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NOTE

# The Copying of Independent Fashion Designers: Perils and Potential Remedies in a Post–*Star Athletica* World

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**Abstract.** Design piracy is a widespread practice in the fashion industry. Individuals and firms across every level of the industry engage in, and benefit from, the taking of others' designs. The copying of small, independent fashion designers, however, poses a unique and significant problem that has yet to be fully addressed by existing intellectual property laws or attempts at reform. This Note pinpoints and evaluates potential remedies for independent designers whose work is copied without attribution or compensation. It first examines the viability of legal action by such designers in the wake of *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, a recent Supreme Court opinion that strengthened copyright protection for clothing designs. It then examines nonlitigation avenues through which designers may seek recourse. Ultimately, this Note concludes that even though *Star Athletica* has strengthened designers' legal claims, there remain practical barriers to the pursuit of litigation, and independent designers may benefit from strategies such as turning to social media and seeking pro bono legal services. On a broader level, this Note illuminates the notion that fashion should not be relegated to the realm of the frivolous and the feminine: It implicates issues including worker exploitation, racial inequity, and social change, and is worthy of greater intellectual attention.

* J.D. Candidate, Stanford Law School, 2023. This Note would not exist without the generous guidance and feedback of Lisa Ouellette. It also would not exist without the invaluable insights shared by K. Tyson Perez, Kari Fry, and Amy Lehman during our interviews. Thank you also to Mark Lemley, who went out of his way to provide comments; my friends and family, who listened when this Note was merely an incipient idea; and the hardworking editors of the *Stanford Law Review*—especially Sydney Jordan, Spencer Furey, Collin Fredricks, Jenny Portis, Lexie Shah, and Mary-Claire Spurgin. Any mistakes are purely my own.



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## Introduction

Fashion is a powerhouse industry. In 2022, the worldwide apparel market generated approximately $1.53 trillion in global revenue,[1] with U.S. revenues amounting to $312 billion.[2] In 2018, the industry employed over 75 million individuals worldwide and was valued at over $2.5 trillion.[3] Fashion is universal: "Everyone wears clothing and inevitably participates in fashion to some degree."[4]

But fashion is also more than just the clothing a person chooses to wear. It has significant cultural and historical value. The trends of each era "reveal society's values and aspirations"—from the utilitarian, resource-saving designs that proliferated during both World Wars to the norm-breaking patterns and silhouettes of the 1960s.[5]

Relatedly, fashion can be a tool for social change. Civil rights activists in the United States "wore their 'Sunday Best' at protests to demonstrate they were worthy of dignity and respect as they challenged the institutions that kept Black people at the bottom of the social hierarchy."[6] Women in the 1970s used experimental styles—denim, miniskirts with bloomers, pantsuits—to "challenge the idea of what society regarded as a 'feminine' dress."[7] More recently, demonstrators wore knitted pink "pussy hats" during the 2017 Women's March on Washington to protest vulgar comments made by President Donald Trump about his predatory actions toward women.[8] T-shirts

1. Statista, Revenue of the Apparel Market Worldwide from 2014 to 2027 (in Trillion U.S. Dollars) (2022), https://perma.cc/RGX5-AFCV.
2. Statista, Revenue of the Apparel Market Worldwide by Country in 2022 (2023), https://perma.cc/7XPM-Q3NT.
3. *Environmental Sustainability in the Fashion Industry*, GENEVA ENV'T NETWORK, https://perma.cc/4MF7-PSM9 (last updated Mar. 27, 2023).
4. C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1148 (2009). The exception to this statement would be individuals who live in nudist communities. *See, e.g.*, Curiosity, *Welcome to the World's Largest Nudist Colony*, CHI. TRIB. (Jan. 27, 2016, 2:50 PM), https://perma.cc/8SWR-2PED.
5. *See* Bel Jacobs, *A New Way of Living and Dressing*, BBC: THE COLLECTION (Sept. 21, 2020) (quoting London College of Fashion Head of Cultural and Historical Studies Caroline Stevenson), https://perma.cc/2CUT-Q3RK; *see also* Karina Reddy, *1910-1919*, FASHION HIST. TIMELINE, https://perma.cc/NHU8-QP87 (last updated Aug. 18, 2020); Karina Reddy, *1940-1949*, FASHION HIST. TIMELINE, https://perma.cc/A5XA-4XUA (last updated Aug. 18, 2020); Lily Rothman, *How the Fashions of the 1960s Reflected Social Change*, TIME (Nov. 21, 2017, 9:00 AM EST), https://perma.cc/8YDK-XNY3; Karina Reddy, *1960-1969*, FASHION HIST. TIMELINE, https://perma.cc/HM4N-KQU6 (last updated Aug. 18, 2020).
6. Melissa De Witte, *Dress Codes Can Reveal Social Aspirations, Political Ideals, Says Stanford Scholar*, STAN. NEWS (Feb. 10, 2021), https://perma.cc/7PAR-9QNP.
7. Scarlett Newman, *A Brief History of Protest Fashion*, TEEN VOGUE (Nov. 27, 2020), https://perma.cc/2Z3N-PMGZ.
8. *Id.*



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with messages such as "Black Lives Matter" and "We Can't Breathe" have been used to signal support for the ongoing fight against police brutality and systemic racism.[9] And an up-and-coming sector of fashion dubbed "healthwear" is producing garments that are better suited for individuals with disabilities, from shirts that allow for the easy insertion and removal of catheters to gloves made specifically for wheelchair users.[10]

At the same time, the fashion industry is capable of inflicting significant social harm. Environmental damage is one of them: Clothing production is responsible for 10% of global carbon emissions—more than what is created by all international flights and maritime shipping combined.[11] The fashion industry also significantly exacerbates water scarcity in regions around the world[12]: In 2020, it took 3,000 liters of water to produce one cotton shirt and textile dyeing accounted for approximately 20% of wastewater worldwide.[13]

The fashion industry, and in particular, "fast fashion"—clothing that is designed, created, and marketed to be both trendy and cheaply available[14]—has a "human cost" as well.[15] The need for cheap and quick production "contributes to the exploitation of low-wage labor, particularly in the developing world."[16] A recent study of forty companies, including major brands such as H&M, Zara, and Nike, found that "not a single one of these brands paid a living wage to all workers in their supply chain," even after "numerous pledges" to do so.[17] Furthermore, this exploitation disproportionately affects women—who make up approximately 80% of garment workers—and children.[18]

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9. *See id.*

10. *See* Vanessa Friedman, *Fashion's Newest Frontier: The Disabled and the Displaced*, N.Y. TIMES (July 19, 2016) (quoting Care and Wear Founder and Chief Executive Chaitenya Razdan), https://perma.cc/ZU8U-99JS.

11. *Environmental Sustainability in the Fashion Industry*, *supra* note 3.

12. *Id.*

13. Ngan Le, *The Impact of Fast Fashion on the Environment*, PRINCETON STUDENT CLIMATE INITIATIVE (July 20, 2020), https://perma.cc/X3WQ-6RNM.

14. *See Fast Fashion*, MERRIAM-WEBSTER, https://perma.cc/2QQZ-AWY7 (archived Apr. 2, 2023).

15. *Environmental Sustainability in the Fashion Industry*, *supra* note 3.

16. *See* Kal Raustiala & Christopher Jon Sprigman, *Faster Fashion:* The Piracy Paradox *and Its Perils*, 39 CARDOZO ARTS & ENT. L.J. 535, 549 (2021). Notably, Raustiala and Sprigman argue that this problem is not unique to fashion, but rather is endemic in "[a] wide variety of developed-world manufacturing industries [that] utilize cheap labor in the developing world." *Id.*

17. CLEAN CLOTHES CAMPAIGN, OUT OF THE SHADOWS: A SPOTLIGHT ON EXPLOITATION IN THE FASHION INDUSTRY 2 (2020), https://perma.cc/TB3B-AW9M.

18. *Gender: Women Workers Mistreated*, CLEAN CLOTHES CAMPAIGN, https://perma.cc/Y6W5-9QH9 (archived Feb. 1, 2023); *see* Josephine Moulds, *Child Labour in the Fashion Supply Chain: Where, Why and What Can Be Done*, GUARDIAN, https://perma.cc/QD9R-82U5 (archived Feb. 1, 2023).



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Fashion also gives rise to disputes over ownership. Some of these disputes concern allegations of cultural appropriation, wherein "a member of a relatively dominant culture [is accused] of taking a traditional cultural expression and repurposing it in a different context, without authorization, acknowledgment and/or compensation, in a way that causes harm to the traditional cultural expression holder(s)."[19] An oft-cited example of such appropriation is the use of Native American headdresses in costumes or fashion shows.[20]

Another form of ownership dispute takes place when one party copies another's design and passes it off as their own. Otherwise known as "design piracy,"[21] this phenomenon is a longstanding and ubiquitous practice in the fashion industry,[22] made all the easier by the fact that fashion designs have historically been afforded few intellectual property (IP) protections in the United States.[23] While there is disagreement in the literature over the role copying plays in fostering innovation in fashion,[24] it is agreed that copying runs rampant throughout all segments of the industry.[25]

Though each of the aforementioned problems with fashion undoubtedly merits its own line of scholarship, this Note focuses on design piracy in the United States—specifically piracy involving the taking of small, independent designers' work. The designers who suffer from this type of piracy are likely to be women.[26] Many of them are likely people of color.[27] On average, they earn far less than the celebrity designers we see featured prominently in the media.[28] Thus, when an independent designer is copied, they have much more

19. Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property*, WIPO MAG., Aug. 2019, at 9, 9, https://perma.cc/2964-WCBE.

20. Amber Lee, *Homage or Faux Paus: Cultural Appropriation in Fashion Apparel*, CTR. FOR ART L. (June 29, 2020), https://perma.cc/QF3B-BWNG (to locate, select "View the live page").

21. *See generally* Alice Wickens, *Design Piracy in the United States: Time to Fashion a Remedy?*, 24 J. WORLD INTELL. PROP. 55 (2021).

22. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1695-98 (2006).

23. *See* Wickens, *supra* note 21, at 58.

24. *Compare* Raustiala & Sprigman, *supra* note 22, at 1717-33 ("[W]e claim that this low-IP system may paradoxically serve the [fashion] industry's interests better than a high-IP system."), *with* Hemphill & Suk, *supra* note 4, at 1180-84 ("The analysis so far shows that copyists [in fashion] reduce the amount of innovation and distort its direction.").

25. *See* Raustiala & Sprigman, *supra* note 22, at 1714-15; Hemphill & Suk, *supra* note 4, at 1170-71.

26. *See Fashion Designers*, DATA USA, https://perma.cc/72FF-4643 (archived Feb. 3, 2023) (stating that, in 2020, 83% of fashion designers were female).

27. *See id.* (stating that, in 2020, 35.7% of designers were Hispanic or nonwhite).

28. *See Fashion Designers: Summary*, U.S. BUREAU OF LAB. STAT., https://perma.cc/2SEC-3JM3 (archived Feb. 3, 2023) (stating that, in 2021, the median annual wage for fashion designers was $77,450); Charlotte Gush, *Raf Simons Has Finally Been Confirmed as Chief*

*footnote continued on next page*



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to lose than do the Forever 21s and Zaras of the world. This Note argues that such copying is a unique and problematic phenomenon which does not yet have a simple or ideal remedy, but which may be addressed through multiple avenues—not only litigation, but also alternative enforcement mechanisms.

In the background of this discussion lies the assumption that the fashion industry and its issues are important and deserving of attention. This assumption is far from universal. Despite all of its promises and perils, fashion has long been dismissed as unworthy of significant intellectual attention, relegated to the realm of the frivolous and the feminine.[29] In fact, the House Report for the Copyright Act of 1976 explicitly dismissed the possibility of protecting "ladies' dress."[30] This trivialization, I believe, is a serious mistake. As this Note will demonstrate, fashion design piracy implicates important issues such as racial equity, the environment, and moral rights.

The Note proceeds as follows: Part I argues that the copying of independent fashion designers is a widespread phenomenon that raises a number of social and IP considerations. It presents case studies of two real-world designers to illustrate its point. Part II evaluates the potential for victims of copying to seek legal recourse through copyright infringement claims. Specifically, it examines whether the viability of such claims has increased after the Supreme Court's 2017 decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*,[31] which many have viewed as increasing copyright protection for fashion designs. It argues that while at least some in the fashion industry have since used *Star Athletica* to file suit over copied designs, there remain practical barriers to taking legal action, such as cost, that will continue to hinder independent designers. Finally, and in response to the conclusion of the previous Part, Part III evaluates three nontraditional avenues through which designers may seek redress after being copied: social media shaming, pro bono legal services, and the newly established Copyright Claims Board. It concludes that while each avenue has its benefits and limitations, social media shaming can be a particularly effective tactic that approximates at least some of the goals of litigation.

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*Creative Officer at Calvin Klein*, I-D (Sept. 8, 2016), https://perma.cc/NGE4-V757 (noting Raf Simons's $18 million salary).

29. *See* Brief of Fashion Law Institute et al. as Amici Curiae in Support of Respondents at 35, Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017) (No. 15-866), 2016 WL 5349673 [hereinafter Brief of Fashion Law Institute]. The frequent intertwining of these two subjects—that what is feminine is often viewed as frivolous, and vice versa—should itself be the subject of a paper, but it is not my focus here.

30. *See* H.R. REP NO. 94-1476, at 55 (1976).

31. 137 S. Ct. 1002 (2017); *see infra* Part II.A.



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## I. The Copying of Independent Fashion Designers

This Part argues that the copying of independent fashion designers is a longstanding phenomenon that raises a unique set of utilitarian and moral-rights concerns.

### A. Two Cases of Design Piracy

In this Section, I aim to provide a window into the all-too-common experience of having one's work copied by presenting case studies of two independent designers, both of whom had their designs copied by fashion firms. The case studies draw from telephone interviews with the designers, which I conducted in January 2022 for the purposes of this Note. Unless indicated otherwise by a footnote, the information stated in each case study was provided by the designer during their interview.

#### 1. Case study: K. Tyson Perez, HardWear Style[32]

K. Tyson Perez's journey into the fashion industry began when he was a student at Parsons School of Design in New York City. "I wanted to be a full-on designer designing apparel," he told me. "Then, two or three semesters in, I realized that I was into the styling aspect of fashion. Garments, but also accessorizing and creating a . . . look. So I made a shift into fashion styling and completely fell in love with it."

Thus began a fifteen-year career as a stylist. Along the way, Perez started a digital fashion magazine, *UNVOGUE*, which aimed to "buck the system of fashion." As a Black designer, he felt strongly about this mission. "[T]he fashion industry is very white," he explained. "That starts with the editors and the designers, who then decide to use the models . . . and then everything becomes very white."

Eventually, Perez also began making custom pieces to use when styling looks for editorials. Among his first creations were baseball caps with brass letters on them. Whenever Perez posted photographs on Facebook, he would receive comments from people asking where they could buy the hats.

At first, he was resistant to the idea of selling them. "I didn't really want to design for the masses because I knew the hard work and labor that goes into designing[,] [a]nd then for things to . . . not be received [well] . . . it's just very tumultuous," he said. "As a designer, you get your feelings hurt . . . all the time. . . . I saw how the fashion industry worked and how things would get knocked off."

32. Telephone Interview with K. Tyson Perez, Founder & Creative Dir., HardWear Style (Jan. 17, 2022).



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But over time, the demand for Perez's hats grew to the point where he could not ignore it anymore. He began making and selling custom caps, using hardware pieces from vintage stores. They began to do well—he received some press attention, and celebrity stylists were requesting his hats for the likes of Kim Kardashian and Kanye West.

In 2014, Perez encountered a "huge zipper" he had never seen on a hat before. That's when he "decided to wrap it around a hat, just to see what it would look like." After wearing his handmade prototype out in public, he "got a really great reception." Then, people began asking whether the zipper could open and close.

After years of searching, Perez found a manufacturer willing to take on the complicated and expensive process of making his hat, but with a functional zipper. In 2018, he began selling the upgraded hats online under his label, HardWear Style.[33] By this point, he had also loaned out samples to stylists and used the hats to shoot numerous editorials. His design had, in other words, "started making its rounds within the industry."

In December 2020, Perez received a message alerting him to an Instagram post of a man wearing a leather hat with a zipper on it—one that looked very similar to Perez's product.[34] At first, he brushed it off. "[I]t happens all the time," Perez explained. "You become desensitized to it because people are always trying to copy and remake and redo. So I was just like, 'it is what it is.'"

But upon further inspection, Perez saw that the individual who had posted the lookalike hat was Matthew M. Williams, the creative director for Givenchy, a luxury fashion company.[35] That's when things changed for him. In his eyes, the Givenchy hat had to have been a copy, in part because Perez had "become known [in the fashion industry] for the zipper detail on a leather hat," but even more so because he and Williams had crossed paths numerous times over the years. "He has seen me with that hat," Perez insisted.

And for Perez, the misattribution of the design to Williams and Givenchy was the toughest pill to swallow:

> I started noticing all of the comments, and even some of . . . the stylists and people I know within the industry who knew this was my design aesthetic, saying . . . the hat was amazing. . . . It's annoying that [Williams] copied it, but then reading the comments about how genius this is, talking about how hard it is to create such a hat . . . it was just another form of colonialism and suppression . . . . A bigger European brand thinking, I see a smaller Black designer doing it . . . and maybe

33. *See* HARDWEAR STYLE, https://perma.cc/L6MR-D8EV (archived Feb. 3, 2023).

34. This post is no longer publicly available to view on Instagram.

35. Williams remains in this role as of April 2023. *See* Matthew M Williams (@matthewmwilliams), INSTAGRAM, https://perma.cc/P7B2-PKDR (archived Feb. 12, 2023) (to locate, select "View the live page").



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he's not getting all of the sales that this would generate under the Givenchy brand. So I'll just take it from him.

Interestingly, Perez said that he had "almost been anticipating this day for years." Though he had often been encouraged to pursue design patents or copyrights for his designs, he was aware that "there weren't a lot of protections available" in the fashion industry. "That's why [copying] happens all the time," he explained.

Soon afterward, Perez decided to take action. He uploaded a side-by-side of his hat and Givenchy's copy on Instagram, shown in Figure 1 below, accusing Givenchy of "blatantly steal[ing] . . . a small black brand's design aesthetic" and participating in "appropriation & creative colonization."[36]

**Figure 1**

K. Tyson Perez's Instagram Post

Perez also posted Instagram stories about the copying, and quickly noticed that Williams' account was viewing them. To him, this was proof that Williams knew what was going on—and was blatantly choosing to ignore it. "People were like, 'Do you really think he [Williams] knows who . . . this guy is?' And it's like, yes."

36. *See* K. Tyson Perez-Harris (@tysonisking), INSTAGRAM (Dec. 16, 2020), https://perma.cc/5JLV-URAH (to locate, select "View the live page").



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Perez's posts began to attract buzz, and in the ensuing days and weeks, "the whole thing took on a life of its own." Numerous newspapers covered his story,[37] and multiple IP attorneys reached out. Perez hired one of them, who began communications with Givenchy's legal team.

According to Perez, Givenchy's attorneys initially expressed that "they wanted to make things right." All Perez wanted was for the brand to "acknowledge that this was an attempt to recreate [his] design aesthetic." He remembered that Givenchy appeared amenable to this, promising to issue a public apology. He also recalled that the brand committed to making a charity donation after he pointed out the racial injustices perpetuated by such copying.

As time went on, however, Perez came to the conclusion that neither promise was going to be fulfilled. According to him, Givenchy's attorneys had also promised to remove the hat in question from the brand's website, but that did not happen either.[38] When questioned about it, they "started trying to backpedal, saying, . . . 'We didn't really get [the hat] from you.'" And ultimately, they told his attorney, "We're not willing to settle because your client's hat is a fedora and ours is a bucket hat."

Perez hypothesized that Givenchy's incentive to do right by him vanished after "they noticed that . . . the comments [on social media] . . . started slowing down and the news articles started slowing down." Similarly, Perez recalls that attorneys' interest in the matter began to die down over time. He stated that "one lawyer referred me to another, and they initially went after them [Givenchy], but both fell by the wayside after they realized it wasn't going to be an immediate settlement."

Months later, according to Perez, Givenchy told him it had paused production of the hat—though it continued to maintain that it had not taken the design from him. By then, Perez had largely come to terms with what had happened, taking on a mentality toward design piracy that he continues to hold today. "I can't focus too much on who's going to knock [my designs] off. If someone does it again, I'm going to speak up again. But . . . I don't expect any recourse."

Perez also emphasized that in the fashion industry, piracy is widespread. "[I]t's bigger than me. I know that [brands] are doing this to many young

37. *See, e.g.*, Carlos Greer, *Bronx Designer Accuses Givenchy of Stealing His Design*, PAGE SIX (Dec. 17, 2020, 7:33 PM), https://perma.cc/L5PX-ESQP; Priya Elan, *Givenchy Accused of Stealing Leather Hat Design from New York Designer*, GUARDIAN (Dec. 18, 2020, 2:47 PM EST), https://perma.cc/4ARZ-Z48M.

38. The Givenchy website no longer advertises this hat, though it is unclear when the change was made. *See* GIVENCHY, https://perma.cc/VGL9-CLEK (archived Feb. 13, 2023); *see also* Carlos Greer, *Givenchy 'Paused' Hat After Bronx Designer Alleged Design Copy*, PAGE SIX (Mar. 31, 2021, 12:36 PM), https://perma.cc/Z4N8-L6YF (suggesting that production of the hat was "paused" sometime around or before March 2021).



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designers of color [and] design students who aren't seen," he said. "I know firsthand that these people have full teams dedicated to just that, to scouring the internet for cool, young, innovative design aesthetics and bringing them back."

Importantly, he condemned copying of any kind, stating that "[e]ven . . . when I see smaller designers replicating bigger brands' design aesthetics, I don't like that either. . . . I don't feel like smaller designers should have the . . . leeway to copy others in the name of making it more affordable." He also did not draw a distinction between intentional and coincidental copying, at least in terms of the recourse that should result: He only wanted Givenchy to "acknowledge there is a similarity [between the hat designs], whether intentional or unintentional."

In Perez's opinion, the pervasiveness of copying warrants stronger IP protections for fashion designs. "[W]ith this design aesthetic that I have been doing for close to ten years, there should be something where I can put in a bid and say . . . 'This is my design.' And anyone who replicates this has to either give me credit or give me a percentage of their proceeds." He proposed a test for determining who should receive ownership over a design: "If a layman sees two hats together, and thinks they're by the same person, that should be enough. If they look aesthetically the same, whoever created the aesthetic first should be credited."[39]

Until the legal landscape changes, Perez will use social media as "proof—proof that this is my design, that this is my timestamp of when I launched it." That way, "if someone tries to come out with it two years later, I can easily come out with a screenshot and show, 'This is when I posted it, and this is when you're posting it.'" At the same time, he remains undeterred by the prospect of being copied in the future. "All I can hope is that people want the original. And some people don't . . . they don't care that it's a knockoff. But those are not my clients or my customer base anyway."

39. Notably, this test closely tracks the substantial-similarity standard that is currently used in U.S. copyright law to determine whether a defendant has infringed the reproduction right of a copyright. A plaintiff must prove both actual copying and substantial similarity. *See* Jarrod M. Mohler, Comment, *Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. CIN. L. REV. 971, 976-81 (2000) ("One oft-cited and concise definition [of substantial similarity] is 'whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'" (quoting Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966))). The issue is perhaps not that such a standard is lacking, but rather that fashion designs rarely qualify for copyright protection in the first place. *See generally infra* Part II.A.1 (describing the historically weak protections afforded to clothing).



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2. Case study: Kari Fry, SUBSURFACE[40]

Though Kari Fry entered the fashion industry relatively recently, she is hardly new to the creative process. Previously, she worked in experiential design, doing "[3-D] installation-type work." After spending most of her career at a design agency in Brooklyn, she moved to California after her partner relocated for his job.

That's when Fry decided to take the plunge and begin designing clothing. "I had always wanted to start a brand, but it took me a long time to . . . gain the confidence to do it, because I don't have a traditional . . . fashion education," she told me. She did, however, already have a sense of the market and what she wanted to contribute. "[T]here were a lot of sustainable brands that had basics, like denim and t-shirts, in nice materials and produced in really . . . thoughtful, smart ways . . . . But I didn't feel like I was finding that type of sentiment in . . . specialty wear. Like more specific pieces. . . . [T]hat's what I felt like my niche in the market was."

After about a year and a half of preparation, Fry launched SUBSURFACE in April 2020.[41] Almost immediately, it became the subject of design piracy. "[W]hen I saw the first knockoff, I was pretty shocked, because . . . I had such little visibility. . . . [B]ut [I] was already on the radar of these people," she said.

Now, about two years in, Fry sees her work copied all of the time. Some of her most popular and most copied pieces, shown in Figure 2 below, include the Ribbon Wrap Skirt (left) and the Hostess Pant (right), the latter of which she noted was a "a big, big trend now, and probably my most ripped-off piece."[42]

40. Telephone Interview with Kari Fry, Founder & Designer, SUBSURFACE (Jan. 21, 2022).

41. *See* Sarah Wasilak, *26 Women-Owned Fashion Brands to Shop This Month and Beyond*, POPSUGAR (Mar. 8, 2022), https://perma.cc/U9CE-67KH.

42. *Ribbon Wrap Skirt, Moss*, SUBSURFACE, https://perma.cc/XM9Z-CZAD (archived Feb. 13, 2023); *Hostess Pant, Black*, SUBSURFACE, https://perma.cc/JF9V-YGXS (archived Feb. 13, 2023). Fry did not wish to provide the names of retailers or designers who she believes directly copied her designs. Nonetheless, both of these styles mirroring her pieces were trending at the time of our interview. *See* Alexis Bennett, *This Summer, the Sarong Skirt Is Going Beyond the Beach and Into the City*, VOGUE (May 30, 2022), https://perma.cc/K7F3-GLX6 (to locate, select "View the live page"); Nicole Kliest, *The Thong Pant Renaissance: 10 Ways to Wear the Trend*, BYRDIE (updated Apr. 1, 2022), https://perma.cc/YAF5-UK3X.



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**Figure 2**
Kari Fry's Most Copied Pieces

Fry is usually alerted to copyists by others in her circle. "[M]y customers, my friends, my family, whomever it is, they'll see stuff online, and then they'll send it to me," she said. And while many have made knockoffs of her pieces, some have gone a step further and used images from her website and social media to sell their products. "[T]hat's what I didn't like, even more so than selling [copies of] my pieces, was them using my images," she told me. Furthermore, "a lot of people will buy the knockoffs and then tag my brand in their [posts] and pretend it's from there, but I can tell that it's not."

In one notable incident, Fry recalls that her designs were copied and used in a well-known artist's music video. The artist's stylist had originally reached out and requested a few SUBSURFACE pieces. But the pants Fry provided were not the color they were looking for, so they ended up recreating the pants in the desired color, as well as one of her tops—without telling her, returning the samples, or compensating her.

Fry told me that she has "never really considered legal action" in response to copying, mostly due to the high cost of hiring an attorney. She is also dubious about whether taking legal action would even help. Once, after a major retailer duplicated both her clothing piece and the style of its editorial, she initiated a conversation with the retailer's legal team. At first, the piece in question was removed from the website, but a couple of weeks later, it appeared back online. As Fry recounted, "Their lawyer emailed me and was just like, 'Sorry. . . . I talked to the creative director, and their piece had nothing to do with yours.' . . . [W]e went back and forth a few times, but what am I [going to] do? . . . I can't sue [them]. . . . I don't have the money."



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Without the promise of legal action, Fry relies on other strategies to try to protect her brand. She has called copyists out on social media, although they "usually just wait and then put [the copies] back up."[43] She is a member of a resources group for small brand owners. And she is much more careful about how much "process work" she shares online. "I'm now . . . very hesitant to share my [creative] process before anything has launched, whereas before . . . I would show what I was doing," she said. "And that's a bummer to me because I think the process is the most interesting part."

When asked for her vision of what protections for fashion *should* look like, Fry responded:

> In my ideal world, [protection] would almost stem from . . . a bigger support system in general. . . . We have the CFDA [Council of Fashion Designers of America], but . . . if you look at the CFDA award winners in the past ten years, it's the same people over and over again. . . . [S]mall brands feel very unsupported. So for me . . . I don't even know if . . . legal [support] is the first thing I'd think of. . . . [I]t would be absolutely amazing to feel supported in the sense of . . . having access to lawyers . . . but it's also about access to resources and having . . . a fashion council who is more focused on smaller brands and doing right by the environment as opposed to . . . the brands that everyone already knows and has relationships with.

Ultimately, Fry lamented the "ecosystem" of copying in today's fashion industry. "I've had a few . . . influencers reach out to collaborate, whom I decided not to work with, and . . . now they're getting paid by [a fast fashion brand] who has created the [knockoff] piece and hired them to post about it," she explained. "[T]hat was a . . . bit difficult for me . . . especially when I would see the influencers that I didn't give [the piece] to, now posting the [knockoff piece] as an ad . . . it's hard not to feel like everyone's making money off your design but you."

At the same time, Fry acknowledged that "fashion is so referential"—she explained that her Hostess Pant was inspired by looks from the early 2000s—and that there are instances in which "people can have similar ideas and come out with similar pieces, and it's not copying." Because of this, she tries to begin her own design process offline, so as to avoid "pulling stuff from Instagram."

Fry also stressed that there are still reasons to be optimistic about the future of the fashion industry. Even the experience of being copied, she said, has "brought a lot of positives, just in terms of . . . my customers being like, 'I support you. Don't worry about this.'" In addition, she stated, "I genuinely feel

43. At time of publication, Fry's Instagram page does not include any posts calling out copyists. *See* Kari Fry (@bradshhaw), INSTAGRAM, https://perma.cc/AM95-UK6J (archived Feb. 13, 2023) (to locate, select "View the live page"). Thus, such callouts were likely either posted as Instagram Stories, which disappear from the user's profile after twenty-four hours, *see Stories*, INSTAGRAM HELP CTR., https://perma.cc/NMW9-MCB2 (archived Feb. 13, 2023), or subsequently archived or deleted.



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like people care more [now] about what's in their clothes and who's making it. . . . [T]here are so many . . . good people in this world that are working really hard to . . . make [the fashion industry more eco-friendly], . . . and that's really exciting."

### B. The Ubiquity of Design Piracy

The experiences of Perez and Fry are neither uncommon nor new. Design piracy "has long been a widespread practice in the fashion industry."[44] In fact, publications dating back nearly a century describe copying as an already pervasive and problematic phenomenon—both across and within different countries.[45]

In the United States, the Fashion Originators' Guild was established in 1932 for the precise purpose of "limit[ing] copying within the small but growing ranks of American designers."[46] Eventually, however, the Guild "ran afoul of the antitrust laws"; the Supreme Court deemed the Guild's practices to be "unfair competition and a violation of the Sherman and Clayton Acts" in its 1941 decision in *Fashion Originators' Guild of America, Inc. v. FTC*.[47] Without any regulatory body and with little to no legal protection for clothing designs, piracy continued to run rampant.[48] Large retailers, luxury brands, and individual designers alike copied each others' designs.[49]

Over the ensuing decades, copying has only become cheaper, easier, and more prevalent. Kal Raustiala and Christopher Sprigman note:

> Digital photography, digital design platforms, the Internet, global outsourcing of manufacture, more flexible manufacturing technologies, and lower textile tariffs have significantly accelerated the pace of copying. . . .
>
> The result is the remarkably pervasive appropriation of designs, with firms at every level of the apparel marketplace producing copies and derivatives.[50]

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44. Raustiala & Sprigman, *supra* note 22, at 1695. As this Note demonstrates, much of the discussion of design piracy is based on testimony from individuals in the fashion industry. For a number of reasons, it would be difficult to provide concrete statistics on how often copying actually occurs. Perhaps most critically, it is unlikely that someone would admit to copying and difficult to discern when an accusation of copying is just that—an accusation.

45. *See id.* at 1695-97.

46. *Id.* at 1697.

47. *Id.*; *see also* 312 U.S. 457, 463-65 (1941).

48. *See* Raustiala & Sprigman, *supra* note 22, at 1698; *see also infra* Part II.A.1.

49. *See* Raustiala & Sprigman, *supra* note 22, at 1705-17 (providing examples of design piracy).

50. *Id.* at 1714-15; *see also* Hemphill & Suk, *supra* note 4, at 1171 ("What has changed is not the fact or speed of copying, but the large scale and low cost at which rapid copies can be made.").



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Though copying does take place across "every level" of the industry, fast-fashion retailers in particular are some of "the most prolific offenders," because their "entire business model revolves around copying trends and bringing them to market quickly."[51] These retailers are now able to manufacture products in as little as two weeks and add thousands of new styles to their sites each week.[52] In doing so, they are routinely accused of ripping off others'—particularly independent designers'—designs.[53] And some have "openly admit[ted] that Instagram trend scouting fuels their ever-growing business."[54]

The rest of this Note is dedicated to evaluating why the copying of independent designers is harmful, and how victims of such piracy might be able to respond. Importantly, Scott Hemphill and Jeannie Suk have distinguished between (1) "referencing," wherein someone interprets an existing trend in a manner that "looks to the prior work as a source of influence," but "does not pass off the work as the work that is being copied," and (2) "close copying," wherein someone creates an essential duplicate of a piece that "can substitute for and reduce the value of the original."[55] This Note focuses on the latter practice of "close copying."

### C. Concerns Raised by Close-Copying

Design piracy's potential to hurt independent designers has long been recognized in the literature.[56] In fact, many have posited that, compared to bigger players in the industry, such designers have much more to lose from being copied.[57] The literature is divided, however, on the extent to which this

51. Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And It's Completely Legal.*, VOX (Apr. 27, 2018, 7:30 AM EDT), https://perma.cc/9LE2-WDB6.

52. *See id.*

53. *See id.*

54. *See id.*

55. *See* Hemphill & Suk, *supra* note 4, at 1160.

56. Over two decades ago, Peter K. Schalestock warned that, due to modern technology which made it faster and easier to copy fashion designs, "small designers . . . may be driven out of the industry." Peter K. Schalestock, Comment, *Forms of Redress for Design Piracy: How Victims Can Use Existing Copyright Law*, 21 SEATTLE U. L. REV. 113, 115 (1997).

57. *See, e.g.*, Hemphill & Suk, *supra* note 4, at 1153 ("[T]he primary threat to innovation currently is not to the major fashion conglomerates. . . . [These] are already well protected by the existing trademark and trade dress legal regime, brand investments, and the relatively small overlap between markets for the original and for the copy. The main threat posed by copyists is to innovation by smaller, less established, independent designers who are less protected along all of these dimensions."); Arielle K. Cohen, *Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma*, 11 CHI.-KENT J. INTELL. PROP. 172, 182 (2012) ("[T]he lack of copyright protection is especially harmful to mid-level and independent designers who lose out on profit from their designs that are copied by big box fast-fashion copyists or better known designers. This, in turn, reduces their incentive to create new designs."); Lauren Howard, Note, *An Uningenious*

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copying is an important policy concern. In this Subpart, I first address the argument that copying increases the rate of innovation in fashion and is thus beneficial from a utilitarian perspective. I argue that while the effect of copying on the overall rate of *innovation* might be ambiguous, copying does reduce *diversity* in fashion, a fact which should also be considered in the utilitarian calculus. I then argue that there are also moral-rights justifications for viewing the copying of independent fashion designers as problematic.

1. A utilitarian perspective

Broadly speaking, utilitarianism aims to produce the greatest good for the greatest number of people.[58] In the United States, IP regimes are grounded largely in utilitarian theory.[59] More specifically, IP protections are justified on the basis that they "provide sufficient incentive to develop new technology and creative products."[60] The view is that without these protections, "copyists will free-ride on the efforts of creators, discouraging future investments in new inventions and creations" and thus stifling innovation.[61]

But the net effect of stronger IP can decrease innovation, particularly among future innovators who want to use existing works as inputs to new creations. Most prominently, Raustiala and Sprigman have long argued that fashion's "low-IP" regime, which allows for the rampant copying of designs, might in fact be "paradoxically beneficial for the fashion industry" because it helps promote innovation.[62] In fact, they assert that the prevalence of design

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*Paradox: Intellectual Property Protections for Fashion Designs*, 32 COLUM. J.L. & ARTS 333, 350-53 (2009) ("In order to build . . . a brand, new designers must offer a unique and identifiable image that communicates their point of view to consumers. A young designer's ability to create such a brand is significantly hindered to the extent she is competing with low-priced knockoffs."); Aya Eguchi, Note, *Curtailing Copycat Couture: The Merits of the Innovative Design Protection and Piracy Prevention Act and a Licensing Scheme for the Fashion Industry*, 97 CORNELL L. REV. 131, 143-44 (2011) ("[I]ndependent designers and small- and medium-sized enterprises (SMEs) . . . do not have the manufacturing and production capabilities of major fashion houses and retailers. When copyists imitate their designs, the damages they suffer are significant since these designers and SMEs do not have the capital or technology to mass produce their own designs and compete with the copyists.").

58. *See* Brian Hilton, Chong Ju Choi & Stephen Chen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 J. BUS. ETHICS 345, 348 (2004).

59. *See id.*; 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, 659 (2020).

60. Hilton et al., *supra* note 58, at 348.

61. Raustiala & Sprigman, *supra* note 22, at 1688.

62. *Id.* at 1717-34.



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copying actually increases the rate of innovation by "accelerat[ing] the diffusion of designs and styles" and thus speeding up the fashion cycle.[63]

In particular, Raustiala and Sprigman have alleged that "the assertion that fashion's low-IP regime harms small designers lacks empirical support," since "[e]ven a cursory look at the fashion industry will reveal thousands of new and young designers competing for their place in the industry, seemingly undeterred by the prevalence of fashion copying—and, often, engaging in it."[64] They have also argued that strengthening copyright protections is more likely to harm rather than help emerging designers, since "fashion's low-IP equilibrium does at least deprive large fashion firms of one anticompetitive tool that big firms operating in high-IP markets often use to grind down upstarts: lawyers."[65] In other words, opening the door to increased copyright litigation would merely exacerbate existing power dynamics and resource imbalances between larger fashion firms and smaller designers.

Their argument has been the subject of much debate.[66] For example, Hemphill and Suk have argued that when Raustiala and Sprigman refer to "copying," they fail to distinguish between close copying and other "remixing and trend-joining" activities that take place in fashion, such as "interpretation, adaptation, [and] homage."[67] In doing so, they mistakenly use the benefits of the latter to justify the former.[68]

Ultimately, whether Raustiala and Sprigman are correct—whether design copying has a positive effect on the overall rate of innovation in the fashion industry—is an empirical question that has yet to be resolved by the literature and which I will not attempt to resolve here. I will argue, however, that copying limits the amount of diversity in fashion in at least two ways, a fact that should be part of the utilitarian calculus but that has received insufficient attention thus far.

Measurements of the social value of new designs should include not only the quantity but also the overall diversity of designs that are created—including value that stems from designer diversity, a form of diversity that has been largely ignored in the existing literature.[69] Importantly, less established

63. *Id.* at 1722.

64. Kal Raustiala & Christopher Sprigman, Response, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1221 (2009).

65. *Id.* at 1221-22.

66. *See, e.g.*, Hemphill & Suk, *supra* note 4, at 1174-80 (arguing that fast-fashion copying reduces the amount of innovation and distorts its direction).

67. *See id.* at 1180-84.

68. *See id.*

69. *See, e.g.*, *id.* at 1176-77 (discussing diversity only with regard to the "kinds of products" that are created, and not to the backgrounds of the designers themselves).



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designers are more likely to be shut out of the industry as a result of copying.[70] This incumbency bias, coupled with the fashion industry's current lack of diversity,[71] means that existing imbalances in racial, socioeconomic, and other forms of representation will only continue to be exacerbated so long as close copying occurs.

Furthermore, Hemphill and Suk have argued that copying decreases the overall breadth of the fashion industry's output by incentivizing the production of goods that are more difficult to copy, which has the distorting effect of "push[ing] creators toward the high-end realm of status and luxury, and away from devoting creative resources to design innovation."[72] That copying limits the diversity of fashion designs in these ways is problematic from a utilitarian perspective, so long as we believe that diversity of fashion is a social good which we want more of, not less.

### 2. A moral-rights perspective

Even assuming, *arguendo*, that Raustiala and Sprigman are correct and the current permittance of copying is beneficial—or at least not harmful—to the fashion industry, are there other reasons we should be concerned about the copying of independent designers? I will argue that the answer is yes: Even if both the fashion industry as a whole and its individual players benefit economically from the current low-IP regime, there remain moral-rights justifications for believing that copying is harmful.

Moral rights in copyright are "the rights of authors generally to preserve the integrity and dignity of their works."[73] They include the rights to "prevent distortion of their work, to be recognized as the author, to control the work's publication, and to withdraw a work after publication."[74] These "rights of attribution and integrity" have been recognized in some form for centuries and across the globe.[75] They have long been protected in many European

70. *See id.*; *see also supra* note 57 (detailing the particular effects of copying on small designers).

71. *See, e.g.*, Thin Lei Win & Nellie Peyton, *Black Designers Lead Push for a More Diverse Fashion Industry*, THOMSON REUTERS FOUND.: LONG READS (Aug. 6, 2020), https://perma.cc/QLA4-WSFY (stating that only 4% of the members of the Council of Fashion Designers of America are Black); Jenna Ryu, *White Men Still Run the Fashion Industry: Report Shows There's a Long Road Ahead Toward Inclusion*, USA TODAY (Feb. 1, 2021, 1:29 PM ET), https://perma.cc/N2U3-HJDP (reporting that less than 10% of the undergraduate students in the class of 2020 at the top six U.S. fashion schools are Black).

72. *See* Hemphill & Suk, *supra* note 4, at 1179-80.

73. Nagel, *supra* note 59, at 641.

74. *Id.*

75. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 10-13 (2019).



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countries,[76] a result of the fact that they have underpinnings in the teachings of German philosophers Immanuel Kant and Georg Wilhelm Friedrich Hegel.[77] In particular, the moral rights framework is supported by Hegel's personality theory, which posits that "creative works are manifestations of the personalities of their creators,"[78] so the ability for creators to control their works is "valuable 'for self-actualization, for personal expression, and for dignity and recognition as an individual person.'"[79]

The moral-rights argument against fashion design piracy, then, is as follows: If fashion designers can be thought of as possessing moral rights in their works, which seems plausible based on the European example, then the unauthorized copying of their designs is an infringement of these rights—a desecration of the dignity and integrity of their works—and thus undesirable.

But though this argument is recognized in Europe, it has not gained as much traction in the United States, where IP protection focuses primarily on the economic rights rather than the moral rights of fashion designers.[80] Interestingly, the United States does grant certain moral rights to artists through the Visual Artists Rights Act (VARA).[81] However, VARA applies only to "work[s] of visual art" as defined in 17 U.S.C. § 101, which do not include fashion designs.[82]

This has caused some scholars to lament that "Congress wants to protect only the moral rights of authors who create a specific type of fine art."[83] Indeed, there also appears to be some connection between a creator's identity as

76. Irina Oberman Khagi, *Who's Afraid of Forever 21?: Combating Copycatting Through Extralegal Enforcement of Moral Rights in Fashion Designs*, 27 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 67, 89-90 (2016); *see also* Nagel, *supra* note 59, at 658.

77. *See* Nagel, *supra* note 59, at 659.

78. Keyon Lo, *Stop Glorifying Fashion Piracy: It Is Time to Enact the Innovative Design Protection Act*, 21 CHI.-KENT J. INTELL. PROP., Nov. 2021, at 159, 199-200 (2021).

79. Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 456 (2013) (quoting Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988)).

80. *See* Nagel, *supra* note 59, at 641-43, 657-59 (stating that "[c]opyright regimes in the United States seem to be based in Lockean labor theory and general utilitarian theory," and that "[l]egal scholars have long discussed the differences between the economic rights protected in . . . the United States and the moral rights protected by a variety of European countries"); *see also* U.S. COPYRIGHT OFF., *supra* note 75, at 3 (stating that the United States has a "lack of strong [moral rights] protections").

81. *See* Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 603, 104 Stat. 5128, 5128-29 (codified as amended at 17 U.S.C. § 106A); *see also* Nagel, *supra* note 59, at 642.

82. 17 U.S.C. § 101; *see* Nagel, *supra* note 59, at 642-43.

83. Nagel, *supra* note 59, at 643; *see also* Justin Hughes, *American Moral Rights and Fixing the* Dastar *"Gap,"* 2007 UTAH L. REV. 659, 672-73 ("[T]he real problem with VARA is not the strength of its provisions, but their limited scope.").



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an *author* of a written work and their ability to claim moral rights in their work. Stina Teilmann-Lock has argued:

> Being recognized as an "author" entails not merely an esteemed social status. Emphatically, it is a position with a claim to legal rights. . . . [A]uthors have "moral rights" in their work. . . . [T]he concept of the author as an individual creator remains the cornerstone of copyright law; copyright exists *because* books and other works have "authors."[84]

According to Teilmann-Lock, fashion designers are not afforded the same protections, including the claim to moral rights, as certain other creators because designers are not viewed as *authors* of works in the same way that, say, writers and fine artists are.[85] This suggests that a shift toward treating fashion designers as "authors"—as creators whose works of art incorporate their personhood, in the Hegelian sense—would increase the likelihood that the piracy of their designs would be viewed as harmful from a moral-rights perspective.[86]

## II. The Viability of Legal Claims After *Star Athletica*

In Part I, I argued that the copying of independent fashion designers is a ubiquitous and unresolved IP problem that raises both utilitarian and moral-rights concerns. This Part discusses the potential for victims of copying to seek legal recourse via copyright infringement claims. Specifically, it examines the viability of such claims after the Supreme Court's 2017 decision in *Star Athletica L.L.C. v. Varsity Brands, Inc.*,[87] which was viewed by many as increasing copyright protection for fashion.[88] It finds that while the available data on

84. Stina Teilmann-Lock, *The Fashion Designer as Author: The Case of a Danish T-shirt*, DESIGNISSUES, Autumn 2012, at 29, 32-33.

85. *See id.* at 39-41.

86. Not everyone believes that fashion designers and their work can be characterized in this way. Irina Oberman Khagi, for example, has pointed to interviews by Gwen Stefani and Michael Kors to argue that "[s]ome designers may not even feel that they have invested their personhood in the designs at all." Khagi, *supra* note 76, at 83-84. By her own admission, however, these examples are of "celebrity fashion designers" who sit at the helm of large businesses. *See id.* at 83. Intuitively, it seems more likely that independent designers would treat their process of creation as an exercise of personal expression. In fact, Khagi herself recognized that "a great number of fashion designers—big names and small—[do] view their designs as intensely personal," pointing to testimony from numerous independent designers in support of this claim. *See id.* at 86-87; *see also* Margaret E. Wade, Note, *The Sartorial Dilemma of Knockoffs: Protecting Moral Rights Without Disturbing the Fashion Dynamic*, 96 MINN. L. REV. 336, 364 (2011).

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

88. *See, e.g.*, Lili Levi, *The New Separability*, 20 VAND. J. ENT. & TECH. L. 709, 713-14 (2018) ("[M]any in the traditional fashion industry see the Court's approach as an invitation to significantly expanded copyright protection for apparel.").



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copyright registrations is inconclusive, there have been a number of lawsuits in which a party used *Star Athletica* to successfully assert copyright protection over elements of clothing. At the same time, it emphasizes that there remain practical barriers for many wishing to pursue such legal claims—most importantly, the high cost of litigation.

### A. Changes to IP Protection for Fashion After *Star Athletica*

#### 1. The lead-up to *Star Athletica*: the useful article doctrine and the issue of separability

Historically, although patterns *on* fabric and surface ornamentation *on* garments have been copyrightable,[89] the design *of* clothing itself has not received the same level of protection.[90] Clothing has long been viewed as a utilitarian item or "useful article," the designs of which, much like the designs of furniture or household appliances, fall outside the purview of copyright.[91]

Over half a century before *Star Athletica*, the Supreme Court articulated the "useful article doctrine" in *Mazer v. Stein*,[92] a case concerning the copyrightability of statuettes of dancing figures that were initially designed to serve as bases for electric lamps.[93] There, the Court endorsed an existing practice of the Copyright Office that even though the lamps themselves were useful articles, the statuette bases were copyrightable because they were "works of artistic craftmanship, *in so far as their form but not their mechanical or utilitarian aspects are concerned*, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts."[94] Thus emerged a rule: Though useful articles themselves are not protectable by copyright, separable artistic features incorporated in or on them might be.[95] This principle of separability, which was later reflected in a regulation promulgated by the Copyright Office a few years after *Mazer*,[96] was

89. *See* David E. Shipley, *All for Copyright Stand Up and Holler! Three Cheers for* Star Athletica *and the U.S. Supreme Court's Perceived and Imagined Separately Test*, 36 CARDOZO ARTS & ENT. L.J. 149, 163 (2018).

90. *See* Raustiala & Sprigman, *supra* note 22, at 1699.

91. *See* Jonathan E. Moskin, Commentary, *C-O-P-Y-R-I-G-H-T: What Does That Spell?* Star Athletica v. Varsity Brands *Reimagines Protection for Useful Articles*, 107 TRADEMARK REP. 776, 778 (2017).

92. 347 U.S. 201 (1954), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2543 (codified as amended at 17 U.S.C. § 101).

93. *Id.* at 202-05.

94. *See* Shipley, *supra* note 89, at 154-55 (quoting *Mazer*, 347 U.S. at 213-14).

95. *Id.* at 155-56; Raustiala & Sprigman, *supra* note 22, at 1699 ("[C]opyright law applies only when the article's expressive component is 'separable' from its useful function.").

96. *See* Shipley, *supra* note 89, at 155.



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subsequently codified in Section 101 of the Copyright Act of 1976, now known as 17 U.S.C. § 101, which states:

> [T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work [eligible for protection] only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that *can be identified separately from, and are capable of existing independently of*, the utilitarian aspects of the article.[97]

In the context of clothing, then, a design was copyrightable "only to the extent that its artistic qualities can be separated from the utilitarian nature of the garment."[98] Before *Star Athletica*, design elements of clothing were often unable to meet this separability requirement.[99] As the Second Circuit noted in *Whimsicality, Inc. v. Rubie's Costume Co.*, "clothes are particularly unlikely to meet [the test of separability]," since "the very decorative elements that stand out [are] intrinsic to the decorative function of the clothing."[100] Similarly, Raustiala and Sprigman have explained that "very few fashion designs are separable in this way," because "the expressive elements in most garments are not 'bolted on' in the manner of an appliqué, but are instilled into the form of the garment itself—in the 'cut' of a sleeve [or] the shape of a pant leg."[101] As a result, "the vast majority of the fashion industry's products exist in a copyright-free zone."[102]

To further complicate things, courts were struggling more broadly with how to evaluate whether the separability requirement borne out of *Mazer* had been met—or, in other words, whether a useful article's artistic features could be identified separately from, and exist independently of, its utilitarian aspects. Indeed, in the years leading up to *Star Athletica*, circuit courts and scholars had devised at least nine different tests for determining separability.[103]

It was this lack of a clear and consistent approach for drawing a distinction between protectable artistic features and unprotectable utilitarian features that served as the precipitating factor for the Supreme Court's decision to hear the *Star Athletica* case. After disagreement between the district and appellate court over whether the separability requirement had been met by two-dimensional

97. Copyright Act of 1976 § 101, 90 Stat. at 2543 (codified as amended at 17 U.S.C. § 101) (emphasis added).

98. Galiano v. Harrah's Operating Co., 416 F.3d 411, 419 (5th Cir. 2005).

99. *See, e.g.*, *id.* at 422 (holding that the designs of casino uniforms were uncopyrightable in the absence of a showing that the designs "[were] marketable independently of their utilitarian function").

100. 891 F.2d 452, 455 (2d Cir. 1989).

101. Raustiala & Sprigman, *supra* note 22, at 1699-700.

102. *Id.* at 1700.

103. Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 484-85 (6th Cir. 2015).



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designs on the surfaces of cheerleading uniforms,[104] the Court granted certiorari for the precise purpose of "resolv[ing] widespread disagreement over the proper test for implementing § 101's separate-identification and independent-existence requirements."[105]

### *2.* The Court's decision in *Star Athletica*

The plaintiff in the initial lawsuit was clothing manufacturer Varsity Brands , the "undisputed giant" of the cheerleading apparel industry.[106] Prior to the case, Varsity had obtained over two hundred U.S. copyright registrations for two-dimensional designs that appeared on the surface of its cheerleading uniforms and other garments.[107] These designs, examples of which are shown in Figure 3 below, consisted of elements such as chevrons, lines, diagonals, coloring, and shapes.[108]

104. *Compare* Varsity Brands, Inc. v. Star Athletica, LLC, No. 10-2508, 2014 WL 819422, at *9 (W.D. Tenn. Mar. 1, 2014), *vacated*, 799 F.3d 468 (6th Cir. 2015) ("Because the court concludes as a matter of law that it is not possible to either physically or conceptually sever Varsity's designs from the utilitarian function of the resulting cheerleading uniforms, the court grants Star's motion for summary judgment on each of Varsity's copyright infringement claims . . . ."), *with Varsity Brands*, 799 F.3d at 492 ("Because we conclude that the graphic features of Varsity's designs 'can be identified separately from, and are capable of existing independently of, the utilitarian aspects of [cheerleading uniforms],' we hold that Varsity's graphic designs are copyrightable subject matter." (alteration in original) (quoting 17 U.S.C. § 101)).

105. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017).

106. Erin Geiger Smith, *Who Owns Cheerleader Uniform Designs? It's up to the Supreme Court*, N.Y. TIMES (Oct. 29, 2016), https://perma.cc/2F4A-TJBG.

107. *Star Athletica*, 137 S. Ct. at 1007.

108. *Id.*



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**Figure 3**[109]

Varsity Brands's Cheerleading Uniform Designs

In 2011, Varsity brought suit against competitor Star Athletica in the Western District of Tennessee, alleging that Star Athletica had infringed the copyrights on five of its cheerleading uniform designs.[110] The district court granted summary judgment for Star Athletica, holding that the designs were not copyrightable because "it is not possible to either physically or conceptually sever Varsity's designs from the utilitarian function of the resulting cheerleading uniforms."[111] Varsity appealed to the Sixth Circuit, which reversed and remanded the district court's decision, concluding that the graphic features of Varsity's designs were indeed separable from the utilitarian aspects of the uniforms.[112] Star Athletica then appealed to the Supreme Court.[113]

In a 6-2 decision, the Court affirmed the Sixth Circuit's ruling in favor of Varsity.[114] The majority opinion, penned by Justice Thomas, established a new two-factor test for the separability requirement outlined in 17 U.S.C. § 101:

> [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

109. *Id.* app. at 1017.

110. *See* Varsity Brands, Inc. v. Star Athletica, LLC, No. 10-2508, 2014 WL 819422, at *1, *7 (W.D. Tenn. Mar. 1, 2014), *vacated*, 799 F.3d 468 (6th Cir. 2015); *see also* Jared Schroeder & Camille Kraeplin, *Give Me a ©: 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. 19, 31 (2019).

111. *Varsity Brands*, 2014 WL 819422, at *9.

112. *Varsity Brands*, 799 F.3d at 492, 494.

113. *See Star Athletica*, 137 S. Ct. at 1007-08.

114. *See id.* at 1002, 1016.



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> 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.[115]

The first requirement, the Court explained, was "not onerous," since "[t]he decisionmaker need only be able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities."[116] It was the second requirement that would generally be more difficult to satisfy, as the element in question would have to "be able to exist as its *own* pictorial, graphic, or sculptural work . . . once it is imagined apart from the useful article."[117]

Applying this test to the uniform designs at hand, the Court concluded that the outcome was "straightforward."[118] As for the first prong of the test, one could in fact "identify the decorations as features having pictorial, graphic, or sculptural qualities."[119] And as for the second, the Court determined that "if the arrangement of colors, shapes, stripes, and chevrons on the surface of the [uniforms]" were "imaginatively remove[d]" and applied in another medium, such as on a canvas, they would qualify as two-dimensional works of art.[120] This meant that the designs on Varsity's cheerleading uniforms were separable from the uniforms themselves and thus eligible for copyright protection.[121]

In the opinion, Justice Thomas carefully clarified that "the only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric."[122] That is, only the designs on the surface of the uniforms were potentially copyrightable: The Court's decision did not extend to the "shape, cut, and dimensions" of the garments.[123]

This meant that the *Star Athletica* decision had been narrowly tailored to surface designs, right? Not everyone agreed. In a dissenting opinion, Justice Breyer warned that the Court had "look[ed] past the three-dimensional design inherent in Varsity's claim."[124] In his eyes, Varsity was attempting to "bring along the design and cut of the dresses by seeking to protect surface

115. *Id.* at 1007.

116. *Id.* at 1010.

117. *Id.* (emphasis added).

118. *Id.* at 1012.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1013.

123. *Id.*

124. *Id.* at 1036 (Breyer, J., dissenting).



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decorations whose 'treatment and arrangement' are *coextensive with that design and cut.*"[125] Because the chevrons and stripes that formed the surface designs were merely "dress-shaped lines that replicate[d] the cut and style of the uniforms," the ability to protect those designs was in essence the ability to protect the cut and style of the uniforms as well.[126]

Justice Breyer disapproved of this perceived outcome. Noting that Congress had explicitly declined to extend broad copyright protection to fashion designs over the years, he argued that courts should "not grant copyright protection where Congress has decided not to do so."[127] He also warned that by granting such sweeping protection to designers, the Court's decision would "risk increased prices and unforeseeable disruption in the clothing industry."[128]

The dissenting Justices were not the only ones who believed that *Star Athletica* could have nontrivial implications for the fashion industry.[129] Many IP scholars and attorneys predicted a significant increase in the number of designers protecting, or at least attempting to protect, their work.[130]

Some were wary of this potential expansion of copyright. Lili Levi argued, for example, that "the *Star Athletica* approach will likely lead to extensive *overprotection* of useful works through strategic deployment of copyright in incorporated expressive designs."[131] And Barton Beebe lamented that the majority's two-factor test would open the door for nearly anything to be copyrightable: "[It] appears to depend entirely on the subjective mindset of any viewer of the design. Could anyone imagine it as art?"[132]

Others, particularly those in the fashion industry, were in favor of this expansive reading of *Star Athletica*. During litigation, both the Council of Fashion Designers of America (CFDA) and the Fashion Law Institute filed

125. *Id.*

126. *Id.* at 1035; *see also id.* at 1036 ("[W]ith that cut and arrangement, the resulting pictures on which Varsity seeks protection do not simply depict designs. They depict clothing. They depict the useful articles of which the designs are inextricable parts.").

127. *Id.* at 1034.

128. *Id.* at 1035. Justice Breyer was not alone in this concern. *See, e.g.*, Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. REV. 1102, 1172-73 (2017).

129. In fact, during oral argument, Justice Sotomayor stated: "We are now going to use copyright law to kill the . . . knockoff industry." Transcript of Oral Argument at 35, *Star Athletica*, 137 S. Ct. 1002 (No. 15-866).

130. *See, e.g.*, Gene Quinn & Steve Brachmann, *Copyrights at the Supreme Court:* Star Athletica v. Varsity Brands, IPWATCHDOG (Mar. 22, 2017, 6:51 PM), https://perma.cc/A936-9B7S; Larry C. Russ & Nathan D. Meyer, *Fashion Forward*, L.A. LAW., Sept. 2017, at 20, 24.

131. Levi, *supra* note 88, at 713 (emphasis added).

132. Barton Beebe, Keynote, Star Athletica *and the Problem of Panaestheticism*, 9 U.C. IRVINE L. REV. 275, 283, 287 (2019).



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amicus briefs in support of Varsity, encouraging the Supreme Court to uphold the Sixth Circuit's finding that the uniform designs were copyrightable.[133] In its brief, the CFDA argued that the copyright protections at stake in the case were "of vital importance to the fashion industry" due to their role in preventing design piracy, a phenomenon which threatens innovation and harms designers—especially emerging ones who are already struggling to make a name for themselves.[134] Indeed, the Court's ultimate ruling in favor of Varsity was hailed by many as "a big step forward for clothing designers."[135]

At the same time, not everyone believed that *Star Athletica* had truly changed much for fashion designs at all. It was not clear that the Court's decision, which concerned two-dimensional surface designs, would necessarily extend to *three*-dimensional design elements—which are central to fashion.[136] According to Rebecca Tushnet, many three-dimensional design features of clothing, such as the "arrangement of ruffles and hem" on a dress, are "close to the aspects of cut and sizing that the Court thought were not part of the protectable 'work' in the cheerleading uniforms."[137] Thus, protections of designs involving such features were not expanded after *Star Athletica*.[138] Similarly, David Shipley wrote that "clothing designers have not really gained much additional protection due to *Star Athletica*," since "protection for textile and fabric designs as two dimensional pictorial and graphic works was well established long before *Star Athletica* . . . and the Court took pains to say that it was not extending protection to the functional aspects of fashion design such as the cut or venting of a garment."[139]

Whether and to what extent the Court's decision would alter protections for fashion designs, then, was up for debate. All the fashion industry could do was wait and see.

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133. *See* Brief of Council of Fashion Designers of America, Inc., as Amicus Curiae in Support of Respondents at 2, *Star Athletica*, 137 S. Ct. 1002 (No. 15-866) [hereinafter Brief of Council of Fashion Designers of America]; Brief of Fashion Law Institute, *supra* note 29, at 4.

134. *See* Brief of Council of Fashion Designers of America, *supra* note 133, at 5-12; *see also* Brief of Fashion Law Institute, *supra* note 29, at 16-19.

135. *E.g.*, Quinn & Brachman, *supra* note 130 (quoting Holwell Shuster & Goldberg LLP Partner John DiMatteo).

136. *See, e.g.*, Trenton Davis, Note, *A Missed Opportunity: The Supreme Court's New Separability Test in* Star Athletica, 33 BERKELEY TECH. L.J. 1091, 1102 (2018); Rebecca Tushnet, *Shoveling a Path After* Star Athletica, 66 UCLA L. REV. 1216, 1238-39 (2019).

137. Tushnet, *supra* note 136, at 1239.

138. *Id.*

139. Shipley, *supra* note 89, at 166.



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3. Implications for the fashion industry: real or imagined?

In the roughly five years since *Star Athletica*, the actual impact of the ruling on the protectability of fashion designs has remained relatively murky. This Part seeks to gain some clarity by examining (1) whether any insight can be gleaned from the number of copyright registrations granted after the decision, and (2) the success of subsequent lawsuits alleging copyright infringement of fashion designs.

As mentioned before, many predicted that designers, perceiving *Star Athletica* to have expanded the copyrightability of their designs, would begin to file more copyright registrations.[140] If this were true, and if the decision had indeed opened the door to increased protections for designs, then the number of fashion design registrations filed with the U.S. Copyright Office should have increased since the 2017 decision.[141]

The information available on copyright registrations, however, is inconclusive at best. First, the Copyright Office's annual reports of filings do not break down the category of pictorial, graphic, or sculptural (PGS) works into further subcategories, so one can see only the total number of registrations for all PGS works.[142] There is no telling how many of these registrations are for fashion designs as opposed to paintings, sculptural works, or other works of visual art.

If *Star Athletica* did have a dramatic impact on the registrability of useful articles, one might still expect it to be apparent in the total number of PGS registrations per year. It is unclear, however, whether any meaningful trend can be discerned from the available statistics. Figure 4 below shows the number of registrations filed each year from fiscal year (FY) 2014 (three years before *Star Athletica*) through FY 2020 (three years after) for PGS works, performing arts works, and literary works.[143] The latter two categories are

140. *See, e.g.*, Quinn & Brachman, *supra* note 130.

141. *See* David Jacoby, 'Star Athletica' *Three Years On*, N.Y.L.J. (Aug. 28, 2020, 3:04 PM), https://perma.cc/3EAU-HJXY (to locate, select "View the live page").

142. *See, e.g.*, U.S. COPYRIGHT OFF., FISCAL 2016 ANNUAL REPORT app. at 17 (2016). The Copyright Office's reports refer to the PGS category as "[w]orks of the visual arts, including two-dimensional works of fine and graphic art, sculptural works, technical drawings and models, photographs, cartographic works, commercial prints and labels, and works of applied arts." *Id.*

143. *See* U.S. COPYRIGHT OFF., FISCAL 2014 ANNUAL REPORT app. at 19 (2014); U.S. COPYRIGHT OFF., FISCAL 2015 ANNUAL REPORT app. at 17 (2015); U.S. COPYRIGHT OFF., *supra* note 142, app. at 17; U.S. COPYRIGHT OFF., FISCAL 2017 ANNUAL REPORT app. at 18 (2017) [hereinafter USCO REPORT 2017]; U.S. COPYRIGHT OFF., FISCAL ANNUAL REPORT FOR FISCAL 2018 app. at 22 (2018) [hereinafter USCO REPORT 2018]; U.S. COPYRIGHT OFF., FISCAL ANNUAL REPORT: FISCAL 2019 app. at 46 (2019) [hereinafter USCO REPORT 2019]; U.S. COPYRIGHT OFF., FISCAL ANNUAL REPORT: FISCAL 2020 app. at 38 (2020) [hereinafter USCO REPORT 2020]. Note that in a given fiscal year, the number of registrations *filed* is

*footnote continued on next page*



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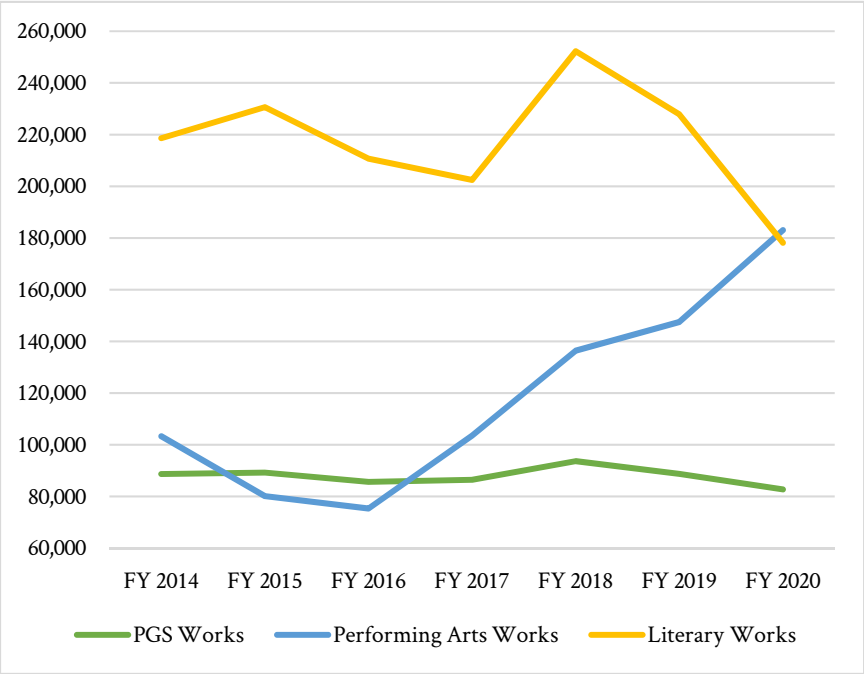
included for comparison, since their copyrightability would not have been affected by *Star Athletica*.

**Figure 4**

Number of Registrations Filed with the U.S. Copyright Office




From the outset, these data cast doubt on the overall significance of any year-to-year change in registration numbers, since they reveal that it is commonplace to see fluctuations—often even larger ones—within categories of works. At the same time, the particular changes in the PGS works category are in line with, or at least do not contradict, the aforementioned hypothesis regarding *Star Athletica*'s impact: There was an approximately 9.4% increase in

different from the number of registrations *granted*, because the Copyright Office refuses some number of claims. However, the Copyright Office does not provide a breakdown of rejected claims by category, so it is unknown how many rejections were of clothing designs.



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the number of registered works between 2016 (the last full fiscal year before the decision) and 2018 (the first full fiscal year following the decision).[144]

It is true that the number of registered PGS works dropped in both FY 2019 and FY 2020.[145] From this alone, one might conclude that by 2019, the impact of *Star Athletica* had waned; either designers no longer believed as strongly that their works could be protected, or their attempts at registration were failing, or both. But in both years, the *total* number of copyright registrations—in all categories, not just PGS works—had also decreased compared to the year before.[146]

The timing of this trend, as well as its presence in multiple categories of works, suggests it might be attributable to the COVID-19 pandemic, rather than to a change in either the perceived or actual protectability of fashion designs. Furthermore, a look at all available data since the Copyright Office's inception reveals major fluctuations in the total number of registrations over the decades.[147] This supports the notion that innumerable factors—the economy, a global pandemic, other unknown forces—may impact the number of copyright registrations in any given year.

Given the murky significance of copyright registration data, another way of evaluating the impact of *Star Athletica* is to examine fashion-related litigation that has taken place since the decision. Are designers successfully using its two-factor separability analysis to establish copyright infringement?

Indeed, there have been a number of interesting lawsuits over apparel and footwear designs. Just over a week after the Court's ruling in *Star Athletica*, Puma filed suit against Forever 21 in the Central District of California, alleging that the latter had infringed copyright in Puma's Fenty shoe line, which it had created in collaboration with celebrity music artist Rihanna.[148] In its

144. In FY 2016, 85,614 PGS works were registered; in FY 2017, 86,466 PGS works were registered; and in FY 2018, 93,651 PGS works were registered. U.S. COPYRIGHT OFF., *supra* note 142, app. at 17; USCO REPORT 2017, *supra* note 143, app. at 18; USCO REPORT 2018, *supra* note 143, app. at 22.

145. In FY 2019, the number of registered PGS works dropped by 5.2% to 88,762; in FY 2020, it dropped by another 6.8% to 82,716. *See* USCO REPORT 2018, *supra* note 143, app. at 22; USCO REPORT 2019, *supra* note 143, app. at 46; USCO REPORT 2020, *supra* note 143, app. at 38.

146. USCO REPORT 2020, *supra* note 143, app. at 37. Importantly, other individual categories, such as literary works and mask works, also saw a decrease in registrations over those two years. *See id.* app. at 38; USCO REPORT 2019, *supra* note 143, app. at 46; USCO REPORT 2018, *supra* note 143, app. at 22.

147. For example, there were over 600,000 registrations in some years during the 1990s and early 2000s, and as few as 232,907 in 2008, when the country was experiencing a major recession. *See* USCO REPORT 2020, *supra* note 143, app. at 37.

148. *See* Complaint at 2-5, Puma SE v. Forever 21, Inc., No. 17-cv-02523 (C.D. Cal. Mar. 31, 2017), 2017 WL 1193694, ECF No. 1.



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complaint, Puma cited the separability test created in *Star Athletica*, arguing that its Fenty shoes passed muster under the test and were thus copyrightable.[149] Ultimately, the parties settled the suit before a judgment could be rendered,[150] but it remains notable for being one of the earliest instances of a plaintiff using the *Star Athletica* approach to argue for the copyrightability of a fashion design.

Other lawsuits have also invoked the *Star Athletica* approach to copyrightability. In *Silvertop Associates, Inc. v. Kangaroo Manufacturing, Inc.*, for example, one banana-costume manufacturer sued another, alleging copyright infringement of its costume.[151] Using the separability test, the district court found that while the "cutout holes" of the plaintiff's banana costume were purely functional and thus not eligible for copyright, other features of the costume were copyrightable—including the overall shape and length of the design; the location of the head and arm cutouts; the look, feel, and yellow shade of the chosen fabric; and the parallel lines that mimicked a banana's ridges.[152] On appeal, the Third Circuit affirmed.[153]

In another lawsuit, *Triangl Group Ltd. v. Jiangmen City Xinhui District Lingzhi Garment Co.*, swimwear manufacturer Triangl alleged that the defendants had committed copyright infringement by duplicating the pattern of decorative black trim that it used on its bikini tops and bottoms.[154] Ultimately, Triangl won a default judgment: The court analogized the patterns of black trim to the patterns of chevrons and stripes that the Court had deemed protectable in *Star Athletica*, found that the defendants were infringing on these protectable designs, and issued a permanent injunction.[155] And in *Diamond Collection, LLC v. Underwraps Costume Corp.*, another infringement suit involving two costume sellers, the Eastern District of New York found that design elements of *Día de los Muertos*-themed costumes, including "ruffles and bowties" and "graphic skeleton patterns," were separable and thus copyrightable.[156] All of these cases, then, are examples of parties successfully using *Star Athletica* to claim copyright protection over elements of clothing.

Importantly, it appears plausible that in at least some of these cases, the new *Star Athletica* separability analysis is what allowed—or at least made it

149. *Id.* at 10, 16.

150. *See* Hilary George-Parkin, *Puma and Forever 21 Settle Contentious Fenty Footwear Lawsuit*, FOOTWEAR NEWS (Nov. 9, 2018, 12:17 PM EST), https://perma.cc/2HCX-TLXP.

151. 319 F. Supp. 3d 754, 760 (D.N.J. 2018), *aff'd*, 931 F.3d 215 (3d Cir. 2019).

152. *Id.* at 763-65.

153. *Silvertop Assocs.*, 931 F.3d at 221-22.

154. No. 16 Civ. 1498, 2017 WL 2829752, at *1 (S.D.N.Y. June 22, 2017).

155. *Id.* at *8, *10-11.

156. No. 17-CV-0061, 2019 WL 347503, at *1, *4 (E.D.N.Y. Jan. 22, 2019).



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easier for—the design elements in question to be deemed copyrightable. Recall that before *Star Athletica*, a design was copyrightable only to the extent that its artistic qualities were separable from the utilitarian aspects of the garment.[157] During this time, some courts created a distinction between "physical" and "conceptual" separability,[158] such that a design feature was only eligible for copyright protection if it could be *physically* separated from the item of clothing while leaving the utilitarian aspects of the garment completely intact.[159] If this were the requirement, it would have likely been difficult for elements of the banana costume in *Silvertop Associates* to pass muster, since the plaintiff could then have argued that features like the "overall length of the costume" and the "location of the head and arm cutouts" could not be physically removed while leaving the underlying garment intact.[160]

In *Star Athletica*, however, the Court noted that it was abandoning such a "physical-conceptual distinction," writing that "separability is a conceptual undertaking" that "does not require the underlying useful article to remain."[161] This new approach, which "does not require the decisionmaker to imagine a fully functioning useful article without the artistic feature,"[162] likely opens the door for more design elements of clothing—including the aforementioned features of the banana costume—to be copyrightable.

Thus, though there is an absence of conclusive empirical data on the implications of *Star Athletica*, it does appear that at least some in the fashion industry are using the decision to assert copyright protection where they may not have been able to previously. At a minimum, then, the Court's decision has left protections for fashion designs untouched; a stronger reading would suggest that it has made it easier to protect one's designs against copyists.

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157. *See supra* Part II.A.1.

158. Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1014 (2017).

159. *See* Rachel E. Fertig, *U.S. Supreme Court Clarifies Separability Analysis in Its Ruling on* Star Athletica, LLC v. Varsity Brands, Inc., LIBR. CONG.: COPYRIGHT (Apr. 6, 2017), https://perma.cc/2KG9-B2Y6.

160. *See* Silvertop Assocs. Inc. v. Kangaroo Mfg. Inc., 319 F. Supp. 3d 754, 764-65 (D.N.J. 2018), *aff'd*, 931 F.3d 215 (3d Cir. 2019).

161. *Star Athletica*, 137 S. Ct. at 1014. The Court explained that, moving forward, the separability inquiry should focus on "the extracted feature" and whether it could exist as its own pictorial, graphic, or sculptural work when imagined apart from the useful article—not on the "aspects of the useful article that remain after the imaginary extraction." *Id.* at 1012-13; *see also supra* Part II.A.2 (providing more detail on the separability test advanced in *Star Athletica*).

162. *Star Athletica*, 137 S. Ct. at 1013.



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### B. Remaining Concerns for Independent Designers Wishing to Sue

Though *Star Athletica* may have increased the viability of copyright infringement claims involving clothing designs, this fact alone is not necessarily a cure-all for independent designers' woes. In this Subpart, I will discuss two considerations that remain. The first is that, even if it is now easier in theory to bring forth such claims, the steep cost of pursuing litigation remains a barrier in practice—particularly for independent designers who, unlike fast fashion and luxury retailers, cannot afford to spend huge sums of money on legal fees. The second is that in this post-*Star Athletica* world, it might also be easier for independent designers to be named as *defendants* in copyright infringement lawsuits.

#### 1. Cost

While pursuing litigation is always a time-consuming and resource-intensive process, copyright litigation is particularly expensive.[163] In fact, in 2021 the American Intellectual Property Law Association reported that the median cost of copyright litigation, when the amount at stake is less than $1 million, is $350,000.[164] From the outset, such a hefty price tag precludes many designers from even considering legal action.[165] Furthermore, just sending a cease-and-desist letter to an alleged infringer can cost a significant amount: One California law firm, for example, offers a flat fee of $750 per letter.[166] But

163. *See* Shyamkrishna Balganesh, Essay, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280, 2285 (2013) (stating that copyright litigation costs "well over three times the already high average cost of litigation"); *see also* Nicholas Vennekotter, Note, *Full Cost in Translation: Awarding Expert Witness Fees in Copyright Litigation*, 87 FORDHAM L. REV. 1721, 1737-38 (2019) (arguing that intellectual property litigation is expensive largely because of the frequent need for expert witness testimony).

164. AM. INTELL. PROP. L. ASS'N, REPORT OF THE ECONOMIC SURVEY 2021 app. A at I-210 (2021). This figure includes any costs from pretrial through the appeals process. *Id.* When considering only the costs up through discovery, motions, and claim construction, that number was still $150,000. *Id.* The median cost of initial case management alone was $15,000. *Id.* Furthermore, this $350,000 figure can be contrasted with the results of a 2012 survey of American Board of Trial Advocates members, which revealed a median post-disposition cost of about $43,000 for automobile lawsuits, $66,000 for real property lawsuits, $88,000 for employment lawsuits, $91,000 for contract lawsuits, and $122,000 for malpractice lawsuits. *See* Paula Hannaford-Agor, *Measuring the Cost of Civil Litigation: Findings from a Survey of Trial Lawyers*, VOIR DIRE, Spring 2013, at 22, 26 fig.3.

165. *See* Eliza Huber, *Young Designers Get Ripped Off All the Time. Is There Any Way to Stop It?*, REFINERY29, https://perma.cc/CFA3-BCZA (last updated May 3, 2021, 8:52 AM) (to locate, select "View the live page"); *Design Piracy a Tough Case Even for Fashion Police*, IOWA ST. UNIV. NEWS SERV. (Oct. 3, 2016, 8:00 AM), https://perma.cc/NB5U-LPT8.

166. *Cease and Desist Letter*, MANDOUR & ASSOCS., https://perma.cc/4A9L-5C44 (archived Feb. 18, 2023).



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this is no small price tag for an emerging designer: The U.S. Bureau of Labor Statistics reported that the median annual pay for a fashion designer was $77,450 in 2021.[167] As Perez explained during our interview, "[A] young designer is happy for every sale, because every sale equates to a bill paid, or the ability to produce something else."[168]

Recent Supreme Court decisions have arguably made things bleaker. In *Rimini Street, Inc. v. Oracle USA, Inc.*, the Court held that the award of "full costs" to a party in copyright litigation must be limited to the six categories of costs specified in the general costs statute codified at 28 U.S.C. §§ 1821 and 1920.[169] This reduced the total amount of what victorious litigants could recover; for example, a small designer with a successful challenge would no longer be able to recover expert costs.[170]

That same year, the Court determined in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC* that a party cannot file a copyright infringement suit until the Copyright Office has approved that party's copyright registration.[171] Previously, certain circuits had treated the mere filing of an application for registration as sufficient, but this decision formally struck down such an approach.[172] Unfortunately, waiting for approval from the Copyright Office often takes months,[173] which is particularly precarious given the three-year statute of limitations on copyright infringement actions.[174] The only way to expedite this process is to pay an $800 special handling fee in addition to the

167. *Fashion Designers*, U.S. BUREAU LAB. STAT., https://perma.cc/6GGQ-UM7N (last updated Sept. 8, 2022).

168. Telephone Interview with K. Tyson Perez, *supra* note 32.

169. 139 S. Ct. 873, 875-76 (2019).

170. Scott Alan Burroughs, *Copyright Litigation: Now More Expensive and with More Delay than Ever Before!*, ABOVE THE L. (Mar. 13, 2019, 11:14 AM), https://perma.cc/5D4M-JC9N.

171. 139 S. Ct. 881, 892 (2019).

172. *Id.* at 887-89.

173. The Copyright Office states that the average processing time for all claims for cases closed from April 1, 2022, through September 30, 2022, was 2.7 months. U.S. Copyright Off., Registration Processing Times (n.d.), https://perma.cc/L6QL-AXHN (archived Feb. 18, 2023). However, that number increased to 9.2 months for mail-in applications with a mail-in physical deposit that require correspondence with the Office, and 9.9 months for online applications with a mail-in physical deposit that require correspondence. *Id.* To register a copyright claim, an applicant must submit an application, a deposit of the work, and the appropriate filing fee. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1503.1, at 8 (3d ed. 2021).

174. *See* Lauren N. Ross, Note, *The Implications of* Fourth Estate v. Wall-Street.com *on Copyright Registration*, 52 CONN. L. REV. 451, 471-72 (2020).



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baseline fee for a copyright registration.[175] This additional cost is likely to have a deterrent effect on independent, resource-strapped artists.[176]

It is difficult to imagine that emerging designers, many of whom are still focused on turning any sort of profit, would be willing or able to spend so much money on litigation—particularly in the wake of these Court decisions, which have made the process even less accessible. Hemphill and Suk argued over a decade ago that such designers would certainly take advantage of expanded IP protections since "[u]nder existing law, small designers already file suit,"[177] but the designers they cited as evidence are difficult, at least today, to classify as "small."[178] It remains dubious that the independent designers this Note is interested in—those who are still working to establish themselves and who have not yet received critical acclaim from the CFDA or made millions in sales—would possess the resources to take legal action against copyists. And in fact, many such designers have explicitly stated that they do not.[179]

175. *Special Handling*, U.S. COPYRIGHT OFF., https://perma.cc/Y39A-HA3J (archived Feb. 18, 2023); U.S. COPYRIGHT OFF., COPYRIGHT OFFICE FEES 4 (2021), https://perma.cc/CC58-E9Z6. Furthermore, special handling is granted only in cases where the applicant faces pending or prospective litigation, customs matters, or contract or publishing deadlines that require expedited issuance. *See Special Handling*, *supra*.

176. *See* Burroughs, *supra* note 170; Candace Lynn Bell & Christina Frangiosa, *Protecting Creative Works After* Fourth Estate v. Wall-Street.com, IPWATCHDOG (Jan. 23, 2020, 12:15 PM), https://perma.cc/A8AF-XNFB.

177. Hemphill & Suk, *supra* note 4, at 1192.

178. In support of their claim, Hemphill and Suk point to a list of infringement lawsuits against Forever 21 and note that "many" of these suits were filed by small designers. *Id.* at 1174 tbl.1, 1192. But a closer examination of this list, *see id.* at 1173, 1174 tbl.1, reveals that few, if any, of the plaintiffs can actually be categorized as a "small designer." Anthropologie and Bebe Stores are large retailers, while Harajuku Lovers is a label by celebrity artist Gwen Stefani. *See* Press Release, Urban Outfitters, Inc., URBN Q2: Record Sales, Record Profits (Aug. 24, 2021), https://perma.cc/JW42-4DCQ (to locate, select "View the live page"); *bebe.com*, ECOMMERCEDB, https://perma.cc/PXH5-3HGQ (archived Feb. 18, 2023); Hugh McIntyre, *Gwen Stefani's 'Harajuku Girls' Empire Is Still Growing*, FORBES (Oct. 14, 2016, 9:15 AM EDT), https://perma.cc/NF28-UVX5 (to locate, select "View the live page"); *see also* Erin Barajas, *Harkham Launches Junior Dress Line, Relocates Headquarters*, CAL. APPAREL NEWS (Oct. 27, 2006), https://perma.cc/SRA2-UZQ6 (noting that Harkham Industries employs multiple designers and that its brands can be found in over 2,000 stores). Anna Sui, Carole Hochman, and Diane von Furstenberg are well-known, commercially successful designers. *See Anna Sui*, CFDA: RUNWAY360, https://perma.cc/2HZK-XGEM (archived Feb. 18, 2023); *Carole Hochman*, CFDA, https://perma.cc/6LFC-62YD (archived Feb. 18, 2023); *Diane von Furstenberg*, CFDA, https://perma.cc/D9WS-RDXD (archived Feb. 18, 2023). This leaves only one plaintiff: Trovata. This brand was founded by four young newcomers to the fashion industry. But it won a $200,000 grant from the CFDA in its early days and was racking up $8 million in sales within a few years of its inception. *See* Eric Wilson, *A Split in Fashiondom: Can This Label Be Saved?*, N.Y. TIMES (Mar. 22, 2007), https://perma.cc/WJ4N-L6FF.

179. *See, e.g.*, Ariana Bindman, *SF Fashion Startup Dolls Kill Accused of Plagiarizing Independent Designs*, SFGATE (updated Feb. 18, 2021, 11:11 AM), https://perma.cc/37WD-UB58 ("I

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This sentiment was echoed in my own interviews, too. Although Perez was initially interested in seeking legal assistance after his hat design was copied, he felt that he could not compete with "bigger brands . . . [who] have lawyers who are [on] retainer who can send me to court for three to five years."[180] Similarly, Fry shared that in all the times her designs and images were stolen, she "never really considered legal action, mainly because it seemed really expensive and unobtainable. . . . [H]iring a lawyer [was] just . . . not in [her] budget."[181] The unfortunate reality is that even if *Star Athletica* has rendered certain infringement claims more viable from a legal perspective, the cost of actually bringing those claims to court remains an insurmountable barrier for many.

2. Becoming defendant rather than plaintiff

A related concern is that *Star Athletica* has increased the risk that legal claims will be wielded not *by* but rather *against* independent designers. If fashion design is an inherently cumulative endeavor that requires reworking and building off of existing designs,[182] there is good reason to think that independent designers also take inspiration from, and at times even copy, others.[183] If this is true, a post-*Star Athletica* world wherein it is easier to litigate certain claims regarding clothing designs might also be one in which independent designers are more frequently sued for copyright infringement.

In what circumstances might such lawsuits be filed? One possibility is that independent designers will sue other independent designers over alleged copying. Given the high costs and overall inaccessibility of litigation discussed in the previous Subpart, however, this seems unlikely to be a frequent

did not have $1,000 to pay a lawyer at the time. I don't have that now." (quoting a designer)); Dayna Evans, *Talking with Tuesday Bassen About Her David vs. Goliath Battle Against Zara*, CUT (July 29, 2016), https://perma.cc/8JFP-5T7C ("When this kind of theft happens, there's so little that artists can actually do . . . . Most of us don't have the time or resources to fight properly . . . ." (quoting another designer)); Dara Prant, *Kai Collective Calls Out Fendi for Copying Its Signature Designs*, FASHIONISTA (July 22, 2021), https://perma.cc/GKD9-6GE8 (to locate, select "View the live page") (detailing the experience of a designer who did pursue litigation against a brand that allegedly copied her work, but who took care to note that "as a small brand, it is just not sustainable to keep incurring legal fees" (quoting the designer)).

180. Telephone Interview with K. Tyson Perez, *supra* note 32.

181. Telephone Interview with Kari Fry, *supra* note 40.

182. *See* Kal Raustiala & Christopher Jon Sprigman, Opinion, *Why Imitation Is the Sincerest Form of Fashion*, N.Y. TIMES (Aug. 12, 2010), https://perma.cc/94JD-ZYNJ (articulating the belief that "every clothing design is a reworking of something we've seen before").

183. Fry, for example, clarified that not only "really large brands," but also "small brands" and even "indie brands" have stolen her designs. Telephone Interview with Kari Fry, *supra* note 40.



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occurrence.[184] Indeed, a search in both Westlaw and Bloomberg for cases and dockets including the terms "clothing," "design," "copyright infringement," and "Star Athletica" did not appear to yield many instances of this taking place.[185]

A more troubling possibility is that bigger players in the industry—fast fashion retailers, luxury labels—will file suit against smaller designers, knowing they are largely unable to fight back.[186] First, is there a risk that fast fashion retailers will increasingly file suit against independent designers? Though fast fashion retailers certainly possess the resources to do so, there are reasons to believe this is not a major concern. For one, fast fashion retailers likely do not view independent designers as a threat in the first place: It is the retailers that tend to have the massive customer base and sales, since they are able to offer more designs at a lower price point by manufacturing clothing much more cheaply and quickly.[187] Additionally, fast fashion retailers are frequently the ones doing the copying in the first place—they are more often in the position to *be* sued, rather than *to* sue.[188] Thus, it may not be all that common to see fast fashion retailers going after smaller designers after all. The aforementioned Westlaw and Bloomberg searches confirm this suspicion, yielding no identifiable instances of this occurring.[189]

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184. *See supra* Part II.B.1.

185. Though the search yielded 33 cases in Westlaw and 40 dockets in Bloomberg, the vast majority of the results—all but one, in fact—either did not include an independent designer as a party, involved patent or trademark rather than copyright claims, or did not concern clothing at all. I obtained these results by searching Westlaw for federal and state cases and Bloomberg for federal and state dockets that (1) appeared after March 22, 2017, i.e., after *Star Athletica* was decided, and (2) contained the terms "clothing," "design," "copyright infringement," and "*Star Athletica*." The single most relevant result was *Ferrarini v. Irgit*, in which Maria Solange Ferrarini, an artist who sold handmade crochet bikinis, filed suit against swimwear line creator Ipek Irgit, alleging that Irgit had stolen her designs. No. 19 Civ. 0096, 2020 WL 122987, at *1-2 (S.D.N.Y. Jan. 9, 2020), *aff'd*, No. 21-597-cv, 2022 WL 1739725 (2d Cir. May 31, 2022), *cert. denied*, 143 S. Ct. 570 (2023) (mem.). Even assuming that this could be characterized as an example of one independent designer suing another (note that Irgit's line had quickly risen from its scrappy beginnings and was making millions in sales by its second year, *see* Katherine Rosman, *The Itsy-Bitsy, Teenie-Weenie, Very Litigious Bikini*, N.Y. TIMES (Dec. 20, 2018), https://perma.cc/6N9E-7WLD) it was the only potentially on-point lawsuit found in these databases.

186. In fact, years before *Star Athletica*, Hemphill and Suk acknowledged this concern: that increased protections for fashion designs "will be an effective weapon only in the hands of established designers, and will be used not against copyists, but against the very designers most in need of protection." Hemphill & Suk, *supra* note 4, at 1193.

187. *See* Zhai Yun Tan, *What Happens When Fashion Becomes Fast, Disposable and Cheap?*, NPR (Apr. 10, 2016, 12:29 PM ET), https://perma.cc/BVB9-NF8L; Jasmin Malik Chua, *The Environment and Economy Are Paying the Price for Fast Fashion—But There's Hope*, VOX (Sept. 12, 2019, 7:00 AM EDT), https://perma.cc/B9EB-TJ3P.

188. *See supra* Part I.A.2.

189. *See supra* note 185 and accompanying text.



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If not fast fashion retailers, how about luxury brands? Because of the high price point of their products, it *is* possible that independent designers are able to compete with them by offering similar products at a cheaper price. Indeed, luxury retailers already file suit over trademark infringement claims.[190] Louis Vuitton, for example, is known as a litigious brand that will take action against any party it believes is infringing on its trademarks—most notably, its signature "LV" logo.[191]

It seems likely, however, that luxury brands will remain more concerned with trademark infringement than with copyright infringement, because trademarks—which include names, logos and slogans—are what serve to "indicate the source of the goods," making them "a [luxury] brand's most valuable asset."[192] Thus, any increased potential for *copyright* infringement claims after *Star Athletica* may not have much of an effect on luxury brands' actions against independent designers.

While it may still be too early to make any definitive statements, it appears so far that *Star Athletica* has not significantly increased the risk that independent designers will be named as defendants in copyright infringement suits.

## III. Nonlitigation Avenues for Redress

In Part II, I examined the potential for independent designers to take legal action after being copied and concluded that there are often practical barriers preventing them from doing so—one of the foremost being the high cost of

190. *See, e.g.*, Mark A. Lemley & Sari Mazzurco, *The Exclusive Right to Customize?*, 103 B.U. L. Rev. (forthcoming 2023) (manuscript at 12-23), https://perma.cc/Z6L6-U9DY (detailing instances in which luxury brands from Cartier to Chanel to Ferrari have filed suit over alleged trademark infringement).

191. *See, e.g.*, Declan Eytan, *Louis Vuitton Loses Lawsuit (Again) Filed over Allegations of Trademark Infringement*, FORBES (Dec. 31, 2016, 11:10 PM EST), https://perma.cc/3986-PEUG (to locate, select "View the live page"); Michael Satterfield, *Louis Vuitton's "Cease & Desist,"* W. LIFESTYLE RETAILER (June 10, 2019), https://perma.cc/3Z7C-ES7S. Louis Vuitton, however, may be the exception and not the norm. It has garnered criticism for its aggressive pursuit of small businesses, and other brands may not want to risk receiving bad press. *See, e.g.*, *Louis Vuitton Should Focus on Its Own Business, Not Bully Small Businesses by Making Weak Trademark Claims*, PUB. CITIZEN (Mar. 1, 2019), https://perma.cc/U3MX-JXZ5.

192. *See* Betina A. Baumgarten, Note, *One Too Many Sticks for the Trademark Bundle? The Unintended Consequences of Luxury Brands' Push for a Post-First Sale Authentication Right*, 42 LOY. L.A. ENT. L. REV. 111, 120-21 (2021). Indeed, most of Louis Vuitton's disputes are over alleged trademark infringement and not copyright infringement. *See, e.g.*, Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc., 868 F. Supp. 2d 172, 174 (S.D.N.Y. 2012); Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 87-89 (2d Cir. 2012); Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1343 (11th Cir. 2013); Louis Vuitton Malletier S.A.S. v. Sandra Ling Designs, Inc., No. 21-CV-352, 2021 WL 3742024, at *1-2 (S.D. Tex. Aug. 24, 2021).



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litigation.[193] In this Part, I will evaluate three other avenues through which designers might seek redress: social media shaming, pro bono representation, and the Copyright Office's recently established Copyright Claims Board. I ultimately conclude that social media can be a particularly powerful tool for policing design piracy, though it still possesses its own set of limitations.

### A. Social Media Shaming as an Extralegal Enforcement Method

#### 1. How and when it works

Many designers who are unable to use the legal system turn to social media, calling out copyists in an attempt to hold them accountable.[194] In today's increasingly digital culture, this use of social media as an extralegal enforcement method is more prevalent than ever before.[195] In fact, not only do designers themselves post about being copied, but social media accounts dedicated to policing and calling out design piracy—including the famous Diet Prada, which has amassed over three million followers—do too.[196]

How does social media shaming work? And why is it a popular avenue for designers seeking redress? Elizabeth Rosenblatt has posited that shaming "operates through public perception. . . . Since entities want to avoid the disapproval of others, they tend to avoid behavior that would lead to public shaming."[197] It is a tactic that can be used on both individuals and collective entities, such as fashion firms. In the case of the latter, public shaming works because corporations "fear the economic impact caused by loss of reputation."[198] And it can be a particularly helpful tool for regulating copying in areas such as fashion, where there are few formal legal protections in place—areas that Rosenblatt refers to as "doctrinal no man's land."[199]

There are many reasons individuals may take to social media to seek redress in the face of design piracy. For starters, whereas taking legal action is

193. *See supra* Part II.B.1.

194. *See, e.g.*, Lieber, *supra* note 51.

195. *See* Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1530 (2019); Lucrezia Palandri, *Fashion as Art: Rights and Remedies in the Age of Social Media*, LAWS, Mar. 2020, at 1, 13-14.

196. Diet Prada (@diet_prada), INSTAGRAM, https://perma.cc/G7JH-MGAN (archived Feb. 19, 2023) (to locate, select "View the live page"); *see also* Amelia Diamond, *An Anonymous Instagram Account That's Calling Out Fashion Copy-Cats*, REPELLER (Dec. 20, 2017), https://perma.cc/5UFX-B7BU.

197. Elizabeth L. Rosenblatt, *Fear and Loathing: Shame, Shaming, and Intellectual Property*, 63 DEPAUL L. REV. 1, 11 (2013).

198. *See* Adler & Fromer, *supra* note 195, at 1515.

199. *See* Rosenblatt, *supra* note 197, at 20 (quoting Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 325 (2011)).



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costly and time-consuming, uploading a post to social media is quick, easy, and free.[200] In this sense, social media shaming is "powerfully democratizing," since it allows "entities with very little financial power [to] shape public opinion."[201] A successful social media callout is also likely to bring about a much quicker resolution than a lawsuit would, saving designers from having to wait months or even years to receive redress.[202] And the resolution brought about might even "approximate the goals of litigation," since social media shaming has the potential to "yield monetary damages, stop appropriation, garner attribution to the original creator, [and] avoid misattribution of the copyist's work to the original creator."[203]

Some also believe that corporations, including large fashion retailers, are particularly susceptible to shaming campaigns. Amy Adler and Jeanne C. Fromer have argued that corporations possess an "exquisite reputational sensitivity" due to their economic dependence on a supportive customer base, and furthermore that:

> Although companies have always been sensitive to reputation, social media has changed the game. Individual customers now have the capacity to wage shaming campaigns that can bring a brand to its knees in a matter of hours. . . . [B]ecause public shaming is more attention-grabbing than court trials, it is no wonder that companies act quickly to repair the brand damage shaming can cause.[204]

Given these benefits, it is no wonder that many designers turn to social media to call out their copyists. In fact, both of the designers I interviewed for this Note—Perez and Fry—mentioned doing so.[205]

Arguably, neither designer received an optimal outcome from their social media posts. Fry explained that "I have had a couple of people take stuff down, but . . . if you leave them alone for a while, they'll usually just wait and then put it back up."[206] Perez recalled that Givenchy failed to deliver on promises of a

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200. *See id.* at 32 ("[S]haming, especially in the age of viral Internet discussion, is very inexpensive. . . . For that reason, shame and shaming can level the playing field between Davids and Goliaths."); Adler & Fromer, *supra* note 195, at 1508-09 ("[S]elf-help in the intellectual property context has shown itself to be dramatically cheaper and faster than bringing a lawsuit. . . . All parties avoid costly and protracted litigation, a factor that becomes particularly salient when there are power and wealth disparities among them.").

201. *See* Rosenblatt, *supra* note 197, at 38.

202. *See* Adler & Fromer, *supra* note 195, at 1508-10.

203. *See id.* at 1503.

204. *See id.* at 1515-16. Note, however, that not everyone may agree with this evaluation. Rosenblatt has suggested that shaming is most effective when regulating *individual* transgressors, especially in "close-knit communities where members are likely to communicate with each other and may depend on each other for creative or inventive purposes." Rosenblatt, *supra* note 197, at 41-42.

205. *See supra* Part I.A.

206. Telephone Interview with Kari Fry, *supra* note 40; *see also supra* Part I.A.2.



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public apology, a donation to charity, and the removal of the hat in question from its website; only many months later did the brand "pause" production of its hat, and even then, it denied drawing any inspiration from Perez's design.[207]

Others, however, have achieved more tangible results. Mati Ventrillon, a Scottish designer behind an eponymous knitwear label,[208] took to social media to allege that her designs had been copied and used by Chanel in one of its 2015 collections.[209] In a series of posts on multiple social media platforms, Ventrillon explained that two members of the Chanel team had visited her studio in Fair Isle earlier that year and purchased her garments as research for the collection.[210] Replicas of her designs then appeared on the runway.[211] Several days after the posts were made, and after receiving backlash as a result, Chanel released the following statement:

> Further to discussions that have allowed the parties to clarify this issue, Chanel will credit Mati Ventrillon by including the words "Mati Ventrillon design" in its communication tools to recognise her as the source of inspiration for the knitwear models in question. Chanel recognises that this situation resulted from a dysfunctionality within its teams and has presented its apologies. Chanel also recognises the heritage and know-how of Fair Isle. Chanel wishes to emphasise that the House is extremely vigilant in terms of its respect for creativity, whether its own or that of others.[212]

While Ventrillon received nonmonetary recourse in the form of accreditation, which is valuable in its own right,[213] others have succeeded in seeing their stolen designs pulled from sale altogether. In 2018, Carrie Anne Roberts, the designer behind the brand Mère Soeur, posted that Old Navy had copied both the adult and children's versions of her best-selling shirt.[214] In response, many users left angry comments on Old Navy's Instagram posts and

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207. Telephone Interview with K. Tyson Perez, *supra* note 32; *see also supra* Part I.A.2.

208. *Story: About Mati*, MATI VENTRILLON, https://perma.cc/A5JN-AVF6 (archived Feb. 20, 2023).

209. Maria Bobila, *Chanel Accused of Copying Knitwear Designer Mati Ventrillon [Updated]*, FASHIONISTA (Dec. 7, 2015), https://perma.cc/LXM9-VYJ5 (to locate, select "View the live page").

210. *See id.*; Mati Ventrillon Fair Isle-Scotland, FACEBOOK (Dec. 3, 2015), https://perma.cc/PKB6-A2K3 (to locate, select "View the live page").

211. *See* Bobila, *supra* note 209.

212. *See* Madelyn Chung, *Chanel Apologizes for Copying Mati Ventrillon's Designs in Its Metiers d'Art Show*, HUFFINGTON POST (updated Dec. 8, 2015), https://perma.cc/RHV9-YKXS (to locate, select "View the live page").

213. *See* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1790-91 (2012) ("[A]ttribution can bolster an author's or inventor's reputation. . . . In a visible way, it [also] establishes a link between the creator and the creator's work.").

214. *See* Lieber, *supra* note 51; Carrie Anne (@mre.soeur), INSTAGRAM (Apr. 8, 2018), https://perma.cc/MW96-DDWH (to locate, select "View the live page").



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posted negative reviews of its shirts online; as a result, Old Navy pulled the products from its website and told Roberts that no additional orders would be placed.[215] And in 2021, London-based designer Monika Young of Monika the Label used Instagram to call out ASOS and Topshop for copying her dress design, calling them "the 'gift' that keeps on stealing."[216] A day later, ASOS "quietly removed" the dress from its website.[217]

2. Limitations and concerns

While the aforementioned instances show that social media shaming can be successful in fighting design piracy, this strategy still has certain limitations and concerns. The first and most fundamental one is that social media shaming is not guaranteed to work. Unlike formal law, which is "more reliably enforceable" against copyists,[218] internet shaming will have no effect if the copyist in question chooses not to respond.

Indeed, one can see that for every designer who was successful in achieving some result through the use of social media, there are others—potentially many others—who were not. Anifa Mvuemba, creator of the label Hanifa, has called out numerous fast-fashion retailers for copying her designs.[219] Most recently, she alleged that Pretty Little Thing had replicated one of her blouses, through a Twitter post that ultimately received over 12,000 retweets and nearly 54,000 likes.[220] By the next day, Pretty Little Thing responded, stating, "[O]ur design inspiration was taken from an existing vintage style. There are noticeable differences between Anifa's designs and ours."[221] Yet a visual comparison of the two, as shown in Figure 5 below, reveals striking similarities in features such as the neckline, the cutout on the chest, and the pattern of ruching on the fabric, and provides at least some support for Mvuemba's claim:

215. Lieber, *supra* note 51. Old Navy has since removed all content related to the shirt from its website and social media, including the user comments and negative reviews. *See* Old Navy (@oldnavy), INSTAGRAM, https://perma.cc/SGD9-F5BE (archived Feb. 20, 2023) (to locate, select "View the live page").

216. Monika the Label (@monikathelabel), INSTAGRAM (Sept. 5, 2021), https://perma.cc/J5DJ-GLH4 (to locate, select "View the live page").

217. *Id.*

218. *See* Rosenblatt, *supra* note 197, at 33.

219. *See, e.g.*, Susie Heller, *ASOS Is Being Accused of Copying This Designer's Dress*, INSIDER (June 30, 2017, 12:12 PM), https://perma.cc/3X6Z-U25W; Tira Urquhart, *Fast-Fashion Retailer Pretty Little Thing Is Accused of Copying Black-Owned Designer*, BET (Jan. 19, 2021, 10:59 AM), https://perma.cc/GP3W-G3D8.

220. *See* Anifa Mvuemba (@AnifaM), TWITTER (Jan. 17, 2021, 9:06 AM), https://perma.cc/7CUH-UC2M (to locate, select "View the live page").

221. *Anifa Mvuemba Claims Fast Fashion Brand Ripped Off Her Designs*, VOICE (Jan. 18, 2021), https://perma.cc/M2DB-TQKL.



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**Figure 5**[222]
Anifa Mvuemba's Tweet

Around the same time, numerous other designers of color—Fisayo Longe of Kai Collective,[223] Mariama Diallo of Sincerely Ria,[224] and Aurora James of Brother Vellies,[225] to name a few—came forward with allegations that large retailers had stolen their designs, but to little avail. This prompted discussions about the longstanding appropriation of Black and brown designers' work and

222. Mvuemba, *supra* note 220.

223. *See* Prant, *supra* note 179; Fisayo Longe (@FisayoLonge), TWITTER (July 22, 2021, 4:19 AM), https://perma.cc/5YGP-F2D8 (to locate, select "View the live page"). The tweet is no longer available on Twitter but is still available through the Internet Archive's Wayback Machine. *See id.* (archiving the tweet on March 15, 2022).

224. *See* Mariama Diallo (@MariamaDiallo__), TWITTER (June 11, 2021, 11:57 AM PST), https://perma.cc/JXQ9-WEQV.

225. *See* Dominique Hobdy, *Designer Aurora James Calls Out Zara for Copying Her Signature Footwear*, ESSENCE (updated Oct. 26, 2020), https://perma.cc/X7VY-2JTH.



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its contribution to racial inequities in the fashion industry.[226] As Longe wrote in her post, "Black women continue to be the blueprint."[227]

Equity-related concerns are closely linked to a second limitation of social media as an enforcement tactic: Only certain designers' posts will attract attention or go viral. As Rosenblatt put it, "For every Internet shaming campaign that reaches its audience, there may be dozens of attempts at shaming that few people ever become aware of."[228] Furthermore, Rosenblatt has argued that "[a]s the Internet becomes increasingly saturated, it becomes even more difficult for an audience to separate signal from noise. This means that the effectiveness of shaming as a regulatory mechanism may end up depending as much on luck as on merit."[229]

Luck? Perhaps—but there are also tangible factors that increase the likelihood that one's social media post will receive attention. Being famous is one of them: In 2019, Kim Kardashian successfully sued fast-fashion retailer Missguided for using her name and image to advertise knock-off designs, winning $2.7 million in damages.[230] In suing Missguided, she used a side-by-side of her own Instagram post next to one by Missguided as evidence.[231] Kardashian's rare success in court prompted some to point to her celebrity status; as one blogger wrote, "When most influencers accuse brands of copying their designs, nothing happens because let's face it, few influencers have 251M followers on Instagram."[232]

Besides fame, race may also play a factor in whether a designer's post will attract attention. A 2021 study of more than 400 U.S.-based influencers, or individuals who create online content to earn income, revealed that only 23% of Black influencers fell into the "macro" influencer category, meaning they

226. *See, e.g.*, Taylor Crumpton, *The Challenges of Being a Black Independent Designer*, NYLON, https://perma.cc/YB97-AXVX (archived Feb. 21, 2023); Chioma Gathoga-Ogbuike, *Black Women Designers Are Standing Up Against the Theft of Fast Fashion Fraud*, MEFEATER (June 21, 2021), https://perma.cc/39L2-SU75.

227. Longe, *supra* note 223; *see also* Maiysha Kai, *'Black Women Continue to Be the Blueprint'—Is That Why Big Brands Keep Knocking Off Independent Designers?*, ROOT (July 22, 2021), https://perma.cc/R9R9-WUY8.

228. Rosenblatt, *supra* note 197, at 14.

229. *Id.* at 35-36.

230. Channing Hargrove, *Kim Kardashian Won $2.7 Million from Suing Missguided for Knockoffs*, REFINERY29, https://perma.cc/7F3U-ZUGT (last updated July 5, 2019, 7:00 AM).

231. *Id.*

232. *See* Caroline Edwards, *As More Influencers Call Out Fast Fashion Brands for Copycat Designs, Does It Result in Any Real Change?*, CORQ, https://perma.cc/E8HR-VEPN (archived Apr. 4, 2023) (to locate, select "View the live page").



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had more than 50,000 followers.[233] In contrast, 41% of white influencers fell into that category.[234] Another study that same year found causal evidence that white Americans pay less attention to their Black peers, deeming this phenomenon a "racial attention deficit."[235] In conjunction, these discrepancies suggest there could be a racial skew to the posts that receive and sustain higher engagement.

A third limitation of social media is that it is far less likely to result in monetary compensation for the aggrieved designer. In theory, social media shaming does have the power to bring about such compensation. For example, the party being shamed "might worry about the pecuniary consequences that result from earning a reputation for appropriating the works of others," so it "might readily pay the original creator to stop the shaming."[236] In addition, the attention from the social media post can "cast[] a spotlight on the original creator, garnering attention that the creator might not otherwise enjoy" and increasing sales of the original creator's works.[237]

At the same time, these forms of monetary compensation are more restricted than compensation from a formal legal process. For one, a designer's compensation in the form of increased sales comes from members of the public, thus the appropriator may still be undeterred.[238] Furthermore, and perhaps more devastatingly, nothing is mandating the copyist to pay up after being called out—the ball is in their court, so to speak.[239] Indeed, none of the aforementioned designers—including Perez, Fry, and Ventrillon—received any monetary compensation from their copyist.[240] This is in stark contrast to the outcome that would result from a successful infringement lawsuit. One of the central goals of copyright law is to compensate successful claimants for infringement; it entitles a copyright owner to "'actual damages and any additional profits of the infringer' or statutory damages ordinarily ranging between $750 and $30,000 per infringed work."[241]

That social media shaming has sprung up in our world of existing formal IP laws gives rise to another potential concern, discussed by Adler and Fromer:

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233. *MSL Study Reveals Racial Pay Gap in Influencer Marketing*, MSL (Dec. 6, 2021), https://perma.cc/9ZSP-TTBZ.

234. *Id.*

235. *See* Sheen S. Levine, Charlotte Reypens & David Stark, *Racial Attention Deficit*, SCI. ADVANCES, Sept. 17, 2021, at 1, 1, 3-4.

236. Adler & Fromer, *supra* note 195, at 1505-06.

237. *Id.* at 1506.

238. *Id.*

239. *See id.* at 1506-07.

240. *See supra* Parts I.A, III.A.1.

241. *See* Adler & Fromer, *supra* note 195, at 1498 (quoting 17 U.S.C. § 504(a)-(c) (2012)).



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The use of extralegal enforcement tactics may "undermine the delicate balance that copyright and trademark laws have struck between protecting rightsholders and protecting the public."[242] They argue that "[t]hese labyrinthine doctrines exist to ensure that intellectual property law does not overreach in a way that would unduly limit copying," and that forms of self-help such as social media shaming "disregard[] this carefully constructed nuance . . . cater[ing] instead to a folk sense of law, reflected for example, in the avenging Diet Prada site, where copying is almost always assumed to be wrong."[243] In other words, extralegal enforcement methods, such as social media shaming, "threaten[] to over-police copying."[244]

Finally, I would like to flag an often-understated limitation of social media shaming: It can be an emotionally taxing experience for the designer. While the process of litigation is widely conceived of as draining,[245] the negative effects of fighting for oneself on social media are easier to overlook. Perez explained that after a period of discussing Givenchy online, "I started finding myself consumed with it. And it was blocking me. . . . I should be celebrating having produced my own first collection, but my posts were overwhelmed with Givenchy stealing from me."[246] Similarly, Fry shared that while she used to post about being copied on social media, "I found . . . that it put me in . . . a worse place. . . . I realized that it was . . . more negative than positive and that it was better to just ignore it."[247]

Ultimately, social media shaming is an accessible strategy that even has the potential to "approximate the goals of litigation"[248]—though success is not guaranteed in every instance, and individuals taking to social media to call out their copyists should be cognizant of the impact that doing so can have on their mental health.

242. *See id.* at 1525.

243. *Id.*

244. *Id.* at 1528-29.

245. *See, e.g.*, Miguel Clemente & Dolores Padilla-Racero, *The Effects of the Justice System on Mental Health*, 27 PSYCHIATRY, PSYCH. & L. 865, 865 (2020) ("Anyone enduring lengthy legal proceedings . . . will complain that long drawn-out legal proceedings have seriously affected their health."); Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 59 (2018) ("No one can deny that many aspects of litigation today are expensive and time-consuming . . . .").

246. Telephone Interview with K. Tyson Perez, *supra* note 32.

247. Telephone Interview with Kari Fry, *supra* note 40.

248. Adler & Fromer, *supra* note 195, at 1503.



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B. Pro Bono Representation

Given that cost is one of the major barriers to the pursuit of legal action,[249] pro bono legal representation should, in theory, be a promising solution for fashion designers with copyright infringement claims. Indeed, there are many nonprofit organizations dedicated to providing lawyer referrals and pro bono legal services to artists, such as the Fashion Law Institute,[250] California Lawyers for the Arts,[251] and Volunteer Lawyers for the Arts (VLA).[252] To gain a better sense of whether and how often fashion designers receive such services, I spoke with Amy A. Lehman, Director of Legal Services at VLA.[253]

VLA, which is based in New York, provides legal services to "low-income artists and all non-profit arts organization [sic] in every artistic discipline."[254] The organization's staff attorneys "successfully resolve about 50% of matters in the initial consultation" with the client.[255] If the matter at hand requires further legal assistance and the client meets VLA's income standard, the organization will then seek to place the case with one of its roughly 2,000 volunteer attorneys.[256]

According to Lehman, VLA has placed 267 fashion-related matters with a volunteer attorney since 2011. She explained that fashion designers seek assistance with a wide variety of matters, including but not limited to contract, trademark, and copyright issues. Importantly, she noted that although some designers do come to VLA with copyright infringement claims,[257] it is uncommon for them to end up pursuing litigation.

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249. *See supra* Part II.B.1.

250. *Fashion Law Pop-Up Clinic*, FASHION L. INST., https://perma.cc/WE8T-U4FJ (archived Feb. 22, 2023).

251. *Lawyer Referral & Information Service (LRIS)*, CAL. LAWS. FOR ARTS, https://perma.cc/AD7B-7YE4 (archived Mar. 11, 2023).

252. *Pro Bono Legal Services*, VOLUNTEER LAWS. FOR ARTS, https://perma.cc/QN84-8ALQ (archived Feb. 22, 2023).

253. Telephone Interview with Amy A. Lehman, Dir. of Legal Servs., Volunteer Laws. for the Arts (Jan. 24, 2022). Unless otherwise indicated by a footnote, all of the information about VLA is drawn from a telephone interview with Lehman, which I conducted in January 2022 for the purposes of this Note.

254. *Pro Bono Legal Services*, *supra* note 252.

255. *Id.*

256. To meet VLA's income standard, an individual's annual taxable income must be less than three times the amount specified by the U.S. federal poverty guidelines.

257. Lehman recalled the story of one client, a young designer, who had submitted a book of designs to "one of the big department stores" in the hopes that it would decide to sell his line. When he received the book back in the mail, it looked like it had been taken apart and then put back together again. About a year later, he saw his exact designs on the floor of the store—they had been stolen without his knowledge. Lehman could not remember whether the designer had received any recourse, but stated that "most likely

*footnote continued on next page*



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One reason for this is that there are times where a designer "will think . . . they were infringed upon, but after [a] consultation it becomes clear that they were not." But even in cases where a client might have a viable legal claim, which "are not unusual," it is still rather unlikely that VLA, or any similar organization, will be able to help them file a lawsuit. This is because the client must be matched with a volunteer attorney who does not have a conflict of interest—and these are hard to find. "[I]f you have an independent designer who is up against a heavyweight . . . the challenge is that [attorneys at] big firms would probably end up with a conflict, because the firm might represent the other side," Lehman explained. "[W]e would have to find an attorney who wouldn't have a conflict. Generally that means a smaller firm or a solo [attorney]. That's not unheard of . . . [b]ut . . . it really depends."

Furthermore, even if a designer does manage to secure a pro bono attorney, pursuing legal action is still not guaranteed to be free. "[E]ven if you have a pro bono lawyer working with you, there are other costs to litigation," Lehman stated. "[T]here are filing fees, there are discovery costs, these [costs] are extraordinary. And they're out of pocket. No pro bono attorney is going to pay for those things. . . . [T]hat's why . . . litigation is just out of reach. . . . [I]t's troubling. It's problematic."[258]

Due to the inaccessibility of litigation, Lehman suggested that victims of design piracy instead attempt to send cease-and-desist letters or "use mediation as a tool to resolve a dispute." She also pointed to the newly established Copyright Claims Board as an alternative avenue for redress, though she noted that it was also an imperfect solution.[259]

Even if litigation remains largely out of reach, however, there are still other ways in which designers can benefit from pro bono legal services. For example, VLA offers a variety of educational programming, including classes on how to register a copyright.[260] This has the potential to help many designers—in fact, Lehman notes that it is common for a client to come in with a copyright infringement-related matter and then learn "that what they should

he would have been placed with an attorney who would have . . . sent a cease-and-desist letter or done something along those lines."

258. The cost to file a civil action in federal district court is $350 plus a $52 administrative fee. 28 U.S.C. § 1914; *District Court Miscellaneous Fee Schedule*, U.S. CTS., https://perma.cc/28TY-87V7 (archived Mar. 11, 2023). In 2021, the median cost of initial case management for copyright litigation—where the amount at stake is less than $1 million—was $15,000; this figure jumps to $150,000 once the costs of discovery, motions, and claim construction are included. AM. INTELL. PROP. L. ASS'N, *supra* note 164, app. A at I-210.

259. For further discussion of the Copyright Claims Board, see Part III.C below.

260. *See, e.g.*, *On-Demand Recording: Lamps, Amps, and Registration Stamps: Intellectual Property Protections for Functional Design*, VOLUNTEER LAWS. FOR ARTS, https://perma.cc/2CQG-N3JF (archived Feb. 22, 2023).



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do first is register their copyright." Designers can also receive help with pursuing the alternative, nonlitigation strategies suggested by Lehman: There are organizations that draft cease-and-desist letters and provide arbitration and mediation services at no or reduced cost.[261]

### C. The Copyright Claims Board

On December 27, 2020, President Trump signed into law the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020.[262] The Act directed the Copyright Office to establish the Copyright Claims Board (CCB), a "three-member tribunal within the Office that provides an efficient and user-friendly option to resolve certain copyright disputes that involve up to $30,000."[263] The CCB is meant not to "displace or limit the ability to bring small copyright claims in federal court, but rather [to] provide[] a more accessible alternative forum."[264] The CCB opened for filing on June 16, 2022.[265]

The CCB is located at the Copyright Office's Washington, D.C. offices; however, "proceedings are handled completely electronically and remotely."[266] Parties do not need an attorney to file a claim or participate in a CCB proceeding, though they will be allowed to use one if they so choose.[267] To file a claim with the CCB, a party must either already have a copyright registration for the work at issue, or have filed a copyright registration application.[268] The party must also file its claim within three years from the date the allegedly infringing activity took place.[269]

Notably, a party cannot file the same claim in both the CCB and federal court; it must choose between the two.[270] Furthermore, participation in a CCB

261. *See, e.g.*, *Arts Arbitration & Mediation Services*, CAL. LAWS. FOR ARTS, https://perma.cc/V2QJ-PJ3A (archived Feb. 22, 2023).

262. Copyright Alternative in Small-Claims Enforcement Act of 2020, Pub. L. No. 116-260, 134 Stat. 2176 (codified at 17 U.S.C. §§ 101, 1501-1511).

263. *Copyright Small Claims and the Copyright Claims Board*, U.S. COPYRIGHT OFF., https://perma.cc/V95C-BBST (archived Feb. 23, 2022).

264. Copyright Alternative in Small-Claims Enforcement ("CASE") Act Regulations: Expedited Registration and FOIA, 86 Fed. Reg. 46,119, 46,119 (Aug. 18, 2021) (to be codified at 37 C.F.R. pts. 201, 203, 221).

265. *Copyright Office Announces Claims Board Is Open for Filing*, U.S. COPYRIGHT OFF. (June 16, 2022), https://perma.cc/J75Y-297W.

266. *Frequently Asked Questions*, COPYRIGHT CLAIMS BD., https://perma.cc/84LQ-66F6 (archived Feb. 23, 2023).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*



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proceeding is voluntary, meaning a party can opt out after receiving notice that a claim has been filed against it.[271]

Three Officers, appointed by the Librarian of Congress, hear claims.[272] They are able to award up to $30,000 in total damages in each proceeding, regardless of the number of works at issue.[273] These can be either actual or statutory damages; the former has a cap of $30,000 per work, while the latter has a cap of $15,000 per work.[274] They can also include in their determination a requirement that a party stop or modify certain activities, though only if that party agrees to do so.[275]

It remains to be seen whether the CCB will be an easy and effective avenue for creators—especially emerging designers—to resolve copyright disputes. It was certainly designed as such: The Copyright Office states that the CCB was created because Congress recognized that "while a copyright owner may want to stop an infringement, he or she may be dissuaded from filing a lawsuit if the prospect of a modest recovery is outweighed by the potentially large expense of litigation."[276] That parties can represent themselves, and will not need to travel to and from proceedings, is certainly helpful. Other elements of the procedure are designed to be streamlined as well: Discovery will be "limited,"[277] and proceedings will not include formal motions or in-person hearings, meaning they will "involve far less money and time than federal court lawsuits."[278] Thus, at least in theory, the CCB will benefit independent designers since they are the least likely to possess the time and resources to pursue traditional litigation, and they are the most likely to have smaller claims involving less than $30,000.

At the same time, certain limitations and concerns remain. First and foremost, because participation in CCB proceedings is voluntary, many claims will be barred from moving forward when a party accused of copyright infringement simply chooses to opt out. While it is true that the filing party can still bring a claim against it in federal court,[279] this simply redirects the

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Remedies for Copyright Small Claims*, U.S. COPYRIGHT OFF., https://perma.cc/P88R-8PR4 (archived Feb. 23, 2023).

277. U.S. Copyright Off., Coming Soon: Copyright Claims Board to Hear Small Copyright Claims 1 (2021), https://perma.cc/8HZJ-CYFZ.

278. *See About the Copyright Claims Board*, COPYRIGHT CLAIMS BD., https://perma.cc/6JEG-RE8Q (archived Feb. 23, 2023).

279. U.S. Copyright Off., *supra* note 277.



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dispute back to the federal court system, which is what the CCB was meant to help parties avoid in the first place. Furthermore, this redirection would be particularly devastating for emerging, resource-strapped designers.[280] Another potential concern is that the CCB will be inundated with claims and become heavily congested—it is a single tribunal, and it is unclear how quickly it will be able to move through proceedings.

Until the CCB begins to hear claims, however, all of this is mere speculation. It will be interesting and important to monitor the general success of the system, as well as whether and how often fashion designers use it to resolve infringement disputes.

## Conclusion

There is no one-size-fits-all solution, legal or otherwise, for independent designers whose works have been stolen. In fact, not everyone believes that design piracy should be regulated by IP—or halted at all, for that matter. This Note has aimed to establish, however, that there are reasons to view the copying of independent designers as problematic. Some concern its impact on the individual victim in question, including on their ability to receive attribution and compensation for their work. Others concern the macro effects of such copying in the aggregate—what it reveals about our conception of designers and whether they have any claim to moral rights in their creations, and how it stunts diversity in fashion on multiple fronts. But no matter what one ultimately believes about the permissibility of copying in fashion, the following is certain: The pursuit of legal action is costly and inaccessible, and designers seeking recourse can benefit from working outside the bounds of the formal legal system.

280. *See supra* Part II.B.1 (describing the steep costs of copyright litigation).



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