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Slowing Down Fast Fashion: How Improved Intellectual Property Law Can Protect Designers and Promote Sustainability

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Slowing Down Fast Fashion: How Improved Intellectual Property Law Can Protect Designers and Promote Sustainability

Cover Page Footnote

J.D. Candidate, 2025, University of Georgia School of Law. Prior to attending UGA Law, Julia Krzeminski graduated magna cum laude from the University of Georgia Terry College of Business with a B.B.A. in Finance and a B.B.A. in Economics. Julia would like to thank Dr. Adam Orford and Professor Joseph Miller for their expertise and guidance throughout the note writing process and her friends and family for their constant support and encouragement.

NOTE

**SLOWING DOWN FAST FASHION: HOW IMPROVED
INTELLECTUAL PROPERTY LAW CAN PROTECT
DESIGNERS AND PROMOTE SUSTAINABILITY**

*Julia Krzeminski**

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I. INTRODUCTION

The average American spends roughly \$1,800 per year on clothing.¹ Beyond the functionality of clothing to cover one’s body, consumers may buy clothes for self-expression, to establish a sense of personal identity, because of retail persuasions or insecurities, to seek a sense of belonging and social acceptance, or to simply feel good about themselves.² Interwoven with desires of self-acceptance, belonging, and consumers facing insecurities, are fashion trends and trend cycles.³ A fashion trend occurs when “a particular item, silhouette, color,

¹ Sheiresa McRae Ngo, *The Average American Spends This Much on Clothing – See How You Stack Up*, GO BANKING RATES (Nov. 18, 2023), <https://www.gobankingrates.com/saving-money/shopping/the-average-american-spends-this-much-on-clothing-see-how-you-stack-up/>; see also *Amount Spent Monthly by Consumers on Online Clothing Purchases in a Month in the United States in 2023, in U.S. Dollars*, STATISTA <https://www.statista.com/statistics/1414917/us-money-spent-on-clothes-online-monthly/> (last visited Jan. 13, 2024) (explaining how much consumers in the United States spent online shopping per month, with the majority spending \$51 to \$100 per month).

² Brittany Sierra, *The Psychology of Consumption: Decoding What Drives Our Purchasing Behavior*, SUSTAINABLE FASHION FORUM (Aug. 23, 2023), <https://www.thesustainablefashionforum.com/pages/how-psychology-impacts-consumer-behavior>.

³ *Id.*

or other new look rises in popularity.⁴ Trends may be influenced by celebrities, designer fashion shows, clothing manufacturers, or social media.⁵

When a trend is established, it enters a five-stage cycle: introduction, increase, peak, decline, and obsolescence.⁶ Fashion trends begin with the new style or clothing item being introduced to consumers, often in small quantities from a limited number of designers and retailers.⁷ Next, during the increase stage, the style or clothing gains momentum, is established as a trend, and fashion leaders begin incorporating it into their outfits and increasing consumer demand.⁸ Next is the peak stage, where the trend is saturating the market and everyday consumers are able to participate in the trend via mass production at different price points.⁹ However, a trend does not stay popular forever, and eventually the decline stage begins where consumers find the trend outdated and its original popularity turns consumers away in their pursuit to be unique.¹⁰ Lastly, a trend becomes obsolete as consumers move onto the next trend entering its introduction and increase stages.¹¹

Explaining this process best is Miranda Priestley, a fictional character from the critically acclaimed movie *The Devil Wears Prada*. While explaining to her assistant the importance of the fashion choices the famous magazine they work for makes, Priestley states:

“You go to your closet, and select . . . that lumpy blue sweater, for instance, . . . but what you don’t know is that sweater is not just blue, it’s not turquoise, it’s not lapis, it’s actually cerulean. You’re also blithely unaware of the fact that, in 2002, Oscar de la Renta did a collection of cerulean gowns, and then I think it was Yves Saint Laurent, wasn’t it? . . . who showed cerulean military jackets And then cerulean quickly showed up in the collections of eight different designers. Then it filtered down through the department stores and then trickled down into some tragic casual corner where you, no doubt, fished it out of some clearance bin.”¹²

⁴ *Understanding the 5 Stages of the Fashion Cycle*, MASTER CLASS (June 7, 2021), <https://www.masterclass.com/articles/fashion-cycle-explained>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *THE DEVIL WEARS PRADA* (Fox 2000 Pictures, Wendy Finerman Productions, Dune Entertainment 2006); see also Rose Lagacé, *The Devil Wears Prada Cerulean Sweater Monologue*, ART DEPARTMENTAL (July 17, 2017), <https://artdepartmental.com/blog/devil-wears-prada-cerulean-monologue/> (providing the entire monologue from Miranda Priestley).

Historically, the fashion trend cycle Priestly explains—seasonal acceptance of a single style—lasts for a period of several months to several years and as the name implies, typically resurfaces every few decades.¹³ For example, 2023 saw the resurgence of classic Y2K fashion such as Juicy Couture tracksuits, tiny sunglasses, strappy kitten heels, and miniskirts.¹⁴ With today's influence of the internet and social media however, multi-year trend cycles are out, and shorter micro trend cycles are in.¹⁵

A micro trend is a fashion fad that has a surge in popularity before falling off just as quickly.¹⁶ Instead of the traditional five stage trend cycle, micro trends may only see the introduction, peak, and decline phase.¹⁷ The internet and social media's influence on fashion trend cycles is today's illustration of the theory of collective selection.¹⁸ The theory of collective selection is a leadership theory where “nearly any creative or innovative individuals can become leaders of fashion trends, provided their innovative choices are reasonably in line with the social climate and lifestyles of the times.”¹⁹ Today, these creative and innovative individuals are known as social media influencers who tell consumers what to buy and when as they dictate emerging micro trends.²⁰

As fashion trend cycles shorten and social media influencers heighten consumer demand for on-trend clothing options, fashion companies have had to adapt to new business models to meet demands before the current micro trend declines. Companies such as Zara have established “a product turnaround of two to six weeks,”²¹ allowing them to accommodate consumers with around 20,000 new items offered each year.²² Surpassing Zara, e-commerce fashion

¹³ George B. Sproles, *Analyzing Fashion Life Cycles: Principles and Perspectives*, 45 J. MKTG. 116, 117 (1981).

¹⁴ Boutayna Chokrane, *Y2K Fashion 101: How 2023 Got the Millennium Bug All Over Again*, VOGUE (Dec. 13, 2023), <https://www.vogue.com/article/y2k-fashion>.

¹⁵ Hannah Ewens, *Trends Used to Come Back Round Every 20 Years. Not Anymore.*, VICE (Dec. 14, 2022, 4:00 AM), <https://www.vice.com/en/article/bvmkm8/how-the-20-year-trend-cycle-collapsed>.

¹⁶ Anna Mikhaylyants, *TikTok Core: The Fashion World of Today*, HARV. CRIMSON (Mar. 9, 2023), <https://www.thecrimson.com/article/2023/3/9/tiktok-aesthetics-microtrends-fast-fashion-style/#:~:text=Microtrends%20are%20fashion%20fads%20that,falling%20off%20just%20as%20quickly>.

¹⁷ *Id.*

¹⁸ Sproles, *supra* note 13, at 120.

¹⁹ *Id.*

²⁰ Megan K. Bannigan & Beth Shane, *Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry*, 64 N.Y.L. SCH. L. REV. 247, 248 (2019).

²¹ Allison Denton, *The Cost of Looking Good: How Fashion and Trend-Based Consumerism Impact the Economy, Law, and Environment*, 30 IND. J. GLOBAL LEGAL STUD. 363, 376 (2023).

²² Gad Allon, *The Fashion Industry's Dirtiest Secret*, BUS. INSIDER (Dec. 23, 2022, 2:45 PM), <https://www.businessinsider.com/fast-fashion-christmas-shopping-clothes-returns-shein-zara-waste-mountain-2022-12>.

company Shein releases 6,000 new styles per day.²³ The ability to deliver on-trend clothing items at various price points within weeks of consumers establishing demand is a phenomenon known as fast fashion.

Fast fashion is defined as “an approach to the design, creation, and marketing of clothing fashions that emphasizes making fashion trends quickly and cheaply available to consumers.”²⁴ Where famous designers and luxury brands release collections around four times a year, fast fashion brands produce around 52 micro-seasons a year—a new collection almost every week.²⁵ To consistently provide consumers with on-trend clothing at all price points, the entire fast fashion industry has been built on pollution and intellectual property theft.

This Note proceeds in five sections. Section II provides background on the fast fashion industry and details the various supply chain models that contribute to the success of the fast fashion industry. Section III discusses fast fashion’s practice of copying designs from other designers in order to profit from selling trendy clothing at low price points. Section III further details the existing intellectual property protection, or lack thereof, for designers under trademark, copyright, and patent law and how designers are able to exploit such lack of protection to continue copying other designers without consequences.

Section IV describes the production life cycle for fast fashion clothing and the environmental impact of each stage, culminating in how consumers and brands are responding to an increased concern over fast fashion’s impact on the environment. Section V provides general background on the Clean Air Act and the Clean Water Act as it pertains to regulating the environmental impact of textile production. Section V further explains how the Clean Air Act and Clean Water Act have been wholly ineffective in regulating fast fashion production and the World Trade Organization’s influence over overseas textile production. Section VI provides an in-depth explanation of the history of the Vessel Hull Design Protection Act, its previous amendments attempting to add protection for fashion designs, and the arguments against amendments. Finally, it proposes a new bill amending the Vessel Hull Design Protection Act to include narrowly-tailored protection for fashion designs in order to reduce fast fashion production and subsequent harm to designers and the environment.

II. FAST FASHION

In order to be categorized as a fast fashion company, the company must be following a business model that combines quick response, frequent assortment

²³ *Id.*

²⁴ *Fast fashion*, MARRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/fast%20fashion> (last visited Jan. 15, 2024).

²⁵ Audrey Stanton, *What is Fast Fashion, Anyway?*, GOOD TRADE (Feb. 2, 2024), <https://www.thegoodtrade.com/features/what-is-fast-fashion/>.

changes, and fashionable designs at affordable price points.²⁶ The strategy behind fast fashion aims at reducing lead times²⁷ for getting new clothing into stores in order to satisfy consumer demands during the peak trend stage.²⁸ Consumers want clothing that fits into the current trend and they want it now. Shortened trend cycles and the constant demands for something new has put pressure on the traditional fashion supply chain format.²⁹ Fast fashion leaders Zara and H&M have thus shifted their focus away from price and towards ensuring a fast response to the changing trends and consumer demands.³⁰

Zara and H&M have chosen to focus on specific items for sale, including providing all sizes and colors of a garment, rather than an entire collection.³¹ They are able to make this change because there is no wholesale channel that is demanding they produce a whole collection as Zara and H&M control their respective retail points of sale.³² Another important advantage to working at the item level is creating the freedom to continuously introduce new items to consumers rather than waiting for the next season.³³

By taking control of a greater portion of the supply chain process, fast fashion companies are no longer required to design products dictated by supplier lead times and can make decisions based on rapidly changing consumer demands.³⁴ According to H&M, “[t]he time from an order being placed until the items are in the store may be anything from a few weeks up to 6 months,” varying based on the type of product.³⁵ For high volume fashion basics such as the classic white t-shirt and children’s wear, it is beneficial to place orders in advance.³⁶ For trendier items however, H&M needs to deliver the clothing much quicker.³⁷

²⁶ FELIPE CARO & VICTOR MARTÍNEZ-DE-ALBÉNIZ, *Fast Fashion: Business Model Overview and Research Opportunities*, in *RETAIL SUPPLY CHAIN MANAG.* 237, 242-43 (Narendra Agrawal & Stephen A. Smith eds., 2d ed. 2015).

²⁷ See Will Kenton, *Lead Time: Definition, How It Works, and Example*, INVESTOPEDIA (Sept. 28, 2023), <https://www.investopedia.com/terms/l/leadtime.asp> (“Lead time is the amount of time that passes from the start of a process until its conclusion. . . . Reducing lead time can streamline operations and improve productivity, increasing output and revenue. By contrast, longer lead times negatively affect sales and manufacturing processes.”).

²⁸ Liz Barnes & Gaynor Lea-Greenwood, *Fast Fashioning the Supply Chain: Shaping the Research Agenda*, 10 J. FASHION MKTG. & MGMT. 259, 259 (2006).

²⁹ *Id.* at 260.

³⁰ *Id.*

³¹ CARO & MARTÍNEZ-DE-ALBÉNIZ, *supra* note 26, at 240.

³² *Id.*

³³ *Id.* at 241.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ CARO & MARTÍNEZ-DE-ALBÉNIZ, *supra* note 26, at 241.

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A. FAST FASHION SUPPLY CHAIN AND BUSINESS MODEL

In the fashion industry, the supply chain is the flow of goods from the start of production through the final sale to the end consumer.³⁸ “Effective management of the supply chain has been identified as a key success factor in retailing, to the extent that in modern retailing it is the supply chains that compete rather than companies.”³⁹ Historically, the fashion industry’s production process has been “long, complex, and inflexible” resulting in long buying cycles incompatible with current industry and consumer demands.⁴⁰ To improve the responsiveness of supply chains, just-in-time, agile supply chains, and quick response systems were introduced.⁴¹

1. *Just-in-Time*

The just-in-time approach was designed to reduce costs and create no waste, or rather no overproduction that results in inventory that cannot be sold.⁴² To accomplish this, just-in-time is focused on delivering finished goods in time to meet market demand, but without carrying up front supply chain inventory.⁴³ In the fashion industry, this is typically achieved by a company trusting a supplier with all of their production needs.⁴⁴ However, this reliance can limit flexibility and is not the most efficient for companies, specifically fast fashion companies, therefore resulting in greater use of agile and quick response concepts.⁴⁵

2. *Agile*

Agile supply chains are “driven by information such as market data and information-sharing between businesses in the supply chain.”⁴⁶ It is essential that the agile production system is always adapting to the changing market by focusing on “speed, flexibility, responsiveness[,] and infrastructure.”⁴⁷ Conventional supply chains are lengthy, have long lead times, and are forecast-driven.⁴⁸ Agile supply chains, however, are demand driven and therefore an ideal concept for fast fashion companies seeking to increase responsiveness.⁴⁹ The

³⁸ Tara Hackett, A Comparative Life Cycle Assessment of Denim Jeans and a Cotton T-Shirt: The Production of Fast Fashion Essential Items from Cradle to Gate 1, 7 (2015) (Master’s thesis, University of Kentucky) (UKnowledge).

³⁹ Barnes & Lea-Greenwood, *supra* note 28, at 262.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Hackett, *supra* note 38, at 11.

⁴³ Barnes & Lea-Greenwood, *supra* note 28, at 263.

⁴⁴ Hackett, *supra* note 38, at 10.

⁴⁵ *Id.* at 11.

⁴⁶ Barnes & Lea-Greenwood, *supra* note 28, at 264.

⁴⁷ Hackett, *supra* note 38, at 11.

⁴⁸ Martin Christopher et al., *Creating Agile Supply Chains in the Fashion Industry*, 32 INT’L J. RETAIL & DISTRIB. MGMT. 367, 374 (2004).

⁴⁹ *Id.*

agile supply chain is characterized as being market sensitive, virtual, network-based, and process aligned.⁵⁰

Zara is able to be market sensitive with their team of fashion scouts, which finds new ideas and determines what is trending in the market.⁵¹ They also have salespeople who identify consumers' likes and dislikes and then inform the Zara design team.⁵² With improvements in technology, Zara's designs can be made into clothing and enter the marketplace in a matter of weeks.⁵³ The agile supply chain is virtual as it relies on information to be shared across all members of the supply chain, including fabric manufacturers, garment makers, and retailers, to ensure better efficiency.⁵⁴

Being network-based is an aspect of the agile supply chain that Zara thrives at, meaning that Zara achieves flexibility by utilizing the strengths of specialists in their supply chain.⁵⁵ Zara follows the strategy of keeping production in-house, such as "dyeing, cutting, labeling, and packaging," when there is "cost efficiency through economies of scale."⁵⁶ All other manufacturing is conducted by subcontractor specialists who work exclusively for Zara's parent company.⁵⁷ Lastly, it is critical that agile supply chains have process alignment where there are no delays caused by buffers between the stages of the supply chain process.⁵⁸ To keep fast fashion fast, the flow of information and materials must be coordinated.⁵⁹

3. *Quick Response and Vertical Integration*

The evolution of supply chain management and agile supply chains has created a background for the quick response movement.⁶⁰ Quick response is a strategy that links retailing and manufacturing operations in order to provide the flexibility needed to respond to changing markets.⁶¹ An ideal quick response system "would enable the manufacturer to adjust production in response to retail sales in order to . . . meet the demand revealed during the season."⁶² Quick response is centered around minimal pre-season ordering and taking advantage of the speed and flexibility of the supply chain to place more frequent in-season

⁵⁰ *Id.*

⁵¹ *Id.* at 376.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Christopher et al., *supra* note 48, at 374, 376.

⁵⁵ *Id.* at 374.

⁵⁶ *Id.* at 377.

⁵⁷ *Id.*

⁵⁸ *Id.* at 371–72.

⁵⁹ *Id.*

⁶⁰ Barnes & Lea-Greenwood, *supra* note 28, at 263.

⁶¹ James Richardson, *Vertical Integration and Rapid Response in Fashion Apparel*, 7 *ORG. SCI.* 400, 401 (1996).

⁶² *Id.*

orders for specific items.⁶³ Implementing a quick response system allows for lower inventory costs, fewer markdowns of overproduced items that did not sell, and increased sales of popular items because the company is able to keep them well stocked.⁶⁴

For the fast fashion industry, vertical integration is a beneficial way to implement a rapid response strategy for the changing market demands.⁶⁵ Vertical integration is “a strategy that allows a company to streamline its operations by taking direct ownership of various stages of its production process rather than relying on external contractors or suppliers.”⁶⁶ The volatility in the fashion industry, exceptionally so in the fast fashion industry, makes vertical integration less risky than in other industries and provides the control needed to introduce new technologies and coordinate mechanisms required for rapid response.⁶⁷

Fast fashion companies “combine supply chain agility to respond quickly, and constant product introductions to attract variety-seeking/fashion-conscious customers.”⁶⁸ Beyond efficient supply chains, many fast fashion companies are able create large profit margins, respond quickly to changes in demand, and deliver on-trend items at the expense of the environment and other designer’s ideas.

III. INTELLECTUAL PROPERTY RIGHTS IN THE FASHION INDUSTRY

Companies that fall into the fast fashion category “are not ‘haute couture’ or trend-setters but rather fashion followers that target the mid-to-low price range.”⁶⁹ The fast fashion industry is attentive to the new designs put out each season by luxury brands and designers, paying attention to what gains traction as the new trendy style and what styles consumers want to purchase at more attainable price points.⁷⁰ With this knowledge, fast fashion companies “contact overseas manufacturing companies with plans to mimic” the garments—a legal

⁶³ Barnes & Lea-Greenwood, *supra* note 28, at 263.

⁶⁴ Richardson, *supra* note 61, at 401.

⁶⁵ *Id.* at 402.

⁶⁶ Adam Hayes, *Vertical Integration Explained: How It Works, with Types and Examples*, INVESTOPEDIA (Jan. 12, 2024), <https://www.investopedia.com/terms/v/verticalintegration.asp>; *see also* Richardson, *supra* note 61, at 403 (explaining vertical integration as when a company owns assets, organizes activities, or controls activities in successive stages of the value chain).

⁶⁷ Richardson, *supra* note 61, at 404.

⁶⁸ CARO & MARTÍNEZ-DE-ALBÉNIZ, *supra* note 26, at 241–42.

⁶⁹ CARO & MARTÍNEZ-DE-ALBÉNIZ, *supra* note 26, at 238–39.

⁷⁰ Brittany Sierra, *The Psychology of Fashion: Why Conversation about Fast Fashion Evokes Such Strong Emotions in Us*, SUSTAINABLE FASHION FORUM (Feb. 2, 2024), <https://www.thesustainablefashionforum.com/pages/the-psychology-of-fast-fashion-exploring-the-complex-emotions-fast-fashion-evokes-in-consumers#:~:text=With%20the%20rapid%20pace%20at,trend%20without%20breaking%20the%20bank>.

practice that provides “little incentive to hire designers to create an entirely original line.”⁷¹

The leaders of this practice are fast fashion companies H&M and Zara.⁷² H&M and Zara avoid copying other designer’s work too closely, and instead produce adaptations or interpretations of the latest popular designs developed by their own in-house designers.⁷³ Other fast fashion companies however engage in more direct copying of designers work and are known as fast fashion copyists.⁷⁴

Copyists sell their copies at a discount to the original item, made possible by using lower quality materials, and are able to obtain large profit margins from low manufacturing costs and avoided design expenses.⁷⁵ Most notorious for being a fast fashion copyist is Forever 21.⁷⁶ Between 2003 and 2008, “Forever 21 was a defendant in fifty-three lawsuits” alleging close copying, “compared to two for H&M and none for Zara”.⁷⁷

Fashion copying is not a new concept and not exclusive to the fast fashion industry.⁷⁸ What has changed, however, is “the large scale and low cost at which rapid copies can be made.”⁷⁹ The combination of gradually easing import quotas beginning in 1995 that lowered manufacturing costs, with electronic communications and express shipping ensuring that finished clothing can be brought to market quickly, has resulted in thousands of cheap copies able to be produced, “from start to finish, in six weeks or less.”⁸⁰

Despite offering intellectual property protection via trademark, copyright, and patent law, “it has been argued forcefully that the United States law does not protect fashion design adequately.”⁸¹ Intellectual property protection in the fashion industry is a source of great controversy, with commentators divided between working within the confines of the existing laws, considering *sui generis* statutory protection,⁸² or arguing that suggested protections would damage the fashion industry and should be avoided.⁸³

⁷¹ Cassandra Elrod, *The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability*, 24 IND. J. GLOBAL LEGAL STUDIES 575, 578 (2017).

⁷² C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1172 (2009).

⁷³ *Id.* at 1173.

⁷⁴ *Id.* at 1171–72.

⁷⁵ *Id.* at 1172.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1173.

⁷⁸ Hemphill & Suk, *supra* note 72, at 1170.

⁷⁹ *Id.* at 1171.

⁸⁰ *Id.*

⁸¹ *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 223 (2012).

⁸² Hemphill & Suk, *supra* note 72, at 1151.

⁸³ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1775–77 (2006).

Despite the lobby attempts made by numerous fashion companies, the intellectual property protections available to the fashion industry remain essentially the same as what existed at the time of the Fashion Originator's Guild in 1932.⁸⁴ Today, brands are confined to seeking various forms of protection under existing trademark, copyright, and patent law in hopes that it is sufficient to ward off copying of their designs.

A. IS IT A COUNTERFEIT, A KNOCKOFF, OR A DUPE?

Before discussing the existing intellectual property laws available to designers, it is important to distinguish between fashion counterfeits, knockoffs, and dupes as they each have unique legal implications.

1. Counterfeits

Individuals have historically turned to buying counterfeit goods as supplements for things they want, yet cannot afford.⁸⁵ The Lanham Act defines a counterfeit as “a spurious mark, which is identical with, or substantially indistinguishable from, a registered [trade]mark.”⁸⁶ Counterfeits will usually appear identical to the original item it intended to copy, except that counterfeits are typically inferior in quality.⁸⁷ By looking indistinguishable from the original item, counterfeits exploit the goodwill of the original designer, have a negative impact on the fashion industry, and infringe on other designer's trademarks.⁸⁸

2. Knockoffs

Despite often being used interchangeably, counterfeits and knockoffs are very different.⁸⁹ A knockoff is “a copy of an original design intended to be sold at a lower price than the original.”⁹⁰ To strategically avoid a lawsuit, knockoffs “only copy[] the unprotectable parts of the original design.”⁹¹ “Knockoffs are the natural progression of the fashion industry, from the catwalk to the department

⁸⁴ *Id.* at 1698–99.

⁸⁵ Danielle Sciarretta, What Can Luxury Brands Do to Protect Value in the Age of Social Media and Counterfeit Culture? 1, 4 (2022) (Law School Student Scholarship, Seton Hall University) (Seton Hall eRepository).

⁸⁶ 15 U.S.C. § 1127; *see also* Miranda Nolan, *How Intellectual Property Laws Allow for Fashion Dupes*, SLU L.J. ONLINE 1, 4 (2023) (defining a counterfeit as “an unauthorized lookalike of an original that is ‘substantially indistinguishable’ from the original—including using the original's trademark . . .”).

⁸⁷ Sciarretta, *supra* note 85, at 9.

⁸⁸ Nolan, *supra* note 86, at 3–4.

⁸⁹ *Id.* at 3.

⁹⁰ *Id.*

⁹¹ *Id.*

store. . . . [They] promote social inclusivity of fashion by making trends more affordable and universal.”⁹²

3. *Dupes*

A term coined by social media influencers, the term dupe refers to a designer-inspired item that looks very similar to the original, but without making infringing use of the designer’s mark.⁹³ Often used incorrectly, many influencers refer to exact copies of luxury goods being offered at a lower price point as dupes.⁹⁴ In reality, the exact or indistinguishable copies influencers promote are counterfeits, not dupes.⁹⁵ Dupes and knockoffs are essentially interchangeable terms. The difference, however, is instead of possessing a negative connotation like the term knockoff, dupe has taken over social media as a fun new term for finding a cheaper version of an expensive and trendy item.⁹⁶

B. TRADEMARKS

Trademark law is likely the most recognized and understood form of intellectual property law in the fashion industry. Derived from the Trademark Act of 1946, or more commonly referred to as the Lanham Act, a trademark can be “any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.”⁹⁷ Trademark law varies from other forms of intellectual property law by focusing on guarding consumers from marketplace confusion rather than encouraging new creative works.⁹⁸ Therefore, “it was long the rule that a trademark must be something other than, and separate from, the merchandise to which it is applied.”⁹⁹

Trademarks are extensively used in the fashion industry as a way for brands to protect themselves and their merchandise from outright counterfeiting and potential destruction of their goodwill.¹⁰⁰ Common examples of designer

⁹² *Id.* at 3–4.

⁹³ Sciarretta, *supra* note 85, at 8.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See Courtney Shields (@courtney.shields), TIKTOK (Mar. 14, 2022), <https://www.tiktok.com/t/ZTLsRVhcp/> (showing her TikTok followers an “amazing” dupe).

⁹⁷ *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1336 (C.C.P.A. 1982) (citing 15 U.S.C. § 1127).

⁹⁸ Christopher Buccafusco & Jeanne C. Fromer, *Fashion’s Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51, 93 (2017).

⁹⁹ *In re Morton-Norwich Prods. Inc.*, 671 F.2d at 1336 (citing *Davis v. Davis*, 27 F. 490, 492 (D. Mass. 1886)).

¹⁰⁰ Sharon Urias, *Comparing Trademark Issues in Very Different Industries: Fashion, Cannabis, High-Tech*, REUTERS (Nov. 21, 2022, 11:54 AM), <https://www.reuters.com/legal/litigation/comparing-trademark-issues-very-different-industries-fashion-cannabis-high-tech-2022-11-21/>.

fashion trademarks include the Hermès “H,” the interlocking Gucci “Gs,” and Louis Vuitton’s overlapping “LV.”¹⁰¹ Despite being able to protect brand-specific logos on clothing, trademark law is widely ineffective at protecting the clothing itself and its unique designs.¹⁰²

The lack of trademark protection available for clothing is rooted in functionality. The functionality doctrine takes two forms: “‘traditional’ or ‘utilitarian’ functionality” and “‘aesthetic’ functionality.”¹⁰³ The traditional utilitarian understanding of functionality is that “a product feature is considered to be ‘functional’ . . . if it is (1) ‘essential to the use or purpose of the article,’ or if it (2) ‘affects the cost or quality of the article.’”¹⁰⁴ Alternatively, “when the aesthetic design of a product is *itself* the mark for which protection is sought, we may also deem the mark functional if giving the markholder the right to use it exclusively ‘would put competitors at a significant non-reputation-related disadvantage.’”¹⁰⁵

Historically, clothing designs have been classified as being functional.¹⁰⁶ For example, a designer may choose to “use fabric that provides warmth . . . or fabric that wicks sweat away from the wearer’s body,” both acting as functional aspects of the clothing’s design.¹⁰⁷ Beyond standard functionality, a clothing design’s ability to make “wearers look attractive” may also be considered functionality as “the garment’s design is valued for what it can do when it is being used.”¹⁰⁸ Clothing design’s typical classification as functional has been detrimental to receiving trademark protection as “aspects of a product that are ‘functional’ generally ‘cannot serve as a trademark.’”¹⁰⁹ Rather, “functional features can be protected only through the patent system.”¹¹⁰

Unable to use trademark law generally to protect more than brand names, symbols, or identifying marks, brands may turn to trade dress, a “species” of

¹⁰¹ See generally HERMÈS, <https://www.hermes.com/us/en/> (last visited May 21, 2024); GUCCI, <https://www.gucci.com/us/en/> (last visited May 21, 2024); LOUIS VUITTON, <https://us.louisvuitton.com/eng-us/homepage> (last visited Mar 21, 2024).

¹⁰² See Raustiala & Sprigman, *supra* note 83, at 1701–02 (explaining that since most used trademarks are located on the inside of an article or on a very small portion of it, having a trademark does not prevent copying).

¹⁰³ *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 219 (2012).

¹⁰⁴ *Id.* (citing *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 850 (1982)).

¹⁰⁵ *Id.* at 219–20 (citing *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995)).

¹⁰⁶ See Buccafusco & Fromer, *supra* note 98, at 54–60.

¹⁰⁷ *Id.* at 54.

¹⁰⁸ *Id.* at 55.

¹⁰⁹ *Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d at 218 (citing *Qualitex Co.*, 514 U.S. at 165); see also 15 U.S.C. § 1152(e)(5) (explaining that no trademark shall be refused registration on the principle register unless it is functional).

¹¹⁰ *Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d at 218.

trademark law to defend their designs.¹¹¹ Trade dress is “the overall image used to present it to purchasers; it could thus include. . . the product’s size, shape, color, graphics, packaging, and label.”¹¹² By viewing a product wholistically, “trade dress provides protection for the entire . . . work rather than mere identifiable, separate elements of a piece.”¹¹³

On its face, trade dress may appear favorable for designers because “it focuses on a product’s total appearance and image” and thus could protect the entire piece of clothing beyond the designs it bears.¹¹⁴ However, “trade dress infringement has been difficult to prove because the courts have required the original creator to show secondary meaning” and then further “prove that the design pirate’s fashion work is confusingly similar to the designer’s original fashion work.”¹¹⁵

Hurdles and high bars to trade dress infringement claims receive additional support from the functionality defense governing trademark law as a whole. Designers have faced difficulty in overcoming aesthetic functionality arguments and have turned to the more popular and designer-friendly copyright law instead.¹¹⁶

C. COPYRIGHTS

“Commentators have suggested that copyright law holds the best solution to combat design piracy in the fashion industry.”¹¹⁷ Governed by Title 17, Section 102 of the United States Code and codified in Article I, Section 8 of the United States Constitution, “The Congress shall have [p]ower . . . [t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.”¹¹⁸ The goal of copyright law is to promote creativity and protect works such as books, music, movies, recordings, and paintings.¹¹⁹ Notably, clothing design is not included under the umbrella of creative works.

As is the case in trademark law, clothing is often unable to be copyrighted because copyright protection is limited. Protection does not extend to work that

¹¹¹ Manon Burns & Lisa Holubar, *Is it Functional or Is It Functional? Trade Dress vs. Design Patent “Functionality”*, AM. BAR ASS’N (Feb. 8, 2021), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/january-february/is-it-functional-trade-dress-vs-design-patent-functionality/.

¹¹² S. Priya Bharathi, *There Is More Than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works*, 27 TEX. TECH L. REV. 1667, 1679 (1996).

¹¹³ *Id.* at 1668.

¹¹⁴ *Id.* at 1680.

¹¹⁵ *Id.* at 1681, 1684.

¹¹⁶ *Id.* at 1686.

¹¹⁷ *Id.* at 1672 (citations omitted).

¹¹⁸ U.S. CONST. art. I, § 8, cl. 8.

¹¹⁹ 17 U.S.C. § 102(a)(1)-(8).

is considered a “useful article.”¹²⁰ A useful article is an object that has “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information,” such as an item of clothing.¹²¹ To overcome the limitations of clothing being considered a useful article, designers separate their designs from the clothing and utilize copyright law to protect the designs alone.¹²²

In the landmark case *Star Athletica, LLC v. Varsity Brands, Inc.*, the Court of Appeals for the Sixth Circuit considered whether a cheer uniform, without the stripes, zigzags, chevrons, and color blocks, is really a cheer uniform.¹²³ In other words, are the “pictorial, graphic, or sculptural features” able to be separated from the utilitarian function of the uniform?¹²⁴ In addressing separability, the court made the following clarification:

“[T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work,” and thus copyrightable, “only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”¹²⁵

Under this rule, a piece of clothing as a whole does not qualify for copyright protection, but the design features that can be separated from the piece of clothing are protected.¹²⁶ The ability for Varsity’s uniform designs to be separated from their utilitarian functionality led the court to find they were protectable under the Copyright Act, thus reversing the District Court’s holding.¹²⁷

Following the Sixth Circuit’s decision, the Supreme Court granted certiorari to lay to rest the debate over “the proper test for implementing Section 101’s separate identification and independent-existence requirements.”¹²⁸ The

¹²⁰ 17 U.S.C. § 113.

¹²¹ *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 481 (6th Cir. 2015); see also *Useful Articles*, COPYRIGHT.GOV, <https://copyright.gov/register/useful.html#:~:text=A%20%E2%80%9Cuseful%20article%E2%80%9D%20is%20an,%2C%20dinnerware%2C%20and%20lighting%20fixtures> (last visited Mar. 5, 2024) (listing examples of useful articles as clothing, furniture, machinery, dinnerware, and lighting fixtures).

¹²² See Zarocostas, *infra* note 126 (explaining how the design features that can be separated from the clothing itself are subject to copyright protection).

¹²³ *Varsity Brands*, 799 F.3d at 470.

¹²⁴ *Id.* at 471.

¹²⁵ *Id.* at 481.

¹²⁶ John Zarocostas, *The Role of IP Rights in the Fashion Business: A US Perspective*, WORLD INTELL. PROP. ORG. (Aug. 2018), https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html.

¹²⁷ *Varsity Brands*, 799 F.3d at 493.

¹²⁸ *Star Athletica, LLC, v. Varsity Brands, Inc.*, 137 U.S. 1002, 1007 (2017).

Supreme Court affirmed the Sixth Circuit decision and held that “a feature incorporated into the design of a useful article is eligible for copyright protection” if it satisfies a two prong test similar to that described by the Sixth Circuit.¹²⁹

First, “if the feature can be perceived as a two- or three- dimensional work of art separate from the useful article,” and second, if it “would qualify as a protectable pictorial, graphic, or sculptural work. . . if it were imagined separately from the useful article into which it is incorporated.”¹³⁰ In this instance, the “designs on the surface” of Varsity’s cheer uniforms satisfied this test and were thus eligible for copyright protection.¹³¹

The holding and analysis of *Varsity Brands* was a win for fashion designers being able to protect the creative designs they adorn to their clothing. Copyright law is not without its flaws however as “[t]he Copyright Act protects fabric designs, but not dress designs.”¹³² Meaning the “designs[s] imprinted on a fabric” are protected, while the creativity of designers in choosing the “arrangements of sequins, beads, ribbon, and tulle” to form the bust or waistband of a dress does not qualify for protection because the elements of the dress serve the utilitarian function to cover the wearer’s body.¹³³

Despite its limitations, copyright law is arguably the strongest avenue to seek intellectual property protection that designers have, and yet it still falls short, leaving designers to continuously suffer from design theft.

D. PATENTS

The utilitarian and aesthetic functionality of clothing that encumbers aspects of copyright and trademark law finds its place in patent law. Under United States patent law, a designer may apply for a utility patent, a design patent, or both.¹³⁴ “[A] ‘utility patent’ protects the way an article is used and works”—its functionality—“while a ‘design patent’ protects the way an article looks.”¹³⁵ More beneficial to the fashion industry, a design patent provides protection to “any new, original and ornamental designs for an article of manufacture.”¹³⁶

Contemplated by the Supreme Court in *Samsung Electronics Co., Ltd. v. Apple Inc.*, “article of manufacture” was determined to have a “broad meaning,” encompassing “both a product sold to a consumer as well as a component of

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1016.

¹³² *Varsity Brands*, 799 F.3d at 492 (citations omitted).

¹³³ *Id.* at 492-93.

¹³⁴ *Applying for Patents*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents/basics/apply#types> (last visited Mar. 5, 2024).

¹³⁵ U.S. PAT. & TRADEMARK OFF., MANUAL OF PATENT EXAMINING PROCEDURE § 1502.01 (9th ed. 2014, rev. Feb. 2023) (citations omitted).

¹³⁶ 35 U.S.C. § 171.

that product.”¹³⁷ The Court defined “article” as just a “particular thing,” and found “manufacture” to mean “the conversion of raw materials by the hand, or by machinery, into articles suitable for the use of man’ and ‘the articles so made.”¹³⁸

Rooted in appearances, “the subject matter of a design patent application may relate to the configuration or shape of an article, to the surface ornamentation applied to an article, or to the combination of configuration and surface ornamentation.”¹³⁹ Further, the article seeking protection is the design embodied in or applied to an article when it was made—a component of the article, not the article itself.¹⁴⁰ Examples of design patents in the fashion industry include designer Jenny Yoo’s patent for her convertible bridesmaid dresses¹⁴¹ and Gucci’s iconic bamboo handle used on several of its handbags.¹⁴²

These design patents were not easy to come by for these designers. To meet the requirements for a design patent, “the design must be novel, nonobvious, ornamental, and nonfunctional.”¹⁴³ These requirements often “present significant hurdles for fashion designers”¹⁴⁴ Obtaining patents for fashion designs has often been further criticized for being expensive and involving a “lengthy examination process.”¹⁴⁵

For smaller designers, this may mean foregoing the patent application process that large fashion houses can otherwise handle for their signature lines.¹⁴⁶ Patents also may provide uncertain prospects of protection. With a 15-year life span,¹⁴⁷ a design patent may last too long in the fast-paced fashion industry thus prohibiting creativity and innovation.¹⁴⁸

¹³⁷ Samsung Elecs. Co., Ltd. v. Apple Inc., 137 U.S. 429, 434–35 (2016).

¹³⁸ *Id.* at 435 (citation omitted).

¹³⁹ U.S. PAT. & TRADEMARK OFF., *supra* note 135, § 1502.

¹⁴⁰ *Id.*

¹⁴¹ Barton LLP Successfully Defends Jenny Yoo Collection, Inc. in Denial of Post-Grant Review of a Design Patent for a Convertible Dress Instituted by David’s Bridal, Inc., BARTON (Mar. 21, 2017), <https://www.bartonesq.com/news-article/barton-llp-successfully-defends-jenny-yoo-collection-inc-in-denial-of-post-grant-review-of-a-design-patent-for-a-convertible-dress-instituted-by-davids-bridal-inc/>.

¹⁴² Natalie Hughes, *History of the Hero: The Gucci Bamboo Bag*, HARPER’S BAZAAR (Jan. 5, 2024), <https://www.harpersbazaar.com/uk/fashion/what-to-wear/a40805954/gucci-bamboo-bag/>.

¹⁴³ Keely Irene Vega, *A Proposal for the Production of Fashion Design: Knocking Off Design Patent Law*, 56 J. COPYRIGHT SOC’Y U.S.A. 985, 992 (2009).

¹⁴⁴ *Id.* at 993.

¹⁴⁵ *Id.* at 994 (quoting *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006)).

¹⁴⁶ See *Clothing Design Patent: Everything You Need to Know*, UPCOUNSEL (July 6, 2020), <https://www.upcounsel.com/clothing-design-patent> (discussing the benefits and drawbacks of applying for a design patent).

¹⁴⁷ U.S. PAT. & TRADEMARK OFF., *supra* note 135, § 1502.01(a).

¹⁴⁸ Vega, *supra* note 143, at 994.

IV. FAST FASHION'S ENVIRONMENTAL IMPACT

As a consequence of fast fashion perpetuating micro-trend cycles and the “inadequacy of intellectual property protection” in the fashion industry, “the mimicked copies of designer trends are widespread and easily accessible” to consumers.¹⁴⁹ The constant pressure on the fast fashion industry to offer new, low-priced, and trendy items within weeks of consumers showing demand for them calls into question what impact the fast fashion industry has on the environment. The speed and volume of clothing production coupled with the materials utilized by fast fashion retailers is polluting the environment and depleting Earth's natural resources.¹⁵⁰

A. TEXTILE PRODUCTION

In fashion manufacturing, cotton and polyester are two of the most widely used and popular fibers, making up ninety percent of clothing sold in the United States.¹⁵¹ To produce the cotton needed to meet manufacturing demands and global exportation,¹⁵² cotton crop production accounts for more than three percent of global water consumption per year.¹⁵³ As a whole, the fashion industry uses 24 trillion gallons of water each year, equating to the consumption needs of five million people.¹⁵⁴ It takes over 700 gallons of water to make just one cotton shirt, enough to meet the average person's drinking needs for two and a half years,¹⁵⁵ and around 2,000 gallons to make one pair of jeans.¹⁵⁶

The increase of production in the fashion industry has caused the demand for manufactured fibers, such as polyester, to double in the last twenty years, despite the population growing by only twenty-five percent over the same time period.¹⁵⁷ This increase can be attributed to fast fashion trends as consumers have come to expect new products in stores every week.¹⁵⁸

¹⁴⁹ Elrod, *supra* note 71, at 585.

¹⁵⁰ *Id.*

¹⁵¹ Bick et al., *The Global Environmental Injustice of Fast Fashion*, 17 ENV'T HEALTH 1, 2 (2018).

¹⁵² *Cotton & Wool: Overview*, U.S. DEP'T AGRIC., <https://www.ers.usda.gov/topics/crops/cotton-and-wool/> (last updated Nov. 15, 2022).

¹⁵³ COTTON CONNECT, MORE CORP PER DROP: WATER REPORT ON THE COTTON INDUSTRY 1, 4 (Sept. 2014) https://static1.squarespace.com/static/5ff5d85f409193661a071749/t/603fcea39fa8ed5b7ed1eb3c/1614794407666/cottonconnect_more_crop_per_drop.pdf.

¹⁵⁴ Denton, *supra* note 21, at 383.

¹⁵⁵ *Id.*

¹⁵⁶ *Putting the Brakes on Fast Fashion*, UN ENV'T PROGRAMME (Nov. 12, 2018), <https://www.unep.org/news-and-stories/story/putting-brakes-fast-fashion>.

¹⁵⁷ Cristina Palacios-Mateo et al., *Analysis of the Polyester Clothing Value Chain to Identify Key Intervention Points for Sustainability*, ENV'T SCI. EUR. 1, 1 (2021).

¹⁵⁸ *Id.*

Fast fashion brands benefit from using polyester because it is the most inexpensive and versatile textile available, yet it poses extensive harm to the environment.¹⁵⁹ The production of polyester begins with extracting crude oil, a non-renewable fossil fuel resource consisting of thousands of different organic compounds.¹⁶⁰ Reaching the oil is a very energy intensive process requiring drilling through rock layers deep underground and pumping the oil to the surface.¹⁶¹

After being extracted, the crude oil must be refined and processed.¹⁶² This occurs by heating, distilling, and releasing harmful toxins such as BTEX compounds, particulate matter, and nitrogen oxides.¹⁶³ If these compounds are not properly controlled, they can contribute to air pollution and global warming.¹⁶⁴ After the crude oil is refined, it is used to produce polyethylene terephthalate (“PET”) pellets which are later converted into fibers by extrusion and spinning.¹⁶⁵ Once spun into a yarn-like material, it is knitted or weaved to produce fabric for garments, a process that includes adding dyes and additives to adjust the qualities of the fabrics.¹⁶⁶ Lastly, the fast fashion industry uses the fabric to make garments and delivers them to the market.¹⁶⁷ From start to finish, the production of polyester uses 125 megajoules per kilogram of energy—roughly equivalent to the energy obtained from burning one gallon of gasoline—and emits 27.2 kilograms of CO₂.

Out of the entire process of creating polyester, “[t]he dyeing and finishing step is ranked first in terms of environmental unsustainability” by causing “climate change, freshwater withdrawal . . . , [and] depletion of resources, ecosystem quality, and human health.”¹⁶⁸ Approximately twenty percent of global water pollution is attributed to the dyeing and finishing of textiles.¹⁶⁹

¹⁵⁹ Lucy Handley, *Polyester is One of the Biggest Polluters in Fashion – Here’s What One CEO Wants to Do About It*, CNBC (Sept. 17, 2023, 8:02 AM), <https://www.cnbc.com/2021/05/31/sustainability-in-fashion-why-polyester-is-a-problem-for-the-industry.html>.

¹⁶⁰ Palacios-Mateo et al., *supra* note 157, at 3.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 2.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *The Impact of Textile Production and Waste on the Environment*, EUR. PARLIAMENT (Nov. 11, 2015), <https://www.europarl.europa.eu/news/en/headlines/society/20201208STO93327/the-impact-of-textile-production-and-waste-on-the-environment-infographics#:~:text=Textile%20production%20is%20estimated%20to,microplastics%20released%20into%20the%20environment>.

Dye contaminated wastewater is often left untreated and disposed in nearby waterways, allowing it to eventually reach the sea and contaminate the ocean on a global scale.¹⁷⁰ In a 2007 study conducted in Tirupur India, it was revealed that “729 dyeing units were flushing 23 million gallons per day of mostly untreated wastewater into the Noyyal River, the majority of which collected in the Orathupalayam Dam reservoir.”¹⁷¹ When the dam was finally flushed, “400 tons of dead fish were found at the bottom.”¹⁷²

At the end of the polyester manufacturing process, consumers purchase clothing from a retailer and begin to wear it. Not only are microfibers, a subgroup of microplastics, being released into the air when the polyester clothing is worn,¹⁷³ but when consumers wash their clothes, roughly 4,000 microfibers per gram of fabric are released.¹⁷⁴ On a larger scale, an individual could release nearly 300 million polyester microfibers per year into the environment from washing their clothes, and over 900 million into the air just from wearing their clothing.¹⁷⁵ According to a 2020 United Nations Environment Program report, around nine percent of annual microplastic losses to the ocean come from clothes and other textiles.¹⁷⁶ Although the microplastics will eventually break down, the process can take hundreds or thousands of years.¹⁷⁷

B. TEXTILE WASTE

“The fast fashion model encourages consumers to view clothing as disposable.”¹⁷⁸ The accessibility of fast fashion, the constant cycle of new items

¹⁷⁰ Elrod, *supra* note 71, at 587.

¹⁷¹ Adam Matthews, *The Environmental Crisis in Your Closet*, NEWSWEEK (Aug. 13, 2015, 11:25 AM), <https://www.newsweek.com/2015/08/21/environmental-crisis-your-closet-362409.html>.

¹⁷² *Id.*

¹⁷³ Palacios-Mateo et al., *supra* note 157, at 8.

¹⁷⁴ See Alan Williams, *New Study Suggests Wearing Clothes Could Release More Microfibers to the Environment Than Washing Them*, UNIV. PLYMOUTH (Mar. 10, 2020), <https://www.plymouth.ac.uk/news/wearing-clothes-could-release-more-microfibres-to-the-environment-than-washing-them/> (discussing a study conducted by scientists from the Institute for Polymers, Composites and Biomaterials of the National Research Council of Italy (“IPCBC-CNR”) and the University of Plymouth comparing four different items of polyester clothing and how many fibers were released when they were being worn and washed).

¹⁷⁵ *Id.*

¹⁷⁶ *Microplastics: The Long Legacy Left Behind by Plastic Pollution*, U.N. ENV’T PROGRAMME (Apr. 28, 2023), <https://www.unep.org/news-and-stories/story/microplastics-long-legacy-left-behind-plastic-pollution>.

¹⁷⁷ *Microplastics*, NAT’L GEOGRAPHIC SOC’Y (Oct. 31, 2023), <https://education.nationalgeographic.org/resource/microplastics/>.

¹⁷⁸ Bick et al., *supra* note 151, at 2; see also Denton, *supra* note 21, at 372 (explaining that the fast fashion business model allows consumers to buy fashionable items conveniently, wear them while they are in style, and discard them after a few wears).

being offered to consumers, and the affordability of each piece has slowly diminished the value the clothing holds.¹⁷⁹ With little value to the consumer and the need to make room in their closet for the next trending item, consumers typically either dispose of their fast fashion purchases or donate them to second-hand stores.

According to the United States Environmental Protection Agency (“EPA”), less than fifteen percent of clothing produced in 2018 was recycled to second-hand stores such as Goodwill.¹⁸⁰ Beyond the United States, donated clothing may find its way into the second-hand clothing trade.¹⁸¹ The United States exports roughly “500,000 tons of used clothing” each year, with “the majority ending up in low and middle income countries.”¹⁸² In 2015 alone, “the United States exported over \$700 million worth of used clothing.”¹⁸³ Additionally, any second-hand clothing that is unable to be sold in stores in the United States gets compressed into bales, exported to other countries, and sold in their second-hand markets.¹⁸⁴ When this clothing fails to sell, it then finally gets thrown away, “becomes solid waste, clog[s] rivers, greenways, and parks,” and can cause health hazards in the low and medium income countries “lacking robust municipal waste systems.”¹⁸⁵

When Americans choose to throw their fast fashion purchases away, often due to their poor quality,¹⁸⁶ they are generating roughly ninety-two million tons of clothing waste each year.¹⁸⁷ That is equivalent to a garbage truck full of clothes being sent to landfills or being incinerated every second, or enough discarded clothing to fill one and a half empire state buildings every day.¹⁸⁸ Once in a landfill, it can take over two hundred years for fabrics to decompose.¹⁸⁹ As it

¹⁷⁹ Aisiri Girish, *Effect of Fast Fashion on the Environment and Its Impact on Sustainable Development*, 5 INDIAN J. L. & LEGAL RSCH. 1, 9 (2023).

¹⁸⁰ MARCUS RUGGIERO ET AL., FAST FASHION AND OCEAN POLLUTION: EXPLORING PROBLEMS AND POTENTIAL SOLUTIONS 1, 8 (2021).

¹⁸¹ Bick et. al, *supra* note 151, at 2.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; see also Alexandra L. Bernard, *The Hidden Costs Behind Cheap Clothing: Addressing Fast Fashion’s Environmental and Humanitarian Impact*, 25 VAND. J. ENT. & TECH. L. 541, 548–49 (2023) (explaining that when the United States exports clothing to Ghana, forty percent of the clothing bales ends up in landfills causing methane that exploded and burned for months).

¹⁸⁶ Elrod, *supra* note 71, at 588.

¹⁸⁷ Owen Mulhern, *The 10 Essential Fast Fashion Statistics*, EARTH.ORG (July 24, 2022), <https://earth.org/fast-fashion-statistics/#>.

¹⁸⁸ *Id.*

¹⁸⁹ *The Environmental Crisis Caused by Textile Waste*, ROADRUNNER (Jan. 8, 2021), <https://www.roadrunnerwm.com/blog/textile-waste-environmental-crisis#:~:text=And%20when%20consumers%20throw%20away,the%20groundwater%20and%20our%20soil.>

decomposes, the textiles generate greenhouse methane gas and leach toxic chemicals and dyes into the groundwater and soil.¹⁹⁰

Consumers throwing away their clothing after only a few wears are not the only contributors to fashion textile waste. Pre-consumer, or production waste, is created during the manufacturing of textiles and garments, including fiber, yarn, and fabric waste.¹⁹¹ Studies estimate fifteen percent of fabric used in garment manufacturing is wasted and twenty-five to thirty percent of textiles in general are wasted.¹⁹²

Fabric waste is typically produced during the cutting process of clothing construction and mistakes in assembling the clothes can generate additional waste.¹⁹³ As production has increased, pre-production waste has as well.¹⁹⁴ Recently, a type of pre-consumer waste known as deadstock has gained attention.¹⁹⁵ Deadstock is used to describe the unworn garments that are unsold, or returned, and are then designated as waste.¹⁹⁶ In 2018, fast fashion leader H&M was reported to have \$4.3 billion worth of deadstock in their warehouses.¹⁹⁷ To deal with deadstock, fashion companies will incinerate the clothing which generates emissions and air pollutants.¹⁹⁸

C. HOW CONSUMERS AND FAST FASHION COMPANIES ARE RESPONDING

Not all consumers are naive to the environmental toll caused by fast fashion production. Many consumers have the freedom to choose what brands they support and now more than ever, consumers are demanding better.¹⁹⁹ While fast fashion's affordable price tag has played arguably the most significant role in its success with consumers, now consumers are looking to "a brand's promotion of sustainability" and "use of sustainable materials" as important purchasing

¹⁹⁰ *Id.*

¹⁹¹ Kirsi Nünimäki et al., *The Environmental Price of Fast Fashion*, 1 EARTH & ENV'T 189, 195 (2020).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Nünimäki et. al., *supra* note 191, at 195.

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* (revealing that H&M was reported to have been incinerating brand new clothing at a waste-to-energy plant in Denmark and Burberry admitted £28.6 million worth of clothing was incinerated in 2017).

¹⁹⁹ Denton, *supra* note 21, at 384; *see also* Blake Morgan, *11 Fashion Companies Leading The Way In Sustainability*, FORBES (Feb. 24, 2020, 6:38 PM), <https://www.forbes.com/sites/blakemorgan/2020/02/24/11-fashion-companies-leading-the-way-in-sustainability/?sh=bb019ed6dba1> (discussing how customers increasingly want to have a positive impact on the environment with eighty-eight percent of consumers wanting brands to help them be more environmentally friendly).

factors.²⁰⁰ As a result of this demand, fast fashion brands have begun to incorporate sustainable practices into their operations.²⁰¹

H&M, a leader of the fast fashion industry, has leaned into sustainability with several initiatives such as its Garment Collecting program, being transparent regarding where its clothing comes from, voicing its commitment to reducing H&M's negative impact on emissions and water pollution, and its use of more sustainable materials.²⁰² Despite H&M's appealing and convincing website detailing its sustainability efforts and acknowledging the harms of the fast fashion industry, consumers should be cautious of sustainability claims made by fast fashion companies in the age of greenwashing.

Greenwashing occurs when a company or other entity misleads the public to believe that it is doing more to protect the environment than it really is.²⁰³ In doing so, false solutions to the climate crisis are being promoted which “distract[s] from and delay[s] concrete and credible action” thus presenting significant obstacles “to tackling climate change.”²⁰⁴ In July of 2022, H&M's claims of sustainability came under fire when a class action lawsuit was filed against it, citing false and misleading sustainability labeling, marketing, and advertising.²⁰⁵ The lawsuit alleged that the marketing for H&M's Conscious collection “deceives consumers into believing that the products are sustainable and environmentally friendly” by using terms such as “conscious” and “sustainable.”²⁰⁶

The lawsuit further claimed that H&M's marketing violated the Federal Trade Commission's (“FTC”) Guides for the Use of Environmental Marketing Claims, known as Green Guides “because it used an unqualified General Environmental Benefit Claim that misleadingly overstated the line's positive impact on the environment.”²⁰⁷ As of 2023 however, the FTC's Green Guides do not “provide parameters for when and how marketers can use ‘sustainability’ claims,” which

²⁰⁰ Alison Bringé, *The State of Sustainability in The Fashion Industry (and What It Means for Brands)*, FORBES (Jan. 2, 2023, 7:00 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2023/01/02/the-state-of-sustainability-in-the-fashion-industry-and-what-it-means-for-brands/?sh=66a417881c82>.

²⁰¹ *Id.*

²⁰² *Sustainability*, H&M, https://www2.hm.com/en_us/sustainability-at-hm.html (last visited Mar. 8, 2024).

²⁰³ *Greenwashing – The Deceptive Tactics Behind Environmental Claims*, U.N., <https://www.un.org/en/climatechange/science/climate-issues/greenwashing> (last visited Mar. 8, 2024) (citation omitted).

²⁰⁴ *Id.*

²⁰⁵ Class Action Complaint at 1, *Commodore v. H&M Hennes & Mauritz LP*, No. 7:22-cv-06247 (S.D.N.Y. Jul. 22, 2022).

²⁰⁶ Tiffany Ferris et al., *Guidance for ‘Sustainable’ Claims after Dismissal of H&M ‘Greenwashing’ Class Action*, REUTERS (June 2, 2023, 10:11 AM), <https://www.reuters.com/legal/legalindustry/guidance-sustainable-claims-after-dismissal-hm-greenwashing-class-action-2023-06-02/>.

²⁰⁷ *Id.*

has allowed use of the term to skyrocket.²⁰⁸ Despite the lawsuit against H&M later being dismissed, the FTC cautioned brands to avoid vague General Environmental Benefit Claims unless “stringent criteria” are met.²⁰⁹ While several fast fashion brands tout their meaningful environmentally-conscious initiatives, it is likely not enough to compensate for the overall impact of the fast fashion industry.²¹⁰

V. CURRENT ENVIRONMENTAL REGULATORY SCHEME

Emissions and water pollution from textile production are not without regulation. The Clean Air Act (“CAA”) is the comprehensive federal law that defines the Environmental Protection Agency’s (“EPA”) “responsibilities for protecting and implementing the nation’s air quality and stratospheric ozone layer.”²¹¹ More specifically, the CAA “regulates air emissions from stationary and mobile sources” and “authorizes the EPA to establish National Ambient Air Quality Standards (“NAAQS”) to protect public health and public welfare and to regulate emissions of hazardous air pollutants.”²¹²

Section 112 of the CAA addresses the emission of hazardous air pollutants stating that the emissions standards “applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction of the hazardous air pollutants subject to this section.”²¹³ Implicating the fashion industry, the EPA estimates that there are roughly 135 “major source facilities in the printing, coating, and dyeing of fabrics and other textile source category.”²¹⁴

The Clean Water Act (“CWA”) “establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Marianna Cerini, *Fast-Fashion Brands Claim They’re Cleaning Up Their Act for the Planet, But Their Premise Might Be Inherently Flawed*, FORTUNE (Nov. 28, 2022, 11:00 AM), <https://fortune.com/2022/11/28/fast-fashion-brands-claim-theyre-cleaning-up-their-act-for-the-planet-but-their-premise-might-be-inherently-flawed/>; see also Kenneth P. Pucker, *The Myth of Sustainable Fashion*, HARV. BUS. REV. (Jan. 13, 2022), <https://hbr.org/2022/01/the-myth-of-sustainable-fashion> (discussing how the fast fashion industry is anything but sustainable).

²¹¹ *Clean Air Act Overview*, ENV’T PROT. AGENCY, <https://www.epa.gov/clean-air-act-overview/clean-air-act-text> (last visited Mar. 9, 2024).

²¹² *Summary of the Clean Air Act*, ENV’T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-air-act> (last visited Mar. 9, 2024).

²¹³ 42 U.S.C. § 7412.

²¹⁴ *Printing, Coating, and Dyeing of Fabrics and Other Textiles: National Emission Standards for Hazardous Air Pollutants (NESHAP)*, ENV’T PROT. AGENCY, <https://www.epa.gov/stationary-sources-air-pollution/printing-coating-and-dyeing-fabrics-and-other-textiles-national> (last visited Mar. 9, 2024).

quality standards for surface waters.”²¹⁵ In order to “prevent, reduce, and eliminate pollution in the nation’s water,” the CWA established the National Pollutant Discharge Elimination System (“NPDES”) Program.²¹⁶ The NPDES Program “establishes an effluent permit system for point source . . . discharges of pollutants into waters of the U.S.”²¹⁷ Involving the fashion industry, the EPA promulgated the Textile Mills Effluent Guidelines which have been incorporated into NPDES permits.²¹⁸ Broadly defined, textile mills include facilities that receive and prepare fibers, transform fibers into yarn or thread, convert yarn into fabric, and finish various materials.²¹⁹ Further, methods of wastewater production derived from textile mills includes the dyeing and bleaching of various materials.²²⁰

There is one glaring problem with the effectiveness of both the Clean Air Act and Clean Water Act on regulating fast fashion production: both are domestic Acts with control solely over the United States. By outsourcing production to developing countries, fast fashion companies are circumventing the environmental regulations in place in the United States and taking advantage of lower labor costs.²²¹ Clothing manufactured for fast fashion company H&M spans forty countries, with Bangladesh home to 275 factories.²²² Similarly, fast fashion company Zara is able to quickly deliver new items to its nearly 3,000 stores spanning 96 countries with the power of its distribution centers in Spain.²²³

In order to get clothing into U.S. stores, fast fashion companies are continuously importing items from their overseas facilities. In 2022, the United States ranked first in the world in clothing imports amounting to \$116.1

²¹⁵ *Summary of the Clean Water Act*, ENV’T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited Mar. 9, 2024).

²¹⁶ *Clean Water Act (CWA) and Federal Facilities*, ENV’T PROT. AGENCY, <https://www.epa.gov/enforcement/clean-water-act-cwa-and-federal-facilities> (last visited Mar. 9, 2024).

²¹⁷ *Id.*

²¹⁸ *Textile Mills Effluent Guidelines*, ENV’T PROT. AGENCY, <https://www.epa.gov/eg/textile-mills-effluent-guidelines> (last visited Mar. 9, 2024).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Emma Ross, *Fast Fashion Getting Faster: A Look at the Unethical Labor Practices Sustaining a Growing Industry*, GEORGE WASH. L. (Oct. 28, 2021), <https://studentbriefs.law.gwu.edu/ilpb/2021/10/28/fast-fashion-getting-faster-a-look-at-the-unethical-labor-practices-sustaining-a-growing-industry/>.

²²² Elizabeth Paton & Sapna Maheshwari, *H&M’s Different Kind of Clickbait*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/2019/12/18/fashion/hms-supply-chain-transparency.html>.

²²³ Mary Hanbury, *We Went Inside One of the Sprawling Factories Where Zara Makes Its Clothes. Here’s How The World’s Biggest Fashion Retailer Gets It Done*, BUS. INSIDER (Oct. 28, 2018, 7:13 AM), <https://www.businessinsider.com/how-zara-makes-its-clothes-2018-10>.

billion.²²⁴ Monitoring the importation and exportation of clothing and other goods between nations is the World Trade Organization (“WTO”).²²⁵ The WTO is run by its 164 member governments and broadly defined, “[i]t is a forum for governments to negotiate trade agreements.”²²⁶ While the WTO states its purpose is to “help its members use trade as a means to raise living standards, create jobs and improve people’s lives,” it originated after “five decades of negotiations aimed at progressively reducing obstacles to trade.”²²⁷

One of the WTO’s core principles is promoting fair competition.²²⁸ Despite often being referred to as a “‘free trade’ institution,” the WTO argues that its system does allow for tariffs and other forms of protection in limited circumstances.²²⁹ Focusing on the environmental implications of imports and exports, the WTO states that its “members have the right to adopt trade-related measures to protect the environment” so long as such measures comply with the General Agreement on Tariffs and Trade.²³⁰ The WTO may indicate its willingness to protect the environment, but in reality the WTO’s standpoint is that “the responsibility for environmental policy should remain at the national level” and international trade should not be complicated by environmental issues.²³¹ The WTO’s perspective correlates with the specificity rule, an economic principle that suggests “policy solutions should be targeted directly at the source of the problem,” and therefore using trade tariffs and other measures to accomplish environmental goals is not the proper solution.²³² Doing so would

²²⁴ *Merchandise Trade*, WTO, https://stats.wto.org/dashboard/merchandise_en.html (last visited Mar. 10, 2024).

²²⁵ *What is the WTO?*, WTO, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Mar. 10, 2024).

²²⁶ *Id.*

²²⁷ *Who We Are*, WTO, https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm#:~:text=The%20WTO%20operates%20the%20global,they%20face%20with%20each%20other (last visited Mar. 10, 2024).

²²⁸ *Principles of the Trading System*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#:~:text=The%20WTO%20is%20sometimes%20described,open%2C%20fair%20and%20undistorted%20competition (last visited Mar. 10, 2024).

²²⁹ *Id.*; see also JONATHAN M. HARRIS, TRADE AND THE ENVIRONMENT 1 (Tufts Univ. ed., 2004) (discussing how the free trade principles that form the basis of the General Agreement on Tariffs and Trade and the WTO preclude countries from restricting imports except in very limited circumstances).

²³⁰ *WTO Rules and Environmental Policies: Introduction*, WTO, https://www.wto.org/english/tratop_e/envir_e/envt_rules_intro_e.htm#:~:text=WTO%20members%20have%20the%20right,the%20exceptions%20to%20these%20rules (last visited Mar. 10, 2024).

²³¹ HARRIS, *supra* note 229, at 12.

²³² *Id.*

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reduce the benefits of trade, the concern for which further highlights the WTO's priority of free trade over environmental concerns.²³³

The influx in greenwashing lawsuits, fast fashion production occurring in countries outside the United States, and the WTO's focus on free trade rather than the environment encourages looking for a solution to fast fashion's environmental destruction outside of environmental or trade law.

VI. PROPOSED SOLUTION

The fashion industry and the environment are suffering at the expense of fast fashion companies.²³⁴ Fast fashion companies have adapted their supply chains to make copying other designers' work easier while simultaneously increasing output at a rate that is unsustainable and difficult to stop.²³⁵ In order to hinder the production of knockoffs and minimize the environmental impacts of production, fashion designs must be protected by intellectual property law. Seeking protection for fashion designs through amendments to existing intellectual property law is not a new approach, however, as members of Congress have repeatedly turned to amending the Vessel Hull Design Protection Act ("VHDPA") to include protection for fashion designs.

A. THE VESSEL HULL DESIGN PROTECTION ACT AND SUBSEQUENT AMENDMENTS

In 1989, the Supreme Court struck down a state statute prohibiting individuals from making molds of unpatented vessel hulls and then utilizing the molds to manufacture and sell copies.²³⁶ In *Bonito Boats, Inc v. Thunder Craft Boats, Inc.*, the court held that the statute was preempted by the Supremacy Clause for offering "patent-like protection" for ideas unprotected under federal law.²³⁷ Justifying their holding, the court reiterated that "Congress has considered extending various forms of limited protection to industrial design either through the copyright laws or . . . design patents," yet has "explicitly refused to take this step in the copyright laws" and "has declined to alter the patent protections . . . for industrial design."²³⁸

²³³ *Id.*

²³⁴ See Brad Plumer, *Climate Change is Speeding Towards Catastrophe. The Next Decade is Crucial*, U.N. Panel Says., N.Y. TIMES (Sep. 13, 2023), <https://www.nytimes.com/2023/03/20/climate/global-warming-ipcc-earth.html>.

²³⁵ See CARO & MARTÍNEZ-DE-ALBÉNIZ, *supra* note 26, at 241–42 (discussing the changes fast fashion retailers have made to their business models and supply chains to increase production).

²³⁶ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 143 (1989).

²³⁷ *Id.* at 166.

²³⁸ *Id.* at 166–67.

In 1998, in response to *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, Congress passed the Vessel Hull Design Protection Act (“VHDPA”) as part of the Digital Millennium Copyright Act (“DMCA”).²³⁹ The VHDPA established sui generis protection for the original designs of vessel hulls.²⁴⁰ The VHDPA protects the “original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public” for ten years upon registration.²⁴¹ Historically the focus of amendments, the VHDPA narrowly defines a useful article as “a vessel hull or deck, including a plug or mold.”²⁴² While vessel hulls and fashion designs bear few obvious similarities, members of Congress have repeatedly introduced bills in the house and senate seeking to amend the VHDPA to include sui generis protection for fashion designs.²⁴³

1. *The Design Piracy Prohibition Act*

In 2006, Representative Bod Goodlatte introduced the Design Piracy Prohibition Act (“DPPA”) as House Bill 5055 (“H.R. 5055”) to amend Chapter 13 of Title 17, the VHDPA, to provide protection for fashion designs.²⁴⁴ Under H.R. 5055, the VHDPA would explicitly indicate that “a fashion design is subject to protection” and would amend the definition of a useful article to include an “article of apparel.”²⁴⁵ Acknowledging the fast pace of the fashion industry, H.R. 5055 provides for only three years of protection, a reasonable concession from the ten years provided to vessel hulls, and maintains the VHDPA registration requirement.²⁴⁶

H.R. 5055 also expands the definition of infringement to include any article, the design of which has been copied from an image of a protected design.²⁴⁷ It is not considered infringement, however, to make, have made, import, sell, or distribute any article embodying a design that was created without knowledge or “reasonable grounds to know that the protection for the design is claimed.”²⁴⁸ During the hearing before the Subcommittee on Courts, the Internet, and Intellectual Property, Representative Goodlatte acknowledged concerns over the scope of the legislation and clarified that “only ‘closely and substantially similar’

²³⁹ Bradley J. Olson, *The Vessel Hull Design Protection Act of 1998: Is It Still Afloat?*, 1 J. INTELL. PROP. L. & PRAC. 732, 732 (2006).

²⁴⁰ 17 U.S.C. §§ 1301–1316.

²⁴¹ 17 U.S.C. §§ 1301, 1304, 1305.

²⁴² 17 U.S.C. §1301(b)(2).

²⁴³ Kimberly Ann Barton, *Back to the Beginning: A Revival of a 1913 Argument for Intellectual Property Protection for Fashion Design*, 35 J. CORP. L. 425, 434 (2009).

²⁴⁴ H.R. 5055, 109th Cong. (2006).

²⁴⁵ *Id.* § 1(a).

²⁴⁶ *Id.* § 1(c).

²⁴⁷ *Id.* § (1)(d).

²⁴⁸ *Id.*

copies will be considered to infringe on registered designs,” a standard that will “promote innovation and preserve the development of trends.”²⁴⁹

Despite garnering support from the fashion and apparel industries and other members of Congress, H.R. 5055 never made it past its subcommittee hearing. H.R. 5055 was not the end for the DPPA, however, as it was reintroduced as House Bill 2033 (“H.R. 2033”) by Representative William Delahunt in 2007.²⁵⁰ H.R. 2033, an exact copy of its predecessor H.R. 5055, subsequently received a similar fate as it was referred to the Subcommittee on Courts, the Internet, and Intellectual Property, where no further action was taken.²⁵¹

Later in 2007, however, the DPPA was introduced a third time as Senate Bill 1957 (“S. 1957”) by Senator Charles Schumer.²⁵² S. 1957 was substantially the same as H.R. 5055 and H.R. 2033, with only one additional significant change to Section 1309 of the VHDP, which discusses infringement.²⁵³ As amended, Section 1309 of the VHDP would state, “in the case of a fashion design, a design shall not be deemed to have been copied from a protected design if it is original and not closely and substantially similar in overall visual appearance to a protected design.”²⁵⁴ S. 1957 thus formally introduces the standard for determining infringing use that was intended by Representative Goodlatte for H.R. 5055.²⁵⁵ Adding greater specificity for infringing use was not enough, however, as S. 1957 was referred to the Committee on the Judiciary and never further addressed.²⁵⁶

The final attempt at passing the DPPA was made in 2009 via House Bill 2196 (“H.R. 2196”), proposed by William Delahunt in the 111th Congress.²⁵⁷ H.R. 2196 proposed several additional amendments to the VHDP and varied significantly from prior unsuccessful DPPA bills, beginning with amending Section 1301 of the VHDP to include a broader definition of fashion design.²⁵⁸ In addition to including “article of apparel” as a useful article, a fashion design would encompass both the “appearance as a whole of an article of apparel,

²⁴⁹ *A Bill to Provide Protection for Fashion Designs: Hearing on H.R. 5055 Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. [hereinafter *H.R. 5055 Hearing*] (statement of Rep. Bob Goodlatte, Member, Subcomm. on Cts., the Internet, and Intell. Prop.).

²⁵⁰ H.R. 2033, 110th Cong. (2007).

²⁵¹ H.R. 2033 – *Design Piracy Prohibition Act*, CONGRESS.GOV, <https://www.congress.gov/bill/110th-congress/house-bill/2033/committees> (last visited May 15, 2024).

²⁵² S. 1957, 110th Cong. (2007).

²⁵³ *Id.* § 1(d).

²⁵⁴ *Id.*

²⁵⁵ H.R. 5055 *Hearing*, *supra* note 244.

²⁵⁶ S. 1957 – *Design Privacy Prohibition Act*, CONGRESS.GOV, <https://www.congress.gov/bill/110th-congress/senate-bill/1957> (last visited May 15, 2024).

²⁵⁷ H.R. 2196, 111th Cong. (2009).

²⁵⁸ *Id.* § 2.

including its ornamentation” and “original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel.”²⁵⁹ Reflecting an understanding of the fashion industry and the influence of trends on fashion designs, H.R. 2196 states that a fashion design will not be considered a copy if it is “original and not closely and substantially similar in overall visual appearance to a protected design, if it merely reflects a trend, or if it is the result of independent creation.”²⁶⁰

Following previous bills, H.R. 2196 offers 3 years of protection, requires registration, and will not find an infringement has occurred if an article was created without “reasonable grounds to know that protection for the design is claimed.”²⁶¹ In an attempt to avoid infringement and excess litigation, H.R. 2196 proposed adding Section 1333 to the VHDPA, requiring the Register of Copyrights to establish and maintain a “computerized database of fashion designs protected.”²⁶² Like all DPPA bills to come before it, however, H.R. 2196 was referred to the House Committee on the Judiciary, but went no further. After four failed attempts to pass the DPPA and establish protection for fashion designs, members of Congress persisted and turned their focus on the Innovative Design Protection and Piracy Prevention Act (“ID3PA”).

2. *The Innovative Design Protection and Piracy Prevention Act*

First introduced by Senator Charles Schumer as Senate Bill 3728 (“S. 3728”) in 2010, the ID3PA built upon the DPPA and sought to amend the VHDPA to extend copyright protection to fashion designs.²⁶³ Once introduced, S. 3728 was referred to the Committee on the Judiciary and then placed on the Senate legislative calendar under general orders, but was never further discussed.²⁶⁴ In the following year, Representative Goodlatte introduced an identical bill, House Bill 2511 (“H.R. 2511”), in the 112th Congress.²⁶⁵ H.R. 2511 proposed amending the VHDPA like all DPPA bills that came before it, but narrowed the scope of infringement, added greater specificity as it relates to fashion designs, and addressed many of the concerns hindering the success of the DPPA bills.²⁶⁶

H.R. 2511 strictly defines protectable fashion designs as “the appearance as a whole of an article of apparel, including its ornamentation.”²⁶⁷ Also included are the “original elements of the article of apparel” that are the result of a designer’s

²⁵⁹ *Id.* § 2(a).

²⁶⁰ *Id.* § 2(e).

²⁶¹ *Id.*

²⁶² *Id.* § 2.

²⁶³ S. 3728, 111th Cong. (2010).

²⁶⁴ S. 3728 – *Innovative Design Protection and Piracy Prevention Act*, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/senate-bill/3728> (last visited May 16, 2024).

²⁶⁵ H.R. 2511, 112th Cong. (2011).

²⁶⁶ *Id.*

²⁶⁷ *Id.* § 2(a).

own creativity and “provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs” for similar articles.²⁶⁸ By proposing such a narrow definition, H.R. 2511 encourages designers to be innovative and come up with original, unique designs.

The most significant amendment to the VHDPA proposes a “substantially identical” standard for fashion design infringement, precluding a claim for infringement if a design is not substantially identical in appearance to a protected design and its original elements, or is the result of independent creation.²⁶⁹ By replacing the prior bill’s proposed “substantially similar” language, H.R. 2511 focuses on deterring the manufacture and sale of knockoffs that undermine the market for original designs.²⁷⁰ In targeting knockoffs, the ID3PA “reflects a judgment that knockoffs are not necessary to the business of high-volume sellers of on-trend clothing at a low price point.”²⁷¹ In other words, producing knockoffs is not required for fast fashion companies to be successful and should be deterred.

In response to concerns over increased litigation, H.R. 2511 proposes amending the VHDPA to include a pleading requirement specifically for fashion designs, where a claimant in an infringement action must “plead with particularity” facts establishing that the design is entitled to protection, the defendant infringes upon the protected design, and the protected design was available in manner that it can be “reasonably inferred from the totality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design.”²⁷²

As amended under the proposals of H.R. 2511, the VHDPA would provide 3 years of protection for fashion designs but would not require registration.²⁷³ Therefore, the owner of a design could bring an infringement claim for a design once the design has been made public, pursuant to Section 1310(b) of the VHDPA.²⁷⁴ The lack of a registration requirement may lower barriers to protection but may simultaneously create difficulty in meeting the pleading standards required for infringement claims.

Even with the support of several members of Congress, the American Apparel and Footwear Association, and other members of the fashion and apparel industry, H.R. 2511 was referred to the Subcommittee on Intellectual

²⁶⁸ *Id.*

²⁶⁹ *Id.* § 2(e).

²⁷⁰ *Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intell. Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 13 (2011) [hereinafter *H.R. 2511 Hearing*] (statement of Jeannie Suk, Professor of Law, Harvard Law School).

²⁷¹ *Id.*

²⁷² H.R. 2511, 112th Cong. § 2(g) (2011).

²⁷³ *Id.* § 2(d) (2011).

²⁷⁴ *Id.* § 2(g).

Property, Competition, and the Internet for a hearing where no further action was taken.²⁷⁵ Undeterred by the bleak prospect of amending the VHDPA to include fashion design, a last stitch effort was made by Senator Charles Schumer, who introduced the Innovative Design Protection Act of 2012 (“IDPA”) as Senate Bill 3523 (“S. 3523”) in the 112th Congress.²⁷⁶

3. *The Innovative Design Protection Act of 2012*

Although largely similar to H.R. 2511 with a three year protection term afforded without registration, a “substantially identical” infringement standard, narrow definition of fashion design, and pleading requirements, S. 3523 has several key differences.²⁷⁷ Most notably, S. 3523 proposes that in the case of a fashion design, “the owner of the design shall provide written notice of the design to any person the design owner has reason to believe has violated or will violate” chapter 13.²⁷⁸ Once notice is delivered to the defendant, the owner of the design must wait twenty-one days from the date of delivery to commence an action for infringement.²⁷⁹

S. 3523 also retains the unique home sewing infringement exception from H.R. 2511, stating that “it is not an infringement . . . for a person to produce a single copy of a protected design for personal use or for the use of an immediate family member, if the copy is not offered for sale or use in trade.”²⁸⁰ Also in the realm of infringement, S. 3523 defines “substantially identical” as being “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.”²⁸¹ By defining substantially identical, S. 3523 provides additional guidelines for designers and removes subjectivity from the process of determining whether something is infringing.

After building upon and strategically changing the bills that preceded it, S. 3523 reached a similar fate as it was referred to the Committee on the Judiciary and eventually placed on the Senate Legislative Calendar where no further actions were taken.²⁸² Since the 112th Congress in 2012, no proposed

²⁷⁵ *All Information (Except Text) for H.R. 2511 – Innovative Design Protection and Piracy Prevention Act*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/2511/all-info> (last visited May 16, 2024).

²⁷⁶ S. 3523, 112th Cong. (2012).

²⁷⁷ *Id.*

²⁷⁸ *Id.* § 2(e).

²⁷⁹ *Id.*

²⁸⁰ *Id.* § 2(f).

²⁸¹ *Id.* § 2(a).

²⁸² *S. 3523 – Innovative Design Protection Act of 2012*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/senate-bill/3523/text> (last visited May 16, 2024).

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amendments to the VHDPA have been introduced and protection for fashion designs has fallen to the wayside.²⁸³

B. OPPOSITION TO AMENDING THE VESSEL HULL DESIGN PROTECTION ACT

Over the span of six years, members of Congress introduced seven bills in the pursuit of amending the VHDPA to add protection for fashion designs. Yet, in 2024 the VHDPA still contains no mention of fashion designs or articles of apparel.²⁸⁴ A lack of support for and outright lobbying against amendments to the VHDPA combined with concerns of increased litigation, lack of specificity, and amendments being ineffective has left bills sitting in congressional committees and prohibited bills from passing.

When the DPPA was first introduced as H.R. 5055, Christopher Sprigman, Associate Professor at the University of Virginia School of Law, was vocal of his opposition to H.R. 5055 and his opinion that legislation was not needed.²⁸⁵ Sprigman pointed out that “we view competition as the mainspring of our economy” and therefore only “introduce IP rights when we think there is a problem with innovation, and we need to incentivize innovation.”²⁸⁶ Finding no problem with innovation in the fashion industry and claiming the industry incentivizes innovation with competition and low barriers of entry, Sprigman further asserted that the fashion industry is actually helped by piracy and knockoffs.²⁸⁷ While Sprigman admitted that small, individual designers may suffer, he emphasized that the industry depends on creating trends to sell as much fashion as the industry does and that there is a “huge benefit to the way we do things and the way the industry does things now.”²⁸⁸ Sprigman broadly rested his argument on the consistent creativity and profitability of the fashion industry, an industry without any intellectual property rules in place to protect original designs.²⁸⁹

Agreeing with Sprigman, The California Fashion Association (“CFA”) published a position paper detailing its opposition of the DPPA in 2009 when introduced as H.R. 2916.²⁹⁰ Citing reasons similar to Sprigman, the CFA claimed that (1) the fashion industry benefits from copying and does not need more legislation, (2) copying does not hurt designers, (3) fashion designs are no longer truly original, (4) the DPPA would curb creativity and innovation in fashion, (5)

²⁸³ *Legislative Developments*, COPYRIGHT.GOV, <https://www.copyright.gov/legislation/> (last visited April 14, 2024).

²⁸⁴ 17 U.S.C. §§ 1301–1316.

²⁸⁵ *H.R. 5055 Hearing*, *supra* note 249.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Barton, *supra* note 243, at 443.

enforcement of legislation will be prohibitively difficult, and (6) it will be hard for small design companies to defend against infringement claims.²⁹¹

Beyond lobbying against any new legislation for fashion design in general, opponents to amending the VHDPA expressed common concerns over new legislation. When H.R. 2196 was introduced in 2009, Kevin Burke, then President and CEO of the American Apparel and Footwear Association (“AAFA”), asked Congress to refrain from enacting the DPPA out of concern for “excess litigation,” “bogus claims,” and the subjective nature of H.R. 2196’s “substantial similarity” language.²⁹² When the ID3PA was introduced as H.R. 2511, it also faced criticism over its potential to increase litigation and give rise to copyright trolls.²⁹³ By not requiring a registry for fashion design yet imposing liability when someone “reasonably should have known” that they are “dealing in infringing garments,” Sprigman anticipated law firms could go into business with copyright trolls and buy the right to litigate infringement claims against department stores.²⁹⁴

The scope of amendments to the VHDPA were also a major concern when H.R. 5055 was introduced in 2006. Opponents felt H.R. 5055 was too broad and worried it would “prohibit the ability for designers and retailers to replicate current trends and styles,” a practice upon which the fashion industry thrives.²⁹⁵ In defense of H.R. 5055, supporters responded by pointing out the proposed “substantially similar” language for infringement is consistent with copyright law and therefore not overly broad or inadequate as a standard for infringement.²⁹⁶ Hearing the concerns over the scope of H.R. 5055, however, drafters of the ID3PA, as H.R. 2511, addressed this by significantly narrowing infringement to “substantially identical.”²⁹⁷

Despite thoughtful changes to bills over the years addressing concerns held by those against amending the VHDPA, the benefit of providing protection for fashion designs was nevertheless overshadowed with concerns regarding need, litigation, and scope. It has been twelve years since the last proposal and with the current state of the environment and fashion industry, it is more crucial than ever to propose a new amendment to the VHDPA to provide protection for fashion designs.

²⁹¹ *Id.*

²⁹² *Id.* at 442–43.

²⁹³ H.R. 2511 Hearing, *supra* note 270, at 96.

²⁹⁴ *Id.*

²⁹⁵ H.R. 5055 Hearing, *supra* note 249.

²⁹⁶ *Id.*

²⁹⁷ H.R. 2511, 112th Cong. (2011); *see generally*, H.R. 2511 Hearing, *supra* note 270, at 15–16 (explaining how the ID3PA has been narrowed to the substantially identical standard for infringement).

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C. AMENDING THE VESSEL HULL DESIGN PROTECTION ACT TO PROTECT DESIGNERS AND THE ENVIRONMENT

A new bill picking up where H.R. 2511 left off with the ID3PA, with amendments inspired by the DPPA bills that came before it, provides the greatest chance of finally providing protection to fashion designs. When H.R. 2511 was drafted, the AAFA, the Council of Fashion Designers of America (“CFDA”), Senator Schumer, and Representative Goodlatte joined forces to revamp H.R. 5055 into the ID3PA to create a targeted approach that solves the “narrow design piracy problem without exposing any innocent actor in the fashion industry to confusing rules and frivolous legal claims.”²⁹⁸ H.R. 2511 is a moderate yet tailored bill focused strictly on protecting fashion designs and deterring the production and sale of knockoffs of original designs.²⁹⁹ Many of the concerns of manufacturers and retailers are overstated because “as long as retailers are not selling knockoffs, they have nothing to fear” from H.R. 2511 and “even if they are, they are still safe if the design that they knock off is in the public domain or is not itself original, or if they are unaware that the items that they sell are knockoffs.”³⁰⁰

H.R. 2511 is not perfect, however, and not only should it be amended and repropoed as a new bill, but when arguing in support of it, there must be an added emphasis on the environment and the role fast fashion and knockoffs play in its destruction. Historically, seeking protection for fashion designs though the VHDPA has been rooted in promoting innovation, deterring knockoffs, and protecting emerging designers.³⁰¹ While each of these is important and will continue to be advocated for, it has not been enough to garner support to pass any bill amending the VHDPA as there has been a counter concern of intellectual property legislation having an adverse impact on economic growth.³⁰² By exposing the harsh reality of the effects the fast fashion industry has on the environment, supporters of amending the VHDPA can put necessary pressure on Congress to disrupt the fast fashion industry by providing protection for fashion designs.

The new bill will retain many of the amendments proposed in H.R. 2511. A three-year limit for protection, beginning when a design enters the market, reflects the fast pace of the fashion industry and constant emergence of new trends, yet is not overly restrictive. It is critical for the new bill to maintain the narrow scope of H.R. 2511 in order to secure support, and therefore infringement shall not be found unless the design is substantially identical to a protected design, meaning it is so similar in appearance as to likely be mistaken

²⁹⁸ H.R. 2511 Hearing, *supra* note 270, at 91.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ H.R. 5055 Hearing, *supra* note 249.

³⁰² *Id.*

for the protected design. Setting a high bar for infringement claims allows designers to still draw inspiration from others but prevents the production of knockoffs and promotes innovation.³⁰³

To address litigation concerns, it is critical that the new bill maintains the pleading standard of H.R. 2511, requiring that claimants plead with particularity facts establishing that their design has been infringed upon. For potential defendants, it is not infringement when a design is created without knowledge, either actual or reasonably inferred from the totality of the circumstances, that a design is protected. To prevent copyright trolls and put designers on notice of protected designs, an optional database should be established, such as the one proposed in H.R. 2196. The database must be optional, however, because the new bill would not have a registration requirement since it is inconducive to the pace of the fashion industry and may be an obstacle for smaller designers seeking protection.

Fashion designers and the environment cannot afford this bill to end up like its predecessors. Protection must be afforded to fashion designs, and if not for the protection of designer's hard work and creativity, then for the environment and the future.

VII. CONCLUSION

The popular styles that the majority of consumers are purchasing today will be out of style in a month, maybe less. Without new legislation aimed at protecting designers and subsequently the environment, companies will continue to mimic other designers' work by exploiting the holes in existing intellectual property law and destroy the environment in the process. Amendments to the VHDPa can lead to an overall reduction of design theft, thus potentially slowing fast fashion production, and subsequently halting the irreversible destruction the environment is headed towards. The fashion industry has been left to monitor itself for too long and a drastic change in intellectual property law is imperative.

³⁰³ H.R. 2511 Hearing, *supra* note 270.