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Introduction

In the year 2015 alone, the United States fashion industry generated over $343 billion in revenue.[1] Fashion is not just a business—it is also a respected art form in the United States.[2] Despite the economic and artistic significance of fashion, the tailoring and structural aspects of a fashion article are generally not protectable under U.S. copyright law. However, certain patterns exhibited on a fashion article such as an original pattern on a skirt or a screen print of an artist's painting on a t-shirt may be copyrightable. In contrast, Europe has several legal mechanisms for protecting fashion designs and articles under the laws of the European Union and other nations. This article compares the intellectual property fashion design protections in the United States, including the recent congressional attempt to protect fashion designs under copyright law and the upcoming Supreme Court's decision involving protection of fashion designs, with the fashion intellectual property protections offered in the European Union, France, Italy and the United Kingdom.

I. Fashion Protection in the United States

A. Limited Fashion Design Protection under Trademark and Patent Law in the U.S.

In the United States, several distinct intellectual property rights are available for designers. Trademark law offers minimal protection for fashion articles, as it protects the marks and logos that distinguish the source of the goods, but not the designs themselves.[3] Under trademark law, designers and fashion houses may protect their goods by adopting a distinctive trademark that allows the consuming public to recognize the fashion article's source.[4] Designers and brands can also seek trade dress protection in "the overall commercial image (look and feel) of a product that indicates or identifies the source of the product and distinguishes it from those of others."[5] Trade dress protections may include the nonfunctional elements such as size, shape, color and texture, and the overall look and feel of a fashion good.[6]

Some designers and brands use trademarks to distinguish their designs by incorporating their logos or marks into the fashionable item.[7] To do so, designers and brands must show that the design identifies the source of the fashion article.[8] It may be difficult to prove trademark use of patterns, as the U.S. Trademark Office has taken the position that a mere repeating pattern placed on an article does not serve as a trademark.[9] One issue with relying on

trademarks to protect designs is that once the design becomes popular, many other companies will begin to use the same design on their goods since the design itself is not actually protected—a good case in point is the fast fashion industry.[10] Once others use the design, it may be difficult to prove that the design points to the source and functions as a trademark.[11]

A designer or fashion company can also apply for a design patent,[12] which protects any "new, original and ornamental design for an article of manufacture."[13] A design patent is an under-utilized tool that offers an effective, economically feasible way to protection fashion designs.[14] Because patents are only granted for designs that are "new", patent protection is not available for designs that are merely re-workings of previously existing designs.[15] Often, fashion designs incorporate pre-existing designs and therefore do not meet the "new" standard and cannot qualify for design patent protection.[16]

B. Current Copyright Protection

Another form of intellectual property—copyright—protects "original works of authorship fixed in any tangible medium of expression."[17] For a work to be considered original, it need only be "independently created by the author (as opposed to copied from other works), and [] possess[]at least some minimal degree of creativity."[18] Since the originality requirement for copyright is a lesser hurdle than the "novelty" threshold required for a design patent, copyright would appear to be an efficient way to protect fashion designers.[19]

However, fashion designs, i.e., the particular manner a garment is assembled and tailored, are not protectable under current U.S. copyright law.[20] Professor David Nimmer differentiates between two separate concepts that fall under the term "fashion designs": (1) "fabric designs" and (2) "dress designs."[21] Fabric designs are the patterns used on the article of clothing, such as the floral design repeated on a blouse, and are copyrightable.[22] However, the latter type—dress designs—which "graphically sets forth the shape, style, cut, and dimensions for converting fabric into a finished dress or other clothing garment," are not protectable by copyright.[23]

Clothing has been considered a "useful article" as defined in section 101 of the Copyright Act because it has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[24] The only way for the design of a garment to acquire copyright protection is if the design "can be identified separately from, and [is] capable of existing independently of, the utilitarian aspects of the article," as set out in section 101 of the Copyright Act.[25] Courts have construed this section as the "physical" or "conceptual" separability test.[26] Physical separability has been demonstrated when the decorative elements "can actually be removed from the original item and separately sold, without adversely impacting the article's functionality."[27] Conceptual separability is when the garment "invoke[s] in the viewer a concept separate from that of the [garment's] 'clothing'

function," and the additional function "was not motivated by a desire to enhance the [garment's] functionality qua clothing."[28] For example, a fabric design—the repeated floral print—is capable of existing separately from the actual skirt, but the dress design—the tailoring and the shape the skirt—cannot exist separately from the skirt.[29]

For certain articles of clothing that may appear to serve an additional function other than the typical function of clothing (to cover a person's body)—e.g., costumes, prom dresses, or worker uniforms—the actual dress designs may or may not be copyrightable.[30] In 2005, the Second Circuit in *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.* held that Halloween costumes may be protected by copyright if the costume's design elements can be separated from the overall function of the costume as clothing.[31] In a 2012 unpublished decision, *Jovani Fashions v. Fiesta Fashions*, the Second Circuit denied copyright protection to the designs of a prom dress, specifically "the arrangement of decorative sequins and crystals on the dress bodice; horizontal satin ruching at the dress waist; and layers of tulle on the skirt."[32] Citing *Mazer v. Stein*, the Court held that Jovani failed to meet the separability requirements because "Jovani has not alleged, nor could it possibly allege, that the design elements for which it seeks protection could be [physically] removed from the dress in question and separately sold."[33] The Court added "that clothing, in addition to covering the body, serves a 'decorative function,' so that decorative elements of clothing are generally 'intrinsic' to the overall function, rather than separable from it."[34]

The Fifth Circuit, in *Galiano v. Harrah's Operating Co.*, denied copyright protection for uniforms of casino workers because the clothing designer could now show that "its designs [were] marketable independently of their utilitarian function as casino uniforms."[35] The Fifth Circuit admitted that "[t]he caselaw on costume design is, to say the least, uneven."[36] But regardless of which standard test a court may use to find valid "separability," copyright protection would still be limited to the portions of the fashion, and not the fashion article as a whole.[37]

C. The Supreme Court's Decision Involving Cheerleading Uniforms and Fashion Design Protection —the Star Athletica v. Varsity Brands *Case*

Since the Supreme Court's decision in *Mazer v. Stein*,[38] which determined that the original design aspects of otherwise functional useful articles may be copyrighted, and thereafter became codified as part of the Copyright Act in 1976,[39] U.S. courts have struggled with applying the various separability tests that have emerged over the years to determine whether an article of clothing's design elements are purely functional and utilitarian or whether the original designs are capable of existing separately from the utilitarian purpose.[40] This year, the Supreme Court may clarify the issue when it reviews the U.S. Court of Appeals for the Sixth Circuit's copyright decision in *Star Athletica v. Varsity Brands*.[41] The case involves the issue of whether certain designs in cheerleader uniforms merit copyright protection.[42] The Sixth Circuit, in a split decision, reversed the district court and ruled that the cheerleader uniform design elements were copyrightable, despite the current copyright law's bar against utilitarian

items (i.e., articles of clothing).[43] Star Athetlica filed a petitioned for or a writ of certiorari presenting the following two questions:

1) what is the appropriate test to determine when a feature of a useful article is protectable under § 101 of the Copyright Act?; and

2) whether, in determining a copyright registration's validity, a court should give any judicial deference in addition to the statutory deference articulated in 17 U.S.C. § 410(c).[44]

The Supreme Court heard oral arguments on Halloween, October 31, 2016. Legal practitioners, scholars, and the fashion industry alike await the Court's decision that will hopefully settle the debate and clarify the law on copyright protection for fashion designs.

D. Legislative Initiative to Extend Copyright Protection to Fashion Designs—the IDPA

In an effort to expand copyright protection to fashion articles, a congressional proposal was made in 2012 to amend the Copyright Act's definition of "useful article" to include apparel.[45] The most recent proposal is the Innovative Design Protection Act of 2012 (the "IDPA").[46] The IDPA proposed to grant protection to fashion designs for a period of three years and would prohibit a claim that a fashion design was copied from a protected design if it "(1) is not substantially identical in overall visual appearance to and as to the original elements of a protected design, or (2) is the result of independent creation."[47] It also attempted to revise the state infringement remedy by declaring that the design owner can sue for design infringement after the design is made public and after a twenty-one day notice period.[48]

The debate continues in the United States on whether extending copyright protection to fashion designs will help or hurt the U.S. fashion industry. The IDPA "has been heralded by [some of] the heads of the fashion industry as a tool that may finally level the playing field in the counterfeit goods and design infringement cases that have been exploding in recent years due to the ease at which individuals are able to steal designs."[49] In contrast to the idea that unauthorized copying reduces innovation, some scholars believe that copying actually benefits the U.S. fashion industry.[50] According to Kal Raustiala and Christopher Sprigman, "piracy paradoxically benefits designers."[51] This "piracy paradox"—the notion that copying "actually promote[s] innovation and benefit[s] originators" in the U.S. fashion industry[52]—is why the debate continues on in the United States and why no action has been taken. This paradox is also a reason to push forward with the IDPA since it was introduced in 2012.[53]

II. Fashion Design Protection in Europe: Copyright and Design Rights

Intellectual property protection is at the heart of most European fashion business models. The industry is "driven by fast-paced innovation embodied in the creation of seasonal collections of new fashion designs."[54] Europe remains the center of *haute*

couture,[55] and the protection of fashion designs is a core feature of its cultural identity and legal regimes. In contrast to the United States, in the European Union, fashion products—including traditional apparel categories, accessories, and footwear—may be protected under national and European Union design laws and national copyright laws.

A. European Union Design Protection

The European Union implemented a uniform, EU-wide protection for design rights by first adopting the EU Designs Protection Directive (98/71/EC). The Directive required all Member States (the individual European countries that comprise the European Union) to protect "designs" by registration[56] and defined design as "the appearance of the whole or a part of a product resulting from the features of . . . the lines, contours, colours, shape, texture . . . or its ornamentation."[57] To be valid, the design must be "novel" and possess an "individual character."[58] Novelty is determined by whether or not there are identical designs available to the public, and individual character is determined by whether "the overall impression, from an informed user's point of view, is different from other designs available to the public."[59]

After its design right directive, the EU enacted EU Regulation 6/2002, (the "EU Regulation"), extending protection of what was then called the Community design right to include both registered and unregistered rights.[60] While registered design rights were already provided for under the EU Designs Protection Directive, EU Regulation 6/2002 implemented a new *sui generis* design right for unregistered EU designs.[61] Registered and unregistered EU design rights provide different rights; for example, registered rights for the first term are protected five years from the application filing date with a renewal possibility for up to 25 years, whereas unregistered designs are only protected for three years from the date which the design was first made available to the public within the European Union and cannot be extended.[62] However, unregistered design rights are good for protecting "short-life products (e.g., products within the fashion industry)," because the registration process may be long and costly.[63]

A decision celebrated by fashion design rights holders is *Karen Millen v. Dunnes Stores*.[64] In January 2007, the popular British brand Karen Millen filed an action against Dunnes Stores based on an unregistered EU design rights on its clothing, and began proceedings for injunctions and damages in the Irish High Court. Dunnes Stores appealed and the Supreme Court referred two questions to the CJEU, which ultimately lead to the determinations that 1) for the purposes of individual character, the overall impression a design produces on a user must be different from that produced by a design or designs taken *individually* as opposed to an amalgam of features handpicked from several pre-existing designs and 2) that the right holder does not need to prove the individual character of the unregistered EU Design in the infringement action; the right holder merely needs to indicate the features that bring about the individual character in the design.[65]

B. National Copyright Protection: France, the United Kingdom, and Italy

EU design rights can also be protected under national copyright laws, but the conditions to obtaining copyright protection, including the level of originality required, are determined by each Member State.[66] As the home to some of the most prominent *haute couture* fashion houses, France's copyright system has historically protected fashion designs.[67] The French Intellectual Property Code (the "IPC") protects original works of the mind under Article L 112-1,[68] including those that "reflect the personality of their author" and expressly lists "the creations of the seasonal industries of dress and articles of" as a protected work of the mind in Article L 112-2.[69] The challenge faced by design owners is showing the original character of their designs, because fashion designs usually follow the current trends and therefore may lack originality.[70] The design is granted protection on the date of creation, regardless of registration.[71] The French courts tend to adhere more strictly to the originality requirement for designs and typically will deny copyright protection over a design that could be considered commonplace.[72] New fashion designs in France can be protected not only under national copyright, but also under the EU *sui generis* design rights as discussed above.[73]

Like France, Italy protects fashion designs under its national copyright system. The Italian Copyright Law (the "LDA") protects "works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theater or cinematography, whatever their mode or form of expression, shall be protected in accordance with this Law," and "[i]n particular, protection shall extend to . . . industrial design works that have creative character or inherent artistic character."[74] Copyright protection does not depend on registration; under the LDA, fashion designers can seek an ex parte interim injunction to seize any copy of their designs that have creative and artistic value from the Italian courts and then ask for a permanent injunction and damages for unregistered works.[75] A designer's copyright lasts the life of the designer plus seventy years after the designer's death.[76] Fashion designs can also be protected under Italian national design protection and European design protection,[77] as the Italian Industrial Property Code ("CPI") protects designs that are registered with the Italian Patent and Trademark Office ("IPTO") and any applicable international design registrations.[78]

In the United Kingdom, copyright law is governed under the Copyright, Designs, and Patents Act of 1988 ("CDPA"). Original "artistic works" obtain automatic copyright protection in the United Kingdom.[79] "Artistic works" are defined under the CDPA as "a graphic work, photograph, sculpture, or collage, irrespective of artistic quality, a work of architecture being a building or a model for a building, or works of artistic craftsmanship."[80] Fashion designs fall under the category of "works of artistic craftsmanship." However, case law demonstrates that there is a high threshold to show that a work is of artistic craftsmanship, making it difficult to assert fashion design protection under copyright.[81] Under the CDPA, if a work is considered "commonplace in the design field in question at the time of its creation," it is not "original" for the purpose of the design right.[82]

The copyright protections granted under the national laws of France, Italy, and U.K. nare separate and distinct from the *sui generis* design rights designated under the EU Regulation 6/2002 and EU Designs Protection Directive (98/71/EC). Therefore, dual protection (copyright and design protection) over a fashion design may sometimes confuse courts and cause them to conflate the novelty requirement for design protection with the originality requirement for copyrights. For example, the Paris Court of Appeals held that a shoe model was original (in favor of the copyright protections) but also novel and possessing individual character (relating to the design protection requirements) because no identical model was disclosed to the public and the overall impression it imposed upon the consumer was different from the other models disclosed to the public.[83] There is an effort to distinguish copyright and design rights. Thus, it may be possible for a fashion creation to be denied copyright protection but granted design protection in France. This was illustrated by a recent French Supreme Court decision, which rejected the protection of a shoe because it had the same characteristics as a preexisting model, but upheld the design rights because the models were not identical.[84]

Conclusion

Fashion designers and companies must be cognizant of the differences in the fashion design intellectual property protections in the United States versus those in the European Union. In the United States, fashion designs, may be afforded minimal protection under trademark and patent law, and currently dress designs are not protected under copyright. Despite the recent congressional proposals to amend the Copyright Act to include apparel as a copyrightable work,[85] the U.S. fashion industry is a unique business that many believe actually benefits from rapid widespread copying, and therefore, extending copyright protection to fashion articles may be unlikely to occur anytime soon.

In contrast, the European Union and some of its Member States offer broader intellectual property protections for fashion designers, which reflects upon Europe's reputation as the fashion hub and noted region for *haute couture* fashion houses.[86] Designers in the EU may have two main sources of intellectual property protection for fashion designs: copyright protection and EU design rights.[87] While a designer may choose to protect his or her designs under only one regime, cumulative protection is possible. However, both designers and even the courts of the EU Member States must be careful to recognize the difference between copyright and design protections and not conflate copyright's "originality" requirements with the design right's "novelty" and "individual character" requirements. Overall, the intellectual property protections available for fashion designs vary dramatically between the United States and Europe. Whether the United States will continue to bar fashion designs under copyright or bridge the gap and follow Europe's generally fashion-friendly copyright laws may be soon determined by the Court.

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[1] Statistica.com, *Facts on the Apparel market in the U.S.*, *https://www.statista.com/topics/965/apparel-market-in-the-us/* (last visited Sept. 21, 2016).

[2] Prominent museums have devoted their halls to fashion exhibits, such as the t the Metropolitan Museum of Art's Alexander McQueen exhibit, "Savage Beauty," and the Met's Punk: Chaos to Couture exhibit. Fashion exhibits such as these illustrate the artistic significance behind fashion. *See Alexander McQueen: Savage Beauty*, The Metropolitan Museum of Art, http://blog.metmuseum.org/alexandermcqueen/ (last visited Oct. 4, 2016); *see also PUNK: Chaos to Couture*, The Metropolitan Museum of Art, http://www.metmuseum.org/en/exhibitions/listings/2013/punk (last visited Oct. 4, 2016).

[3] "The Burberry plaid provides an example—the plaid is a registered trademark, which the company incorporates into many of its products." Lisa J. Hedrick, *Tearing Fashion Design Protection Apart at the Seams*, 65 Wash. & Lee L. Rev. 215, 226 (2008).

[4] Michael P. Ryan, *Introduction: Intellectual Property And The Creative And Innovative Economy*, USPTO, http://www.uspto.gov/ip/events/uspto_mena_booket_introduction.pdf (last visited Oct. 4, 2016).

[5] *Trade Dress,* International Trademark Association, Fact Sheets: Types of Protection http://www.inta.org/TrademarkBasics/FactSheets/Pages/Trade-Dress.aspx.

[6] *Id.* ("Trade dress can consist of such elements as size, shape, color and texture, to the extent that such elements are not functional."). *See also* Michelle Mancino Marsh & Natasha Sardesai-Grant, *Safe Protection/Safe Inspiration: An Introduction to Intellectual Property Law for Fashion Designs*, 2012 Emerging Issues 6821 (Dec. 12, 2012).

[7] *Id.*

[8] *Id.*

[9] *See* TMEP Section 1202.19.

[10] *Id.*

[11] *Id.* Companies like Forever 21 frequently copy the designs and popular fashion trends from other designers. *See* Jenna Sauers, *How Forever 21 Keeps Getting Away With Designer Knockoffs*, (July 20, 2011 4:20 P.M.) http://jezebel.com/5822762/how-forever-21-keeps-getting-away-with-designer-knockoffs.

[12] Some iconic fashion design patents are Bottega Veneta's "Veneta" Handbag, U.S. Patent No. D657,952 and Jimmy Choo's "With a Twist," U.S. Patent No. D529,264. Marsh & Sardesai-Grant, *supra* note 5.

[13] 35 U.S.C.A. § 171 (West 2012). This section lists various types of works that would be considered "works of authorship" for the purpose of this section, and apparel is not listed: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. *Id*.

[14] See Elizabeth Ferrill and Tina Tanhehco, Protecting the Material World: The Role of Design Patents in the Fashion Industry, http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1184&context=ncjolt Gene Quinn, *Design Patents: The Under Utilized and Overlooked Patent*, September 10, 2016, http://www.ipwatchdog.com/2016/09/10/design-patents/id=72714/.

[15] Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L. Rev. 1687, 1704, available at (2006)).http://www.virginialawreview.org/sites/virginialawreview.org/files/1687.pdf .

[16] *See id*. Hedrick, *supra* note 10 at 223 (citing *id.*).

[17] 17 U.S.C.A. § 102 (West 2016)

[18] *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345, (1991) (citing 1 M. Nimmer & D. Nimmer, Nimmer on Copyright §§ 2.01[A], [B] (1990)).

[19] Hedrick, *supra* note 10 at 228.

[20] Nimmer on Copyright, *supra* note 15, at § 2.08 [H]

[21] *Id.*

[22] *Id.* (citing *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142 (S.D.N.Y. 1959); *Peter Pan Fabrics, Inc. v. Acadia Co.*, 173 F. Supp. 292 (S.D.N.Y. 1959), aff'd, 274 F.2d 487

(2d Cir. 1960); *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, 187 F. Supp. 334 (S.D.N.Y. 1960); *Spectravest, Inc. v. Mervyn's, Inc.*, 673 F. Supp. 1486 (N.D. Cal. 1987)).

[23] Nimmer on Copyright, *supra* note 15, at § 2.08(H).

[24] 17 U.S.C. § 101 (West 2010). However, Professor Nimmer believes that not all clothing has an intrinsic utilitarian function, but rather some clothing items may be "intended to portray the appearance of the article" and offers men's ties as a possible example. Nimmer on Copyright, *supra* note 15, at §2.08(H) (citing *Nimmer on Freedom of Speech,* § 3.06(E)(3)).

[25] *See* 17 U.S.C. § 101.

[26] *See* Jovani Fashions, Ltd. v. Fiesta Fashions, No. 12-598-cv, 2012 WL 4856412 at *1 (2d Cir. Oct. 15, 2012) (citing Chosun Int'l, Inc. v. Chrisha Creations, Ltd. 413 F.3d 324 (2d Cir. 2005) ("We have construed 17 U.S.C. § 101 to afford protection to design elements of clothing only when those elements, individually or together, are separable—'physically or conceptually'—from the garment itself.")).

[27] *Chosun*, 413 F.3d 324, at 329.

[28] *Id.*

[29] *See* Nimmer on Copyright, *supra* note 15, at § 2.08(H).

[30] *See Chosun*, 413 F.3d 324 at •326 (stating that costumes may be copyrightable); *but see Jovani Fashions, Ltd. v. Fiesta Fashions*, No. 12-598-cv, 2012 WL 4856412 (2d Cir. Oct. 15, 2012) (explaining that Jovani did not have a plausible copyright claim because the aesthetic and functional features of the prom dress are inseparable); *see also* Galiano v. Harrah's Operating Co., 416 F.3d 411 (5th Cir. 2005) ("[D]esigns were not copyrightable absent showing that they were marketable independently of their utilitarian function as casino uniforms.").

[31] 413 F.3d 324 (2d Cir. 2005).

[32] *Jovani* Fashions, No. 12-598-cv, 2012 WL 4856412 at *1.

[33] *Id*. (citing *Mazer v. Stein,* 347 U.S. 201 (1954)).

[34] *Id. See also* Sheppard Mullin Richter Hampton LLP- Los Angeles Office, *Jovani Fashion, Ltd. v. Fiesta Fashions: Second Circuit Finds Dress Designer's Copyright Claim Weak at the Seams*, Martindale.com (Dec. 3, 2012), http://www.martindale.com/intellectual-property-law/article_Sheppard-Mullin-Richter-Hampton-LLP_1635964.htm (citing *Jovani*).

[35] *Galiano v. Harrah's Operating Co., Inc.*, 416 F.3d 411, 422 (5th Cir. 2005).

[36] *Id.* at 420.

[37] *See* Hedrick *supra* note 10, at 229-232 (citations omitted).

[38] Mazer v. Stein, 347 U.S. 201 (1954).

[39] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (Oct. 19, 1976).

[40] *See generally*, Brief of Amicus Curiae New York Intellectual Property Law Association in Support of Neither Party, *Star Athletica, LLC v. Varsity Brands*, 136 S.Ct. 1823 (2016) (No. 15-866), http://www.scotusblog.com/wp-content/uploads/2016/07/15-866_amicus_np_new_york_intellectual_property_law_association.pdf.

[41] *Id. See* Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468 (6th Cir. 2015), *cert. granted*, 136 S.Ct. 1823 (2016) (No. 15-866).

[42] *Id.*

[43] *Id.*

[44] *See* Varsity Brands, 799 F.3d 468 (6th Cir. 2015), *petition for cert. filed*, 2016 WL 94219 (U.S. Jan. 5, 2016) (15-866), http://www.scotusblog.com/wp-content/uploads/2016/05/SACP.pdf.

[45] *See* Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012).

[46] *Id.* The IDPA was reintroduced from its predecessor bill, the Innovative Design Protection and Piracy Prevention Act (the "IDPPPA"), H.R.2511.

[47] Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012).

[48] *Id.*

[49] Kelly Grochala, *Intellectual Property Law: Failing the Fashion Industry and Why the "Innovative Design Protection Act" Should be Passed*, Seton Hall Law Student Scholarship (2014) (citing Guillermo C. Jimenez, *Fashion Law Editorial: Let's Pass the New Design Piracy Bill*, Fashion Law Center (Sept. 13, 2012) (*available at* http://fashionlawcenter.com/?tag=design-piracy).

[50] *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L. Rev. 1687 (2006).

[51] *Id.* at 1722.

[52] Eveline van Keymeulen & Louise Nash, *Fashionably Late*, Intellectual Property Magazine, December 2011/January 2012, at 53, (quoting Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L.Rev. 1687 (2006), https://www.cov.com/~/media/files/corporate/publications/2011/12/fashionably-late.pdf.

[53] Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012).

[54] Keymeulen & Nash, *supra* note 49, at 53.

[55] *Haute Couture*, Cambridge Advanced Learner's Dictionary & Thesaurus (2016), http://dictionary.cambridge.org/us/dictionary/british/haute-couture (*Haute couture* can be defined as "(the business of making) expensive clothes of original design and high quality.").

[56] *See* Council Directive 98/71, art. 3, 1998 O.J. (L 289) 28, 30 (EC) [hereinafter EU Directive].

[57] *Id.,* art. 1, at 30.

[58] *Id.,* art. 3, at 30.

[59] Emma Yao Xiao, *The New Trend: Protecting American Fashion Designs Through National Copyright Measures*, Note, 23 Cardozo Arts & Ent. L.J., 405, 412 ("This is a heightened standard of infringement because even if a design has not been copied exactly, infringement can occur if it has the same overall impression on an informed user.").

[60] JF Bretonniere & Frédérique Fontaine, *Europe: Using Community design rights to protect creativity*, Building and enforcing intellectual property value 32 (2010), *available at* http://www.iam-magazine.com/issues/Article.ashx?g=2309c3b6-a4fe-4f8b-bb07-48775ecfee22.

[61] *Id.*

[62] EUIPO, Designs in the European Union, https://euipo.europa.eu/ohimportal/en/designs-in-the-european-union.

[63] *Id.*

[64] Karen Millen Fashions Ltd v. Dunnes Stores, Dunnes Stores (Limerick) Ltd, Case C-345/13 (CJEU, June 19, 2014).

[65] *See* Richard Hing and Leighton Cassidy, *Karen Millen Fashions Ltd v. Dunnes Stores, Dunnes Stores (Limerick) Ltd: Clarifying the Assessment of Individual Character in EU Designs*, 1446-1454, International Trademark Association,

http://www.inta.org/TMR/Documents/Volume%20105/TMR_Vol105_No6_Hing-Cassidy.pdf; see also Michele Woods & Miyuki Monroig, WIPO Fashion Design and Copyright in the US and EU, WIPO (2015) http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf.

[66] *Id.*

[67] *See* Xiao, *supra* note 56, at 413; *see also* Keymeulen & Nash, *supra* note 49, at 54.

[68] "The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose." [Intellectual Property Code] Article L 112-1, (Fr.), *available at* https://www.legifrance.gouv.fr/content/download/1959/13723/version/3/file/Code_35.pdf.

[69] *See* [Intellectual Property Code] Article L-112-2 (14º) (Fr.); *see also* Holger Gauss, Boriana Guimberteau, Simon Bennett, Lorenzo Litt, *Red Soles Aren't Made for Walking: A Comparative Study of European Fashion Laws*, 5 Landslide 6, *available at* http://www.americanbar.org/publications/landslide/2012_13/july_august/red_soles_arent_made_walking_comparative_study_european_fashion_laws.html.

[70] *See* Gauss et al., *supra* note 66.

[71] Xiao, *supra* note 56 (The grant of protection regardless of registration is "unlike different protection schemes given to registered and unregistered designs under the European Union regulations.").

[72] Gauss, et al., *supra* note 66.

[73] In some EU Member States, including France and Belgium, fashion designs that are protected by copyright may also receive cumulative protection by registered or unregistered design rights. *See* Woods & Monroig, *supra* note 62.

[74] Gauss, et al., *supra* note 66 (citing Legge d'autore [LDA] 22 Aprile 1941, n. 633, pt. I, ch. I (It.)).

[75] *Id.*

[76] Xiao, *supra* note 56 at 414 (citing Law No. 633 of April 22, 1941, § 25, Protection of Copyright and Rights Related to its Exercise (It.), *available at* http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=2582).

[77] *See Information*, Società Italiana Brevetti Information/ Italian designs, http://www.sib.it/en/designs/design-registration-in-italy-and-the-eu/italian-designs/ (last visited Oct. 18, 2016).

[78] *Id.* at 415.

[79] *Id.*

[80] Copyright, Designs and Patents Act, 1988, c. 48, § 4 (U.K.), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=127294.

[81] Iona Silverman, *Copyright and Fashion: A UK Perspective*, WIPO Mag., June 2014, *available at* http://www.wipo.int/wipo_magazine/en/2014/03/article_0007.html. Some think that it could be possible for a one-off piece, but maybe not for mass-products. Woods & Monroig, *supra* note 62.

[82] Copyright, Designs and Patents Act, 1988, c. 48, §213(4) (U.K.), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=127294.

[83] *SAS Chaussea v. SARL Menport* CA Paris, June 3, 2011 (Fr.).

[84] *J-M Weston v. Manbow*, Cass., 1e civ., Apr. 5, 2012 (Fr.).

[85] *See* Innovative Design Protection Act of 2012, S.3523, 112th Cong. (2012).

[86] *See* Keymeulen & Nash, *supra* note 49 at 53.

[87] Gauss, et al., *supra* note 66.