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DESIGNER COLLABORATIONS AS A SOLUTION TO THE FAST-FASHION COPYRIGHT DILEMMA

Arielle K. Cohen*

INTRODUCTION

Fashion design is the redheaded stepchild in the field of intellectual property. It is an industry that thrives on creativity much like the music industry and the visual arts and yet it receives only a fraction of the intellectual property protection that other creative industries enjoy.¹ Design piracy is “the increasingly prevalent practice of enterprises that seek to profit from the invention of others by producing copies of original designs under a different label.”² As technology advances, the process of design piracy is becoming faster and more efficient which is troubling to many designers who put much thought and hard work into the creation of a single garment much less an entire collection.³

The Council of Fashion Designers of America (CFDA) has been lobbying Congress since 2006 in order to receive protection for fashion designs.⁴ A number of versions of the Design Piracy Prohibition Act (DPPA) have entered Congress and none have passed, largely due to some controversial provisions that were contained therein such as the registration requirement which would require designers to register their designs in order to receive protection.⁵ In July, 2011 the Innovative Design Protection and Piracy Prevention Act (IDPPPA), which is a revised version of the DPPA, was reintroduced into the House of Representatives and it has eliminated many of the controversial provisions that opponents to the previous bills took issue with.⁶ However, there are still many opponents to providing any copyright protection to fashion design because they feel that the lack of protection actually helps the fashion industry.⁷

* Associate at Constangy, Brooks, and Smith, LLP.

¹ See Janet Kim Lin, *Alterations to the Design Piracy Prohibition Act: Innovative Design Protection and Piracy Prevention Act ("IDPPPA")*, BULLIVANT, HOUSER, AND BAILEY, P.C.: ADVISORIES AND INSIGHTS (Aug. 23, 2010), available at <http://www.bullivant.com/Alterations-to-Design-Piracy-Prohibition-Act>.

² *Design Piracy*, COUNCIL OF FASHION DESIGNERS OF AMERICA, <http://www.cfda.com/design-piracy/> (last visited Feb. 24, 2012).

³ See *id.*

⁴ *Id.*

⁵ See Kathleen Fasanella, *IDPPPA: Yet Another Fashion Design Copyright Law*, FASHION-INCUBATOR (Aug. 6, 2010, 7:09 AM), <http://www.fashion-incubator.com/archive/idpppa-yet-another-fashion-design-copyright-law>.

⁶ *Id.*

⁷ See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1718 (2006).

Fast-fashion is the main culprit regarding why designers are looking for protection of their designs. Fast-fashion is the “low-cost, high-scale, rapid copying”⁸ of original designs of a lower quality at a discount price.⁹ The fast-fashion dilemma lies not in the interpretational copying of trends or styles but in the “exact” or “close-copying” of original designs.¹⁰ The difference is that a close copy is a line-by-line copy of a design and looks almost if not exactly identical to the original design, while an interpretational copy is an original design in itself that follows a current trend. Many large chain stores employ these fast-fashion methods of copying in order to capitalize on current fashion trends. Close copying is rampant among retailers and Forever 21 is the most notorious close copyist chain. Zara and H&M also create fast-fashion but the companies employ in-house designers to create new designs inspired by recent runway looks that follow the current trends.¹¹ Designers oppose close copying because retailers profit from the designers’ work while there is no economic benefit to the designer, which in turn, creates a disincentive for designers to create new designs.¹²

In response to the fast-fashion dilemma and to opponents of copyright protection for fashion design, I propose the more widespread use of designer collaborations as a way to allow fast-fashion copyists to use others’ designs while still giving the original designers credit for their work. A designer collaboration usually involves a large chain store employing a high end and usually well-known designer to design a limited edition collection for the store under the designer’s name.¹³ This trend has become wildly popular due to the use of big name designers and the limited edition nature of the lines.¹⁴ Although it will not likely fully satisfy the most rampant of fast-fashion copyists, the popular trend of designer collaborations could be used as a strategy to satiate fast-fashion copyists’ need to close-copy designs while still giving credit (both in name and money) to the original designers under the new rules of the IDPPPA if it is passed.

Part I of this paper discusses the current realms of IP protection, how each relates to fashion design, and how each inevitably falls short of adequate protection. Part II of this paper discusses the controversy over whether fashion is a useful article or whether it is art and why that distinction matters. Part III of this paper discusses the current pending legislation regarding copyright protection for fashion design and why I think this piece of legislation is a reasonable solution to the current lack of protection. Part IV explores the arguments against copyright protection for fashion design and why these arguments lack merit. Finally, in Part V of this paper I will discuss the emerging popularity of designer collaborations and why retailers should capitalize on this strategy of marketing in order to

⁸ C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1171 (2009).

⁹ *Id.* at 1172.

¹⁰ *Id.*

¹¹ *Id.* at 1172-73.

¹² *See id.* at 1174.

¹³ *See* Reena Jana, *Are Designer Collaborations Dead?*, BLOOMBERG BUSINESSWEEK (Apr. 4, 2007, 10:56 AM), http://www.businessweek.com/innovate/content/apr2007/id20070404_260024.htm.

¹⁴ *See* Lydia Dishman, *Macy's Follows Target into Designer Collaboration Territory -- Without the Brand Name*, CBS NEWS: MONEYWATCH (Oct. 21, 2010), <http://www.bnet.com/blog/publishing-style/macy-8217s-follows-target-into-designer-collaboration-territory-8212-without-the-brand-name/880>.

be able to use a style designed by another designer while still falling into compliance with the IDPPPA should it pass.

I. CURRENT REALMS OF IP PROTECTION ARE INADEQUATE FOR FASHION DESIGN

A. Trademark Law

A trademark is defined as:

“any word, name, symbol, or device or any combination thereof used by a person, or which a person has a bona fide intention to use in commerce and applies to register...to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”¹⁵

The purpose of trademark law is to protect source-identifying marks from being used on unrelated goods in a way that would cause confusion among consumers.¹⁶ In order for trademark infringement to occur, the plaintiff must prove that there is a likelihood of confusion between the plaintiff’s mark the potentially infringing mark.¹⁷ The courts look at a number of factors to determine whether there is a likelihood of confusion but the confusion must arise between two or more source identifying marks.¹⁸

As such, trademark law does not protect the design of a garment but rather only the source-identifying logo that is placed on it.¹⁹ Therefore, designs that have the brand’s logo conspicuously placed on the garment do receive a certain amount of protection under trademark law. However, if a copyist decides to copy the overall design of the garment and remove the logo there is no recourse for the designer under current trademark law.²⁰ Although trademark protection does allow a very slim amount of protection for garments that bear a logo, it excludes that vast number of designs that do not have visible logos. Also, trademark law favors strong, well-known marks, which causes trademark protection to be stronger for well-known designers compared to up and coming or mid-level designers.²¹

Trade dress on the other hand, refers to the overall look and feel of a product. It is defined as, “the total image of a product and may include features such as size, shape, color, or color combinations, texture, graphics, or even particular sales techniques.”²² Trade dress, like a trademark, indicates the source of goods.²³ In order for trade dress to

¹⁵ 15 U.S.C. § 1127.

¹⁶ 15 U.S.C. § 1125(a)(1)(A)-(B).

¹⁷ *Zapata Corp. v. Zapata Trading Int’l, Inc.*, 841 S.W.2d 45, 47 (Tex. App. 1992).

¹⁸ J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 24:30-24:43.

¹⁹ Aleksandra Spevacek, *Couture Copyright: Copyright Protection Fitting for Fashion Design*, 9 J. MARSHALL REV. INTELL. PROP. L. 602, 607-08 (2010).

²⁰ See Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 AM. BUS. L.J. 27, 45 n.5 (2011).

²¹ *Id.* at 46.

²² *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 (1992).

²³ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000).

be protected it also must be inherently distinctive or have acquired distinctiveness through secondary meaning.²⁴ In order for a mark to be inherently distinctive its intrinsic nature must serve to identify a particular source.²⁵ However, product design can never be inherently distinctive, so in order for a fashion design to be protected under trade dress it must have secondary meaning.²⁶ Secondary meaning occurs when “in the minds of the public, the primary significance of a mark or dress is to identify the source of the product rather than the product itself.”²⁷

Therefore, in order for a fashion design to be protected by trade dress protection it must be designed by an established fashion label that is so recognizable that people know who makes the design without even seeing the label.²⁸ This type of protection is clearly insufficient for a vast majority of the designs that are on the market today. Very few designers have the iconic recognition that is required in order to be afforded trade dress protection.

B. Design Patents

Design patents protect, “new, original and ornamental design for an article of manufacture.”²⁹ A requirement to obtain a patent is that the invention be novel and non-obvious.³⁰ At first blush, this description seems like it would be fitting for the protection of fashion design. However, courts have consistently found that fashion design does not meet the novel and non-obvious requirement.³¹ In *Neufeld-Furst*, the court stated:

In this circuit it is firmly established that more is required for a valid design patent than that the design be new and pleasing enough to catch the trade; it must be the product of ‘invention,’ by which is meant that conception of the design must demand some exceptional talent beyond the skill of the ordinary designer.³²

This holding only adds to the confusion of what is considered to be a sufficient design for protection. The court’s usage of the phrases “Invention” and “exceptional talent beyond the skill of the ordinary designer,” are not clear definitions in themselves. Therefore, the “novel, non-obvious” standard is ambiguous at best and difficult to apply.

Also, design patents take a long time to issue, roughly sixteen months, and they are expensive to obtain.³³ The length of this process is not suited to the fashion industry, where trends and styles are constantly changing by season. Assuming the patent is granted, by the time it is issued the design will be obsolete and the designers will have moved on to bigger and better things. Finally, a design patent can cost up to \$4,000 over

²⁴ *Two Pesos*, 505 U.S. at 775.

²⁵ *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 635 (6th Cir. 2002).

²⁶ *Wal-Mart*, 529 U.S. at 212.

²⁷ *Abercrombie*, 280 F.3d at 635.

²⁸ See Monseau, *supra* note 20, at 48.

²⁹ 35 U.S.C. § 171.

³⁰ 35 U.S.C. §§ 102, 103.

³¹ *Neufeld-Furst & Co v. Jay-Day Frocks*, 112 F.2d 715 (2d Cir. 1940).

³² *Id.*

³³ Spevacek, *supra* note 19, at 609.

the life of the patent, which is unreasonably high for fashion designers who create hundreds of looks per year.³⁴ This price is also unreasonable for emerging designers who have not yet made a large profit off of their designs and cannot afford such a high cost for protection.

C. Copyright Law

The main purpose of copyright law

is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and ... when the limited term ... expires and the creation is added to the public domain.³⁵

The Copyright Act protects “original works of authorship fixed in any tangible medium of expression.”³⁶ The test for copyrightability is: (1) the work must be original to the author, and (2) the work must be at least minimally creative.³⁷

Copyright law does not protect useful articles.³⁸ A useful article is “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”³⁹ A useful article can only gain protection to the extent that, “its artwork or creative design is separable from the utilitarian aspects of the work.”⁴⁰ This concept is known as conceptual separability. There has been little consensus among the circuits as to how to apply the test.⁴¹

The conceptual separability test is laid out in *Galiano*, where the Fifth Circuit applied a two prong test for conceptual separability: (1) determine whether the item for which copyright protection is sought is a “useful” article; and (2) determine whether the design incorporates features that are capable of existing independently of, and that can be identified separately from, the utilitarian aspects of the article.⁴² In 1991, the Copyright Office issued a policy decision in order to help clarify the ambiguous principle of conceptual separability.⁴³ The Office explained that in general, it would not register copyrights in “three-dimensional aspects of clothing or costume design,” because clothes contained “no artistic authorship separable from their overall utilitarian shape.”⁴⁴ The Office distinguished regular clothes from costumes; it would offer registration for regular

³⁴ U.S. House, Committee on the Judiciary, *Protection for Fashion Designs*, Hearing, July 27, 2006 (Serial 109-138), Washington: Government Printing Office (2006).

³⁵ *Eldred v. Ashcroft*, 537 U.S. 186, 247 (2003) (quoting H.R.Rep. No. 100-609 (1988)).

³⁶ 17 U.S.C. § 102(a).

³⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

³⁸ 17 U.S.C. § 101.

³⁹ *Id.*

⁴⁰ *Galiano v. Harrah's Operating Co., Inc.*, 416 F.3d 411, 416 (5th Cir. 2005).

⁴¹ *Id.* at 416-17.

⁴² *Id.*

⁴³ Monseau, *supra* note 20, at 40.

⁴⁴ Registrability of Costume Designs, Policy Decision, 56 Fed. Reg. 56, 530-31 (Nov. 5, 1991).

clothes “if they contain separable pictorial or sculptural authorship.”⁴⁵

However, this test has continued to be very difficult for courts to interpret, leading to little consistency among the circuits as to how to apply the test.⁴⁶ The courts, “have twisted themselves into knots trying to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article’s utilitarian function.”⁴⁷ Hence, the extension of copyright protection to fashion design has been enormously limited due to what courts have found to be the overall utilitarian nature of clothing.

II. FASHION DESIGN: USEFUL ARTICLE OR WEARABLE ART?

A. Useful Article?

As explained above, courts have been reluctant to extend copyright protection to fashion design because it has been determined that clothes are useful articles whose creative elements are not separable from the overall utilitarian function of the garment. Courts have determined that a garment’s purpose is to cover embarrassing parts of the body and to protect the body from the elements.⁴⁸ If this were the case, copyright protection should be available for the many sheer garments seen on the runways that neither cover embarrassing parts of the body nor protect them from the elements. But alas, these garments remain ineligible for protection.⁴⁹

However, there is a gaping hole in consistency regarding copyright legislation for useful articles. Congress extended copyright protection to architectural design through the Architectural Works Copyright Protection Act (AWCPA) in 1990.⁵⁰ This not only extended protection to architectural drawings but also to any three-dimensional depiction of a drawing.⁵¹ In contrast, a drawing of a fashion design is protected under copyright law but the three-dimensional representation of the drawing is not.⁵² When Congress addressed the policy decisions behind affording copyright protection to architecture, it acknowledged that while architecture is useful, it is also aesthetically interpreted.⁵³ Protection of architectural design is not determined through a separability test.⁵⁴ All that is required for an architectural design to be protected under the AWCPA is that it is: (1) original and (2) not wholly functional.⁵⁵

⁴⁵ *Id.*

⁴⁶ Monseau, *supra* note 20, at 41.

⁴⁷ *Galiano*, 416 F.3d at 417.

⁴⁸ *Boyds Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 661 (M.D. Pa. 2005).

⁴⁹ *See Spevacek, supra* note 19, at 621.

⁵⁰ 17 U.S.C. § 102.

⁵¹ Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1608 (1992).

⁵² *See* Alissandra Burack, *Is Fashion an Art Form That Should Be Protected or Merely A Constantly Changing Media Encouraging Replication of Popular Trends?*, 17 VILL. SPORTS & ENT. L.J. 605, 611 (2010).

⁵³ *Spevacek, supra* note 19, at 613.

⁵⁴ *Id.*

⁵⁵ Winick, *supra* note 51, at 1616.

The inconsistency between the treatment of fashion design and architectural design is blatantly obvious. The two types of design are extremely similar in that they are both useful at their core, but they can also be very artistic depending on what the architect or designer creates. The action that Congress has taken to expand copyright protection to architecture can easily be applied to fashion designs.⁵⁶ However, Congress has refused to grant the same protection to fashion design as it has to architectural design.⁵⁷

B. *Wearable Art?*

There is evidence to demonstrate that many fashion designs are not useful at all, but rather are another form of art akin to sculpture or painting, both of which enjoy copyright protection.⁵⁸ In *Poe v. Missing Persons*, the court was willing to consider whether a fashion design was a form of wearable art.⁵⁹ The *Poe* court denied summary judgment because there was a question of fact as to whether a crystal encrusted bathing suit was a useful article or a piece of art.⁶⁰

In the realm of popular culture, fashion has been inspired by art and art has been inspired by fashion.⁶¹ In the early twentieth century, the French fashion designer Paul Poiret was famously inspired by Middle Eastern art.⁶² More recently, the famous design house Louis Vuitton collaborated with Japanese artist Takashi Murakami where Murakami created a popular multi-colored monogram print for Louis Vuitton.⁶³

Moreover, notable museums house exhibitions of collections designed by famous fashion designers. The Guggenheim exhibited designs by Giorgio Armani, the Metropolitan Museum has exhibited designs by Christian Dior, Balenciaga,⁶⁴ and Alexander McQueen, and the Dallas Museum of Art has exhibited designs by Jean Paul Gaultier.⁶⁵ Museums have also presented exhibitions of clothing worn by famous style icons such as the Grace Kelly exhibition at the Victoria and Albert Museum in London.⁶⁶

It is clear that there has been widespread societal recognition of fashion as a form of art. Therefore, copyright law should fall in line with popular opinion and Congress should expand the interpretation of useful articles and extend protection to fashion design just as it has in the past for architectural works and vessel hulls.⁶⁷

⁵⁶ Raustiala & Sprigman, *supra* note 7, at 1751.

⁵⁷ Spevacek, *supra* note 19, at 614.

⁵⁸ Zandra Rhodes & Alice Rawsthorn, *Is Fashion a True Art Form?* (July 13, 2003), THE GUARDIAN, <http://www.guardian.co.uk/artanddesign/2003/jul/13/art.artsfeatures1>.

⁵⁹ Nisha Balsara, *Redefining Fashion: From Congress to the Runway*, 11 J. HIGH TECH. L. 93 (2010).

⁶⁰ *Poe v. Missing Persons*, 745 F.2d 1238, 1243 (9th Cir. 1984).

⁶¹ Balsara, *supra* note 59, at 5.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ DALLAS MUSEUM OF ART, *The Fashion World of Jean Paul Gaultier: From the Sidewalk to the Catwalk*, <http://dallasmuseumofart.org/View/Gaultier/index.htm>.

⁶⁶ VICTORIA AND ALBERT MUSEUM, *Grace Kelly*, <http://www.vam.ac.uk/collections/fashion/gracekelly>.

⁶⁷ Balsara, *supra* note 59, at 11.

III. INNOVATIVE DESIGN PROTECTION AND PIRACY PREVENTION ACT

The Council of Fashion Designers of America (CFDA,) lead by president Diane Von Furstenberg, has been lobbying Congress to receive copyright protection for fashion design since 2006.⁶⁸ The CFDA is a trade association whose members are among the top designers in the country and which has a strong interest in obtaining copyright protection for its members' fashion designs.⁶⁹

All of the different versions of proposed legislation for protection of fashion design have used the Vessel Hull Design Protection Act (VHDPA) as a framework to extend copyright protection to fashion design.⁷⁰ The VHDPA was passed by Congress in 1998 and it was passed due to heavy lobbying from boat hull manufacturers to prevent "hull splashing" which is the immediate copying of a boat hull design by competitors.⁷¹ The act gives vessel hull design protection similar to that of copyright protection for a ten-year period, as long as the design is registered within two years of the date it was made public.⁷² Several CFDA members have argued that protection of fashion design would be analogous to protection of boat hulls as a necessity to prevent rampant copying by fast-fashion copyists.⁷³

In 2009, the Design Piracy Prohibition Act (DPPA) was introduced to extend protection for boat hulls to articles of apparel.⁷⁴ The act defines fashion design as, "the appearance as a whole of an article of apparel, including its ornamentation; and includes original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel."⁷⁵ The test for originality under the DPPA requires that the design "provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source."⁷⁶ Therefore an article cannot be "original" if it is a standard item such as a basic pair of jeans or a polo style shirt. Under the DPPA, an infringing article is defined as, "any article the design of which has been copied from a design protected under this chapter, or from an image thereof, without the consent of the owner of the protected design."⁷⁷ The requisite period of protection for fashion designs would be three years under the DPPA and in order to receive protection, a designer would have to register the design.⁷⁸

The DPPA was created with the intention to protect the rights of fashion designers

⁶⁸ See COUNCIL OF FASHION DESIGNERS OF AMERICA, *Design Piracy*, <http://www.cfda.com/design-piracy>.

⁶⁹ Monseau, *supra* note 20, at 51.

⁷⁰ *Id.* at 50.

⁷¹ *Id.* at 49.

⁷² *Id.*

⁷³ *Id.* at 51.

⁷⁴ H. R. 2196 § (2)(a)(2)(A).

⁷⁵ H. R. 2196 § (2)(a)(7).

⁷⁶ 17 U.S.C. § 1301(b)(1) (2006).

⁷⁷ H. R. 2196 § (2)(e)(1).

⁷⁸ H. R. 2196 §§ (2)(d)(a)(2), (2)(h)(a)(2).

but there was much opposition to the bill due to certain provisions.⁷⁹ One of the main concerns was the registration requirement.⁸⁰ Some opposed to the bill feared that the registration requirement would greatly favor established designers who have the funds to hire attorneys to register all of their designs, even those that are not truly original, in order to prevent people from copying the design. The concern was that smaller, less well-funded designers would be wary of creating new designs for fear of infringement and being slammed with an expensive lawsuit.⁸¹ Also, the infringement standard under the DPPA is overly broad. It disallows, “any article the design of which has been copied,” and goes on to say, “a design shall not be deemed to have been copied from a protected design if it is original and not closely and substantially similar in overall visual appearance to a protected design, if it merely reflects a trend, or if it is the result of independent creation.”⁸² This definition leaves too much interpretation regarding whether a design has been copied to the courts.

In August 2010 Senator Charles Schumer introduced the Innovative Design Protection and Piracy Prevention Act (IDPPPA) into the senate where the bill eventually died. However, in July 2011, Representative Robert Goodlatte reintroduced the IDPPPA in to the House, which has addressed many of the concerns regarding previous versions of the bill.⁸³ First, the bill defines original designs as those that “provide a unique, distinguishable, non-trivial, and non-utilitarian variation over prior designs.”⁸⁴ This definition is more narrowly tailored than the DPPA in order to help courts determine what constitutes an original garment.

Second, the bill changes the infringement standard to, “substantially identical in overall visual appearance...as to the original elements of a design.”⁸⁵ This new infringement standard is much clearer than that in the DPPA, requiring an infringing item to be substantially identical to the copied item. Therefore, this new standard allows designers to be “inspired” by other designers’ garments without fear of infringing on their designs. This process of design interpretation is accepted in the fashion industry and is considered to be beneficial to the industry as a whole.⁸⁶ Third, the IDPPPA removes the registration requirement that was in the DPPA and which was cause for much concern.⁸⁷

Finally, the bill heightens the pleading standard and requires that a plaintiff show three things: (1) the design is protectable, (2) the design is substantially identical to the potentially infringing article, and (3) the defendant had access to or was aware of the protected design.⁸⁸ This heightened pleading standard makes it more difficult for

⁷⁹American Apparel and Footwear Association, *Innovative Design Protection and Piracy Prohibition Act*, <https://www.wewear.org/aafa-on-the-issues/category/?CategoryId=45>.

⁸⁰ See Fasanella, *supra* note 5.

⁸¹ Monseau, *supra* note 20, at 54.

⁸² H.R. 2196 § (2)(e).

⁸³ Fasanella, *supra* note 5.

⁸⁴ H.R. 2511 § 2(a)(2).

⁸⁵ H.R. 2511 § 2(e).

⁸⁶ Monseau, *supra* note 20, at 53.

⁸⁷ H.R. 2511 § 2(f).

⁸⁸ Monseau, *supra* note 20, at 55.

plaintiffs to bring suit and is an important requirement in order to prevent frivolous lawsuits from well-funded designers who want to over-police their designs. Therefore, the IDPPPA has addressed the controversial issues that were present in the DPPA and it is narrowly tailored to protect designers' rights in a way that is practical and reasonable for large and small designers alike.

IV. THE ABSURDITY OF THE PIRACY PARADOX

Many critics of the previous versions of the proposed legislation for copyright protection for fashion design took issue with certain provisions in the bill but were not necessarily against copyright protection as a whole. Other critics however, are against the entire notion of copyright protection for fashion design and believe that it should not be afforded under any circumstance.

The leading opponents of copyright protection for fashion design are Professors Raustiala and Sprigman.⁸⁹ They are proponents of the view known as “the piracy paradox” which is the concept that the lack of IP rights for fashion design actually helps the fashion industry rather than hurts it.⁹⁰ Raustiala and Sprigman argue that “IP rules providing for free appropriation of fashion designs accelerate the diffusion of designs and styles.”⁹¹ They call this process “induced obsolescence” without which, they argue, would cause the fashion cycle to slow down tremendously thereby causing less turnover and a decrease in sales.⁹² Proponents of the piracy paradox also argue that low IP protection for fashion design causes consumers to purchase more in order to stay up to date with the rapidly changing trends thereby benefiting designers and the fashion industry as a whole.⁹³

On the surface, the piracy paradox sounds logical, but once the surface is scratched it is clear that there are numerous holes in the argument. First, proponents of the piracy paradox do not take the rapidly evolving new technologies of fast-fashion close copying into account.⁹⁴ Foreign factories can create cheaply made close copies of designs that have been newly released on runways and the copy can be in stores before the original design even goes into final production.⁹⁵ This does not give the designers a chance to compete because their designs may not hit stores until months after the knockoffs land in stores due to the longer production time for their higher quality product. Also, fast-fashion copyists can go the opposite route and wait to see which designs are popular and quickly create close copies of those designs thereby profiting off of the designer's efforts without putting in any of the creative work.⁹⁶ In both cases, the fast-fashion copyist benefits economically while the designer loses out on profits and credit.

⁸⁹ *Id.* at 28.

⁹⁰ Raustiala & Sprigman, *supra* note 7, at 1689.

⁹¹ *Id.* at 1722.

⁹² *Id.*

⁹³ *Id.* at 1733.

⁹⁴ Monseau, *supra* note 20, at 29.

⁹⁵ *Id.*

⁹⁶ See Hemphill & Suk, *supra* note 8, at 1171-72.

Second, the lack of copyright protection is especially harmful to mid-level and independent designers who lose out on profit from their designs that are copied by big box fast-fashion copyists or better known designers. This, in turn, reduces their incentive to create new designs.⁹⁷ When a fast-fashion copyist makes an exact copy of a mid-level designer's design, many consumers will choose to purchase the cheaper fast-fashion version even though the original is affordable to the consumer in order to save money.⁹⁸ Also, when a well-known designer copies an independent designer, people may purchase the well-known designer's version due to the status associated with that designer or because they are unaware of the independent designer's version. Either way, the independent designer loses out because another designer is enjoying their potential profits.

Third, proponents of the piracy paradox do not distinguish between close copying, which reduces designers' incentive to create, and interpretational copying, which can enhance creativity in the fashion industry.⁹⁹ Close copying is very prevalent among some fast-fashion chains such as Forever 21. It reduces designers' incentive to create because others are profiting from their exact designs.¹⁰⁰ However, interpretational copying is a practice that is accepted within the fashion industry and which enhances creativity.¹⁰¹ Interpretational copying is a process whereby a designer "interprets" another designer's design and creates a derivative work based on that design.¹⁰² The more that designers are inspired by one another, the more creativity will flow from them. Therefore, distinguishing between close copies and interpretational copies is important because one actually enhances creativity without "infringing" while the other prevents creativity by causing a disincentive to create.

Finally, proponents of the piracy paradox did not take downturns in the economy into account when predicting consumer behavior. They argue that a lack of copyright protection for fashion will speed up the fashion process causing a high turnover of designs and trends, causing consumers to purchase more fashion items in order to keep up with the rapidly evolving trends.¹⁰³ However, the extremely high turnover of fashion trends from one season to the next can be a turnoff to consumers and even more so in a down economy. While a natural evolution of trends throughout the seasons is desirable for designers and consumers alike, extreme changes from season to season would become frustrating for designers because the natural creative process would be overtaken by a need to quickly change designs in order to minimize close copying. Also, extreme changes from season to season may cause consumers to become apathetic and give up trying to follow the quickly changing trends due to the high cost of keeping up, which will in turn hurt the fashion industry as a whole.

⁹⁷ *Id.* at 1175.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1165.

¹⁰⁰ *Id.* at 1175.

¹⁰¹ *See id.* at 1160.

¹⁰² *See id.*

¹⁰³ Raustiala & Sprigman, *supra* note 7, at 1733.

Therefore, proponents of the piracy paradox have clearly ignored some major flaws in their argument. I believe that protection for fashion design in the form of the IDPPPA will be extremely beneficial to the industry, especially if stores and designers pick up on the designer collaboration model, which I will discuss in detail below.

V. DESIGNER COLLABORATIONS AS A SOLUTION TO THE FAST-FASHION COPYRIGHT DILEMMA

The already popular marketing method of designer collaborations could be a solution to the fast-fashion close copying dilemma for designers and retailers alike. Setting aside all arguments for or against copyright protection for fashion design, the fact of the matter is the IDPPPA is likely to pass due to the strong amount of lobbying that has gone on in favor of the bill as well as the removal of the controversial provisions.¹⁰⁴ If the bill passes, many designers will celebrate the newly acquired protection of their future designs. However, many fast-fashion retailers will be displeased by their lack of ability to make cheaper copies of high fashion styles. I propose that retailers utilize the already popular marketing and sales strategy of designer collaborations in order to fill the void created by their inability to make copies. I believe that this strategy is a win-win-win scenario for the retailer, the designer, as well as the consumer.

A designer collaboration usually involves a large chain store employing a high end and usually well-known designer to design a limited edition collection for the store under the designer's name.¹⁰⁵ There tends to be a lot of buildup and hype surrounding these collaborations and the marketing strategies get more and more creative.¹⁰⁶ However, there are different types of collaborations. Examples include ongoing designer collaborations such as Vera Wang for Kohl's¹⁰⁷ as well as collaborations with less well-known designers such as Tucker for Target.¹⁰⁸ Collaborations can even include celebrity-designer collaborations and artist-designer collaborations (as discussed earlier with Louis Vuitton and Murakami). This marketing model has numerous possibilities.

The trend of designer collaborations started becoming popular in 2006 with Luella Bartley's collaboration with Target to create high fashion for low prices; the trend has been rapidly growing ever since.¹⁰⁹ Since then, the strategy has exploded. Target alone has teamed up with designers like Behnaz Sarafpour, Proenza Schouler, Richard

¹⁰⁴ Columbia Business Law Review Online, *The IDPPPA – Is The Third Time A Charm?*, <http://cblr.columbia.edu/archives/11357>.

¹⁰⁵ See Reena Jana, *Are Designer Collaborations Dead?*, BLOOMBERG BUSINESSWEEK (Apr. 4, 2007), http://www.businessweek.com/innovate/content/apr2007/id20070404_260024.htm.

¹⁰⁶ See Eileen Conlan, *Target Collaborations To Sell On Gilt Groupe Before Stores*, SHE FINDS, <http://www.shefinds.com/2010/shop-target-collaborations-before-they-hit-stores-at-gilt-groupe/> (discussing hype surrounding Tucker for Target being pre-sold on flash sale site Gilt Groupe).

¹⁰⁷ *Vera Wang to Design Line Just for Kohls*, USA TODAY, Aug. 24, 2006, http://www.usatoday.com/money/industries/retail/2006-08-24-vera-wang_x.htm.

¹⁰⁸ *Tucker for Target GO International Collection*, THE BUDGET FASHIONISTA (Sept. 7, 2010), <http://www.thebudgetfashionista.com/archive/tucker-for-target-go-international-collection> (describing the Tucker for Target designer collaboration).

¹⁰⁹ See Deidre Woollard, *Luella Bartley Designs for Target*, LUXIST (Feb. 2, 2006), <http://www.luxist.com/2006/02/02/luella-bartley-designs-for-target/>.

Chai, Rodarte, Thakoon, Zac Posen, and Missoni.¹¹⁰ Even Forever 21, which may be the most notorious fast-fashion copyist, has hopped on the collaboration bandwagon with its collaborations with Brian Lichtenburg, Rory Becca, and Petro Zillia.¹¹¹

If the IDPPPA passes, fast-fashion copyists will be prohibited from making close copies. This creates an incentive to bring about collaborations between the former close copyists who will still be able to enjoy profits from a designer's work and designers themselves who can now profit on their own designs through collaborations with large retailers. These types of collaborations can easily exist under the proposed legislation if it passes and are a win-win-win for retailers, designers, and consumers alike. Under the designer collaboration model, instead of making cheap copies of designer clothes, retailers can have the designer create an exclusive collection for the store. This strategy is beneficial to the retailer because the retailer will not have to be concerned with infringement and it will also gain credibility among consumers as a desirable place to shop. Also, the collection is a great way to bring customers into a store due to the large amount of hype that surrounds many of these collaborations.¹¹² The customer may or may not find an item in the collection that they want to buy, but once they are in the store they are a captive audience and may potentially buy more items from other areas. The designer collaboration strategy has already proven to be a very successful marketing strategy for retailers. I believe it could be even more so under the IDPPPA should the legislation pass.

This model is also very beneficial to designers for a number of reasons. First, designers will profit from the collections that they design for the retailers instead of being close copied without any compensation. Also, collaborations create an expansion in the designer's profit base since, in many cases, people who purchase designs from the collaboration are not usual consumers of the designer's styles, thereby creating new customers automatically. Finally, the collaboration can benefit designers by acting as form of advertising for the designer by creating brand recognition. This advertising is especially beneficial lesser-known designers who grow in popularity tremendously when they design a collection for a large retailer. Also, mid-level designers whose usual collections are within the realm of affordability to many of the customers of the collaboration may gain long-term customers once the collaboration ends.

Consumers also benefit greatly from these collaborations because they are able to purchase an original design by a designer that interests them at an affordable price. In some cases, especially with the very large name designers, the usual designs would be unaffordable for many consumers. However, these collaborations bring original designs

¹¹⁰ Eileen Conlan, *Target's Go International Designer Collective: You've Got Another Chance To Snag A Collaboration Dress*, SHE FINDS (Mar. 14, 2011), <http://www.shefinds.com/2011/targets-go-international-designer-collective-youve-got-another-chance-to-snag-a-collaboration-dress>.

¹¹¹ See Ashley, *Forever 21 to Launch First Designer Collaboration*, COLLEGE FASHION (July 19, 2010), <http://www.collegefashion.net/fashion-news/forever-21-to-launch-first-designer-collaboration/> (describing Forever 21's first designer collaboration).

¹¹² See Elizabeth, *5 Tips on Scoring Big with Designer Collaborations*, COLLEGE FASHION (Apr. 20, 2010), <http://www.collegefashion.net/shopping/5-tips-on-scoring-big-with-designer-collaborations/> (explaining how some collaborations create much more hype than others depending on the designer involved).

into the realm of possibility for many people. For example Lanvin, whose dresses usually sell for around \$2,000, created a line for H&M in 2010,¹¹³ and Mulberry, whose bags normally sell for around \$1,500, created a line for Target in 2010. These original price points are clearly out of the realm of affordability for many consumers but the collaboration price points are much lower. Therefore, the consumer benefits by being able to get an original design at an affordable price.

Finally, designer collaborations benefit the fashion the industry and society as a whole because they inspire more creation. As a society, we value creation; the more creation the better. Designer collaborations are beneficial to the fashion industry and society as a whole because they give designers an incentive to create entire new collections, which will eventually only contribute to the richness of the public domain.

CONCLUSION

Aside from the limited trademark and trade dress protection that some designs acquire, fashion designs have not been afforded intellectual property protection. Design patents are not an appropriate fit for fashion design. Copyright protection on the other hand, is appropriate because it is meant to protect original works of authorship that are fixed in a tangible medium and fashion design falls into this category. However courts have consistently found fashion designs to be useful articles whose creative aspects are not separable from their utilitarian aspects.

A reasonable person would find Congress' refusal to extend copyright protection to fashion designs to be antiquated, especially in light of the AWCPA, the Vessel Hull Design Protection Act, and society's recognition of fashion design as an art form. The pending legislation in favor of copyright protection for fashion design has finally been revised into a form that has removed the controversial provisions and is a practical and reasonable form of protection for fashion design. I believe that should this legislation pass, fast-fashion retailers should use the marketing strategy of designer collaborations as a way to continue to use original designs without infringing.

The strategy of designer collaborations is an increasingly popular model that can and should be capitalized on by fast-fashion retailers under the new legislation should it pass. However, currently H&M and Target are the main users of this model and many other stores could benefit from it as well. This strategy benefits retailers by drawing in new customers; it benefits designers by allowing them to profit from new designs; it benefits consumers by allowing them to purchase designer brands at affordable prices; and it benefits society by creating an incentive for new creativity which will eventually fall into the public domain.

¹¹³ Leah Chernikoff, *Lanvin for H&M: The Full Collection*, FASHIONISTA (Nov. 2, 2010, 9:38 AM), <http://fashionista.com/2010/11/lanvin-for-hm-the-full-collection/>.