Rebecca Sullivan

10/20/14

IP Theory—First Draft

Protecting Fashion Designs [working title]

1. Introduction

The fashion industry is a global, multi-billion dollar industry. Everyone participates in fashion, even those who don’t intend or wish to partake in it. New fashion trends depend on a collective adoption (or rejection) of styles that reflect the time in which we live, while different designs allow for individual expression. The notion of self-expression and collective adoption is fairly new; fashion was traditionally reserved as a symbol of status while clothing for the masses was simply a product of function. Fashion design in the modern era began as a privilege for the elite; those who could afford garments made with the finest materials and craftsmanship of French designers. Technology has made replication of high-end fashion increasingly easier, cheaper and more accurate. We now live in a world of H&M, Zara, and Forever 21—where nearly anyone can afford to be “in fashion”. Section II will discuss the evolution of fashion, trend adoption and it’s economic and innovative effects on designers.

Part III will compare and analyze intellectual property protection for fashion in the United States and other countries around the world. Fashion is utility and art; the combination of these two purposes leave it largely unprotected by the laws of intellectual property in the United States. However, other countries and regions have laws to protect fashion designs and have found it beneficial to do so. Part IV proposes an amendment to the current United States law that would encompass protection for fashion designs. In addition, this section will talk about international agreements regarding protection of fashion design rights and the effects that enforcement would have on the global clothing trade.

II. History, Theory and Economics of Fashion

A. Fashion Elite to “Fashion for All”

B. Theories of Fashion Innovation and the Value of Protection

It has been argued by many that there is no need to protect fashion designs from copying because a) fashion continues to be innovative and the industry is booming and b) because there is little to no value in fashion design. This discussion will begin with the second point.

1. Value of Fashion

Traditional moral disapproval of frivolous spending on clothes is seen in various religions and cultural norms. [[1]](#endnote-1)

Fashion is not seen in the same light as books, music and other art that is given substantial protection by copyright law. [[2]](#endnote-2) However, it is contrary to the law of copyright to judge the merits of an artistic expression of an idea. Copyright requires merely a “modicum of creativity” to enjoy protection. [[3]](#endnote-3) Paperback novels sold at grocery store checkouts are given the exact same protection as the work of John Steinback. The Copyright Office nor the courts determine whether a work of artistic expression is “good enough” to receive protection, they merely require all the elements of copyrightability to be met.

Another argument against the value of fashion is that it perpetuates status hierarchy. [[4]](#endnote-4) Some view fashion as a product of social pressure that with it comes “negative position externalities”.[[5]](#endnote-5) The “zeitgeist” concept actually opines that status is not the dominant aspect of fashion and that fashion is a collective process that reflects the spirit of the time we are living in. There is a desire to be in fashion without emulating the lifestyles or values of those who first started the trend—high fashion designers and those who can afford their clothes. [[6]](#endnote-6) This collective process allows trend formation to begin vaguely and then sharpen until a particular fashion is established. [[7]](#endnote-7) However, the lack of intellectual property protection for designs is beginning to drive high-end designers to design around labels and brand—which does perpetuate status. [[8]](#endnote-8) Regardless, protection should not be granted or withheld on such patriarchal grounds that it promotes status because many material goods that are protected by copyright, trademark and patents do just that.

2. Continued Innovation

Fashion cycles through seasons. What is on trend one season will likely be off trend in the next; this cyclical nature promotes innovation from designers. There are two opposing viewpoints on the reason fashion continues to cycle—one which promotes copying and one which does not.

a. Piracy Paradox

An article written by Raustialia and Sprigman argue that the fashion industry needs copying; copying drives trend adoption by the masses that incentivize designers to innovate. [[9]](#endnote-9) First, copying fosters diffusion and “Induced Obsolesce”. [[10]](#endnote-10) Once a trend is widely diffused to the broader public, the early-adopters of fashion deem it unfashionable and so is born the next trend or cycle of fashion. Copying promotes diffusion through cheaper versions of the original garment that are produced by the masses. The faster and more widespread the copies become, the sooner the trend becomes obsolete and the sooner designers come out with the next trend. Allowing “piracy” of fashion designs speeds up the cycle of fashion design, thus benefiting the industry as a whole. Raustialia and Sprigman argue that protecting fashion designs would slow the cycle and stifle innovation from designers. Anchoring, communicating that the styles have changed, is a key feature of induced obsolence.[[11]](#endnote-11) Designers come out with many different styles each season, but copying signals to the public that these styles have become trends.

b. Flocking and Differentiating

The opposing view of trend formation and adoption is referred to as “flocking” and “differentiating”. [[12]](#endnote-12) Trends are adopted by consumer because of the need to be a part of the whole, while simultaneously remaining unique. Flocking may involve direct imitation, but more frequently manifests as the desire to participate in a group movement. [[13]](#endnote-13)

Differentiation, seemingly in opposition to flocking, is the other piece to trend adoption. Differentiation is the desire of the individual to separate themselves from the rest of the group through self-expression. [[14]](#endnote-14) Differentiation isn’t possible if each designer makes exactly the same products.

There are individuals on either side of the flocking and differentiation spectrum but most people fall somewhere in the middle. There is a desire to be on trend, while having an individualized personal brand of self-expression. Different people are drawn to different styles due to locale, socio-economic factors, age, gender, race, profession, personal preference and a myriad of other reasons. Styles may differ from one person to the other but there are common trends that transcend most fashion niches.

Designers create trends due to flocking and differentiation. A designer has a brand identity and artistic vision that they stay true to—differentiation. However, designers flock because of trade shows, new technology, editorials and any shared influences.

Consumers adopt trends while designers form them; but both do this through flocking and differentiation. In this model, direct copying is not necessary or wanted to produce fashion cycles. Unlike the first model of innovation, this theory takes into account the motivations of designers to innovate. [[15]](#endnote-15)

c. Direct Copy Undermining Designer Innovation

Fast-fashion copyists are those who make direct copies of designs quickly and cheaply. Technology has made this process increasingly fast and cheap. New York Fashion week was broadcast on the Internet in 2013. This made it possible for fast-fashion copyist to broadcast across seas the patterns to be used to and those garments could be manufacturer and be in stores before the original. It is very common that stores like Forever 21 will exactly replicate a high fashion garment and sell it for a fraction of the price. Pictures from “Adventures in Copyright”. [[16]](#endnote-16)

* Hurts middle price-point designers the most
* Snob Factor🡪 does hurt high end brands

Fast-fashion designer do independent design that in on trend. These designers look to high-fashion and other shared influences to gather inspiration for their designs. Fast-fashion copyist promote trends and encourage trend adoption by the collective whole.

III. Foreign Protection vs. United States Protection

The United States does theoretically have protection for fashion designs, however it is extremely unusual for any articles to meet the requirements for copyright, trademark or patent protection. Trademark and copyright have non-functionality requirements, which create a difficulty for clothing. On the other hand, patent protection embraces functionality but requires stringent rules of novelty and non-obviousness. The European Union has created another distinct class of intellectual protection for industrial design—design rights. EU design rights encompass far more than just fashion apparel design. Design rights protect furnishings, foodstuffs, means of transport or hoisting, stationary and office equipment, and articles for hunting, fishing and pest control; just to name a few.[[17]](#endnote-17) The scope of this paper will stop at fashion design—focusing primarily on apparel.

A. European Union

The European Union is a unique coalition of 27 nations known as Member States. Each nation is free to enact legislation in addition the design rights agreed to through EU Directive, and each nation has. The United Kingdom recently enacted the Intellectual Property Act of 2014 that, in part, criminalizes the intentional copying of registered designs. France affords the greatest protection to design; the same copyright protection enjoyed by other artistic works. Europe, and France in particular, hold moral rights as a strong justification for intellectual property.

1. EU Protection Requirements

EU required that a design be novel and have individual character. Novel in the context of the law means that an identical design hasn’t been made available to the public. Individual character is a slightly harder burden to meet. A design has individual character if the overall impression produced differs from the overall impression by a design that been made available to the public. The overall impression is through the perception of the “informed user” comparing impression of similar designs. In the case of component parts of a complex design, the component part must meet the novel and individual requirement standards and remain visible during normal use of the complex design.

2. Community Designs and Registered Designs

Community designs are simply designs that meet the criteria above and have uniform protection in all Member States. Community designs receive automatic protection that last for 3 years and is not renewable. Registered designs are community designs that have been registered with the industrial property office of the Member State or for international registration with OHIM, Office of Harmonization in the Internal Market. The Hague Agreement is an international agreement for international registration of designs; international registration streamlines the process of design right recognition.

B. United States IP Protection

The various courts of the United States have declined to protect fashion designs in trademark, patent and copyright law. Various different intellectual property rights may protect a specific part of a fashion design, but no one form protects the design as a whole.

1. Trade Dress and Trademark

Trade Dress protection protects the design of a product if it is an indicator or source. Product design, which fashion apparel falls under, requires secondary meaning in order to obtain trade dress protection.[[18]](#endnote-18) Secondary meaning is acquired when the public associates a design to the company who made it. Courts have said clothing will almost never get trade dress protection and this sentimate, “The producer can ordinarily obtain protection for a design that is inherently source identifying (if any such exist), but that does not yet have secondary meaning by securing a design patent or copyright for the design.” [[19]](#endnote-19)

Additionally, trade dress prohibits designs from being functional. Protecting functional designs hinders competition, especially if the given design is the best way to achieve a given a result. There are two types of functionality in trade dress law—traditional and aesthetic[[20]](#endnote-20) Traditional functionality is essential to the use or purpose of the device; or effects the cost or quality of the device. If the cost of the device is effected by the design it is more likely to receive protection because the product could have been produced cheaper but the added cost is evidence of it’s purpose as designator of origin, rather than function. Aesthetic functionality is when protection would put competitors at significant non-reputation related harm. In a lawsuit between Abercrombie and Fitch vs. American Eagle; the court rejected various text on apparel and the combination of materials as trade dress for Abercrombie. The combination of text and material connoted reliability and durability and the court found that prohibiting other companies from using that same combination would adversely effect competitive alternatives to convey the same thing.

* + - Comparative Alternates
    - Effective Competition

Trade dress is not sufficient for protection. Clothing design will hardly ever achieve secondary meaning given the short period of time designs are in fashion and clothing almost always serves as something besides a source identifier. Fashion designs nearly always form a functional purpose—clothes to cover the body. The court in Abercrombie said the articles did affect the cost of the device so it may fail traditional functionality. However, it is hard to imagine a fashion design that, by it’s use, would not put competitors at significant non-reputation related harm.

High-end designs with a longstanding reputation are opting to cater their designs to receive trademark protection. Years of development and an enormous amount of money go into designing and producing the styles of any given season’s line. Therefore trading on labels is an effective tool for designers to protect their designs. Two problems have surfaced from designers shifting focus from creative design to labels. The first, designs are more “label focused” promote the idea of fashion as status rather than expression. Consumers are mixing affordable fashion with high-fashion status illuminating pieces. This harms high-end designers because their brand is being widely disseminated amongst the masses and is no longer “chic” or “exclusive”. The second, more harmful consequence of brand heavy design is that it hurt new or lesser-known designers who have no acquired widespread brand recognition. Pasting the label of a lesser-known brand all over their accessories or apparel will perhaps give them trademark protection; but it will surely not facilitate innovation or sell products.

2. Design Patent

Design patent requirements are similar to that of utility patents. A design patent must be non-obvious, novel, original and ornamental. The primary purpose test is used for design patents: was the design primarily ornamental or primarily functional? The answer must be ornamental to receive design patent protection. Design patents sound like a fit for fashion design then, doesn’t it? For a number of reasons it is not; there is not a single published design patent case for fashion outside of jewelry and footwear because filing would be a futile exercise.

First, design patents require non-obviousness. This means the design would not have been obvious, in light of prior art, to a designer or ordinary skill who designs the same types of articles. Prior art is all designs in the public domain. Clothing design is artistic and innovative but even the most innovative designs are likely obvious.

Second, the process of obtaining a patent is costly and time consuming. The rapid pace of fashion design, the volume of designs and the last minute “tweaking” of designs all make filing a design patent a waste of time for most designers.

3. Copyright

IV. Proposal

A. United States Design Rights

It is evident that none of the current regimes of intellectual property rights protect fashion designs to the extent they deserve to be. Fashion design, as art and utility, does not wholly align with the common justifications for any category of intellectual property right either. I propose the United States enact a design right, wholly separate from any other right conferred by intellectual property. The EU model is a starting point for the United States to bounce from. [[21]](#endnote-21)

B. International Agreements

C. Effects of enforcement on creators, producers and consumers

The biggest consumer of fashion in the European Union, estimated around $190 billion in 2012, imports and exports largely within it’s own countries. [[22]](#endnote-22) Does this have anything to do with the design privilege afforded by the EU?

China/Asia—largest exporter of clothing (PRODUCERS)

EU—second largest exporter of clothing (CREATORS/PRODUCERS/CONSUMERS)

Imports/exports largely within the EU

United States exports less than 1% of the worlds clothing but imports 76% of it’s clothing from China (CREATORS, CONSUMERS)

* 1. Effects of Fashion creators, producers and consumers

1. C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 Stan. L. Rev. 1147 (2009). [↑](#endnote-ref-1)
2. Id. [↑](#endnote-ref-2)
3. Find case law from IP survey notes [↑](#endnote-ref-3)
4. See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 Stan. L. Rev. 1147 (2009), Lynsey Blackmon, Comment, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 Pepp. L. Rev. 107 (2007). [↑](#endnote-ref-4)
5. C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 Stan. L. Rev. 1147 (2009). [↑](#endnote-ref-5)
6. Id. [↑](#endnote-ref-6)
7. Id. [↑](#endnote-ref-7)
8. Id. [↑](#endnote-ref-8)
9. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L. Rev. 1687 (2006). [↑](#endnote-ref-9)
10. Id. [↑](#endnote-ref-10)
11. Id. [↑](#endnote-ref-11)
12. C. Scott Hemphill & Jeannie Suk, *supra* note 1. [↑](#endnote-ref-12)
13. Id. [↑](#endnote-ref-13)
14. Id. [↑](#endnote-ref-14)
15. hkbhkb [↑](#endnote-ref-15)
16. Adventures in Copyright Series, Fashionista.com. <http://fashionista.com/2012/09/adventures-in-copyright-victoria-beckham-fw-2012-vs-mango-fall-2012> [↑](#endnote-ref-16)
17. World Intellectual Property Organization, International Classification for Industrial Designs, 10th Edition 25-26, 2013. [↑](#endnote-ref-17)
18. *Wal-Mart Stoes v. Samara Bros*., 529 U.S. 205 (200). [↑](#endnote-ref-18)
19. Id. [↑](#endnote-ref-19)
20. *Abercrombie & Fitch Stores*, Inc. v. Am. Eagles Outfitters, Inc., 280 F.3d 619 (6th Cir. 2000). [↑](#endnote-ref-20)
21. Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 Am. Bus. L.J. 27 (2011). [↑](#endnote-ref-21)
22. World Trade Organization, International Trade Statistics (2013). [↑](#endnote-ref-22)