A DESIGN FOR THE COPYRIGHT OF FASHION

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I. INTRODUCTION

Fashion apparel is a multi-billion dollar industry that has no national boundaries. Designers, [1] retailers and consumers follow the game of international fashion. Within the last decade, consumer knowledge of specific designers has increased dramatically. Magazines and newspapers now cover the fashion industry as part of their national news coverage, focusing on the ever-changing world of creative designer expressions. [2] The general public has a ready command of the names and faces of fashion models and the designers for which they model. Countless television shows and feature films [3] exploit the fashion industry world. Consumers can now recognize the distinct style of their favorite designers: Chanel, jersey-knit double-breasted suits in contrast colors with trademarked brass buttons, and quilted leather accessories; Gianni Versace, colorful handprinted silks with reproduced 17th and 18th century illustrations; Issey Miyake, sparse deconstructed gender neutral garments in natural fabrics or highly unnatural polymers, which redefine both form and movement. [4]

In 1977, former Register of Copyrights Barbara Ringer stated that the issue of design protection is “one of the most significant and pressing items of unfinished business” of copyright revision. [5] This issue remains unaddressed today, even though the need for revision is even more significant, because garment designs lie along the fringe area of creative expressions that exhibit the same qualities as protected matter. This paper suggests that the traditional reasoning which denied certain articles copyright protection is no longer reasonable, and that protection should now be extended to garment designs. Further, this paper proposes solutions to the problems of implementing copyright for fashion and what effect copyright will have on the garment industry and consumers.

II. HISTORY OF NON-PROTECTION OF FASHION

A. Reasoning Behind Non-Protection of Garment Design

Copyright protection is denied to garment designs due to the misconception that garment designs are solely useful articles without any copyrightable elements. Useful articles are granted limited protection under the Copyright Act, provided there are elements of the pictorial, graphic, or sculptural work that may be identified separately and can exist independently of the utilitarian aspects of the article. [6] Since 1914, several bills [7] have been handed down to Congress advocating the protection of the designs of useful articles through copyright. [8] Such protection of garment designs has always been opposed, however, for to do otherwise, would arguably grant protection to a purely utilitarian article and pave the way for monopolies in the apparel market.

Although many garment designs maintain an underlying utilitarian function, many designers have crossed the traditional boundaries of wearable apparel into wearable art. The creations of haute couture, [9] for example, are not meant to be worn as clothing, but rather as an embodiment of all the design statements made in the ready-to-wear line, albeit toned down. [10] Moreover, subsequent copyright cases distinguish between a utilitarian object and its artistic appearance, so that an object's artistic qualities may entitle it to copyright protection despite its utilitarian function. [11] Under the reasoning followed in Barnhart v. Economy Cover, aesthetic features of a useful article may be protected when they are not in any way required or necessary for the performance of the utilitarian function. [12] Thus, one might reasonably conclude that most, if not all, garment designs could be treated as protectable, for their aesthetic elements go far beyond the simple function of clothing. [13] Considering the nature of fashion as exhibited today, the policy of prohibiting copyright in garment design is outdated and no longer serves the purpose of preserving useful ideas for the general public.
The second reason for denying copyright to garment designs was the fear that monopolies in the apparel market would be created. [14] A grant of copyright contains the exclusive ability to control the subject matter [15] through permissive use and arranged licenses. [16] Thus, it was deemed to be in the best economic interest of the general public to deny copyright protection and, in essence, encourage the theft and reproduction of garment designs. [17] By denying copyright, the valuable creations of designers would be widely copied, making a garment, albeit of much lower quality, potentially available to consumers of every income level. Similar to the policy reasons advanced, the denial of copyright in order to promote social equality is no longer applicable. Inherent in this reasoning is a belief in a finite number of acceptable and valuable garment designs that will become controlled by a select group of designers selling to the highest bidder. In comparison with countries that do extend copyright to garment design, however, there have been no monopolies of clothing created. [18] As with any artistic endeavor, the number of possible creative expressions is only as limited as the human mind, and in haute couture, no one has yet to stop inventing. [19]

B. Attempts at Design Protection Through Other Areas of Law

A designer's unpublished work, in this case, not yet put on the market or otherwise displayed to the public, may be protected under common law. [20] This is, however, hollow protection for designers whose value in their creations depend on public awareness and buying power. Thus, due to the denial of copyright protection for garment designs, designers have looked to other areas of federal and state legislation, such as design patents, trademark and unfair competition, and trade restrictions to obtain protection for their creations. [21] Just as with copyright, however, these attempts have proved unavailable or ineffective. [22]

1. Design Patents

Under the design patent statutes, protection is granted to a “new, original and ornamental design for an article of manufacture.” [23] A design patent will protect the configuration or ornamental elements of a product which gives a distinctive appearance. [24] In order to be eligible for protection the article's design must be novel, non-obvious, ornamental and meet the test of invention. [25] Garment designs have consistently been held to have failed these requirements. [26] Even if the design patent statutes were modified to allow inclusion of garment designs, the protection obtained would be useless. The patent process is lengthy, most notably due to the prior art search, [27] which could be quite unwieldy with regard to fashion elements. Design patents are most effective when the element sought to be protected is used repeatedly and has a shelf life of many years. Fashion, to the contrary, is notoriously ephemeral and transient; what is “in” this season, is passé the next. Thus, designers could only seek to prove retroactive infringement, after much of the revenue and importance of the design has passed. [28]

2. Trademarks and Unfair Competition

Trademark law serves to protect the “mark-good” combination. [29] In order to receive protection, the trademark must be employed with a certain product, such that the public recognizes the mark and associates the elements and qualities of the product with the good. [30] An example of a trademark is the ubiquitous Nike ‘swoosh.’ The general public recognizes this graphic element as belonging to a genuine Nike product, and thus expects a certain caliber of product to be attached to the mark. While trademark law will protect that designer from unauthorized use of the registered mark, in this case a designer's “label”, it will not protect the actual garment design. Under this reasoning, a manufacturer could make an exact reproduction of a garment design, without suffering any repercussions under trademark law. Moreover, the same manufacturer could use the designer's name and marks to promote his copy as an exact reproduction of the designer's work, [31] thus bringing the “truth in advertising” theory to its most logical conclusion.

In connection with a claim of trademark infringement, many designers have attempted to protect their marks and creations by bringing claims of unfair competition. In this way, a designer must show that the sale of a copy is likely to confuse the public, because the public has acquired a “secondary meaning” [32] for the mark. Although some designers who repeatedly utilize their trademarks with their garments and
fabric patterns, such as Chanel, Mossimo, Gucci, and Louis Vuitton, may be successful in pursuing such a claim, the majority of designers will be defeated by the transient and seasonal nature of the industry. [33] This is exemplified by the number of cases where unfair competition has been denied to fashion designers. [34]

3. Trade Restrictions

In 1932, garment designers decided to utilize self-help tactics against manufacturers who were stealing their original designs. [35] The designers formed the Fashion Originators' Guild of America (Guild) after being unable to elicit support or protection from Congress or the courts. [36] The Guild was a trade association of garment manufacturers and retailers who dealt with and used the products of fashion designers. [37] In order to accomplish their goal of eradicating design theft, retailers and manufacturers pledged to only deal in original creations. [38] If a retailer failed to follow the provisions of the Guild, their name would be included on a “red-card” which listed all “non-co-operating retailers”. Other Guild members were then forbidden to deal with the red-carded retailer. [39] Although the Guild was effective in stemming the theft of garment designs, in 1941 the Supreme Court held that the Guild's practices violated the Sherman Antitrust Act, thus ending the use of self-help trade restrictions. [40]

It seems, therefore, that copyright is the most appropriate method of protecting the creative expressions of fashion designers. No other method is effective to protect the property interest and value of the garment design or the inherent and complicated nature of the industry. Courts, in denying the protection of copyright and other legal remedies, have stated that copyright protection would still provide a readily workable solution to the problems of design theft, without impinging the free market of ideas. [41]

C. Fabric Pattern Protection

Currently the only available copyright protection for a designer's fashion rests with the protection of the actual fabric design. An author's sole right to the first printing and publishing of his work was adopted by the U.S. Constitution from the English common law system and codified as the Copyright Act of 1790. [42] The Act authorized Congress “to promote the progress of science and useful arts, by securing, for a limited time to authors and inventors, the exclusive right to their respective writings and discoveries.” [43] The word “writings” has been broadly construed by the courts to include fabric designs, but distinguishes the actual “dress design” as an unprotected useful article. [44] Fabric designs are deemed to be consistent with the similarly copyrightable expressions of paintings and other pictorial or graphic materials. [45]

While the copyright of a fabric design does afford a fashion designer some protection, it only extends to the actual fabric and not the garment that is created from it. Many designers do not create their own fabric, instead they buy cloth from manufacturers without taking any assignment of its copyright. As a result, the value of any recovery for infringement of a copyrighted fabric pattern would be limited to the value of the fabric as cloth, not as the garment or product created with the fabric. Assuming the designer actually creates his own patterns, protection for fabric is only offered if the designer uses fabric with intricate and complicated patterns and designs. Still, the copyright protection is extremely narrow, for it is judged under the “ordinary viewer” test. Copyright infringement may be inferred when proved that a defendant had access to the copyrighted work and substantial similarities to the protected material exist. [46] Even if a plaintiff can show access, there is no infringement when the similarities between the works are insufficient to prove copying. [47] The test then asks whether “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.” [48] It is not inconceivable then, under this standard, that most fabric designs would fail to be protected unless there is evidence of egregious copying by the defendant. [49] Nonetheless, fabric designs are routinely copied, or euphemistically, “used for inspiration” by other fabric designers in creating other patterns. [50]
III. REASONS TO PROTECT GARMENT DESIGNS THROUGH COPYRIGHT

On May 2, 1991, the Copyright Office (Office) issued a Notice of Inquiry to the public requesting comments on the Office's practices regarding the registerability of three-dimensional garment or costume designs. [51] The Office wished to maintain settled copyright principles concerning conceptual separability and the useful article doctrine. It stated that marketability and aesthetic quality would continue to be excluded from consideration. [52] The Office solicited commentary on four main policy questions, three of which were of great importance to the fashion industry, as they could have resulted in a change of policy for certain garment designs. [53] The Office, however, continued to uphold the traditional, restrictive interpretations of the Copyright Act and its pictorial and graphic provisions. [54] These provisions would not allow garment designs copyright protection even if they contained ornamental features or were intended to be used as historical or period dress. [55] The Office, having received many public comments arguing for a broader availability of copyright protection to include garment designs, advised those interested parties to seek Congressional revision of the Copyright Act. [56] Until such a revision, the Office would continue to draw the line “between works of imagination (masks and some costumes) and works of utility (garments)”. [57]

A. Monopoly in Clothing Does Not Exist

Regardless of what existed in the garment industry during the earlier part of this century, it can no longer be said that designers have a monopoly over garment production. [58] Every major city has a fashion center and encourages startup companies to design and create new work. While there continues to exist a cadre of established design houses in Paris, such as Chanel, Dior, and Yves Saint Laurent, the current design market is dominated by young designers who push the boundaries of fashion. [59] In 1977, there were over 15,000 apparel industry establishments creating work for every economic level. [60] Further, the French system of copyright, in comparison to Europe's, has protected garment designs since 1793, [61] and there has obviously been no hindrance to either the industry's ability to create new designs or to the public's ability to purchase clothing. In fact, an opposite effect has taken hold, as many European designers now refuse to sell certain garments across the Atlantic.

B. Architectural and Technical Drawings Protection Inequity

The interpretation of the Copyright Act and its policies have created many inequities with respect to the useful article doctrine. Perhaps none more so than the allowance of copyright protection for technical drawings, architectural renderings, and the actual products of the architecture. Under the current Act, a drafter of architectural or technical drawings may copyright his work as pictorial or graphic expression. [62] While giving some credence to the argument that architectural and technical renderings contain aesthetic elements, these renderings are used exclusively for utilitarian purposes. In comparison to architectural renderings, it is difficult to comprehend why a garment design fails to achieve protection. [63]

C. Comporting with International Copyright Standards

On March 1, 1989, [64] the United States officially entered the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), helped to pass the Berne Convention Implementation Act of 1988 (BCIA), [65] and subsequently ratified the treaty. [66] In adopting the Berne Convention provisions, the United States only complied with its minimum requirements. [67] The rights and responsibilities relating to copyright matters are now to be resolved under domestic law, not under the provisions of the international treaty. [68]

This has led to some conflicts regarding the protection afforded to copyright holders. [69] While other conflicts have been resolved in favor of the authors' rights, [70] the protection of fashion designers remains a contradiction. Under international rules, the creative works of fashion designers are protected by copyright, albeit for a limited term. [71] The works which are protected against pirating in Europe receive no such protection in the U.S. [72] Thus, each time a designer shows new work, it may be copied exactly
and reproduced for sale in the U.S. In addition, the design copier may use the original designer's name in his advertisement. [73]

The U.S. constantly alleges that other countries are not doing enough to protect the copyrighted works of American authors, [74] yet fails to extend its own copyright protection for certain works, most notably the creations of fashion designers. This inequity undermines the fashion design markets in the U.S. [75] Many designers are also powerless to combat the effect of the resulting grey goods market, although international laws attempt to prohibit the importation of such products.

D. Garment Designs Are Not Solely Useful Articles

The effect of fashion can be seen in the dramatic changes of style within any century. New trends do not exhibit any changes in the ultimate utility of clothing, [76] but rather a designer's effect on tastes. Moreover, utility as well as art, in the context of copyright law, are concepts of legal fiction. In reality, that which is useful is just as likely to be viewed as art as the artistic is treasured for its utility. [77] Today, fashion is more akin to "wearable art." Even though the court in Bleistein v. Donaldson Lithography, [78] warned that anything could be viewed as art in context, the court in Keiselstein-Cord, made specific mention of the plaintiff's inclusion of the permanent collections of certain museums. [79]

It has been well recognized that the "chief value of a 'quality' dress lies, not so much in the quality of the material, as in the smartness and originality of the design." [80] While an obvious element of utility is usually inherent in garment designs, the primary purpose and value to the designer lie in their appearance. Because copyright law aims to protect and encourage creative works of art, allowing protection for garment designs poses no contradiction to the underlying policy. [81]

Garment designers have attempted, to no avail, to rely on other areas to protect their intellectual property rights. In fact, the courts which have denied the use of other remedies have stated that the most applicable and most reasonable solution to the quandary of garment designs is the extension of copyright protection. Unfortunately the legislature has been wary of such an extension. The 1991 call for comments by the Copyright Office, however, shows that the federal government is not unamenable. Rather, it appears to be looking for an argument that would not only withstand a useful article debate, but also a more politicized debate that copyright protection is being extended too far. [82]

IV. IMPLEMENTATION OF FASHION DESIGN COPYRIGHT

Beyond the mere establishment of fashion design copyright, there are additional problems regarding the efficient implementation of new protection. In addition to offering solutions to practical concerns, this paper suggests formulating a doctrine to determine which elements of a garment design may be protected by copyright. As with all useful articles, the grant of copyright is conditioned on the existence of separate aesthetic elements. Although there is an argument against incorporating only one method of inquiry into the conceptual separability test, this paper seeks to only use the test that would better represent the garment industry.

A. Conceptual Separability of Fashion's Artistic Elements From the Functionality of Clothing: The Need for Revision

Under current copyright law, useful, functional articles are denied protection based in part on a belief that when creating a particular manifestation of a useful article, an artist will receive comprehensive protection that exceeds the original expression of its particular aesthetic qualities. Courts do not want to foreclose competitors from using the same design, thus depriving consumers of the useful article's benefits.

Clothing is inherently functional. However, fashion designer's creations, especially those pieces considered haute couture, are not meant to be worn as everyday clothing, or even as once-in-a-lifetime clothing. They are created as expressions of the designer's creativity and to keep the designer's name in the
minds of the fashion media and buyers.

In the language of the Copyright Act of 1976, a useful article is “an article having an intrinsic utilitarian function that is not merely used to portray the appearance of the article or to convey information.” [83] A useful article need not be a complicated device that can only be expressed within a limited number of designs. [84] Additionally, “an article that is normally a part of a useful article is considered a useful article.” [85] Such an article enjoys copyright protection “only to the extent that [its] design incorporates pictorial, graphic, or sculptural features that can be identified from, and are capable of existing separately from the utilitarian aspects of the article.” [86] Determining the separability of the useful article's utilitarian function from its artistic features is the paramount concern of a court when considering the appropriateness of copyright protection. [87]

Ordinarily, the distinction between protectable works of authorship and useful articles works perfectly well, barring copyright in purely technological advances, processes and functional works. [88] A dilemma arises, however, when the attraction of a useful article does not necessarily arise from the article's “intrinsic utilitarian function”. [89] Rather, a peculiar attribute or design can appeal to a consumer's aesthetic notions, regardless of the utilitarian application or function of the article. [90] This is the realm into which fashion design falls; to the consumer, the item's appearance is of paramount importance, whereas the utilitarian aspect is incidental. [91]

Separating the purely aesthetic elements from the intrinsically functional elements of the useful article generates problems for courts. Currently, there is no clear guideline for such determination because numerous sources of authority espouse different methods for determining copyright protection. [92] Such confusion has resulted in courts erring on the side of underprotection under a strict formalism, even though the useful article contains a particular visual appeal. [93]

1. The Majority Approach to Separability: Physical and Conceptual

For a useful article to be copyrightable, the court must first consider if the artistic element of the article is separable from its utilitarian application. [94] When aesthetics can physically separate the artistic elements from the article without also removing its intrinsic utilitarian function, the analysis is relatively simple. [95] If the aesthetic element may not be so removed, the Registry of Copyright and the courts look to the possibility of “conceptually” separating the artistic element from the useful article. [96] Unlike physical separability, conceptual separability recognizes that a useful article can contain both aesthetic and functional elements and still merit copyright protection. As critics point out, however, current interpretations of conceptual separability could leave a court determining the nature of the aesthetic elements and ultimately deciding upon the level of artistic merit. [97]

Because the aesthetic nature of fashion and fashion design is inexorably linked with the utilitarian function of clothing, for most designs, copyright protection can only be viewed under a conceptual separability test. Based on the current interpretations of the conceptual separability doctrine, most, if not all fashion designs would fail. Under Carol Barnhart Inc. v. Economy Cover Corp., the court's majority only interpreted the forms objectively, as detached from other possible connotations. [98] Thus, even though the forms had other uses, the court ruled that an average viewer would always associate the form with the function of mannequin, not as a statue or other use. It seems then almost impossible to show an average consumer a designer dress and expect him or her to see anything other than a dress. In order to put real meaning into a grant of copyright protection for fashion designers, the copyright must not be so easily vulnerable to attack. This will require a new interpretation of conceptual separability.

2. Conceptual Separability Under the Creative Process Model

A more appropriate focal point for courts determining the protection of useful articles is the creative process, rather than the useful article itself. [99] Thus, the motivations of the artist who creates the article dictate whether the ultimate function of the article is aesthetic or utilitarian. [100] The mere fact that the
article contains both elements does not immediately discount the availability of protection, but rather furthers the spirit behind copyright protection for objects that add to the cultural, creative and artistic wealth of society. [101] Properly implemented, this interpretation will provide expanded protection for otherwise unprotected useful articles. The creative process model, however, may prove completely unworkable in the practical courtroom setting, as it ultimately depends on whether or not a designer can prove and record the pure artistic creative process behind the useful article. [102] The court may find itself deciding the artistic merit of an object, contrary to the long held principal of avoiding such decisions. [103] Further, this model assumes that there will be a recognizable difference in the creative processes, such that the artistic element may be discerned from the utilitarian and that a reasonable trier of fact would be able to comprehend the difference between the creative process of a fashion designer and that of a mere clothing manufacturer. [104]

3. The Temporal Displacement Test

Judge Newman, dissenting in Barnhart, delineated a different approach to conceptual separability for useful articles. [105] According to Newman, “for the design features to be conceptually separable from the utilitarian aspects of the useful article that embodies the design, the article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function.” [106] This approach has become known as the “temporal displacement” test. [107] It recognizes that the decision regarding whether an item is able to exist as art, despite its utility, is ultimately in the eyes of the beholder. [108] Because every useful article could be held as “art” by at least one person, the boundaries of what is protectable have been eradicated. Further, the creative motivations of the artist or designer are meaningless. [109]

4. The Polakovic Approach to Conceptual Separability

According to Professor Polakovic, the proper standard for determining which useful articles are to be protected rests in the combination of the creative process approach and temporal displacement approach. [110] His analysis would take into account the creative process of both the designer and the artist, while taking a more accommodating view of the artistic contributions of the designer. [111] Designs that achieve their aesthetic appeal solely from their utilitarian function would not be protected. [112] Thus, the designer would first be treated as an artist, one whose medium deserves protection when it does not amount to an application of a utilitarian function. [113]

5. Application of the Polakovic Model

Under Polakovic's approach, the fashion designer would receive the same treatment as any other artist. Although not all the designs created would be protected under this model, the fashion designer would have a better chance proving that his creations are art and engendered with creative process, even though he has expressed himself through the medium of fabric. The main obstacle for the designer will be the court's decision regarding the underlying idea behind the useful article and whether the elements of the useful article are viewed as either ideas or expressions of that idea. In other words, the court will determine the level of abstraction.

In deciding whether a useful article is inherently functional, as opposed to aesthetic, the designer will want applied the most abstract level of function possible. If the court determines the utility of a fashion designer's product based upon a strict functional standard, such as “formal all-black sequinned, sleeveless evening dresses,” the designer will have a lesser chance of receiving copyright protection than if the article is judged against a broad abstract “clothing” standard. If the court characterizes the article as clothing, each element or adornment to the article may be considered conceptually separable and thus, capable of receiving copyright protection. To illustrate this point, consider two recent cases concerning the copyrightability of costumes.

In Whimsicality Inc. v. Rubie's Costumes Co., the court determined that a costume serves the utilitarian
function of allowing the wearer to masquerade. [114] Thus, the motivation of the artist was to create a costume, and the actual production of such an article, under this strict interpretation, will automatically be refused copyright. [115] If, however, a court applies a broader and more abstract analysis, as it did in *National Theme Products, Inc. v. Jerry B. Beck Inc.*, a costume, although a useful article with which one masquerades, is deemed to be mere clothing. [116] As a result, the costume would be amenable to copyright protection, for the intentions of the artist were to create a particular, adorned article of clothing that does not constitute an unprotected, useful article under the Copyright Act. [117] Practically, the trier of fact in an action for infringement would need to be acquainted with both the complexities of a particular application and the difficulties of resolving these complexities when creating a single design and attempting to give the article its aesthetic appeal. [118]

Even assuming the legislature allowed copyright protection for these expressions, the current approach of the courts is too comprehensive and would all but eliminate the copyrightability of a fashion design. The proper approach is to determine: 1) why the useful article is appealing; and 2) whether the source of its appeal is an imperative component of its function. [119] As a result, only those articles which derive their aesthetic appeal from their utilitarian application would be denied protection. [120] This would allow other designers to make innovative and creative designs based on underlying functionality, while still preserving protection in the artistic expression of the original designer. [121]

**B. Requirements for Implementation**

In creating a copyright system which recognizes the expressions of designers, many old fears, such as burdening the consumer and creating a marketplace monopoly, resurface. With tens of thousands of designers churning out work, it is easy to foresee chaos. How far does the copyright extend? For how long? What would constitute infringement?

1. **Scope of Copyright**

   Garments are popular and desirable to the public because of the selection and arrangement of their materials, style and quality. Many of their actual elements are not new expressions, but appropriate ideas within the public domain. No designer would argue that a hem was a new expression, much less a seam or button closure. Like the photograph in *Burrow-Giles v. Sarony*, it is the selection and arrangement of the finished product which provides value and therefore deserves protection as creative expression. [122] It is also a well-established industry practice to be inspired by the work of other designers when creating your own work. [123] The result is a necessarily thin copyright which provides protection for garment designs from outright theft but does not seek to completely overburden the copyright system.

2. **Limited Duration**

   In an industry which waits with bated breath for the next big trend and seasonal fashion changes, a garment design has its greatest value when it is new and may only have a shelf life of a few months. Yet, in order to protect against monopoly, there should be a special duration limit applied to the protection of garment designs. By allowing protection for only one year, designers will have adequate time to recoup costs of their design development and receive the greatest benefit from their creation. [124] This duration would also comport with the limit of garment design copyright available in Europe. [125]

3. **Compulsory License System**

   If copyright is extended to garment designs, it is reasonable to assume that designers will seek protection for their designs and then license them. One of the arguments against extending protection is the potential for large numbers of infringement actions. This problem might be successfully eliminated by incorporating a compulsory license system. [126] Such a system is not new to the world of copyright. It would avoid the need for individual negotiations over license fees and allow small manufacturers to benefit from the work of larger designers. [127]
Just as with the compulsory license system for phonorecords, manufacturers who feel that a particular design is valuable would be able to make reproductions of the garment for a statutory fee. [128] Such a license, however, would only allow the manufacturer to make his own interpretation of the design, not an exact replica. Under the current system, this is the same process already followed by some manufacturers: the design is copied and reproduced in different fabrics or with slight changes in the design. [129] In addition to the monetary benefits of a compulsory license system, the system would also reduce the need for a court to foray into the “artistic realm” it so clearly wishes to avoid. [130]

V. EFFECT ON INDUSTRY

The claim of copyright is primarily based on a moral right of the creator of a work and a society's desire to reward this labor. In this case, copyright serves to legitimize the artistic endeavors of the designer. The claim of copyright for garment design, however, is also related to the need for economic incentives. [131] The denial of copyright for clothing has only marginally protected the welfare of the general public and has ignored the need for a designer's economic incentive. [132] It is clear that the lack of copyright protection in the U.S., as well as the existence of protection in Europe, has not changed the ability of designers to create new garments each season. Nor has there been any adverse effect on the power of the public to purchase garments made by quality designers at reasonable prices. [133]

Opponents to the extension of copyright protection for fashion designers argue that, based on pure statistical information, the lack of copyright protection has benefited both the public and the apparel industry. Designers have only had to surrender a small portion of their profits to manufacturers who steal and reproduce their designs. Further, they argue, the pirate's ability to take this property from the designers, along with the designer's name, provides indirect advertising for the designer, which ultimately benefits the designer's market share. By all accounts, the fashion industry has blossomed in recent years, and many designers are posting record profits.

The profits of designers can not be causally related to the lack of copyright protection in the marketplace. Rather, these profits result from public demand and designer ingenuity. The denial of copyright protection in garment designs sanctifies the outright theft of a designer's creative work. This threat to marketplace viability actually drives up the cost of designer goods, resulting in fewer consumers being able to purchase the garments. [134] The denial of the economic incentives of copyright protection has also forced the industry to seek out other methods of economic benefit. In order to recapture a greater share of the market, [135] many designers developed lower cost lines, which reflected some of the concepts of the haute couture lines, but with cheaper fabrics and reduced quality. [136] In this instance, the designer aims to limit the development cost, so as to compete effectively with the pirates. [137] The ultimate loss, however, is borne by the consumer who has decreased access to high quality garments. [138]

If copyright protection is extended to garment designs, it will not likely have significant effect between designers. True, if a designer infringes upon another's work (and there are rumors of designers trying to steal another's "ideas") there can be an action for infringement. However, the case law in Europe indicates that designers understand that there is a certain level of inspiration and similar themes in each season, and have not been suing each other rampantly over infringement. Rather, as the Yves Saint Laurent case shows, an action for infringement arises when there is an exact copy made. By adopting a limited duration and compulsory license system, the fear of increased litigation is put to rest. If there is a particularly valuable design, a manufacturer can simply pay the customary license and produce his own version of the garment.

VI. CONCLUSION

The question of whether or not to grant copyright protection should consider the work of the designers and their economic interest, rather than the desires of the general public. The mere fact that an industry has been able to devise other methods of upkeeping its financial stability should not be a reason to deny creative expression protection. By continuing to deny proper protection, economic incentive is displaced to...
design pirates, who create no new material, thus undermining the copyright policy by adding to the public's cultural welfare. Under a system of copyright protection, the public view on the world of fashion design would not change considerably from the one we all currently know. The number of designers would not increase any more rapidly than it has because the copyright system is not a major economic incentive for fashion designers who have lived so long without it. The basis for granting copyright protection lies in awarding the author a moral right to his creation. In actuality, a garment design copyright only punishes the pirate, who deliberately copies the design, while benefiting the true creators and the public.

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[1]. Designers are defined as creators of garment styles which typically feature high quality materials and construction. Designers create their own patterns and styles, creating the trends which design pirates seek to follow by explicit copying.

[2]. Following the fashion industry has become an increasingly common pastime as well; the European Travel Commission sponsored an advertisement supplement detailing the fashion industry and how to plan a European vacation around it. See Kit Barnes, *The Passion for Fashion, Your Invitation to Europe* (advertising supplement), N.Y. TIMES, October 6, 1996. This supplement was also included in the WASHINGTON POST and the BOSTON GLOBE.

[3]. Numerous documentaries have been made about the fashion industry. Many networks and cable channels have created new series which feature designers, models and the industry. Two feature films made in 1995 pertained to fashion: *Unzipped*, a work depicting the life of designer Isaac Mizrahi, and Robert Altman's comedy, *Pret-à-porter* (Ready To Wear). Even the film *Clueless* showcased the work of designers Alaôa and Calvin Klein.

[4]. Many designers go through a creative process similar to that of traditional visual artists: their expressions are borne by the wish to communicate an idea. For the designer, the medium is fabric; for the visual artist, canvas or bronze. Garment designs reference the same artistic movements found in art and architecture, including minimalism, pop-art, post-modernism, and deconstructionism. Many museums, such as the Victoria and Albert Museum, London; Bayerisches National Museum, Munich; The Louvre, Paris, exhibit the works of designers as part of their art collections.


[8]. See H.R. 2223, 94th Cong., 1st Ses. tit. II (1975) (would have created a form of copyright for “original” designs of a useful article, even though they failed to meet the design patent standard of “novelty.”) See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 50 (1976). Although Title II would not have protected the three-dimensional features of garments, the Copyright Office and the Commerce Department strongly supported the bill because of the scarcity of available protection. See Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., 95, 161-169, 171-72, 1008-09 (1975). Title II was deleted from the 1976 Act in part because of the extremely wide scope of protection it granted. See H.R. Rep. No. 1476 at
50.

[9]. The function of haute couture is to create fantastic creations that may or may not be conceivable beyond the runway. Ready-to-wear creations are typically purchased for retail.

[10]. Haute couture shows are financial losing propositions. The pieces are usually made in small lots of 10 garments of less. A successful haute couture show, however, previews the designer's ready-to-wear show, and keeps that work in the mind of the retail buyers. Designers usually recoup the haute couture losses on the ready-to-wear lines.


[12]. See Barnhart, 773 F.2d 411 (distinguishing the mannequins from the Kieselstein-Cord belt buckles by noting the ornamental dimensions were “wholly unnecessary” for the belt buckle to act as a belt buckle).

[13]. In a temperate environment, one might assume that a simple uniform of turtleneck and pants would be the minimum required for protection from the elements and prurient interests, thus any additions to such a uniform would be unnecessary for the garment to function as clothing.


[16]. See Schmidt, supra note 7 at 867-68.

[17]. See Millinery Creators' Guild v. FTC, 109 F.2d 175 (2d Cir. 1940) (noting that design piracy exerts a downward force on prices and is therefore a socially desirable form of competition), aff'd, 312 U.S. 469 (1941); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929), cert. denied, 281 U.S. 728 (1930) (refusing to outlaw design piracy on grounds that to do so would afford a virtual monopoly to the creator of an unpatented and uncopyrighted design).

[18]. European countries which allow copyright show no evidence of clothing monopolies or shortages.

[19]. Opponents would argue that providing copyright would eliminate the ability of designers to be inspired by each other's work and the prior art. As with songs and other artworks, there is nothing in the copyright laws which would prohibit new creations inspired by the old. Copyright seeks only to give the author exclusive use of his expression and prohibit infringement. Ideas alone do not merit copyright protection.


[21]. See Schmidt, supra note 7 at 867.

[22]. See id.


[25]. See Western Elec. Mfg. Co. v. Odell, 18 F. 321, 322 (N.D. Ill. 1883) (designs patents require a high degree of inventive or originative faculty). See also Gold Seal Importers v. Morris White Fashions, Inc., 124 F.2d 141, 142 (2d Cir. 1941) (in denying patent for woman's handbag design court stated: “it is not enough for patentability to show that a design is novel, ornamental and pleasing in appearance ... it must be the product of invention; that is, the conception of the design must require some exceptional talent beyond the range of the ordinary designer familiar with the prior art”).

[26]. See e.g., Belding Heminway Co. v. Future Fashions, Inc., 143 F.2d 216 (2d Cir. 1944) (per curiam); White v. Lenore Frocks, Inc., 120 F.2d 113 (2d Cir. 1941) (per curiam); Neufeld-Furst & Co. v. Jay-Day Frocks Inc., 112 F.2d 715 (2d Cir. 1940); Nat Lewis Purses, Inc. v. Carole Bags, 83 F.2d 475 (2d Cir. 1936) (per curiam).

[27]. See 37 C.F.R. ß 1.104(a) (1982), see also In Re Winslow, 365 F.2d 1017, 1021 (C.C.P.A. 1966)


[30]. This is the so-called “secondary meaning” test, which states that the original trademark has become so associated in the minds of the public that the mark is solely identified with the original goods, and that public confusion would ensue if another's similar mark was allowed into the public marketplace.

[31]. Copyists have been held to have a right to truthfully advertise that their goods are copies of a designer, and therefore to have a right to utilize the designer's name and label. See e.g., Société Comptoir de L'Industrie Cotonnière Establissements Boussac v. Alexander's Dept. Stores, 299 F.2d 33, 36 (2d Cir. 1962); Clemens v. Belford, Clark & Co., 14 F. 728 (N.D. Ill. 1883); Jaccard v. R.H. Macy & Co., 265 A.D. 15, 37 N.Y.S. 2d 570 (1942); Ellis v. Hurst, 70 Misc. 122, 128 N.Y.S. 144 (1910), aff'd per curiam, 145 A.D. 918, 130 N.Y.S. 1110 (1911).

[32]. See supra note 30.

[33]. The ability of designers to prove secondary meaning and public confusion would be increased if the ordinary purchaser standard was replaced with a purchaser knowledgeable of haute couture and designers. Considering the increased spending and public awareness of designers and their creations, this would not be an unreasonable adjustment.

[34]. See e.g., Wm. Filene's Sons Co. v. Fashion Originators' Guild of Am., 90 F.2d 556, 559-60 (1st Cir. 1937); Pagliero v. Wallace China Co., 198 F.2d 339, 343 (9th Cir. 1952); Swank, Inc. v. Anson, Inc., 104 F. Supp. 703, 711 (D.R.I. 1951).

[35]. See Schmidt, supra note 7 at 871 (citing Weikart, Design Piracy, 19 IND. L.J. 235 (1944)).

[36]. See id.

[37]. See id.

[39]. See id. at 462-63. The court in Fashion Originators found based on 1936 market figures that the Guild controlled 60% of the dress market (selling for $10.75 or more), but only 38% of the $6.75 and up dress market. See id. at 462.

[40]. See id. at 466. The Court reasoned that the Guild constituted a monopoly over the garment market, and lessened competition.

[41]. See Belding Heminway Co. v. Future Fashions, Inc., 143 F.2d 216, 218 (2d Cir. 1944) (per curiam) (“... what the makers of women's dresses really need is copyright protection, which Congress has hitherto denied them.”); White v. Lenore Frocks, Inc., 120 F.2d 113, 114 (2d Cir. 1941) (per curiam) (“... [fashion designers] need a statute which will protect them against the plagiarism of their designs.”); Nat Lewis Purses, Inc. v. Carole Bags, 83 F.2d 475, 476 (2d Cir. 1936) (per curiam) (“... new designs ought to be entitled to a limited copyright.”); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 281, cert. denied, 281 U.S. 728 (1929) (“... there should be a remedy, perhaps by an amendment of the Copyright Law.”).


[44]. See e.g., Millworth Converting Corp. v. Slifka, 276 F.2d 443 (2d. Cir. 1960) (Millworth II); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960).

[45]. See e.g., Millworth II, 276 F.2d at 443; Peter Pan Fabrics, 274 F.2d at 487.


[47]. See Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

[48]. Peter Pan Fabrics, 274 F.2d at 489; see Walker, 784 F.2d at 51.

[49]. See e.g., Millworth Converting Corp. v. Slifka, 180 F. Supp. 840, 841-42 (S.D.N.Y. 1960) (Millworth I) (plaintiffs created a fabric design and printed it on several different backgrounds, all of which defendants infringed by exactly repeating the design and backgrounds); Soptra Fabrics Corp. v. Stafford Knitting Mills, 490 F.2d 1092, 1093 (2d Cir. 1974) (per curiam) (infringement found when defendant took swatch of plaintiff's fabric and attempted to make as close a replica without actually infringing).

[50]. See Soptra, 490 F.2d at 1093.

[51]. See 56 FR 20241, issued by Copyright Office, Library of Congress, May 2, 1991, available in LEXIS, Lexis Library, LOC File. Because costumes contain many similarities to the garment industry, and lie along the threshold of copyrightable subject matter, questions and revisions of policy have substantial effect on the fashion industry. The majority of responses came from the garment industry.

[52]. See id.

[53]. See id. The Copyright Office asked in essence: (1) Are all costumes useful articles? (2) Can a line be drawn by the Copyright Office permitting registration of three-dimensional aspects of costume designs, ... while denying registration of designs of clothing ...? (3) If certain three-dimensional design elements of garments or costumes should be protected, what standards [specifically the separability test] should be applied? (4) Does the intention of the artist or designer have any relevance in determining whether ... [the] aesthetic features [are] separate from the functional purpose?

[55]. See id. at par. 4. The historical or period dress exclusion eliminates protection for garments that could be intended to serve as costumes. This specific exclusion is particularly harsh considering the considerable creative effort employed in designing a garment to develop the fashion sensibilities previously only portrayed in a painting of Marie Antoinette, for example, into a tangible three-dimensional creation. The policy would allow masks to be treated as protected subject matter, while only protecting those costume designs which pass the conceptual separability test and upon a finding of identifiable authorship. See id.

[56]. See id. at par. 6.

[57]. See id. at par. 8.

[58]. The public no longer manufactures the majority of its clothing by hand, as was done during the early part of this century when the major garment decisions came down.

[59]. The works of Dolce & Gabbana, Todd Oldham, Jean Paul Gaultier, and countless others all command more press and profits than many of the older houses.

[60]. See Schmidt, supra note 7 at fn.122 (citing AMERICAN APPAREL MANUFACTURERS ASSOCIATION, FOCUS: ECONOMIC PROFILE OF THE APPAREL INDUSTRY 16-17 (1980)).

[61]. Garment designs were protected as applied art under the Copyright Act of 1793. See Schmidt, supra note 7 at fn.94.

[62]. A designer's illustration of a new design may be protected under copyright as a pictorial or graphic work. However, many designers do not obtain such protection because it offers no protection or benefit. The copyright protects the right to creative derivative works, but this only applies to other copyrightable subject matter productions. The real value of a sketch is in creating the actual garment, which is itself unprotected. Because the actual work is unprotected, a designer will have no recourse to claim infringement by another's article, even if it was based on the sketch alone.

[63]. The most palpable explanation for the dichotomy is the degree to which the general public is involved. By allowing copyright in fashion, the courts and the legislature feared the creation of continual short term monopolies for desirable goods. The nature of architecture (and the length of construction) apparently render the possibility of design monopolies moot.

[64]. The 1976 Copyright Act brought the United States into compliance with some of the minimum protections offered under international copyright law, most notably an extension of the duration of copyright to “life plus 50 years”. See CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEAFFER & PETER JASZI, 3 COPYRIGHT LAW 988 [hereinafter JOYCE]. The 1976 Act, however, fell short of complete compatibility, thus requiring numerous amendments to the 1976 Act. See id.; S. Rep. No. 100-352, 100th Cong., 2d Sess. 4 (1988).


[66]. The Treaty text was first established in Berne Switzerland in 1886, and has been revised six times. The United States adheres to the most recent language of the treaty as contained in the 1971 version adopted in Paris. See JOYCE, supra note 64 at 984-85.

[67]. See id. at 988.
[68]. See id.

[69]. See id. at 991 (citing the delayed protection available to copyrights of architectural works, which were initially barred under the useful articles doctrine of U.S. law, but eventually protected under an interpretation of the “moral rights” theory).

[70]. See id.

[71]. See e.g., Société Yves Saint Laurent Couture v. Société Louis Dreyfus Retail Mgmt., [1994] ECC 512, 18 May 1994, (Paris) (Ralph Lauren was found to have exactly copied a YSL dress). (NB: Mr. Lauren is “known” to be heavily “inspired” by the works of his fellow designers. This was not the first time he was sued for infringement in Europe).

[72]. In the United Kingdom, a garment design will be protected as long as it can be related back to a copyright drawing. See Schmidt, supra note 7 at fn.94 (citing 3 EUR. INTELL. PROP. REV. 163 (1981)). Under French law, garment designs are protected as applied art or non-functional designs and patterns. Designs may be protected upon a showing of public popularity, even though there is no evidence of originality. See id. (citing DALLOZ, JURISPRUDENCE GÉNÈRALE, at PROPIÉTÉ LITTÉRAIRE ET ARTISTIQUE and DESSINS ET MODELES (1952)).

[73]. A copier may mark his clothing as being “inspired” or “copied” from a certain designer without fear of trademark infringement or false advertising.

[74]. U.S. interests complain about the loss of entertainment and computer software profits in Asian nations, due to rampant pirating of copyrighted materials. The World Intellectual Property Organization is debating three new treaties which would harmonize the copyright standards.

[75]. It is not uncommon for design pirates to sneak into a designer's fashion show in Paris (or raid the studio's trash for sketches) and have “knock-offs” available in New York the next day.

[76]. This paper concedes all arguments concerning the improved utility of clothing absent hoop skirts, bustles, or corsets.

[77]. See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); Keiselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2nd Cir. 1980).

[78]. See Bleistein, 188 U.S. 239.

[79]. See Keiselstein-Cord, 632 F.2d 989.


[81]. The Supreme Court stated that “[c]reative work is to be encouraged and rewarded .... The immediate effect of our copyright law is to secure a fair return for an ‘author's' creative labor.” See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

[82]. The conflict over software has fueled the debate on whether copyright has been over-extended.


[84]. See e.g., Ted Arnold, Ltd. v. Silvercraft Co., 259 F. Supp. 733 (S.D.N.Y. 1966) (pencil sharpener in the shape of an antique telephone recognized as having consumer appeal because it was a decorative...
conversation piece).


[87]. See Raymond M. Polakovic, Should the Bauhaus be in the Copyright Doghouse? Rethinking Conceptual Separability, 64 U. COLO. L. REV. 871, 872-73 (Summer 1993).

[88]. See id. at 873. Copyright protection in a useful article may preclude others from duplicating the underlying function without consequently infringing the artisan's copyright. Id.


[90]. See generally Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980) (court granted copyright protection in a belt buckle, after finding that consumers were mainly using the buckle as jewellery and not as a belt buckle).

[91]. See Polakovic, supra note 87 at 873.

[92]. See id. Polakovic cites statutes, administrative regulations, congressional advisory notes, case law and academic theories as creating confusion regarding the appropriate course of action to be taken by a particular court. See id.; 37 C.F.R. ß 202.10(a) (1992) (intention of the author not an issue); Robert C. Denicola, Applied Art and Industrial Design: A Suggested Approach to Copyright Protection in Useful Articles, 67 MINN. L. REV. 707 (1983) (asserting that the intention of the artist to create art as opposed to industrial design is of paramount importance); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976), reprinted in U.S.C.C.A.N. 5659, 5668 (indicating that either physical or conceptual separability must be present before copyright protection can extend to useful articles).

[93]. See generally Brandir Int'l v. Cascade Pac. Lumber Co., 834 F.2d 1142 (2d Cir. 1987) (copyright denied because court could not separate the aesthetic attributes from the utility of a bicycle rack design); Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) (copyright denied for light fixture which mimicked modern abstract art even though the functional and aesthetic elements could have been physically separated).

[94]. See Polakovic, supra note 87 at 874.

[95]. See Mazer v. Stein, 347 U.S. 201 (1954) (copyright protection of Balinese statuette used as a lampbase was upheld despite its incorporation into the useful article).


[97]. See Polakovic, supra note 87 at 875 (citing Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)).

[98]. See Barnhart, 773 F.2d 411.

[99]. See Denicola, supra note 92 at 709.
[100]. See id.

[101]. See Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984). “The limited grant [of copyright protection] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors ... by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”.

[102]. See Polakovic, supra note 87 at 876-77. Polakovic is mainly concerned with industrial designers versus sculptors, and that under the Denicola model, legal savvy industrial designers would be able to document their “creative process” to the detriment of pure artistic sculptors who don't bother to document their process. See id. Polakovic further notes that since a design patent is upheld in only 30% of the infringement suits, industrial designers have a greater incentive to obtain copyright protection. See id. (citing Ralph S. Brown, Design Protection: An Overview, 34 UCLA L. REV. 1341, 1353 (1987). See generally Brandir, 834 F.2d 1142.

[103]. See Bleistein, 188 U.S. 239. In Bleistein, the court warned against judges deciding the merits of artistic works, rather artistic merit should be presumed based on the finding of public giving merit. Because useful articles will by their utilitarian nature have a market, this reasoning becomes ineffectual.

[104]. See id. Polakovic also questions whether a finding resulting in the denial of copyright protection for an industrial designer in favor of another designer, would violate the Equal Protection Clause of the Fourteenth Amendment. See id. at fn. 21 and accompanying text.


[106]. See id. at 422.

[107]. See Polakovic, supra note 87 at 879 (citing WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 43-45 (6th ed. 1986)).

[108]. See Polakovic, supra note 87 at 879.

[109]. The majority in Barnhart held that Newman's approach was a “non-test”. See Barnhart, 773 F.2d 411.

[110]. See Polakovic, supra note 87 at 880.

[111]. See id.

[112]. See id.

[113]. See id.


[115]. See id.


[117]. See id. at 1354. Court stated: ‘Costumes' artistic features simply do not advance their utilitarian purpose as clothing or accessories .... Given the minimal functional considerations which went into the design of the costumes, the court holds they should be afforded protection as applied art under the
copyright law.” *Id.*

[118]. *See* Polakovic, *supra* note 87 at 890.

[119]. *See* *id.* at 892.

[120]. *See* *id.* This method would allow the court to escape judgments on the artistic merit and the creative process. *See* *id.*

[121]. *See* *id.* at 895.


[123]. Designers will allow “inspiration” but not a decrease in market share or their reputation as creative geniuses.

[124]. The duration would begin at the first public exhibition of the work. Given the nature of the industry, designers have no rational basis for keeping their work “unpublished” or otherwise circumventing the start date. The right to create derivative works would necessarily be limited to this one year period, unless the derivative work could qualify for separate copyright protection.

[125]. The French term of copyright is limited to one season (year). *See* Schmidt, *supra* note 7 at 876 (citing Gros et Cie. v. dame Gally, Gazette du Palais (May 19, 1953). In the *Yves Saint Laurent* infringement action, although the design was first presented in 1970, the court found that Ralph Lauren has copied the work after it was represented in a 1992 YSL fall show. *See* *Yves Saint Laurent*, [1994] EEC 512.


[127]. Conversely, young and unknown designers could benefit by having major manufacturers or designers license their works. Additionally, a license system could be set up to include both the royalty collection and a fund for enforcement, matching the system of ASCPA or BMI.

[128]. A license fee could be based on either a per copy amount or a percentage of retail sales. Due to the nature of retail fashion sales, it seems reasonable to take a per copy count. This way inventory figures from retail stores could be utilized to determine the appropriate fee due. Schmidt recommends taking a royalty of 1% of the retail price per copy. *See* Schmidt, *supra* note 7 at fn.128. This would secure perhaps 200 million dollars for designers, based on an estimated apparel spending of 200 billion, while not creating any great additional burdens for the consumers.

[129]. Arguably, subtle changes in the design may qualify for separate copyright protection, however, manufacturers would likely pay the royalty rate then become embroiled in an infringement action. Moreover, it is the entire garment which will be viewed not the component parts, since there will obviously be no copyright protection for the normal design elements already within the public domain, such as seams, hems, or button closures.

[130]. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).


[132]. The policy follows the argument that truly creative people will always create, while others need
economic incentives to add to the cultural store.

[133]. In Europe many designers have discount stores to sell off-season wears. In the U.S. discount retailers either sell the off-season and damaged wears at separate stores, such as Filene's Basement, or sell the product in bulk to other retailers like Marshalls. The difference is the ability of the designer to control this secondary market.

[134]. There is always a market for consumers who will purchase designers goods because of the designer. But since designers could be consistently underpriced by manufacturers who had no development costs, designers were forced to raise the price and limit volume of their creations in order to maintain financial stability.

[135]. Designers have also turned their corporations into public companies. While most of the IPO's offer quick cash, their value as an investment is low.

[136]. Many designers have several lines or labels. Usually the actual designer creates work for the haute couture and ready-to-wear lines while merely overseeing the lesser labels. For instance, New York designer Donna Karan maintains a signature collection as well as the lesser line known as DKNY. This trend also is found in Europe, Giorgio Armani has six separate labels.

[137]. The lesser labels show how designers can be creative business people. The designers are also benefitted by the public's desire to have designer clothing, which the lesser labels can provide.

[138]. Fashion designers have always been known for their quality of design, materials and construction. In the race to compete with the design pirates, the apparel industry has continually eliminated these elements. One of the most unfortunate precipitates of this battle has been the rise in exploitative child labor in overseas garment factories, a practice in relation to which neither the pirates nor the designers can claim innocence.