

11-15-2011

A New Look for the Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Protection Act (IDPPPA)

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Recommended Citation

Brittany West, *A New Look for the Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Protection Act (IDPPPA)*, 5 J. Bus. Entrepreneurship & L. Iss. 1 (2011)

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A NEW LOOK FOR THE FASHION INDUSTRY: REDESIGNING COPYRIGHT LAW WITH THE INNOVATIVE DESIGN PROTECTION AND PIRACY PREVENTION ACT (IDPPPA)

BRITTANY WEST*

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ABSTRACT

Introduced in Congress in August 2010, the Innovative Design Protection and Piracy Prevention Act (IDPPPA) would amend 17 U.S.C. § 1301 to extend copyright protection to unique, distinguishable, non-trivial, and non-utilitarian fashion designs. The fashion industry in the United States is currently a \$200 billion industry which is afforded limited intellectual property protection compared to foreign markets. This article explores the applicability of the existing Copyright Act to fashion designs and argues that the IDPPPA takes a narrow approach to

eliminate ambiguity present in former bills attempting to amend copyright law. The IDPPPA would incentivize innovation, the ultimate goal of copyright law, lead to the creation of new designs, and help stimulate the economy of the fashion industry. Although the IDPPPA as proposed does not completely eliminate the inconsistency of copyright application as compared to other artistic mediums, the IDPPPA is an appropriate step toward extending intellectual property protection to fashion designs.

I. INTRODUCTION

“Fashion is made to become unfashionable.”

-Coco Chanel¹

Exclusive runway shows. Glossy magazine covers. Expensive boutiques lining the streets of Los Angeles and New York. Fashion has been idealized as glamorous and practically inaccessible. Fashion houses and haute couture like Chanel, Louis Vuitton, Hermès, and Prada create designs and sell expensive couture that many people cannot afford to fill their wardrobes with, especially without saving up.² New York Fashion Week, for example, creates “a tremendous amount of press and buzz for some of the world’s most expensive clothes. But many of the runway styles are actually purchased by a small group of customers.”³

The fashion industry in the United States is currently a \$200 billion emerging industry,⁴ which is afforded limited intellectual property protection.⁵ After devoting considerable time and effort into creating custom designs, a designer presents his or her line of clothing, handbags, eyewear, and other accessories

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¹ One of the most well-recognized haute couture fashion houses, Chanel, S.A. was founded by Gabrielle “Coco” Chanel in the early 1900s. JUSTINE PICARDIE, *COCO CHANEL: THE LEGEND AND THE LIFE 2* (It Books 2010). Prior to the current debate of whether intellectual property law should be extended to fashion designs, Coco Chanel believed “[f]ashion should die and die quickly, in order that commerce may survive . . . the more transient fashion is the more perfect it is.” *Id.*

² Elizabeth Holmes, *Who Buys These Clothes? They Do: A Peek Inside the Closets of Shoppers Who Pay Full Price for Designers’ Latest Runway Looks*, WALL ST. J. (Feb. 16, 2011), http://online.wsj.com/article/SB10001424052748704409004576146420210142748.html?mod=WSJ_LifeStyle_LeadStoryNA.

³ *Id.*

⁴ C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1148 (2009). The fashion industry in the United States is relatively young compared to France and Italy. *Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Susan Scafidi, Prof. Fordham Law Sch.) [hereinafter *Hearing*], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:28908.wais. The growing interest in fashion is evidenced by young adults choosing careers within the fashion industry, including the decision of students to attend the Fashion Institute of Design and Merchandising (FIDM) and Parsons School of Design in New York. *Id.*

⁵ See Emma Yao Xiao, *The New Trend: Protecting American Fashion Designs Through National Copyright Measures*, 28 CARDOZO ARTS & ENT. L.J. 417, 418 (2010).

without the protection of intellectual property law.⁶ As a result, copy houses are able to knockoff these designs and sell them at affordable prices, effectively stealing profits from the original designer.⁷ Such design piracy not only harms the designer financially, but also results in brand dilution and injury to the designer's reputation.⁸ To some people, the garments they see parading down the runway are beautiful works of creative expression.⁹ To others, they are simply clothes worn for functional purposes—to cover the human body and keep warm.¹⁰ Either way, the trend is toward accepting fashion as a form of artistic expression.¹¹

Many foreign countries treat fashion design as an art form and thus, provide copyright protection to fashion designs.¹² Under French copyright law, fashion designs are given automatic protection on the date of creation, regardless of registration.¹³ Italian copyright law also recognizes fashion as a form of art, requiring the design to “have creative character or inherent artistic character.”¹⁴

⁶ *Id.*

⁷ Holmes, *supra* note 2.

⁸ Erika Myers, *Justice in Fashion: Cheap Chic and the Intellectual Property Equilibrium in the United Kingdom and the United States*, 37 AIPLA Q.J. 47, 52 (2009). Poor quality takes away from the originality of the concept. *See id.* In the fashion industry, reputation and name recognition are vital to establishing a brand. *See id.* at 56–57.

⁹ Insiders in the fashion industry contemplate fashion as distinguishable from its basic function of covering the human body. *Hearing, supra* note 4. There is a fundamental difference between a sweater or a jacket that a person wears to keep warm and a design created as a result of an original concept, hours of creative effort, intricate design and detail, and the use of rare or hard to work with fabric. *See id.* Many designers spend countless hours constructing highly specialized pieces or utilize some interesting process in creating an innovative design. *See id.* An extreme example of a unique fashion design, arguably a sculptural work, is demonstrated by a student of Professor Deborah McNamara's Avant Garde design course at Parsons School of Design: a wearable dress constructed out of chicken wire covered with thousands of individually placed cranberries. Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011). “There was a lot of time, effort and creative energy that went into that piece. It is both unique and distinguishable,” says Professor McNamara. *Id.*

¹⁰ *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1691 (2006) [hereinafter *The Piracy Paradox*].

Though one may need a replacement pair of jeans when an old pair gets holes from wear, or a warmer coat when the weather gets cold, for most people across the socio-economic spectrum, the purchase of clothing is far from limited to these kinds of situations. Nearly all of us inevitably participate in fashion, even if we do not try to follow it.

Hemphill & Suk, *supra* note 4, at 1155.

¹¹ Cindy Rachofsky, a fine-art enthusiast, views her vintage and couture wardrobe as a “collection she is curating. ‘I hope someday someone will find it important and significant,’ she says.” Holmes, *supra* note 2.

¹² Xiao, *supra* note 5, at 426–27. In particular, both France and Italy have a long history and reputation as fashion capitals and both extend copyright protection to designs. *Id.*

¹³ *Id.* at 426. As codified in the Code de la Propriete Intellectuelle, fashion is listed as a protected work in Article L. 112–1. *Id.* at 426. The designer obtains both “moral and patrimonial rights to the design.” *Id.* The moral right ensures that the designer's “name and work are respected” indefinitely, as the right does not end upon the death of the designer but passes to the heirs. *Id.* The Patrimonial right gives the designer control of the work for financial gain. *Id.* France has also imposed civil and criminal liability for infringement. *Id.* Furthermore, the French courts determine the duration of protection on an individual basis. *Id.*

¹⁴ *Id.* at 427 (quoting Legge 22 aprile 1941, n. 633 (It.)). Italian law protects both registered and unregistered works for the duration of the life of the designer plus seventy years. *Id.* A panel of ten experts in the industry, known as the Jury of Design, are created by the Italian Association of Designers and determine whether a particular work is copyrightable under the law. *Id.*

Under current copyright law in the United States, fashion is treated as utilitarian rather than as a form of creative expression, therefore exempting the fashion industry from copyright protection.¹⁵ Under section 101 of the Copyright Act, the design of a useful article is considered copyrightable under the statute “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.”¹⁶ Copyright protection has been denied for designs of articles of clothing under the statute because such goods are not considered to be distinguishable from the useful article, which is the article of clothing itself.¹⁷

Proposed in 2006, the Design Piracy Prohibition Act (DPPA) sought to amend current copyright law and afford limited copyright protection to fashion designs.¹⁸ Opponents of this bill argued that it was too vague and that applications for copyright would become too numerous.¹⁹ The DPPA was met with resistance on Capitol Hill.²⁰ In an effort to confront the copyright issue and create a more

¹⁵ See 17 U.S.C.A. § 101 (West 2008). Although the statute does not provide protection and remedies for American designers seeking to protect their designs in the United States, infringement cases in the French court system have been successfully litigated by French designers against American designers. Xiao, *supra* note 5, at 426–27.

¹⁶ 17 U.S.C.A. § 101 (West 2008). An article of clothing is an example of a useful article. Allan J. Sternstein & Neal G. Massand, *Fashion Police*, INSIDE COUNSEL (Oct. 19, 2010), available at <http://www.insidecounsel.com/2010/10/19/fashion-police>. An exception to this rule is the Vessel Hull Design Protection Act, extending copyright protection for an original design of a useful article, currently defined as a vessel boat hull, “which makes the article attractive or distinctive in appearance.” 17 U.S.C.A. § 101(a)(1) (West 2008). The IDPPPA would amend the Vessel Hull Design Protection Act, by adding “Fashion Designs” to the statute. Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. § 2 (2d Sess. 2010) [hereinafter S. 3728].

¹⁷ 17 U.S.C.A. § 101 (West 2008). Minimal protection for designs may be found where courts invoke the concept of separability: features that can be identified separately and are capable of existing independently as a work of art are eligible for copyright protection. *Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1352 (S.D. Cal. 1988). The California District Court held that a masquerade costume was copyrightable under the test of separability despite the fact that Halloween costumes had utilitarian functions because they are made of articles with the purpose to be worn. *Id.*

¹⁸ H.R. 5055, 109th Cong. (Mar. 30, 2006), <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5055>. In her testimony regarding the DPPA before Congress, Susan Scafidi gave an example of what would be protected under this proposed bill: “an elaborate ball gown that is the product of dozens of preliminary sketches, hours of fittings, and days of detailed stitching and adjustment before finally complete.” *Hearing, supra* note 4. Copyright protection benefits the copyright holder, granting her the exclusive right to make copies, prepare derivative works based on the work, distribute copies or phonorecords of the work, and perform or display the work publicly. See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW (4th Ed. 2005). A valid copyright also allows the copyright holder to seek remedies, including an injunction, damages, and loss of profits based on an infringement claim. *See id.*

¹⁹ Lisa J. Hedrick, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215, 255 (2008). Previous attempts at achieving copyright protection for fashion apparel includes the creation of the Fashion Originator's Guild in the 1930s, which operated for a few years before it was charged with violating antitrust law. *Should Fashion be Protected by Copyright Laws? A Guest Post*, FREAKONOMICS (Mar. 12, 2010), <http://freakonomics.blogs.nytimes.com/2010/03/12/should-fashion-be-protected-by-copyright-laws-a-guest-post/>. “The Guild registered American designers and compelled retailers—some 12,000 across the nation were members—not to sell copies. If a retailer did sell a copy, they were issued a ‘red card,’ and other manufacturers were supposed to boycott them.” *Id.*

²⁰ Opponents of the DPPA argue it would actually harm independent fashion designers, since they often do not have the funds to hire an intellectual property attorney or combat copyright infringement claims. Susan Scafidi, *IDPPPA: Introducing the Innovative Design Protection and Piracy Prevention*

structured law, Senator Charles E. Schumer (D-NY) proposed the Innovative Design Protection and Piracy Prevention Act (IDPPPA).²¹ The proposed bill would extend copyright protection to fashion designs incorporating unique and distinguishing elements.²² The IDPPPA indicates a change in the collective attitude of Americans toward the fashion industry.

Currently, a t-shirt with a screen print of an artist's rendering would be eligible for copyright protection because the art printed on the shirt would be protected, whereas a unique and custom design would not be protected.²³ An example of such a garment that would not be eligible under current copyright law is one that required hours to sketch, select the perfect colors and fabrics, make the right cuts, sew, and custom tailor.²⁴ The IDPPPA would amend the Copyright Act and thus allow a designer to seek protection for such a custom design.²⁵ The designer would receive protection for his original work and would subsequently be entitled to benefit both in reputation for creating a unique garment, and financially through profits from selling the garment.

This article will explore the applicability of the Copyright Act to fashion designs and will analyze the implications of the IDPPPA. This comment will argue that the IDPPPA takes a narrow approach to eliminate any ambiguity present in the DPPA. Although Senator Schumer's proposed bill does not completely eliminate the inconsistency of copyright application as compared to other artistic mediums, the IDPPPA is an appropriate step in the right direction toward extending intellectual property protection to fashion designs.

Part II presents the legal standards for copyright infringement claims and recovery under the IDPPPA and examines the support and criticism of the bill, while Part III introduces the academic debate regarding the existence of a "Piracy Paradox" occurring in the fashion industry. Part IV examines recent legal battles and proposes that tension will result between courts and the legislature over the interpretation of the bill.

Part V navigates the policy rationale for extending copyright protection to fashion designs and evaluates the equitable grounds for the need of copyright

Act, a.k.a. Fashion Copyright, COUNTERFEIT CHIC (Aug. 6, 2010), <http://www.counterfeitchic.com/2010/08/introducing-the-innovative-design-protection-and-piracy-prevention-act.html>. Opponents also argue the DPPA is too vague and would open the door to numerous and frivolous lawsuits. Cathy Horyn, *Schumer Bill Seeks to Protect Fashion Design*, N.Y. TIMES (Aug. 5, 2010), <http://runway.blogs.nytimes.com/2010/08/05/schumer-bill-seeks-to-protect-fashion-design/>.

²¹ S. 3728, *supra* note 16. The Senate Judiciary Committee unanimously passed the IDPPPA in December 2010. Vanessa O'Connell, *Project Copyright! Bill Giving IP Protection to Fashion Moves Forward*, WALL ST. J. LAW BLOG (Dec. 1, 2010), <http://blogs.wsj.com/law/2010/12/01/project-copyright-bill-giving-ip-protection-to-fashion-moves-forward/>.

²² S. 3728, *supra* note 16. Original elements, as defined in the bill, include those that "are the result of a designer's own creative endeavor" or that "provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles." *Id.*

²³ *Hearing, supra* note 4. One court determined that a sketch of a dress was protected under the Copyright Act, but the creation of the dress itself was not suitable for protection. *Jack Adelman, Inc. v. Sonners & Gordon, Inc.*, 112 F. Supp. 187, 188 (S.D.N.Y. 1934).

²⁴ Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011).

²⁵ S. 3728, *supra* note 16.

protection in the fashion industry. This part suggests that the IDPPPA will incentivize innovation—the goal of copyright—and the creation of new designs, as well as help to stimulate the economy of the fashion industry. Finally, this comment will conclude by recommending enactment of the IDPPPA.

II. THE COPYRIGHT ACT: EXTENDING PROTECTION TO FASHION DESIGN

The United States Constitution provides that Congress shall have the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”²⁶ Copyright protection is afforded to “original works of authorship” that are fixed in a tangible form, which currently includes literary, dramatic, musical, artistic, and certain other intellectual works.²⁷ This protection extends to original works of authorship expressed through mediums from which works can be “perceived, reproduced, or otherwise communicated.”²⁸ The originality requirement under copyright law is relatively low—a work must demonstrate only a minimal degree of original expressive authorship and must be a work of independent creation.²⁹

Defined as useful articles, clothing cannot be protected under current copyright laws.³⁰ However, fabric patterns can be distinguished from fashion designs and may be suitable for copyright protection.³¹ Fabrics or textiles that are

²⁶ U.S. CONST. art. I, § 8.

²⁷ 17 U.S.C.A. § 102(a) (West 2008). “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.* Although the statute states that protection is offered for “original works of authorship,” the statute does not define “original.” *See id.* The Supreme Court found that novelty is not required for purposes of originality, a constitutional requirement. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991) (“Originality requires only that the author make the selection or arrangement independently (*i.e.*, without copying that selection or arrangement from another work), and that it display some minimal level of creativity.”).

²⁸ 17 U.S.C.A. § 101 (West 2008). “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” *Id.* § 102(b). Along with fashion design, other material not protected under copyright include choreographic or pantomime works not written or recorded; titles, names, short phrases, and slogans; symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients or contents; works consisting entirely of information that is common property and containing no original authorship; ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration. *See id.* §§ 102(a)(1)–(8).

²⁹ LEAFFER, *supra* note 18, at 59. The requirement of creative authorship is *de minimis*—almost any variation of a distinguishable work will be found to be original. *Id.* at 59–60. Independent creation requires that the original work could not have been copied, but does not require any artistic sophistication or merit. *Id.* at 59, 61; *see also* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249–50 (1903). Thus, maps and architectural blueprints may be registered as “pictorial, graphic, and sculptural works,” whereas a calendar or tape measure could not be protected. LEAFFER, *supra* note 18, at 59.

³⁰ 17 U.S.C. A. § 102 (West 2008).

³¹ *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142, 143 (S.D.N.Y. 1959) (holding a design printed upon a dress fabric is the proper subject of copyright either as a work of art or as a print).

imprinted or embossed with a design are suitable for copyright, as distinguished from the finished garment itself.³²

A. Fashion Designs Cannot Be Protected Under Patent and Trademark Law

Other sources of intellectual property are available to designers, but do not solve the problems created by design knockoffs.³³ Under current intellectual property law, trademarks offer minimal protection to designers.³⁴ Under the Lanham Trademark Act of 1941, distinctive words, symbols, or phrases can be trademarked.³⁵ In order to be distinctive, the mark must be inherently distinctive or must have acquired its distinctiveness through secondary meaning.³⁶ As a result, fashion designers are afforded protection of their brand, which normally

³² See, e.g., *Malden Mills, Inc. v. Regency Mills, Inc.*, 626 F.2d 1112, 1112–13 (2d Cir. 1980); *Lauratex Textile Corp. v. Allton Knitting Mills, Inc.*, 519 F. Supp. 730, 732 (S.D.N.Y. 1981).

³³ The majority of design related litigation involves trademark and trade dress. See e.g., *Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp.*, 426 F.3d 532, 534–36 (2d Cir. 2005) (holding that the court should give particular weight to any evidence submitted by the parties addressing the overall impression that consumers are likely to have of the handbags when they are viewed sequentially, and in different settings, rather than simultaneously). In *Malletier*, famous French fashion house, Louis Vuitton, brought suit against Burlington Coat Factory, a discount warehouse, for alleged infringement of its trademarked design pattern. See *id.*

³⁴ See Hedrick, *supra* note 19, at 224–27.

The term “trademark” includes any word, name, symbol, or device, or any combination thereof: (1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

15 U.S.C.A. § 1127 (West 2008).

³⁵ 15 U.S.C.A. § 1051 (West 2009). In *Christian Louboutin S.A. v. Yves Saint Laurent Am., Inc.*, 778 F. Supp. 2d 445 (S.D.N.Y. 2011), the District Judge denied designer Christian Louboutin’s motion for preliminary injunction seeking to prevent a competitor, specifically Yves Saint Laurent America, from using his trademarked “lacquered red sole on footwear.” The court reviewed the trademark issued by the United States Patent and Trademark Office in 2008, entitled “Red Sole Mark,” to determine whether the mark merited protection under the Lanham Act. *Id.* At the outset, the court acknowledged the presumption of validity based on the certificate of registration. *Id.* at 448. The court even acknowledged that the red sole is widely associated with Louboutin’s brand:

When Hollywood starlets cross red carpets and high fashion models strut down runways, and heads turn and eyes drop to the celebrities’ feet, lacquered red outsoles on high-heeled, black shoes flaunt a glamorous statement that pops out at once. For those in the know, cognitive bulbs instantly flash to associate: “Louboutin.”

Id. However, the court reasoned that the single color was overly broad, functional, appealed to consumers, raised the cost of the shoe, and indicated exclusivity. *Id.* at 454. “[I]n fashion markets, color serves not solely to identify sponsorship or source, but is used in designs primarily to advance expressive, ornamental and aesthetic purposes.” *Id.* at 451. As a result, the court found that the color red serves a non-trademark function. *Id.* at 453–54.

³⁶ Hedrick, *supra* note 19, at 225.

The primary tool fashion designers use to distinguish their designs is a trademarked logo or name usually placed inside an item of apparel. Sometimes designers incorporate their distinctive mark into the creation of apparel However, this use of trademark does not render the design of the article protected; the protection applies only to the distinctive mark.

Id. at 226.

includes their name, logo, or tagline.³⁷ However, the garment created from their design concept remains unprotected under trademark law.³⁸

Designers can resort to obtaining patents to protect their designs, but often do not.³⁹ The process of patent application, which is lengthy and expensive, can be a bar to obtaining a patent on fashion design.⁴⁰ Three types of patents are available to protect intellectual property: utility, design, and plant patents.⁴¹ Utility patents are issued to an invention or useful improvement of an existing invention.⁴²

Patent law requires that a design or invention be novel and non-obvious.⁴³ Novelty sufficient to warrant patent protection requires that the invention is not known in the United States or any other country prior to filing.⁴⁴ For a patent to be non-obvious, “the subject matter as a whole” must not be obvious to “a person having ordinary skill in the art to which said subject matter pertains.”⁴⁵ Fashion designs are generally not considered “new” under patent requirements and therefore unlikely to be granted protection.⁴⁶

A design patent is available to anyone who “invents any new, original, and ornamental design for an article of manufacture.”⁴⁷ Similar to copyright, the design must also be ornamental and not merely functional:⁴⁸

[A] design patent is not rendered invalid merely because the article of manufacture which is the subject of the design may, in addition to having a pleasing appearance, also perform a useful function. This is undoubtedly the law But . . . the rule is otherwise if the primary purpose of the design is functional. The configuration and appearance of many articles of manufacture, though dictated by functional

³⁷ *Id.* at 224–25.

³⁸ *Id.* Trade dress, as distinguished from trademark, has been defined as “the total image of a good as defined by its overall composition and design, including size, shape, color, texture, and graphics.” *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (2d Cir. 1991). In *Louis Vuitton Malletier v. Dooney & Burke, Inc.*, 454 F.3d 108, 115–16 (2d Cir. 2006), the plaintiff did not seek protection for trade dress of its handbag, which is the overall appearance and look of the item, but rather the narrower trademark established in colors and patterns.

³⁹ Hedrick, *supra* note 19, at 216–17.

⁴⁰ *Id.*

⁴¹ *Process for Obtaining a Patent*, THE U.S. PAT. AND TRADEMARK OFF., <http://www.uspto.gov/patents/process/index.jsp> (last modified Sept. 16, 2011). The discussion of plant patents for purposes of this note is unnecessary, as a plant patent has no application to fashion design. 35 U.S.C. § 161 (2000).

⁴² 35 U.S.C.A. § 101 (West 2005). “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor [sic], subject to the conditions and requirements of this title.” *Id.*

⁴³ *Id.* at § 103.

⁴⁴ *Id.* at § 102 (listing requirements for novelty and enumerating situations where a patent is unavailable).

⁴⁵ *Id.* at § 103.

⁴⁶ Hedrick, *supra* note 19, at 223. Examples of fashion items registered for patent protection include: a patent granting protection for a Victoria’s Secret molded breast cup for one of its bras. *Id.* at 273, n.39; see *Victoria’s Secret Stores Brand Mgmt., Inc.*, U.S. Patent No. 7,052,360 (filed Mar. 19, 2004).

⁴⁷ 35 U.S.C. § 171 (2000). The issuance of a design patent is subject to the same requirements of a utility patent. *Id.*

⁴⁸ Hedrick, *supra* note 19, at 223.

requirements, are often pleasing to look at. However, if the resulting configuration proceeds primarily from the necessity of functional or mechanical requirements, it is not a valid design patent.⁴⁹

In many circumstances, design patents do not afford the necessary protection, “for designs and patterns usually are short-lived and with the conditions and time incidental to obtaining the patent, this protection comes too late, if at all.”⁵⁰ Compared to trademarks and patents, copyright is the most practical source of protection for fashion design.⁵¹

B. The IDPPPA Versus the DPPA

The IDPPPA⁵² is similar to and distinguishable from the DPPA in several ways. Comparing the IDPPPA to the previous bill: both create a three-year term of protection for copyrightable designs; both amend Chapter Thirteen of the Copyright Act; and both require novelty and original design to qualify for protection.⁵³ The three-year duration of protection indicates the fashion industry’s understanding that fashion is contemporary and changes quickly from season to season.⁵⁴

The IDPPPA can be distinguished from its predecessor by the lack of a registration period.⁵⁵ This new addition would benefit younger, inexperienced designers by removing any costs and waiting periods associated with registering for copyright protection.⁵⁶ The IDPPPA also includes an exception not found in the DPPA—the “Home Sewing Exception,” which prevents infringement where a person produces a single copy of a protected design when used solely for personal use, or the use of an immediate family member.⁵⁷ This allows designers who admire such innovative designs to practice sewing such garments in their own home or perhaps in an educational setting, so long as the “copy is not offered for sale or use in trade.”⁵⁸

⁴⁹ *Barofsky v. Gen. Elec. Corp.*, 396 F.2d 340, 342 (9th Cir. 1968).

⁵⁰ *Jack Adelman, Inc. v. Sonners & Gordon, Inc.*, 112 F. Supp. 187, 190 (S.D.N.Y. 1934). “There are no provisions in the Copyright Law for protecting fashions for dresses. The right to make and sell an artistically designed garment may under proper circumstances be obtained by a design patent issued from the Patent Office but not by copyright.” *Id.* at 189.

⁵¹ Hedrick, *supra* note 19, at 228; *see also supra* text accompanying note 27.

⁵² The proposed legislation defines “apparel” to include: “an article of men’s, women’s, or children’s clothing, including undergarments, outerwear, gloves, footwear, and headgear; handbags, purses, wallets, tote bags, and belts; and eyeglass frames.” S. 3728, *supra* note 16. Thus, the bill does not protect patterns or colors, which might already be suitable for protection under intellectual property law. *Couleur Int’l. Ltd. v. Opulent Fabrics Inc.*, 330 F. Supp. 152, 153–54 (S.D.N.Y. 1971) (holding color and design of defendant’s fabric pattern was an infringement on plaintiff’s original design protected under copyright, even though the designs were not identical).

⁵³ Compare S. 3728, *supra* note 16, with Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).

⁵⁴ S. 3728, *supra* note 16; *see Hearing, supra* note 4.

⁵⁵ Scafidi, *supra* note 20.

⁵⁶ *See id.*

⁵⁷ S. 3728, *supra* note 16.

⁵⁸ *Id.* This exception is analogous to the doctrine of fair use, a judicially created defense to copyright infringement. LEAFFER, *supra* note 18, at 469. This defense allows a third party to purport

C. Copyright Infringement

Courts use a two-part test in determining whether a copyright infringement has occurred.⁵⁹ Plaintiff must prove: 1) the ownership of a valid copyright, and 2) the aspects of the work that were copied are claimed to be original.⁶⁰ Senator Schumer's proposed bill states that infringement occurs when the protected design has been copied without consent.⁶¹ Infringement under the bill does not occur when the copy of a design is not "substantially identical in overall visual appearance to . . . the original elements of a protected design,"⁶² or when the copy is a result of independent creation.⁶³ "Substantially identical" is defined in the IDPPPA as "an article of apparel which is so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial."⁶⁴

Additional provisions of the IDPPPA, unlike the DPPA, require heightened pleading—specifically pleading with particularity—for claiming infringement of fashion designs.⁶⁵ In addition to proving: 1) the design at issue is protected under copyright law, and 2) the protected design is being infringed upon by the defendant's design, the plaintiff must also show that 3) "the protected design or an image thereof was available in such location or locations, in such a manner, and for such duration that it can be reasonably inferred from the totality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design."⁶⁶ This heightened pleading requirement will discourage

that the use of a copyrighted work without the owner's consent was done in a reasonable manner. *Id.* As an equitable rule, the fair use doctrine is not particularly defined:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C.A. § 107 (West 2008). Thus, the "Home Sewing Exception" expressly states the limitations of the fair use doctrine. *See* S. 3728, *supra* note 16.

⁵⁹ *See* Feist Publ'n, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340, 361 (1991).

⁶⁰ *See id.*

⁶¹ S. 3728, *supra* note 16. Furthermore, the bill specifies that an infringing article is not an "illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium." *Id.* Therefore, a "two-dimensional" fabric pattern, picture or sketch of an article of clothing might be eligible for copyright protection, but the "three-dimensional" design of clothing (i.e. the dress itself) is not protectable under current law. EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 187 (David Stanford Burr ed., 2000).

⁶² S. 3728, *supra* note 16.

⁶³ *Id.* "As in copyright, it's theoretically possible for creative lightning to strike twice, without triggering liability." Scafidi, *supra* note 20.

⁶⁴ S. 3728, *supra* note 16. The narrowly tailored law is designed to discourage litigation with a heightened pleading requirement. *Id.*

⁶⁵ *Id.* Pleading requirements under the DPPA required only a showing that the design is "substantially similar in overall visual appearance" to the protected design. Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).

⁶⁶ S. 3728, *supra* note 16. In determining whether sufficient facts are pleaded, the court should consider the totality of the circumstances surrounding the claim. *Id.* This requirement for heightened

frivolous lawsuits.⁶⁷

Furthermore, where the DPPA would have allowed for higher recovery amounts, the IDPPPA sets recovery for infringement at “\$50,000 or \$1 per copy.”⁶⁸ Recovery under the DPPA would increase the available damages for infringement under current copyright law from “\$50,000 or \$1 per copy” to “\$250,000 or \$5 per copy,” determined by the greater amount or by a finding by the court of whichever is “just compensation.”⁶⁹ The IDPPPA sets recovery equal to Chapter 13 of the Copyright Act.⁷⁰ Therefore, the cap on damages under the IDPPPA would be fair and reasonable as compared to current copyright law.

D. Support and Criticism of the IDPPPA

Proponents of Senator Schumer’s proposed legislation argue that policy reasons support the need for intellectual property protection for fashion design.⁷¹ The IDPPPA enjoys bipartisan support, and those backing the bill include the Council of Fashion Designers of America and the American Apparel and Footwear Association, the two largest trade associations in the fashion industry.⁷² Although there is a high burden on the designer to show that the innovated design is unique, distinguishable, and has been copied for a profit, both well-known and emerging designers support the bill.⁷³

The IDPPPA is tailored to protect unique, distinguishable, non-trivial, and non-utilitarian designs.⁷⁴ Although some may argue that the lack of a registration requirement in the bill will fail to put other designers on notice, this is similar to trademark in common law.⁷⁵ Designers will be able to determine whether their

pleading will discourage litigation in the future and mitigate the negative impact of lack of notice resulting from the lack of registration requirement. *See infra* Part IV.

⁶⁷ See Sara R. Ellis, *Copyrighting Couture: An Examination of Fashion Design Protection and Why the DPPA and IDPPPA are a Step Towards the Solution to Counterfeit Chic*, 78 TENN. L. REV. 163, 210 (2010).

⁶⁸ Xiao, *supra* note 5, at 435; *see also* S. 3728, *supra* note 16.

⁶⁹ Ellis, *supra* note 67, at 208–09. “[T]his award potentially exceeds the current statutory damages cap of \$150,000 for willful infringement under copyright law Because the DPPA’s cap on sui generis damages would be higher than the current cap on copyright statutory damages, the IDPPPA’s drafters were wise not to include this provision.” *Id.*

⁷⁰ 17 U.S.C.A. § 1323(a) (West 2008). “[I]f future amendments are made to the monetary recovery available under the Copyright Act, the recovery for design infringement should be adjusted accordingly.” Ellis, *supra* note 67, at 209.

⁷¹ See, e.g., Laura C. Marshall, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTEL. PROP. L. 305, 323 (2007).

⁷² Scafidi, *supra* note 20.

⁷³ Horyn, *supra* note 20.

⁷⁴ S. 3728, *supra* note 16; *supra* Part I and accompanying notes.

⁷⁵ Common law or the judicially created right to trademark, as opposed to statutorily created trademark, allows for protection of a trademark without requiring registration. ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* 551 (2003). As a result, discovering whether anyone else has the intellectual property rights to that particular mark can be hard to find, but is a requirement for seeking recovery on an infringement claim or defending oneself from becoming a willful infringer. *Id.* Attempts to find common law trademarks can be made by searching databases such as the United States Patent and Trademark Office (USPTO) website, other common law databases, or simply searching Google.com. *See Trademark Electronic Search System*, THE U.S. PAT. AND TRADEMARK OFF., <http://www.uspto.gov/ebc/tess/index.html> (last

design is truly original and unique by conducting searches of fashion magazines, attending runway shows or trade shows, or searching other databases.⁷⁶ Additionally, these unique designs are likely to be recognized among the fashion community and thus put other designers on notice. Furthermore, there are several defenses that can be utilized, especially when a designer claims he was not put on notice, such as the innocent infringer defense.⁷⁷

Commentators point out that the lack of a registration requirement in the bill is a detriment to designers, as they would not be put on notice of similar preexisting, protected designs and would therefore be liable for infringement.⁷⁸ For example, one designer could release a garment into the stream of commerce, and another designer could release a garment substantially similar in the next year without knowledge of the prior garment's existence.⁷⁹ However, the bill removes those designs that are the result of independent creation from the definition of an "infringing article."⁸⁰ Furthermore, academic observers argue that designers would be more apt to "tweak" one element of the design as to avoid the originality requirement of the IDPPPA.⁸¹ However, this factual determination of similarity would be left to the court to determine.⁸²

visited Jan. 6, 2012).

⁷⁶ S. 3728, *supra* note 16.

⁷⁷ LEAFFER, *supra* note 18, at 59. "In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages." 17 U.S.C.A. § 504(c)(2) (West 2008). Other legal defenses to a copyright infringement claim include: the doctrine of fair use, the claim is barred by the statute of limitations, the infringer obtained a license from the owner, and the infringer did not rely on the copyrighted work. LEAFFER, *supra* note 18, at 59.

⁷⁸ Kal Raustiala & Christopher Sprigman, OP-ED, *Why Imitation is the Sincerest Form of Fashion*, N.Y. TIMES (Aug. 12, 2010), <http://www.nytimes.com/2010/08/13/opinion/13raustiala.html> [hereinafter OP ED].

⁷⁹ See Susan Scafidi, *DVF Does the Right Thing*, COUNTERFEIT CHIC (Apr. 24, 2009), http://www.counterfeitichic.com/2009/04/dvf_does_the_right_thing.php. Diane von Furstenberg, a designer and proponent of extending intellectual property law to fashion design, recently discovered that one of her sweaters with a floral pattern and silk bow was substantially similar to one created one year earlier by a lesser-known label, Mercy. *Id.* As a victim of design copying, Furstenberg offered to voluntarily compensate the label for use of their design. *Id.*

⁸⁰ S. 3728, *supra* note 16. For example, if a designer does not have notice that a particular design existed and creates a substantially similar design independently, the second design will not be deemed a copied design. *See id.*

⁸¹ OP ED, *supra* note 78.

⁸² An extremely unique garment, such as the dress made of chicken wire and cranberry, would likely not be able to be "tweaked," as other garments might, to avoid a copyright infringement claim. Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011). However, for those more commercial designs, in a copyright infringement claim under the proposed law, the questions to be considered by a court or jury would be whether the design:

[I]s creative, unique, distinguishable, non-trivial and non-utilitarian enough to be worthy of protection. The court or jury would also look at garment A next to garment B and determine whether they were substantially identical so as to be mistaken for one another, with merely trivial differences. In addition, a court or jury would look at damages and whether the infringer profited financially.

Id.

III. IS THERE A "PIRACY PARADOX": THE ACADEMIC DEBATE

On one side of the academic debate with respect to extending copyright protection to fashion design is the argument that copying promotes innovation and creates demand for new designs, therefore benefiting designers by motivating them to continually focus creative energy into developing new designs.⁸³ Commentators on the other side of the debate argue that copying, though it may play a role in fashion, is not the driving force behind the creation of new designs.⁸⁴ Rather, trends, seasons, and creative expression are the driving force behind fashion.⁸⁵

Many supporters of the IDPPPA argue that fashion designs are a form of artistic expression and should be treated in a similar manner as music, art, literature, and other creative works in regard to copyright protection.⁸⁶ The inconsistent application of copyright protection to differing art forms thus becomes a moral and equitable argument for affording copyright protection to original designs. Senator Schumer observes, "[o]ne of the great things America still has the lead on over other countries is intellectual property; we come up with the best ideas, we find they are often stolen, and [the IDPPPA] will protect us in one area where we tend to be the leader."⁸⁷ The rationale behind copyright is to protect those designs that are a product of creative energy, time, and original ideas.⁸⁸

A. According to Kal Raustiala⁸⁹ and Christopher Sprigman,⁹⁰ the Piracy Paradox Exists: Keeping Up with the Joneses

Raustiala and Sprigman coined the phrase "Piracy Paradox."⁹¹ The Piracy Paradox is the phenomenon that exists because, although copying another person's work is not to be encouraged, the fashion industry is unique in that copying actually increases sales across the industry, produces more revenue, and shortens trends, thus encouraging innovation.⁹² Raustiala and Sprigman believe that fashion innovation also occurs as a result of seasonal changes and is created by

⁸³ *The Piracy Paradox*, *supra* note 10, at 1691.

⁸⁴ *See, e.g.*, Hemphill & Suk, *supra* note 4; *Hearing*, *supra* note 4.

⁸⁵ *Hearing*, *supra* note 4.

⁸⁶ Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011).

⁸⁷ Ellis, *supra* note 67, at 210.

⁸⁸ *Id.*

⁸⁹ Kal Raustiala is a Professor of Law at the UCLA School of Law and the UCLA International Institute. *Faculty Biography*, UCLA SCH. OF LAW, <http://www.law.ucla.edu/faculty/all-faculty-profiles/professors/Pages/kal-raustiala.aspx> (last visited Jan. 6, 2012). Raustiala's research focuses on international law and politics and on intellectual property. *Id.* He is a frequent media contributor whose writings have been featured in the New York Times, the Wall Street Journal, the Financial Times, the New Republic, the New Yorker, the International Herald Tribune and Le Monde. *Id.*

⁹⁰ Christopher Sprigman is a Professor of Law at the Virginia School of Law, specializing in intellectual property law, antitrust law, competition policy and comparative constitutional law. *Faculty*, VIRGINIA LAW, <http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/1211247> (last visited Jan. 6, 2012). His scholarship focuses on how legal rules affect innovation and the deployment of new technologies. *Id.* Sprigman has served as appellate counsel in the Antitrust Division of the United States Department of Justice. *Id.*

⁹¹ *The Piracy Paradox*, *supra* note 10, at 1691.

⁹² *Id.*

dominant themes used by multiple designers.⁹³ They assert, “[c]opying creates trends, and trends are what sell fashion.”⁹⁴

However, those insiders of the industry distinguish the concept of trend from custom designs.⁹⁵ The same economic argument could be proffered for eliminating copyright protection altogether—allowing for the freedom of expression of ideas and free use of those ideas, in juxtaposition with a moral and equitable argument for rewarding and encouraging artists, musicians, and others to continually create with the guarantee and warranty that their hard work will pay off.⁹⁶ Aside from necessity, designers have alternative motivation to create designs, which stems from the creative process itself.⁹⁷

Furthermore, from an economic view within the fashion industry, copyright protection would allow emerging new designers to establish small businesses, have the exclusive rights to profits from those unique designs, and enable designers to enter into licensing agreements for financial gain.⁹⁸ While Raustiala and Sprigman admit that some designers suffer at the hands of copiers, they do not support the IDPPPA.⁹⁹

⁹³ *Id.* at 1732. The authors proffer that these themes, mixed with low intellectual property protection, do not adversely affect the fashion industry and even help to encourage innovation. *See id.*

⁹⁴ OP ED, *supra* note 78. Raustiala and Sprigman fail to differentiate between a trend and an original design as defined in the IDPPPA:

Shakespeare put it, “The fashion wears out more apparel than the man.” That is, many people buy new clothes not because they need them, but only to keep up with the latest style. Without copyright restrictions, designers are free to rework a design and jump on board what they hope will be a money-making style. The result is the industry’s most sacred concept: the trend . . . Every season we see designers “take inspiration” from others. Trends catch on, become overexposed and die. Then new designs take their place. This cycle is familiar. But what is rarely recognized is that the cycle is accelerated by the freedom to copy.

Id.

⁹⁵ Insiders of the fashion industry define a trend differently:

A trend might be the color orange, or short hems, or oversized trousers this season. The IDPPPA will not protect trends—everyone will be able to use the color orange and design standard miniskirts and oversized trousers. Designers will still be able to follow trends and utilize standard, trivial, utilitarian design elements. The IDPPPA would, however, protect a fashion design in a case where a designer makes something truly unique and original. What will be difficult is determining whether a design is just that, and that decision will be left to courts and juries. I suspect those in the fashion industry might have a different perspective about what is original and unique than those not in the industry (i.e. judges and juries), which will make for some interesting precedent.

Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011).

⁹⁶ *Id.*

⁹⁷ “[W]hat makes the field a creative endeavor is the drive to differentiate—to reinterpret, change, remix, and transform, and as such, resist the sheer replication of existing works even while incorporating them. That is the creative impulse.” Hemphill & Suk, *supra* note 4, at 1166. This creative process would not slow with the adoption of copyright protection for fashion design, but would support the creative process. This same creative process can be seen, for example, in the film industry: boy-meets-girl romantic comedies are a dime a dozen, but each one is unique in its casting, scenes, set, and dialogue.

⁹⁸ A licensing agreement would allow the licensee to use the licensed material for financial gain. Schechter & Thomas, *supra* note 75, at 781.

⁹⁹ *See* OP ED, *supra* note 78. Raustiala and Sprigman argue, “Mr. Schumer’s bill is a cure that would be worse than the illness.” *Id.* This theory asserted by Raustiala and Sprigman is at odds with

The IDPPPA would not hinder innovation. It calls for copyright protection of those designs that are unique.¹⁰⁰ A fashion design is unique under the bill if it “includes original elements of apparel.”¹⁰¹ An extreme example of a garment that would likely be protected as a unique design under the bill is Lady Gaga’s infamous dress made entirely of meat worn at the 2011 MTV Music Video Awards.¹⁰² As a result of the bill’s “unique” requirement, most trends will not be protected by copyright.¹⁰³ Rather, those unique forms of creative expression—into which designers invest their energy, creativity, and hard work—will benefit from the bill’s protection.

According to Raustiala and Sprigman, because the IDPPPA lacks a provision that requires designers to register with the United States Copyright Office, it fails to put other designers on notice.¹⁰⁴ This argument can also be applied to works currently copyrightable under the Copyright Act.¹⁰⁵ In order for copyright protection to apply under current copyright law, the owner of the work need not register the work with the United States Copyright Office.¹⁰⁶

The two professors of law argue that the fashion industry is an inappropriate venue for intellectual property law.¹⁰⁷ In fact, they argue that intellectual property protection of designs would negatively impact the economic health of the industry,¹⁰⁸ thereby slowing the creative cycle, raising prices, and decreasing the amount of goods available in the industry.¹⁰⁹ Furthermore, they claim that the

the basic premise of copyright, which is to reward innovative and original ideas with protection, for the purposes of financial gain in profits and to facilitate research and development. “Copyright law was designed to create order . . . to prevent ruinous competition when unscrupulous firms engage in wholesale commercial piracy.” NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 8 (2008).

¹⁰⁰ S. 3728, *supra* note 16.

¹⁰¹ *Id.*

¹⁰² *Lady Gaga’s Meat Dress: Outfit With A Message?* 60 MINUTES CBS NEWS (Feb. 13, 2011), <http://www.cbsnews.com/stories/2011/02/13/60minutes/main20031711.shtml>. This dress was constructed entirely out of raw meat and would likely satisfy the “original element” requirement of the IDPPPA. *Id.*; S. 3728, *supra* note 16. Applying the bill to this design, the meat dress “includes original elements that . . . are the result of a designer’s own creative endeavor.” S. 3728, *supra* note 16. Furthermore, the useful, utilitarian function of this dress is substantially decreased by the fact that the material is made out of fresh, raw, cold meat that would not last long, keep the body warm or provide any level of comfort. This dress would likely be protected under the IDPPPA. *See id.*

¹⁰³ Examples of designs that would not likely warrant protection under the IDPPPA include: a wrap dress; a leather jacket without any creative cut, zippers, or any other differentiating features; a silk empire waist wedding gown without intricate or ornate beading. *See* S. 3728, *supra* note 16.

¹⁰⁴ OP ED, *supra* note 78.

¹⁰⁵ *See Registering a Work*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/help/faq/faq-register.html> (last visited Jan. 6, 2012).

¹⁰⁶ *Id.* However, timely registration enhances the legal remedies available for the owner. LEAFFER, *supra* note 18, at 59. Application for copyright protection is simple and can be done via mail or online. *Registering a Work*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/help/faq/faq-register.html> (last visited Jan. 6, 2011).

¹⁰⁷ *The Piracy Paradox*, *supra* note 10, at 1691. Raustiala and Sprigman observe that the fashion industry itself is largely accepting of copying. *Id.* “Fashion firms take significant, costly steps to protect the value of their trademarked brands, but they largely appear to accept appropriation of designs as a fact of life. Design copying is occasionally complained about, but it is as often celebrated as ‘homage’ as it is attacked as ‘piracy.’” *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* at 1733. Scafidi counters this argument:

current practice of design copying benefits designers by requiring them to produce new ideas faster, in order to keep up with new trends and create new trends once consumers start to look for something new.¹¹⁰ Raustiala and Sprigman offer two theories for why copyright protection has not yet been extended to fashion design: 1) clothing confers status and 2) trends are created by many designers releasing the same or similar designs.¹¹¹

1. *Clothing as a status symbol*

The first theory for why copyright protection has not yet been afforded to fashion design is that clothing confers status.¹¹² Economists refer to these as “positional goods,” which confer prestige.¹¹³ Copying, Raustiala and Sprigman argue, allows for wide dissemination of a design.¹¹⁴ This in turn diminishes the prestigious effect of the apparel or accessory purchased from a high-end or independent designer.¹¹⁵ Often, distinguishing between the copy and the original is difficult.¹¹⁶ Once an item becomes readily available, and cheap copies cannot be distinguished from the expensive original design, the “elite quickly becomes mass.”¹¹⁷

2. *Inform the masses: Trends are anchored in copying*

Raustiala and Sprigman offer a second theory: copying allows for anchoring of trends.¹¹⁸ In order for a trend to exist, it must be communicated to the public.¹¹⁹

Granting copyright to a John Grisham novel does not halt the publication of many similar legal thrillers When an author writes a bestseller, imitators of his or her style tend to follow—but they are not permitted to plagiarize the original. Copyright in this sense is merely a legal framework that supports an existing social norm; neither reputable authors nor creative fashion designers engage in literal copying of one another.

Hearing, *supra* note 4.

¹¹⁰ See *The Piracy Paradox*, *supra* note 10, at 1691.

¹¹¹ See *id.*

¹¹² *Id.*

¹¹³ *Id.* at 1718–19. Not all goods would be considered positional, but those expensive designer goods (i.e. purses, sunglasses, dresses, suits), which people recognize and associate with high-end brands, would be considered positional. See *id.*

¹¹⁴ *Id.*

¹¹⁵ See *The Piracy Paradox*, *supra* note 10, at 1718–20. “To even a casual follower of fashion, the key point is obvious: what is initially chic rapidly becomes tacky as it diffuses into the broader public, and for true fashion junkies, nothing is less attractive than last year’s hot item.” *Id.* at 1720. The stigma attached to keeping up with the latest styles is evident from monthly style magazines (i.e. InStyle, Vogue, Vanity Fair) and television programs (i.e. The Rachel Zoe Project and Project Runway). “In 2006, Glamour magazine’s readership was more than [twelve] million and Vogue magazine’s readership was more than [ten] million.” Marshall, *supra* note 71, at 307.

¹¹⁶ *The Piracy Paradox*, *supra* note 10, at 1722. Brand dilution and overexposure can have a negative impact. Myers, *supra* note 8, at 56. In 2004, overexposure resulted in loss of profits for the British high-end company, Burberry—its signature plaid was coveted among the “elite class,” but copyists began selling goods with the trademarked plaid. *Id.* at 57. Thus, in addition to notoriety among the elite, fake Burberry goods became available to “the person who mugged them.” *Id.*

¹¹⁷ *The Piracy Paradox*, *supra* note 10, at 1722.

¹¹⁸ *Id.* at 1728.

In the fashion industry, Raustiala and Sprigman argue that the communication of trends is advanced by copying.¹²⁰ Conversely, they explain that copying helps to accelerate trends.¹²¹ The very concept of a trend requires some element of copying, since designers aspiring to be trendy need to fall in line with the trend:

Designers and critics note these trends all the time, and they often talk of the convergence of designs as a reflection of the zeitgeist. Like a school of fish moving first this way and then that, fashion designers follow the lead of other designers in a process that, while bewildering at times, results in the emergence of particular themes.¹²²

The IDPPPA is limited to protecting unique, non-useful designs.¹²³ These unique, custom designs can be distinguished from the trend phenomenon argued by Raustiala and Sprigman. Insiders of the fashion industry define trends as those common concepts relating to apparel that might be applied by numerous design houses in a particular season, such as a particular color, a certain style of pant, a certain cut for a jacket, or length of a skirt hem.¹²⁴ Custom designs are those articles of fashion within a trend that are so unique as to warrant intellectual property protection.¹²⁵ For example, a unique design would be a wedding gown custom made for a bride with embellishments and differentiating features, or a blouse with oversized, wing-like sleeves constructed from feathers created exclusively for a magazine photo shoot.

Raustiala and Sprigman concede that because the United States fashion industry has not had access to intellectual property protection for designs, they are unable to speculate on whether allowing intellectual property protection would raise consumer or producer welfare.¹²⁶ However, as previously discussed, intellectual property protection in the European Union has existed for many years and no evidence exists that such protection has slowed the creative process.¹²⁷

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 1729.

¹²² *Id.* at 1728.

¹²³ S. 3728, *supra* note 16. The IDPPPA balances the need for protection of original, unique ideas with the need for allowing designs to remain in the public domain to promote future creative inspiration. *Hearing, supra* note 4. “It is a forward-looking measure that lays the groundwork for the future development of a robust, creative American fashion industry.” *Id.*

¹²⁴ Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011).

“Consumers have a taste for trends—that is, for goods that enable them to move in step with other people. But even in fulfilling that taste they desire goods that differentiate them from other individuals.” Hemphill & Suk, *supra* note 4, at 1152.

¹²⁵ See Myers, *supra* note 8, at 52. “Fashion designs are difficult and expensive to create, but relatively easy and inexpensive to copy. Fashion designers must invest substantial amounts of ‘time, money, and talent—R&D to any other industry—in realizing their visions.’” *Id.*

¹²⁶ *The Piracy Paradox, supra* note 10, at 1734.

¹²⁷ See *infra* Part I.

B. Fashion Designers Deserve Copyright Protection: The Piracy Paradox Is a Myth

The Piracy Paradox has been criticized by many scholars.¹²⁸ One proponent of the IDPPPA, Susan Scafidi,¹²⁹ argues that fashion designs are suitable for copyright protection because they are products of creative expression in addition to being useful articles.¹³⁰ Traditionally, clothing was considered purely utilitarian.¹³¹ The modern trend is recognizing fashion as a form of creative expression—from petticoats to beaded flapper dresses, or punk rock to avant-garde designs.¹³² This trend towards accepting fashion design as an art form and cultural influence is evidenced by dozens of fashion magazines,¹³³ runway shows,¹³⁴ red carpet events,¹³⁵ college and graduate programs dedicated exclusively to fashion and design,¹³⁶ exhibitions at the Metropolitan Museum of Art,¹³⁷ television

¹²⁸ See, e.g., Hemphill & Suk, *supra* note 4.

¹²⁹ Susan Scafidi is a professor of law at Fordham University and the author of *Counterfeit Chic*, a fashion law blog acclaimed by the ABA as a top one hundred legal blog. Scafidi, *supra* note 20. Scafidi also testified before Congress regarding the DPPA and the IDPPPA. See *Hearing*, *supra* note 4.

¹³⁰ *Hearing*, *supra* note 4. Scafidi views fashion as an art and suggests that, at minimum, society appreciates fashion as a form of creative expression:

[F]ashion design is a creative medium that is not driven solely by utility or function. If it were, we could all simply wear our clothes until they fell apart or no longer fit. Instead, the range of new clothing designs available each season to cover the relatively unchanging human body—and the production of specific, recognizable copies—demonstrates that designers are engaged in the creation of original works.

Id.

¹³¹ *Id.*

The origins of copyright law date back to the Enlightenment era, a period that also articulated the Western distinction between art and craft. As copyright developed and extended to include various forms of literary and artistic works, it continued to maintain the division between legally protected, high status “fine art” and mere “decorative arts” or handicrafts. The design and manufacture of clothing, which for most families was a household task, did not rise to the level of creative expression in the eyes of the law.

Id.

¹³² See generally CHRISTOPHER BREWARD *FASHION* (2003).

¹³³ Created in 1892, the first publication of *Vogue* featured the lifestyle of New York high society. Hemphill & Suk, *supra* note 4, at 1156. “The magazine exerts tremendous influence on consumers and the fashion industry, and continues today to feature prominently the link between fashion, high society, and wealth.” *Id.* at 1156–57.

¹³⁴ E.g., MERCEDES-BENZ FASHION WEEK, <http://www.mbfashionweek.com/> (last visited Jan. 6, 2012).

¹³⁵ *10 Best Oscar Dresses*, INSTYLE, http://www.instyle.com/instyle/package/oscars/photos/0,,20345654_20344401_20740062,00.html (last visited Feb. 25, 2011). Many fans of fashion have considered the Givenchy dress worn by Cate Blanchett at the 2011 Oscars as a form of artistic expression. *Cate Blanchett’s Amazing Dress at the Oscars*, ART IS ALIVE (Mar. 3, 2011), <http://artisnotdead.blogspot.com/2011/03/cate-blanchetts-amazing-dress-at-oscars.html>.

¹³⁶ FASHION INSTITUTE OF DESIGN MERCHANDISING, <http://fidm.edu/> (last visited Jan. 6, 2012).

¹³⁷ The Costume Institute of the Metropolitan Museum of Art, New York exhibits include: “The World of Balenciaga,” “Hollywood Design,” “The Glory of Russian Costume,” and “Vanity Fair.” *The Costume Institute*, METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/about%20the%20museum/museum%20departments/curatorial%20departments/the%20costume%20institute> (last visited Jan. 6, 2012). The Costume Institute also features thematic exhibitions, including “Jacqueline

programs,¹³⁸ and research on the influence of clothing on culture and the influence of society on design.¹³⁹

Copyright protection is afforded to literary, musical, dramatic, pantomimes, choreographic, pictorial, graphic, sculptural, cinematic and other audiovisual works, sound recordings, and architectural works.¹⁴⁰ When fashion is viewed as a form of creative expression, copyright is the proper intellectual property protection to apply to those designs.¹⁴¹ Although wearable fashion, as opposed to fashion created for the purpose of being artistic,¹⁴² might not yet be considered a fine art, clothing is a “creative good that has expressive features.”¹⁴³ From a cultural standpoint, the view of the United States is changing from perceiving clothing as a necessity to interpreting fashion designs as art.¹⁴⁴ Those designs considered typical, such as a pencil skirt, high-heeled boots, and a chiffon button-down blouse, would not be protected under the proposed bill. The IDPPPA is forward-looking and is narrowly tailored to protect highly specialized pieces within a trend.¹⁴⁵

Contrary to the view of Raustiala and Sprigman, Scafidi argues that the IDPPPA is worded such that innovation and trends will continue to be advanced.¹⁴⁶ A distinction is drawn between knockoffs and those designs that are influenced by trends.¹⁴⁷ Knockoffs are those copied designs that, when compared side-by-side with the original design, are substantially similar.¹⁴⁸ Trends are identified as a certain look that will be popular and used for the season. The use of certain colors, lengths of hems, cuts of a pant leg, and fabrics are all examples of

Kennedy: The White House Years—Selections from the John F. Kennedy Library and Museum” and “The Model as Muse: Embodying Fashion.” *Id.* Monographic exhibitions also include: “Yves Saint Laurent,” “Madame Grès,” “Christian Dior,” “Gianni Versace,” and “Chanel.” *Id.*

¹³⁸ See, e.g., *Project Runway*, BRAVOTV.COM, <http://www.bravotv.com/project-runway> (last visited Jan. 6, 2012); *The Rachel Zoe Project*, BRAVOTV.COM, <http://www.bravotv.com/the-rachel-zoe-project> (last visited Jan. 6, 2012); *What Not to Wear*, TLC, <http://tlc.howstuffworks.com/tv/what-not-to-wear> (last visited Jan. 6, 2012).

¹³⁹ See FRED DAVIS, *FASHION, CULTURE, AND IDENTITY 4* (Univ. Chi. Press 1992) (“In the case of the sociological interest in clothing and fashion, we know that through clothing people communicate some things about their persons”); see LINDA GRANT, *THE THOUGHTFUL DRESSER: THE ART OF ADORNMENT, THE PLEASURES OF SHOPPING AND WHY CLOTHES MATTER* (Scribner 2009); Hemphill & Suk *supra* note 4, at 1149 (“Fashion has also been seen to embody representative characteristics of modernity, and even of culture itself.”).

¹⁴⁰ 17 U.S.C.A. § 102(a) (West 2005).

¹⁴¹ *Hearing*, *supra* note 4. Scafidi notes, “[t]he goal of the [intellectual property] system . . . is not merely to ensure that authors put pen to paper or needle and thread to fabric, but to encourage and reward individuals so that they can continue to develop their ideas and skills in a productive manner.” *Id.*

¹⁴² For example, a dress covered with metal spikes displayed in a museum of art and culture might not be wearable, but could be considered as fine art.

¹⁴³ Hemphill & Suk, *supra* note 4, at 1162.

¹⁴⁴ See *Hearing*, *supra* note 4.

¹⁴⁵ S. 3728, *supra* note 16.

¹⁴⁶ *Hearing*, *supra* note 4. “The well-known fact that ‘borrowing’ is common in fashion, and might be valuable to fashion innovation, does not itself provide support for the permissibility of close copying in fashion design.” Hemphill & Suk, *supra* note 4, at 1153 (footnote omitted).

¹⁴⁷ *Hearing*, *supra* note 4. Scafidi purports, “copyright law is clearly capable of protecting specific expressions while allowing trends and styles to form.” *Id.*

¹⁴⁸ S. 3728, *supra* note 16.

trends.

Fashion insiders concede that trends should not be copyrightable and argue that it is the designs within the trends that took time, energy, and money to create that warrant copyright protection.¹⁴⁹ The IDPPPA will benefit the fashion industry by protecting those designs. Additionally, emerging designers in the fashion industry can take advantage of copyright protection.¹⁵⁰ Without copyright protection, aspiring designers lose profits necessary to establish their business when consumers can find their apparel elsewhere for less money.¹⁵¹ Although Scafidi notes the loss due to design piracy is difficult to quantify, she believes there is strong evidence that the United States fashion industry suffers at the hands of copiers.¹⁵²

C. Scott Hemphill¹⁵³ and Jeannie Suk¹⁵⁴ also address the attempt to balance the need for copyright protection, especially for emerging designers, with the advantages of inspiring innovation by copying.¹⁵⁵ Hemphill and Suk conclude that copying plays a role in innovation in the fashion industry, but is not the driving force in fashion.¹⁵⁶ Thus, by differentiating between “flocking”¹⁵⁷ and close copying of fashion designs, the authors ultimately conclude that unique fashion

¹⁴⁹ “It is those designs that are truly unique and took time, energy, and in most cases, money to create that warrant copyright protection.” Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011).

¹⁵⁰ *Id.* Well-known designers, such as Oscar de la Renta, Balenciaga, and Burberry, have the option to trademark their brand, whereas emerging designers typically do not have the means to trademark a brand. *Id.* Furthermore, an original idea created by an emerging designer can give him the edge in the fashion industry, a difficult industry to break through and establish a business in. *Id.* Lack of intellectual property protection for unique designs is a significant blow to small business. *Id.* Scafidi opines, “[t]hese aspiring creators cannot simply rely on reputation or trademark protection to make up for the absence of copyright. Instead, they struggle each season to promote their work and attract customers before their designs are copied by established competitors.” *Hearing, supra* note 4.

¹⁵¹ *Hearing, supra* note 4.

¹⁵² *Id.* “Over the past century successive waves of American designers have entered the industry, but few fashion houses have endured long enough to leave a lasting impression comparable to the influence of French fashion.” *Id.*

¹⁵³ C. Scott Hemphill is an Associate Professor of Law and Milton Handler Fellow at Columbia Law School. Hemphill & Suk, *supra* note 4, at 1147. Hemphill “holds a Ph.D. in economics from Stanford University and a J.D. from Stanford Law School.” COLUMBIA LAW SCH. FULL TIME FACULTY, http://www.law.columbia.edu/fac/C_Scott_Hemphill (last visited Jan. 11, 2012). His research and teaching examine the balance between innovation and competition set by antitrust law, intellectual property, and other forms of regulation. *Id.*

¹⁵⁴ Jeannie Suk is a Professor of Law at Harvard Law School. Hemphill & Suk, *supra* note 4, at 1147. Professor Suk is a graduate of Harvard Law School, where she was Chair of the Harvard Law Review’s Articles office. HARVARD LAW SCH. FACULTY, <http://www.law.harvard.edu/faculty/directory/index.html?id=690> (last visited Jan. 11, 2012). “Her writing has also appeared Yale Law Journal, Stanford Law Review, Columbia Law Review, Wall Street Journal, Slate, and elsewhere.” *Id.* Her research focuses include Criminal Law and Procedure, Family Law, Art, and Entertainment Law. *Id.*

¹⁵⁵ Hemphill & Suk, *supra* note 4, at 1152.

¹⁵⁶ *See id.*

¹⁵⁷ “Flocking” is the authors’ term for features of a trend copied by designers. *Id.* at 1152–53. “People flock to ideas, styles, methods, and practices that seem new and exciting, and then eventually the intensity of that collective fascination subsides, when the newer and hence more exciting emerge on the scene.” *Id.* at 1149.

designs should be copyrightable.¹⁵⁸ Hemphill and Suk take an intermediate approach to copyright protection by recommending that copyright protection be limited to close copies, rather than general thematic elements, i.e. trends.¹⁵⁹

The two professors' rationale consists of three main points: 1) clothing is used for self-expression by all people, as opposed to a smaller group of consumers who enjoy music, art, or literature; 2) due to the size of the fashion industry, "[g]etting the economics of this industry right" is necessary to the United States' economy and can be regulated through application of intellectual property law; and 3) a limited amount of intellectual property protection for fashion designs would be proper.¹⁶⁰

Hemphill and Suk argue that everyone is influenced or affected by fashion.¹⁶¹ The professors also address the argument that some people might find fashion wasteful or frivolous, but choose for the purposes of their argument to treat the consumption of fashion along the same lines as one would treat "other nonharmful goods that have creative and expressive components, such as books, music, films, and art."¹⁶² Furthermore, to varying degrees, fashion is present in those mediums, which are currently afforded intellectual property protection.¹⁶³

According to Hemphill and Suk, clothing identifies socio-economic status,¹⁶⁴ but also emerges from a "collective process," or zeitgeist.¹⁶⁵ These motivations for innovation in fashion reflect the concept of trends¹⁶⁶ and the belief that

¹⁵⁸ *Id.* at 1153–54. Unique designs that should be eligible for protection include those designs within a trend with distinguishing features, such as fabrics, cut, color, and texture. *Id.* at 1166–67. For example, an animal print blazer would not warrant copyright protection, but an animal print blazer with additional features, such as length, tailoring, pleats, and intricate hems, might be eligible for protection.

¹⁵⁹ *Id.* This is precisely what the IDPPPA will protect. *See* S. 3728, *supra* note 16.

¹⁶⁰ Hemphill & Suk, *supra* note 4, at 1151–52.

¹⁶¹ *Id.* at 1155.

¹⁶² *Id.* at 1162.

¹⁶³ *Id.* The *Sex and the City* franchise, a television show turned film and sequel, grossed approximately \$262 million. Lisa Armstrong, Luke Leitch & Alice Olins, *25 movies that shook the world of fashion: Ticking off the calendar until Sex and the City 2? Well, we aren't. There are just so many more stylish movies out there . . .*, TIMES ONLINE (Apr. 21, 2010), http://women.timesonline.co.uk/tol/life_and_style/women/fashion/article7103088.ece. The characters of *Sex and the City* are famous for their obsession with couture, and many viewers tuned in to see the latest fashions worn by the franchise heroin, Carrie Bradshaw, played by Sarah Jessica Parker.

¹⁶⁴ Many sociologists, including Georg Simmel and Thorstein Veblen, believed that fashion reflects struggles over social status. Hemphill & Suk, *supra* note 4, at 1156. "The drive of the ordinary consumer to emulate those who can afford the most expensive fashion is assumed and indeed promoted in the popular discourse of fashion." *Id.* at 1157.

¹⁶⁵ *Id.* The authors identify a fashion inspired Zeitgeist as:

[M]any people, through their individual choices among many competing styles, come to form collective tastes that are expressed in fashion trends. The process of trend formation begins vaguely and then sharpens until a particular fashion is established. The themes of this trend reflect the spirit of the times in which we are living.

Id. at 1157.

¹⁶⁶ A trend begins when a designer produces a large quantity of designs with a certain trend feature, such as the use of a floral print in the spring. *Id.* at 1167. Consumers then become aware of the use of floral prints via fashion magazines, runway shows, seeing what other people are wearing, and seeing what is available in stores. *Id.* According to Hemphill and Suk, the success of a trend is contingent upon three factors: 1) the new trend must be different from previous trends, so that

designers may be influenced by trends in their designs without directly imitating someone else's work.¹⁶⁷ This observation undermines Raustiala and Sprigman's theory that direct copying leads to trends and promotes innovation in the fashion industry. According to Scafidi, Hemphill, and Suk, trends as defined under the Piracy Paradox should not be copyrightable, but rather designers who invest substantial time, creative energy, money, and innovation into a design within a trend deserve protection by copyright.

IV. THE PROPOSED IMPACT OF THE IDPPPA ON THE JUDICIAL SYSTEM

Courts have continuously struggled to develop standards for determining whether elements of fashion apparel are subject to intellectual property laws.¹⁶⁸ Minimal protection to fashion designs has been afforded by the courts in the past through the test of conceptual separability.¹⁶⁹ Under this test, judicial focus has been on which aspects of fashion apparel are copyrightable as "a pictorial, graphic or sculptural feature that can be identified separately from and can exist independently of the fashion item as a whole."¹⁷⁰ For example, the Southern District of California held that a masquerade costume was subject to copyright protection because the design and form of Halloween costumes have little to do with their suitability as functional fashion and wearing apparel.¹⁷¹ When courts apply the test of separability, articles of clothing are particularly unlikely to satisfy the requirements of the test unless the designs contain elements that can be viewed as those fundamental to the ornamental character of clothing.¹⁷²

Under the test of separability, a useful article will be denied protection if "the design elements reflect a merger of aesthetic and functional considerations.

consumers will want to purchase something new; 2) the new feature of the trend must be "sufficiently prevalent," meaning that it must stand out to consumers as a trend and must be readily available; and 3) there must be enough designs created within the trend that are sufficiently distinguishable to satisfy demand for the need for consumers to differentiate themselves. *Id.* at 1168.

¹⁶⁷ *Id.* at 1159–60. "Copying is a more literal and direct process in which one targets the original for replication." *Id.* at 1159. An example of direct and intentional copying would be copying the exact fabric, cut, length, and seams of a particular garment, whereas a consumer who purchases a skirt of only the same length may not be purchasing a close copy. *Id.* at 1159–60.

¹⁶⁸ Judith S. Roth & David Jacoby, *Copyright Protection and Fashion Design*, PRACTISING L. INST: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROP. COURSE HANDBOOK SERIES 1086–87 (2009).

¹⁶⁹ See Hedrick, *supra* note 19, at 230.

¹⁷⁰ See Roth & Jacoby, *supra* note 168, at 1086–87. For example, the Supreme Court held that statuettes on the base of a lamp were intended by Congress to be included within the phrases "works of art" and "reproductions of works of art" under copyright law and therefore separate from the utility function of the lamp itself. *Mazer v. Stein*, 347 U.S. 201, 214 (1954).

¹⁷¹ *Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1352 (S.D. Cal. 1988) (holding masquerade costumes were eligible for protection to the extent that the costume had features which could be identified separately and were capable of existing independently as a work of art). Several costumes were considered for copyright protection by the court, including a "Rabbit In Hat" costume designed with multiple wire hoops to resemble a magician rabbit being pulled out of a hat. *Id.* at 1350. The court observed, "[s]ince it requires one to normally remain in a standing position while wearing the costume, [plaintiff's] designers intended the costume to be worn as an outer shell over regular clothing that would permit its total removal to allow full participation at functions such as costume parties." *Id.* at 1350.

¹⁷² *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452, 455 (2d Cir. 1989).

Conversely, where design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists."¹⁷³ Therefore, to be copyrightable under current judicial precedent, features must be conceptually separate from the utilitarian functions of the garment.¹⁷⁴

Leaving the amendment of copyright law to the legislature is proper.¹⁷⁵ As evidenced by a line of cases confusing the artistic and utilitarian elements of clothing design, leaving the development of copyright protection for designs to the courts would be a slow process, resulting in splits of authority among the federal courts.¹⁷⁶ Scafidi observes, "Congress should fill the gap in intellectual property law as it applies to fashion designs in order to relieve the courts from the frustrating process of sorting out elements of design that are 'conceptually separable' from a garment's utilitarian function."¹⁷⁷ Thus, leaving the responsibility to amending copyright law to the courts would be improper.

In 1991, the Copyright Office issued a policy decision in an effort to clarify conceptual separability as applicable to design.¹⁷⁸ The decision reviewed the past treatment of clothing as purely utilitarian in function, and reviewed the Copyright Office's refusal to grant protection to designs claimed to exhibit artistic elements separable from their useful function.¹⁷⁹ After reviewing application of copyright law to masks, garment designs, and costumes, the Copyright Office concluded that "fanciful costumes, although also useful articles, would be 'registered if they contain separable pictorial or sculptural authorship.'"¹⁸⁰ Therefore, only the portion of the design that can reasonably be construed as conceptually separable will be afforded protection, not the entirety of the design.¹⁸¹ This conclusion resulted in various interpretations among the circuit courts.¹⁸²

The IDPPPA would help to alleviate the frustration of the courts by protecting unique designs that "are the result of a designer's own creative

¹⁷³ *Nat'l Theme*, 696 F. Supp. at 1353. For example, a Halloween costume that combines both wearable and artistic elements does not warrant protection. *See id.* at 1352. Such a costume might look like a leotard covered in fur, since the fur is not conceptually separate from the leotard, whereas a tail attached to the leotard is considered separable; *see* Professor Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983).

¹⁷⁴ *See e.g.*, *Act Young Imports, Inc. v. B & E Sales Co., Inc.*, 673 F. Supp. 672 (S.D.N.Y. 1987) (holding animal-shaped children's backpacks were copyrightable, where the artistic aspect of backpacks was separate from useful function of packs).

¹⁷⁵ *See Fashion Originators Guild of Am. v. F.T.C.*, 114 F.2d 80, 84 (2d Cir. 1940) ("To embody a design in a dress or a fabric, and offer the dress for general sale was such a 'publication'; nothing more could be done to bring it into the public demesne. It may be unfortunate—it may indeed be unjust—that the law should not thereafter distinguish between 'originals' and copies; but until the Copyright Office can be induced to register such designs as copyrightable under the existing statute, they both fall into the public demesne without reserve.").

¹⁷⁶ *Hearing*, *supra* note 4.

¹⁷⁷ *Id.*

¹⁷⁸ Registerability of Costume Designs, Policy Decision, 56 Fed. Reg. 56,530, 56,531 (Nov. 5, 1991).

¹⁷⁹ Hedrick, *supra* note 19, at 231.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 231–32.

endeavor” or that “provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.”¹⁸³ Those portions of designs that would formerly be protected under the test of separability would, under the IDPPPA, be entitled to copyright protection as a whole work—not just the portion of design that could be identified as an artistic expression.¹⁸⁴ Although the bill is more narrowly tailored than previous bills, subsequent litigation will result over what would qualify for protection.¹⁸⁵ Such litigation will be typical for a newly enacted law.¹⁸⁶ As in copyrights of music, art, and literature, precedent and case law would define what is protectable under the law.

Copyright protection would initially protect emerging designers.¹⁸⁷ Professors Hemphill and Suk conjecture that “[a]ffording design protection would level the playing field with respect to protection from copyists and allow more such designers to enter, create, and be profitable.”¹⁸⁸ The professors further claim that small designers already file suit under the existing intellectual property regime.¹⁸⁹

However, others conjecture that the bill would initially protect larger, known design houses that can afford to litigate infringement claims, with a “trickle down” effect to unknown and emerging designers.¹⁹⁰ Emerging designers, although likely unable to litigate initially due to financial restraints, will be able to issue cease and desist letters, citing precedent and case law pursuant to the enactment of the IDPPPA.¹⁹¹

Perhaps most importantly, the heightened pleading requirement in the bill will prevent frivolous claims, alleviating the court system from adjudicating meritless lawsuits.¹⁹² Ultimately, a designer will file a claim when she reasonably

¹⁸³ S. 3728, *supra* note 16.

¹⁸⁴ Compare S. 3728, *supra* note 16, with *Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1352 (S.D. Cal. 1988).

¹⁸⁵ Some commentators believe judges will have a difficult time interpreting the IDPPPA, arguing the unique requirement is “extremely ambiguous.” See Cherie Yang, *The IDPPPA: A Cure Worse Than Its Illness?* COLUM. BUS. L. REV. (Nov. 28, 2010), <http://cblr.columbia.edu/archives/11401>.

¹⁸⁶ Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011).

¹⁸⁷ High-end and couture fashion lines are currently able to acquire protection of their brand through trademark and trade dress protection. Hemphill & Suk, *supra* note 4, at 1153.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1192. “We see no reason to doubt [small designers] would take advantage of expanded protection. In this respect, fashion is no different from other areas of copyright, patent, and trademark, in which small plaintiffs are able to invoke their rights, sometimes with the assistance of counsel retained on a contingency basis.” *Id.*

¹⁹⁰ Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011). McNamara believes the larger fashion houses will have the financial ability to litigate against knockoff couture, and that these cases will result in legal precedent, including an understanding of the type of designs that will warrant copyright protection under the IDPPPA. *Id.* These cases would result in precedent for other designers to know which designs, if any, created are subject to copyright protection.

¹⁹¹ “Like most laws, they take time to really trickle down and reach everyone who is entitled to protection ultimately—I believe they do.” *Id.*

¹⁹² See S. 3728, *supra* note 16. A plaintiff bringing a claim for copyright infringement under the IDPPPA would be required to plead with particularity facts establishing that: 1) the design meets the requirements of a “fashion design” as defined in the bill and is therefore protected; 2) the copied design is an infringing article as defined in the bill; and 3) based on the totality of the circumstances, the original design was available in a location or in such a manner that it can be reasonably inferred that the

foresees a “positive return on her litigation investment.”¹⁹³

V. COPYRIGHT PROTECTION SHOULD BE EXTENDED TO FASHION DESIGN TO PREVENT INCONSISTENT APPLICATION OF COPYRIGHT LAW

Copyright creates a legal monopoly of a work for a limited duration of time.¹⁹⁴ As a result, the IDPPPA would also create a legal monopoly for those certain designs that qualify for protection.¹⁹⁵ This benefits the designer by protecting the design against copyists, allows the designer to gain financially from exclusive rights to the design, and rewards the designer with name recognition and protection of reputation. The bill also includes a limited term of protection for three years.¹⁹⁶ This reflects the seasonal nature of the industry, motivates designers to continuously create new designs, and also limits the legal monopoly on a particular design for a short duration.

A. *Inconsistent Application of Copyright Law*

Creative works are afforded copyright protection based on the need to promote innovation, discourage copyists, and protect the consumer. Copyright law has broadened in scope to include painting, software, music, film, fabric patterns, and jewelry design.¹⁹⁷ However current copyright law has yet to afford fashion designs protection, based on the fact that such designs are still considered “useful works.”¹⁹⁸

The developing trend toward viewing certain designs of fashion as an art form has become prevalent in the United States, as evidenced by the size of the

defendant saw or had knowledge of the original design. *Id.*

¹⁹³ Hemphill & Suk, *supra* note 4, at 1193. Hemphill and Suk propose that the fashion industry should create a guild, similar to those in the film and music industries, in order to create a mode of enforcement for preventing distributions of knockoffs. *Id.* Such a guild, backed by law rather than threat of strike or boycott, “would provide a credible enforcement commitment in situations where individual designers found enforcement too expensive to be worthwhile.” *Id.* A previous attempt at creating a guild in the fashion industry to prevent the sale of copied goods was shut down by the United States Supreme Court for violating antitrust laws. *Fashion Originators’ Guild of Am. v. F.T.C.*, 312 U.S. 457 (1941).

¹⁹⁴ Schechter & Thomas, *supra* note 75, at 34–35.

¹⁹⁵ *See id.*

¹⁹⁶ S. 3728, *supra* note 16. When evaluating copyright protection in art, music, and literature, one columnist observed, “[a]t a certain point, copyrights stop protecting innovation and begin protecting profits. They scare off future inventors who want to take a 60-year-old idea and use it as the foundation to build something new and interesting.” Ezra Klein, *Copycats v. Copyrights: Does it make sense to legally protect the fashion industry from knockoffs?* NEWSWEEK (Aug. 20, 2010), <http://www.newsweek.com/2010/08/20/copycats-versus-copyrights.html>. In the case of the IDPPPA, designs are protected for a period of three years. S. 3728, *supra* note 16. This allows a custom design to be protected for a minimal duration, which is typically longer than the duration of any trend, and also allows an interpretation or reworking of the designed to be used in future. For example, if copyright protection had been afforded to Givenchy’s famous little black dress worn by Audrey Hepburn in *Breakfast at Tiffany’s* three years after the dress was made, no one would be able to use the hem length or the interesting cuts in the back of the dress. However, the current generation of designers would be able to rework the dress with a modern appeal and pay homage to a 1960s design.

¹⁹⁷ 17 U.S.C.A. § 102 (West 2005).

¹⁹⁸ *Id.*

fashion industry, the existence of magazines dedicated to fashion, the multitude of students choosing fashion and design for careers, the numerous exhibitions featuring elements of fashion at the Metropolitan Museum of Art, and the award of a Pulitzer Prize to a fashion writer.¹⁹⁹ The modern trend is moving towards viewing fashion design as art. Copyright law should extend protection to those unique, original, custom designs that constitute works of art.

The argument that the fashion industry can be distinguished from other mediums currently protected by copyright law, under the theory that innovation drives the fashion industry forward, cannot stand.²⁰⁰ Creativity is not a byproduct of the intellectual property system.²⁰¹ Scafidi observes, “[i]ntellectual property law ideally serves as a tool for harnessing and directing creativity.”²⁰² For example, musicians are afforded copyright protection of their work and the music industry continues to thrive. Musicians, motivated by creative energy, exclusive profits, and passion for their work, continue to create new hits.

The inconsistent application of copyright law also raises a moral and equitable argument. Imagine this scenario: A designer has taken the time, energy, and effort to create something so unique and so original, that both fashion insiders and those outside of the fashion industry alike would recognize the design as something innovative and new, such as a dress made entirely of chicken wire and cranberries.²⁰³ Days later, before presenting his creation in his runway show, the designer comes across his design in the current issue of *Vogue*, as copied by a designer who had seen the original design and was financially able to manufacture and promote the design more quickly. He not only loses profits, but also does not receive the name recognition and credit to his reputation.²⁰⁴

B. Economies of Fashion

Granting designers copyright protection of their work would allow them to sustain their emerging businesses by guaranteeing profits generated from their hard work and creative energy that resulted in a custom design.²⁰⁵ Those designers

¹⁹⁹ Robin Givhan won a Pulitzer Prize for her fashion column in the Washington Post. *Robin Givhan: 2006 Pulitzer Prize Winner in Category of Criticism*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/content/linkset/2006/04/17/LI2006041700592.html> (last visited Jan. 11, 2012).

²⁰⁰ See *The Piracy Paradox*, *supra* note 10.

²⁰¹ “With respect to close copies, there is no reason to reject the standard justification for intellectual property, that permissive copying reduces incentives to create.” Hemphill & Suk, *supra* note 4, at 1153.

²⁰² *Hearing*, *supra* note 4.

²⁰³ Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011).

²⁰⁴ One tool utilized by designers in order to avoid inexpensive copying of original designs is to create pieces that would be difficult to copy. Myers, *supra* note 8, at 69. From a moral view, designers should not be forced to resort to using expensive fabrics, or investing even more time and energy into their unique designs to prevent copying.

²⁰⁵ Scafidi urges that high-end designers are currently making some of their designs available at affordable prices: “Fashion houses are seeking to experiment with new ideas in their runway collections, then to provide customers with affordable versions in their diffusion lines, and finally to adapt the looks for a broad range of consumer needs and budgets.” *Hearing*, *supra* note 4. For example, both Isaac Mizrahi and William Rast have lines at Target, Vera Wang designs Simply Vera

creating unique pieces warranting protection under the bill would be able to enter into licensing agreements, thereby generating business and additional profits from such designs.²⁰⁶ Some argue that preventing large retail chains from copying designs would result in a loss of profits for those stores and slow the economy of the fashion industry.²⁰⁷ However, prohibiting retailers and wholesalers from distributing close copies would simply require the copyists to innovate their own designs.

Trendy, fashionable, but inexpensive chains of retail stores such as Forever 21 or the United Kingdom equivalent, Top Shop, are often responsible for selling close copies to consumers.²⁰⁸ Referred to as “cheap chic”²⁰⁹ or “fast-fashion copyists”²¹⁰ by scholars and fashion insiders, these retailers actually undermine the market for the copied design.²¹¹ By selling discount, lower quality goods, these retailers earn profits without investing time, money, and creative energy in the design process.²¹² An example of a known copyist is A.B.S. by Allen Schwartz.²¹³ Schwartz deliberately creates copies of dresses worn by celebrities at the Oscars, Grammys, and other red carpet events and then sells mass quantities at much cheaper prices.²¹⁴

Evidence also indicates that an overlapping customer base exists between high-end brands and cheap chic retailers.²¹⁵ When customers shop at both high-end boutiques or department stores and cheap chic retailers, the result is that a customer will end up directly comparing the original to the copied good.²¹⁶ This in turn diminishes the desirability of the original, resulting in higher profits for cheap chic retailers and lower profits for the original designers.²¹⁷

The IDPPPA would prevent Forever 21 and A.B.S. from creating close copies. Such “cheap chic” retail stores would still be able to follow trends and

Vera Wang for Kohls, and Karl Lagerfeld has collaborated with H&M. *Id.*

²⁰⁶ LEAFFER, *supra* note 18, at 59.

²⁰⁷ Klein, *supra* note 197.

²⁰⁸ Hemphill & Suk, *supra* note 4, at 1173. Between 2003 and 2008, Forever 21 was a defendant in fifty-three lawsuits. *Id.*

²⁰⁹ Myers, *supra* note 8, at 65.

²¹⁰ Hemphill & Suk, *supra* note 4, at 1171.

²¹¹ *Id.* at 1174.

²¹² *Id.* at 1172. Such retailers are supplied by manufacturers who remain anonymous. *Id.*

²¹³ *Id.*

²¹⁴ Klein, *supra* note 197. Some argue that such copying does not curtail innovation:

Schwartz is threatening to take Wang’s profits. In theory, that might dissuade Wang from making new dresses. But America has never had copyright protection for dresses, and Wang keeps making—and profiting from—them. Meanwhile, Schwartz’s copies make versions of Wang’s designs available to consumers who would never be able to afford them otherwise. That has value, too. Copyright law is supposed to help consumers by protecting innovation, not producers by protecting profits. If we’re not having an innovation problem, we’re not having a problem that needs to be fixed through copyright.

Id.

²¹⁵ Myers, *supra* note 8, at 57–58.

²¹⁶ *Id.*

²¹⁷ *Id.*

would be encouraged to invest in design innovation:

Copying is not a necessary element of the fast-fashion business model. Even retailers that sell copies do not sell only copies. And some fast-fashion firms eschew or exact close copies. For example, the two leading fast-fashion firms, Zara and H&M, avoid close copying. Although Zara and H&M may have become conflated with Forever 21 in the public mind, their strategies are different. Like the copyists, they move product to market it very quickly. But their on-trend product, reactive though it is to the latest offerings of top designers, is not a precise copy. Instead, it is an adaptation or interpretation, developed by in-house designers.²¹⁸

Larger designers who currently are able to afford trademark or trade dress protection, although pushing for intellectual property protection for designs, are not the main targets of copyists. Scafidi purports that “[t]he main threat posed by copyists is to innovation by smaller, less established, independent designers who are less protected along all of these dimensions.”²¹⁹ For example, an emerging designer striving to establish a reputation, while simultaneously attempting to launch her small business, suffers greatly at the hands of copyists. Often, the unknown designer sells her goods at higher prices—reflecting both the quality of her hard work and the material she uses. When a consumer can find an identical good at a lower price, the emerging designer suffers from loss of profits and many times fails to get the business off the ground.²²⁰

Copyists no longer target only high-end designers. Scafidi argues that creative designs exist at all price levels and that some creative designs are affordable.²²¹ Less expensive designs are also copied for financial gain as a result of “the democratization of style.”²²² Traditionally, style and trendsetting was reserved for the elite class. Today, style exists at all socio-economic levels and custom design can be created at any cost. For example, an intricate, custom design can be created through the use of inexpensive fabrics. Furthermore, certain trends drive consumers to buy clothes and accessories to disassociate themselves from high-end fashion. For example, the 2011 “hipster” trend—a mix between urban and bohemian—is created mostly through assembling vintage pieces, scarves, hats, and retro glasses. Additionally, the issue of direct competition further induces the need for intellectual property protection in fashion design.²²³

²¹⁸ Hemphill & Suk, *supra* note 4, at 1172.

²¹⁹ *Hearing*, *supra* note 4.

²²⁰ Jennifer Baum Lagdameo, a young designer and co-founder of the label Ananas, suffered at the hands of copyists. *Id.* After success in selling her handbags, retailing between two and four hundred dollars, she lost wholesale orders to a copyist using cheaper materials in manufacturing identical designs. *Id.* Ananas continues to sell handbags, but the loss of wholesale and retail sales causes substantial harm to a small business. *Id.* “The race to the bottom in terms of price and quality is one that experimental designers cannot win.” *Id.*

²²¹ *Id.* “A change in copyright law to incorporate fashion would facilitate designers’ ability to disseminate their own new ideas throughout the market, much the way copyright law allows book publishers to first release hardcover copies, and then, if the book is successful, to print paperbacks.” *Id.*

²²² *Id.* “Fashion is now as likely to flow up from the streets as down from haute couture, and reasonable prices are no guarantee against copyists. Some of the most aggressively copied designs are popularly priced; consider this summer’s popular Crocs ‘Beach’ style shoe at \$29.99 and its battle with copies sold for as little as \$10.00.” *Id.*

²²³ Myers, *supra* note 8, at 58. Copying designs in the fashion industry is not limited to cheap chic

C. *Sending Fashion Designs to the Moon: With Advancements in Technology Comes a Need for Change in the System*

Changes in technology have exacerbated the problem of close copying. A design takes months, sometimes years, to create while a design can be copied in a matter of minutes.²²⁴ For example, a person sitting in the front row at a runway show can snap a photograph with a camera phone, then immediately send the image back to a copy house, where it can begin manufacturing an exact copy with cheaper fabrics and cheaper labor.²²⁵ The Internet, instant downloads, and uploads of photographs taken of custom garments allow for those designs to be instantly copied.

The United States Department of Justice currently regulates the sale of counterfeit goods.²²⁶ An exact replica of a custom design, usually with counterfeit label or logo attached to the good, is referred to as counterfeit.²²⁷ A knockoff can be distinguished from a counterfeit good in that it is a close copy of a design, normally without a label claiming to be the original item.²²⁸ Therefore, whether intellectual property protection exists depends upon whether a label has been affixed to the copied design:

Not only does the legal copying of fashion designs harm their creators, it also provides manufacturers with a mechanism for circumventing the current campaign against counterfeit trademarks. If U.S. Customs stops a shipping container with fake trademarked apparel or accessories at the border, it can impound and destroy those items. If, however, the same items are shipped without label, they are generally free to enter the country—at which point the distributor can attach counterfeit labels or decorative logos with less chance of detection by law enforcement The continued exclusion of fashion designs from copyright protection thus undermines federal policy with respect to trademarks by perpetuating a loophole in the intellectual property law system.²²⁹

copying high-end designers. *Id.*

²²⁴ New copying technology alters the dynamics of innovation. In recent years, we have seen how digital file sharing of copyrighted music has changed the economics of that industry. The same is increasingly true of movies and other video content. In fashion, as in other industries, we see rapid copying becoming cheaper and more effective, and tools that enable remixing and reuse are becoming more widespread.

Hemphill & Suk, *supra* note 4, at 1195.

²²⁵ *Id.* at 1171. “Electronic communications and express shipping ensure that prototypes and finished articles can be brought to market quickly. As a result, thousands of inexpensive copies of a new design can be produced, from start to finish, in six weeks or less.” *Id.*

²²⁶ “The Department of Justice Task Force on Intellectual Property is part of [the] initiative to confront the growing number of domestic and international intellectual property (IP) crimes. It is chaired by the Deputy Attorney General.” INTELLECTUAL PROP. TASK FORCE THE U.S. DEPT. OF JUST., <http://www.justice.gov/dag/iptaskforce/> (last visited Jan. 11, 2012).

²²⁷ Affixing fake labels to a copied item violates trademark law. “While the fashion industry brings in a large amount of profits and jobs to the United States, studies have shown that in New York City alone, the government loses a total of \$1 billion annually in tax revenue due to counterfeiting. This has a tremendous effect on the overall American economy, especially since the United States is facing economic downturn.” Xiao, *supra* note 5, at 441.

²²⁸ Telephone Interview with Deborah McNamara, Prof., Parsons Sch. of Design (Feb. 14, 2011).

²²⁹ *Hearing, supra* note 4.

United States Attorney General Eric Holder has stated, “[i]ntellectual property crimes are not victimless. The theft of ideas and the sale of counterfeit goods threaten economic opportunities and financial stability, suppress innovation and destroy jobs.”²³⁰ In November 2010, the United States Justice Department shut down internet domain names selling misrepresented goods, such as fraudulent versions of Coach, Inc., Walt Disney Co., Oakley, Inc., Louis Vuitton S.A., and Nike Inc.²³¹ “Counterfeit goods result in billions of dollars of lost revenue for legitimate business and taxes for the government,” said Ronald Machen, United States Attorney for the District of Columbia.²³² John Morton, Director of Immigration and Customs Enforcement said in response to the November 2010 shut down, “[s]ale of counterfeit U.S. brands on the Internet steals the creative work of others, costs our economy jobs and revenue and can threaten the health and safety of American consumers.”²³³

VI. CONCLUSION: BEAUTY IS IN THE EYE OF THE BEHOLDER

Although historically clothing was viewed purely as a necessity of life, the view of fashion in the United States is changing toward accepting fashion as an art form. Therefore, no longer considered purely “useful articles,” certain unique designs should be afforded copyright protection. Extending copyright protection to fashion will not curtail innovation, but rather will spur innovation by encouraging those retailers and wholesalers currently involved in copying to create new designs. Furthermore, trends in fashion will not be affected by the IDPPPA because the bill will protect only those custom designs within a trend.

Application of standard copyright law to fashion designs will likely not be successful. However, some degree of protection is necessary to protect the work of designers, and the IDPPPA appears to be a sufficient compromise between balancing the need to protect the creative expression of ideas with the difficulty of regulation and practicality of protection. Courts will not be inundated with frivolous lawsuits, but will be asked to clarify precisely what is protectable under the new law and to determine which designs will not be eligible for protection. Additionally, the legal monopoly on certain designs will be limited to three years. Through the proposal of a law tailored narrowly to fashion designs and requiring a “unique” and “non-utilitarian variation,” Senator Schumer’s IDPPPA has the potential to successfully protect innovative designs and inspire new trends by protecting emerging designers and encouraging originality in design.

²³⁰ Jerry Seper, *U.S. hits Online Sellers of Fake Goods: Seizes Website Domains*, WASH. TIMES (Nov. 29, 2010), <https://www.washingtontimes.com/news/2010/nov/29/us-hits-online-sellers-of-fake-goods/>. In an effort to target online piracy, a bipartisan bill was proposed in the Senate. *Id.* The Combating Online Infringement and Counterfeits Act (COICA) would give the Justice Department an expedited means to track and shut down unlawful Internet domains devoted to unauthorized downloading, streaming, and sale of copied and counterfeit goods. *Id.*

²³¹ Jeff Bliss & Sara Forden, *U.S. Seizes 82 Websites on Allegations They Sold Fake Goods, Holder Says*, BLOOMBERG (Nov. 29, 2010), <http://www.bloomberg.com/news/2010-11-29/u-s-seizes-82-websites-on-allegations-they-sold-fake-goods-holder-says.html>.

²³² *Id.*

²³³ *Id.*