Fashioning a New Idea: How the Design Piracy Prohibition Act Is a Reasonable Solution to the Fashion Design Problem

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I. INTRODUCTION

In the Academy Award nominated film *The Devil Wears Prada*, Meryl Streep's character, the devilish editor in chief, icily dresses down a new assistant by explaining to her the iterative nature of the dissemination of fashion design.[1] Everything from cut and color to fit and details begin with an innovative designer in a season's fashion collection. The designer shows his or her designs to prospective buyers,

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1. THE DEVIL WEARS PRADA (Twentieth Century Fox 2006) ("You go to your closet and you select out, oh I don't know, that lumpy blue sweater, for instance, because you're trying to tell the world that you take yourself too seriously to care about what you put on your back. But what you don't know is that that sweater is not just blue, it's not turquoise, it's not lapis, it's actually cerulean. You're also blithely unaware of the fact that in 2002, Oscar De La Renta did a collection of cerulean gowns. And then I think it was Yves St Laurent, wasn't it, who showed cerulean military jackets? And then cerulean quickly showed up in the collections of 8 different designers. Then it filtered down through the department stores and then trickled on down into some tragic Casual Corner where you, no doubt, fished it out of some clearance bin. However, that blue represents millions of dollars and countless jobs . . . .").

editors, and high-end retailers. Each fashion season, trends are born of this fashion elite, and from there, some version of the designer's original art will trickle down to a cheaper, mass-market version. While this trickle-down effect may be a part of the traditional business model of the fashion industry, new technology has increased the pace of fashion "remixing," turning the tradition of "remixing" design ideas into design piracy.

Design piracy, where a manufacturer of inexpensive products copies almost exactly a design from a high-end designer, is made even easier in today's digital world.[2] All one needs is a digital photograph of the clothes as presented during a fashion show, and within a matter of days, copies can be cheaply produced and marketed, long before the original designer has a chance to market or distribute his or her own design.[3]

Fashion is one of the few creative industries in the United States that is not protected from such piracy by intellectual property (IP) laws.[4] Music, movies, publishing, and video games are all protected by IP laws, but U.S. courts have consistently held that fashion design cannot garner the same sort of protection.[5] Other nations, particularly those with strong ties to the fashion world, have sought to protect fashion design as art through legislation. This Comment will first discuss the current state of fashion design and modern design piracy, including fashion industry basics and available protections from IP law. The Comment will also address H.R. 2033, the Design Piracy Prohibition Act, and argue that this proposed legislation, like its European counterparts, is an appropriate and necessary addition to U.S. IP law.

II. THE FASHION INDUSTRY AND ITS PLACE IN AMERICAN JURISPRUDENCE

A. Fashion Industry Basics

The global fashion industry generates profits of over $750 billion annually.[6] In the United States alone, the fashion industry produces $350 billion annually.[7] A fashion design trade group estimates that losses

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2. *See* Kal Raustiala, *Fashion Victims*, NEW REPUBLIC, Mar. 15, 2005, https://ssl.tnr.com/p/docsub.mhtml?i=w050314&s=raustiala031505.

3. *See id.*

4. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1689 (2006).

5. 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[B][3]293-95 (2005).

6. *See* Safia Nurbhai, *Style Piracy Revisited*, 10 J.L. & POL'Y 489 (2002).

7. *See A Bill To Provide Protection for Fashion Design: Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property on H.R. 5055*, 109th Cong. 9

resulting from design piracy each year from apparel and footwear are at least $12 billion.[8]

The structure of the fashion industry forms what has been called a "fashion pyramid."[9] Haute couture, the very expensive custom clothing styles created for individual female customers, forms the top level of the "fashion pyramid."[10] The remaining levels are comprised of ready-to-wear clothing made for both sexes produced by well-known designers, followed by moderately priced "better" fashion, and finally, basic or commodity clothing.[11]

Garments at the top of the pyramid typically command significantly higher prices and contain higher levels of originality and design creativity than less pricey mass-produced fashions; designers of top-tier garments also turn out new designs at a much higher rate than bottom-tier producers.[12] Not only does haute couture contain more "fashion content" relative to lower tiers, but the seasonal demands of the industry also dictate a higher rate of production of fresh designs.[13]

The fashion trends at the top of the pyramid, set by the desire of the wealthy to possess the most original clothing, drive what is known in the industry as the "style cycle."[14] Less affluent consumers hoping to emulate the styles worn by haute couture trendsetters create demand for lower-priced, similarly designed garments.[15] By the time a particular look or trend reaches the mass market, haute couture buyers discard the designs and demand new creations to satisfy their desire to wear only the latest and most unique clothing.[16] In the style cycle, fashions are created by top designers as original works of art designed for a limited and exclusive clientele for an incredible profit. The general idea or trend of a

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(July 27, 2006) [hereinafter *Hearings*] (statement of Jeffrey Banks, Fashion Designer, Representing the Council of Fashion Designers of America). These hearings were held in regard to the Design Piracy Prohibition Act's predecessor bill, H.R. 5055, which was submitted during the 109th Congress but died before it was brought to a vote. *See* H.R. 5055, 109th Cong. (2006), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h109-5055. H.R. 5055 is identical in all respects to the 2007 Design Piracy Prohibition Act. A companion bill with the same title, S. 1957, was submitted to the Senate on August 2, 2007. *See* S. 1957, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s110-1957.

8. *See Hearings*, *supra* note 7, at 4.

9. *See* Peter Doeringer & Sarah Crean, *Can Fast Fashion Save the U.S. Apparel Industry?*, 4 SOCIO ECON. REV. 353, 357 (2006); *see also* Raustiala & Sprigman, *supra* note 4, at 1693.

10. *See* Raustiala & Sprigman, *supra* note 4, at 1693.

11. *See id.*

12. *See id.* at 1694.

13. *See id.*

14. *See* Nurbhai, *supra* note 6, at 492.

15. *See id.*

16. *See id.*

haute couture design is copied or "referenced" by lower level designers and produced for a mass market at a cheaper price.[17]

This cycle has long been accepted in the fashion industry without detriment to profits for the top designers whose original designs are being referenced. Although the cycle theory is still a valid interpretation of the fashion industry, modern technology has created a situation where some lower level designers are no longer "referencing" top designs, but pirating them. Television and the Internet allow design pirates to see the fashions of the top tier of the pyramid immediately upon their showing and copy the designs overnight.[18] One commentator noted:

> [A] photograph snapped at a fashion show in Milan can be faxed overnight to a Hong Kong factory, which can turn out a sample in a matter of hours. That sample can be FedExed back to a New York showroom the next day, ready for retail buyers to preview. Stores order these lower-priced "interpretations" for their own private-label collections even as they are showing the costlier designer versions in their pricier departments.[19]

There are many well-known fashion companies that specialize in producing knock-offs of high fashion trends, such as H & M. Designer Allen Schwartz of A. B. S. Collections declares that he has "collections that emulated runway trends, which would be delivered to stores so quickly, they beat other major designers to the racks."[20]

Legal commentators have noted that because this technology allows runway fashions to be sent around the world and copied "[i]n the blink of an eye," it may be difficult for designers to recoup the expense and effort that went into designing an original collection.[21] If the key to a design's profitability is its novelty, then a designer can only expect to profit while he has exclusive use of his design, which is the period of time before a competitor can copy the design at a cheaper cost.[22] In the past, there was a significant time lag, up to several months, between when the design was introduced to the market and the time a competitor could reproduce a copy, allowing the original designer to market and profit from his originality and creativity.[23] In today's fashion market, the copy can be

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17. *See* Raustiala, *supra* note 2.

18. *See* Nurbhai, *supra* note 6, at 493.

19. Teri Agins, *Copy Shops: Fashion Knockoffs Hit Stores Before Originals as Designers Seethe*, WALL ST. J., Aug. 8, 1994, at A1.

20. A.B.S. Web Site, http://web.archive.org/web/20060712043323/http://www.absstyle.com/asstd_pages.php?temp=company (last visited Oct. 7, 2007).

21. *See Hearings*, *supra* note 7, at 11.

22. *See* Peter K. Schalestock, *Forms of Redress for Design Piracy: How Victims Can Use Existing Copyright Law*, 21 SEATTLE U. L. REV. 113, 115 (1997).

23. *See id.*

reproduced and distributed for sale before the original design can enter stores, which may lead to a disincentive for designers to create new and original works.[24] Especially for small designers, the cost of researching and producing a wholly original design may be too great because they are unable to recoup their expenses due to piracy of their design.[25] One of the theories of IP rights "predicts that extensive copying will destroy the incentive for new innovation."[26] As such, IP law protects the majority of creative industries in the United States, including music, film, video games, and publishing.[27] However, the current IP standard often gives little or no protection to fashion design.[28]

B. Current Status of IP Protection for Fashion Design

If fashion designers want to legally safeguard their art from pirates, they have only a few options for IP protection. One option for fashion designers is to register their work as a trademark. Trademarks are designed to provide continuity for a recognizable brand by preventing consumer confusion. While fashion industry firms certainly police their brands from illegal counterfeiters selling pirated street versions of genuine apparel and accessories with the trademarked designs attached, only the actual trademark is protected, not the underlying pirated product or garment design.[29] As long as a competitor attaches his own trademark, he is free to copy the garment design as much as he likes.[30] While at times the source identifying mark may be located on the garment design, for most designers, if they want to protect their design with a trademark they will have to attempt to protect the trade dress of the object.[31]

Trade dress traditionally protects the product packaging of an item, and the United States Supreme Court has held that product design alone is not inherently distinctive under trademark law.[32] If a garment is held to be a product design and not product packaging, then a designer must show that his design has acquired secondary meaning in order to gain trademark protection.[33] Secondary meaning requires that the primary significance of the mark be to identify the source of the product, instead

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24. *See id.*
25. *See id.*
26. Raustiala & Sprigman, *supra* note 4, at 1689.
27. *See id.*
28. *See id.*
29. *See id.* at 1700-01.
30. *See id.*
31. *See id.* at 1702.
32. *See* Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 212 (2000).
33. *See id.*

of the product itself.[34] In one case involving the product design of children's summer apparel, the Supreme Court ruled that the product design was not inherently distinctive and that the clothing designer could not prove trade dress distinction because it had not proven secondary meaning in its design.[35] The Supreme Court held that when other courts are unsure as to whether a product is product design, with no inherent distinctiveness, or product packaging, which is eligible for trade dress without a showing of secondary meaning, they should "err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning."[36] The problem for fashion design, as the Supreme Court suggests in *Wal-Mart Stores, Inc. v. Samara Bros.*, is that it will very rarely be source-identifying and will often not qualify for trademark protection.[37]

The second method of protection for design available to the fashion industry is under U.S. patent laws. U.S. law states that "[w]hoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor."[38] Fashion designers, however, often find the requirements for patent protection difficult to meet. The overall appearance and visual effect of a design must be "novel and nonobvious" to obtain protection.[39] In the fashion industry, where most designs have been "referenced" from an earlier designer, meeting the high standards for originality set by the United States Patent and Trademark Office (USPTO) can be difficult.[40]

Another obstacle to possible patent protection presents itself in the patent application process. The current length of time between an application filing and final approval or disapproval from the USPTO is about two years, which causes companies in many different industries to forgo the patent process and instead focus efforts on trademark or copyright protections.[41] Additionally, the cost of a patent application, without the added cost of patent attorney fees, can be in the thousands of

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34. *See id.* at 211.
35. *See id.* at 216.
36. *Id.* at 206.
37. *Id.* at 212.
38. 35 U.S.C. § 171 (2000).
39. *See In re* Haruna, 249 F.3d 1327, 1335 (Fed. Cir. 2001) (citing *In re* Rosen, 673 F.2d 388, 390 (1982)).
40. *See* Raustiala, *supra* note 2.
41. *See* Tom Michael, Slow-Going at the Patent Office, http://www.innovation-america.org/archive.php?articleID=168 (last visited Oct 7, 2007) (noting that many other industries are also forgoing patent protection due to the delay in receiving patents).

dollars.[42] In an industry that moves particularly fast, like fashion design, spending the time and money necessary to file a design patent may not be worthwhile for designers when there is no guarantee that the application will be successful. Even if a designer is successful in patenting the design, the design may no longer be current or marketable in the industry by the time the design receives protection.

The final option for a person wishing to protect his or her fashion design is copyright law. Copyright protection exists in the United States to protect literary works, musical works, motion pictures, dramatic works, choreographic works, pictorial, graphic and sculptural works, other audiovisual works, sound recordings, and architectural works.[43] Three-dimensional objects received copyright protection in 1870, including works of "fine arts."[44] While "fine arts" receive copyright protection, "useful articles" that "hav[e] an intrinsic utilitarian function that is not merely to portray the appearance of the article," do not.[45] For this reason, clothing is granted copyright protection only to the extent that artistic features can be removed and separately identified.[46]

The fashion industry formed the Fashion Originator's Guild of America in 1935 to protect fashion designers from style piracy.[47] A "declaration of cooperation" required members to deal only in original creations, new designs had to be registered with the Guild, and the Guild imposed sanctions on members who did business with non-member garment producers.[48] Until the Supreme Court declared the Guild in violation of the Sherman Act's antitrust regulations, the Guild was highly successful in preventing design piracy.[49]

Not until 1954 did the Supreme Court alter the utilitarian doctrine denying copyright protection to mass-produced, industrially designed products.[50] *Mazer v. Stein* granted copyright protection to a lamp because the sculptured lamp base was found to be a "work of art" separable from the object's primary use as a lighting fixture.[51] For the

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42. *See* U.S. Patent & Trademark Office, FY 2007 Fee Schedule, http://www.uspto.gov/web/offices/ac/qs/ope/fee2007february01.htm#patapp (last visited Oct. 7, 2007).

43. *See* 17 U.S.C. § 102 (2000).

44. *See* Copyright Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212.

45. *See* 17 U.S.C. § 101.

46. *See id.*

47. *See* Nurbhai, *supra* note 6, at 495.

48. *See id.* at 495-96.

49. *See id.*; *see also* Fashion Originator's Guild of Am. v. FTC, 312 U.S. 457, 460 (1941) (holding that the Guild engaged in unfair, monopolistic business practices).

50. *See* Nurbhai, *supra* note 6, at 497.

51. 347 U.S. 201, 214 (1954).

first time, the Court granted copyright protection to an industrially designed, mass-produced product.[52]

The Copyright Act of 1976 codified the *Mazer* holding and introduced the theory of conceptual separability into the statutory scheme.[53] If an item is considered a "useful article," it is entitled to copyright protection only if the artwork or creative design is separable from the utilitarian aspects of the work.[54] In one case, the United States Court of Appeals for the Fifth Circuit held that a designer of casino uniforms could not copyright her designs because clothing has a utilitarian and aesthetic value.[55] The Fifth Circuit found that her designs did not have marketability independent of their function as uniforms.[56] Essentially, the court ruled, as most circuit courts in the United States have ruled, that dress designs "generally do not have artistic elements that can be separated from the utilitarian use of the garment."[57]

Under current copyright law, a two-dimensional sketch of a fashion design garners copyright protection as a pictorial work.[58] However, artists lose all copyright protection as soon as they render sketches into three-dimensional garments because clothing is not normally considered to have separable elements.[59] Garments are protectable under copyright in certain circumstances, but for the vast majority of fashion designs, copyright protection is unavailable because the expressive elements are found "in the 'cut' of a sleeve, the shape of a pant leg, and the myriad design variations that give rise to the variety of fashions for both men and women."[60]

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52. *See id.* at 218.

53. *See* Nurbhai, *supra* note 6, at 498-99.

54. *See* 17 U.S.C § 101 (2000); *see also* Galiano v. Harrah's Operating Co., 416 F.3d 411, 416 (5th Cir. 2005) (discussing that the test for whether designs can be copyrighted is whether design features are separable from the utilitarian aspects of the object); Kieselstein Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980) (discussing the difficulty in determining whether the design features of an object can be identified separately from the utilitarian aspects).

55. *See Galiano*, 416 F.3d 411.

56. *See id.* at 422.

57. *Id.* at 419.

58. *See* Raustiala & Sprigman, *supra* note 4, at 1699.

59. *See id.*

60. *Id.* at 1700. *But see* Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980) (holding that belt buckle designs were protected under copyright because they were being used principally for ornamentation and the ornamental design was conceptually separable from the utilitarian function as a belt).

III. A REASONABLE SOLUTION: THE DESIGN PIRACY PROHIBITION ACT

A. The Basics of House Report 2033

Introduced on April 25, 2007, by the House IP Subcommittee, the Design Piracy Prohibition Act, or H.R. 2033, proposes to extend copyright protection to fashion designs.[61] The bill would exclude any designs that have been in existence for more than three months before an application for copyright protection and would limit available protection to a maximum of three years.[62] Like other copyright protected articles, no infringement would lie for independently created fashion designs.[63] An infringing article would be any article copied from an image of the original article without the consent of the owner of the protected design.[64] The fashion designs included under the bill would not only be outer garments but also gloves, underwear, footwear, headgear, handbags, purses, tote bags, belts, and eyeglasses.[65] In response to H.R. 2033, the Copyright Office suggests that design protection would be best served for creators of haute couture apparel and that a strong notice requirement is essential.[66] Otherwise, the Copyright Office finds the proposed legislation to be "an appropriate, balanced legislative proposal."[67]

B. Theoretical Arguments in Favor of H.R. 2033

Advocates for strong IP protection laws typically argue that if copying is permitted, the public good suffers because free riding lessens the financial incentives artists and other original content producers have to produce beneficial new works.[68] The Design Piracy Prohibition Act springs from the theory that one of the purposes of copyright law is to protect "the general benefits derived by the public from the labors of authors."[69] U.S. Representative Bob Goodlatte noted that "[t]his loophole [in American copyright protection] allows pirates to cash in on other's efforts and prevent [sic] designers in our country from reaping a fair

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61. *See* H.R. 2033, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h110-2033.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See* The Patry Copyright Blog, *Why Fashion Design Is Like a Boat*, http://williampatry.blogspot.com/2006/04/why-fashion-design-is-like-boat.html (Apr. 11, 2006, 06:37 EST).

66. *See Hearings*, *supra* note 7, at 197 (statement of the United States Copyright Office).

67. *Id.* at 219.

68. Raustiala & Sprigman, *supra* note 4, at 1688.

69. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

return on their creative investments."[70] He also stated that "[b]ecause these knockoffs are usually of such poor quality, these reproductions not only steal the designer's profits, but also damage his or her reputation."[71]

The representative for the Council of Fashion Designers of America stated that when designers spend "tens of thousands" to produce a runway show to showcase their designs, they are not able to recoup those expenses when "[t]heir designs are stolen before the applause has faded . . . [because] software programs develop patterns from photographs taken at the show and automated machines then cut and stitch copies of designers' work from those patterns."[72] He also discussed that "American design and designers add a value in the world marketplace, [and] design innovation is the reason for this."[73]

A law professor at the same subcommittee meeting stated that it "is the constitutional intent of copyright law, to promote and protect the development of creative industries by ensuring that creators are the ones who receive the benefit of their own intellectual investments."[74] Allowing fashion designs to be protected by copyright does not violate the theoretical basis for copyright protection.

Kal Raustiala and Christopher Sprigman have noted the fashion industry does not need the protection of copyright law because the seasonal and cyclical nature of the fashion industry continues to produce innovative designs without any legal protections against piracy.[75] The very nature of the fashion industry, that of constant remixing and innovation, is not harmed, and may even be helped, by the "low-IP equilibrium."[76] They argue that, unlike the music or publishing industry, the fashion industry does not need the utilitarian protection of copyright law.[77]

However, they do admit that the current regime may not be "optimal for fashion designers or for consumers."[78] They state that it is impossible to know whether having a high IP equilibrium would increase consumer or producer welfare because the United States has never had formal protection for fashion designers.[79] While they think it is possible that

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70. *Hearings*, *supra* note 7, at 4 (statement of U.S. Rep. Bob Goodlatte).
71. *Id.*
72. *Id.* at 9 (testimony of Jeffrey Banks).
73. *Id.* at 10.
74. *Id.* at 77 (testimony of Susan Scafidi, Visiting Professor, Fordham Law School, Associate Professor, Southern Methodist University).
75. *See* Raustiala & Sprigman, *supra* note 4, at 1727.
76. *See id.*
77. *See id.* at 1734.
78. *Id.*
79. *See id.*

"the fashion industry may also be able to thrive in a high-IP environment," they do not think that the fashion industry's cyclical nature would cease with increased IP protection.[80]

Admittedly, when considering IP protection, it is important to ask whether the desired protection is truly necessary. It does seem true that the fashion industry is currently thriving in a world of widespread copying. However, if IP protection were to be removed from other creative industries that currently receive formal IP protection, such as music and publishing, those industries would also likely continue to thrive. As Professor Scafidi noted in the subcommittee hearing, "[o]f course, fashion designers create without the benefit of copyright law, but so would poets and songwriters if there were no copyright."[81] The theoretical distinction does not seem to be that creators *will* cease innovation, but that they will be *discouraged* from innovation. Artists will continue to create without legal protection from copying, but they may not be able to get a return on their effort. Professor Scafidi notes that this economic loss on creativity due to copying is particularly hard on young designers who are the future of American fashion.[82] If the effect of higher IP protection on the fashion industry is unknown, and an equally strong possibility exists that the industry will thrive with higher protection, an ideal standard would be one that discourages piracy. Many other creative, monetarily successful industries depend on copyright protection. H.R. 2033 may not be the solution for all designers, but it may provide the needed protection against piracy for designers of unique, original haute couture who want to protect their art and for young, innovative designers who do not have the resources to survive a burst in popularity that leads to piracy of their designs. These are the people H.R. 2033 was designed to protect and the same theories that justify IP protection also support the protection of their designs.

C. The Logical Extension of Design Protection

The proposed legislation would amend chapter 13 of Title 17 of the United States Code, which now offers limited protection for another type of utilitarian design.[83] Currently, chapter 13 gives protection to "an

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80. *Id.*

81. *Hearings*, *supra* note 7, at 77 (statement of Susan Scafidi, Visiting Professor, Fordham Law School, Associate Professor, Southern Methodist University).

82. *See id.* She gives an example of a young handbag designer who works from home. She has been successful in marketing her handbags (retailing between $200 and $400 apiece). She has lost actual retail and wholesale business because a design pirate has copied her unique designs and sells them on the Internet for less money with lower-quality materials.

83. *See id.* at 197.

original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public."[84] However, the statute restricts the definition of a useful article to a "vessel hull, including a plug or mold."[85]

In 1998, Congress, as a part of the Digital Millennium Copyright Act, enacted the Vessel Hull Design Protection Act, which provides limited protection to designs of vessel hulls.[86] The specific problem this legislation attempted to resolve is described as "hull splashing."[87] Hull splashing occurs when a boat manufacturer copies the design of a vessel hull and creates a line of watercrafts seemingly identical to the originally designed boat hull.[88] The Congressional Committee explained that the original designers of boat hulls often spent considerable time and resources to create a product, with research and development costs at times amounting to $500,000.[89] The Committee noted that protection for boat designers was important because consumers could possibly be defrauded because they might not receive the same "quality and safety" that they would receive from a boat with an originally designed hull.[90] The Committee added that "[m]ost importantly for the purposes of promoting [IP] rights, if manufacturers are not permitted to recoup at least some of their research and development costs, they may no longer invest in new, innovative boat designs that boaters eagerly await."[91]

Although the statute limits protection to useful articles defined as vessel hulls, extending protection to other types of designs by revising the definition of useful articles would not be difficult.[92] When Congress enacted the statute it did not consider expanding coverage of the statute to useful articles other than vessel hulls.[93] However, the Vessel Hull Design Protection Act was not the first time Congress expanded copyright protection outside of judicial precedent to add exceptions to the utilitarian doctrine.[94] In the 1980s, the Semiconductor Chip

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84. 17 U.S.C. § 1301 (2000).
85. *Id.* § 1304(b)(2).
86. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2905-18 (1998).
87. *See id.*
88. *See* H.R. REP. NO. 105-436, at 10 (1998).
89. *See id.*
90. *See id.*
91. *Id.* at 13.
92. *See Hearings*, *supra* note 7, at 205.
93. *See id.* at 200.
94. *See* Olivera Medinica, *Designers Seek To Prevent Cheaper Knockoffs*, NAT'L L.J., Aug. 28, 2006, at A1, *available at* http://www.wrlawfirm.com/Blog/2006/10/fashion-copyright-bill-analysis-by-wm.html.

Protection Act provided protection for computer chip designs, which are "items with largely utilitarian functions."[95] In 1990, Congress allowed buildings, with their natural utilitarian functions, to receive copyright protection as architectural designs, under the Architectural Works Copyright Protection Act.[96]

The proposed legislation would make very few changes to the current chapter 13; adding the words "an article of apparel" to § 1301(b) would extend the scope of copyright protection to fashion designs.[97] Unlike the current statute, the proposed changes would only allow protection for three years, being different from the vessel hull's ten-year protected term or the standard life plus seventy years for other copyrighted works.[98] Even the Copyright Office, which takes no official position on the enactment of H.R. 2033,

> applauds the proponents of fashion design legislation for seeking a modest term of protection that appears to be calibrated to address the period of time during which fashion designs are most at risk of being infringed and during which fashion designers are most likely [to] be harmed by the sale of infringing goods.[99]

The Copyright Office also noted that it would likely not support legislation for fashion design that included the ten-year term allotted for vessel hulls.[100] Creating copyright protection for fashion design would not comprise an upheaval of the current legal system because protection for high fashion could exist under the same reasoning as the vessel hull exception. Although H.R. 2033 would be a legislative exception to current U.S. judicial precedent, it would be just another in a line of exceptions to the utilitarian doctrine.

D. European Counterparts

While there is no current American precedent for IP protection for fashion design, much of the rest of the world, notably countries with strong fashion industries, has enacted legislation to protect fashion design. For example, the European Council adopted a European Directive that obliges all Member States to harmonize laws regarding

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95. *Id.*
96. *See id.*
97. *Hearings*, *supra* note 7, at 209.
98. *See id.* at 210.
99. *Id.*
100. *See id.*

fashion designs.[101] The Directive requires countries to create laws to protect fashion design under the guidance of standards contained in the Directive.[102] For a design to be protected, it must first be registered.[103] A registered owner has exclusive rights to his or her designs against even substantially similar designs.[104] The design registration is valid for twenty-five years in Member States and includes the "lines, contours, colours, shape, texture and/or material[]" elements of the design.[105]

Few designers have taken copycat designers to court over protected designs, but examples in European law exist.[106] For example, the design powerhouse Yves Saint Laurent Couture (YSL) sued Ralph Lauren for infringement under French copyright law.[107] The court found that a YSL women's dinner-jacket dress, originally shown in 1970, then updated and returned to the runway in 1992, was sufficiently original to give the fashion house property rights in the haute couture design.[108] Ralph Lauren's subsequent ready-to-wear dinner-jacket dress infringed the YSL haute couture model because the differences with the original were so slight that the average customer would not be able to distinguish them.[109]

While proposed U.S. copyright protections for fashion design would not be identical to European law, the United States is the only country with a strong fashion industry that does not provide similarly strong IP protection to designers.[110] As Professor Scafidi noted when speaking to the Subcommittee on Courts, the Internet, and Intellectual Property,

> [t]he United States should no longer be a pirate nation with respect to intellectual property . . . . We are a global superpower and we work with fellow members of the G-8 group, the WTO, [and] the World Intellectual Property Organization at their bilateral trade negotiations to promote I.P. protection, except in the area of fashion design.[111]

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101. *See* Council Directive 98/71, 1998 O.J. (L 289) 28 (EC); *see also* Raustiala & Sprigman, *supra* note 4, at 1735-36 (discussing the European Council adoption of the European Directive).

102. Council Directive 98/71, 1998 O.J. (L 289) 28 (EC).

103. *See id.* at 30.

104. *See id.* at 32.

105. *Id.* at 30.

106. *See* Raustiala & Sprigman, *supra* note 4, at 1740.

107. *See* Société Yves Saint Laurent Couture S.A. v. Société Louis Dreyfus Retail Mgmt. S.A., [1994] E.C.C. 512, 514 (Trib. Comm. (Paris)).

108. *See id.* at 520.

109. *See id.* at 521.

110. *See Hearings*, *supra* note 7, at 9.

111. *Id.* at 77.

She also noted that "[t]he failure to protect fashion design is both inconsistent with our international policy and a disadvantage to our own creative designers."[112]

H.R. 2033, if enacted, would bring the United States into alignment with international IP law, while remaining consistent with U.S. legal policy and theory. The proposed legislation would only give protection for three years, as opposed to the European Union's twenty-five.[113] The EU Directive gives protection against designs that are "substantially similar," a standard that looks more like patent protection in the United States than copyright.[114] H.R. 2033 would still fall under the legal limitations of copyright but would not provide so broad a protection.[115] If the United States wants to encourage its young and haute couture designers, it should protect them in a manner similar to its European counterparts. H.R. 2033 would give American designers the protection they need and create equilibrium in international legal protection.

IV. CONCLUSION

Even though the United States has never had formal IP protection for fashion design, in a modern world of almost instantaneous piracy, no concrete reasons exist to prevent adoption of such a protection policy now. The advent of technology makes protection of fashion design more important than ever before. Fashion design should receive the protection it deserves. The IP theory of copyright protection justifies protection for fashion designs. H.R. 2033 is in accordance with the current legislative exceptions to the utilitarian doctrine, and would create equilibrium for American designers with their international counterparts.

Although high IP protection is not guaranteed to help the American fashion industry, discouraging piracy and protecting designers seems a better policy than not doing so. Continued refusal to allow copyright protection of fashion designs seems to suggest that fashion design is not an art that deserves IP protection. I suggest that while some clothing may indeed just be a shirt covering one's back, other types of clothing are undeniably art. The designers who create such art should receive the same rights as any other author of an original and creative work within

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112. *Id.* at 77-78.

113. Copyright Office, *supra* note 66; *see* H.R. 2033, 110th Cong. (2007) (indicating a three-year copyright term); *see also* Council Directive 98/71, 1998 O.J. (L 289) 28 (EC) (indicating a twenty-five-year term).

114. *See* Raustiala & Sprigman, *supra* note 4, at 1736.

115. *See Hearings*, *supra* note 7, at 197; *see also* Copyright Office, *supra* note 66.

the American legal system. H.R. 2033 gives a reasonable, justifiable solution for protection of fashion and its designers.