

THE MOST FASCINATING KIND OF ART: FASHION DESIGN PROTECTION AS A MORAL RIGHT

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In recent years, politicians, academics, and industry professionals have argued vehemently that copyright protection should extend to cover fashion designs, which are currently excluded under the “useful articles” doctrine. These arguments have proved somewhat successful, as a number of bills have been drafted to expand copyright laws to include fashion, most recently the Innovative Design Protection Act of 2012, and two congressional hearings have been held on the subject. None of bills, however, have managed to gain much traction in Congress, and progress appears to be stalled. My objective in this Note is not to examine the legislation that has been proposed, but to uncover why the supporters of fashion copyright have been so steadfast in their promotion of it. Copyright in the United States is built on economic principles and aims to incentivize innovation. It seems clear that from an economic perspective, copyright is unneeded to incentivize creativity in the fashion industry. After reviewing the legislative history and other arguments made by proponents of fashion copyright, a different picture emerges: supporters of fashion copyright view fashion as “art” and feel a sense of harm when it is cheaply or slavishly copied. Even if designers feel no economic harm from the copying of their creations, they are morally harmed by it. Perhaps then moral rights law, not copyright, provides the appropriate theoretical framework in which to analyze the extension of further protections to fashion design. The stalled debate over fashion copyright might be revitalized by discussing design protection in the more theoretically relevant framework of moral rights laws, which are concerned with reputational—as opposed to economic—harms.

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INTRODUCTION

“Being good in business is the most fascinating kind of art.”

-Andy Warhol¹

In recent years, a debate has reemerged² in Congress,³ in academia,⁴ and in the fashion industry⁵ over the extension of copyright-like protection to fashion

¹ ANDY WARHOL, *THE PHILOSOPHY OF ANDY WARHOL* 92 (1975).

² Discussion of protection for fashion design (often along with other useful articles) has arisen many times throughout the last 100 years. A *sui generis* design protection clause that was struck from the 1976 Copyright Act just before it was passed would have granted up to ten years of protection for useful articles that were not “staple or commonplace.” See S. 22, 94th Cong. (1975), reprinted in S. REP. NO. 94-473, at 162 (1975).

³ See Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012) [hereinafter IDPA]; Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011); S. 3728, 111th Cong. (2010) [hereinafter IDPPPA]; Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009); H.R. 2033, 110th Cong. (2007); S. 1957, 110th Cong. (2007) [hereinafter DPPA]; H.R. 5055, 109th Cong. (2006).

⁴ See, e.g., Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381 (2005); C. Scott Hemphill & Jeannie Suk, *Remix and Cultural Production*, 61 STAN. L. REV. 1227 (2009); C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009) [hereinafter Hemphill & Suk, *Fashion*]; Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006) [hereinafter Raustiala & Sprigman, *The Piracy Paradox*]; Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009). There have also been numerous student notes written on the topic in recent years. See, e.g., Sara R. Ellis, Note, *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 (2010);

design.⁶ The proponents of increased protection for fashion design argue that copying technology—particularly the speed with which images of designs from runway shows can be sent around the world via the internet—has changed so drastically in recent years that designers are suffering unprecedented harm that must be rectified by copyright-like protection.⁷ On the other hand, opponents argue that increased protection is unnecessary because the American fashion industry—a \$340 billion industry⁸—is thriving,⁹ and therefore, even if copying has

Shelley C. Sackel, Note, *Art is in the Eye of the Beholder: A Recommendation for Tailoring Design Piracy Legislation to Protect Fashion Design and the Public Domain*, 35 AIPLA Q. J. 473 (2007).

⁵ See, e.g., CFDA, CFDA Design Manifesto, <http://www.cfda.com/the-latest/cfda-design-manifesto-3> (last visited Aug. 16, 2012) (“All designers deserve the right to design protection and only the creator of an original design should profit from that design. Taking someone’s work and calling it your own is wrong and robs the designer of a rightful return on their investment.”) (quoting Stephen Kolb, CFDA CEO).

⁶ A bill that has been circulating throughout Congress in different forms since 2006 would extend protection for three years from the “date of commencement of protection” to “the overall appearance of an article of apparel,” which includes “original elements” that “provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles” against infringing designs that are “substantially identical,” meaning “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.” See IDPA, *supra* note 3.

⁷ See *infra* Part I.

⁸ See *Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 4 (2011) [hereinafter *2011 Hearing*] (statement of Lazaro Hernandez, Designer and Co-Founder, Proenza Schouler).

⁹ See, e.g., *Design Law—Are Special Provisions Needed to Protect Unique Industries?: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 20 (2008) [hereinafter *2008 Hearing*] (statement of Hon. William D. Delahunt, Member, H. Comm. on the Judiciary) (“America has become the world leader in fashion design. This is not just an LA / NY phenomena, it’s happening across America. Fashion design businesses are proliferating and growing.”); *id.* at 24 (statement of Narciso Rodriguez on behalf of the CFDA) (“More and more young Americans are going into fashion, and America now leads the world in fashion design.”); *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before Subcomm. on Courts, the Internet, and Intellectual Property of the*

increased in recent years, designers are not economically harmed by it.¹⁰ Supporters of “fashion copyright”¹¹ have introduced two design protection bills into Congress: the Design Piracy Prohibition Act (“DPPA”)¹² in 2006, which was revised as the Innovative Design Protection and Piracy Prevention Act (“IDPPPA”)¹³ in 2011 and re-introduced in September 2012 as the Innovative Design Protection Act of 2012 (“IDPA”)¹⁴. This bill would amend the Copyright Act to extend *sui generis*, copyright-like protection to fashion design.¹⁵

The primary proponents of increasing intellectual property protection for fashion design have (unsurprisingly) been fashion designers, represented by the

H. Comm. on the Judiciary, 109th Cong. 85 (2006) [hereinafter *2006 Hearing*] (statement of Christopher Sprigman, Associate Professor, University of Virginia School of Law) (“Now, the first thing I just want to remind you of is something that no one has disagreed with, which is that the fashion industry is thriving.”).

American designer Michael Kors’s company recently went public with a valuation of \$3.8 billion, making it the largest public offering of a U.S. fashion company, with shares that performed better than the average U.S. IPO in first day trading in 2011. *See Kors shares open 25% higher*, FINANCIAL TIMES, Dec. 14, 2011, <http://www.ft.com/intl/cms/s/0/47e920f0-267d-11e1-9ed3-00144feabdc0.html#axzz1gj40NG00>.

¹⁰ Raustiala and Sprigman go further to argue that copying actually promotes innovation by rendering old, copied designs less valuable to consumers, thus providing an incentive for designers to create new fashions, and advancing the fashion cycle. Raustiala & Sprigman, *The Piracy Paradox*, *supra* note 4. A common retort to this argument is that protection should only extend to exact or “line-by-line” copies, preserving the ability of all designers to draw inspiration from each other, and that the term of protection should be short, allowing designers to easily revive old designs, even in “line-by-line” copies. *See, e.g.*, Hemphill & Suk, *Fashion*, *supra* note 4.

¹¹ I will use the terms “fashion copyright” and “design protection” to refer both to the particular protection scheme proposed by the IDPA, see *supra* notes 3 & 6, and more generally to any copyright-like scheme for fashion protection that would extend protection to all designs without prior examination and would judge for infringement based on a “similarity” standard.

¹² H.R. 2196, 111th Cong. (2009); DPPA, *supra* note 3; H.R. 2033, 110th Cong. (2007); H.R. 5055, 109th Cong. (2006).

¹³ IDPPPA, *supra* note 3.

¹⁴ IDPA, *supra* note 3.

¹⁵ *See supra* note 6.

Council of Fashion Designers of America (“CFDA”), with the assistance of a number of law professors.¹⁶ The greatest roadblock they have encountered in arguing for increased protection is convincing lawmakers that there is a reason to alter the status quo. American copyright law is generally seen as a means by which to incentivize investment in creative products by “securing for limited Times . . . the exclusive Right”¹⁷ to create and distribute copies of those creative products so that initial investments may be recouped before other copiers enter the market.¹⁸ In the absence of copyright, there would be a dearth of investment in the

¹⁶ Professor Jeannie Suk of Harvard and Professor Susan Scafidi of Fordham have both testified before Congress in support of increased design protection. *See 2011 Hearing, supra* note 8, at 13; *2006 Hearing, supra* note 9, at 77. Although not all fashion designers have expressed support for increased protection, I refer to fashion designers generally because the CFDA purports to represent designers as a group and has sent a number of designers to testify before Congress on its behalf in supporting the DPPA and the IDPPPA. Further, designer Jeffrey Banks testified that “there is a groundswell of support for this bill” among his colleagues. *2006 Hearing, supra* note 9, at 189.

It is certainly plausible that many designers oppose an increase in design protection, either because they fear that its benefits will only be available to large design houses with the resources to enforce their rights, perhaps to the detriment of some designers, or simply because they share the feelings of Gabrielle “Coco” Chanel who “saw the widespread copying of her couture originals as confirmation that they had gone beyond mere fashion to embody style itself.” Nancy J. Troy, *Chanel’s Modernity*, in *CHANEL 20* (Harold Koda & Andrew Bolton eds., 2005).

¹⁷ U.S. CONST. art. I, § 8, cl. 8.

¹⁸ *See* William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989) (“In [copyright’s] absence anyone can buy a copy of the book when it first appears and make and sell copies of it. The market price of the book will eventually be bid down to the marginal cost of copying, with the unfortunate result that the book probably will not be produced in the first place, because the author and publisher will not be able to recover their costs of creating the work.”). This economic view serves as the primary justification for copyright under U.S. law. *See, e.g., Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[T]he limited grant [of copyright privileges] is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 2, 3 (2003) (“The principal justification for intellectual property (IP) laws in the

creative goods—a market failure that can be cured by copyright.¹⁹ Copyright protection currently excludes fashion design under the “useful articles” doctrine, which bars copyright for any object whose design features cannot be separated from its utilitarian aspects, either physically or conceptually.²⁰ Although trademark laws protect brand names²¹ and some designs enjoy trade dress²² or

Anglo-American tradition is economic.”); Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, 10 *CARDOZO ARTS & ENT. L. J.* 423, 425 (1992) (“The ... theory states that copyright exists solely to provide necessary economic incentives for the production of creative work.”).

¹⁹ See Landes & Posner, *supra* note 18, at 328.

²⁰ Copyright protection is afforded to “useful articles” only to the extent that their “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.” 17 U.S.C. § 101 (2006) (defining “pictorial, graphic, and sculptural works” as “works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned”). “Useful articles” include any object that has an intrinsic utilitarian function, even if it has other, non-utilitarian functions. See MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §2.08[B][3]. Thus clothing, which serves the utilitarian function of covering the body, is a useful article even though it may have other aesthetic or signifying purposes.

The separability test applies to both physically and conceptually separable elements of an article of design such that “design elements that can be conceptualized as existing independently of their utilitarian function . . . are eligible for copyright protection.” *Chosun Int’l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324, 329 (2d Cir. 2005) (internal quotation marks omitted); see also *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) (conceptual separability sufficient for copyright). However, designs printed on clothing fabrics are copyrightable, see *Scarves by Vera, Inc. v. United Merchs. & Mfrs.*, 173 F. Supp. 625 (S.D.N.Y. 1959); *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142 (S.D.N.Y. 1959).

²¹ Fashion products bearing logos and other source-identifying marks are protected under the Lanham Act against the sale of goods that bear confusingly similar marks, 15 U.S.C. § 1125(a) (2006), dilutive marks, § 1125(c), or counterfeit marks, § 1114. Counterfeit goods of the type seen on Canal Street, while an ongoing plague on the fashion industry, are not the subject of this Note.

²² The shape of a product may be protectable as “trade dress” when it is so distinctive as to have “secondary meaning”—i.e. consumers associate the design of the product with its source and consider the design to be source identifying. See *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000) (holding that product design trade dress can never be inherently distinctive and thus designs can only be protected upon a showing of secondary meaning).

design patent²³ protection, the fashion industry generally operates under a low-IP regime.²⁴ The low-IP regime has existed since the beginning of the American fashion industry and, as many opponents of design protection have pointed out, the industry has thrived both creatively and economically in the absence of copyright, rather than crumbled as economic theories might predict.²⁵ Thus, there is little evidence of the type of market failure in the fashion industry that copyright seeks to remedy.

Why then have so many members of the fashion industry continued to argue for increased intellectual property protection for fashion design? If copying does not financially harm designers, then there must be non-economic motivations behind their quest for increased design protection. During recent Congressional hearings on the DPPA and IDPPPA, advocates of design protection, while attempting to tailor their arguments to fit an economic theory of copyright,

However, product designs that have aesthetic or utilitarian functionality generally are not protectable. *See* *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001). Furthermore, in order to be protected against trade dress dilution, which is more expansive than confusion protection, trademarks and trade dress must be shown to be “famous.” *See* 15 U.S.C. § 1125(c)(1) (2006).

²³ Design patents are available for some novel fashion designs, but the high price and difficulty of achieving design patents for individual garments makes them generally impractical for the fashion industry. *See, e.g.*, Sackel, *supra* note 4, at 493. Because it can take over a year to receive a design patent, they are most useful for items like handbags and shoes that are sold continually for many seasons.

²⁴ *See* Raustiala & Sprigman, *The Piracy Paradox*, *supra* note 4, at 1698-1704 (describing “fashion’s low-IP equilibrium” and reviewing reasons that copyright, trademark, and patent law exclude protection of fashion designs).

²⁵ *See, e.g.*, 2006 *Hearing*, *supra* note 9, at 85 (statement of Professor Christopher Sprigman) (“[N]o one has disagreed . . . that the fashion industry is thriving. . . . We have U.S. firms participating in an industry that is approaching \$1 trillion around the world. Never in our 217-year history of copyright has Congress extended copyright or copyright-like protections to the fashion industry.”).

revealed that they have been strongly motivated by morals-based reasoning that builds upon the unique contemporary relationship between fashion and art.²⁶

The proponents of increased design protection have been correct to recognize the striking similarities between fashion and art in contemporary culture.²⁷ Not only do fashion designers and artists collaborate and inspire each other,²⁸ the practices and business models of the fashion and contemporary art worlds are hardly distinguishable in modern society.²⁹ Fashion designers are widely recognized and discussed as creative geniuses,³⁰ their work is examined and analyzed in art-historical frameworks,³¹ and their designs are exhibited internationally in museums alongside prized art objects.³² Simultaneously, artists, particularly since the 1950s, have incorporated the mass-production, business-minded, and branding practices of the fashion industry into their work at least in part as a way to challenge the definition of art.³³ It is not economic harm, but the sense that fashion *is* art and thus *deserves* intellectual property protection that has motivated modern proponents of increased design protection. They desire moral, not economic protection.

However, U.S. copyright law generally rejects morals-based justifications in favor of economic, utilitarian ones.³⁴ It makes little sense to extend an economic right to fashion designers predicated upon a desire for morals-based protection—especially without explicit recognition of these motivations. Visual art, unlike

²⁶ The problem of defining “art,” especially for the purposes of legal analysis, has continually plagued courts and academics. I use the term “art” in this Note in two senses: to refer to both the popular conception of “works of art” or “forms of art” and in a more narrow way to the work that critics, museums, and galleries generally refer to as “art.” This dual use of the term is in my view an inescapable symptom of the ever-changing and indefinable nature of the term itself.

²⁷ See generally *infra* Part II.

²⁸ See *infra* notes 91-97 and accompanying text.

²⁹ See *infra* notes 115-122 and accompanying text.

³⁰ See *infra* notes 88-90 and accompanying text.

³¹ See *infra* notes 98-103 and accompanying text.

³² See *infra* notes 104-106 and accompanying text.

³³ See *infra* notes 114-126 and accompanying text.

³⁴ See *supra* note 18 and accompanying text.

other copyrightable goods, does receive special morals-based protection under the Visual Artists Rights Act of 1990 (“VARA”)³⁵ and various state moral rights laws.³⁶ The moral rights granted under these statutes seek to protect the reputation of an artist by preventing others from modifying or misattributing his works.³⁷ If proponents of increased design protection desire prevention of copying predicated on morals-based harms, that position and related arguments both for and against such protection should be discussed openly. Discussion of the extension of increased design protection in the fashion industry should be considered and discussed under a moral rights, not copyright, framework.

In Part I, I analyze the shortcomings of the economic arguments for increased design protection. In Part II, I show that an examination of the legislative history of the DPPA and IDPPA reveals that many of the proponents of increased rights are motivated by the belief that fashion is “art” and is thus deserving of intellectual property protection equal to that of art. Although it is highly contestable whether fashion merits the status of “art,” an understanding of this viewpoint is necessary to explore fully the arguments for increased design protection. In Part III, I argue that the contention that fashion should receive commensurate protection with art because of the similarities between the two creative fields draws more strongly on a morals- and personality-based theory of

³⁵ VARA, 17 U.S.C. 106A (2006).

³⁶ See, e.g., California Art Preservation Act, CAL. CIV. CODE § 987 (West 2012); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2012).

³⁷ See 17 U.S.C. 106A(a) (preventing modification & misattribution that would be prejudicial to an artist’s honor or reputation); CAL. CIV. CODE § 987(a) (finding that “physical alteration or destruction of fine art, which is an expression of the artist’s personality, is detrimental to the artist’s reputation”); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (preventing modification when damage to the artist’s reputation is reasonably likely). See also John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1025 (1976) (“Copyright . . . protects the artist’s pecuniary interest in the work of art. The moral right, on the contrary, is one of a small group of rights intended to recognize and protect the individual’s personality[, including the] right to one’s identity, to a name, to one’s reputation”); Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 104 (1997) (moral rights serve “in important part, to protect not just artists’ personal feelings about their creations but rather (or in addition) their reputational interests”).

intellectual property than on the economic theories that underlie contemporary U.S. copyright doctrine. Thus, the debate over increased design protection should shift its focus to a discussion of reputational and moral intellectual property rights instead of straining to discuss fashion protection within the framework economically grounded American copyright law.

I

SHORTCOMINGS OF THE ECONOMIC ANALYSIS

“Art produces ugly things which frequently become more beautiful with time. Fashion, on the other hand, produces beautiful things which always become ugly with time.”

—Jean Cocteau³⁸

Under current U.S. law, fashion designs, unlike many other creative goods, can be freely copied. Although economic theories of copyright predict that in the absence of protection against copying, investments in creative goods will not be recouped and will result in a lack of incentive to create, the American fashion industry has continued to produce creative goods and to thrive financially in the absence of copyright protection. This “low-IP equilibrium”³⁹ is explained by the economic model, under which there are certain circumstances that may facilitate market stability in creative industries that lack copyright. First, if the copying of creative works takes a significant amount of time, and demand for the work decreases over time, the original producer of the work will enjoy a period of market exclusivity until copied works are available. In some instances, this first-mover advantage provides enough economic compensation to incentivize creation

³⁸ JOSEPH ABBOUD, *THREADS: MY LIFE BEHIND THE SEAMS IN THE HIGH-STAKES WORLD OF FASHION* 79 (2005).

³⁹ Raustiala & Sprigman, *The Piracy Paradox*, *supra* note 4 (describing the “low-IP equilibrium” and suggesting that copying might in fact lead to more innovation in the fashion industry since widespread copying often makes designs undesirable to early adopters who then demand new work from designers).

in the absence of copyright.⁴⁰ Second, if copies are not perfect, original creators will continue to enjoy economic success by selling their products to consumers who do not wish to buy low-quality substitutes.⁴¹

A. *The First-Mover Advantage*

Proponents of “fashion copyright” have clung to the first-mover advantage exception in the economic theory,⁴² arguing that in the past designers enjoyed a substantial first-mover advantage that has recently disintegrated due to technological change.⁴³ That copying (or “piracy”) has existed in the fashion industry since the birth of “fashion” as we know it is indisputable.⁴⁴ However, the

⁴⁰ Landes & Posner, *supra* note 18, at 330 (“[F]or works that are faddish—where demand is initially strong but falls sharply after a brief period—copyright protection may not be as necessary in order to give the creator of the work a fully compensatory return.”).

⁴¹ *Id.* at 329 (“[I]n the case of works of art—such as a painting by a famous artist—a copy, however accurate, may be such a poor substitute in the market that it will have no negative effects on the price of the artist’s work.”).

⁴² Their argument is drawn straight from Landes and Posner’s theory: “because modern technology has reduced the time it takes to make copies as well as enabled more perfect copies to be made at low cost, the need for copyright protection has increased over time.” *Id.* at 330. Generally, the quality of copies in fashion has not been as affected by technological changes as it has in other industries like music and film. I address the availability of “more perfect copies” in fashion in Part II.B *infra*.

⁴³ See, e.g., 2006 Hearing, *supra* note 9, at 13 (statement of Jeffery Banks, Fashion Designer, on Behalf of the CFDA) (“We can’t compete against piracy so the creativity and innovation that has put American fashion in a leadership position will dry up.”); *id.* at 79 (statement of Susan Scafidi, Professor, Fordham Law School) (acknowledging that fashion has historically not received much intellectual property protection but that there are now “changed circumstances that indicate a greater need for some protection today.”).

⁴⁴ See, e.g., Sara B. Marcketti and Jean L. Parsons, *Design Piracy and Self-Regulation: The Fashion Originators’ Guild of America, 1932-1941*, 24 CLOTHING & TEXTILES RESEARCH J. 214, 216 (2006) (noting that in the late-19th century, “styles were copied so quickly that any innovative style was available to all consumers virtually immediately, at successively lower price points”); *Piracy on the High Fashions*, VOGUE, July 1933, at 28:

It is a perfectly legitimate practice for American dress houses to send buyers to the Paris Openings, where they buy only one of each model they select. These are brought back and copied exactly in largish numbers for customers who are dying

advocates of design protection argue that the piracy game has now changed significantly due to the increased speed with which high-resolution photos from runway shows can be disseminated across the globe via the internet.⁴⁵ Designer Lazaro Hernandez of Proenza Schouler summed up the problem for Congress in 2011:

[T]here [are] Web sites now where you get a runway show, and they can literally zoom in to the garment front and back, copy stitch for stitch, and pretty much print it and make it in a couple days flat and ship it before we ourselves can even take orders on the product. And I think that's something that's happened in the last 10 years that has changed the game 100 percent. The protection hasn't caught up to the level of technology.⁴⁶

Similarly, Professor Susan Scafidi told Congress five years earlier that “[c]reative fashion designers in earlier periods fought copyists by relying on strategic measures like speed and secrecy. . . . Today, however, the same speed and accuracy of information transfer that affects the music and film industries is also having an impact on fashion.”⁴⁷

for a “French model.” . . . But there is no sin where none is felt; the French are aware that American shops buy their models for copying. That has become an accepted fact.

⁴⁵ See, e.g., *2006 Hearing, supra* note 9, at 12 (statement of Jeffery Banks) (“Copying, years ago, would take anywhere from three to four months to a year or more. But as I said, all that changed with new technology. . . . a new and original design . . . can be stolen before the applause has faded thanks to digital imagery and the internet.”).

⁴⁶ *2011 Hearing, supra* note 8, at 99 (statement of Lazaro Hernandez); see also *2006 Hearing, supra* note 9, at 11 (statement of Jeffrey Banks) (“In the blink of an eye, perfect 360 degree images of the latest runway fashions can be sent around the world. . . . And that . . . is the main reason I sit before you today.”).

⁴⁷ *2006 Hearing, supra* note 9, at 81.

This argument is not without intuitive appeal, and indeed many changes in copyright law have been motivated by changes in copying technology.⁴⁸ However, the use of this narrative in the story of the fashion industry's plight has been less successful than in other creative industries. It is not so clear in fashion that the speed with which pictures can be sent across the globe has really had such a drastic impact on the fashion industry as Napster had on the music industry, YouTube had on the film industry, or Google Books has threatened to have on the publishing industry.⁴⁹ Unlike Napster, YouTube, and Google Books, copying in fashion is not completed merely through internet dissemination: physical copies must still be produced and those copies can never be perfect substitutes as Napster, YouTube, and Google Books copies usually are.⁵⁰ After all, images of fashion designs have always been disseminated around the world. In the early days of fashion, designs originating in Paris were shown throughout Europe on traveling mannequins (that even travelled to America).⁵¹ Later, as photography and

⁴⁸ See, e.g., Russ VerSteege, *The Roman Law Roots of Copyright*, 59 MD. L. REV. 522, 522 (2000) ("Modern technology—specifically the computer and its uses via the Internet—increasingly demands that we reconsider and rethink copyright law. This phenomenon is not new. Before computers made us reassess copyright law, other once-new forms of copying, communication, and information transmission did the same for the following: the satellite, the photocopier, the VCR, radio, sound recording, photography, the printing press, and various forms of television, including cable television.").

⁴⁹ These technological advances in film, music, and publishing not only affected the speed with which copies could be made and disseminated, but also drastically improved the quality of those copies, particularly in music and film. I discuss the impact of the quality of copying in fashion in Part I.B *infra*. See also *supra* note 41 and accompanying text.

⁵⁰ Most of the arguments can also be made about visual art. The question of the necessity of copyright protection for art is beyond the scope of this Note, but it is worth noting that copyright in visual art is generally used to protect the market for licensing images of art works and for derivative goods like postcards, posters, and coffee mugs that are sold in museum gift shops. Such derivative markets do not generally exist in fashion and further, the ability of a photograph of a fashion design to infringe the copyright in the garment has not been proposed in the discussion of fashion copyright.

⁵¹ In the late 18th century, Rose Bertin, the designer of choice for Marie Antoinette, grew to fame for her role of dressing the "grade Pandora" doll that traveled throughout Europe and the

publication technologies developed, so did fashion magazines that spread images of new designs throughout Western culture.⁵² Now, as digital technology and the internet expand, fashion blogs and websites broadcast runway show photos throughout the world instantly.⁵³

It is clear that the speed of image dissemination has increased with advances in technology, and it is no longer necessary for manufacturers to send designers to couture shows in Paris in order to sketch designs for copying as was necessary in the early-to-mid 20th century. Contemporary complaints about the speed of copying, however, seem hardly different from those of nearly 100 years ago. A designer in 1916 complained that “within forty-eight hours after [a design is] exhibited in a retail department store . . . at the corner of Twenty-third Street and Fifth Avenue, they are selling sketches of [as many of] my designs as can be secretly captured.”⁵⁴ And the increased interest in fashion and style in the inter-war period only led to an increase in the amount and extent of piracy, leading it to be called in 1928: “one of the most outstanding evils of the apparel industry.”⁵⁵ By 1932, dressmakers in New York felt that piracy had become so detrimental to the fashion industry that the major American design houses joined together to form the Fashion Originators’ Guild of America, which entered agreements with all of the

New World and was “one of the main ways to propagate fashions before the regular publication of fashion magazines.” REBECCA ARNOLD, *FASHION: A VERY SHORT INTRODUCTION* 13 (2009).

⁵² *Id.* at 15 (The 19th century saw “the growth of fashion media, photography, and by the end of the century, film, which disseminated imagery of fashion more widely than ever before, and fuelled women’s desire for more variety and quicker turnover of styles”).

⁵³ For fashion companies, a strong web presence and creative use of social media is generally praised as marker of good branding and public relations. See, e.g., Cate T. Corcoran, *Everyone’s Doing It: Brands Take on Social Media*, *WOMEN’S WEAR DAILY*, Sep. 28, 2009, at 20, available at <http://www.wwd.com/media-news/digital/everyones-doing-it-brands-take-on-social-media-2318508> (discussing the “Digital IQ” study by NYU professor Scott Galloway that ranked the digital competence of 109 brands, and pointing out that several bloggers “were given front-row seats at the D&G show . . . complete with desks and laptops for instant transmission, knocking . . . retail heavyweights to the second row”).

⁵⁴ JULIUS HENRY COHEN, *LAW AND ORDER IN INDUSTRY: FIVE YEARS’ EXPERIENCE* 88 (1916).

⁵⁵ PAUL HENRY NYSTROM, *ECONOMICS OF FASHION* 425 (1928).

major retailers that prevented them from selling pirated designs if they wished to sell the clothing of Guild members.⁵⁶

By the 1980s, fax machines allowed images of designs to be sent around the world within hours of their debut on the runway. In fact, Professor Sprigman has argued that even if the speed of copying today is drastically faster than it was in the early 20th century, it has increased only negligibly since the advent of the fax machine.⁵⁷ In the end, whether or not the speed of copying has increased in recent years, copying speed is meaningless in the debate over design protection unless we know two things. First, exactly how much lead-time is necessary for designers to receive sufficient compensation to maintain the low-IP equilibrium? And second, does the first-mover advantage actually affect the low-IP equilibrium in the fashion industry at all? It could certainly be the case that the speed with which design copies reach stores has no discernible economic effect on designers' profits. Unfortunately, economic evidence that would answer these questions has yet to—and may never—emerge,⁵⁸ leaving both advocates and opponents of design protection (and Congress) unsatisfied.

B. Imperfect Copies

Under an economic analysis of copyright law, a second practical consideration may lead to market stability in the absence of protection: in the world of quick copies, the quality of copies may be so low that they do not serve as an adequate market alternative for originals.⁵⁹ This natural limitation on

⁵⁶ The Guild was soon ordered to disband because of antitrust violations. *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

⁵⁷ *2011 Hearing*, *supra* note 8, at 94 (statement of Christopher Sprigman) (“I think the speed of copying hasn’t really changed very much in 20 years. . . . [T]he fax machine really changed the speed of copying.”).

⁵⁸ Professors Raustiala and Sprigman introduced new economic data on the fashion industry to Congress in the 2011 hearings on the IDPPPA, but they were not nuanced enough to answer these questions. *2011 Hearing*, *supra* note 8, at 81.

⁵⁹ Landes & Posner, *supra* note 18, at 329. This is a consideration that the proponents of copyright-like protection for fashion have discussed less thoroughly than the first-mover advantage. This is probably because unlike in other creative industries like music and film,

economically harmful copies seems to make perfect sense in the fashion industry: Economics tells us that even if copies reach stores at the same time as originals, buyers of originals will not defect to copies that are of a significantly lower quality; the fashion industry tells us that there are often significant differences between “fast-fashion” copies and the originals that inspire them. For example, it is hard to imagine that a regular Chanel customer who, for instance, accompanied her teenage daughter on a shopping trip to Forever 21 would be so enticed by a \$20 copy of a new \$2,000 Chanel jacket that she would buy the former instead of the latter. The Forever 21 version is undoubtedly of a drastically lower quality than the Chanel original, and, importantly, it lacks the powerful cachet of the “Chanel” name. It seems that even if Forever 21 can produce and sell an exact look-alike Chanel jacket as quickly as Chanel can, Chanel probably loses very few customers to fast-fashion.⁶⁰

technological change has not had a drastic impact on the quality of fashion copies. The quality of fashion copies tends to decrease as the speed at which the copies reach the market increases, which is nearly unavoidable due to the physical (as opposed to digital) nature of the goods.

Furthermore, an element of this exception to the economic theory of copyright is that “the [imperfect] copy may have a positive effect on [the] price [of the original] by serving as advertising for [a creator’s] works.” Landes & Posner, *supra* note 18, at 329. Fashion designers quickly rebuff this argument, it seems, to avoid surrendering to an argument that is equivalent to the old adage that “any press is good press.” For example, during the 2006 Congressional hearings on the DPPA, designer Jeffery Banks complained that copies of dresses worn on the red carpet at the Academy Awards appeared days later on morning shows and were on sale within a week. Congressman Berman suggested that this benefitted the designers by publicizing their brands and designs, to which Mr. Banks countered, “That sells your personality as a designer, but that doesn’t sell your dress.” Of course designers make most of their money by selling “their personality,” both directly through licensing deals and indirectly through the effect that branding and publicity have on the perceived value of their designs. In the end Mr. Banks argued that the harm to designers occurs when the dress is knocked-off so quickly that consumers who could afford to buy the original fashion are dissuaded from purchasing because the knockoffs have in a sense tarnished the appeal of the fashion to them. *2006 Hearings, supra* note 9, at 183-84.

⁶⁰ There is, of course, the argument that the existence of cheap copies cheapens the value of the original design and dissuades consumers of the original from purchasing it once they know that the item can be purchased by less wealthy consumers at a significantly lower price. This class-based, sociological tarnishment of designs, however, is akin to the problem of brand

Proponents of design protection usually counter this argument with anecdotes of the “personal tragedy”⁶¹ of individual designers who are driven out of business by design pirates.⁶² As Professor Sprigman has noted, however, an economic analysis of copyright law in a particular industry is generally premised on an examination of benefits and losses taken together, not on an individual basis.⁶³ In any industry there are winners and losers, with or without copyright, and, as Professor Sprigman has advocated, “Before we go and change [a 217-year tradition denying copyright to fashion design], we should have more than a few anecdotes about harm. We should have some robust, formal, methodologically rigorous studies of this industry.”⁶⁴

We no longer live in a world where Mr. Macy sends a designer to the Christian Dior show in Paris to hastily sketch designs and buy individual pieces to be brought back across the Atlantic and copied in Seventh Avenue garment shops.

tarnishment that trademark dilution law seeks to redress, further indicating that a legal regime focused on the protection of reputation and consumer perception is more suited for the fashion industry than copyright law.

A second argument could be made that the two distinct classes of consumers described above are the result of an artificial inflation in prices for original designs because of the availability of knock-offs. That is, in a world without knock-offs, prices for originals may exist at some median price such that both classes of consumers could afford to buy originals. However, once copying begins, designers of originals start to lose revenue to knock-off manufacturers and then must increase prices to account for the losses to a point where the buyer of the knock-off can no longer afford to buy the original. It follows from this that design protection would lower costs and make original fashions more affordable to the public. A full economic analysis of these issues is beyond the scope of this Note, but it is worth considering that the basic cost of manufacturing original couture and ready-to-wear designer goods may be so high that members of the “general public” could never afford to buy designer originals, even at cost, and so no revenue could be lost to affordable knock-offs, meaning there would be no need to inflate prices of originals to account for losses to knock-offs.

⁶¹ 2006 *Hearing*, *supra* note 9, at 187 (statement of Susan Scafidi).

⁶² *See id.* at 83 (statement of Susan Scafidi) (“While it is difficult to quantify or even identify designers who give up their businesses, particularly for reasons of piracy, there is strong anecdotal evidence that design piracy is harmful to the U.S. fashion industry.”).

⁶³ *Id.* at 181.

⁶⁴ *Id.* at 85.

Copying is now quick and cheap, but simultaneously, the American fashion industry is thriving. Macy's no longer has to send copyists to Paris, but can instead buy garments from an impressive assortment of original, innovative, and successful American designers. All of this economic growth and creative evolution has happened in the absence of copyright protection. If, as it seems, most participants in the fashion industry are economically successful and traditional economic arguments show lack of a need for fashion copyright, it remains to be seen why the debate over fashion copyright has continued to rage.⁶⁵ In the end, the economic arguments both for and against design protection have proven unsuccessful.

II FASHION AS ART

Art? Isn't that a man's name?"

—Andy Warhol⁶⁶

If copying in fashion design does not cause industry-wide economic harm at a level that would indicate a market failure necessitating correction through copyright protection, then a logical question arises: Why has the economically thriving fashion industry decided to wage this copyright war? I believe the answer can be found by stripping away the unconvincing economic arguments that disguise the thrust of the industry's real argument—that fashion design is “an art

⁶⁵ Although little movement has been seen at the Congressional level since the 2011 hearing on the IDPPPA, the bill remains a widely discussed topic among fashion industry professionals and lawyers. The U.S. Chamber of Commerce did voice its support for the bill in October 2011 by sending a letter to the House Judiciary Committee calling for a full committee vote. See Kristi Ellis, *Design Piracy Bill Picks Up Support*, WOMEN'S WEAR DAILY (Oct. 12, 2011), <http://www.wwd.com/business-news/government-trade/design-piracy-bill-picks-up-support-5289381>, but as of this writing, no vote has taken place.

⁶⁶ ARTHUR C. DANTO, ENCOUNTERS AND REFLECTIONS 286-87 (1990).

form,”⁶⁷ an extension of a designer’s creative soul, and thus *deserves*⁶⁸ some form of protection.

The problem with copyright law according to *Women’s Wear Daily*, the leading industry publication, is that its “protection does not cover apparel because articles of clothing are currently considered ‘useful articles’ as opposed to works of art”⁶⁹—an apparent “loophole in copyright law.”⁷⁰ Implicit in this statement is the faulty assumption that copyright protects “works of art,”⁷¹ and that if fashion can make the leap from being considered a “useful article” to a “work of art,” it too can enjoy some sort of copyright protection. The assumption that fashion design should receive copyright protection if it can be seen as “art” is not only an idea popularized by the fashion media but is also one regularly invoked by supporters of fashion copyright, including in the congressional debates on the DPPA and IDPPPA. For example, when the IDPPPA was passed by the Senate Judiciary Committee in December 2010, the manager of government relations for the American Apparel and Footwear Association approvingly remarked:

The industry will finally have the ability to protect the truly original, artistic pieces of fashion that presently do not have any protection. This bill does a great job of drawing the line between what is useful and artistic. For those who do truly original art in fashion, they will have an opportunity to gain protection.⁷²

Earlier, in the 2006 hearing on the DPPA, Congressman Issa argued to his peers that “dresses are clearly, let’s be honest, it’s art. . . . [and thus] [c]learly there

⁶⁷ 2008 Hearing, *supra* note 9, at 27 (statement of Narciso Rodriguez).

⁶⁸ See, e.g., 2006 Hearing, *supra* note 9, at 78 (statement of Susan Scafidi).

⁶⁹ Kristi Ellis, *Designers to Back Knock-off Bill*, WOMEN’S WEAR DAILY, July 15, 2011, at 2.

⁷⁰ Rosemary Feitelberg, *Schumer Touts Plan to Fight Design Theft*, WOMEN’S WEAR DAILY, Aug. 9, 2007, at 12.

⁷¹ The Copyright Act does not explicitly protect “works of art” but instead protects most visual art as a “pictorial, graphic, and sculptural works,” 17 U.S.C. § 102(a)(5), and extends further protection to “works of visual art” under VARA, 17 U.S.C. § 106A (2006).

⁷² Kristi Ellis, *Design Piracy Bill Advances to Senate*, WOMEN’S WEAR DAILY, Dec. 2, 2010, at 4 (quoting Kurt Courtney).

is a constitutional obligation for us to [protect] these creations.”⁷³ In the 2008 DPPA hearing, designer Narciso Rodriguez argued that over the last century “fashion design has become an art form,”⁷⁴ and Professor Scafidi maintained that one reason fashion deserves protection is because it is “now recognized as a form of creative expression,”⁷⁵ and that French recognition of design protection indicates “[t]he formal recognition of fashion design as an art form” in France.⁷⁶

One could easily dismiss this line of reasoning as unprincipled by pointing out that copyright law does not seek to protect “works of art” but instead protects economic incentives when necessary to generate investment in creative goods that benefit the public good. Sometimes this results in the protection of “works of art.” Although that may be correct as a matter of copyright jurisprudence, it has been unsuccessful in discouraging the proponents of design protection. The belief that fashion *is* art is deeply held, and has developed over decades of interaction between the fashion and art worlds. Beginning in the 1960s⁷⁷ and increasing rapidly over the past twenty years, simultaneous changes in the art world and fashion industry have led to an increased sense among designers, members of the fashion community, and many members of the fashion-consuming public that

⁷³ 2006 *Hearing*, *supra* note 9, at 187.

⁷⁴ 2008 *Hearing*, *supra* note 9, at 27.

⁷⁵ 2006 *Hearing*, *supra* note 9, at 81.

⁷⁶ *Id.* at 84.

⁷⁷ It has been noted that the pop art craze of the early 1960s “caused the realms of art, fashion, and journalism to intersect as rarely before.” JAMES MEYER, *MINIMALISM: ART AND POLEMICS IN THE SIXTIES* 25 (2001). And in the 1960s, fashion magazines like *Harper’s Bazaar* and *Vogue* featured the work and writings of contemporary artists like Robert Morris, Dan Flavin, Donald Judd, Sol Lewitt, James Rosenquist, and Frank Stella alongside and interspersed with fashion description and photography. The inclusion of high art in glossy fashion magazines “equated the new art with fashion and vice versa It brought the highbrow into congress with the middlebrow, blurring the distinction between those spheres; it lent the authority of fine art to design while conferring the glamour and publicity of fashion to fine art.” *Id.* at 29. This was perhaps more accurately a new beginning for the symbiosis of art and fashion, which had previously flourished in pre-war France with designers like Paul Poiret who were inspired by modern artists of the time. See ARNOLD, *supra* note 51, at 42.

fashion, if not “art” in itself, is so closely related to and intertwined with “art” that it should receive—and in fact *deserves*—the same types of legal protections as art.

Discussions of increased design protection should not be ignorant of the contemporary relationship between fashion and art and the resulting sense that fashion designs should receive morals-based protections in a way similar to art. In the sections that follow, I describe the ways in which fashion is more art-like and art is more fashion-like than ever before, as I believe it would be naïve to ignore these developments in crafting appropriate intellectual property protection for fashion design.

A. *Fashion Imitating Art*

"My primary concern has always been respect for my craft, which is not exactly an art, but which depends on an artist for its existence."

—Yves Saint Laurent⁷⁸

1. *The Fashion Designer as Artist*

For the vast majority of human history, there was no such thing as “fashion” or the “fashion designer,” only clothing made at home or by seamstresses.⁷⁹ The concept of the fashion designer as a celebrated creative individual did not emerge until the late 19th century.⁸⁰ Prior to this time, well-dressed ladies in the courts of Europe had personal seamstresses who created custom garments without receiving any recognition as a “designer.”⁸¹ Most women wanted their peers to believe that their clothing was the product of individual creativity and style and avoided

⁷⁸ *Yves Saint Laurent*, Exhibition Brochure, PETIT PALAIS, MUSÉE DES BEAUX-ARTS DE LA VILLE DE PARIS, at 6 (2010), available at http://www.petitpalais.paris.fr/sites/default/files/DP_YSL_English_0.pdf.

⁷⁹ See ARNOLD, *supra* note 51, at 12.

⁸⁰ See, e.g., AMY DE LA HAYE, *THE CUTTING EDGE: 50 YEARS OF BRITISH FASHION* 13 (1997) (“The high-fashion industry as we know it today, with seasonally presented, designer-led fashions was established in Second Empire Paris (1852–70).”).

⁸¹ See ARNOLD, *supra* note 51, at 12.

accrediting it to any designer.⁸² Charles Frederick Worth is generally cited as being the first “designer” in the modern sense. Worth formed his fashion house in 1858 and, with his resolute vision, created the system of designer-led fashion that we now take for granted: “With great aplomb and a shrewd business head, Worth emphasized that his taste was the final word.”⁸³

Worth and other early couturiers “were to crystallize the notion of the designer as the creator not just of handmade clothes, but also of the idea of what was fashionable at a particular time.”⁸⁴ Gabrielle “Coco” Chanel added further meaning to the concept of the designer by putting her own personality center-stage in the marketing of her clothes. Her success is credited as founded upon “the magic of the self,”⁸⁵ and she was lauded for her “ability to market an idealized vision of herself, and to embody her own perfect customer.”⁸⁶

Although European couturiers have been recognized for their creative genius since the time of Worth, it is only since the second half of the 20th century that American fashion designers attained a similar status. Prior to the emergence of American designers like Bill Blass, Perry Ellis, and Calvin Klein—the first to transition from mere garment to true designer—American designers were regarded as anonymous craftsmen who used their sartorial skills to copy Parisian designs for the American consumer.⁸⁷

⁸² DE LA HAYE, *supra* note 80, at 13 (“Worth conceived and imposed his own design ideas and in so doing created fashion unequivocally determined by the designer.”).

⁸³ *Id.*

⁸⁴ ARNOLD, *supra* note 51, at 6.

⁸⁵ *Id.* at 10 (quoting Ernestine Carter).

⁸⁶ *Id.* (“Chanel designed herself, and then sold this image to the world.”). This technique has been used with similar success by designers like Donna Karan, Donatella Versace, and more recently Margherita Missoni. But the image of the designer remains incredibly important even when he is not selling a vision of himself. For example Karl Lagerfeld who designs for Chanel today does not epitomize the Chanel customer but instead uses his personal style to “denote[] his status as a cultured aesthete” and remains involved in art and cultural projects which support the elite status of his couture. *Id.* at 11.

⁸⁷ *Id.* at 21.

Not only are designers now recognized as the creators of the clothing they produce and sometimes as the face of their brands, in the modern fashion world they are often discussed as having a kind of creative genius previously reserved for great artists. The design houses themselves have played no small part in the celebration of their designers as innovators and artists.⁸⁸ This exaltation of the designer as an artist has been pivotal in elevating fashion to be discussed “on a parallel footing to art” in the “larger system of visual culture and communication.”⁸⁹ In turn, the admiration of the designer’s creative genius is fundamental to the argument that legal protection for fashion design might be based on a reputation-based theory of moral rights.⁹⁰

2. *Appropriation, Collaboration, and Inspiration*

The many collaborations that have occurred and cross-inspirations that have been discussed between fashion and art in recent decades have furthered the notion that fashion is “art” (or at least art’s equally respectable cousin). Direct appropriation provides the most obvious example of fashion imitating art. Many times throughout his career, Yves Saint Laurent produced garments that looked as though they could have been made by stripping an artist’s canvas off of its frame and wrapping it around a body. Perhaps the most iconic of these was the “Mondrian” dress of 1965. Saint Laurent saw the simple planes of the popular shift dress as the perfect canvas for the geometric color blocks and lines of the Piet Mondrian’s paintings.⁹¹ A year later Saint Laurent produced a pop art-inspired

⁸⁸ See, e.g., *id.* at 17 (“Fashion houses, partly to raise the status of the designer, and partly to provide a recognizable identity and personality to promote each label, asserted the idea of the couturier as an innovator and artist.”).

⁸⁹ Ingrid Sischy and Germano Celant, *Editorial*, ARTFORUM, Feb. 1982, 34.

⁹⁰ See *infra* notes 134-141 and accompanying text.

⁹¹ See Yves Saint Laurent: “Mondrian” day dress (C.I.69.23), *Heilbrunn Timeline of Art History*, THE METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/toah/works-of-art/C.I.69.23> (last visited Aug. 16, 2012). It is interesting to note that the Metropolitan credits both Mondrian and Saint Laurent as being the “artist” of this piece in their index. Although Mondrian did not live to see Saint Laurent’s creation, one can imagine that he would have approved: “The essence of Mondrian’s ideas is that painting, composed of the most fundamental aspects of line and colour, must set an example to the other arts for achieving a society in which

collection that featured “The Souper Dress,” a shift dress made of paper bearing Campbell’s soup can labels repeated in a geometric grid—a wearable Warhol. Saint Laurent, an avid art collector in his own right,⁹² revived this practice many times throughout his career with tributes to Van Gogh, Matisse, Picasso, Braque, and Cocteau, among others.⁹³ In discussing this practice, Saint Laurent said that his “intention was not to compete with the Masters, but at the very most to get close to them and learn from their genius.”⁹⁴

If Yves Saint Laurent appropriated the work of artistic “Masters” in order to feel close to their genius, other designers have taken this impulse further to work directly in collaboration with the artists they admire. Two of the most salient and successful contemporary examples of this practice are Takashi Murakami’s and Richard Prince’s collaborations with Louis Vuitton. The Murakami collaboration produced a number of incredibly popular handbags, most famously the “Monogram Multicolor” bags that made their way into the collection of perennially produced Vuitton classics. Richard Prince also designed a capsule collection of “Joke Monogram” handbags for Vuitton, inspired by the artist’s *Jokes* series of paintings; Prince’s famous *Nurses* works influenced the designs of the entire Vuitton Spring/Summer 2008 collection designed by Marc Jacobs. The bags were

art as such has no place but belongs instead to the total realization of ‘beauty.’” Introduction, Piet Mondrian, *The Collection*, MUSEUM OF MODERN ART, http://www.moma.org/collection/artist.php?artist_id=4057 (last visited Aug. 16, 2012).

⁹² After Saint Laurent died, his partner Pierre Bergé put their art collection, which included works by Picasso, Matisse, Duchamp, Brancusi, Mondrian, and de Chirico up for auction at Christie’s in Paris. See Steven Erlanger, *Saint Laurent Art Sale Brings In \$264 Million*, N.Y. TIMES, Feb. 24, 2009, at A8, available at <http://www.nytimes.com/2009/02/24/arts/design/24auction.html>.

⁹³ Yves Saint Laurent: “Mondrian” day dress, *supra* note 91. See also Barbara Pollack, *All Dressed Up*, ARTNEWS, Feb. 2012, at 88. As for art’s reclaiming of the designs, an Irving Penn photograph of one of the Braque inspired 1988 dresses recently sold at contemporary art auction house Phillips de Pury for \$27,500, \$9,500 over the high estimate. Lot 39, Irving Penn, *Saint Laurent, Braque Inspired Fashion*, Paris 1988, Photographs Auction, New York, April 9, 2011, <http://www.phillipsdepurys.com/auctions/lot-detail.aspx?sn=NY040111&search=&p=4&order=1&lotnum=39>.

⁹⁴ *Yves Saint Laurent*, *supra* note 78, at 13.

not only sold in traditional retail outlets but also in museums exhibiting the artists' work—Murakami's at the Los Angeles Museum of Contemporary Art in 2007⁹⁵ and the Brooklyn Museum of Art in 2008,⁹⁶ and at a party for Prince's Guggenheim retrospective in 2008⁹⁷—placing the objects in an intriguing place somewhere between commercial fashion and high art.

Beyond appropriation and collaboration, the fashions of the past fifty years are often discussed as operating within and contributing to major artistic movements and theories, particularly minimalism and postmodernism. Often designers describe themselves as inspired by artists and designers who preceded them, assisting us in finding a place for their work among broader aesthetic movements.⁹⁸ Like the minimalist artists of the 1960s who rejected the constraints of oppressive artistic categories such as painting and sculpture,⁹⁹ designers of high fashion at this time began to rebel against the dictations of the human form, which had previously served to limit design choices. Designers' rebellion against the constraints of the body can be seen as a sartorial answer to minimalist art's abandonment of representation.¹⁰⁰ Hubert de Givenchy anticipated this when he introduced the "sack dress" in the late 1950s. It was met with skepticism, reflected in a *Time* magazine caption that read: "*Ou est la poitrine, ou sont les hanches, ou*

⁹⁵ See Jack Bankowsky, © *Murakami*, ARTFORUM, Dec. 2007, at 334.

⁹⁶ See Press Release, Brooklyn Museum, The Brooklyn Museum Announces the Inclusion of an Exclusive Louis Vuitton Store Within the Retrospective of Japanese Artist Takashi Murakami (Mar. 21, 2008), available at <http://www.brooklynmuseum.org/press/uploads/Louis%20Vuitton%20Press%20Release-PROD.pdf>.

⁹⁷ See *Fashion Scoops, Early to the Party*, WOMEN'S WEAR DAILY, Jan. 10, 2008, at 13.

⁹⁸ See, e.g., Francisco Costa, *Foreword* to ELYSSA DIMANT, MINIMALISM AND FASHION: REDUCTION IN THE POSTMODERN ERA, at 9 (2010) ("I often look to film, sculpture, photography, and architecture for inspiration and have found it in the unpretentious works of artists such as Brancusi, Madame Vionnet, Frank Stella, Man Ray, and John Pawson—my minimalist predecessors.").

⁹⁹ ELYSSA DIMANT, MINIMALISM AND FASHION: REDUCTION IN THE POSTMODERN ERA 31 (2010) (discussing Donald Judd's expositions on minimalism in "Specific Objects").

¹⁰⁰ *Id.* at 32 (describing Balenciaga's creation of "clothing that was neither bolstered by a corset infrastructure nor adherent to the human body's natural shape")

est la femme?”¹⁰¹ or “Where is the chest, where are the hips, where is the woman?” To which M. Givenchy replied that the dress was “inspired by modern art, the experimental art that seeks new shapes and forms transgressing the limitations set by convention. With my new dress form I have discarded, among other things, the limitations set by the female form.”¹⁰² This practice reemerged in the 1990s with Japanese designers such as Rei Kawakubo (of Comme des Garçons), Issey Miyake, and Yohji Yamamoto, who “mined their own form of sartorial minimalism, heavily reliant on the abstraction and rejection of the traditional female body.”¹⁰³

3. *Museums’ and Runway Shows’ Display of Fashion as Art*

Further contributing to the conception that fashion might be considered art is the extreme popularity of museum fashion exhibitions. Museums have long exhibited clothing along with furniture, jewelry, and other decorative arts, generally as pieces of historic interest. There has been a shift, however, to the display, celebration, and contemplation of fashion for fashion’s sake, which owes much credit to Diana Vreeland, the former *Vogue* Editor-in-Chief who took the helm of the Costume Institute at the Metropolitan Museum of Art in 1971.¹⁰⁴ The

¹⁰¹ VALERIE STEELE, *FIFTY YEARS OF FASHION: NEW LOOK TO NOW* 41 (1997).

¹⁰² *Id.* at 41-42.

¹⁰³ *Id.* at 75. Dimant also singles out Chanel as a forerunner of minimalism:

Chanel’s easily adaptable components are the sartorial counterparts of minimal art’s primary shapes: basic building blocks that appealed intrinsically to a larger audience than the one drawn to overly ornate designs. . . . Of all Chanel’s innovations, her little black dress would emerge as a conceptual ready-made that conveyed discreet, refined chic no matter the price tag. . . . The little black dress is a standard and an original, a design that can be reinterpreted by nearly any designer or manufacturer and still retain its inherent value as the champion of progressive fashionable dressing. With regard to the minimalist discourse, this ready-made speaks to the major criticism of minimalism itself: in its simplicity, accessibility, and translation to mass production, is the minimal object enough “art”?

Id. at 54-55.

¹⁰⁴ See, e.g., *Diana Vreeland at the Costume Institute*, DIANA VREELAND, <http://dianavreeland.com/page/posts/op/read/id/73> (last visited Aug. 16, 2012).

movement of fashion into the museum picked up speed in the 1990s as the Victoria and Albert Museum in London and the Musée des Arts Décoratifs in Paris curated increasing numbers of fashion exhibitions. Since then, the popularity of displaying fashion in museums has continued to soar, perhaps culminating in the 2011 Costume Institute retrospective of Alexander McQueen, which attracted over 650,000 viewers to the Metropolitan Museum of Art.¹⁰⁵ Placing an object in a museum certainly does not irrefutably make it art, but the museum context invites a more serious and contemplative approach to fashion, not offered by the retail store, that has led many fashion fans to think of the museum-exhibited garments as art.¹⁰⁶

Similarly, the fashion show has gone from being a private venue for the showing of designs to buyers and press to a platform for public spectacle. The modern fashion show is highly conceptualized and choreographed to reflect and aid in the creation of a thematic coherency for each season's collection. Gianni Versace changed the nature of the runway show in the 1980s by shifting the focus from the selling of clothing to the celebration of celebrity, glamour, and excess that his famed Supermodels exemplified.¹⁰⁷ Once liberated from its constraints, other designers were free to use the runway show as a vehicle for both outsized theatrics and more restrained, conceptual performance art. Karl Lagerfeld's shows for

¹⁰⁵ Diane Cardwell, *Waiting Hours to See the McQueen Exhibit, in a Line Not Unlike a Runaway*, N.Y. TIMES, Aug. 8, 2011, at A14, available at <http://www.nytimes.com/2011/08/08/nyregion/alexander-mcqueen-exhibition-at-metropolitan-museum-of-art-draws-thousands.html>.

¹⁰⁶ ARNOLD, *supra* note 51, at 5-6 ("Curatorial study of fashion has produced numerous important exhibitions and the vast number of visitors who attend such displays testify to the widespread interest in fashion. Importantly, exhibitions provide an easily accessible connection between curators' specialist knowledge, current academic ideas and the central core of fashion, the garments themselves, and the images that help to create our ideas of what fashion is.").

¹⁰⁷ Reka C.V. Buckley and Stephen Gundle, *Flash Trash: Gianni Versace and the Theory and Practice of Glamour*, in *FASHION CULTURES: THEORIES, EXPLORATIONS AND ANALYSIS* 331, 339 (Stella Bruzzi & Pamela Church Gibson, eds., 2000) ("[Runway shows] evolved from restricted events aimed at the fashion press, buyers and selected clients into show business events which captured newspaper headlines, generated magazine coverage and therefore impacted on popular culture. In every aspect they were conceived and choreographed to attract attention.").

Chanel, often transformed Paris' Palais Royale into an otherworldly paradise, such as the underwater universe he created to frame the Spring 2012 collection epitomize the former,¹⁰⁸ while the late Alexander McQueen's strange shows have been compared approvingly to the latter. McQueen, who has been credited with "redefin[ing] the runway as a stage for high-concept theatrics,"¹⁰⁹ in 1999 presented a show in which a model in a white dress was repeatedly pelted by a paint gun, and in 2004 staged a show choreographed by celebrated contemporary dancer and choreographer Michael Clark. During Issey Miyake's Spring/Summer 1999 presentation, models cut apart the designer's "A-POC" ("A Piece of Cloth") garments while on the runway,¹¹⁰ in a show reminiscent of Yoko Ono's "Cut Piece" performance art of 1964.¹¹¹

Fashion shows themselves have even begun to occupy the museums and galleries once reserved for serious artists. After sponsoring a Leonardo da Vinci retrospective at the Louvre, Ferragamo was the first fashion house to present a collection inside the hallowed museum walls in June 2012.¹¹² Moreover, in what is becoming a more common practice, many fashion companies held their Spring/Summer 2012 shows and presentations in New York galleries.¹¹³

¹⁰⁸ See Jess Cartner-Morley, *Chanel goes underwater to unveil latest collection*, THE GUARDIAN, Oct. 4, 2011, at 26, available at <http://www.guardian.co.uk/fashion/2011/oct/04/chanel-lagerfeld-pearl-collection>.

¹⁰⁹ David Velasco, *Alexander McQueen: Savage Beauty*, ARTFORUM, May 2011, at 134.

¹¹⁰ DIMANT, *supra* note 99, at 81.

¹¹¹ See, e.g., Michael Bracewell, *Yoko Ono*, FRIEZE, Nov.11, 2003, available at http://www.frieze.com/issue/review/yoko_ono1.

¹¹² Luisa Zargani, *Salvatore Ferragamo to Sponsor Da Vinci Exhibit*, WOMEN'S WEAR DAILY, Feb. 28, 2012, 11. Other designers, including Marc Jacobs for Louis Vuitton, have held shows in the Louvre's courtyard.

¹¹³ See Ann Binlot, *It's a Model Invasion! Inside Fashion Week's Full-Blown Takeover of NYC's Galleries and Museums*, ARTINFO (Sept. 7, 2011), <http://www.artinfo.com/news/story/38530/its-a-model-invasion-inside-fashion-weeks-full-blown-takeover-of-nycs-galleries-and-museums/> (quoting Chelsea Art Museum special events manager Melissa Netecke: "I know that many of the galleries—both commercial and nonprofit—host fashion events because fashion, as an art form, falls along the lines of their mission or interests.").

B. Art Imitating Fashion

“[I]f artists were in hell in 1946, now they are in business.”

—Allan Kaprow¹¹⁴

For all the ways in which fashion has increasingly emulated art over the past fifty to sixty years, during the same period, artists have begun to incorporate into their work many practices that mimic those of the fashion industry. Many contemporary artists operate like fashion designers by having their work produced in factory-like settings by teams of assistants, celebrating the commerciality of their products, and embracing celebrity and popular culture. Andy Warhol exemplified this practice. He worked out of a space he called “the Factory,” idolized celebrities to an extreme, rarely had a hand in the physical production of his work, and unapologetically acknowledged the commerciality of his enterprise, famously remarking: “[b]eing good in business is the most fascinating kind of art.”¹¹⁵

The extreme commerciality¹¹⁶ of fashion historically sullied its reputation in the art world and removed it from consideration as a serious artistic medium. In the 1960s, however, artists began to test the boundaries of commerciality.¹¹⁷ While

¹¹⁴ Allan Kaprow, *The Artist as a Man of the World* (1964), reprinted in *ESSAYS ON THE BLURRING OF ART AND LIFE* 46, 47 (Jeff Kelley ed., 1993).

¹¹⁵ WARHOL, *supra* note 1, at 92; see also Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 297-98 (2009) (pointing out that in the recent collaborations between contemporary artists and fashion designers, “[o]f course, Warhol’s spirit reigns over this merger of retail and art.”).

¹¹⁶ In describing the constraints of commerciality, Yves Saint Laurent noted, “I am bursting with the desire to go much further and revolutionize everything. Then I think: it would be perfect for the Saint-Germain-des-Près boutique at, say, \$100 . . . but at couture prices will they accept it?” STEELE, *supra* note 101, at 65. But one could easily argue that with a fashion industry today so reliant on brand licensing for profits, designers of couture and runway designs have freedom to create without worrying about the saleability of their designs.

¹¹⁷ DIMANT, *supra* note 99, at 57 (describing the work of Claes Oldenburg who sold painted plaster reliefs (many of shoes and other types of clothing) at his Lower East Side outpost “The Store,” and was criticized at the time for blurring distinctions between art and commerce.)

this practice was originally met with criticism,¹¹⁸ it is now so commonplace that commerciality in contemporary art has become “overt and intrinsic.”¹¹⁹ During a retrospective of the work of Japanese artist Takashi Murakami at the Los Angeles Museum of Contemporary Art in 2008, a Louis Vuitton boutique was installed within the museum to sell the handbags that the artist had helped create, signaling that Murakami was not only willing to sell his name to sell handbags, but also that the Vuitton venture was hardly separable from his “serious” art on view in the museum. Not only have artists such as Warhol and Murakami embraced the commerciality of their practice, but also market prices for contemporary art continue to soar, making it even more difficult to view art as a category of goods that transcend commerce.¹²⁰

While couturiers of the past might physically have constructed the fashions they designed, it is accepted in the modern fashion industry that designers have little presence in the creation of their works beyond the stages of initial conception and final approval. Similarly, although it is easy to picture a great artist of high modernism such as Jackson Pollock physically creating his art—theatrically applying paint to canvas—contemporary artists today are rarely so involved in the creation of their works. Artists like Murakami, Jeff Koons, and Damien Hirst supervise the work of teams of assistants who create the actual works that the artist conceives. Hirst has said of his “spot” paintings, “[M]y spots I painted are shite. . . . The best spot painting you can have by me is one painted by [my assistant]

¹¹⁸ *Id.*

¹¹⁹ Samantha Vettese Forster, *Connections Between Modern and Postmodern Art and Fashion*, 12 DESIGN J. 217, 228 (2009) (“The ‘sellability’ of a Postmodern art work can now be a factor in its inclusion in the elected ‘art timeline’ – what will be recorded in history as ‘good art’ or an important movement. Some Postmodern artists now produce works with definite commercial considerations and gear their work to particular buyers and segmented sections of society, as with fashion, and dealers and galleries often use equivalent artifices to fashion marketing.”). See also Adler, *supra* note 115, at 297 & n.204 (noting that “young artists seem to embrace commercialism in a casual way that previous generations would have considered heresy” and “the increasing absurdity of trying to separate art from commerce”).

¹²⁰ See Adler, *supra* note 115, at 298 (“As art increasingly functions like other luxury commodities, this shift undermines the notion that art is distinct from other products.”).

Rachel.”¹²¹ This practice of denying authorship is certainly indebted to Warhol, who once remarked to a reporter in 1966, “Why don’t you ask my assistant Gerry Malanga some questions? He did a lot of my paintings.”¹²²

We might still deny fashion’s equivalence with art by requiring art to be “serious” in either subject matter or meaning. Fashion could rarely compete on this level because of its preoccupations with beauty and celebrity. However, contemporary art has similarly embraced these notions. Warhol’s obsession with celebrity culture perhaps permanently abolished the idea that high art could somehow be above the intrigue of celebrity. Legendary designer Gianni Versace has been described as “[l]ike Andy Warhol, . . . in thrall to the aura of celebrity. . . . ‘unashamedly star-struck, so unashamedly that it became endearing.’”¹²³

Finally, one could argue that fashion, unlike art, rarely has any meaning or purpose beyond the functional and aesthetic: it exists to provide body clothing and warmth in an attractive and sometimes sexually appealing way. But like most precepts of “art” that have been attacked since the postmodern period, many contemporary artists refuse to announce any grand meaning behind their art, merely describe their work as “cool” or “really great looking.” Warhol described his process of choosing source material in a 1964 interview as relying on whatever image “caught my eye,” rejecting any notion that his images were symbolic or meaningful.¹²⁴ And while being deposed for a recent copyright infringement suit,

¹²¹ DAMIEN HIRST & GORDON BURN, *ON THE WAY TO WORK* 90 (2001). This is not a particularly contemporary practice but continues a long tradition of the use of found and mass-produced objects going back to the early 20th century Dadaists. Marcel Duchamp began the practice of elevating the found object to the status of art with his “ready-mades,” and minimalist artists such as Donald Judd, Carl Andre, Sol le Witt and others had their sculptures manufactured by factories, a process imitated by Warhol in his “Factory.” Dan Flavin’s work using store-bought light bulbs and florescent tubes, though minimalist, also associated him with the “found object” and “junk” tradition associated with Robert Rauschenberg, Jasper Johns, and Claes Oldenburg among others. See DIMANT, *supra* note 99, at 57.

¹²² I’LL BE YOUR MIRROR: THE SELECTED ANDY WARHOL INTERVIEWS 99 (Kenneth Goldsmith, ed. 2004).

¹²³ Buckley & Gundle, *supra* note 107, at 341.

¹²⁴ DIMANT, *supra* note 99, at 61-62.

artist Richard Prince, in describing a work at issue said he wanted only to create a “balls-out, great, unbelievably looking great painting.”¹²⁵ Just as it is left to the wearer to breathe life into the raw materials of fashion, its left to the viewer to construct the meaning of much contemporary art. A recent collaboration between artist Gary Hume and fashion designer Stella McCartney perfectly illustrates this modern disavowal of artistic genius on the part of both the designer and artist. Hume said of his work, “I just make things to look at. It’s a picture. It’s not a manifesto,” describing his style as “unexpressionist,” while McCartney similarly proclaimed, “I don’t design with a theme in mind; it’s about my friends and what I get up to when I’m in London. I’m not trying to shock people.”¹²⁶

C. *Is Fashion Art?*

There are two possible conclusions to this story. The first is that fashion *is* art: contemporary art has been so successful in destroying the boundaries between “art” and everything else that consumer goods such as fashion articles have been allowed in. If this is the case, then should there be any consequence for fashion? If “the great achievement of contemporary art, has been to destroy the category of art as we know it,”¹²⁷ then even if fashion is art, the classification as such means little in the contemporary art world where both everything and nothing is art.¹²⁸ If “art” is no longer a special category reserved for the products of artistic genius, should it mean anything that fashion has won entry into the category? The

¹²⁵ Brief for Plaintiff-Appellee at 20, *Cariou v. Prince*, No. 11-1197 (2d Cir. Jan. 25, 2012).

¹²⁶ Forster, *supra* note 119, at 234.

¹²⁷ Adler, *supra* note 115, at 299. Professor Adler does qualify this potentially sweeping statement by noting:

Or at least, to have come close to destroying it. Adorno wrote that “art revolts against its essential concepts while at the same time being inconceivable without them.” Has the contemporary revolt against the category of art been so successful that it has destroyed art’s “essential concepts”? Has contemporary art turned “art” into a category that is “inconceivable”?

Id. at n.218 (internal citation omitted).

¹²⁸ *See id.* at 298-99 (“I believe that art has been (almost) successful in destroying the line separating art from everything else. In an ultimate act of iconoclasm, the great achievement of contemporary art, has been to destroy the category of art as we know it.”).

argument by the fashion community that their work is art may actually be counterproductive.

The second conclusion is that fashion is not art.¹²⁹ Even though a principled method for conceptually distinguishing fashion from art may no longer exist, the two categories remain distinct, and we can quickly identify fashion by its wearability. However, even if fashion is not art, by exposing the place of fashion in relation to contemporary art, it is easier to understand the arguments of those who desire increased intellectual property protection for fashion. Whereas the argument that fashion designers need economic incentives to create is unsatisfying, it is understandable that in a contemporary culture where it is no longer clear that a principled line exists between fashion and art, members of the fashion community find it increasingly difficult to accept that their work exists within a starkly different legal regime from that of art.

III MORAL RIGHTS IN FASHION DESIGN

“Design piracy denigrates the integrity of the style.”

—Nicole Miller¹³⁰

Although the assertion that fashion *is* art may be misguided, or at least an incomplete solution to problem of design protection, it is undeniable that fashion

¹²⁹ See, e.g., ARNOLD, *supra* note 51, at 33-34:

In [some fashion] designs and presentations, artistic methods are used to comment on the practice of fashion, but this does not necessarily turn their fashion into art. . . . Like other design forms, such as architecture, fashion has its own particular concerns that prevent it from ever being purely art, craft, or industrial design. . . . In fashion’s case, focus on body and cloth, and the fact that it is, usually, designed to be worn and sold, distinguishes it from fine art. However, this does not prevent fashion from being meaningful, and the art world’s continued fascination with fashion underlies its cultural significance.

¹³⁰ Kristi Ellis, *Copyrighting a Dress: Congress Mulling Bill to Protect Designers*, WOMEN’S WEAR DAILY, Apr. 26, 2007, at 13.

and art today have a synergistic relationship.¹³¹ When viewed from this perspective, it is obvious why fashion designers have felt compelled to demand increased protection for their work: their beloved creations, which they think of as art, which they created with the love and devotion of an artist, which have been critically reviewed like art, and which have been displayed in museums like art, are treated in a radically different way under U.S. law than art. In an effort to receive commensurate treatment with art, designers have petitioned Congress for copyright protection, but are not in need of the economic-based protection that copyright provides.¹³² Instead, they feel a sense of personal harm when their “art” is cheaply and slavishly copied. Thus, what the proponents of fashion copyright really desire—and have essentially been arguing for—is a moral right to protect against the reputation-based harms that are felt when designs are copied.

Moral rights laws are generally designed to protect artists’ reputational interests in their works¹³³ and are often premised on a personhood theory of protection,¹³⁴ which posits that works of art embody an artist’s “individual

¹³¹ See, *supra* Part II. See also Forster, *supra* note 119, at 239:

Art and fashion may have crossed over through coincidence but most often, throughout the 20th century, it has been because of mutual aesthetic and ideological affinities. These affinities may be because of an underlying similarity between the artist and designer or because of an actual collaboration that has occurred. Artists can appropriate the stereotypically held notions of business success and glamour from fashion and fashion has often taken the sentiments of profundity and innovation believed of art. They have both benefited from the alliance in some way.

¹³² See *supra* Part I.

¹³³ The Paris Act of the Berne Convention, Article 6bis defines moral rights as existing “[i]ndependently of the author’s economic rights” and protecting against certain acts that “would be prejudicial to [the author’s] honor or reputation.” S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 37 (1986). There is also often said to be a general public interest in protecting moral rights of artists. See, e.g., Merryman, *supra* note 37, at 1029 (a work should be “protected and kept as it emerged from the imagination of its author and later conveyed to posterity without damage”) (quoting Millet, Tribunal de la Seine, May 20, 1911, *Amm. I.* 271).

¹³⁴ See, e.g., Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L. J. 1532, 1542 (1989).

essence”¹³⁵ and are part of her “very identity.”¹³⁶ Therefore, in order to fully protect an artist’s interests,¹³⁷ we should recognize rights that “preserve the bond between the artist and her work.”¹³⁸ The U.S. grants moral rights under the Visual Artists Rights Act of 1990,¹³⁹ which protects visual artists’ rights of attribution¹⁴⁰ and integrity,¹⁴¹ and many states grant similar moral rights protection.¹⁴²

This sense that the work of an artist is an extension of the artist himself and is deserving of special, non-economic protection can be seen clearly in the Congressional debate over the DPPA and IDPPPA. Designers have not been shy to share heart-wrenching stories of their sense of personal attack in arguing for increased protection. They convey a sense that their creative works—thought of as

¹³⁵ *Id.*

¹³⁶ *Id.* See also California Art Preservation Act, CAL. CIV. CODE § 987(a) (West 2012) (“the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation”).

¹³⁷ See ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 5 (2010) [hereinafter KWALL, *SOUL OF CREATIVITY*]:

[T]here are practical benefits to designing a legal system of authors’ rights that promote authorship morality. . . . “[T]he law can have an important symbolic function if it accords with public views about what is fair, but it loses that power as the formal law diverges from public morality.” . . . In the context of intellectual property laws specifically, [people should] “believe that the rules established serve reasonable social purposes and are not simply efforts to create profits for special interest groups, such as large corporations.

(quoting Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT’L L. & POL. 219, 225-26 (1997)).

¹³⁸ Lacey, *supra* note 134, at 1537. See also KWALL, *SOUL OF CREATIVITY*, *supra* note 137, at xiii (“The act of creative authorship implicates the honor, dignity, and artistic spirit of the author in a fundamentally personal way, embodying the author’s intrinsic dimension of creativity.”).

¹³⁹ VARA, 17 U.S.C. § 106A (2006).

¹⁴⁰ *Id.* § 106A (a)(1)(A).

¹⁴¹ *Id.* § 106A (a)(3)(A).

¹⁴² See, e.g., California Art Preservation Act, CAL. CIV. CODE § 987 (West 2012); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2012).

“represent[ing] a complete embodiment of the internal self”¹⁴³—should be protected against unauthorized use because that would amount to a personal assault on the designer himself.¹⁴⁴ For example, Narciso Rodriguez, who had the great fortune of designing the bridal gown for Carolyn Bissette’s wedding to John F. Kennedy, Jr., described the design as follows: “I designed something with great love for the most important person in my life. . . . You know, it was a very personal thing for me, that dress.”¹⁴⁵ The dress was subsequently copied many times over for American women who wished to emulate the enviable Mrs. Kennedy’s style.

Mr. Rodriguez provided this story to Congress as an example of the way he was harmed in the absence of increased protection for fashion design, but he went on to say, “I never looked at it like something was stolen from me because I would have made that dress anyway.”¹⁴⁶ Mr. Rodriguez’s statement perfectly illustrates the tension of extending copyright-like protection to design under a utilitarian, economic theory of copyright. He loved the dress and he loved the woman for whom he designed it. He did not need an economic incentive to create it, but he still felt harmed when it was copied.¹⁴⁷ It could be said that the design “embodie[d] an intrinsic dimension” where his “creative impulse...eminat[ed] from inner drives that exist in the human soul . . . [which] do not depend upon external reward or recognition but instead are motivated by . . . the creation of

¹⁴³ Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1976 (2006) [hereinafter Kwall, *Inspiration*] (citing IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 64 (W. Hastie trans., T. & T. Clark 1887)).

¹⁴⁴ See Lacey, *supra* note 134, at 1542 (stating that artistic works are “part of an artist’s very identity”).

¹⁴⁵ 2008 *Hearing*, *supra* note 9, at 22.

¹⁴⁶ *Id.* Mr. Rodriguez likely did not see this work as having been “stolen” because its value to him was emotional and not economic and thus could not be stolen.

¹⁴⁷ The observation that many artists, authors, and other creators are motivated largely by non-economic sources and would continue to create without any economic incentive has formed the basis of most scholarship advocating the adoption of more expansive moral rights laws in the U.S. See Kwall, *Inspiration*, *supra* note 143; Kwall, *SOUL OF CREATIVITY*, *supra* note 137; Lacey, *supra* note 134.

works with a particular meaning or significance.”¹⁴⁸ The intrinsic dimension of Mr. Rodriguez’s creativity is perfectly illustrated by his description of copying as “theft” and that “to steal something . . . [is] to copy my DNA and diffuse it.”¹⁴⁹

It is not just designers who have invoked this personality theory in their arguments for design protection. Professor Scafidi, the fashion industry’s staunchest supporter in legal academia, has argued that fashion is “creative expression” and should thus be protected because “creative expression” is “exactly what copyright is supposed to protect.”¹⁵⁰ In other words, fashion design warrants protection not because protection incentivizes design, but because all creative expressions of an artistic soul deserve protection.¹⁵¹ Congresswoman Maxine Waters voiced her opinion that the copying of Diane von Furstenburg’s wrap dress in “cheap material” is “an insult to the work she has done” noting that “there is probably something called pride in your work” that shouldn’t be “undermined by those who [copy] poorly.”¹⁵² Congressman Waters clearly sensed the moral rights undercurrent of the congressional hearing and felt that Ms. von Furstenburg deserved some sort of reputation-based right to protect the valuable creative energies she has expended in creating the wrap dress that is synonymous with her name.¹⁵³

¹⁴⁸ KWALL, SOUL OF CREATIVITY, *supra* note 137, at xiii.

¹⁴⁹ 2008 Hearing, *supra* note 9, at 54.

¹⁵⁰ 2006 Hearing, *supra* note 9, at 79 (statement of Susan Scafidi).

¹⁵¹ See, e.g., KWALL, SOUL OF CREATIVITY, *supra* note 137.

¹⁵² 2006 Hearing, *supra* note 9, at 189.

¹⁵³ Another common argument advanced by proponents of increased protection is that the U.S. should attempt to conform to the design protection regimes of Europe in order to successfully compete in the global marketplace. See, e.g., 2006 Hearing, *supra* note 9, at 84 (statement of Susan Scafidi) (arguing that the French recognition of intellectual property rights in fashion design has “helped maintain the preeminence of the French fashion industry” also that the French see fashion as art). A detailed analysis of that argument is beyond the scope of this Note, but it is worth noting that many European design protections flow from Franco-German personality-based theories of intellectual property. See Kwall, *Inspiration*, *supra* note 143, at 1976.

It is evident that advocates for increased design protection have been motivated by the sense that fashion is art to argue—albeit deceptively—that it deserves morals-based protection equivalent with that of art. Arguments over design protection that focus on the economic aspects of copyright law are inappropriate in the contemporary fashion industry. Instead, the debate should center on the moral rights protections that designers seemingly desire. But the question remains as to whether moral and reputational considerations can adequately justify the extension of copyright-like protection to fashion design,¹⁵⁴ or if not, whether some alternative scheme might be devised to protect personality and reputational interests of designers. Instead of attacking the argument that copyright is economically necessary for the fashion industry, opponents of design protection should rebuke the arguments that fashion should receive commensurate protection with art or that any consumer goods should receive morals-based protection.

CONCLUSION

In the end, the contemporary quest for copyright protection undertaken by fashion designers and other industry supporters is misguided. The American fashion industry as a whole has not suffered any detectable economic harm as a result of the lack of copyright protection, and modern technological changes have not improved copying techniques so drastically that there is reason to believe that the long-standing low-IP equilibrium has been upset. However, economically successful designers have continued to argue fervently for increased protection. Upon further examination of their arguments, it is clear that in attempting to curtail copying, they seek to redress a morals-based harm. Their sense of harm when their designs are copied is magnified by the synergistic relationship between fashion and art that has recently emerged in the U.S., which has led to a growing perception that fashion *is* art. When comparing their work to that of their peers and

¹⁵⁴ Many legal scholars have argued that natural law and personhood theories that are offered to justify moral rights laws should be incorporated into copyright law, but as it stands, most academics and courts continue to endorse the economic view. See, e.g., Kwall, *Inspiration*, supra note 143, at 1947 (“[T]he law can, and should, be shaped in response to all relevant forces motivating creativity, not just those concerned with economic reward.”).

collaborators in the art world, fashion designers have been shocked to discover that U.S. law treats their precious work much differently than that of the artists. This has led designers to seek copyright protection in their work. However, their harm has little basis in economics and is instead predicated upon a sense of personal, morals-based harm that is felt when the integrity of their designs are compromised.

The debate over fashion design protection should focus on moral and reputational considerations outright, instead of veiling them in economics-based arguments favored by copyright policy. If it is moral rights protection that the fashion industry really desires, then a morals-based regime should be on the Congressional docket instead of the pending quasi-copyright proposal that has failed to gain significant legislative support.