of fashion designs. Part IV analyzes and identifies *exactly* what we should endeavor to protect in terms of fashion designs — namely, the value–added elements of a design, as well as the reputation of designers and design brands — and how such a focus is, in fact, supported by the language of the United States Constitution and the intent of the framers.

Ultimately, Part V considers ways to reconcile the interests of both *what* and *who* we endeavor to protect. It proposes that the focus of such protection should not depend on whether a garment or accessory is useful and separable, and thus, subject to traditional copyright protection. Instead, the focus should resemble a defamation–style analysis, as defamation law's goal of guarding against the tarnishment and/or diminishment of reputation can be applied to address fast fashion retailers' hijacking of brands' design signatures and more broadly, their brand images. By removing the utility and separability inquiries from the equation, we are not only able to

9. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." The underlying policy that drives copyright law in the United States is encouragement of creativity so that the public can ultimately benefit).

formulate more meaningful protection for garments and accessories, but we are able to advance protection that addresses *who* we aim to protect and not merely *what* we strive to protect.

II. FASHION AND THE IMPACT OF DESIGN PIRACY

Based on designs that are shown on the runway each season, fast fashion retailers are able to build enormous businesses that rely on the practice of design piracy.[10] As a result, blatant — yet entirely legal — copies make it to store shelves and e–commerce websites long before the original, authentic designs do and for a tiny fraction of the price.[11] Forever 21, H&M, Zara, Primark, Nasty Gal, ASOS, and Topshop are just a few of the most widely renowned fast fashion retailers, as their business models are based almost entirely on the offering of inexpensive, line–for–line replicas of designs of both established design houses and sought–after emerging design labels, alike.[12] Thus, enabling them to "earn a profit thanks to lower unit costs and the avoided expense of design."[13]

Such piracy commonly comes in the form of retailers replicating some of the most striking and recognizable elements of a designer's creation.[14] Take for instance, Cushnie et Ochs' Spider Halter Dress, a standout look from the New York–based brand's Fall/Winter 2011 collection. Consumers were drawn to that dress for its ornamental design elements, namely, the angled web–like strips of fabric that adorn the chest and ribs portions of the dress. These design elements were uniformly cited in nearly every fashion critic's review of this collection. For instance, writing for Style.com (now Vogue Runway), Alison Baenen, noted: "[e]lastic boning — think thin strips of fabric crisscrossing the back or side of the body — had its origins in elaborate Native American body jewelry; here it made for sexy, organic cutouts on superbly tailored dresses in molten stretch moiré or rich wool crepe."[15]

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10. *See* Teri Agins, *Copy Shops: Fashion Knockoffs Hit Stores Before Originals as Designers*, WALL ST. J., Aug. 8, 1994, at A1.

11. *Id.*

12. *See* C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1172 (2009) (describing how many retailers sell copies of the original design at a lower quality, and profit thanks to lower unit costs and minimal – if any – design expense).

13. *Id.*

14. *See* Nia Porter, *Are High-Fashion Copies Actually Legal?*, RACKED (Aug. 18, 2016, 11:02 AM), https://www.racked.com/2016/8/18/12428004/fast-fashion-copy-sites-legal-knockoff (detailing fast fashion retailers' "spot on" copies of runway designs).

15. Alison Baenen, *Cushnie et Ochs Fall 2011 Ready–to–Wear*, VOGUE (Feb. 12, 2011), http://www.vogue.com/fashion-shows/fall-2011-ready-to-wear/cushnie-et-ochs.

With this in mind, it should come as little surprise that in copying the Cushnie et Ochs dress,[16] ASOS, a British fast fashion giant, focused on and incorporated these key elements in creating a replica version. ASOS's Midi Dress with Cut Out Panels[17] contains the aforementioned design features and placements. These value–added elements were copied specifically to elicit the look and feel of the original design in the minds of consumers.

Figure 1: Comparison Between Cushnie et Ochs dress (left) and ASOS's Midi Dress with Cut Out Panels (right)

Let us consider another example: Loéil.com's Lighter Heeled Mules.[18] The shoe, with its prominent lighter–inspired cylindrical stiletto heel, is a dead–ringer for Paris–based "it" brand Vetements' own Lighter Heeled Mule,[19] which it showed as part of its Spring/Summer 2016 collection to much fanfare, media attention and editorial coverage.

16. *See* Figure 1 (left).
17. *See* Figure 1 (right).
18. *See infra* Figure 2 (right).
19. *See infra* Figure 2 (left).

Figure 2: Comparison Between Vetements' Lighter Heeled Mule (left) and Loéil.com's Lighter Heeled Mules (right).

Another illustration comes from Joseph Altuzarra's Spring/Summer 2015 collection, namely, his latticework leather skirt,[20] which was a noteworthy design in this specific collection.[21] Not long after Altuzarra's runway show, a highlight of the bi-annual New York Fashion Week calendar, Nasty Gal began offering its "Laser Cut Skirt" for sale.[22] The copy bears markedly similar design elements, including, the diamond-shape cut–outs, front slit, and long leather–ribbon waist closure.

Figure 3: Comparison between Joseph Altuzarra's Spring/Summer 2015 latticework leather skirt (left) and Nasty Gal "Laser Cut Skirt" (right).

20. *See* Figure 3 (left).

21. *See* Nicole Phelps, *Altuzarra Spring 2015 Ready-to-Wear*, VOGUE (Sept. 6, 2014), http://www.vogue.com/fashion-shows/spring-2015-ready-to-wear/altuzarra (des cribing the design as having "[f]etish–y leather latticework pieces").

22. *See* Figure 3 (right).

Still yet, another recurring target of design piracy is Proenza Schouler.[23] In the past several years alone, Target, Steve Madden, Nasty Gal, Forever 21, and ASOS have offered versions of the brand's famed PS1 and PS11 handbag styles, two of "the most knocked off designs on the market today."[24] This prompted the label's co–founder, Lazaro Hernandez, to speak out on behalf of one of the recent bills proposing an amendment to the Copyright Act to include *sui generis* protection for fashion designs.[25]

As intellectual property scholars Scott Hemphill and Jeannie Suk aptly noted in their own study of the state of protections for fashion designs, fast–fashion copying is dangerous.[26] It "pulls the direction of innovation toward fashion's status conferral aspects and away from its expressive aspects."[27] Professor Amy Landers echoed this sentiment, writing: "[f]ashion knockoffs present a problem that is not faced in other industries . . . . The early replication of one or a few early designs can be problematic."[28]

The negative effects borne from design piracy extend beyond fast fashion retailers' ability to rapidly manufacture and offer copies for sale at a fraction of the cost. Such tactics also serve to directly undermine the cycle of legitimate fashion design:

> The most striking consequence of low–cost, high–scale, rapid copying is not in beating an original to market, but in the ability to wait and see which designs succeed, and copy only those. Copyists can choose a target after retailers have made their buying decisions, or even after the product reaches stores, and customers have begun to buy. Such copyists can reach market well before the relevant trend has ended.[29]

Furthermore, fast fashion–style copying presents additional adversities. From a designer's perspective, there are two primary issues: (1) the loss of sales and licensing deals that result from widespread copying and (2) the less tangible but potentially even more harmful effect of damage to their brand image as a result of the proliferation of cheap knockoffs, which directly correlates to sales.[30] The following sections will examine these

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23. *About*, PROENZA SCHOULER, https://www.proenzaschouler.com/about/ (last visited May 9, 2017) (describing Proenza Schouler as a New York based womenswear and accessories brand).

24. *Hernandez Statement*, *supra* note 1, at 6.

25. *See generally id.*

26. Hemphill & Suk, *supra* note 12, at 1170.

27. *Id.*

28. Amy L. Landers, *The Anti–Economy of Fashion; An Openwork Approach to Intellectual Property Protection*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 427, 501 (2014).

29. *Id.* at 1171.

30. Distinct from copyright and/or trademark infringing goods and counterfeits, knockoffs, which are defined as unauthorized copies or imitations of a product, are

issues in turn.

A. Loss of Sales and Business Opportunities

The cost of producing a collection and showing it during one of the respective seasonal fashion weeks in the form of a presentation or runway show is very costly.[31] Brands routinely spend at least $100,000 for one season.[32] With these up–front expenses, the subsequent sale of garments is essential to the viability of a brand.

While the overwhelming belief is that low–priced knockoffs have very minimal, if any, effect on the sale of luxury items,[33] this is not entirely correct. Even as Hernandez states:

> Designers are only able to recoup their investments when they later offer their own affordable ready–to–wear lines based on those high end collections. They then can lower the prices at which their designs are sold because they sell more of them. Just like other businesses — it's dependent on volume.[34]

This problem has been compounded in recent years as a result of the downturn in the global economy. For instance, the Great Recession[35] has had significant and enduring effects on the state of fashion, including styling and merchandizing, which impacts consumer buying practices.[36] As Harper's Bazaar journalist Anamaria Wilson wrote in 2008, "[f]inancial woes are putting fashion lovers in a panic. Survive with one big–ticket item, something in between, or a little bit of both."[37] As such, it is no

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legally permissible because they do not make use of legally protected intellectual property.

31. *See* Guy Trebay, *At Marc Jacobs, the Show Before the Show*, N.Y. TIMES (Feb. 16, 2011), http://www.nytimes.com/2011/02/17/fashion/17Curtain.html.

32. *Id.*; *see also Hernandez Statement*, *supra* note 1, at 2 ("Just one of our collections — and we produce 4 collections a year — costs $3.8 million. The cost of a typical show is approximately $320,000.").

33. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1688 (2006) (arguing that pirated designs increase awareness for the original designs and, thus, can have a potentially positive effect on the original, in addition to ensuring the proliferation of trends and innovation in the industry).

34. *Hernandez Statement*, *supra* note 1, at 4.

35. *The Great Recession*, ST. OF WORKING AM., http://stateofworkingamerica.org/great-recession/ (last visited May 9, 2017) (explaining that the Great Recession was a period of economic downturn that lasted from approximately December 2007 to June 2009).

36. Lee Joon–Hawn et. al., *Fast Fashion: Out–of–the–Box Thinking in the Apparel Industry*, SAMSUNG ECON. RES. INST. 3, 6–7 (May 2011) (explaining the recession's impact on fash-ion).

37. Anamaria Wilson, *Gucci or Gas?*, HARPER'S BAZAAR (Aug. 27, 2008), http://www.harpersbazaar.com/fashion/fashion-articles/gucci-or-gas-0908.

longer taboo to mix high fashion and fast fashion, something that represented a significant fashion misstep in prior generations.[38] Consequently, it is not uncommon to see high fashion shoppers dipping their toes in the pool of fast fashion for certain items.[39] Furthermore, consumers have become less loyal to their favorite high fashion brands.[40] Women that once only wore head–to–toe designer looks have branched out by way of more individualized, diversified looks. This results in wardrobes that seamlessly combine both high fashion garments and accessories, with less investment–worthy articles.

In terms of sales, "the entry of a knockoff has an overall negative effect on the financial performance of the original,"[41] because "[t]hey cut into sales."[42] While this was an unpopular and largely unfounded notion as recently as a decade ago, the shift in consumer activity has made it so that the effect on sales is not only well–documented, but can be perceived in two distinct ways. First, there is the issue of substitution, which represents the loss of sales due to individuals buying a knockoff — a Balenciaga copy from Zara in lieu of the real thing, for instance — instead of the original design.[43] Second, there is the loss of sales that "occurs when a design becomes more ubiquitous as a result of the knockoff."[44] Both serve as roadblocks for designers that are either aiming to profit directly from sales of their original designs or to parlay their original designs into more affordable versions.[45]

In terms of the latter, an increasingly popular approach for designers to

38. The stigma that comes with mainstream collections, which had a hand in destroying the appeal of designer Roy Halston Frowick's main collection in the 1980′s, is long gone. Frowick, professionally known as Halston, signed on to do a collection with JC Penney in the 1980′s. When he teamed up with the retailer for a line of affordable dresses in 1983, one of his most celebrated stockists, Bergdorf Goodman, immediately dropped his collection from its store floor for fear that Halston's association with JC Penney would hamper the luxury image of his main collection.

39. *See* Ruth La Ferla, *Zara, Where Insiders Look for an Edge*, N.Y. TIMES (June 4, 2014), https://www.nytimes.com/2014/06/05/fashion/zara-where-insiders-look-for-an-edge.html? (stating that even high fashion shoppers "tap Zara routinely, and repeatedly, for timely, decently priced approximations of the runways' greatest hits").

40. *See* Steve Olenski, *Only One Quarter of American Consumers Are Brand Loyal*, FORBES (Mar. 26, 2012, 8:06 AM), http://www.forbes.com/sites/marketshare/2012/03/26/only-one-quarter-of-american-consumers-are-brand-loyal/.

41. Gil Appel, Barak Libai & Eitan Muller, *The Short and Long-term Impacts of Fashion Knockoffs on Original Items*, MKTG. SCI. INST. (2013), http://www.msi.org/reports/the-short-and-long-term-impacts-of-fashion-knockoffs-on-original-items.

42. Robin Givhan, *The End of 'Gown in 60 Seconds'?*, WASH. POST, Aug. 10, 2007, at C02.

43. *See* Appel et al., *supra* note 41.

44. *Id.*

45. *See generally id.*

profit from their original creations is by partnering with a mass–market retailer, such as Target, J. Crew, the Gap, Uniqlo, and H&M, to produce low–priced collections based on their main line for a more expansive audience.[46] In essence, they partner to create authorized or licensed fast fashion copies.

Widespread design piracy, however, can prove a hindrance to the establishment of such partnerships. This "[d]esign piracy makes it difficult for a designer to move from higher priced fashion to developing affordable renditions for a wider audience. It also makes it impossible to sell collections to stores when the clothes have already been knocked off."[47] This is, in part, because mass–market retailers have far less incentive to pay — oftentimes, large sums[48] — to partner with a designer or design brand if it is already stocking unauthorized copies of that brand, and thereby unofficially benefiting from the association with the brand. For example, if unauthorized replicas of Proenza Schouler's well–known PS1 handbag and garments bearing the brand's design signatures are readily available from third–party manufacturers, a fast fashion retailer, in an effort to keep costs low, is more likely to stock those goods rather than to pay to partner with Proenza Schouler. It would therefore, choose the third–party manufacturer over licensing Proenza Schouler's name and associated intellectual property in furtherance of an official collection.

B. Reputational Harm and Damage to a Brand's Identity

The less tangible, but equally — if not more harmful — issue is the reputational damage that comes about as a result of the saturation (or the appearance of saturation) of the market with copies of a designer's original creations.[49] This is particularly true if the garments and/or accessories are

46. *See* Steff Yotka, *Every H&M Fashion Collaboration, Ranked*, VOGUE (Oct. 19, 2016, 1:06 PM), http://www.vogue.com/article/hm-designer-collaborations-ranked (listing H&M's collaborative projects with high end brands/designers, such as: Chanel's creative director Karl Lagerfeld, former Lanvin creative director Alber Elbaz, Versace, Alexander Wang, Matthew Williamson, Stella McCartney, Balmain, Jimmy Choo, Maison Martin Margiela, Isabel Marant, Marni, and Kenzo); *see also* Kerry Folan, *Target's Collab History: A Timeline*, RACKED (June 25, 2012, 10:30 AM), https ://www.racked.com/2012/6/25/7720279/targets-collab-history-a-timeline (providing a list of brands/designers that collaborated with Target, such as: Missoni, Alexander McQueen, Proenza Schouler, Rodarte, Jason Wu, Jean Paul Gaultier, and Liberty of London).

47. *Hernandez Statement*, *supra* note 1, at 4.

48. *See* Eric Wilson, *A Marriage of Economic Convenience*, N.Y. TIMES (Nov. 16, 2011), http://www.nytimes.com/2011/11/17/fashion/designer-retailer-union-remains-lucrative.html (explaining that designers who have partnered with H&M to license their name and design signatures have been paid approximately one million dollars for such a collaboration).

49. *See* Julie Zerbo, *Fashion in an Industry Filled with Fakes*, FASHION L. (Feb. 11,

of significantly inferior quality, which they most commonly are.[50] In addition to the loss of revenue that results from the sale of knockoffs, design piracy stands to tarnish and/or diminish a brand's reputation and goodwill.[51] This is a major barrier for young designers, in particular, who are working to establish their identity in the marketplace.[52]

When a brand becomes synonymous with mass–market availability in the mind of luxury shoppers, in particular, this can be a death knell for the brand because "in fashion, reputation matters, and overexposure plays a large role in this. It undermines a luxury brand's identity, which is often based on ideals of grandeur and exclusivity, and often leads the discerning consumer to look to another brand that still has its image of exclusivity, and thus, luxury, in check."[53]

As designers work to develop a brand, they become known for signature designs and/or aesthetics, which thereby enable them to stand out in a market filled with talent and similarly situated brands. For instance, Thom Browne, a New York–based menswear designer, is known for the exaggerated and distinct proportions of his namesake suiting.[54]

2015), http://www.thefashionlaw.com/tbt-fashion-in-an-industry-filled-with-fakes (" Not only are brands losing sales to fast fashion retailers, they stand to lose their air of exclusivity as copies are widely available."); *see also* Andrew Roberts, *Less Is More as Vuitton Stays Atop Luxury List in Brands Ranking*, BLOOMBERG (May 20, 2014, 7:01 PM), https://www.bloomberg.com/news/articles/2014-05-20/less-is-more-as-vuitton-stays-top-luxury-brand-in-ranking ("If you lose exclusivity, you lose your luxury status.").

50. *See, e.g.*, Marc Bain, *Burberry Is Suing J.C. Penney for "Inferior Quality" Knockoffs of Its Famous Check Pattern*, QUARTZ (Feb. 10, 2016), https://qz.com /614024/burberry-is-suing-j-c-penney-for-inferior-quality-knockoffs-of-its-famous-check-pattern/ (describing the inferior quality of a knockoff scarf).

51. *See* Givhan, *supra* note 42, at C02.

52. *Hernandez Statement*, *supra* note 1, at 4.

53. Julie Zerbo, *Louis Vuitton and the Danger of Over-Exposure*, FASHION L. (Apr. 30, 2015), http://www.thefashionlaw.com/louis-vuitton-the-danger-of-over-ex posure.

54. Guy Trebay, *Being Thom Browne: His Moment Is Now*, N.Y. TIMES (Feb. 8, 2013), http://www.nytimes.com/2013/02/10/fashion/the-designer-thom-browne-is-in-his-moment.html?pagewanted=all ("An expanse of hairy leg stretched between trouser hem and shoe, an unsettling bit of erogenous peekaboo that is a Thom Browne signature" and "what once looked weird now seems oddly proportionate and correct"); *see also Mary Katrantzou*, BRIT. FASHION COUNCIL, http://www.Britishfashion council.com/designer_profile.aspx?DesignerID=939 (last visited May 9, 2017) (explaining that London–based Mary Katrantzou's name is synonymous with her "hyperrealist aesthetic, bold graphics and industrial jewellery"); Emily Farra, *Monse Fall 2017 Ready-to-Wear*, VOGUE (Feb. 13, 2017), http://www.vogue.com/fashion-shows/fall-2017-ready-to-wear/monse (noting that Monse, the emerging New York–based brainchild of Laura Kim and Fernando Garcia, is known for its sought–after "Monse–isms," which include intricate crafted shirting designs and "twisted tailoring"); Alexander Fury, *A Screw Loose: The Secret of Rei Kawakubo's Signature Look*, INDEP. (June 28, 2013), http://www.independent.co.uk/life-style/fashion/news/a-screw-loose-the-secret-of-rei-kawakubos-signature-look-8679284.html (stating that Rei

When fast fashion retailers flood the market with inexpensively made and very modestly priced garments and accessories that are blatant rip–offs of designers' original garments and accessories — particularly those derived from designers' brand signatures — it creates the appearance of saturation, and thus, accessibility.[55] This thereby, undermines the foundation of high fashion, which is based not only on quality and originality, but exclusivity, as well.[56] This can have a damning effect on a brand's image, and "the dilution of a design can cut into sales, for instance, when a design [falls out of favor] in the industry [because] it becomes too widespread or associated with a less exclusive image."[57]

III. WHY EXISTING LAW IS NOT ENOUGH

Existing forms of intellectual property in the U.S. fall short in protecting fashion designs in large part because they prove either to be substantively or procedurally challenging. A brief review of the applicable forms of intellectual property that exist in the U.S. — beginning with trademark and patent law, followed by a more in–depth examination on copyright law — demonstrates that these doctrines fail to provide adequate protection for garments and accessories.

A. Trademark and Trade Dress

Trademark protection generally extends to "any word, name, symbol, or device, or any combination [used] to identify and distinguish goods, including a unique product, from those manufactured or sold by others and

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Kawakubo, the mastermind behind Comme des Garçons, has been recognized for the distress and decay of her clothing. Some of her earliest designs included "random holes in the garments . . . the fabrics were creased and rumpled, felted, with seams exposed. Some had raw–edged panels peeling away").

55. *See* Julie Zerbo, *Is the Internet Era Slowly Killing High Fashion?*, FASHION L. (May 8, 2014) [hereinafter Zerbo, *Internet Era*], http://www.thefashionlaw.com/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").

56. *See id.*; *see also* Deepti Chaudhary, *We Strengthen Ties by Selling a Dream: Fendi CEO*, FORBES INDIA (Nov. 12, 2014), http://forbesindia.com/article/best-things-money-can-buy/we-strengthen-ties-by-selling-a-dream-fendi-ceo/38971/1#ixzz3JYmjEr9h ("At Fendi, we are constantly trying to strengthen our ties with the audience by selling a dream, selling a lifestyle, and offering our customers a luxurious taste of our products.").

57. Silvia Beltrametti, *Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse Than the Disease? An Analogy with Counterfeiting and A Comparison with the Protection Available in the European Community*, 8 NW. J. TECH. & INTELL. PROP. 147, 160 (2010).

to indicate the source of the goods."[58] This type of protection most commonly extends to a designer or brand's logo or name in accordance with the Lanham Act and state trademark law.[59] However, because this protection is limited to the trademark specimen alone, it is not broad enough to protect the underlying fashion designs, themselves.[60]

Trade dress[61] may, on its face, seem fitting for fashion designs. However, much like classic trademark protection, it is not ideal for the vast majority of designs.[62] In order to be protected as trade dress, a product must entail distinctiveness in the marketplace, either because (1) such distinctiveness is inherent or (2) it results from the development of "secondary meaning" in the minds of consumers.[63] The "secondary meaning" standard is a markedly difficult one to meet, as it requires the expenditure of great amounts of time and resources.[64] For example, the appearance of a Birkin bag — which historic French house Hermès began producing in 1984 and is one of the most famous handbags in history — is an example of a design that embodies the requisite level of secondary meaning and thus, is subject to trade dress protection.[65]

Given the resource–intensive nature of establishing secondary meaning, as is required for trade dress protection, this is an arguably ill–fitting form

58. 15 U.S.C. § 1127 (2012).

59. *See* 15 U.S.C. § 1125; *see also State Trademark Information Links*, USPTO, https://www.uspto.gov/trademarks-getting-started/process-overview/state-trademark-information-links (last modified Jan. 10, 2017) (listing state trademark laws).

60. Martinez, *supra* note 3.

61. *Trade Dress*, CORNELL L. INFO. INST., https://www.law.cornell.edu/wex/trade dress (last visited May 9, 2017) (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"); *see also* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 765 (1992); Am. Greetings Corp. v. Dan–Dee Imports, Inc., 807 F.2d 1136, 1141(3d Cir. 1986); Rose Art Indus., Inc. v. Raymond Geddes & Co., 31 F. Supp. 2d 367 (D.N.J. 1998)).

62. *See generally* Jennifer S. Shultz & Jessica Bruder, *Design Patents and Trade Dress: A Fashion Pairing as Good as Dolce & Gabbana*, FASHION L. BRIEFS (June 30, 2016), http://documents.lexology.com/d0910bb5-5cd6-4430-9907-7ad01c95fdf e. pdf.

63. 15 U.S.C. § 1125(a).

64. In order to claim trade dress infringement in connection with a product's design, one must first establish that the trade dress has obtained "secondary meaning" or "acquired distinctiveness" in the marketplace. In other words, a designer must show that the public associates the product design with the particular producer of the goods or services. This may be established through a showing of a combination of the following six factors: "(1) advertising expenditures, (2) consumer studies linking the mark to a source, (3) unsolicited media coverage of the product, (4) sales success, (5) attempts to plagiarize the mark, and (6) length and exclusivity of the mark's use." (Cartier Inc. v. Sardell Jewelry, Inc, 294 F. App'x 615 (2d Cir. 2008)).

65. *See generally* Hermés Int'l v. Emperia, Inc., No. 2:14–CV–03522-SVW-VBK (C.D. Cal. 2014).

of protection for nearly all but the most established, well–funded design houses.

B. Patent

Patent law provides a significant amount of protection for fashion designs. Design patents, in particular, protect the appearance of an "article of manufacture" that is "new, original and ornamental," such as some garments and accessories.[66] While this form of protection is being increasingly utilized by established brands for their staple products and/or best–selling goods, it is not ideal for most fashion designs.[67] This is primarily because it entails a time–consuming filing and pendency process that is not cohesive with the rapid turnaround time that comes hand–in–hand with the highly seasonal nature of the fashion industry.[68] Within the average patent pendency time of roughly 19.9 months,[69] a womenswear–only fashion brand will have shown seven collections.[70] Moreover, within that year and a half time frame, before the patent is even issued, at least three of the seven collections that were shown on the runway will have been sold in stores and be "so last season," making a patent for anything other than staple items that will be reintroduced after more than one season virtually useless (particularly given that fast fashion retailers tend to beat the original designer item to stores).

Further complicating matters is the fact that design patents entail a costly process.[71] This makes them unattractive and/or unrealistic for the vast majority of design brands, which operate as small businesses.[72]

C. Copyright

On its face, copyright law appears to be an effective doctrine to protect fashion designs. While garments and accessories are not explicitly cited in the list of copyrightable subject matter set out in Section 101 of the

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66. 35 U.S.C. § 171 (2012).

67. *See generally* GUILLERMO C. JIMENEZ & BARBARA KOLSUN, FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, AND ATTORNEYS 55-65 (2d ed. 2014).

68. *See id.* ("Patents are relatively expensive and time–consuming.").

69. Remy Yucel, *Patent Operations Update*, USPTO (May 5, 2016), https:// www .uspto.gov/sites/default/files/documents/20160505_PPAC_Operations_Update.pdf.

70. For instance: Fall/Winter 2017, Pre–Fall 2017, Spring/Summer 2017, Resort 2017, Fall/Winter 2016, and Pre–Fall 2016. *See* Pamela Simmons, *When Do Fashion Seasons Start?*, LEAF, https://www.leaf.tv/articles/when-do-fashion-seasons-start/ (last visited May 9, 2017) (describing the four main fashion seasons).

71. See Gene Quinn, The Cost of Obtaining a Patent in the US, IPWatchdog (Apr. 4, 2015) http://www.ipwatchdog.com/2015/04/04/the-cost-of-obtaining-a-patent-in-the-us/id=56485/ (stating that an "extremely simply" design patent costs between "$5,000 to $7,000").

72. JIMENEZ & KOLSUN, *supra* note 67, at 61.

Copyright Act,[73] this does not preclude them from protection because this list is non–exhaustive.[74] Additionally, case law suggests that fashion designs do, in fact, fall under the umbrella of copyright.[75]

To date, copyright law has provided protection for creative expressions within the realm of fashion, including, but not limited to, "original prints and patterns, unique color arrangements, and novel combinations of elements used on apparel or accessories."[76] In connection with such works, copyright law gives owners "the exclusive right to make copies, prepare derivative works, sell or distribute copies, and display the work publicly."[77]

Problematic, however, is the fact that copyright protection does not extend to useful articles, such as garments and accessories, in their entirety, as copyright law does not protect functionality.[78] Copyright law was "never intended to nor would the Constitution permit them to protect monopolies on useful articles."[79] As a result, separability is a prerequisite to copyright protection for the design of a useful article.[80] In accordance

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73. Works of authorship that fall within the scope of protection of the Copyright Act of 1976 include: "(1) literary works, including computer programs in source code or object code, databases, operating systems programs embedded in ROMS, PROMS, etc., and microcode; (2) musical works and any accompanying words; (3) dramatic works and any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." 17 U.S.C. § 102(a) (2012).

74. H.R. REP. NO. 94–1476, at 51 (1976) ("Section 102 implies neither that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.").

75. *See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 533 (2013) ("[W]ithout some such qualification a copyright holder could prevent a buyer from domestically reselling or even giving away copies of a video game made in Japan, a film made in Germany, or a dress (with a design copyright) made in China, even if the copyright holder has granted permission for the foreign manufacture, importation, and an initial domestic sale of the copy."); *see also* Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1016 (2017) ("We hold that an artistic feature of the design of a useful article [a cheerleading uniform in this case] is eligible for copyright protection.").

76. Oliver Herzfeld, *Protecting Fashion Designs*, FORBES (Jan. 3, 2013, 9:14 AM), https://www.forbes.com/sites/oliverherzfeld/2013/01/03/protecting-fashion-designs/#7462b37bb317.

77. *Copyright Registration for Pictorial, Graphic, and Sculptural Works*, U.S. COPYRIGHT OFF., https://www.copyright.gov/circs/circ40.pdf (last modified Sept. 2015).

78. *See* Herzfeld, *supra* note 76 (explaining that while copyright law provides protection for novel combinations of elements embodied in apparel or accessories, this protection does not extend to the designs themselves).

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

80. *See, e.g.*, MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 2.08[B][3] (2000); *see also* Raymond M. Polakovic, Comment, *Should the Bauhaus Be in the Copyright Doghouse? Rethinking Conceptual Separability*, 64 U. COLO. L. REV. 871, 874 (1993)

with the legislative intent that underlies the Copyright Act:

> The shape of an industrial product may be aesthetically satisfying and valuable, [but] the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically *or conceptually,* can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.[81]

A "useful article" is one that has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[82] This classification is germane, as useful articles[83] are subject to the separability construct that courts use to determine whether the design of a useful article qualifies for copyright protection as a "[p]ictorial, graphic, and sculptural" ("PGS") work.[84]

The PGS work that is protected under Section 101 includes: "two–dimensional and three–dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans."[85] These works are protectable:

> [I]nsofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.[86]

Following therefrom, the corresponding copyright inquiry when a useful article is involved takes the form of a newly–clarified two–step test, as set

("In determining whether a useful article should be copyrightable, the court must decide whether the artistic element of the article is separable from its utilitarian application."). Until very recently, separability was broken into two separate doctrines depending on jurisdiction: physical and conceptual separability. However, this distinction was later eliminated. Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1016 (2017) ("[W]e necessarily abandon the distinction between 'physical' and 'conceptual' separability, which some courts and commentators have adopted based on the Copyright Act's legislative history.").

81. H.R. REP. at 105; S. REP. NO. 94–473, 94th Cong., 1st Sess. 86–87 (1975).

82. 17 U.S.C. § 101 (2012).

83. Copyright: Useful Articles, FL–103, LIBRARY OF CONG. (Dec. 2011) http://www.copyright.gov/fls/fl103.html (explaining that useful articles include: "clothing; automobile bodies; furniture; machinery, including household appliances; dinnerware; and lighting fixtures").

84. *See id.*

85. 17 U.S.C. § 101.

86. *Id.*

forth by the Supreme Court in *Star Athletica, LLC v. Varsity Brands, Inc.*[87] In that case, the Court held that:

> [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.[88]

The doctrine of conceptual separability has strong foundational roots in the Second Circuit, particularly in a string of cases following the enactment of the Copyright Act of 1976, and has since been interpreted by several other circuits.[89] For instance, in 1980, the Second Circuit initially looked to the issue of separability under the Copyright Act in *Kieselstein–Cord v. Accessories by Pearl, Inc.*[90] The court in this case held that two decorative belt buckles were subject to copyright protection.[91] The court followed up this case, which is discussed in more depth below, with *Carol Barnhart Inc. v. Economy Cover Corp.*,[92] in which it applied a variation of its conceptual separability test, and ultimately found that clothing mannequins were not protectable by copyright law.[93]

In terms of Supreme Court treatment of conceptual separability, the Court held in *Mazer v. Stein*[94] that the base design of a lamp, which consisted of statuettes, was protectable by copyright law, despite the utilitarian nature of the lamp, itself.[95] The Court explained that "the use or intended use of the statuettes in lamp bases did not bar their subsequent registration as copyrightable works of art."[96] The Court allowed for their

87. 137 S. Ct. 1002 (2017).

88. *Id.*

89. *See* Inhale, Inc. v. Starbuzz Tobacco, Inc., 755 F.3d 1038 (9th Cir. 2014), *cert. denied*, No. 14–396, 2014 WL 5025796 (U.S. Dec. 8, 2014); Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc., 618 F.3d 417 (4th Cir. 2010); Galiano v. Harrah's Operating Co., 416 F.3d 411 (5th Cir. 2005); Am. Dental Ass'n v. Delta Dental Plans Ass'n, 126 F.3d 977 (7th Cir. 1997); Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663 (3d Cir. 1990); Gay Toys, Inc. v. Buddy L Corp., 703 F.2d 970 (6th Cir. 1983); Norris Indus., Inc. v. Int'l Tel. & Tel. Corp., 696 F.2d 918 (11th Cir. 1983); Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978).

90. 632 F.2d 989 (2d Cir. 1980).

91. *Id.* at 994.

92. 773 F.2d 411 (2d Cir. 1985).

93. *Id.* at 421.

94. 347 U.S. 201 (1954).

95. *Id.* at 214.

96. *Id.*; *see also* Barton R. Keyes, *Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law*, 69 OHIO ST. L.J. 109, 117 (2008).

protection as "works of artistic craftsmanship, in so far as their form, but not their mechanical or utilitarian aspects are concerned."[97]

The less commonly applied standard of physical separability[98] is also worth noting, albeit very briefly. In *Esquire, Inc. v. Ringer*,[99] the court addressed "whether the overall shape of a utilitarian object is an article eligible for copyright protection."[100] Specifically, the case centered on the protectability of the artistic design of lighting fixtures as a whole.[101] The court held that the fixtures contained no elements capable of independent existence as copyrightable works of art apart from their utilitarian aspect.[102] The court explained that the "overall design or configuration of a utilitarian object, even if it is determined by aesthetic as well as functional considerations, is not eligible for copyright."[103] The court differentiated the lighting fixtures at issue from those in *Mazer* because the Mazer "statuettes were undeniably capable of existing as a work of art independent of the utilitarian article into which they were incorporated. And they were clearly a 'feature' segregable from the overall shape of the table lamps."[104]

Looking to an array of fashion–centric cases, in which the separability requirement is applied, is telling of what elements of a design are simply too "utilitarian" to be called "design." Generally speaking, these cases can be divided into two categories: (1) those that provide a thin level of copyright protection and (2) those that fail entirely to provide any copyright protection for the designs at issue.

1. Cases that Provide a Thin Copyright for Fashion Designs

One of the most highly cited and most generously protective cases in the realm of separability is *Kieselstein–Cord*.[105] In this case, a manufacturer of fine jewelry, belt buckles, and leather goods filed a copyright infringement claim, alleging that a knockoff manufacturer was copying its belt buckle design and creating inexpensive knockoffs.[106] The court found that the

97. *Mazer*, 347 U.S. at 212–13 (citing 37 C.F.R. § 202.8 (1949)).

98. Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1016 (2017) ("[W]e necessarily abandon the distinction between 'physical' and 'conceptual' separability, which some courts and commentators have adopted based on the Copyright Act's legislative history.").

99. 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

100. *Id.* at 804.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

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

106. *Id.* at 991.

knockoff manufacturer had been constructing "line–for–line copies . . . made of common metal rather than precious metal" in violation of manufacturer's copyright.[107] The court held that "elements that 'physically or conceptually, can be identified as separable from the utilitarian aspects of' a useful article"[108] are protectable by copyright law. Consequently, the court found that the plaintiff's belt buckles contained "conceptually separable sculptural elements, as apparently have the buckles' wearers who have used them as ornamentation for parts of the body other than the waist,"[109] and that the "primary ornamental aspect of the . . . buckles is conceptually separable from their subsidiary utilitarian function."[110] As a result, the court found that the defendant's near–exact copies of the plaintiff's buckles amounted to copyright infringement.[111] The rest of the belt design, however, did not receive protection.[112]

Additionally, in *Express, LLC v. Fetish Group, Inc.*,[113] the court held that "lace and embroidery accents that were totally irrelevant to the utilitarian functions" of a women's shirt may be subject to a "thin copyright."[114] In that case, Express, an American retail chain, argued for "copyright protection for the decorative details and look of [its] GH268 Tunic as a whole,"[115] but the court ultimately concluded, "the embroidery design is the only aspect of the GH268 Tunic entitled to copyright protection."[116] The court, thereby granted Express much more limited copyright protection in terms of scope than it had hoped for, removing from the scope of protection "the placement of the lace along the hemline, bustline, etc." and protection for the tunic as a whole.[117]

In another case, *Banff Ltd. v. Express, Inc.*,[118] a knitwear manufacturer filed suit against Express, for allegedly infringing the copyright in its Aran fisherman's sweater.[119] In regards to the availability of copyright protection for the cable design on Banff Ltd.'s sweaters, the court held that the single design aspect, itself, was copyright protected (as distinct from

107. *Id.*

108. *Id.* (citing H.R. REP. NO. 1476, at 54–55 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5668).

109. *Id.* at 993.

110. *Id.*

111. *Id.*

112. *Id.*

113. *See generally*, 424 F. Supp. 2d 1211 (C.D. Cal. 2006).

114. *See Id.* at 1216.

115. *Id.* at 1218.

116. *Id.* at 1222.

117. *Id.* at 1221.

118. 921 F. Supp. 1065 (S.D.N.Y. 1995).

119. *Id.* at 1067.

entire sweater), and therefore, Express was liable for infringing upon the copyright.[120]

The most recent treatment of garments in connection with the doctrine of separability comes by way of the Supreme Court. In *Star Athletica*, while the Court explicitly refused to determine whether the specific uniforms at issue are "sufficiently original to qualify for copyright protection,"[121] it did hold that "two–dimensional designs — consisting of various lines, chevrons, and colorful shapes—appearing on the surface of the cheerleading uniforms" are, in fact, protectable by copyright law.[122] As further noted by the Court, such protection extends only to the design created by the "surface designs on a uniform."[123] It does not cover the "shape, cut, or dimensions to the uniforms."[124]

2. *Cases that Fail to Find Separability, and Thus, Rule Out Copyright Protection for Fashion Designs*

In *Jovani Fashion, Ltd. v. Fiesta Fashions*,[125] a manufacturer of special occasion dresses alleged that the decoration of a dress warranted copyright protection.[126] The manufacturer argued that the decoration, itself, did not serve as a useful article because it only contributed to the appearance of the dress.[127] The court disagreed, holding that the "artistic judgment exercised in applying sequins and crystals to a dress's bodice and in using ruched satin at the waist and layers of tulle in the skirt"[128] did not meet the standard for separability required to achieve copyright protection.[129] Instead, the design only served to "enhance the functionality of the dress as clothing for a special occasion,"[130] and "the aesthetic merged with the functional to cover the body in a particularly attractive way for that special occasion."[131] As a result, the court held that the prom dress lacked

120. *Id.*

121. Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1012 n.1 (2017).

122. *Id.* at 1012.

123. *Id.* at 1006.

124. *Id.*

125. 500 F. App'x 42 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1596 (2013), *reh'g denied*, 133 S. Ct. 2821 (2013). Though not a precedential decision, the opinion serves as an indication of how courts may rule on the issue of separability in cases involving fashion designs.

126. *Id.* at 44.

127. *Id.* (finding that "the prom dress at issue merits copyright protection because its design constitutes a combination of features 'that can be identified separately from and are capable of existing independently of, the utilitarian aspects of the article'").

128. *Id.* at 45.

129. *Id.*

130. *Id.*

131. *Id.*

copyrightable elements, and thus, the knockoff manufacturer was not liable for copyright infringement for creating and selling a nearly exact copy.[132]

Similarly, in *Morris v. Buffalo Chips Bootery, Inc.*,[133] the court held that the elements implicit in the design of a vest and a dress, which included "handmade unique leather artwork," were not protectable by copyright law, as they lacked separability.[134] The court stated, "[e]ach and every arguably aesthetic element of [fashion designer Ligia Morris]'s designs plays a utilitarian function in the clothing in which it is embodied."[135] It further held that the fashion designer "failed to specify in any objectively identifiable fashion the copyrightable elements of her designs that are capable of existing independently of the articles of clothing themselves,"[136] which is "fatal" to her copyright claim.[137] Essentially, "the artistic and the functional elements of [Morris]'s designs are inextricably interwoven in the articles of clothing in which they appear"[138] and as a result, they did not amount to articles that could be protected by copyright law.

In *Eliya, Inc. v. Kohl's Department Stores*,[139] a shoe designer claimed copyright infringement based on allegations that a department store copied one of his shoe designs. According to the shoe designer, the original shoe at issue consisted of "patterned stitching on the front and sides of the shoe, a strap with visible stitching, and a sole with a pattern of spots that wraps around the shoe and extends up the back, sides, and front."[140] The court declined to find that the design elements at issue were sufficiently separable from the functional components of the shoe, itself, to warrant copyright protection. The court stated, "[u]nlike a fanciful design on the base of a lamp, or the ornamentation on a belt buckle, the features of the SHOE design described by [the shoe designer] are not purely aesthetic."[141] It continued on to state:

> Removing the strap, stitching, or sole of a shoe would, to some degree, adversely impact a wearer's ability to locomote by foot, either because the shoe would fall off (without a strap), fall apart (without stitching), or provide no protection against the ground (without a sole). Nor could any of the design elements, once removed, be separately sold or exist as an

132. *Id.*
133. 160 F. Supp. 2d 718 (S.D.N.Y. 2001).
134. *Id.* at 721.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. No. 06 Civ 195(GEL), 2006 WL 2645196, at *1 (S.D.N.Y. Sept. 13, 2006).
140. *Id.* at *1.
141. *Id.* at *12.

independent work of art.[142]

Furthermore, the court in *Galiano v. Harrah's Operating Co.*[143] held that garments in their entirety are not subject to copyright protection.[144] In that case, in which a copyright infringement claim centered on the design of uniforms for casino employees, the court held that although "there is little doubt that clothing possesses utilitarian and aesthetic value,"[145] the question of "[h]ow to conduct the conceptual separation is . . . what continues to flummox federal courts."[146] Ultimately, the court applied the "likelihood–of–marketability"[147] standard for garment design, which essentially views a design as conceptually separable if it would have market value on its own. Thus, the court held that absent a showing that the design of casino uniforms was independently marketable, there was no copyright infringement.[148]

In *Poe v. Missing Persons*,[149] a fashion designer argued that a clear plastic bikini filled with crushed rock was conceptual art, not a swimsuit. The court held:

> Nothing in our legal training qualifies us to determine whether the work, entitled, Acquaint No. 5, can be worn as an article of clothing for swimming or any other utilitarian purpose. We are also unable to determine merely by looking at [the fashion designer]'s creation whether a person wearing this object can move, walk, swim, sit, stand, or lie down without unwelcome or unintended exposure.[150]

The court did not decide whether the work in question was or was not protected by copyright.[151] However, it did hold that there was a disputed issue of material fact as to whether the sculptural work in question was a useful article.[152]

From these cases, it can be determined that when garments and accessories are at issue, courts are extremely hesitant to provide copyright protection. For that reason, it is not difficult to see how copyright law, in its current state, is not an entirely sufficient form of protection for the majority of fashion designs.

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142. *Id.* at *11.
143. 416 F.3d 411 (5th Cir. 2005).
144. *Id.* at 419.
145. *Id.* at 417.
146. *Id.* at 419.
147. *Id.* at 421.
148. *Id.*
149. 745 F.2d 1238 (9th Cir. 1984).
150. *Id.* at 1242.
151. *Id.* at 1243.
152. *Id.*

In order to determine whether a useful article, such as a garment or accessory, should fall under the umbrella of copyright protection, a court must decide whether the artistic element(s) of the article is separable from its utilitarian application.[153] Such separability is a prerequisite to copyright protection for the design of a useful article. This is where we routinely experience notable difficulty in terms of considering copyright protection for fashion designs. Under the Copyright Act, there is a prohibition against the protection of utilitarian aspects of clothes that would otherwise amount to copyrightable material.[154] As such, utilitarian items are typically not covered under the copyright regime, but instead, fall under the jurisdiction of patent law. Thus, the challenge, in terms of copyright law, is the absence of a gray area; once an object, such as a dress or a shoe, is classified as useful in nature, that object as a whole will not be granted copyright protection.

IV. NOT ONLY "WHAT?" BUT "WHO?"

As previously explained, existing intellectual property law fails to provide fitting protection for fashion designs. These shortcomings arise from an overarching focus on *what* we would like to protect, in lieu of considering *who* we aim to protect.[155]

While discussions over how best to protect fashion designs are important, they often omit considerations of a more primary inquiry: what *exactly* was intellectual property law, as a whole, intended to protect? Very little, *if any*, of the existing scholarship that focuses on legislation for fashion designs explicitly takes the full extent of this fundamental inquiry into account.

This is undoubtedly a complex issue, especially in the realm of fashion because the exact appeal of a garment or accessory can be difficult to

153. *See* 17 U.S.C. § 101 (2012) ("[T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.").

154. *See* 17 U.S.C. § 101.

155. To date, most scholarship in this realm has been dedicated to discussions of the requisite level of protection – primarily copyright in nature – that should be provided for fashion designs, including the duration of that protection (three years, as opposed to the standard life of the author plus seventy years duration for copyrights), the pleading standards that are appropriate for such lawsuits, and the level of similarity required for copying to constitute infringement. The most recent version of proposed fashion-focused legislation, the Innovative Design Protection Act, requires that the secondary design be "substantially identical" to the original rather than "substantially similar." Such discussions were also carried out in connection with two other relatively recent fashion-related Copyright Act amendment bills, Design Piracy Prohibition Act and Innovative Design Protection and Piracy Prevention Act.

distinctly pinpoint. Nonetheless, this is the core issue in the discussion of legislation and one that simply cannot be left unexplored. In fact, before we can adequately establish pleading and infringement requirements, duration standards, and draft legislation – copyright or otherwise – that is worthy of ratification (as we have not yet been able to accomplish), the dialogue must revolve around identifying and clearly expressing the full extent of what it is that intellectual property law aims to protect.

Dating back to the Statute of Anne,[156] "the first statute of all time to specifically recognize the rights of authors and the foundation of all subsequent legislation on the subject of copyright both [in England] and abroad,"[157] it is clear that creators represent the crux of the intent behind copyright protections. In fact, it has been posited that "the most significant shift in English law was [the Statute of Anne's] recognition of the rights of authors, and not merely those of printers and booksellers."[158]

The preamble of the Statute of Anne takes a marked focus on the author, his rights and the impact of infringement on his livelihood:

> Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books.[159]

Thereafter, and even prior to the ratification of the U.S. Constitution, the state of Massachusetts, in as early as March 1783, enacted legislation, entitled, "[a]n act for the purpose of securing to authors, the exclusive right and benefit of publishing their literary productions for twenty-one years."[160] The preamble of that artist-centric statute reads:

> Whereas, the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness greatly depend on the efforts of learned and ingenious persons, in the various arts and sciences; as the principal encouragement such persons can have, to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry, to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own, than that which is produced by the labour of his mind: therefore, to encourage learned and ingenious persons to write useful books, for the benefit of mankind, be it

156. 8 Ann. 19.
157. *Id.*
158. *Id.*
159. *Id.*
160. *See generally* 1783 Mass. Acts 369.

enacted.[161]

The Intellectual Property Clause of the U.S. Constitution ("IP Clause")[162] followed from this in 1787, granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[163] It is widely accepted that the plain language of the IP Clause indicates that the framers intended Congress to extend protection to creators as a means to an end: "the promotion of science and the useful arts."[164] At the core of copyright protection is creative expression.[165] Hence, while a work, itself, may appear to be at the heart of such protection, the language of the Constitution suggests, instead, that the creator of that work (or the rights holder, if the ownership structure is varied by way of an assignment) and the general public are the more appropriate focal point.[166]

From these early statutes, we can elicit quite a bit about *what* but maybe even more critically, *who* the framers intended to protect. This focus is somewhat intuitive given the subsequent drafting of the Copyright Act of 1909,[167] which established a bundle of rights that vest in the creators of original works of art for a limited duration.[168] It thereby protects the owner against "those who copy or otherwise take and use the form in which the original work was expressed" by the author,[169] and ensures that the work will eventually reside in the public domain.

In enacting the Copyright Act of 1909 and the subsequent Copyright Act of 1976,[170] Congress held that giving artists exclusive rights over their

161. *Id.*

162. U.S. CONST. art. I, § 8, cl. 8.

163. *Id.*; *see also* Goldstein v. California, 412 U.S. 546, 561 (1973) (interpreting the term "writings" to include "any physical rendering of the fruits of creative intellectual or aesthetic labor").

164. U.S. Const. art. I, § 8, cl. 8.

165. *See* Edward L. Carter, *Harmonization of Copyright Law in Response to Technological Change*: *Lessons from Europe About Fair Use and Free Expression*, 30 U. LA VERNE L. REV. 312, 315 (2009).

166. *See generally* U.S. CONST. art. I, § 8, cl. 8.

167. The Copyright Act of 1909 was derived from Article I, Section 8, of the Constitution, with influences from Britain's Statute of Anne, and the earliest copyright legislation in the U.S., the Copyright Act of 1790. *See generally* 17 U.S.C. § 101 *et seq*. (2012).

168. *See id.* § 106 (providing copyright holders with the exclusive right to reproduce, distribute, perform, display, or prepare derivative works of their copyrighted work).

169. *Understanding Copyright and Related Rights*, WORLD INTELL. PROP. ORG. 2, 6, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf (last visited July 7, 2017).

170. 17 U.S.C. § 102(a) (2012) (providing protection for "original works of author-

creations "is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors."[171] Courts have construed this to include two key goals: (1) to "allow the public access to the products of [the artist's] genius after the limited period of exclusive control has expired,"[172] and (2) to reward the owner.[173]

From these dual objectives arises the need to balance the "interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce."[174] In an effort to protect tangible "writings and discoveries," existing and proposed legislation fail to fully encompass the entirety of the legislative intent set forth within the Statute of Anne and subsequent copyright protections. With this language in mind, what we should strive to protect in terms of fashion designs is two–fold: primarily, we should protect specific, original elements that are part of a garment or accessory, and we should also protect the reputation of a brand in connection therewith.

Instead of protecting the underlying design of a simple dress or pair of trousers, it is the additions, alterations, and/or modifications thereto that we are seeking to protect. These value-added elements are the ones that fast fashion copyists identify and ultimately, bank on. Such elements may take the form of an ornate neckline of a dress that ASOS "borrows" from Cushnie et Ochs or a skirt that Nasty Gal copies from Altuzarra.[175] It is an additional element of an otherwise commonplace dress design that is distinctly Cushnie et Ochs' in nature and one to which Cushnie et Ochs' fans and other consumers, alike, are drawn and identify as Cushnie et Ochs.[176]

In addition to protection that extends to the concrete, tangible aspects of a design (the value-added elements that attract consumers to a given garment or accessory), lawmakers need to endeavor to shield the reputations of individual designers and/or design brands from harm. Efforts to protect the "interests of authors and inventors" in connection with the broader, more esoteric elements at play should also be embodied in any proposed legislation. This is a truly critical element that has been

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ship fixed in any tangible medium of expression").

171. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). (citing H.R. REP. NO. 60–2222, at 7 (1909)).

172. *Id.*

173. *Id.*

174. *Id.*

175. *See supra* Figures 1 & 3.

176. *See supra* Figure 1.

uniformly excluded from or perhaps, more accurately, not considered in, discussions of proposed protections for fashion designs to date.

Practically speaking, lawmakers should strive to safeguard a brand's intangible assets, namely, a designer's brand image (and corresponding brand signatures). These intangible assets are the foundations of luxury and high fashion businesses. In the upper echelon of the fashion industry, reputation is largely built upon a brand's ability to be a purveyor of garments and/or accessories that are simultaneously: (1) original and appealing in terms of design; (2) oftentimes limited in quantity (i.e., not as mass produced as fast fashion); (3) existing in a certain price category (i.e., expensive); and (4) demonstrative of a certain caliber in terms of quality.[177]

Designers are the foremost talents in the fashion industry, each bringing distinct abilities and insights to their collections.[178] They are the artists, and the resulting garments and accessories are their creative expressions.[179] It is based in large part on these individuals' skills and unique vantage points that discerning consumers are drawn to and purchase certain garments and accessories.[180]

Jack McCollough and Lazaro Hernandez, for instance, the design duo behind New York–based brand, Proenza Schouler, have been hailed for the "craftsmanship, attention to detail, and relaxed yet refined style"[181] of their garments and accessories. Their collections "draw inspiration from contemporary art and youth culture and feature fine tailoring and custom-developed fabrics."[182] The designers learned these techniques through years of education and training. McCollough spoke of his formal design education, saying, at design school, "they teach you how to put together a collection, draw, drape, and do everything on a technical level."[183] The

177. *See* INFO. RES. MGMT. ASS'N, ADVERTISING AND BRANDING: CONCEPTS, METHODOLOGIES, TOOLS, AND APPLICATIONS ch. 41 (2017) (speaking to consumers' penchant for high fashion due to the level of quality associated with the garments and accessories).

178. Imran Amed, *Why Creative Directors Matter More Than Ever*, BUS. OF FASHION (June 12, 2013), https://www.businessoffashion.com/articles/right-brain-left-brain/why -creative-directors-matter-more-than-ever.

179. Zandra Rhodes & Alice Rawsthorn, *Is Fashion a True Art Form?*, GUARDIAN (July 13, 2003, 10:31 AM), https://www. theguardian.com/artanddesign/2003/jul/13/ art.artsfeatures1 (presenting both sides of the argument about whether fashion is an art form).

180. *Id.*

181. *Brands*, ENTREPRENEURA, https://luciaallende.wordpress.com/categoryfashion-news/ (last visited July 15, 2017).

182. *Id.*

183. Kelsey Garcia, *Proenza Schouler Goes Back to School for the Parsons 2013 Fashion Benefit*, ELLE (May 23, 2013), http://www.elle.com/news/fashion-style/pars ons-fashion-benefit-proenza-schouler.

degree of skill and specificity that the Proenza Schouler duo possesses results in their attention to "the tiniest of details—button sizes, the length of an inseam, fabric finishes."[184]

As discussed above, when a fast fashion retailer copies the design signature and/or specific garments of another brand, the harm is profound; and it is by no means limited to immediate sales. The potential harm extends to the dilution of the brand image and its esteemed position in the hierarchy of the fashion system.[185] This reputation–based consumer perception of a brand and the design talent that sustains the brand are its greatest assets, even if they are intangible ones.

In this way, the appeal of high fashion and/or luxury brands is also based on the image that a brand creates for itself. Brands are built upon dedication to quality and original design, in addition to the use of large–scale, meticulously crafted media and advertising initiatives.[186] Fast fashion retailers select garments and accessories to duplicate and offer for sale based on these unique design elements, as well as the popularity of a brand, in order to attract consumers. This is particularly true given that such retailers tend to boast about their ability to provide "the look for less," which takes the form of copies of well–known and in–demand runway and red carpet looks for a fraction of the price.[187]

Zara, a well-known purveyor of fast fashion garments and accessories, for instance, does not sell a blatant copy of an Altuzarra dress because it is inherently utilitarian; the retailer selects such a dress because of its creative elements, those that are additional to the useful nature of the dress and that can be traced back to Altuzarra. As a result, Zara is banking on the designer's expression of talent, insight and creativity, the exact things we aim to protect with copyright law, as well as on the esteem and widespread popularity of the brand, one that is popular amongst fashion editors and

184. David Amsden, *Gen W: Proenza Schouler*, W (Oct. 1, 2012, 12:00 AM), http://www.wmagazine.com/fashion/2012/10/proenza-schouler-10th-anniversary-and-flagship-opening/.

185. *Id.*

186. Jayson DeMers, *The Top 7 Characteristics of Successful Brands*, FORBES (Nov. 12, 2013, 1:01 PM), https://www.forbes.com/sites/jaysondemers/2013/11/12/the-top-7-characteristics-of-successful-brands/2/#2dd90dbb61be; *see also* JEAN – NOEL KAP FERER & VICENT BASTIEN, THE LUXURY STRATEGY: BREAK THE RULES OF MARKETING TO BUILD LUXURY BRANDS (2d ed. 2012) (explaining that the "Luxury Strategy" model aims to create the highest pricing power by leveraging all of a brand's intangible elements, including time, heritage, craftsmanship, handmade products, small series ranges, and prestigious clients, exclusivity, and aspirationality).

187. *See* The Budget Babe, *The Look for Less: Givenchy Fur Slide Sandals*, BUDGET BABE (May 1, 2017, 8:01 AM), http://www.thebudgetbabe.com/categories/10-The-Look-for-Less (providing an example of how to get a famous fashion trend on a budget).

Hollywood celebrities, alike.

With the critical role that brand image plays in the minds of consumers – at least some of which purchase luxury fashion items because they wish to be associated with a particular brand and the image it presents to society – and considering that copyright law does not provide adequate protection of garments and accessories, it may be more prudent to look beyond the scope of copyright law for sources of protection.

V. DOES THE SOLUTION EXIST IN ANOTHER AREA OF LAW?

Having identified exactly what it is that should be protected — the original elements of a garment or accessory (i.e., the value–added elements), *as well as* the reputation of designers and design brands (which are developed in commerce in much the same way a reputation is bred) — it is clear that intellectual property laws in the United States do not provide appropriate protection. Having said that, lawmakers do not need to eradicate the existing intellectual property doctrines in order to achieve such protection. Because copyright law is rooted in the IP Clause of the Constitution and because that language supports a focus on *who* as opposed to merely *what* we aim to protect, there is a strong parallel between the situation at hand and the tort of defamation. Thus, there may be a way to supplement existing copyright statutory and common laws to embody a sufficient level of protection.

It is worth noting that embodying a defamation–style analysis within the bounds of the existing copyright law, as is permitted by the IP Clause, is logical, especially given the connection between an individual or company's reputation in the marketplace, and the reputation of a designer or brand, as developed via his signature designs and quality of goods. Employing such a construct would enable us to not only protect the original value–added elements of a garment or accessory, but it would also take into account the need to provide protection for a brand's image in connection with such copying. Furthermore, such an approach permits lawmakers to largely remove the hurdles that prevent the adequate protection of fashion designs, namely, the copyright doctrines of utility and separability. From this perspective, it would not be outlandish to liken the case at hand — one in which a fast fashion retailer replicates a design's most salient features for a fraction of the cost and at a substantially lessened quality, while specifically trading on the esteem and appeal of such a brand — to one of slander or libel.

In accordance with the theory of defamation — which serves as an all–encompassing term that covers any statement that hurts an individual's reputation — individuals and entities have a right to not have false

statements made that will damage their reputation.[188] This body of tort law provides redress for "injuries affecting a man's reputation or good name."[189] As such, reputation is held to be intangible property that is protectable by law.[190] Reputation is fostered in an individual's field as a result of efforts and labor, through "the exertion of talent in the learned professions [and] the emoluments acquired by mechanical skill and ingenuity."[191]

Furthermore, reputation is "understood to be a form of 'capital' since it 'creates funds' and the potential for 'patronage and support.'"[192] It plays a central role in the creation and maintenance of a thriving business, and despite its status as an intangible asset, it is a measure of reputation, and/or harm thereto. The various elements of reputation — which include, but are not limited to, "quality, value, and variety of goods"[193] — "connect themselves with credit and character, affixing to them a value, not merely ideal, but capable of pecuniary measurement, and consequently recommending them as the proper objects of legal protection."[194] Consequently, the loss resulting from harm to reputation may be gauged in a manner similar to that of the value of tangible property loss.

With the foregoing in mind, defamation is an apt comparison here for several reasons, but primarily because of what it aims to protect and shield against: reputation and the diminishment thereof or other harm thereto. This is relevant in the context of design piracy, as fast fashion retailers are primarily and very intentionally looking to designers' individual creations and their larger brand signatures, as well as the name and renown associated with their brands as a whole. A retailer is not merely copying an unknown garment originating from an unfamiliar brand. Fast fashion

188. 28 U.S.C. § 4104(1) (2012).

189. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 692 (1986).

190. Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 592 (1997) (explaining that the necessity of protecting "reputation as a property interest" is a longstanding principle, dating back to English common law); *see also* Post, *supra* note 189, at 693 (describing how reputation as a property interest was "subsequently incorporated into domestic law by the American colonial governments via the common law of slander and libel, which is designed to effectuate society's pervasive and strong interest in preventing and redressing attacks upon reputation") (internal quotations and citations omitted).

191. THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMORS xxvi, xxvi (1832).

192. *Id.* at 694.

193. Isabelle Lundmark, Joanna Mainaud & Katarina Sjögren, *The Link Between Consumer Perception and Satisfaction: A Comparative Study of Shopping Malls and City Centres*, LINNAEUS U. (May 30, 2014), https://www.diva-portal.org/ smash/get/ diva2:721747/FULLTEXT01.pdf.

194. Post, *supra* note 189, at 693.

piracy commonly targets well–known, sought–after garments in order to benefit from the proven appeal of the garments, *and* to benefit from the already–established esteem of the brand being targeted.[195]

The copying of a brand's design by a fast fashion retailer proves detrimental both in terms of the loss of sales but also in terms of damage that results from the saturation (or the appearance of saturation) of the market with inferior–quality copies of a designer's original creations. By manufacturing garments and accessories that closely resemble those of another, often much more respected and high quality brand, fast fashion retailers are able to profit from the work and the reputation of that other brand, thereby harming the original designer and diluting the reputation he has built for himself in the luxury fashion sector.

Thus, at issue for us is how to properly balance the protection of a designer or brand's reputation with the protections afforded by the First Amendment, which provides for somewhat expansive freedoms of expression. If we consider the guidance courts have offered in the context of defamation, the answer that courts have given is intent: i.e. the "knowing or reckless disregard of the truth" standard.[196]

Part II of this series will provide a detailed proposal for such a defamation–style copyright analysis.

CONCLUSION

To date, the attempts to shield original fashion design from design piracy by way of *sui generis* copyright law protection have fallen short. Specifically, such proposed legislation fails to explicitly consider what *and* who we aim to protect in the realm of fashion design. As a result, existing approaches to the protection of fashion designs fail to grapple with the problem presented when the invaluable asset of reputation of a designer or design brand — and the necessary element of exclusivity and quality connected therewith — is diminished or tarnished by way of widespread fast fashion–induced piracy.

The existence of the doctrine of defamation provides meaningful support for protection that can be applied to shield value–added elements inherent in original fashion designs from harm without subjecting such works to the copyright theories that make protection difficult to achieve. This alternative provides an opportunity to rethink the aforementioned

195. *See* LOÉIL, https://theloeil.com/ (last visited May 26, 2017), (showing an example of a website that is notorious for offering high fashion knockoffs. Such a business model allows this company to not only benefit from the sale of affordable copies of designer brand goods, but also from the established reputation and established appeal of those brands).

196. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

approaches to protecting fashion designs exactly where they are deficient.