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WILL FAST FASHION GO OUT OF STYLE SOON? HOW COUTURE DESIGNERS, CELEBRITIES, AND LUXURY BRANDS FIGHTING BACK MAY CHANGE THE FUTURE LEGAL LANDSCAPE FOR MASS AFFORDABLE RETAILERS

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WILL FAST FASHION GO OUT OF STYLE SOON?
HOW COUTURE DESIGNERS, CELEBRITIES, AND
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FUTURE LEGAL LANDSCAPE FOR MASS AFFORDABLE
RETAILERS

By Elizabeth Vulaj¹

In this Article, I discuss the current state of litigation within the context of fast-fashion and luxury retailers, a relationship that has been by all intents and purposes, strained for the past several years. As lawmakers, courts, and judges have struggled to outline a set of rules and regulations that govern the line between inspiration and infringement, many fast-fashion retailers have been sued by luxury designers for alleged trademark infringement, unfair competition, and use of likeness without permission. Many retailers claim they are simply being inspired by higher-end designers, yet luxury brands allege that their logos, patterns, designs, trademarks, and years of hard work and innovation have been copied by large stores and mass retailers for their own monetary benefit and gain. With few cases that have been litigated in this area and a general lack of codes and regulations, mass retailers and luxury brands have been left to duke it out amongst themselves while courts work towards providing more stringent outlines for potential cases to come.

This piece focuses on how the rise of mass retailers, such as Forever 21 and Target, have grown to popular online fast fashion brands, such as Fashion Nova and Missguided, which has led to a growth of intellectual property litigation in the world of fashion. This Article also addresses how current legislation, acts, and regulations provide little guidance as to how brands and designers should be working in order to avoid potential

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lawsuits, how each facet of intellectual property law such as trademarks, copyright law, and patents are able to provide some protection for luxury brands, and an examination into the most notable and recent cases involving fast-fashion and luxury designers. The Article closes with a look into what design conduct is legal and what is not and where this leaves fast-fashion retailers in the years to come.

By tracing the origins of the influx of this type of litigation, examining the set of cases that are currently before courts, and discussing where this leaves mass retailers (especially considering their increasing popularity with younger consumers), hopefully readers will get a robust sense of this type of intellectual property litigation and how it will affect courts, designers, and fast-fashion and luxury brands in the years to come.

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INTRODUCTION

Fast fashion now has many more people cramping its style. Within the past several years, affordable and mass brands such as Forever 21, Fashion Nova, and H&M, also known as “fast fashion”, a phrase for “cheap clothing produced quickly and sold by large, mass-

market retailers in order to respond to the latest fashion trends,² have faced various lawsuits alleging trademark infringement,³ unfair competition,⁴ and use of likeness and name without permission.⁵ While there are other similar matters splashed across the headlines of fashion publications and discussed in legal scholarship, it is important to remember that three distinct types of cases are being featured most prominently in the news.

First, designers and couture houses have been quick to initiate lawsuits against fast fashion brands, with many of them alleging trademark infringement because they claim that the designs, logos, and overall look of items of clothing so similarly mirror their original designs. This has been seen in many instances, including several lawsuits initiated against Forever 21 by high-end designers and labels such as Anna Sui,⁶ Diane von Furstenberg,⁷ and Gucci,⁸ alleging the affordable retailer copied the original work. There have also been similar actions filed against Target by luxury retail giant Burberry, alleging the discount chain copied the brand's signature check print in 2018,⁹ or luxury designer Isabel Marant accusing retail giant Mango of copying the design of an original pair of boots.¹⁰ Most recently in November 2019, Italian luxury designer Versace filed a lawsuit against

² *Fast fashion*, MACMILLAN DICTIONARY (Sept. 12, 2018), <https://www.macmillandictionary.com/us/buzzword/entries/fast-fashion.html>.

³ *H&M, Tory Burch Settled Converse Lawsuits Out of Court*, THE FASHION L. (Feb. 24, 2015), <http://www.thefashionlaw.com/home/hm-tory-burch-settled-converse-lawsuits-out-of-court>.

⁴ *Fast fashion and IP regulation: will fast fashion kill the golden goose?*, LEXOLOGY (May 24, 2018), <https://www.lexology.com/library/detail.aspx?g=2b1efd99-6f50-486f-aec2-fa9569bc9102>.

⁵ Will Martin, *Kim Kardashian won \$2.7 million in a lawsuit accusing fast-fashion brand Missguided of 'knocking off' her clothes*, BUS. INSIDER (July 4, 2019, 2:45 AM), <https://www.businessinsider.com/kim-kardashian-missguided-lawsuit-awarded-damages-california-judge-2019-7>.

⁶ Amy Odell, *Forever 21's Ability to Copy Designer Clothes Could Be in Jeopardy*, THE CUT (Apr. 13, 2009), https://www.thecut.com/2009/04/forever_21s_ability_to_copy_de.html.

⁷ Liza Casabona, *Diane von Furstenberg Sues Forever 21 Over Copyright*, WOMEN'S WEAR DAILY (Mar. 28, 2007), <https://wwd.com/business-news/financial/diane-von-furstenberg-sues-forever-21-over-copyright-501745/>.

⁸ Kali Hays, *The 5 Biggest Lawsuits in Fashion*, WOMEN'S WEAR DAILY (Apr. 25, 2017), <https://wwd.com/business-news/legal/the-5-five-biggest-lawsuits-facing-fashion-retail-10875211/>.

⁹ Mary Hanbury, *Target is being sued by Burberry, and it reveals one of the biggest problems facing the clothing industry*, BUS. INSIDER (May 9, 2018, 9:39 AM), <https://www.businessinsider.com/target-sued-by-burberry-reveals-big-problem-fashion-2018-5>.

¹⁰ *Isabel Marant Victorious in Mango Copying Case, Sheds Light on U.S. Copyright Deficiencies*, THE FASHION L. (Oct. 28, 2016), <http://www.thefashionlaw.com/home/isabel-marant-victorious-in-mango-copying-case-sheds-light-on-us-copyright-deficiencies> [hereinafter *Isabel Marant*].

Fashion Nova for selling a gown similar to the iconic green dress worn by Jennifer Lopez to the 2000 Grammys, among other designs.¹¹



Versace's creation worn by Jennifer Lopez in 2000 on the left, compared against Fashion Nova's similar gown that was posted to their website last year.¹²

Second, many fast fashion retailers have also been accused of not only copying the designs of older and more established luxury brands, but they have been alleged to take it a step further and copy designer looks worn by popular celebrities, offering red-carpet looks at a fraction of the price to its loyal customers, many of whom would otherwise not be able to afford a couture piece that is often priced at thousands of dollars. The most recent and shining example of this is Kim Kardashian, who has accused fast fashion retailer Fashion Nova of pre-selling a dress that looked very similar to a gown she wore just the day before, created by French fashion designer Thierry Mugler.¹³ Now, it seems that affordable brands are not only being accused of copying designer works, but also utilizing prominent celebrities that buyers follow to put out similar clothing in the hopes of attracting those consumers.

¹¹ Jessica Davis, *Versace is suing Fashion Nova over Jennifer Lopez's iconic dress*, HARPER'S BAZAAR (Nov. 29, 2019), <https://www.harpersbazaar.com/uk/fashion/fashion-news/a30053010/versace-suing-fashion-nova-jlo-dress/>.

¹² Elana Fishman, *Fashion Nova sued over "knockoff" of Jennifer Lopez's Versace Grammys dress*, PAGE SIX STYLE (Nov. 26, 2019, 12:49 PM), <https://pagesix.com/2019/11/26/fashion-nova-sued-over-knockoff-of-jennifer-lopezs-versace-grammys-dress/>.

¹³ Lauren Alexis Fisher, *Is Kim Kardashian Helping Fast Fashion Sites Knock Off Her Designer Looks?*, HARPER'S BAZAAR (Feb. 20, 2019, 4:50 PM EST), <https://www.harpersbazaar.com/fashion/designers/a26428007/kim-kardashian-leaking-fashion-nova-knockoffs/>.

Third and finally, it is not only couture designers or luxury fashion brands that have sued fast fashion companies, but now celebrities themselves are taking action, claiming those companies are using look-alike models to feature designer clothes they have already worn. These types of actions have made major headlines in the news lately, with Ariana Grande suing Forever 21, claiming certain images from Forever 21's Instagram showed "stills from Grande's work being used to promote the Forever 21 brand, as well as advertisements featuring what the suit calls a 'look-alike model'"¹⁴ and Kim Kardashian obtaining a judgment of \$3 million from Missguided, a fast-fashion company headquartered in the U.K., for using an image of a lookalike model wearing a metallic dress similar to a gown that Kardashian wore that was originally made by her husband, the designer Kanye West.¹⁵

With all of these recent developments making headlines in the past few years, it is clear that fast fashion and luxury fashion have gone head to head regarding their individual intellectual property rights. To understand where the future of this aspect of intellectual property lies and which direction future litigation will take, it is important to understand why and how there has been such a slew of lawsuits initiated against fast fashion companies, the outcome of these cases, and what it will take for luxury labels to be granted more security going forward.



Isabel Marant's "Scarlet" boot on the left and Mango's model on the right, which the Paris District Court ruled against in 2013.¹⁶

¹⁴ Sandra Gonzalez, *Ariana Grande sues Forever 21 over ads featuring 'look-alike model'*, CNN (Sept. 3, 2019, 6:42 PM ET), <https://www.cnn.com/2019/09/03/entertainment/ariana-grande-forever-21-lawsuit-trnd/index.html>.

¹⁵ *Kim Kardashian Will Pocket Nearly \$3 Million From Lawsuit Against Missguided*, THE FASHION L. (July 3, 2019), <http://www.thefashionlaw.com/home/kim-kardashian-will-pocket-nearly-3-million-from-lawsuit-against-missguided>.

¹⁶ *Isabel Marant*, *supra* note 10.

I. IN VOGUE: HOW THE RISE OF POPULAR FAST FASHION COMPANIES HAVE LED TO AN INFLUX OF INTELLECTUAL PROPERTY LITIGATION

Professionals in the fashion world, the legal community, and even individuals who have been following the latest headlines in the news may find themselves now asking: what has led to a rise in lawsuits filed against fast fashion companies, particularly within this past decade?¹⁷

There are many layers to answering this question. First and foremost, fast fashion companies have been able to produce mass amounts of clothing due to their sheer popularity, which exemplifies the age-old aspect of capitalism that the high demand for trendy and affordable clothing by young consumers causes these retailers to supply that need in the market. Simply put, fast fashion “. . . is a result of mass-market retailers increasing the production of inexpensive fashion lines to meet the demands of quickly changing trends.”¹⁸ By shopping at giants, like H&M or Zara, customers can obtain the latest trends inspired from the runway at a fraction of the price – an understandable desire, since most of the target consumer groups of fast fashion companies are young women who are not able to afford couture designs.

Although it is true that certain individuals “. . . can afford to go to Bergdorf Goodman and buy a handbag they saw Kim Kardashian carrying to the gym . . . [m]ost of us, on the other hand, feel lucky when we can go to a fast fashion retailer and buy something that looks remarkably similar. We do not usually stop to think how much we are hurting Chanel, Louis Vuitton, Gucci, or Saint Laurent.”¹⁹

In fact, many of these shoppers simply want quick, trendy designs at an affordable price and may not be aware of the consequences that would affect designers and luxury brands. Another reason large, mass-market brands have been on the rise is that often times, prominent social media influencers with a large following or even celebrities themselves will team up with a particular brand and advertise their

¹⁷ K. Nike Anders, *Imitation or Inspiration?: The Rise of celebrity Lawsuits Against Fast Fashion Brands*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (Sept. 24, 2019), <http://www.fordhamiplj.org/2019/09/24/imitation-or-inspiration-the-rise-of-celebrity-lawsuits-against-fast-fashion-brands/>.

¹⁸ Hadari Oshri, *Three Reasons Why Fast Fashion Is Becoming A Problem (And What To Do About It)*, FORBES (May 13, 2019, 8:30 AM), <https://www.forbes.com/sites/theyec/2019/05/13/three-reasons-why-fast-fashion-is-becoming-a-problem-and-what-to-do-about-it/#1ba25a04144b>.

¹⁹ Denisse F. García, *Fashion 2.0: It's Time for the Fashion Industry to Get Better-Suited, Custom-Tailored Legal Protection*, 11 DREXEL L. REV. 337, 338 (2018).

content on their social media accounts, blogs, or YouTube videos. For example, the brand Fashion Nova has worked “with the likes of Kylie Jenner and Cardi B on Instagram, capitali[z]ing on the reach and influence of these high profile personalities”, noting that the company grew by 600% in 2017.²⁰ Having popular and largely followed young celebrities associated with these brands is another way that young consumers are hooked onto shopping at these stores, thus driving their popularity.

Second, many brands such as Fashion Nova and Misguided not only advertise their merchandise on their websites, but also ensure to make the most use out of their social media accounts and blend attention-grabbing content with their clothing. Knowing their target audience, “consumers are constantly craving fashion and lifestyle-related digital content, not just to inspire their choices, but also for the purpose of entertainment . . . in order to deliver this, many retailers have started to act more like media brands – fusing the worlds of shopping, entertainment and social media”.²¹ Utilizing this tactic to reach their consumers, many of these retailers have begun to use “videos, Instagram Stories, and shoppable content to enable users to smoothly transition from the act of browsing to buying.”²² Many people like to shop, whether it is in person or through other platforms, yet the particular “. . . obsession with looking at products, even if no purchase is intended, is especially prevalent among Millennials, the generation that grew up in the age of the Internet.”²³ A report conducted by the Urban Land Institute, a nonprofit focused on responsible land use, concluded that forty-five percent of millennials spend over one hour each day looking at retail sites, and that nearly “half the men and [seventy] percent of the women consider shopping a form of entertainment.”²⁴ Finally, consumers are able to not only obtain affordable designs, but common shoppers are able to get their fix due to how often fast fashion companies obtain new retail, compared to more infrequent production of high-end designers: “new deliveries to stores are frequent, which means customers always have something

²⁰ Nikki Gilliland, *Four factors fuelling the growth of fast fashion retailers*, ECONSULTANCY (Apr. 9, 2019), <https://econsultancy.com/four-factors-fuelling-the-growth-of-fast-fashion-retailers/>.

²¹ *Id.*

²² *Id.*

²³ Marc Bain & Quartz, *The Neurological Pleasures of Fast Fashion*, THE ATLANTIC (Mar. 25, 2015), <https://www.theatlantic.com/entertainment/archive/2015/03/the-neurological-pleasures-of-modern-shopping/388577/>.

²⁴ *Id.*

new to look at and desire. Zara stores famously gets two new shipments of clothes each week, while H&M and Forever21 get clothes daily.”²⁵

This meteoric rise of fast fashion seems like it has skyrocketed extremely quickly to many, but in fact, fast fashion has been steadily rising since the early millennium, when shopping over the Internet was just beginning to take off and increased the consumer’s desire to obtain high-end looks extremely quickly and at a fraction of the price:

When Forever 21 came on the scene in the early 2000s, it was a time when fashion as a concept was really different . . . [f]ashion was something that was really exclusive. There wasn’t online shopping. You had to go physically to the mall...[the offerings] were very basic, not very runway-driven. They were one of the first companies who could take what you see on the runways and create an affordable version.²⁶

And that trend did not just stop with Forever 21 – in fact, the rise of that store did not only lead to other similar affordable and trendy designs inspired by haute couture creations, but it also joined in on the success of many other similar shopping chains:

Forever 21 experienced big success in the early 2000s with its troves of merchandise that imitated of-the-moment designer styles at rock-bottom prices. It joined Zara and H&M in making fast, disposable fashion widely available to American shoppers, especially young women, who were exposed to new wares seemingly every time they entered a store.²⁷

With so many factors contributing to the initial success of these companies, their growth has not been surprising. According to a September 2018 study conducted by marketing company Hitwise, visits to fast fashion sites such as Fashion Nova, UK-based retailer Boohoo, and Rainbow Apparel grew 20% or more in 2018.²⁸ Yet within this year, even the most prominent brands have shown signs of struggle: fast-fashion retailer Charlotte Russe filed for Chapter 11

²⁵ *Id.*

²⁶ Cady Lang, *Here’s What Forever 21’s Bankruptcy Could Mean for the Future of Fast Fashion*, TIME (Oct. 3, 2019, 4:49 PM ET), <https://time.com/5691340/forever-21-bankruptcy-explained/> (internal quotation marks omitted).

²⁷ Sapna Maheshwari, *Forever 21 Bankruptcy Signals a Shift in Consumer Tastes*, N.Y. TIMES (Sept. 29, 2019), <https://www.nytimes.com/2019/09/29/business/forever-21-bankruptcy.html>.

²⁸ Krista Garcia, *Why Fast Fashion Is Experiencing Rapid Growth*, EMARKETER (Sept. 12, 2018),

<https://www.emarketer.com/content/why-fast-fashion-is-experiencing-rapid-growth>.

bankruptcy in February²⁹ and in September, it was reported that Forever 21 is reportedly preparing to close at least 100 stores in the United States and is filing for bankruptcy as well.³⁰ Similarly, both Zara and H&M are set to close hundreds of their store locations across the country this year.³¹ The fact that Forever 21, a company that enabled young consumers across America to have access to the trendiest clothing inspired by the designs of the runway, is now in financial distress, says a great deal about the current state of fast fashion and its future fate.

Have fast fashion retailers been hit hard by the slew of lawsuits that have been filed against them? It is difficult to say, but while many “fashion designers draw inspiration from the world around them and from their competitors . . . fast-fashion stores like Zara and Forever 21 are frequently accused of crossing the line between being inspired by a designer and copying the item entirely.”³² Within that caveat, now, many “[f]ast-fashion companies are increasingly being served lawsuits for copying the designs of small designers, as social media makes it easier to spot and alert the original artist of copies, experts say.”³³ With the spotlight of Instagram, Twitter, Snapchat and other forms of social media, it has become easier to see when a designer’s work may have been infringed by a retailer as opposed to previous years. With various lawsuits³⁴ initiated against these retailers that have thrived for decades on spurning quick re-creations of haute couture pieces, there are also

²⁹ Sanford Stein, *How Could Changing Consumer Trends Affect Fast-Fashion Leaders H&M and Zara?*, FORBES (Feb. 10, 2019, 11:41 PM), <https://www.forbes.com/sites/sanfordstein/2019/02/10/how-could-changing-consumer-trends-affect-fast-fashion-leaders-hm-and-zara/#5107b8816f48>.

³⁰ Nathan Bomey, *Forever 21 reportedly set to close ‘at least’ 100 stores in bankruptcy*, USA TODAY (Sept. 13, 2019, 10:04 AM), <https://www.usatoday.com/story/money/2019/09/13/forever-21-store-closures/2309811001/>.

³¹ Geoffrey Smith, *H&M and Zara Are Closing Stores to Get Ahead*, FORTUNE (Aug. 11, 2019, 4:00 AM EST), <https://fortune.com/2019/08/11/hm-zara-store-closing/>.

³² Mary Hanbury, *Zara and Forever 21 have a dirty little secret*, BUS. INSIDER (Mar. 6, 2018, 5:45 AM), <https://www.businessinsider.com/zara-forever-21-fast-fashion-full-of-copycats-2018-3>.

³³ Kari Paul, *Company accused of copying independent designer’s work files for bankruptcy*, MARKETWATCH (May 16, 2017, 2:04 PM ET), <https://www.marketwatch.com/story/independent-fashion-designer-accuses-forever-21-of-copying-her-work-2017-05-10>.

³⁴ See, e.g., *From Gucci and adidas to H&M and Puma, a Look at Forever 21’s Long History of Litigation*, THE FASHION L. (Oct. 1, 2019), <https://www.thefashionlaw.com/home/from-gucci-and-adidas-to-hampm-and-puma-a-look-at-forever-21s-long-history-of-litigation>; Chavie Lieber, *Fashion brands steal design ideas all the time. And it’s completely legal*, VOX (Apr. 27, 2018, 7:30 AM EDT), <https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m>.

other potential avenues that allow designers to reclaim protection and ownership of their original and innovative designs.³⁵

II. STATUTORY STYLE: HOW CURRENT LEGISLATION, ACTS, AND CODED LAW PROVIDE LITTLE TO NO PROTECTION FOR DESIGNERS AND FASHION LABELS

Given all of this, why has there been an influx of lawsuits initiated against fast fashion retailers? What legal protections (or lack thereof) are afforded for designers, celebrities, and luxury couture brands? What legal safeguards have been put in place for fast fashion companies? What aspects of intellectual property law, including trademark, copyright, and patents, are able to afford protection to either party involved in actions like this?

A. Trademark Law

To start off, “. . . the United States does not have a *sui generis* framework that protects the fashion industry. As a consequence, the industry relies on patents, trademarks, and copyright to protect its creations, none of which are specifically tailored or appropriate to protect fashion designs as a whole.”³⁶ Typically, trademarks are used to protect the goods or services of an individual or company, and they only usually provide protection for particular aspects of a design, “such as logos, brand names, and signature items.”³⁷ As such, “. . . a designer or brand’s logo is protected, but the overall design of an item is not.”³⁸ In this vein, it is easier for certain brands that have well-known and iconic designs, such as the intertwined C’s featured in Chanel accessories and clothing, or the LV monogram on Louis Vuitton merchandise,³⁹ to have their work protected, but there are also numerous other high-fashion brands that may not have an instantly recognizable feature in their designs, but still want protection for their creations.⁴⁰ Under trademark law, it is difficult for high-luxury brands

³⁵ See generally Tina Martin, *Fashion Law Needs Custom Tailored Protection for Designs*, 48 U. BALT. L. REV. 453 (2019) [hereinafter Tina Martin].

³⁶ García, *supra* note 19, at 343 (emphasis in original) (internal citations omitted).

³⁷ *Id.* at 345 (internal citation omitted).

³⁸ Casey E. Callahan, *Fashion Frustrated: Why the Innovative Design Protection Act is a Necessary Step in the Right Direction, But Not Quite Enough*, 7 BROOK. J. OF CORP. FIN. & COM. L. 195, 197-198 (2012) (internal citation omitted).

³⁹ *Id.* at 198.

⁴⁰ Consider a brand such as Proenza Schouler, which is a high-end label, yet does not feature in its designs, symbols, or logos that many consumers would instantly recognize, such as the intricate Versace logo, featuring the head of the Greek figure Medusa. The PS1 bag designed by

to prevent other retailers, brands, and fast fashion companies from borrowing and copying their work.

B. Copyright Law

The current Copyright Act, which was passed in 1976, serves as the main source of copyright law in the United States and prohibits the unauthorized “. . . copying of a work of authorship.”⁴¹ Primarily, the Copyright Act protects “. . . original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture.”⁴² Originally, the U.S. copyright law was designed to protect primary works of literature and writing, yet it has been amended to afford protections to other types of creative work (such as when the law was amended in 1990 to include architecture under protection laws⁴³ or when, by amendment of the predecessor statute, it was expanded in 1971 to provide copyright protection for sound recordings).⁴⁴ As of now, there have been numerous “. . . attempts at copyright legislation for fashion designs, but they have all failed due to ambiguity in the language of the law.”⁴⁵ Currently, copyright law does not afford protections to colors or color schemes, the way “design elements are cut and pieced together,”⁴⁶ or to “garments and accessories” in their entirety.⁴⁷ In 2007, the widespread focus on congressional intent led to courts applying the test of useful articles “. . . in a way that excludes most industrial designs from copyright protection. As a result, this test has also generally excluded fashion design.”⁴⁸ However, many legal scholars have

Proenza Schouler for example, “does not contain a visible mark, nor does it display the brand’s name other than on a small hanging tag. What distinguishes the bag is its design—which does not earn protection under trademark law.” Callahan, *supra* note 38, at 198 (internal citations omitted).

⁴¹ *Copyright Law in the United States*, BITLAW, <https://www.bitlaw.com/copyright/index.html> (last visited Jan. 19, 2020).

⁴² *What Does Copyright Protect?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-protect.html> (last visited Jan. 19, 2020).

⁴³ Serena Elavia, Senior Theses, *How the Lack of Copyright Protections for Fashion Designs Affects Innovation in the Fashion Industry*, TRINITY C. DIGITAL REPOSITORY 16 (2014), <https://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1370&context=theses>.

⁴⁴ *Copyright Registration for Sound Recordings*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ56.pdf>.

⁴⁵ Elavia, *supra* note 43, at 8.

⁴⁶ *Can I use copyright to protect my fashion designs?*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/ca_faq_post/copyright-fashion-designs/ (last visited Jan. 19, 2020).

⁴⁷ Julie Zerbo, *Protecting Fashion Designs: Not Only "What?" but "Who?"*, 6 AM. U. BUS. L. REV. 595, 596 (2017), <http://digitalcommons.wcl.american.edu/aublrvol16/iss3/2> (internal citation omitted).

⁴⁸ Shelley C. Sackel, *Art is in the Eye of the Beholder: A Recommendation for Tailoring Design*

pointed to the fact that even though garments and accessories such as shoes or handbags are not cited specifically in the Copyright Act, “. . . this does not preclude them from protection because this list is non-exhaustive. Additionally, case law suggests that fashion designs do, in fact, fall under the umbrella of copyright.”⁴⁹

C. Patents

A third aspect of intellectual property litigation that many have attempted to utilize to protect their fashion designs is patent law. Typically, many people obtain patents to protect a product, item, or prototype they have invented, yet there are design patents that can “provide protection for new, original, and ornamental designs, but deny protection to any item deemed utilitarian. Additionally, the item must be novel and exhibit the use of ‘inventive or originitive faculty.’”⁵⁰ With such criteria, oftentimes merchandise privy to infringement such as clothing, shoes, and handbags, are usually not protected under design patents. Despite this difficulty, many brands have still started to rely on design patents more within the past several years, partly because “. . . neither trademark nor copyright law protection extends to articles of clothing or accessories in their entirety.”⁵¹ Despite this, obtaining a design patent can take a considerable amount of time and is often comparatively costly.⁵² Although some aspects of these three areas of intellectual property may offer minimal avenues of protection, the issues with each aspect have made it difficult for creative professionals in the industry to protect their designs: “Fashion designers seeking to protect their creations in the U.S. generally but incorrectly rely on copyright law. Although theoretically, design patent and trademark law could provide protection for fashion design in the U.S., establishing such protections based on these areas of law have thus far proven unworkable.”⁵³ Since these areas only allow for certain portions of a designer’s work to be protected, many argue that this further incentivizes fast fashion retailers to continue re-creating looks at a high speed in order to continue turning a profit: “Trademark, patent, and copyright law today provide designers with patchwork protections that ultimately serve to only protect a portion of their design. This environment breeds a marketplace of knockoff designs

Piracy Legislation to Protect Fashion Design and the Public Domain, 35 AIPLA Q. J. 473, 495 (2007).

⁴⁹ Zerbo, *supra* note 47, at 609 (internal citation omitted).

⁵⁰ Sackel, *supra* note 48, at 493 (internal citations omitted).

⁵¹ García, *supra* note 19, at 341 (internal citation omitted).

⁵² *Id.* at 341-342.

⁵³ Sackel, *supra* note 48, at 492-93 (internal citations omitted).

where the first to market reaps the benefits of another designer's creative efforts."⁵⁴

D. Congressional Acts

Back in 2007, the Design Piracy Prohibition Act was introduced in the U.S. Congress as the first of a number of bills that would offer protection to fashion designers through the amendment of Title 17 of the United States Code.⁵⁵ This proposed act was designed to extend copyright protection to fashion designs for a period of three years and it was created to extend “. . . the definition of infringing article to include any article the design of which has been copied from an image of a protected design without the consent of the owner.”⁵⁶ Ultimately, in 2012, the Senate Committee on the Judiciary voted for the bill to proceed to the Senate floor without amendment, and the bill was introduced by Senator Charles Schumer as The Innovative Design Protection and Piracy Prevention Act (S.3278),⁵⁷ yet it is still unclear what type of impact this has made on the fashion community. Many point out that particular “[d]esign protection bills have been introduced routinely since the 1970s. Yet only in recent years has the cause gained significant legislative momentum.”⁵⁸ There has not been significant coverage on this act since it was first introduced, and it remains to be seen how designers may or may not utilize it to their advantage when attempting to protect their original work.

Given the clear impediments in obtaining protection through current intellectual property, it is clear to see why many brands have seen their works copied by numerous retailers, companies, and other designers in recent years. Many other creative professionals are afforded protection under the eyes of the law for their work, yet such avenues are not yet quite existent for fashion designers: “The legal tools that do protect limited elements of apparel in the U.S. have served as the foundation of influential fashion empires – Ralph Lauren's trademarked polo pony and Levi Strauss' formerly patented metal rivets on jeans come to mind – but for the most part, fashion is excluded from the system that protects writers, filmmakers, painters,

⁵⁴ Tina Martin, *supra* note 35, at 475 (internal citations omitted).

⁵⁵ *Copyright Legislation for Fashion Designs (Proposed)*, THE FASHION L. (Oct. 7, 2016), <http://www.thefashionlaw.com/learn/proposed-copyright-legislation-for-fashion-designs>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Edward J. López, *Fashion design and copyright*, LEARN LIBERTY (Mar. 30, 2017), <https://www.learnliberty.org/blog/fashion-design-and-copyright/>.

photographers and jewelry designers.”⁵⁹ While statutory law demonstrates that luxury designers are often given the short end of the stick (or dress), what does case law say about which side courts are leaning towards in this fight?

III. SUIT UP: HOW RECENT CASES THAT HAVE BEEN LITIGATED AND SETTLED SHOW A GREATER CRACKDOWN ON FAST FASHION COMPANIES

The most recent slew of infringement cases filed against fast fashion companies demonstrates the beginning of a willingness for courts to side in favor of high-end brands and celebrities that have been utilized to drive up sales of commercial fashion retailers. Most recently, as mentioned earlier in this Article, in July 2019, Kim Kardashian won \$2.7 million in her lawsuit against Missguided.⁶⁰ The judge granted Kardashian a default judgment after Missguided failed to respond; the judge concluded that the fast fashion brand “. . . repeatedly used Kardashian West’s name and likeness without permission on its social media platforms to promote the sale of its clothing.”⁶¹



Kim Kardashian modeling a design created by her husband, Kanye West, on the left, compared to a model wearing a similar look featured on Missguided, which was featured on the website shortly after Kardashian posted this photo.⁶²

⁵⁹ Susan Scafidi, *Fashion Designers Need Strong Legal Protection for Their Clothing*, N.Y. TIMES (Oct. 22, 2015, 5:13 PM), <https://www.nytimes.com/roomfordebate/2014/09/07/who-owns-fashion/fashion-designers-need-strong-legal-protection-for-their-clothing>.

⁶⁰ Hannah Preston, *Kim Kardashian West v. Fast Fashion: Reality Star Wins Millions in Lawsuit Against Missguided*, NEWSWEEK (July 3, 2019, 12:46 PM EDT), <https://www.newsweek.com/kim-kardashian-west-missguided-lawsuit-1447394>.

⁶¹ *Id.*

⁶² Ashley Carman, *Kim Kardashian West sues fashion company that keeps tagging her on*

Last year in 2018, Gucci settled a lawsuit it filed against Forever 21 for an undisclosed amount.⁶³ Forever 21 had initially filed the trademark lawsuit against the design brand, after Gucci “. . . repeatedly threatened to sue [the retailer] for using an array of its registered trademarks, namely its blue-red-blue and green-red-green striped marks.”⁶⁴ In its defense, Forever 21 used the argument that many clothing and accessories have stripes featured in their designs, including labels such as Tory Burch, Balenciaga, and even J. Crew; they also claim that Gucci should not be allowed to claim that they have a wrongful “. . . monopoly on all blue-red-blue and green-red-green striped clothing and accessory items”⁶⁵ and in response, Gucci filed counterclaims against Forever 21 for willful trademark infringement, trademark dilution, and unfair competition.⁶⁶



Gucci’s original creation on the left, and Forever 21’s version on the right.⁶⁷

Indeed, intellectual property litigation with fast fashion is often resolved without going to court. The plaintiffs and defendants settle the matter privately, automatic default judgments are granted, or both parties agree to have the matter dismissed entirely, without public explanation (similar to what occurred between Burberry and Target in

Instagram, THE VERGE (Feb. 22, 2019, 9:54 AM EST), <https://www.theverge.com/2019/2/22/18236007/kim-kardashian-west-misguided-lawsuit-claims-fast-fashion-instagram>.

⁶³ *Know All About Gucci versus Forever 21: Trademark Infringement Case*, LATEST LAWS (Nov. 30, 2018), <https://www.latestlaws.com/intellectual-property-news/know-all-about-gucci-versus-forever-21-trademark-infringement-case/>.

⁶⁴ *Gucci, Forever 21 Settle Battle Over Stripes*, THE FASHION L. (Nov. 21, 2018), <http://www.thefashionlaw.com/home/gucci-forever-21-settle-battle-over-stripes>.

⁶⁵ *Gucci “Wrongfully Claims a Monopoly” on Stripes, per Forever 21 Complaint*, THE FASHION L. (Nov. 21, 2017), <http://www.thefashionlaw.com/home/gucci-wrongfully-claims-a-monopoly-on-stripes-per-forever-21-complaint>.

⁶⁶ *Gucci sues Forever 21 for trademark infringement*, CBS NEWS (Aug. 10, 2017, 7:48 AM), <https://www.cbsnews.com/news/gucci-sues-forever-21-trademark-infringement-bomber-jacket/>.

⁶⁷ *Id.*

2018).⁶⁸ Litigation against fast-fashion companies for trademark infringement, unfair competition, and trademark dilution is relatively new, with some of the first types of cases of this nature being initiated a little over a decade ago.⁶⁹ Since a majority of these cases rarely go to trial, and the ones that do take years to litigate and to have a decision rendered (consider the nine-year trademark dispute between Gucci and popular retailer Guess that was rendered in Gucci's favor just last year),⁷⁰ there is a lack of long-standing precedent to draw from when determining just what rights are afforded to either fast fashion companies or luxury, high end brands.



Gucci v. Guess: the affordable retailer's shoe on the left, and the Italian luxury brand's design on the right.⁷¹

Although numerous fast fashion companies and mass retailers such as Forever 21 and H&M have been slapped with infringement lawsuits over the years, even other brands that are pricier but still market themselves as affordable to the masses have experienced push back from high-end designers. For instance, before Ivanka Trump shut her brand down,⁷² her shoe line, which was available for sale at retailers such as Macy's and Neiman Marcus, was hit with a lawsuit from Italian luxury shoe designer Aquazzura, a brand that has been worn by the

⁶⁸ Robyn Turk, *Target and Burberry settle dispute over check pattern*, FASHIONUNITED (Oct. 25, 2018), <https://fashionunited.com/news/fashion/target-and-burberry-settle-dispute-over-check-pattern/2018102524212>.

⁶⁹ *Designer Von Furstenberg sues Target over dress*, REUTERS (Jan. 24, 2008, 2:55 PM), <https://www.reuters.com/article/us-target-suit/designer-von-furstenberg-sues-target-over-dress-idUSN2427549920080124>.

⁷⁰ Kati Chitrakorn, *Gucci and Guess End Nine-Year Trademark Dispute*, BUS. OF FASHION (Apr. 19, 2018), <https://www.businessoffashion.com/articles/news-bites/gucci-and-guess-end-nine-year-trademark-dispute>.

⁷¹ Chantal Fernandez, *Gucci Loses Trademark Infringement Case Against Guess in France*, FASHIONISTA (Feb. 2, 2015), <https://fashionista.com/2015/02/french-court-rejects-gucci-trademark-claims-against-guess-paris-france>.

⁷² Kate Taylor, *Ivanka Trump's fashion brand has finally shuttered its website*, BUS. INSIDER (Aug. 23, 2018, 7:24 AM), <https://www.businessinsider.com/ivanka-trump-brand-website-shuts-down-2018-8>.

likes of Rihanna, Beyoncé, and Oprah Winfrey.⁷³ The plaintiff alleged that Trump’s “Hettie” model shoe, which was available for online purchase for under \$60, was an exact copy of the designer’s “Wild Thing” model, which retails for a total of \$785.⁷⁴ The brand also alleged that Trump’s “Forever Marilyn” pump also mirrored one of their designs; Trump refused to be deposed for this matter, arguing that “. . . she was not involved in the design, promotion or sale of the shoe,” but the judge disagreed with that argument and stated the brand had the right to depose Trump.⁷⁵ In November 2017, it was revealed that Trump and the Italian luxury shoe label came to a settlement, the terms of which would remain confidential.⁷⁶



Designs created by Aquazzura featured on the left, and Trump’s similar looks on the right.⁷⁷

It is evident that these types of lawsuits that allege infringement and the copying of an original design are not just exclusive to huge chains such as H&M or Forever 21 – Ivanka Trump’s brand was “[m]arketed as a purveyor of affordable basics for working women

⁷³ Jackie Wattles, *Judge: Ivanka Trump must answer questions in shoe design lawsuit*, CNN (June 25, 2017, 2:05 PM ET), <https://money.cnn.com/2017/06/24/news/companies/ivanka-trump-court-deposition-aquazzura/index.html>; *About*, AQUAZZURA, <https://www.aquazzura.com/en/world-of-aquazzura/about.html> (last visited Jan. 27, 2020).

⁷⁴ Jonathan Stempel, *Ivanka Trump, Italy’s Aquazzura end ‘Wild Thing’ shoe lawsuit*, REUTERS (Nov. 17, 2017, 12:51 PM), <https://www.reuters.com/article/us-ivankatrump-aquazzura-lawsuit/ivanka-trump-italys-aquazzura-end-wild-thing-shoe-lawsuit-idUSKBN1DH2MS>.

⁷⁵ Natasha Reed, *From Runway to Replica: The Most Fashionable Intellectual Property Infringement Beefs of 2017*, TRADEMARK & COPYRIGHT L. BLOG (Feb. 8, 2018), <https://www.trademarkandcopyrightlawblog.com/2018/02/from-runway-to-replica-the-most-fashionable-intellectual-property-infringement-beefs-of-2017/>.

⁷⁶ Stempel, *supra* note 74; *Aquazzura v. Ivanka Trump Settle Suit*, THE FASHION L. (Nov. 18, 2017), <https://www.thefashionlaw.com/home/a-trumped-up-trial-aquazzura-v-ivanka-trump>.

⁷⁷ Stempel, *supra* note 74; Margaret Sutherlin, *Updated: Ivanka Trump Sued By Luxury Label Aquazzura For Copying Designs*, FOOTWEAR NEWS (June 22, 2016, 2:56 PM PT), <https://footwearnews.com/2016/fashion/designers/ivanka-trump-sued-luxury-label-aquazzura-copy-shoes-233157/>.

since it launched in 2007⁷⁸ and was pushed as a way for consumers to get chic work wear on a budget. Although it was not technically classified as a fast-fashion chain, Trump's brand was still promoted as a way for consumers to access trendy and inexpensive clothing and the settlement of this suit demonstrated that trademark infringement is an issue that extends throughout the fashion market. Yet again, because the matter was resolved through a private and confidential settlement, there was no decision from a judge or jury that helped to illustrate as to what constitutes as copying and what constitutes as merely inspired creativeness. Because many of these cases end up being finalized in this confidential matter, it is difficult to come up with a standard practice, established laws, and recognized legal rules by which to give guidance to future designers. This often leaves professionals in the industry wondering if their designs are even legal and many times, anticipating a potential lawsuit and waiting for the other shoe to drop.

IV. DRAWING THE LINE (OR PATTERN): WHAT'S LEGAL AND WHAT'S NOT?

There is a long history of designers being influenced by the work of their predecessors and peers, and some argue that creative professionals should not be prevented from being inspired by others, something that happens not just in fashion, but even in music, film, literature, and art. Taking this in mind, where does the legal distinction between inspiration and infringement lie? How much leeway should designers get in being able to be inspired by other brands that came before them: is it more critical to give up-and-coming retailers freedom to do this or to give legal protection for luxury brands that have worked for decades on creating and cultivating their signature logo or design? The fashion industry has, for years, thrived on the modus operandi of brands taking inspiration from other designs and implementing them in their own work:

Copying makes trends, and trends are what sell fashion. Every season we see fashion firms 'taking inspiration' from others' designs . . . this fashion cycle is familiar; what is less commonly recognized is that it is accelerated by longstanding legal rules that allow designers to mimic, play with, and

⁷⁸ Leah Bourne, *The Story of Ivanka Trump's Fashion Brand Illustrates the Power of a Shopping Boycott*, GLAMOUR (July 25, 2018), <https://www.glamour.com/story/the-story-of-ivanka-trump-fashion-brand-illustrates-the-power-of-a-shopping-boycott>.

improve upon their competitors' designs.⁷⁹

For years, designers have felt comfortable in lifting inspiration and ideas from traditional and contemporary works. Within the past two decades, however, the rise of fast fashion has caused luxury brands to examine more carefully perceived risks to their creations and reputations and to become legally assertive in particularly challenging situations: “. . . there is a difference between inspiration and gross imitation, and this is arguably where fast fashion retailers take it a step too far, blatantly copying and undermining the original creations of designers.”⁸⁰ Where can we draw the line between inspiration and imitation, and what rights are properly given to left to fast-fashion retailers?

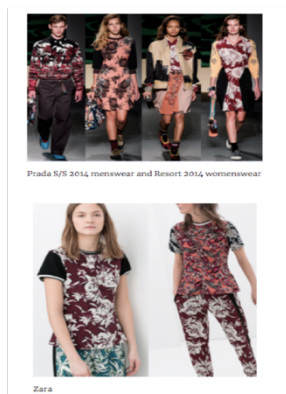
First, patterns and prints that appear on clothing and designs are protectable in copyright law in the same way books or films are – so, if a fast-fashion company tries to imitate the exact pattern or print of another design, that would constitute copyright infringement.⁸¹ Yet, one way that many fast fashion retailers may seek to bypass this is by creating designs that are similar to a high-fashion garment, but different enough so that it does not constitute as a direct copycat (take for instance the example of when Zara created looks similar to pieces from Prada's 2014 collection – the renowned designer was not able to bring a copyright infringement suit forward because the prints were changed and altered enough to not warrant a claim).⁸² That can be a dangerous game to play. What a copyist may believe is a level of alteration sufficient to avoid paying huge damages for infringement may not prove to be sufficient in the eyes of a federal court.

⁷⁹ Kal Raustiala & Christopher Sprigman, *How Copyright Law Could Kill the Fashion Industry*, NEW REPUBLIC (2007), [http://homepages.law.asu.edu/~dkarjala/Copyright/Raustiala&SprigmanC-RKillsFashion\(NewRepublic2007\).htm](http://homepages.law.asu.edu/~dkarjala/Copyright/Raustiala&SprigmanC-RKillsFashion(NewRepublic2007).htm).

⁸⁰ *Fashion in an Industry Filled with Fakes*, THE FASHION L. (Feb. 11, 2015), <http://www.thefashionlaw.com/home/tbt-fashion-in-an-industry-filled-with-fakes>.

⁸¹ *Id.*

⁸² *Id.*



Prada’s runway looks featured up top compared to Zara’s creations below.⁸³

A disheartening challenge is that many consumers simply do not care if they are buying and wearing infringing goods: “. . . most fashion fans are not seeking out novelty in design or shunning copycat wares – either because they do not know the difference . . . or they simply do not care.”⁸⁴ Designers can utilize the “useful article doctrine”, in attempting to protect prints or textile patterns, which can be protected under copyright law, however, there are still other aspects of a designer’s work that can make it distinctly recognizable or unique that cannot be shielded.⁸⁵ While certain patterns can be protectable, other aspects of clothing including hemline, pocket style, or necklines are “. . . considered inseparable from the utilitarian aspects of clothing and will be uncopyrightable no matter how original or aesthetically attractive.”⁸⁶ It can be argued that certain aspects of a garment that fall into this category can be recognized by a customer as belonging to a particular designer (for example, Oscar de la Renta’s “voluminous

⁸³ *Guess What Brand Zara is Channeling for Spring*, THE FASHION L., (Feb. 25, 2014), <http://www.thefashionlaw.com/home/guess-which-collection-zara-is-channeling-for-spring>.

⁸⁴ *If Consumers Are Not Demanding Novelty, Why Should Fashion Deliver?*, THE FASHION L. (May 31, 2017), <http://www.thefashionlaw.com/home/if-consumers-are-not-adverse-to-copying-why-should-fashion-care>.

⁸⁵ Patrick K. Concannon, *How to Protect Your Fashion Designs*, ARTREPRENEUR (July 10, 2017), <https://alj.artrepreneur.com/fashion-design/>.

⁸⁶ García, *supra* note 19, at 351.

skirts”⁸⁷ or Diane von Furstenberg’s “iconic wrap dress”⁸⁸), yet they are unable to be protected as they do not fall under the useful article exception. Such distinctions make it easier for retailers to duplicate designs that may even be signature to a particular brand. Pieces of clothing are excluded from the “useful article” doctrine, primarily because clothing articles are deemed to be utilitarian according to the law since “. . . functional considerations regarding wearability often influence, and inextricably link to, creative aspects of design, and cannot be physically or conceptually isolated for protection.”⁸⁹

Despite this, designers have won various victories over the years in attempting to fight within the courts for greater protection over their work. In *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*,⁹⁰ the Second Circuit Court of Appeals “. . . accepted a copyright claim in an ornate ‘Byzantine’ pattern printed on cloth for making women’s dresses. Likewise, in *Knitwaves, Inc. v. Lytogs Ltd.*, the Second Circuit extended copyright protection to decorative appliques on children’s sweaters, but not to the sweaters themselves.”⁹¹ Through that result, it is possible that more simple adornments or designs may be able to receive more protection under the law than a more intricate, larger design, depending on the unique facts of the case. Branding, however, remains a great strength: “. . . almost all infringement actions regarding counterfeit or knockoff designs are won on the basis of trademark law.”⁹²

The law continues to evolve. In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the Second Circuit issued a decision that allowed more utilitarian items such as belt buckles to be protected in copyright, but not any aspects of design around the buckle, since the designs did not serve a practical function.⁹³ This once novel line of reasoning quickly developed and,

⁸⁷ Shelley Acoca & Jocelyn Noveck, *Oscar de la Renta: What women say makes his style unique*, THE CHRISTIAN SCI. MONITOR (Oct. 21, 2014), <https://www.csmonitor.com/The-Culture/Latest-News-Wires/2014/1021/Oscar-de-la-Renta-What-women-say-made-his-style-unique>.

⁸⁸ Emily Barnes, *What Inspired Diane von Furstenberg’s Iconic Wrap Dress*, STYLECASTER (2012), <https://stylecaster.com/what-inspired-diane-von-furstenbergs-iconic-wrap-dress/>.

⁸⁹ Anna M. Luczkow, Note, *Haute off the Press: Refashioning Copyright Law to Protect American Fashion Designs from the Economic Threat of 3D Printing*, 100 MINN. L. REV. 1131, 1136 (2016), http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Luczkow_ONLINE.pdf.

⁹⁰ *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960).

⁹¹ Luczkow, *supra* note 89, at 1136 (internal citations omitted).

⁹² *Id.* at 1137 (internal citation omitted).

⁹³ Nisha Balsara, *Redefining Fashion: From Congress to the Runway*, 11 J. HIGH TECH. L. 93, 102 (2010).

[A] few years later, in *Carol Barnhart, Inc. v. Economy Cover Corporation*, the dissenting opinion asserted that a design is copyrightable if it elicits a concept that is distinct from the utilitarian function. Two years later, in *Brander Intern, Inc. v. Cascade Pacific Lumber Company*, the Second Circuit proposed another conceptual separation test, focusing on whether the design elements reflected the designer's artistic judgment . . . [c]ourts [soon] provided copyright protection to fabric designs on dresses but never to the dress designs themselves.⁹⁴

Fashion has become to be more broadly regarded and recognized by society as a type of art, and not just a means to an end. In recent years, events such as the Met Gala (also formally called the Costume Institute Gala), the annual fundraising gala that benefits the Metropolitan Museum of Art's Costume Institute in New York City, and the Council of Fashion Designers of America (CFDA) Fashion Awards, have become widely reported by the press and become the subject of much interest for consumers as well, driven in part by the rise of social media. A designer's works are also now more easily visible to the average consumer because they can pop up on an Instagram feed, rather than requiring the user to go online and use a search engine to find a particular label's latest collection. Fashion shows, which used to be accessible primarily to designers, celebrities, or professionals in the industry, and wealthy customers, are now opening its doors to influencers, vloggers, and online personalities, and are being featured on YouTube and other platforms, such as Rihanna's Savage x Fenty Show, which was available for viewers via Amazon Prime Video.⁹⁵ This evolution and recognition of fashion as an art form has permeated into the legal landscape: “. . . with the historical background of appreciating fashion as a form of artistic expression, society now classifies fashion designs as wearable art. In addition to the historical precedent, the courts have implicitly suggested fashion as wearable art by recognizing belt buckles as artistic ornamentation.”⁹⁶ Some say that without broad strokes of change in intellectual property law, fashion may begin to be recognized as a whole as an art that deserves to be protected, in the same way as a painting or a sculpture should be, will establish the mandate for stricter and clearer rules

⁹⁴ *Id.* (internal citations omitted).

⁹⁵ Troy Patterson, *Rihanna's "Savage x Fenty Show" Puts a Super-Fun Face on End-Stage Capitalism*, THE NEW YORKER (Sept. 20, 2019), <https://www.newyorker.com/culture/on-and-off-the-avenue/rihannas-savage-x-fenty-show-puts-a-super-fun-face-on-end-stage-capitalism>.

⁹⁶ Balsara, *supra* note 93, at 118 (internal citations omitted).

regarding infringement.⁹⁷ In terms of the timeline as to when that will happen, many professionals in the industry believe it will take years, whereas others feel that a change is necessary and must happen imminently because, simply put, many agree that the “. . . current intellectual property protections, as applied to fashion design in the United States, are inadequate.”⁹⁸ Knowing and understanding the difficulty of protecting one’s designs from counterfeit and copycats is key, but where does that leave the future of high-end brands, who have become susceptible to this type of action within the past few years?

CONCLUSION: WHERE DOES THIS LEAVE FASHION COMPANIES
IN YEARS TO COME?

There have been recent lawsuits as referenced above that have afforded high-end designers further protection in terms of patterns or specific portions of an item, but for the most part, fast fashion companies have still managed to be able to continue their method of creating and selling clothing by modeling it off of luxury branding and benefiting a great deal from it. Some advocate that this is a positive thing for the fashion industry because they believe that copycats benefit the fast fashion world by speeding up the trend cycle, thus increasing the need for consumers to purchase more goods, resulting in retailers working even harder and faster to supply that demand. Some even believe that large retailers add not only to the quantity of the industry but to the quality as well, with Christopher Sprigman, a law professor at New York University remarking in that. “Without copying, the fashion industry would be smaller, weaker and less powerful.”⁹⁹

Others argue that “. . . free appropriation of clothing designs contributes to a more rapid obsolescence of designs by lowering the prices of the items and thus making them accessible to those who otherwise would not be able to afford them.”¹⁰⁰ Some people also believe enforcing tighter restrictions will put a stop to the inspiration that fashion creatives get from seeing other fellow designers’ work and thus disallow professionals to be inspired by other pieces when creating their own work. In an industry like the fashion world, many designers are often stimulated by clothing that they see on the runway, in the pages of a magazine, or even on the street, even if the pieces they see are not their own designs.

⁹⁷ See generally Tina Martin, *supra* note 35, at 474-75.

⁹⁸ *Id.* at 475.

⁹⁹ Julia Bruculieri, *How Fast Fashion Brands Get Away With Copying Designers*, THE HUFFINGTON POST (Sept. 04, 2018, 5:45 AM EDT), https://www.huffpost.com/entry/fast-fashion-copycats_n_5b8967f9e4b0511db3d7def6.

¹⁰⁰ García, *supra* note 19, at 377-78 (internal quotation marks omitted).

Others simply believe that it is highly unlikely that copycat designs will ever cease to completely exist, arguing that fashion trends get repeated and re-cycled over the years, and to stop that would pose a major obstacle in the industry: “It’s unlikely we’ll see fast fashion brands stop copying other brands and designers, both big and small, anytime soon. While it’s not necessarily admirable, recycling designs is commonplace in the industry . . . Fashion is so inherently cyclical and it’s so inherently dependent on looking to others for inspiration, that it’s inevitable that there are claims of copying.”¹⁰¹

Yet for as many people as there are advocating against fashion design protection, there is arguably an even larger group of people fighting to enforce greater restrictions in the effort to protect works of innovative and hardworking designers. Many just argue that enforcing these rules is simply the right thing to do, given how much time, money, and hard work designers and their teams put into creative original designs, and that to allow copycat designs to go unpunished would allow those investments to go to waste. Some believe that allowing copycat designs to continue would not only hurt the designers, but would also negatively affect the industry as well: “If piracy continues to be difficult to punish, those who create original fashion designs will make less profit because consumers will most likely buy the less-expensive option, and designers will not be incentivized to continue creating original designs or even enter the market at all.”¹⁰² Both designers and legal advocates alike believe that having these restrictions in place helps the designers from much of the worry that the original works they are creating will be copied and sold later on. If designers are able to think freely and design without this fear, then it would “. . . likely lead to designers taking bigger risks and innovating more, instead of the usual luxury brands using already existing models and including their strong trademarks on them to prevent others from copying their designs.”¹⁰³ Allowing designers greater freedom to do their job without fear of losing the designs they worked so hard to create and perfect to the mass market through copycat versions would not only be a welcome change to many in the fashion industry, but it can be argued that it would also benefit society and the global artistic community as a whole.

¹⁰¹ Bruculieri, *supra* note 99 (internal quotation marks omitted).

¹⁰² García, *supra* note 19, at 379.

¹⁰³ *Id.*

The journalist and author Lucy Siegle recently stated: “Fast fashion isn’t free. Someone, somewhere is paying.”¹⁰⁴ Allowing for leniency in rules regarding intellectual property protection for fashion means that many people in the industry have to end up paying this hefty price, starting from luxury designers who have to resort to whatever avenues they can to fight back against retailers, or the industry itself, which may inevitably suffer if designers begin feeling as though they have no protection and are less incentivized to keep coming up with original work. While the law has come far in terms of affording greater security to high-end labels, designers, and fashion houses, many argue it has not come far enough in terms of preventing fast fashion retailers in copying entire works and that, some in the fashion industry say, is a price tag too large to bear.

¹⁰⁴ Jennifer Nini, *33 Thought-Provoking Quotes About Ethical, Sustainable and Fast Fashion*, ECO WARRIOR PRINCESS (Oct. 17, 2018), <https://ecowarriorprincess.net/2018/10/brilliant-quotes-about-ethical-sustainable-and-fast-fashion/> (internal quotation marks omitted).